Karimbla Construction Services Pty Ltd v Alliance Group Building Services Pty Ltd (subject to Deed of Company Arrangement)

JUDGMENT : Barrett J : Supreme Court in New South Wales : 9th July 2003.

1 By an originating process filed on 26 September 2002 and heard by me on 13 June 2003, Karimbla Construction Services Pty Ltd ("Karimbla") makes application under s.459G of the **Corporations Act** 2001 (Cth) for an order setting aside a statutory demand served on or soon after 6 September 2002 by Alliance Group Building Services Pty Ltd ("Alliance") in respect of an alleged debt of $394,364.13 described as: "*Payment Claim pursuant to section 13 of the Building & Construction Industry Security Act 1999 dated 3 January 2002 relating to air conditioning and ventilation systems work for the construction of the Arncliffe Apartments located at 76-90 Bonar Street, Arncliffe NSW*"

2 The application is advanced on the twofold basis that there is a genuine dispute between Karimbla and Alliance about the existence of the debt (s.459H(1)(a)) and that Karimbla has an "offsetting claim" (within the meaning of s.459H(5)) against Alliance (s.459H(1)(b)).

3 Karimbla is a building or development company and a wholly owned member of the Meriton Group. Alliance is a mechanical services contractor retained by Karimbla under a contract made in March 2001 to provide air conditioning services in respect of a home unit development undertaken by Karimbla at the Arncliffe address referred to in the statutory demand.

4 For the purposes of the genuine dispute part of Karimbla's case, it is sufficient to relate that, following various complaints, accusations and discussions between the parties concerning the quality and timeliness of Alliance's purported performance of its contractual obligations, Alliance delivered to Karimbla a document dated 5 December 2001 described in its covering letter as "a Payment Claim" under the **Building and Construction Industry Security of Payment Act** 1999". Following further correspondence, another document identically described was delivered by Alliance to Karimbla on 3 January 2002.

5 The debt alleged in the statutory demand is expressly identified as: "*Payment Claim pursuant to section 13 of the Building and Construction Industry Security of Payment Act 1999 dated 3 January 2002 ...*"

It is therefore appropriate to set out in full s.13 of the **Building and Construction Industry Security of Payment Act** 1999 (which I shall, for convenience, refer to as the "Security of Payment Act"), together with the following s.14:

"*13. **Payment claims***

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

*14. **Payment schedules***

(1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or
(ii) within 10 business days after the payment claim is served,
whichever time expires earlier,
the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates."

6 In view of the way the alleged debt is described in the statutory demand and the fact that the so-called "payment claim" of 3 January 2002 is asserted by Alliance as the sole source of that debt, the only issues relevant to the question whether, as Karimbla maintains, there is a genuine dispute as to the existence of the debt are issues going to the effect of the 3 January 2002 document from the perspective of the Security of Payment Act. The debt's source is precisely stated in the statutory demand: it is said to be the payment claim under s.13, with the result that it is a payment liability under s.14(4) that is asserted in the statutory demand to be the debt claimed. For that reason, I consider it inappropriate to address the question whether the parties' contract or any other matter may have been the source of a debt of $394,364.13 on the part of Karimbla, independently of the Security of Payment Act.

7 A payment claim duly made under s.13 of the Security of Payment Act will cause a payment liability to arise by operation of s.14(4) only in the particular circumstances to which s.14(4) refers – or, perhaps more accurately, if the several conditions specified in s.14(4) are satisfied. One of those conditions, being the condition specified in s.14(4)(b), is that the person on whom the payment claim is served (referred to in the Security of Payment Act as the "respondent") does not, within a particular time, furnish a "payment schedule" to the person by whom the payment claim was served (the "claimant"). Thus, if a "payment schedule" is furnished by the respondent to the claimant within the period to which s.14(4) refers, that section does not cause a payment liability to be imposed on the respondent.

8 In the present case, there was given to Alliance (the "claimant", in terms of the Security of Payment Act) within the s.14(4) period a document said by Karimbla to be a "payment schedule". Alliance says that that document is not a "payment schedule". If Karimbla is right (and the other conditions contemplated by s.14 were satisfied), no payment liability arose by operation of s.14(4) by virtue of Alliance's delivery of the payment claim of 5 January 2002. If Alliance is right, a payment liability did arise. It is by reference to the competing contentions on that central issue that the question of the existence of a genuine dispute within s.459H(1)(a) of the **Corporations Act** is to be determined.

