[2011] WASC 49

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	APEX GOLD PTY LTD -v- ATLAS COPCO AUSTRALIA PTY LTD [2011] WASC 49
CORAM	**:**	PRITCHARD J
HEARD	**:**	9-10 SEPTEMBER 2010
DELIVERED	**:**	28 FEBRUARY 2011
FILE NO/S	**:**	COR 100 of 2010 COR 109 of 2010
BETWEEN	**:**	APEX GOLD PTY LTD Plaintiff AND ATLAS COPCO AUSTRALIA PTY LTD Defendant

Catchwords:

Corporations - Debts - Statutory demand - Offsetting claim - Genuine dispute - Application to set aside statutory demand - *Corporations Act 2001* (Cth) s 459G

Legislation:

Corporations Act 2001 (Cth), s 459G, s 459G(1), s 459G(2), s 459J(1)(b), s 459H, s 459H(1), s 459H(5)
Trade Practices Act 1974 (Cth)

Result:

Statutory demands of 26 May 2010 and 4 June 2010 set aside

Category: B

Representation:

Counsel:

Plaintiff	:	Mr D M Stone & Mr T J Carmady
Defendant	:	Mr M J Feutrill & Mr C A Luck

Solicitors:

Plaintiff	:	Williams & Hughes
Defendant	:	Minter Ellison

Case(s) referred to in judgment(s):

20*20 Pty Ltd v D&G Developments Pty Ltd [2009] WASC 343
Advance Ship Design Pty Ltd v DJ Ryan t/as Davies Collison Cave (1995) 16 ACSR 129
Andi-Co Australia Pty Ltd v Meyers [2004] FCA 1358
Asian Century Holdings Inc v Fleuris Pty Ltd [2000] WASCA 59
Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd [2007] VSCA 121; (2007) 212 FLR 56
Brogden v Metropolitan Railway Company (1877) 2 App Cas 666
CCD Group Pty Ltd v Premier Drywall Pty Ltd [2006] NSWSC 1012
Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd (1994) 13 ACSR 37
Chase Manhattan Bank Australia Ltd v Oscty Pty Ltd (1995) 17 ACSR 128
Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA (1994) 13 ACSR 263
Createc Pty Ltd v Design Signs Pty Ltd [2009] WASCA 85; (2009) 71 ACSR 602
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353
Delnorth Pty Ltd v State Bank of New South Wales (1995) 17 ACSR 379
Edge Technology Pty Ltd v Lite-On Technology Corporation [2000] NSWSC 471; (2000) 156 FLR 181
Energy Equity Corporation Ltd v Sinedie Pty Ltd [2001] WASCA 419; (2001) 166 FLR 179
Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Perpetual Trustees WA Ltd (1997) 25 ACSR 675

Equuscorp Pty Ltd v Perpetual Trustees WA Ltd (1997) 24 ACSR 194
Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785
Financial Solutions Australasia Pty Ltd v Predella Pty Ltd [2002] WASCA 51; (2002) 26 WAR 306
Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1996) 70 FCR 452
Jarpab Pty Ltd v Winter t/as Boldon Haulage (1994) 14 ACSR 255
Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2) (1994) 122 ALR 717
JJMMR Pty Ltd v LG International Corporation [2003] QCA 519
John Holland Construction & Engineering Pty Ltd v Kilpatrick Green Pty Ltd (1994) 14 ACSR 250
John Shearer Ltd & Arrowcrest Group Pty Ltd v Gehl Company (1995) 60 FCR 136
Ketrim Pty Ltd v Jaeger Corporation Pty Ltd [2002] NSWSC 474
Land and National Development Corporation Pty Ltd v Tatebrook Pty Ltd [1999] NSWSC 669
Macleay Nominees Pty Ltd v Belle Property East Pty Ltd [2001] NSWSC 743
Maniotis v Valimi Pty Ltd [2002] VSCA 91; (2002) 4 VR 386
Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] 2 VR 290
Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation [2006] SASC 91; (2006) 94 SASR 269
Re a Bankruptcy Notice [1934] Ch 431
Re Morris Catering (Australia) Pty Ltd (1993) 11 ACSR 601
Re Smith; Ex parte Chesson (1992) 106 ALR 359
Rohalo Pharmaceutical Pty Ltd v R P Scherer SpA & Pharmagel SpA (1994) 15 ACSR 347
Turner Corporation (WA) Pty Ltd v Blackburne & Dixon Pty Ltd [1999] WASCA 294

1 **PRITCHARD J**: Apex Gold Pty Ltd (Apex) operates a gold mine at Wiluna in Western Australia (the Wiluna gold mine). Atlas Copco Pty Ltd (Atlas) sells and hires machinery, including mining equipment, and provides services related to that machinery including maintenance and repairs.

2 On 15 July 2008, Apex acquired a fleet of equipment comprising a number of trucks, loaders and drill rigs (the Equipment) from Atlas Copco Customer Finance Australia Pty Ltd (an entity related to Atlas) pursuant to a hire purchase agreement (the hire purchase agreement). On 8 October 2008, Apex and Atlas entered into an agreement pursuant to which Atlas was to provide on-site maintenance and repairs for the Equipment at the Wiluna gold mine, and at another mine at Wilson, until 30 June 2011 (the Maintenance Agreement). On 4 May 2009, Apex and Atlas also entered into a drilling equipment contract (known as the Secoroc Agreement) the terms of which are not presently relevant.

3 Atlas issued invoices to Apex for payment for the services Atlas provided to Apex pursuant to the Maintenance Agreement. Atlas also issued invoices to Apex for payment in respect of the Secoroc Agreement.

4 Apex failed to pay two invoices from each of February, March and April 2010 which were issued to it by Atlas pursuant to the Maintenance Agreement, and also failed to pay two invoices from February 2010, one invoice from March 2010, and one invoice from April 2010, which were issued to it by Atlas pursuant to the Secoroc Agreement.

5 On 21 April 2010, Mr Mark Ashley, the Chief Executive Officer and Managing Director of Apex, purported to exercise a power under the Maintenance Agreement to direct Atlas to vary the services which were to be provided by it under the Maintenance Agreement (the April variation). Mr Ashley also purported to exercise a power to adjust the price for those services, and to apply that adjustment from the beginning of the term of the Maintenance Agreement.

6 Atlas disputed the validity of the April variation. It viewed the April variation as an attempt to unilaterally and retrospectively vary the price payable for the services provided by Atlas under the Maintenance Agreement.

7 On 5 May 2010, Atlas gave Apex notice of the termination of the Maintenance Agreement, with effect from 3 August 2010.

8 On 26 May 2010, Atlas served Apex with a statutory demand for the sum of $3,132,342.11 which Atlas claimed was the total amount owed by Apex in respect of unpaid invoices issued to it pursuant to the Maintenance Agreement and the Secoroc Agreement (the May statutory demand). The May statutory demand pertained to two invoices dated 25 February 2010, and two invoices dated 25 March 2010, issued to Apex pursuant to the Maintenance Agreement, and to two invoices dated 26 February 2010, one invoice dated 31 March 2010, and one invoice dated 21 April 2010, issued to Apex pursuant to the Secoroc Agreement.

9 On 4 June 2010, Atlas served Apex with a statutory demand for the sum of $1,331,068.10 which Atlas claimed was owed in respect of two unpaid invoices dated 30 April 2010 which were issued to Apex pursuant to the Maintenance Agreement (the June statutory demand).

10 On 15 June 2010, Mr Ashley wrote to Atlas and acknowledged receipt of Atlas' notice of termination of the Maintenance Agreement dated 5 May 2010. Mr Ashley then purported to provide a direction to Atlas to further vary the services to be performed by Atlas under the Maintenance Agreement, on the basis that as a result of Atlas' notice of termination, the Maintenance Agreement would end substantially earlier than had been initially agreed (the June variation). Mr Ashley also purported to exercise the power to adjust the price for the services provided by Atlas under the Maintenance Agreement, in consequence of the variation of those services, and to apply this adjustment from the beginning of the term of the Maintenance Agreement. Mr Ashley calculated that Atlas owed Apex $4,188,064 as a result of this direction together with the April variation.

11 On 22 June 2010, Atlas sent Apex three notices of termination of the Maintenance Agreement, with effect from 6 July 2010. The notices relied on Apex's alleged default arising from its failure to pay the invoices for the months of February, March and April respectively.

