

JUDGMENT : Palmer J : New South Wales Supreme Court : 1st April 2005

Introduction

- 1 This is an application under s.459G of the *Corporations Act 2001* (Cth) to set aside a Statutory Demand issued by the Defendant on 21 December 2004. The Statutory Demand claims an amount of \$31,084.18, which is said to be owing pursuant to an oral contract between the Plaintiff and the Defendant for the design by the Defendant of the layout and fit-out of new office premises for the Plaintiff.
- 2 The Originating Process was filed on 14 October 2004. There is no issue but that the Originating Process was served within time and that the nature of the dispute is sufficiently set forth in the supporting affidavit.
- 3 The Plaintiff asserts that there is a genuine dispute as to the existence of the alleged debt. The Plaintiff says that there was no oral contract for the fit-out of the new office premises in the terms alleged by the Defendant. Rather, the Plaintiff says, there was an agreement between the Plaintiff and the Defendant whereby the Defendant was to prepare plans sufficient for the purpose of obtaining development approval for the fit-out, but no further.

Whether existence of dispute precluded by statute

- 4 The Defendant says that even if the evidence were sufficient to support the existence of a genuine dispute as alleged, that dispute can now no longer be raised. It is precluded, says the Defendant, by the provisions of s.14 and s.15 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the BACISOP Act").
- 5 It is not in issue that the Defendant served a payment claim on the Plaintiff within the provisions of the Act and that the Plaintiff did not serve a payment schedule in response to that claim within the time provided by the Act. Sections 14 and 15 of the BACISOP Act provide:

"14. Payment schedules

- (1) A person on whom a payment claim is served (the 'respondent') may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
 - (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the 'scheduled amount').
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier,the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

15. Consequences of not paying claimant where no payment schedule

- (1) This section applies if the respondent:
 - (a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
 - (a) may:
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and
 - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
 - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
 - (b) the respondent is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract."
- 6 The Defendant says that the provisions of s.15(2) and (4)(b) create a statutory debt owing by the Plaintiff to the Defendant and that it is no longer open to the Plaintiff to contest the existence of that debt. I do not agree with this submission.

- 7 The provisions of s.15(2) apply to the recovery of an amount claimed “as a debt due to the claimant in any court of competent jurisdiction”. A proceeding for the winding up of a corporation under Pt 5.4 of the *Corporations Act* is not a proceeding for recovery of a debt; it is a proceeding to wind up a company on the ground that it is insolvent: s.459A. It is true that s.459C(2)(a), which raises a presumption of insolvency in the case of non-payment of a statutory demand, has the effect in many cases of placing a great deal of pressure upon a company served with a statutory demand to pay the debt claimed. However, if the company does not pay the debt, does not comply with the statutory demand, and is therefore subjected to the presumption of insolvency which the Act provides, it is still able to resist a winding up order by demonstrating positively that, despite non-compliance with the statutory demand, it is in fact solvent: s.459C(3). If the company succeeds in proving its solvency, the winding up application is dismissed and the creditor is left to commence proceedings for recovery of the debt in a court of competent jurisdiction.
- 8 A proceeding to wind up a company for failure to comply with a statutory demand cannot, therefore, properly be regarded in law as a proceeding to “recover” the amount claimed in the statutory demand “as a debt” in the sense in which s.15(2)(a)(i) uses those words. In my view, the provisions of s.15(2) and (4) of the BACISOP Act do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside that statutory demand under s.459G, even where that dispute has not been the subject of a payment schedule served in accordance with the provisions of the BACISOP Act.
- 9 I think that this approach is supported by a number of decisions of the Court. Those decisions are concerned with the ability of a company to raise an offsetting claim in order to set aside a statutory demand under s.459H and with the effect of s.25(4) BACISOP Act whereas the present case concerns the existence of a genuine dispute under s.459G and the effect of s.15(4) BACISOP Act. Nevertheless, in my opinion, the rationale of those decisions is applicable in the present case.
- 10 The decisions are referred to and summarised by Barrett J in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186. His Honour quotes with approval from the judgment of Campbell J in *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 as follows: “It was submitted that, if it were possible to set aside a statutory demand founded on a judgment debt arising from a notice of determination under the BACISOP Act, then that Act would be rendered toothless.
- As a first step in the submission, I was reminded that the purpose of Parliament in introducing that legislation was to ensure that, once a quick, and possibly rough, adjudication by a neutral person had taken place, a progress payment in the amount found by the adjudicator should be made to a builder, and that the ultimate correctness of the progress payment being made should be argued afterwards. I was reminded that the BACISOP Act was concerned with maintaining a builder’s cashflow, not determining its ultimate rights. I accept, in broad terms, that first step.*
- Next, it was submitted that, if it were possible to rely upon an offsetting claim to set aside a statutory demand, the object of the BACISOP Act would not be achieved. I do not accept that this is so. There are means of enforcement, short of a winding up action, which are open to a judgment creditor. When a judgment has been obtained pursuant to the BACISOP Act, if the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the Corporations Act 2001 (Cth), to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Div 3 of Pt 5.4 of the Corporations Act 2001 (Cth) set out a regime whereby a statutory demand is set aside whenever there is an offsetting claim, as defined.”*
- 11 As I have observed, in my opinion the rationale underlying those observations is not affected by the circumstance that the ground for setting aside a statutory demand is said to be an offsetting claim rather than a dispute as to whether the debt has been contracted in the first place. It seems to me, with respect, that both Campbell and Barrett JJ are correct in their conclusion that it is not possible for the provisions of the *Corporations Act*, a Commonwealth statute, to be limited by reference to the provisions of the BACISOP Act, a State Act, and that the question for the Court in an application under s.459G is simply whether, as a matter of fact, a genuine dispute exists.
- 12 For those reasons, I am of the opinion that the Plaintiff is not precluded by the provisions of s.15(4) of the BACISOP Act from endeavouring to prove a genuine dispute in order to set aside the Defendant’s statutory demand under the provisions of s.459G.