9 It is, of course, important to emphasise that it is neither necessary nor appropriate in these proceedings to attempt to answer the question whether the contentions of Alliance or the contentions of Karimbla are, in the end, correct. Rather, the task of the court is to determine whether the contentions of Karimbla in support of the proposition that no debt has arisen under s.14(4) possess a sufficient degree of cogency to warrant further investigation. The test of "genuineness" of a dispute for these purposes emerges from the line of cases centred upon and following ***Re Morris Catering Pty Ltd*** (1993) 11 ACSR 601, ***Eyota Pty Ltd v Hanave Pty Ltd*** (1994) 12 ACSR 785, ***Mibor Investments Pty Ltd v Commonwealth Bank of Australia*** [1994] 2 VR 290 and ***Spencer Constructions Pty Ltd v G & A Aldridge Pty Ltd*** (1997) 76 FCR 452. I would repeat here what I said about those tests in ***Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd*** [2002] NSWSC 411: "*It is appropriate to dwell for a moment on the guidance provided by these cases. The tests of 'plausible contention requiring investigation', 'real and not spurious, hypothetical, illusory or misconceived' and 'perception of genuineness (or lack of it)', applied in the context of a summary procedure where 'it is not expected that the court will embark on any extended inquiry', mean that the task faced by a company challenging a statutory demand on the 'genuine dispute' ground is by no means at all a difficult or demanding one. The company will fail in that task only if it is found upon the hearing of its s.459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.*"

10 The document that Karimbla says is the "payment schedule" should now be examined. It is a document in the form of a letter typed on letterhead carrying the word "Meriton" at the top, with the following notation at the bottom:

"*Level 5, 267-277 Castlereagh Street, Sydney, NSW 2000*
DX 1177 Sydney 2000
Telephone: (02)9264 7177 – Facsimile: (02) 9288 3083
Trading as Meriton Apartments Member of the Meriton Group ABN 75 000 644 880
Email: general@meriton.com.au
Internet: http://www.meriton.com.au"

The letter reads:

"*11 January 2002*
Stephen Oehme
Alliance Group Building Services Pty Ltd
Level 3, 600 George Street

SYDNEY NSW 2000
By fax 9264 6760 (2 pages)
Confidential
Dear Sir
ARNCLIFFE APARTMENTS
You accepted payment of $50,000 from Karimbla on 14 December 2001, and Karimbla arranged further payments in excess of $75,000 for the air conditioning units necessary for your to proceed, on the condition that work to building A would be complete by 28 January 2002, building B by 14 February 2002, building C by 30 March 2002 and building D by 15 April 1001.
Karimbla withheld payment of a further $50,000 to you on 21 December 2001 because you disputed the terms of our agreement to allow you back on site. In particular, you sought a concession that Karimbla permit you to continue with work on blocks E to H and the carpark. Karimbla will not grant this concession.
Karimbla requires the floor units for buildings A and B and the ceiling units for buildings C and D to be delivered immediately. Non-delivery is delaying gyprocking of the ceilings, and completion of blocks C and D. Could you please let me know what arrangements have been made for delivery of the units, and when delivery will take place.
Based on current progress, it appears that you will have to step up work to complete building A by 28 January 2002. If work is not completed by the agreed dates, Karimbla reserves its right to again remove Alliance from the site.
Despite leaving phone messages for you since Monday 7 January 2002, I have been unable to discuss these matters with you. Your continuing inability to be contacted is very frustrating, and is making it extremely difficult to co-ordinate the work on blocks A to D.
Karimbla will pay nothing in response to your payment claim dated 3 January 2002 that you state is made under the Building and Construction Industry Security Payment Act 1999. Karimbla allowed you access to the site from 14 December 2001 on the basis that you would not claim payment for the amounts referred to in the payment claim other than in relation to blocks A to D and the pool, and you agreed to this.
Yours sincerely
MERITON APARTMENTS PTY LTD
(sgd)
Brendan Maier
Corporate Affairs
Direct line: 9287 2539
Email: brendanm@meriton.com.au"