12 On 25 June 2010, Mr Ashley wrote to Atlas and advised that Apex did not consider that it was in default under the Maintenance Agreement because according to Mr Ashley's calculations, the amount that was owed to Apex by Atlas, as a result of the purported directions, exceeded Apex's debt to Atlas. Apex claimed that it was entitled to deduct the debt alleged to be payable by Atlas from the amounts Atlas claimed were owed by Apex.

13 The termination of the Maintenance Agreement took effect on 7 July 2010.

The applications to set aside the statutory demands

14 Apex applied to set aside the May and June statutory demands pursuant to s 459G of the *Corporations Act 2001* (Cth) (the Act) on the basis that there was a genuine dispute between Apex and Atlas about the existence or amount of the debts to which the statutory demands related, and in addition, or alternatively, that Apex had offsetting claims against Atlas.

15 Having regard to the content of the affidavit material relied upon by Apex, and to the submissions of counsel at the hearing, Apex's applications to set aside the statutory demands appeared to be based upon the following claims:

1. Apex claimed that it had an offsetting claim for a part-payment it made to Atlas on 17 May 2010 (the part-payment claim);

2. Apex claimed that it had an offsetting claim for interest which it paid to Atlas on overdue invoices, because it claimed that Atlas was not entitled to charge interest pursuant to the Maintenance Agreement (the interest claim);

3. Apex claimed that it had an offsetting claim for labour costs for which it claimed to have been wrongly charged (the labour costs claim);

4. Apex claimed that it was entitled to vary the Maintenance Agreement by the April variation (including the adjustment made under that variation) and that it had an offsetting claim as a result of that variation (the April variation claim);

5. Apex claimed that it was entitled to vary the Maintenance Agreement by the June variation (including the adjustment made under that variation) and that it had an offsetting claim as a result of that variation (the June variation claim);

6. Apex claimed that it had an offsetting claim for sums it alleged were incorrectly charged in invoices rendered by Atlas in respect of Equipment repairs that were not covered by the Maintenance Agreement (the Equipment damage claim);

7. Apex claimed that it had offsetting claims for damages arising from alleged misleading and deceptive conduct by Atlas in contravention of the *Trade Practices Act 1974* (Cth). Apex's case was that the misrepresentations the subject of those claims related to the costs of spare parts, service exchange components and off-site maintenance repairs (the first misrepresentation claim) and to the costs of maintaining the Equipment (the second misrepresentation claim).

8. Apex claimed that it had an offsetting claim for the adjustment of the Maintenance Agreement in view of the termination of the agreement, to reflect the value of the services provided by Atlas to Apex until the date of termination (the adjustment claim);

9. Apex claimed that it had an offsetting claim for an alleged breach of the Maintenance Agreement as a result of a failure by Atlas to carry out scheduled maintenance on the Equipment, causing damage (the non change-out claim).

In addition, Apex claimed that the May and June statutory demands should each be set aside under s 459J(1)(b) of the Act on the basis that they constituted an abuse of process.

16 Atlas accepted that Apex was entitled to offset the sum of the part-payment claim against the statutory demands, but the sum of that claim was not sufficient to set aside either statutory demand in full. Atlas submitted that the balance of Apex's claims did not meet the requirements of s 459H(1) of the Act so as to support the making of an order under s 459G of the Act because Apex had not demonstrated by relevant and admissible evidence that there was a genuine dispute or an offsetting claim, and in addition or in the alternative because the claims did not meet the jurisdictional threshold requirements for affidavits in support of applications under s 459G of the Act. Atlas also disputed Apex's contention that Atlas' service of the statutory demands constituted an abuse of process.

Objections to affidavits

17 In support of its applications to set aside the May and June statutory demands, Apex relied primarily on four affidavits sworn by Mr Ashley. Those affidavits were sworn on 16 June 2010 (the first Ashley affidavit), 25 June 2010 (the second Ashley affidavit), 9 August 2010 (the third Ashley affidavit) and 4 September 2010 (the fourth Ashley affidavit). While the first and second Ashley affidavits were filed within the 21 day

period following service of the May and June statutory demands, as required by s 459G(2) of the Act, clearly the third and fourth Ashley affidavits were filed outside that 21 day period.

18 For completeness, I note that prior to the hearing of this matter, Atlas filed a notice of objection to the admissibility of the first, second and third Ashley affidavits. Most of those objections were to the effect that statements by Mr Ashley in his affidavits constituted inadmissible legal submissions or inadmissible conclusions unsupported by admissible evidence. In addition, Atlas claimed that Mr Ashley's affidavits contained inadmissible hearsay, inadmissible material which was irrelevant to any matter in issue, or that certain statements in Mr Ashley's affidavits constituted bare assertions.

19 In the course of the hearing, counsel clarified Atlas' position in relation to its objections to the admissibility of Mr Ashley's affidavits. Counsel confirmed that Atlas wished to object only to the admissibility of particular paragraphs of the first and second Ashley affidavits, on the basis that those paragraphs did not meet the jurisdictional threshold required for affidavits filed in support of an application under s 459G of the Act, for example on the basis that the paragraphs contained bare assertions or failed to properly quantify the offsetting claim raised by Apex.

20 Counsel for Atlas indicated that Atlas maintained its objection to the admissibility of the third Ashley affidavit, on the basis that this affidavit raised new matters which had not been raised in the first or second Ashley affidavits, and which therefore could not be relied upon in support of Apex's application under s 459G of the Act. This objection was raised in relation to the adjustment claim and the misrepresentation claim.

21 The basis for this objection was that an affidavit filed outside the 21 day period in which an application under s 459G is required to be made, and which raises a new ground for setting aside a statutory demand (as opposed to an affidavit which expands on grounds set out in an earlier affidavit which was filed within time and which satisfied the jurisdictional threshold) cannot be relied upon in an application to set aside the statutory demand: ***Financial Solutions Australasia Pty Ltd v Predella Pty Ltd*** [2002] WASCA 51; (2002) 26 WAR 306 [17] - [38] (Parker J, Scott & Anderson JJ agreeing); ***Energy Equity Corporation Ltd v Sinedie Pty Ltd*** [2001] WASCA 419; (2001) 166 FLR 179 [29] (Wallwork J, Steytler J & Olsson AUJ agreeing); ***Graywinter Properties Pty Ltd v Gas & Fuel***

Corporation Superannuation Fund (1996) 70 FCR 452, 459 - 460 (Sundberg J).

22 The conclusions I have reached in relation to the claims made by Apex mean that it is unnecessary to deal with Atlas' objections to parts of Mr Ashley's evidence.

Requirements for establishing a genuine dispute or offsetting claim

23 The principles concerning what is required before a court will be satisfied that there is a genuine dispute between a company and its creditor about the existence of a debt to which a statutory demand relates, or that the company has an offsetting claim, are well established.

24 The expression 'genuine dispute' connotes a plausible contention requiring investigation: ***Createc Pty Ltd v Design Signs Pty Ltd*** [2009] WASCA 85; (2009) 71 ACSR 602 [44] (Martin CJ, Owen & Miller JJA agreeing).

25 The demand will be set aside if there is a bona fide dispute concerning an issue of fact or law, which is not based on spurious, hypothetical, illusory or misconceived grounds, and which is not frivolous or vexatious, but which has some substance: ***Createc v Design Signs*** [45] (Martin CJ); ***Asian Century Holdings Inc v Fleuris Pty Ltd*** [2000] WASCA 59 [35] (Sanderson M); ***Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd*** (1994) 13 ACSR 37, 39 (Lockhart J); see also ***Rohalo Pharmaceutical Pty Ltd v R P Scherer SpA & Pharmagel SpA*** (1994) 15 ACSR 347, 353 (Lindgren J).

26 The requirement that the dispute be genuine means that the dispute must be one which the company genuinely believes to exist: ***John Holland Construction & Engineering Pty Ltd v Kilpatrick Green Pty Ltd*** (1994) 14 ACSR 250, 253 (Young J).

27 The onus is on the company in receipt of a statutory demand to establish a genuine dispute: ***Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd*** [2007] VSCA 121; (2007) 212 FLR 56 [140] (Ashley JA).

