

**JUDGMENT WHITE J** : Supreme Court New South Wales Equity Div. Corporations List, 13 November 2007

- 1 This is an application to set aside a statutory demand dated 11 September 2007. The service of the statutory demand followed numerous pieces of litigation between the plaintiff and the defendant. The defendant demanded payment of a debt of \$310,205.99. This was the balance of a sum claimed to be due pursuant to various awards of costs in different pieces of litigation, from a judgment of the District Court in favour of the defendant, and from an adjudicator's determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) in favour of the plaintiff.
- 2 The largest component of the claimed debt was an amount of \$289,111.50 being an award of damages for which judgment had been entered in the defendant's favour in the District Court on 18 May 2007 plus interest on that sum from 18 May 2007.
- 3 An appeal has been filed from that judgment. It is listed for hearing in the Court of Appeal on 11 December 2007. In the notice of appeal, the plaintiff seeks an order that, in lieu of the judgment for \$289,111.50, there be a substituted judgment of \$14,963.14. As an alternative to an order setting aside the statutory demand, the plaintiff seeks an order that the demand be varied so as to reduce the amount of the debt from \$310,205.99 to \$28,052.42.
- 4 That order is sought on the basis that the latter amount is not the subject of contest in the appeal. The only ground advanced in support of the application to set aside the statutory demand is the pendency and imminent hearing of the appeal. The defendant did not dispute that the grounds of appeal are fairly arguable.
- 5 On 18 June 2007, the Court of Appeal ordered that the judgment of the District Court of 18 May 2007 be stayed until the determination of the appeal or further order. The stay was conditional upon the plaintiff procuring an unconditional bank guarantee in favour of the defendant for the judgment sum and such guarantee being lodged with the Court of Appeal within 21 days, to be released to the defendant in the event that the appeal is dismissed. The plaintiff did not provide such a guarantee. Hence the judgment of the District Court is not stayed, and it was not stayed when the statutory demand was served.
- 6 On the hearing of the application to set aside the statutory demand, the defendant made an open offer. It agreed that it would consent to the setting aside of the statutory demand if the plaintiff procured an unconditional bank guarantee in its favour in the amount of \$289,111.50, such guarantee to be lodged with the court and released to the defendant in the event that the appeal is dismissed. Its offer also provided that the plaintiff pay forthwith to the defendant the sum of \$13,116.28. This offer was not accepted.
- 7 The defendant's primary contention on the hearing was that the application to set aside the statutory demand should be dismissed, rather than that the demand should be varied on terms requiring security for that part of the debt which is challenged on appeal and for which the plaintiff contends the demand should be reduced.
- 8 The existence of the appeal on fairly arguable grounds does not give rise to a genuine dispute about the existence of the debt owing under the judgment (*Barclays Australia (Finance) v Mike Gaffikin Marine Pty Ltd* (1996) 21 ACSR 235 at 238; *Scope Data Systems Pty Ltd v BDO Nelson Parkhill* (2003) 199 ALR 56 at 60-61 [17]-[20]; *Midas v Equator* (2007) 25 ACLC 1038 at 1039; [2007] NSWSC 759 at [12]-[13]).
- 9 The plaintiff submitted that the demand should be set aside pursuant to s 459J(1)(b) of the *Corporations Act 2001* (Cth), namely, on the ground that there was "some other reason why the demand should be set aside." That reason, it was contended, was the pendency of the appeal and the imminence of the hearing of the appeal.
- 10 In a number of cases it has been recognised that pendency of an appeal may provide some other reason why a statutory demand based on a judgment debt should be set aside, where the Court asked to set aside the demand can see that there are reasonable and arguable grounds for the appeal. Typically, in such a case the demand is set aside on condition that the debt claimed is secured by payment into Court or other means (e.g. *Barclays Australia (Finance) Limited v Mike Gaffikin Marine Pty Ltd* at 239-240; *Eumina Investments Pty Ltd v Westpac Banking Corporation* (1998) 84 FCR 454; *Midas v Equator* at 1041 [35] and [36]).
- 11 Counsel for the defendant submitted that I should follow observations of Santow JA, with whom Tobias JA and Young CJ in Eq agreed, in *Meehan & Ors v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229 at 239 [51]; [2005] NSWCA 24 at [51]. His Honour there said:  
*"The position is analogous to the case where a judgment (the basis of the demand) was being appealed. That fact was held not to constitute 'some other reason' within s459J(1)(b) whereby the statutory demand should be set aside, unless the Court of Appeal were actually to stay enforcement of the judgment: Barclays (Aust) Finance Ltd v Mike Gaffikin Marine Pty Ltd (1996) 14 ACLC 1,367, 21 ACSR 235; Sajepe Pty Ltd v Lawler (2000) 18 ACLC 457."*
- 12 In *Midas v Equator*, Hammerschlag J said (at 1040 [27]-[28]) that this passage was *obiter*; that it was not intended to apply where the Court considers there are reasonable arguable grounds for the appeal; and that in the cases cited by Santow JA, the question was whether there was a genuine dispute not whether there was "some other reason why the demand should be set aside."
- 13 Counsel for the defendant submitted that the last statement was incorrect because in *Barclays Australia (Finance) v Mike Gaffikin Marine Pty Ltd*, McLelland CJ in Eq did deal with the latter ground. That is true. However, McLelland CJ in Eq did not say that the pendency of the appeal was not some other reason for setting aside the demand unless the Court of Appeal were to stay enforcement of the judgment. His Honour said (at 239) that the pendency of the appeal would not itself provide any sufficient reason for setting aside the demand under s 459J(1)(b).