11 Karimbla's contention that this letter is a "payment schedule" proceeds on the following basis:

1. *Neither s.14 nor any other provision of the Security of Payment Act prescribes any particular form or formality for a "payment schedule".*
2. *It is true that, to be a "payment schedule" in the particular case, a document must be one that is provided by the respondent (Karimbla) to the claimant (Alliance), but there is nothing express or implied in the legislation displacing the operation of the common law rule qui facit per alium facit per se, with the result that a document signed and provided by an agent of Karimbla acting on its behalf in the matter is as good as one signed and provided by Karimbla itself.*
3. *According to the evidence of dealings between the parties, Meriton personnel generally and the letter's signatory Mr Maier in particular had represented and acted for Karimbla at various stages and in various ways (Karimbla being a wholly owned subsidiary of Meriton) and Alliance, through its officers, was aware of this.*
4. *The letter clearly identifies, in the last three lines on its first page, the payment claim to which it relates, thus satisfying s.14(2)(a).*
5. *As regards the requirement that there be specified in a payment schedule "the amount of the payment (if any) that the respondent proposes to make" (s.14(2)(b)), Karimbla points to the words:* ***"Karimbla will pay nothing in response to your payment claim dated 3 January 2002 ..."***
   and says that, even allowing for any conclusion that nil is not an "amount", the words "if any" in s.14(2)(b) make it clear that a valid payment schedule may state that the respondent proposes to pay nothing – indeed, it would be odd, in the particular context, if the section intended otherwise.
6. *The letter also satisfies s.14(3) in that it states in the last sentence the reason why no payment will be made – essentially, that there was some antecedent promise or representation by Alliance that it would not claim payment of the amounts in the payment claim – and, in the present context of a determination whether there is a genuine dispute, it is beside the point whether the reason is a valid and supportable one.*

12 As I have said, it is not the function of the court at this stage to make any adjudication of the issues raised by these points 1 to 6 or the question whether the contentions of Karimbla are sufficient, in terms of s.14, to forestall a payment liability under s.14(4). The task is, rather, as I have described it at paragraph 9 above. My view on that is that, applying "the same sort of considerations as the 'serious question to be tried' criterion which arises upon an application for an interlocutory injunction or for the extension or removal of a caveat" (**Eyota Pty Ltd v Hanave Pty Ltd** (above), per McLelland J), a genuine dispute as to the existence of the debt does exist. I am also of the view, however, that it is not open to Karimbla to rely upon that genuine dispute in these proceedings. This is because of the so-called "Graywinter principle".

13 Section 459G(3) of the Corporations Act requires that an application to set aside a statutory demand be accompanied by "an affidavit supporting the application" and that both be served within 21 days after service

of the demand. In **Graywinter Property Pty Ltd v Gas and Fuel Superannuation Fund** (1996) 70 FCR 452, Sundberg J said: *"In order to be a 'supporting affidavit', an affidavit must say something that promotes the company's case. An affidavit which merely says 'I am a director of the company but am too busy at present to make a full affidavit, and I will do so later' would not support the application. It would in no way advance, further or assist the company's cause, which is to have the notice set aside. At the other extreme, the affidavit need not detail, in admissible form, all the evidence that supports the contention of a genuine dispute:* ***John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd*** *(1994) 14 ACSR 250. That evidence must be available at the hearing of the application to set aside, because that application is for final and not interlocutory relief:* ***71 Paisley St Footscray Pty Ltd v Vineyards Estate Pty Ltd*** *(19 August 1995, Olney J, unreported).*

In a s.459H(1)(a) case, the affidavit must in my view disclose facts showing there is a genuine dispute between the parties. A mere assertion that there is a genuine dispute is not enough. Nor is a bare claim that the debt is disputed sufficient. It follows from the fact that the affidavit need not go into evidence, which is the customary function of an affidavit, that it may read like a pleading.

An affidavit which exhibits an exchange of correspondence between the parties or between their solicitors from which it appears that a claim is made and rejected for reasons given can qualify as a supporting affidavit. And an affidavit verifying the pleadings in an action may qualify.