28 The term 'offsetting claim' is defined in s 459H(5) of the Act. By virtue of the inclusion of a 'cross-demand' within its scope, the term 'offsetting claim' has a wide meaning: ***Re a Bankruptcy Notice*** [1934] Ch 431, 438 (Lord Hanworth MR); ***Re Smith; Ex parte Chesson*** (1992) 106 ALR 359, 363 (Hill J); ***Classic Ceramic Importers Pty Ltd v Ceramica***

Antiga SA (1994) 13 ACSR 263, 269 (Young J). As the definition of 'offsetting claim' makes clear, the offsetting claim need not arise out of the same transaction or circumstances as the debt to which the statutory demand relates. The term 'offsetting claim' therefore effectively encompasses any claim that the company may have against the creditor: ***John Shearer Ltd & Arrowcrest Group Pty Ltd v Gehl Company*** (1995) 60 FCR 136, 142 - 143 (von Doussa, Hill & Tamberlin JJ).

29 An offsetting claim - whether in the form of a counterclaim, set-off or cross demand - must sound in money: ***Chase Manhattan Bank Australia Ltd v Oscty Pty Ltd*** (1995) 17 ACSR 128, 135 (Lindgren J); ***Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation*** [2006] SASC 91; (2006) 94 SASR 269 [45] (Debelle J, Besanko & Layton JJ agreeing); ***CCD Group Pty Ltd v Premier Drywall Pty Ltd*** [2006] NSWSC 1012 (Macready ASJ).

30 An offsetting claim must be genuine in the sense of being bona fide or authentic: ***John Shearer v Gehl*** (143) (von Doussa, Hill & Tamberlin JJ); ***Maniotis v Valimi Pty Ltd*** [2002] VSCA 91; (2002) 4 VR 386 [42] - [43] (O'Bryan AJA). Claims which are 'illegitimate, phoney, counterfeit [or] false' will therefore not constitute genuine offsetting claims: ***Andi-Co Australia Pty Ltd v Meyers*** [2004] FCA 1358 [17] (Heerey J). The claim must not have been manufactured simply for the purpose of defeating the demand made against the company. It must exist independently of the need for an application to set aside the statutory demand: ***JJMMR Pty Ltd v LG International Corporation*** [2003] QCA 519 [18] (McPherson JA). In that sense, a genuine offsetting claim will be one which is brought in good faith: ***Edge Technology Pty Ltd v Lite-On Technology Corporation*** [2000] NSWSC 471; (2000) 156 FLR 181 [29] - [31] (Santow J); ***Macleay Nominees Pty Ltd v Belle Property East Pty Ltd*** [2001] NSWSC 743 [18] (Palmer J); see also ***Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)*** (1994) 122 ALR 717, 720 - 721 (Young J).

31 The dispute must exist at the time of the hearing of the application to set aside a statutory demand: ***Mibor Investments Pty Ltd v Commonwealth Bank of Australia*** [1994] 2 VR 290, 293 (Hayne J). Similarly, an offsetting claim must be in respect of a cause of action which has already accrued and presently exists at the time of the hearing of the application: ***Advance Ship Design Pty Ltd v DJ Ryan t/as Davies Collison Cave*** (1995) 16 ACSR 129, 135 - 136 (McLaughlin M); ***Equuscorp Pty Ltd v Perpetual Trustees WA Ltd*** (1997) 24 ACSR 194, 203 (Heerey J). The amount of any offsetting claim is to be considered as

at the time the court determines the application under s 459G of the Act, not as at the date of the demand: ***Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Perpetual Trustees WA Ltd*** (1997) 25 ACSR 675, 697 (French, Kiefel & Sundberg JJ).

32 The company claiming an offsetting claim must identify, with appropriate evidence, the genuine level of the offsetting claim: ***Re Morris Catering (Australia) Pty Ltd*** (1993) 11 ACSR 601, 605 - 606 (Thomas J). However, the standard of satisfaction which is required is not particularly high: ***Chadwick Industries v Condensing Vaporisers*** (30) (Lockhart J).

33 The court will not attempt to determine where the merits of the dispute lie: ***Turner Corporation (WA) Pty Ltd v Blackburne & Dixon Pty Ltd*** [1999] WASCA 294 [30] (Owen J, Pidgeon & Wallwork JJ agreeing); ***Createc v Design Signs*** [46] (Martin CJ); ***Mibor Investments v Commonwealth Bank*** (295) (Hayne J). Similarly, the court will not assess the merits of an offsetting claim or its likely prospects of success: ***Edge Technology v Lite-On Technology*** [27] - [28] (Santow J).

34 However, '[t]his 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"...': ***Eyota Pty Ltd v Hanave Pty Ltd*** (1994) 12 ACSR 785, 787 (McLelland CJ); ***Createc v Design Signs*** [4] (Martin CJ). Similarly, it does not mean that the court must accept a 'patently feeble legal argument' or 'an assertion of facts unsupported by evidence': ***Eyota v Hanave*** (787) (McLelland CJ); ***Jarpab Pty Ltd v Winter t/as Boldon Haulage*** (1994) 14 ACSR 255, 261 (Santow J).

35 Where the debt is disputed on a number of grounds, the genuineness of each ground must be considered, unless and until one that raises a genuine dispute or offsetting claim is found. If the company establishes a genuine dispute or offsetting claim with respect to only one of its grounds, that is sufficient to set aside the demand: ***20*20 Pty Ltd v D&G Developments Pty Ltd*** [2009] WASC 343 [14] (Murphy J).

The Maintenance Agreement

36 Most of Apex's claims rested on the construction of various clauses in the Maintenance Agreement. It is therefore appropriate to briefly outline the key provisions of that agreement. In order to assess whether Apex has established that there exists a genuine dispute in relation to the

debts the subject of the statutory demands, or that it has offsetting claims, it will be necessary to consider more closely the construction of some of the provisions of the Maintenance Agreement in due course.

37 Under the Maintenance Agreement, Apex engaged Atlas to provide 'Services' to Apex in accordance with the agreement: cl 2(a). The 'Services' were defined in cl 1.1 of the Maintenance Agreement to mean 'the services and operations to be performed by Atlas under the Agreement, as described in item 1 of sch 1 to the Agreement' (the Services). Item 1 of sch 1 to the Maintenance Agreement was headed 'Description of Services' and referred to:

> [T]he provision of all labour, supervision, materials, equipment supplies and all other items necessary to perform and complete the inspection, maintenance and repair of the Equipment in accordance with the Key Performance Indicators and this schedule 1 excluding maintenance and repair caused by Non-Fair Wear or Equipment Damage.

In the same clause, the Equipment was defined to mean the equipment listed in a table which formed part of item 1 of sch 1 to the Maintenance Agreement.

38 The labour component of the Services was described in item 1 of sch 1, which contained a table setting out the staffing that Atlas would provide at the Wiluna gold mine and Wilsons gold mine sites.

39 The parts and Services for the Equipment supplied by Atlas pursuant to the hire purchase agreement were to be provided on rates set out in Annexure 3 to the Maintenance Agreement. A copy of that document was annexed to the first and second Ashley affidavits. It appears that Annexure 3 was incomplete in that it did not specify rates for all of the listed parts for all of the Equipment.

40 Annexure 1 to the Maintenance Agreement was headed 'Key Performance Indicators'. That document required Atlas to maintain the Equipment in line with the Key Performance Indicator targets set out in the document. However, no Key Performance Indicator targets were in fact set out in that document. The document referred to 'Key Point Indicators', and presumably that was intended to mean the Key Performance Indicators. One of those was the 'Availability Guarantee'. That term appeared to contemplate that the Equipment should be available for use (and not unavailable by reason that it needed to be serviced for a repair or breakdown) for 85% of the total days in each month.

41 The Maintenance Agreement did not expressly describe what work comprised the maintenance component of the Services described in item 1 of sch 1. However, sch 2 to the Maintenance Agreement contained special conditions which, subject to some exceptions which are not presently relevant, formed part of the agreement. Special condition 25 provided:

> Schedule change out of all Equipment components will be in accordance with the Maintenance Schedule Forecasting guideline. Should, in conjunction with ATLAS COPCO, APEX consider it necessary to revise the frequency of hours of Schedule Part Change out, APEX will notify ATLAS COPCO in writing and the appropriate changes and rate increases for the Equipment effected [sic] will be implemented. Note any variations are required to be signed by both parties before forming part of the contract.

42 A copy of the Maintenance Schedule Forecasting guideline (the Maintenance Schedule) was annexed to both the first and the second Ashley affidavits. The Maintenance Schedule described in considerable detail the items of maintenance which would be conducted in respect of each piece of Equipment the subject of the Maintenance Agreement. The terms of special condition 25 suggested that the maintenance of the Equipment was intended to be conducted in accordance with the Maintenance Schedule referred to in special condition 25. It is therefore curious that the definition of the Services in the Maintenance Agreement referred only to item 1 of sch 1, which did not make any reference to the Maintenance Schedule. However, because the special conditions formed part of the Maintenance Agreement, it is arguable that the Maintenance Schedule was incorporated into the agreement, although whether and how that impacted on the Services is far from clear.