Nonetheless, his Honour ordered a stay on condition that the judgment debtor undertake to pay into Court the whole amount of the judgment. Indeed, it is clear from McLelland CJ in Eq's decision in *Barclays Australia (Finance) v Mike Gaffikin Marine Pty Ltd* at 239 that his Honour considered that a stay of execution of the judgment would give rise to a genuine dispute.

- 14 Subject to this qualification, I agree with the observations of Hammerschlag J in *Midas v Equator* at [27] and [28]. Notwithstanding what was said in *Meehan v Glazier Holdings Pty Ltd*, I propose to follow the approach endorsed in that case and in *Eumina Investments Pty Ltd v Westpac Banking Corporation*.
- 15 In *Eumina Investments v Westpac*, Emmett J pointed out (at 460) that:  
"*... in an application under s459J(1)(b), it may be appropriate to draw a distinction between the relevance of an appeal to a genuine dispute and the relevance of an appeal to an offsetting claim. Where there is an appeal against a judgment debt which gives rise to the statutory demand and there is no stay, whether or not the stay has been sought, there may be some substance in the conclusion that setting aside the statutory demand is a de facto stay. The appropriate course, in such a case, may be for the company to apply for a stay to the court which entered judgment.*"
- 16 His Honour's observations have particular force in this case where an application for a stay of judgment has been made to the Court of Appeal and it has been granted on terms which have not been complied with.
- 17 If I were to vary the statutory demand by reducing it by the amount which is in contest on the appeal, without imposing a condition which provided security for payment of that amount, then such an order would operate as a de facto stay of the judgment, notwithstanding that the Court of Appeal had ordered the stay only on the condition that security by way of an unconditional bank guarantee was provided.
- 18 On the other hand, if I were to vary the demand by reducing it by the amount which is in contest on the appeal, and did so on terms that that amount was to be secured, then, in substance, I would be extending the time for the provision of security from that ordered by the Court of Appeal when it acceded to the plaintiff's application for a stay of the judgment.
- 19 Where, as here, the Court of Appeal has dealt with the conditions on which enforcement of the judgment should be stayed and those conditions have not been met, I do not consider that there is "*some other reason*" within the meaning of s 459J(1)(b) to set aside the demand.
- 20 It follows that the application to set aside the demand should be dismissed. It is unnecessary to deal with the defendant's contention that the plaintiff had not proved, or had not demonstrated in the supporting affidavit, that the application was served within time. For these reasons, I order that the originating process be dismissed with costs.

Plaintiff: I G Roberts instructed by Sachs Gerace Lawyers  
Defendant: J M White instructed by J S Mueller & Co