I am thus unable to accept the respondent's submission that the affidavit must contain sufficient material to make out a case under s.459H. In reply, that submission was somewhat retreated from. It was said that the affidavit must, as a minimum, contain a statement of the material facts on which the applicant intends to rely to show a genuine dispute - it might read more like a pleading than a story. That accords with what I consider to be the minimum requirement."

14 A note at (2003) 77 ALJ 353 by Lee Aitkin and Serena Armstrong, "Timely Response to the Statutory Demand: Graywinter Revisited"' refers to many of the subsequent cases in which the principle enunciated by Sundberg J has been explored. It is sufficient for present purposes to say that it has been endorsed on three occasions at appellate level in Western Australia and approved in a number of first instance decisions in various jurisdictions, including at least five of this court in 2003 to date: see ***POS Media Online Ltd v B Family Pty Ltd*** (2003) 21 ACLC 533 (Austin J), ***Scope Data Systems Pty Ltd v BDO Nelson Parkhill*** [2003] NSWSC 137 (Barrett J), ***Cameron Stockbrokers Ltd v GBST Holdings Pty Ltd*** (2003) 44 ACSR 712 (Master Macready), ***GI Marketing Services Pty Ltd v Emerald Civil Engineering Pty Ltd*** [2003] NSWSC 219 (Master Macready) and ***Chadah Pty Ltd v Kubota Tractor Australia Pty Ltd*** [2003] NSWSC 456 (Campbell J).

15 This poses a problem for Karimbla in these proceedings. The supporting affidavit called for by s.459G(3) is, in this case, the affidavit of Mr Maier affirmed on 25 September 2002. That affidavit contains no reference at all to the letter of 11 January 2002 which Karimbla now seeks to set up as a payment schedule in relation to Alliance's payment claim dated 3 January 2002. Nor, it seems, does the affidavit refer to that payment claim, although there is reference to the earlier claim dated 5 December 2001.

16 So far as affidavits are concerned, the payment claim dated 3 January 2002 was mentioned by Mr Oehme, sole director of Alliance, in his affidavit of 5 September 2002 which accompanied the statutory demand in compliance with s.459E(3). Paragraphs 3.2 and 3.3 of that affidavit are as follows: *"On 3 January 2002, I caused to be served by hand on the Debtor a Payment Claim pursuant to section 13 of the Building & Construction Industry Security of Payment Act 1999 ('the Act'), requesting payment in the sum of $394,364.13 for works undertaken by the Creditor up to and including November 2001 and in respect of which the Debtor failed to pay. A copy of the Payment Claim is annexed and marked 'A'.*

To date, the Creditor has not been served with a Payment Schedule in accordance with section 14 of the Act and the sum of $394,364.13 has not been paid by the Defendant."

From Karimbla's side, the first reference to the payment claim of 3 January 2002 and the Meriton letter of 11 January 2002 now said by it to be a payment schedule in terms of the Security of Payment Act was the reference in Mr Maier's affidavit of 15 November 2002: *"On 11 January 2002, I sent a facsimile to the defendant, replying to the defendant's payment claim dated 3 January 2002. Annexed at pages 2 to 4 and marked 'A' is a true copy of my letter to the defendant ... ."*

17 The supporting affidavit (being Mr Maier's affidavit of 25 September 2002) refers to a number of bases on which Karimbla claims not to be indebted to Alliance in the sum of $394,364.13, having regard to the terms of the parties' contract, the conduct of Alliance and other surrounding circumstances. Those matters, however, are not relevant to the question whether there is a genuine dispute as to the existence of a debt consisting of a payment liability arising under s.14(4) of the Security of Payment Act. Mr Maier's affidavit of 25 September 2002 did not in any way disclose Karimbla's contention that the Meriton letter of 11 January 2002 was a payment schedule under the Security of Payment Act or even hint at an intention of Karimbla to rely, in making its genuine dispute case, on the effect of that letter in terms of s.14(4) of that Act. The Graywinter principle therefore precludes reliance on the alleged effect of the Meriton letter of 11 January 2002 as displacing or forestalling such a statutory payment liability. Alliance was in no way alerted by the supporting affidavit of 25 September 2002 to an intention of Karimbla to rely on that matter in advancing its genuine dispute case.