43 The Maintenance Schedule set out the maintenance work to be performed, and the parts to be changed out, for each piece of Equipment and the intervals at which that work was to be done (by reference to engine hours or percussion hours) over the three year term of the Maintenance Agreement. What is clear from the Maintenance Schedule is that as the number of hours of operation of each piece of Equipment increased over time, the maintenance required for that piece of Equipment also increased, by virtue of an increase in the number or significance of the parts which would need to be replaced and the cost of those parts or because more major Services were required as the number of hours of operation accumulated.

44 In consideration of Atlas providing the Services to Apex, the Maintenance Agreement required Apex to pay Atlas the 'Price' (as defined) 'for services performed on the basis and terms set out in Schedule 1 and otherwise contained in the Agreement': cl 6.1(a). The 'Price' was defined in cl 1 of the Maintenance Agreement to mean 'the total amount payable by APEX to ATLAS COPCO for the Services as described in and calculated in accordance with the amounts specified in Schedule 1' (the Price). However, nothing in sch 1 indicated precisely how the Price was to be calculated. I will return to this issue below.

45 Within seven days of the end of each invoice period (a term of one calendar month commencing on the 25th day of each month) Atlas was required to invoice Apex for completed Services, and Apex was to pay Atlas for those Services: cl 6.2(b) of the Maintenance Agreement.

46 The Maintenance Agreement expressly provided that payment of an invoice by Apex would not be evidence of the value of the Services or an admission of liability or evidence that the Services were performed satisfactorily, but rather a payment on account only: cl 6.2(e) of the Maintenance Agreement.

47 The Maintenance Agreement contemplated that Apex would be entitled to give directions to Atlas in relation to the performance of the Services in a variety of situations. Clause 5.3 of the Maintenance Agreement permitted Apex 'from time to time to issue directions to ATLAS COPCO in connection with the Services and/or this Agreement'. In turn, Atlas was obliged to comply with all reasonable directions of Apex. This requirement was also reflected in cl 2(b) of the Maintenance Agreement, which provided that the Services must be rendered in accordance with the agreement 'and the reasonable directions of APEX as may be given to ATLAS COPCO from time to time'.

48 The April and June variation claims rested heavily on the terms of cl 18 of the Maintenance Agreement, and it is convenient to set out that clause in full:

> **18. VARIATION**
>
> **18.1 Variations to the Services**
>
> APEX's Representative may direct ATLAS COPCO to:
>
> (a) increase, decrease or omit any part of the Services;
>
> (b) change the character or quality of any Services; or

(c) execute additional work under the Agreement.

ATLAS COPCO is bound to execute any variation directed by APEX's Representative prior to the Completion Date.

ATLAS COPCO shall not vary the Services except as directed by APEX's Representative under this clause 18.

No variation shall invalidate the Agreement but the moneys otherwise payable to ATLAS COPCO under this Agreement shall be adjusted in accordance with clause 18.3.

18.2 Pricing the Variation

Unless APEX's Representative and ATLAS COPCO agree upon the price for a variation the variation directed by APEX's Representative under clause 18.1 shall be valued under clause 18.3.

APEX's Representative may direct ATLAS COPCO to provide a detailed quotation for the work of a variation supported by measurements or other evidence of cost.

18.3 Valuation

Where the Agreement provides that a valuation shall be made under this clause 18.3, APEX shall pay or allow ATLAS COPCO or ATLAS COPCO shall pay or allow APEX as the case may require, an amount ascertained by APEX's Representative as follows:

(a) if schedule 1 prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;

(b) if (a) does not apply, the rates or prices in schedule 1 shall be used to the extent that it is reasonable to use them; and

(c) to the extent that neither (a) nor (b) apply, reasonable rates or prices as may be determined by APEX's Representative in his sole discretion shall be used in any valuation made by APEX's Representative.

49 The Maintenance Agreement permitted both Apex and Atlas to terminate the agreement on 90 days notice: cl 13.1. In such a case, Apex was required to pay Atlas, amongst other things, the value of the Services performed up to the date of the termination: cl 13.1(a) and cl 13.1(b). Each party was also entitled to terminate the Maintenance Agreement on the default of the other party, if following notice of the breach of its obligations the other party failed to comply or rectify the breach within 10 business days: cl 13.2.

The part-payment claim

50 Mr Ashley deposed that the amounts claimed in the statutory demands did not take into account a payment made by Apex to Atlas on 17 May 2010 in the sum of $59,440. As I have noted above, Atlas accepted that Apex was entitled to offset this amount against the statutory demands.

51 In addition, in an affidavit sworn by Mr Nicholas Phillips, Atlas' National Service Manager on 30 June 2010, Mr Phillips accepted that there were errors in the invoices which related to Equipment damage, and which invoices had been paid by Apex, totalling $17,995.15. Atlas accepted that Apex was also entitled to offset this sum against the statutory demands.

The interest claim

(a) The nature of the claim

52 In his first and second affidavits Mr Ashley deposed that Atlas charged Apex a total of $584,974 in interest on five overdue invoices. Mr Ashley stated that the interest was paid by Apex because Apex's staff held the mistaken belief that Atlas was entitled to charge interest under the Maintenance Agreement, when in fact that was not the case. Copies of the invoices attached to Mr Ashley's affidavits indicate that the interest was charged pursuant to cl 6 of the 'Conditions of Sale' for overdue invoices. This appears to have been a reference to cl 6 of Atlas' Standard Terms and Conditions of Sale in Annexure 2 to the Maintenance Agreement (Atlas' Standard Terms). Atlas' Standard Terms formed part of the Maintenance Agreement by the operation of cl 4(e).

53 However, the Maintenance Agreement expressly excluded certain clauses in Atlas' Standard Terms. In his first and second affidavits, Mr Ashley suggested that cl 2(g) of the Maintenance Agreement excluded the application of cl 6 of Atlas' Standard Terms. That was not the case. However, cl 6 of Atlas' Standard Terms was excluded from application to the Maintenance Agreement by cl 6.1(b) of the Maintenance Agreement. There is, therefore, a strong argument that the Maintenance Agreement did not permit Atlas to charge interest on overdue invoices.

54 Some of the documents annexed to the affidavits filed by Atlas in these proceedings suggested an alternative basis for the interest charges, namely the existence of an oral agreement pursuant to which Apex agreed to pay interest, which agreement was made on Apex's behalf by

Mr Ashley, or alternatively by Ms Anna Neuling, Apex's Chief Financial Officer.

55 Mr Phillips swore an affidavit on 30 June 2010 in which he suggested that the payment of interest on outstanding invoices had been a term of a payment plan which was proposed by an employee of Atlas in a conversation with Apex's Chief Financial Officer and Company Secretary. Ms Anna Neuling, Apex's Chief Financial Officer at the relevant time, swore an affidavit in which she deposed that she did not recall if a payment plan, or the payment of interest, had been discussed, but that in any event she was not authorised to agree to such a proposal, and her usual practice would have been to defer any such issue to other officers of Apex who had authority to deal with such matters, including Mr Ashley.

56 Mr Phillips also deposed that in the course of a conversation between Mr Ashley and Atlas' Managing Director, Mr Camozzi, Mr Ashley offered to provide a personal guarantee for the payment of the overdue invoices and to pay interest on the amounts owed. In the third Ashley affidavit, Mr Ashley denied that he had offered any such personal guarantee or agreed to pay interest. Mr Ashley deposed that Mr Camozzi had simply asserted that Atlas was entitled to charge interest, and that at the time Mr Ashley had accepted this assertion.

(b) Whether there exists an offsetting claim in relation to the interest claim

57 On the basis of the affidavit material, there is clearly a dispute between Apex and Atlas in relation to whether Atlas was entitled to charge interest on overdue invoices. Having regard to cl 6.1(b) of the Maintenance Agreement, Apex's claim that Atlas was not entitled to charge interest, either pursuant to the Maintenance Agreement, or pursuant to an oral agreement to pay interest on overdue invoices, constitutes a plausible contention requiring investigation.

