

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

Not Restricted

List E  
No. 10035 of 2009

DELPHIC WHOLESALERS (AUST) PTY LTD  
(ACN 007 384 509)

Plaintiff

v

AGRILEX CO LIMITED

Defendant

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<u>JUDGE:</u>	FERGUSON J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	29 July 2010
<u>DATE OF JUDGMENT:</u>	6 August 2010
<u>CASE MAY BE CITED AS:</u>	Delphic Wholesalers (Aust) Pty Ltd v Agrilex Co Limited
<u>MEDIUM NEUTRAL CITATION:</u>	[2010] VSC 328

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CORPORATIONS – Statutory demand – Whether genuine offsetting claim - *Corporations Act 2001* (Cth) ss 459G, 459H.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr S Maiden	White Cleland Pty
For the Defendant	Mr AT Strahan	Cornwall Stoddart

HER HONOUR:

1 This is an appeal from the order of an Associate Judge dismissing an application  
under s 459G *Corporations Act 2001* (Cth) brought by the plaintiff (“Delphic”) to set  
aside a statutory demand served on it by the defendant (“Agrilex”). The appeal is by  
way of re-hearing.<sup>1</sup>

2 The issue is whether Delphic has a genuine offsetting claim that exceeds the amount  
in the statutory demand.

3 For the reasons set out below, I am not satisfied that Delphic has such a claim, other  
than in respect of an outstanding costs order which was admitted by Agrilex.

4 I dismiss the appeal.

**Legal principles – genuine offsetting claim**

5 Where the Court is satisfied that a company has an offsetting claim which would  
reduce the amount claimed in the statutory demand to less than the statutory  
minimum, the Court must set aside the demand.<sup>2</sup> The offsetting claim must be  
genuine.<sup>3</sup>

6 In *T.R. Administration Pty Ltd v Frank Marchetti and Sons Pty Ltd*,<sup>4</sup> Dodds-Streeton JA  
reviewed a number of the authorities concerning what was required for the purposes  
of setting aside a statutory demand. Her Honour said:<sup>5</sup>

... the company is required ... only to establish a genuine dispute or  
offsetting claim. It is required to evidence the assertions relevant to the  
alleged dispute or off-setting claim only to the extent necessary for that  
primary task. The dispute or off-setting claim should have a sufficient  
objective existence and prima facie plausibility to distinguish it from a  
merely spurious claim, bluster or assertion, and sufficient factual  
particularity to exclude the merely fanciful or futile .... It is not necessary for

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<sup>1</sup> Supreme Court (Corporations) Rules 2003 (Vic) Rule 16.5(1), Supreme Court (General Civil  
Procedure) Rules 2005 (Vic) Rule 77.06(7).

<sup>2</sup> Section 459H(3) *Corporations Act*.

<sup>3</sup> Section 459H(1) and (5).

<sup>4</sup> [2008] VSCA 70.

<sup>5</sup> Ibid at [71].

the company to advance, at this stage, a fully evidenced claim. Something 'between mere assertion and the proof that would be necessary in a court of law' may suffice.

- 7 The authorities make it clear that the Court's examination is limited to whether there is a 'genuine dispute' or 'genuine claim'.<sup>6</sup> However, as McLellan CJ stated in *Eyota Pty Ltd v Hanare Pty Ltd*<sup>7</sup>:

This does not mean that the Court must accept uncritically as giving rise to a genuine dispute every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be' not having 'sufficient prima facie plausibility to merit further investigation as to [its] truth' ....

- 8 It follows from the authorities that the hurdle for establishing a genuine offsetting claim is low.

### **Facts and claims**

- 9 Agrilex is a Bulgarian company which exports cheese. Delphic is an Australian company and imported cheese through Agrilex.
- 10 Agrilex sent 15 shipments of cheese to Delphic and they were received between August 2007 and mid-June 2008. Delphic has no complaints about the cheese that was sent in the first three shipments. However, it alleges that the balance of the cheese (which was received after mid-September 2007) was not of the quality or description that Agrilex agreed to supply, nor was it obtained from the agreed source, being the Madjarov factory. Delphic alleges that Agrilex was in breach of the contract between the parties and that the breach has caused it loss of \$303,316. Delphic asserts that this contractual loss should be set off against the amount claimed in the statutory demand such that no amount is owing by Delphic to Agrilex. Therefore, it says, the demand should be set aside.<sup>8</sup>

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<sup>6</sup> *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605, quoted with approval in *T.R. Administration Pty Ltd v Frank Marchetti and Sons Pty Ltd* *ibid* at [65].