18 Karimbla's claim to have the statutory demand set aside on the genuine dispute ground in s.459H(1)(a) therefore fails. I proceed to consider its claim based on s.459H(1)(b) and the proposition that Karimbla has an "offsetting claim" of such a magnitude that the court must set aside the statutory demand in accordance with s.459H(3).

19 Mr Maier's affidavit of 25 September 2002 asserts that: *"Karimbla has offsetting claims in excess of the Alleged Debt."*

20 It goes on to detail the formation of the contract between Karimbla and Alliance on 5 March 2001 and, under a heading "Problems with works performed by Alliance", refers to a number of difficulties encountered by Karimbla. In essence, Karimbla maintains that Alliance did not perform work on time or to a satisfactory standard, with the result that Karimbla eventually sent a letter to Alliance on 5 December 2001 purporting to terminate the contract, followed by a letter of 6 December 2001 stating that continued presence of Alliance employees and subcontractors on Karimbla's site amounted to trespass. By letter of the latter date, Alliance said that the contract had not been validly terminated by Karimbla. Karimbla replied by confirming the termination.

21 At a meeting held on 10 December 2001, an agreement was reached under which Alliance would be let back into possession to complete specified works. Karimbla confirmed this by letter dated 11 December 2001. Alliance's performance continued to be unsatisfactory to Karimbla. On 24 January 2002, a meeting occurred. It is dealt with in Mr Maier's affidavit as follows: *"On 24 January 2002, Karimbla and the Alliance Group met at the Arncliffe Apartments' site office. Present for Karimbla were McDonald, Gareth Hodgins, John Anderson and myself. Present for the Alliance Group were Oehme and his Site Manager, Mr Tony Verkic. At the meeting, words to the following effect were said:*

McDonald: '*Hodgins, Anderson and I have been for a walk around the site. We have spoken with another mechanical ventilation contractor. We say that only 70% of A, 60% of B and 35% of C and D are done. Maybe 50% overall. At the most. At the very most. Oehme, we don't agree at all with your progress claims. We shouldn't be giving you any more money.*'

Oehme: '*Well, I need it. I have completed the work that I have claimed for,*'

McDonald: '*Look Oehme, you told us that if we put you back on the job you would meet the agreed completion dates. When we paid you money before Christmas you said you could still meet those dates. You are not going to meet those dates. We would offer a 2 week extension if it would help you, but I don't think you are going to do it. You say you have completed maybe 55% of blocks A to D and the pool. We say at best 50% of the work is done. We also say we don't owe you a thing for any work on blocks E to H and the car park. And you don't have enough units on site. Look, we say we don't owe you anything. But we can see you are struggling. We want to help you along. We want to see you deliver these amazing results you keep promising. We will pay you $150,000, but from that we will pay for the units directly. We will pay your supplier, so that should give you about $65,000. The other $85,000 we will pay directly to McQuay for the units you need.*'

Oehme: '*That is not enough.*'

McDonald: '*We aren't paying more. That is more than what we owe anyway. And we aren't even seeing any results yet. You finish something out here, show us that your system works.*'

Oehme: '*I can't do it. That is not enough.*'

McDonald: '*I don't know what else to do. Is that it then?*'

Oehme: '*Yeah. I think that's it.*' "

22 After the events thus related, Karimbla appointed a replacement contractor, Camden Sheet Metal Pty Ltd, to complete the work left unfinished by Alliance. Mr Maier's affidavit refers to the financial consequences as follows:

"*43. Camden advised Karimbla that the cost of works to blocks E to H and the pool and car park is $1,686,224 (GST inclusive). Annexed at page 48 and marked 'P' is a true copy of Karimbla's requisition book signed by Brad Mills dated 10 December 2002.*

44. Camden's quote to complete works to blocks A to D is $1,048,800 (GST inclusive). Annexed at page 49 and marked 'Q' is a true copy of Camden's quotes for blocks A to D dated 20 January 2002.