58 If Atlas was not entitled to charge interest on the overdue invoices, and Apex paid that interest in the mistaken belief that it was liable to pay interest, then Apex would arguably have a claim against Atlas for the recovery of the money paid: ***David Securities Pty Ltd v Commonwealth Bank of Australia*** (1992) 175 CLR 353. In my view, the interest claim is thus capable of founding a genuine dispute or an offsetting claim.

59 Counsel for Atlas submitted that the court should not accept that there exists an offsetting claim in relation to the interest claim. Counsel for Atlas did not seek to contend that Atlas was entitled to charge interest.

Instead, counsel submitted that the interest claim had not crystallised into a dispute by the time the statutory demands were issued. I am unable to accept this submission. The documents annexed to the first and second Ashley affidavits clearly indicate that Apex had challenged Atlas' authority to charge interest on overdue invoices well before the statutory demands were issued, and that Atlas had resisted such challenges and sought to justify the charges imposed.

60 Counsel for Atlas accepted that the interest claim would constitute a genuine dispute or an offsetting claim, but for two matters which he submitted indicated that the interest claim was not a genuine (in the sense of a bona fide) dispute or offsetting claim.

61 First, counsel for Atlas submitted that Mr Ashley's evidence was 'difficult to credit and should not be accepted at face value': Atlas' submissions par 100, (ts 70). Counsel for Atlas submitted that Mr Ashley's position with respect to the interest claim had

> moved in a matter of months from a position of uncertainty, to a mistake of an unnamed employee … to an apparently clear recollection denying any collateral agreement to pay the interest and the identification of Mr Ashley as the person apparently labouring under a mistaken belief as to the defendant's entitlement to the interest charges. No explanation has been given for the shifting and steadily improving character of Mr Ashley's assertions.

62 I am unable to accept this submission. In my view, the basis for Apex's challenge to the charging of interest on overdue invoices, and Mr Ashley's responses to Atlas' attempts to justify the interest charges, do not warrant the significance attributed to them by counsel for Atlas, especially in light of the argument, which is clearly open, that by virtue of cl 6.1(b) of the Maintenance Agreement, Atlas had no authority to charge interest. In addition, what counsel described as the 'shifting and steadily improving character' of Mr Ashley's assertions might alternatively be viewed, on the one hand, as Mr Ashley's explanation of why the interest was paid (namely because Apex's officers and employees believed that Apex was liable to do so) and on the other hand, as Mr Ashley's response to the suggestion which subsequently emerged in Atlas' affidavits that Mr Ashley had entered into an oral agreement to pay the interest. Further, even if grounds do exist to raise a question as to whether Mr Ashley's evidence in relation to the interest claim should be accepted, the present application is not an appropriate forum in which to resolve such questions of credit.

63 The second basis upon which it was said that the interest claim could not be regarded as a genuine offsetting claim was the fact that the interest claim was but one of a number of claims which, counsel submitted, included claims which did not constitute plausible contentions requiring investigation. Counsel submitted that what had occurred was that Apex was unable to pay its debts, that it sought to advance claims to avoid paying its debts, and that over time Apex sought to identify more and more claims until the total value of those claims exceeded the quantum of the statutory demands. In other words, counsel submitted that the genuineness of the interest claim was called into question by its association with other claims which counsel regarded as spurious or misconceived.

64 Given the number and variety of claims raised by Apex in support of its application to set aside the statutory demands, this was a submission which was superficially attractive. However, I am unable to accept the submission for three reasons. First, even if one or more of the claims raised by Apex lack merit, that does not, in my view, necessitate the conclusion that other grounds for challenging the statutory demands, which are found to warrant further consideration, should be assumed not to be genuine claims. It is, after all, hardly surprising that a company faced with a statutory demand will make every effort to have that demand set aside. In some cases that will involve raising multiple grounds for challenging the debt said to be owed. Secondly, as I explain below, I do not consider that all of the other claims raised by Apex in its affidavits are so lacking in merit as to cast doubt on whether the interest claim is genuinely raised as an offsetting claim. Thirdly, the fact that Atlas' entitlement to charge interest on overdue invoices was raised prior to the service of the statutory demands lends considerable support to the conclusion that the interest claim is a genuine (in the sense of a bona fide) offsetting claim.

(c) Conclusion in relation to the interest claim

65 I am satisfied that the interest claim constitutes an offsetting claim for the purposes of s 459G of the Act in the sum of $584,974.

The labour costs claim

(a) The nature of the claim

66 In the second Ashley affidavit, Mr Ashley stated that during the preparation of his first affidavit it became apparent to him that Apex had paid more to Atlas in relation to labour than it was required to pay under

the Maintenance Agreement. The basis for this apparent overcharging was that under the Maintenance Agreement, 38 staff members were to maintain and repair the Equipment. Thirty of those staff were to be located at the Wiluna gold mine, while the remaining eight staff members were to be located at the Wilsons gold mine. However, Mr Ashley deposed that Apex had not commenced operations at the Wilsons gold mine at all, and that the Equipment purchased for the Wilsons gold mine had not been used.

67 Mr Ashley deposed that all 38 staff responsible for the maintenance and repair of the Equipment had been located at the Wiluna gold mine. Although nothing turns on the point for present purposes, Mr Ashley deposed that he believed that the additional eight staff had been required to work at the Wiluna gold mine because Atlas was servicing the Equipment and changing out parts in excess of what was required under the Maintenance Agreement.

68 Mr Ashley deposed that although Apex had since formed the view that it was not required to pay for the cost of labour for more than 30 staff at the Wiluna gold mine, Apex had paid for this labour cost in the mistaken belief that Atlas was entitled to charge for it under the Maintenance Agreement.

69 Mr Ashley's evidence was that according to his calculations (prior to the termination of the Maintenance Agreement) this resulted in an overpayment to Atlas of $1,630,496.96.

(b) Whether there exists an offsetting claim in relation to the labour costs claim

70 As I have noted above, under the Maintenance Agreement, Atlas agreed to provide the Services to Apex and Apex agreed to pay Atlas the Price for Services performed on the basis and terms set out in sch 1 to the Maintenance Agreement.

71 Item 1 of sch 1 contained a table which listed the items of Equipment involved. Item 1 also contained a table headed 'Labour' which indicated that Atlas 'will provide staffing at APEX's Wiluna and Wilsons sites as follows' and which then listed the number of staff of different occupations at each mine site, as well as the total number of staff involved, namely 30 staff at the Wiluna gold mine and eight at the Wilsons gold mine.

72 Counsel for Apex submitted that the fact that Apex was charged for 38 rather than 30 staff members engaged in work at the Wiluna gold mine

meant that the charge was beyond the scope of the Maintenance Agreement. Apex therefore claimed that it was entitled to a refund of the charges for the extra eight staff members.

73 As I noted above, the terms of sch 1 to the Maintenance Agreement did not indicate precisely how the Price was to be calculated. Item 3 of sch 1 to the Maintenance Agreement referred to 'Fixed Costs' and provided that:

> [T]he fixed component for each Invoice Period shall cover the costs of supervision, technical and non-technical labour, tools and equipment, service vehicles, technical and logistics support, recruitment and training of Personnel, administration and workshop support from ATLAS COPCO's nearest Customer Service Centre.

Item 3 then set out tables specifying the fixed costs for certain vehicles and tools, and fixed labour costs, which was an hourly rate for Atlas' personnel, by reference to their occupation.

74 Item 4 of sch 1 to the Maintenance Agreement provided that the 'Variable Component' for each invoice period covered the costs of spare parts, service exchange components and off site maintenance repairs. The 'Variable Component' was to be calculated by multiplying the 'Units Achieved' (the total engine hours achieved, as required by the Maintenance Agreement, during the invoice period) by the 'Variable Rate', which was an hourly rate for each item of Equipment which was specified in a table to item 4. The variable rate appeared to have been drawn from the Maintenance Schedule in that that rate corresponded with the cumulative cost per hour (over the three year term of the Maintenance Agreement) of the change-out of parts for each piece of Equipment, according to the timetable which was set out in the Maintenance Agreement.

75 The fact that there were fixed and variable components to the Price, and the manner in which the Variable Component for each invoice period was to be calculated, suggested that some multiplication of the cost per hour of work actually done would have been required in order to calculate the Price.