<sup>7</sup> (1994) 12 ACSR 785 at [787].

<sup>8</sup> It was argued before the Associate Judge that there was a genuine dispute as to the existence of the debt. Delphic did not pursue that argument before me.

11 Agrilex contends that Delphic's claim is completely inconsistent with the contemporary evidence. It also submits that the contractual terms as to quality and origin of the cheese are not established by the evidence and that the claim by Delphic as to lost profits is merely asserted and not supported by the evidence.

**Evidence as to defective product and source of cheese**

12 The evidence is contained in affidavits of Mr Gregory, a director of Delphic, and Mr Vladov, the general manager of Agrilex.

13 Mr Gregory has sworn that he and Mr Vladov made an agreement that:

- (a) the cheese be of premium quality sufficient to assist Delphic to build market share;
- (b) all sheep and goats' fetta would come from the Madjarov factory; and
- (c) none of the cheese should come from the Matand factory.

14 Mr Vladov denies an agreement on those terms and challenges the assertion that all of the cheese would come from the Madjarov factory.

15 Delphic submitted that even if those terms are not express terms of the agreement, the *Sale of Goods (Vienna Convention) Act 1987* (Vic) implies into the contract terms that the cheese be fit for the purpose expressly or impliedly made known to Agrilex and that the cheese possess the qualities of sample cheese provided by Agrilex to Delphic.

16 Mr Gregory has sworn that after the first three shipments, none of the cheese supplied had the taste or texture required of cheese of 'premium' or 'marketable' quality and it did not come from the Madjarov factory. He says that on 11 September 2007, Delphic began withholding payments to Agrilex because of these issues.

17 As to the lack of quality, Delphic also relies on a letter of complaint from a customer, two credit notes it gave to customers, and significant reductions in sales to existing

large customers. Mr Gregory deposed that the poor quality of the cheese gave rise to customer returns and resulted in Delphic being able to ultimately sell the produce only after it had been repackaged and discounted.

18 He says that from September 2007, he regularly told Mr Vladov of the problems with quality and that because of that, Delphic would not pay for the cheese.

19 Mr Gregory claims that during this period Mr Vladov admitted the issues relating to the quality and origin of the cheese. Mr Vladov denies this, instead claiming that Delphic accepted cheese from sources other than Madjarov and that Mr Gregory admitted the debt.

20 Mr Gregory says that he reached agreement with Mr Vladov at a meeting in May 2008 that Delphic did not have to pay for the last three shipments of cheese (which is the amount claimed in the statutory demand). His evidence is that by 28 August 2008, all payments had been made under that agreement. Mr Vladov denies that any such agreement was reached. He claims that Delphic agreed it would pay off the outstanding debt to Agrilex by instalments. Shortly after the May meeting, Mr Vladov confirmed the terms of what he said was the agreement by email. Mr Gregory did not respond to this email. Mr Gregory's evidence is that he was shocked and disappointed by Mr Vladov's email and, rather than respond in writing to the email, he decided that Delphic would perform its part of the agreed bargain as Delphic understood it, would try to avoid confrontation, and would stop dealing with Agrilex.

21 The first written complaint by Delphic as to the quality of the cheese and its origin is in a letter sent by Delphic's lawyers on 28 January 2009. That letter was sent in response to a letter of demand from Agrilex's lawyers.

### **Analysis of Evidence & Findings**

22 The failure by Mr Gregory to complain in writing is implausible in the context of the various emails passing between Mr Vladov and Mr Gregory which related to

payment demands by Agrilex over the course of the preceding year.

- 23 In January 2008, Mr Gregory sent an email to Mr Vladov regarding the amount owed to Agrilex. He said that they had no cash flow due to a two week closure and concluded:

I understand that you may feel nervous about the amount that is owing.