45. Other additional quantifiable costs incurred by Karimbla as a result of terminating its contract with the Alliance Group, including:

(a) a consultant's report prepared by IAQ Sydney required to independently inspect the status of the work after the Alliance Group left the job, which cost $15,848.26 (GST inclusive). Exhibited to this affidavit and marked 'BPM11' are true copies of 2 invoices from IAQ Sydney dated 19 March 2002 and 21 March 2002; and

(b) controller touch pads for the units from McQuay, which cost $704. Exhibited to this affidavit and marked 'BPM12' is a true copy of an invoice from McQuay dated 28 June 2002.

46. On or about 9 September 2002 I had a conversation with Gareth Hodgins in words to the following effect:

Maier: 'What has terminating the Alliance Group cost us?'

Hodgins: 'Well, Camden is more expensive.'

Maier: 'Yeah, leaving that aside. What else?'

Hodgins: 'We are going to have big gyprocking costs out there. When IAG Sydney went through, they had to rip out some of the gyprocking to get their cameras in to check what the Alliance Group had done.'

Maier: 'How much will that cost?'

Hodgins: 'I don't know. They are still to tell us. It will be thousands. Also, the delays mate. The delays have cost us heaps. We have had to have extra supervision on site. He held us up for ages. And the replacement time, where Camden had to get to know the job.'

Maier: 'Yeah, they are substantial costs, but we will need an expert to determine them.'

I have not yet commissioned an expert to determine the additional costs referred to in my conversation with Gareth Hodgins, but I believe that those costs are likely to be substantial.

47. Based on the above, I have set out in the following table what the works should have cost if the Alliance Group had performed the Contract, and my estimate of what the works will now cost Karimbla:

Item Camden Alliance Group
Blocks A to D and pool $1,245,981
Blocks A to D not pool $1,048,800
Blocks E to H and car park $1,354,018
Blocks E to H, car park and pool $1,686,224
Subtotal $2,735,024 $2,600,00
Units obtained from McQuay $79,304
Payments to Alliance Group $450,000
Consultant's report $15,848
McQuay (Controller touch pads $704.00
Gyprocker Yet to be determined
Delays/additional Yet to be supervision determined
Legal costs Yet to be determined
Total $3,280,880 $2,600,00

48. I have calculated in accordance with the above table that the additional costs to Karimbla will be in excess of $680,000, and this is significantly more than the Alleged Debt. These additional costs would form the basis of Karimbla's claim, or cross claim, against Alliance Group for breach of contract."

23 An affidavit of Mr Hodgins, an assistant construction manager with Meriton, details a number of ways in which the performance of Alliance was unsatisfactory. Mr Hodgins also refers to various costs incurred by Karimbla as a result. He does so in part by reference to a report (with detailed costings) prepared by PE Consulting Pty Ltd on 30 January 2002. He also refers to loss items related to delay in Karimbla's ability to market finished units. Mr Hodgins' affidavit concludes: *"The damage and additional costs to Karimbla will be in excess of $3,955,000, and this is significantly more than the alleged debt. These additional costs would form the basis of Karimbla's claim, or any cross claim, against Alliance Group for breach of contract."*

24 Karimbla's contention that there is an offsetting claim proceeds on the basis of certain express and implied terms of the parties' contract. Karimbla points to express terms requiring Alliance to comply with reasonable directions of Karimbla as to timing and completion of the works (clause 3(a)), that Karimbla may direct the order and timing of stages of the work (clause 3(c)) and that, if Alliance failed to perform its obligations when requested to do so resulting in losses as a result of other contractors being unable to complete their works, Alliance would be liable to Karimbla for the consequent loss and damage (clause 3(e)). Karimbla also says that it was an implied term of the contract that Alliance would provide the necessary resources and otherwise take such reasonable steps as were necessary to proceed with the works expeditiously and so as to facilitate the completion of works by other contractors and the timely completion of the project. Karimbla maintains that Alliance has breached these terms and that, based on the evidence of Mr Maier and Mr Hodgins, the amount of its claim exceeds the amount of the alleged debt the subject of the statutory demand.