76 On the other hand, under cl 19.5 of the Maintenance Agreement, the parties acknowledged that 'the Price has been calculated on the basis that the Equipment will be operated at an across the board average for each group classification at the minimum hours per calendar month as set out in this clause 19.5'. Clause 19.5 contained a table which set out the

minimum average calendar month hours for drills, loaders and trucks. Clause 19.6 provided that 'APEX agrees to pay ATLAS COPCO for a minimum of hours per calendar month per item of Equipment in accordance with the table set out in clause 19.5'. That suggested that whatever the actual cost of the work, the Price would be at least a figure reflecting a minimum number of hours of operation of the various pieces of Equipment per month.

77 Counsel for Apex submitted that as Atlas had not advised Apex of the separate cost of the labour for the additional eight staff members, Mr Ashley had estimated the likely cost involved. Mr Ashley's estimate of the amount which Apex had been overcharged for labour was calculated by reference to the total fixed costs for which Apex was charged in each invoice period, the number of hours of work this was said to represent, and the average salary paid to staff members in that period so as to calculate the number of staff members for which Apex had been overcharged, and the amount of overcharging for each invoice period.

78 Atlas' response to the labour costs claim was premised on the understanding that Apex's claim was that its payment for labour was made under a mistake. In his written submissions, counsel for Atlas contended that 'Apex has not produced any evidence of the nature of the mistake allegedly made or by whom and how it is alleged to have been made'. He also submitted that there was nothing to suggest that the payments for labour were not voluntary and that Apex could not recover for payments made voluntarily even if Atlas was not entitled to charge for them under the maintenance agreement.

79 Counsel for Apex made clear that Apex's case was not a claim that the payments for labour were made under a mistake of law or fact. Instead, Apex's case in relation to the labour costs claim was premised on the view that the Maintenance Agreement was a contract where the consideration was divisible, and that there had been a total failure of consideration in relation to the labour component of the Services if the provision of labour was not in accordance with item 3 of sch 1 (ts 31).

80 Having regard to the commercial context, there may be an argument that the reference to 'fixed costs' in sch 1 to the Maintenance Agreement should be construed as merely providing an indication of how that fixed cost was reached, namely by reference to the cost of a total of 38 staff, charged at an hourly rate for the number of staff members of each particular occupation multiplied by a fixed number of hours those staff members were expected to work over the invoice period, and irrespective

of the number of hours actually worked by each staff member over that period, or of the site at which those staff members worked.

81 However, the terms of the Maintenance Agreement also left open the argument that to the extent that the labour cost was a component of the Price that labour cost was to be calculated by the actual number of hours of work performed by Atlas' employees per month. In addition, the content of the table in item 1 of sch 1 also raised the question whether the parties agreed that the labour component of the Services would be provided by a total of 38 staff, or whether the parties agreed that no more than 30 staff would be engaged at the Wiluna gold mine, and eight staff at the Wilsons gold mine, with the result that Atlas was not entitled to charge for work done by more than 30 staff at the Wiluna gold mine. Counsel for Atlas conceded that the Maintenance Agreement left open the latter argument.

82 The terms of the Maintenance Agreement were therefore ambiguous in relation to the cost of the labour as a component of the Price. Accordingly, in my view the construction of the Maintenance Agreement which underpinned Apex's labour costs claim is a plausible contention requiring further investigation.

83 For present purposes, it is not necessary to reach a final conclusion about the proper construction of the Maintenance Agreement. Although a court will sometimes determine a question of construction of a document in the context of an application to set aside a statutory demand, this is often not possible. For example, a court will not ordinarily attempt to resolve a construction question in a case where factual matters may bear upon that question: ***Delnorth Pty Ltd v State Bank of New South Wales*** (1995) 17 ACSR 379, 384 - 385 (Cohen J); ***Ketrim Pty Ltd v Jaeger Corporation Pty Ltd*** [2002] NSWSC 474 [15] - [17] (Macready M); ***Land and National Development Corporation Pty Ltd v Tatebrook Pty Ltd*** [1999] NSWSC 669 [41] (Santow J). Counsel for Apex submitted that resolution of the issues of construction in relation to the Maintenance Agreement would require a consideration of the factual context.

84 On the basis of Mr Ashley's evidence, and having regard to the terms of the Maintenance Agreement, I am satisfied that Apex's labour costs claim is a plausible contention which requires investigation, and is therefore capable of giving rise to an offsetting claim.

85 At the hearing, counsel for Atlas virtually conceded that the labour costs claim could constitute an offsetting claim (ts 70, 76), but for one

consideration, namely that when the labour costs claim was examined in conjunction with the other claims made by Apex in response to the statutory demands, it could not be regarded as representing a genuine (that is, a bona fide) offsetting claim. This was the same submission as was advanced in respect of Apex's interest claim, and for the reasons set out in relation to the interest claim, I also reject this submission in relation to the labour costs claim.

86 Counsel for Atlas also sought to support his submission that the labour costs claim was not a genuine claim by noting that it had not been raised by Apex at any time prior to the service of the statutory demands, and that Apex had been paying the monthly invoices (calculated by reference to the labour costs for 38 staff) for over two years, without any complaint. It was implicit in that submission that the labour costs claim had been concocted merely for the purpose of setting aside the statutory demands. As was the case with the interest claim, it was implicit in Atlas' submission with respect to the genuineness of the labour costs claim that Mr Ashley's credit should be doubted. As I have already observed, that is an issue which cannot be determined in the absence of cross-examination.

87 Accordingly, in the present context, the fact that the labour costs claim was not raised until after the statutory demands were served does not warrant the conclusion that the claim does not constitute a genuine (in the sense of a bona fide) offsetting claim.

(c) Conclusion in relation to the labour costs claim

88 I am satisfied that the labour costs claim constitutes an offsetting claim, in the sum of $1,630,496.96.

The April variation claim

(a) Nature of the claim

89 In the first and second Ashley affidavits, Mr Ashley deposed that by late 2009 it had become apparent to Apex that the Equipment would not operate over the three year term of the Maintenance Agreement for the number of hours which had been anticipated when the agreement was entered into. By late 2009 it was anticipated that rather than operating for 15,000 hours over the term of the Maintenance Agreement, the Equipment would operate only for 11,000 hours. In that event, the Equipment would not require all of the maintenance, and consequently the spare parts and so on, which had initially been anticipated would be required over the three year term of the Maintenance Agreement. Mr Ashley's evidence was that

as a result he made the April variation in reliance on cl 18.1 of the Maintenance Agreement, and calculated an adjustment, which he considered was in accordance with cl 18.3 of the Maintenance Agreement.

90 In the April variation, Mr Ashley directed Atlas to vary the Services in accordance with an amended Maintenance Schedule (the amended Maintenance Schedule), which effectively omitted the maintenance of the Equipment which would have been required after 11,000 hours of operation.

91 In calculating the adjustment for the April variation, Mr Ashley identified the maintenance which would be required to be done for each piece of the Equipment if it was operated for 11,000 hours rather than 15,000 hours over the term of the Maintenance Agreement, calculated the new cumulative cost of that work, and calculated a revised cumulative cost per hour for the performance of that work, spread over the entire term of the Maintenance Agreement. By way of example, the cumulative cost per hour under the Maintenance Schedule for the Wagner MT 6020 truck was calculated to be $69.57, but under Mr Ashley's adjustment following the April variation, he calculated the cumulative cost per hour, over the entire term of the agreement, to be $33.15.

92 Mr Ashley then compared the total amount charged to Apex until and including the most recent invoice, with the total amount which, on his calculations, would have been owed by Apex had the work been charged at the revised hourly rate for each piece of Equipment. At the time of the April variation, Mr Ashley calculated that Atlas owed Apex $2,659,900, although that figure was subsequently amended with the result that the April variation claim is in the sum of $2,925,890.

93 Clause 6.2(d)(ii) of the Maintenance Agreement permitted Apex to deduct from any monies that were due to Atlas under the agreement any debts owed or amounts payable by Atlas to Apex under or in respect of the agreement which remained unpaid. Accordingly, assuming Apex was permitted to make the April variation, its claim that Atlas owed it $2,925,890 could be pursued as a set off pursuant to the Maintenance Agreement and it therefore appears capable of being characterised as an offsetting claim as defined in s 459H(5) of the Act.