Please do not worry. We shall resolve this situation as soon as possible.

This email is dated four months *after* Mr Gregory alleges that he detected the quality problems with the cheese, yet he made no mention of any issue of quality.

- 24 In late June and early July 2008 there were further email exchanges between Mr Gregory and Mr Vladov, the salient parts of which are as follows:

Mr Vladov to Mr Gregory:

Please do not postpone the Bank transfer this week. The situation is very very serious.

After our visit in Australia we advised all our Producers for your promise every week to do Bank transfer for 20 000 Euro each and one for 150 000Euro by end of July2008. That's why they call me every day several times.

Please to inform us how is going in negotiations with your Bank for credit of 150 000 Euro.

Mr Gregory responded:

We have today sent you EURO 20,000 as arranged.

Please understand that it does not help to keep sending emails twice and sometimes three times a week asking me to send money. We are neglecting some of our other suppliers to send money to you. We are doing the best that we can in this matter.

Regarding our discussion with the bank:

We have not heard anything as yet from them

We shall let you know as soon as we have some news.

Mr Vladov's response:

*From the content of the same e-mail we understand you aren't satisfied and even angry that we remind you for the money every week.*

*We would like to inform you that after two payments the balance for payment from your side is 215 246,52Euro.*

Mr Gregory's reply:

*You misunderstand the tone of my email.*

*We are doing our best to repay you the amount still outstanding as soon as possible.*

*It does not make me feel good to be in this position.*

*I am not unsatisfied.*

*I am not angry.*

*However, you will not receive your money faster by sending me emails two and sometimes three times a week.*

*That is all I am saying.*

- 25 In none of the correspondence is there any mention of the quality or source of the cheese. It was submitted on behalf of Delphic that Mr Gregory's approach to the email correspondence is understandable as he is a commercial person not a lawyer. It was submitted that Mr Gregory chose to 'keep his head down', pay for all but the last three shipments (on the basis that that was what had been agreed) and then stop business dealings with Delphic. Such an explanation may have been plausible if Mr Gregory had not corresponded by email with Mr Vlados at all, but that is not the case.
- 26 Reliance was also placed by Delphic on the credit notes, a letter of complaint from a Delphic customer and the reduction in sales from the preceding year. It was submitted that this was objective evidence that established that the quality of the cheese was not up to standard.
- 27 First, the credit notes. They are dated July and October 2008. On their face, the credit notes do not disclose the reason for them being given. They are not an objective source of proof of any matter relevant to the question of the quality of the cheese. Second, the letter of complaint as to quality. It is dated 22 June 2009; some 12 months *after* the customer had purchased the cheese from Delphic. Third, the reduction in sales. This could be explicable by any number of factors. There is no objective evidence that links the sales drop to poor quality cheese. There is no sworn evidence from any of Delphic's customers complaining or stating that they had reduced the amount of cheese purchased from Delphic because of the quality of the cheese.

- 28 There is also the matter of the delivery and acceptance of ten further shipments of cheese after Mr Gregory says that he first raised with Mr Vlados his concerns about the quality of the cheese. The explanation for this is said to be the long lead time for orders of cheese of this type. It was submitted that, had the orders been cancelled or shipments returned, it would have been impossible to obtain replacement cheese. I do not find it credible that Mr Gregory would have simply remained silent and made no mention (when pressed by Agrilex for payment) that Delphic was prepared to continue to accept poor quality cheese because it had no other option. That is particularly so where there was regular email contact between the parties.
- 29 Finally, it is not disputed that Delphic continued to make payments until August 2008. Part payment alone is not sufficient to establish that there is no genuine dispute or offsetting claim. However, it is relevant when taken in the context of the surrounding circumstances of this case.
- 30 In totality, the matters referred to above lead me to the conclusion that I am not satisfied that there is a genuine offsetting claim. The position adopted by Delphic is not plausible. It is inconsistent with the contemporaneous emails. The explanation for why the issue of quality was not raised in the emails is unconvincing.
- 31 The appeal is dismissed.

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