25 Many matters deposed to in the affidavits filed for Karimbla are disputed by Mr Oehme, the principal of Alliance, in his affidavit of 20 March 2003. Indeed, it is not going too far to say that substantial and wide-ranging factual disputes and uncertainties are thrown up by the competing affidavits, bearing in mind also that an affidavit in reply by Mr Hodgins takes issue with a number of matters in Mr Oehme's affidavit. Alliance says that there has been no genuine attempt to support by evidence either the figure put forward by Mr Maier or that advanced by Mr Hodgins which, it is said, must be "fictitious" and "colourable". On that basis, Alliance regards Karimbla as having failed to discharge its onus of quantification – even assuming that it has shown the existence of an offsetting claim, a proposition that Alliance also rejects.

26 The test to be applied in determining whether there exists a genuine offsetting claim of the kind contemplated by s.459H(1)(b) was stated by Palmer J in ***Macleay Nominees Pty Ltd v Belle Property East Pty Ltd*** [2001] NSWSC 1088: *"In my opinion, a genuine offsetting claim for the purposes of CA s459H(1) and s459H(2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. 'Good faith' means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount*

claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of s459H."

27 It is also necessary, in view of the definition of "offsetting total" in s.459H(2) and its reference to "the amount of that claim", that the party alleging the existence of an offsetting claim as a basis for an order setting aside a statutory take steps to quantiFy it: see ***Jesseron Holdings Pty Ltd v Middle East Trading Consultants*** (1994) 12 ACLC 490. In ***No 96 Factory Bargains Pty Ltd v Kershel Pty Ltd*** [2003] NSWSC 146, I referred to that necessity in these terms: *"The first thing to be said about the way the plaintiff puts its case is that, while the definition of "offsetting claim" in s.459H(5) refers, in general terms, to a claim "by way of counterclaim, set-off or cross-demand", it is clearly contemplated by the section as a whole that the claim must be one capable of being quantified in money terms. It need not be a liquidated claim but it must be one to which a monetary liability can be attached. This is because of the directive in s.459H(2) that the court determine, among other things, "the amount of that claim" or, where there are several claims, "the total of the amounts of those claims". It follows that only claims sounding in debt or damages or other monetary consequences (such as may be available under the **Trade Practices Act**) may be taken into account for the purposes of s.459H."*

28 Despite this clear need, according to the terms of the legislation, to quantify an offsetting claim in money terms, it is not necessary that the party seeking to have the statutory demand set aside should particularise the amount of the claim to the last dollar and cent. Particularly where the claim is of an unliquidated kind, there may be various ways of approaching the issue of assessment of damages and there may be elements of the assessment that are, of necessity, based on broad estimate. It is sufficient that there be, on the evidence, a plausible and coherent basis for asserting a claim to a sum which, despite elements of uncertainty as to details of calculation, can be seen to be, in any event, greater than the amount of the debt the subject of the statutory demand. Of course, the narrower the margin between the alleged debt and the plaintiff's estimate or initial quantification, the greater will be the need for particularity in asserting the "amount" of the offsetting claim.

29 In the present case, one quantification put forward by Karimbla is "in excess of $680,000". The other is "in excess of $3,955,000". Each, it seems to me, reflects a sum that could, without descent into the fanciful (which is the relevant test), be attached to a claim advanced by Karimbla against Alliance on the basis of alleged breaches of the contractual terms that have been identified by Karimbla. I am not concerned, at this point, to determine the sum that might be awarded if a breach of contract claim is successful. In addition, I am satisfied on the evidence that there are grounds on which Karimbla may advance claims for breach of contract that are arguable on the basis of the facts it asserts and that those claims are not fanciful. There is accordingly an "offsetting claim" for the purposes of s.459H(1)(b).

30 Since the alleged debt referred to in the statutory demand is $394,364.13 and the claim is quantified in a non-fanciful way as either greater than $650,000 or greater than $3,995,000, the "amount" of the offsetting claim must be regarded as such that the "offsetting total" referred to in s.459H is greater than $394,364.13, so that the "substantiated amount" is less than the "statutory minimum" and, under s.459H(3), the court must set aside the statutory demand.

31 Karimbla is accordingly entitled to order 1 in the originating process filed on 26 September 2002. Alliance must pay Karimbla's costs of the proceedings.

Mr S R Donaldson SC – Plaintiff instructed by Henry Davis York
Mr M R Gracie – Defendant instructed by NRG Legal