(b) Whether the adjustment made following the April variation constitutes an offsetting claim: the issues in dispute

94 Atlas submitted that the April variation, and the adjustment made as a result of that variation, were not made pursuant to the Maintenance Agreement for five reasons:

(i) the construction of cl 18.1 of the Maintenance Agreement adopted by Mr Ashley was untenable;

(ii) the April variation did not actually constitute a variation of the Services and so was not a variation of the kind contemplated in cl 18 of the Maintenance Agreement;

(iii) the adjustment made by Mr Ashley purported to retrospectively alter the rates charged for the Services, and the Maintenance Agreement did not permit this;

(iv) the April variation was not valid because it was not made by Apex's authorised representative Mr Were; and

(v) the Maintenance Agreement required the Apex Representative to act fairly and impartially in calculating an adjustment and there was no evidence that Mr Ashley had acted in that manner.

95 It is convenient to consider the first three issues together, before dealing with the latter two issues.

Issues (i), (ii) and (iii): was the April variation and the adjustment permitted under clause 18 of the Maintenance Agreement?

96 At first blush, the result of the adjustment made by Mr Ashley as a result of the April variation - which effectively revalued work already performed and paid for - appears absurd, and for that reason the submissions made by counsel for Atlas were attractive in many respects. However, after much consideration I have reached the conclusion that it is not possible to dismiss the proposition put by Apex that the April variation, and the resulting adjustment made by Mr Ashley, was a variation of the kind permitted by cl 18 of the Maintenance Agreement, and moreover, it appears to be a proposition which is plausible and which warrants further investigation. This conclusion flows from the considerable ambiguity in the terms of the Maintenance Agreement, especially in relation to the basis for the agreement (whether it was a rates contract, or whether the monthly invoice payments were progress

payments) and how the Price was to be calculated, and in relation to the meaning of cl 18 of the Maintenance Agreement itself.

97 Counsel for Atlas submitted that the April variation did not constitute a variation of the Maintenance Agreement as contemplated by cl 18.1 because the effect of the April variation was simply to change the assumptions on which Atlas' performance of its obligations under the Maintenance Agreement was based, with the result that the April variation merely changed the rate at which Atlas was entitled to charge for the Services, rather than to change the Services actually required to be performed by Atlas.

98 This argument has considerable attraction, but I am unable to accept it. In order to explain why, it is necessary to first identify the character of the directions which were permitted by cl 18.1 of the Maintenance Agreement. That clause permitted Apex's Representative to direct Atlas in various ways. Insofar as the direction related to the Services, the clause permitted Apex to direct Atlas to increase, decrease or omit any part of those Services or to change the character or quality of any of those Services.

99 The question then is whether the April variation constituted a direction of this kind. As I have already noted, in the April variation Mr Ashley directed Atlas to vary the Services to be performed in accordance with the amended Maintenance Schedule. By way of example, under the Maintenance Schedule in its original form, it was anticipated that an overhaul of the radiator of the Wagner MT 6020 truck would be required when the truck had completed 15,000 hours of operation, and it was anticipated that this would occur during the third year of the term of the Maintenance Agreement. Following the April variation, the overhaul of the radiator was not required under the amended Maintenance Schedule at all, because it was no longer contemplated that the Equipment would be used for 15,000 hours within the term of the Maintenance Agreement.

100 If it was the case that the Maintenance Schedule prescribed, in part, the Services which were to be provided by Atlas within the three year term of the Maintenance Agreement, the effect of the April variation would have been that over the three year term of the agreement, Atlas would perform less maintenance work for Apex than had initially been agreed. The submission that the April variation can be characterised as a direction to Atlas to decrease the Services to be provided pursuant to the Maintenance Agreement, therefore appears to be a plausible contention.

101 Counsel for Atlas also submitted that Apex was subject to an obligation, under the hire purchase agreement, to 'maintain, service and repair the Equipment so that the Equipment [was] complete and available for functional use': cl 8.2(f) of the hire purchase agreement. Counsel therefore submitted that Apex remained under an obligation to maintain the Equipment to that standard, irrespective of the number of hours it was in use. However, that obligation was not reflected in the Maintenance Agreement itself and in my view could not preclude Apex from making a variation pursuant to the terms of the Maintenance Agreement.

102 Counsel for Atlas submitted that the April variation did not actually direct Atlas to decrease or omit or change the character or quality of any of the Services because Atlas remained bound to perform all the Services contemplated by item 1 of sch 1 to the Maintenance Agreement. There appear to be two difficulties with that submission. First, although the Maintenance Agreement required that Atlas perform the Services, which were specified in item 1 of sch 1 to the Maintenance Agreement, those Services in essence amounted to the work required to be done to perform the inspection, maintenance and repair of the Equipment in accordance with the Key Performance Indicators and sch 1 to the Maintenance Agreement. As I noted above, although a document which purported to set out the Key Performance Indicators formed part of the Maintenance Agreement, that document did not actually contain any Key Performance Indicators, but rather set out what were described as Key Points Indicators. In any event, even if it is assumed that those were the Key Performance Indicators, neither sch 1 itself, nor that document, particularised the work which was actually to be performed to meet the Key Performance Indicators.

103 Secondly, to the extent that the Services were particularised in the Maintenance Agreement at all, that appears to have been done through the Maintenance Schedule. Special condition 25 required the change-out of the Equipment components to be carried out in accordance with the Maintenance Schedule. However, because the Maintenance Schedule was not expressly included in item 1 of sch 1 to the Maintenance Agreement, it is arguable whether the content of the Maintenance Schedule falls within the definition of Services in the Maintenance Agreement.

104 In the present context it is not possible to resolve this ambiguity, and thus to assess whether Atlas in fact remained obliged to perform all of the Services notwithstanding the April variation. However, if it was the case that the Services were, in part, particularised in the Maintenance

Schedule, the contention that the April variation altered the Services appears to me to be a plausible one.

105 Counsel for Atlas also submitted that the April variation did not give rise to a genuine offsetting claim because it constituted an attempt by Apex to vary the Maintenance Agreement retrospectively, as well as prospectively, and cl 18.1 of the Maintenance Agreement did not permit a retrospective variation of the agreement. Atlas' submission highlighted the difference between the parties' views of the operation of the Maintenance Agreement.

106 As I understand it, Apex's case was that the Price under the Maintenance Agreement was intended to reflect the actual cost of the provision of the Services, although for the purpose of the calculation of the amount owed for each invoice period an average of the anticipated cost of the maintenance component of the Services was used. That average cost was the variable rate set out in item 4 of sch 1 to the Maintenance Agreement. Apex's case was that the Maintenance Agreement required that that average cost be applied consistently over the life of the agreement. Counsel for Apex noted that if this average cost was not consistently applied over the term of the Maintenance Agreement then if Atlas terminated the agreement with notice before the term expired (as it was entitled to do under cl 13 of the Maintenance Agreement), it would obtain a windfall by virtue of the receipt of a rate for the work it had done which was higher than the actual cost of that work.

107 Counsel for Apex submitted that if there was a change in the Services required to be performed, the average cost of the provision of the Services over the entire term of the Maintenance Agreement would need to be recalculated, and a refund paid by Atlas (or an additional sum paid by Apex), for work already charged at a cost different from that revised average cost. Apex submitted that the monthly invoices were properly seen as progress payments, and I note that that is how the monthly invoices were described on their face.

108 In contrast, on Atlas' view, the Maintenance Agreement was one for the maintenance of the Equipment over a three year term. Atlas' position was that the provision of the Services involved meeting the Key Performance Indicators, that the Maintenance Schedule did not prescribe the Services but simply provided a guide to the work which it was anticipated would need to be performed in order to meet the Key Performance Indicators. Atlas' position was that the cumulative cost per hour of performing that work (which was calculated in the Maintenance

Schedule, and included in item 4 of sch 1 to the Maintenance Agreement as the variable rate) reflected the Price for which Atlas was prepared to provide the maintenance component of the Services, rather than the actual cost of doing so.

109 Counsel for Atlas submitted that the Maintenance Agreement was properly characterised as a rates contract, as evidenced by the fact that Apex agreed to pay Atlas for a minimum number of hours of operation of each piece of Equipment each month, even if the Equipment was not used for that minimum number of hours: cl 19.5 and cl 19.6. In addition, counsel for Atlas submitted that cl 1.1, cl 6.1(b), cl 19.4 and items 1 - 4 of sch 1 to the Maintenance Agreement made clear that Apex accepted the risk that the cost of performing the Services would be less than had been anticipated when the Maintenance Agreement commenced, while Atlas took the risk that the cost of performing the Services would be more than had been anticipated. Atlas' counsel also submitted that it was Atlas, and not Apex, which had the right to review cost models and rates under the Maintenance Agreement, and to vary the rates unilaterally: cl 19.1 and special condition 22.

110 Counsel for Atlas also submitted that there was no power in cl 18 to permit the Apex Representative to retrospectively alter the rates in item 4 of sch 1 as they applied to the maintenance work which had been performed before the April variation. Counsel for Atlas submitted that a valuation under cl 18.3 related to the value of the Services to be performed *after* a direction had been given to vary those Services, so that it could not be applied to the Services performed before the variation.

111 Despite the considerable force in the submissions advanced on Atlas' behalf, I am unable to accept them, because three clauses in the Maintenance Agreement appear to be at odds with the construction of the agreement advanced by Atlas.

112 The most significant of these clauses was cl 18.3 which expressly referred to the possibility that as a result of the valuation of a variation, Atlas might be required to pay an amount of money to Apex. Counsel for Atlas was unable to identify any other clause in the Maintenance Agreement which might operate so as to require Atlas to refund money to Apex under cl 18.3. Counsel for Atlas conceded that this diminished the force of his argument (ts 100). The terms of cl 18.3 provide considerable support for the construction of the Maintenance Agreement advanced by Apex, and for the adjustment made in consequence of the April variation.

113 In addition, cl 6.2(d)(ii) of the Maintenance Agreement permitted Apex to deduct sums from the monies which it owed to Atlas under the agreement, including 'any debts owed or amounts payable by Atlas to Apex under or in respect of this Agreement which remain unpaid'. The terms of that clause also contemplate that in certain circumstances, Atlas might be required to repay monies to Apex under the Maintenance Agreement. Apart from cl 18.1 and cl 18.3, no other provisions in the Maintenance Agreement appeared capable of giving rise to the need for a repayment.

114 Further, cl 13.1 of the Maintenance Agreement, which dealt with the termination of the agreement, required that if the agreement was terminated, Apex was required to pay Atlas 'the value of the Services performed up to the effective date of the termination'. That obligation suggests that the Price was intended to reflect the actual cost of the provision of the Services, which was consistent with Apex's view of the Maintenance Agreement.

115 It is neither possible nor appropriate in the present context to attempt to resolve these differences of view as to the nature of the Maintenance Agreement and how it was to operate. On balance, I am satisfied that the construction of cl 18 of the Maintenance Agreement which was advanced by Apex, and which was the basis for the April variation and the adjustment made by Apex, is a plausible contention which requires investigation. Accordingly, the April variation is capable of giving rise to an offsetting claim.

116 I turn, then, to the balance of Atlas' submissions concerning the April variation.

Issues (iv) and (v): Was the April variation a direction pursuant to cl 18 of the Maintenance Agreement given that it was not made by Apex's authorised representative Mr Were? Was Mr Ashley required to act fairly and impartially in calculating the adjustment and did he in fact do so?

117 Clause 18 of the Maintenance Agreement required that a direction to vary the Maintenance Agreement be given by the Apex Representative. In addition, cl 10(a) of the Maintenance Agreement provided that the 'Apex Representative' (as defined):

> [I]s entitled to give all orders, directions, instructions and approvals on behalf of or by APEX to ATLAS COPCO under this Agreement. The APEX Representative may by notice to ATLAS COPCO from time to time delegate to any person any of his powers, duties, discretions and authorities as he thinks fit. The APEX Representative may, by notice to

> ATLAS COPCO, revoke or amend any delegation so made. Unless otherwise agreed, all directions and approvals made by or on behalf of APEX to ATLAS COPCO may only be given by the APEX Representative or his authorised delegate.

The Apex Representative was specified in item 6 of sch 1 to the Maintenance Agreement to be Mr Travis Were.

118 In the third Ashley affidavit, Mr Ashley deposed that Mr Were's employment with Apex ended on 23 March 2010. According to Mr Phillips, Atlas' National Service Manager, Mr Were had appointed delegates to exercise his authority to issue directions if he was unavailable or absent from the site. In the fourth Ashley affidavit, however, Mr Ashley deposed that by the time of the April variation, Mr Were and all of his delegates, with one exception, had ceased employment with Apex.

119 Atlas submitted that Mr Ashley was not entitled to give the April variation because cl 1.1, cl 10(a), cl 18.1 and item 6 of sch 1 of the Maintenance Agreement made it clear that only the Apex representative, Mr Were, or his delegate, was authorised to give such a direction. Atlas submitted that there was no evidence that Mr Ashley had been appointed as the Apex Representative or as Mr Were's delegate under the Maintenance Agreement at any time prior to the April variation. Atlas also submitted that although Mr Were, and three of his four delegates, were no longer employed by Apex at the time of the April variation, their employment was irrelevant to their appointment as the Apex Representative.

120 Apex's case was that Apex and Atlas had reached an agreement that Mr Ashley could direct Atlas in accordance with the terms of the Maintenance Agreement. Apex relied on cl 10(a) of the Maintenance Agreement which expressly acknowledged that the requirement that directions under the Maintenance Agreement be given by the Apex Representative was subject to a contrary agreement between the parties.

121 There was some evidence, albeit limited in nature, to support Apex's contention that the parties had agreed that Mr Ashley rather than the Apex Representative could give a direction. Mr Ashley deposed that since March 2010 he had acted on behalf of Apex and dealt with Mr Camozzi, Atlas' Managing Director, and that at no time during his communications with Mr Camozzi did Mr Camozzi question Mr Ashley's authority to act on Apex's behalf. Mr Ashley's evidence was that the first time his

authority to act on Apex's behalf was raised as an issue by Atlas was in submissions filed by Atlas' solicitors on 30 June 2010.

122 Nothing in the documentation before the court suggests that Atlas had disputed Mr Ashley's authority to give the April direction. I note, for example, that when Mr Camozzi responded to the April variation he disputed its validity as a variation under cl 18 of the Maintenance Agreement, but there was no suggestion that he disputed whether Mr Ashley was entitled to give the direction. Moreover, in an email to Mr Ashley on 23 April 2010, Mr Camozzi indicated that if Mr Ashley desired his correspondence concerning the April variation to be regarded as a notice under cl 17 of the Maintenance Agreement (which dealt with the resolution of disputes) Mr Camozzi was willing to meet with Mr Ashley to discuss the matter. Under cl 17.2 of the Maintenance Agreement, the Apex Representative and the Atlas Representative were to meet to attempt to resolve disputes. That suggests that Mr Camozzi regarded Mr Ashley as standing in the shoes of the Apex Representative.

123 Agreement may be inferred from conduct: ***Brogden v Metropolitan Railway Company*** (1877) 2 App Cas 666. In my view, the limited evidence which is before me which deals with this question provides some support for the inference that Atlas and Apex had agreed that a direction could be given by Mr Ashley, either in his own right on behalf of Apex, or in the position of he Apex Representative.

124 Counsel for Atlas submitted that as a matter of construction, cl 18 must be interpreted so as to require the Apex Representative to act independently, honestly, fairly and impartially. Further, counsel submitted that there was no evidence that Mr Ashley had acted in that manner when he made the adjustment, and that the available evidence suggested that Mr Ashley did not act fairly and impartially. Atlas submitted that the evidence gave rise to the inference that Mr Ashley had tailored his valuations of the April and June variations to arrive at an amount that he knew would be approximately equal to Atlas' then outstanding invoices.

125 Atlas submitted that even if the court were not satisfied that Mr Ashley had acted unfairly or impartially in making the adjustment, the manner in which he had calculated the value of the variation called into question the genuineness of the April variation claim.

126 These submissions go directly to questions of credit. In the absence of cross-examination of Mr Ashley, I would not be prepared to draw the

adverse conclusion against him which was advanced by Atlas. I am not persuaded that Mr Ashley's calculation of the adjustment, on its face, suggests an absence of genuineness in relation to the claim.

(c) Conclusion in relation to the April variation claim

127 I am satisfied that the April variation claim constitutes an offsetting claim in the sum of $2,925,890.

Conclusion - total of the offsetting claims

128 The part-payment claim, the errors in the invoices relating to Equipment damage which are not disputed by Atlas, the interest claim, the labour costs claim, and the April variation claim amount to total offsetting claims of $5,218,796.10, which exceeds the total sum sought pursuant to the May and June statutory demands.

129 It is, therefore, unnecessary to consider the other claims said to give rise to a genuine dispute or offsetting claims, or to consider Apex's claim that the statutory demands constituted an abuse of process.

130 Accordingly, I set aside the May statutory demand and the June statutory demand. I will hear the parties as to costs.