Whether genuine dispute demonstrated

- 13 I now turn to the question of whether a genuine dispute has been sufficiently demonstrated. As I have noted earlier, the Defendant alleges that the amount claimed in the statutory demand is due pursuant to a contract for services. There is no dispute by the Defendant that the alleged agreement is entirely oral.
- 14 The contract has sought to be proved by the Defendant’s director, Mr De Silva, who has given evidence about a number of conversations with a representative of the Plaintiff, a Ms Luda Roytblat. It is not necessary to traverse in detail the competing versions of the conversations said to give rise to the contract. It is sufficient to say that the versions are significantly different and that resolution of the issue will largely depend upon findings as to the credit and accuracy of recollection of Ms Roytblat and Mr De Silva.
- 15 Ms Roytblat says that in a conversation with Mr De Silva on or about 2 March 2004 she, on behalf of the Plaintiff, agreed with Mr De Silva, on behalf of the Defendant, that the Plaintiff would engage the Defendant to prepare the necessary plans for submissions to Council for a development application. However, she says that she made it

quite clear to Mr De Silva that any agreement for the Defendant to do any further work in relation to the design and fit-out of the premises would be subject to a formal agreement to be negotiated in the future.

- 16 I do not think that Mr De Silva disagrees substantially with the conversation in early March 2004 as alleged by Ms Roytblat. However, he says that the position changed significantly at a meeting between himself and Ms Roytblat in a café in Bondi on 4 June 2004.
- 17 At that meeting Ms Roytblat says that she made it clear to Mr De Silva that he could prepare the plans for the development application and that he would be paid a certain amount for that undertaking. But she says that she also made it clear that he was not authorised to proceed on any contractual basis with any further work for fit-out and design of the premises. She refers to a number of antecedent conversations and meetings in which Mr De Silva had produced plans which she and her principal, a Mr Azlanov, did not find satisfactory.
- 18 The version of the 4 June conversation given by Mr De Silva is substantially different. He says that Ms Roytblat told him that Mr Azlanov had approved the previous sketch plans submitted. Mr De Silva says that Ms Roytblat said: *"I spoke to him [that is, Mr Azlanov] and he has approved your sketch plans and also the changes required by the building manager. So it is now okay for you to proceed with the council applications."*
- 19 It is of some consequence that the conversation of 4 June set out by Mr De Silva in paragraphs 7 and 8 of his affidavit does not explicitly attribute to Ms Roytblat the statement that the Plaintiff was agreeable to entering into a contract with the Defendant for the carrying out of the whole of the fit-out and design. Nevertheless, I concede that the conversations as recounted by Mr De Silva, taken as a whole, are capable of bearing that interpretation.
- 20 I have referred to sufficient of the evidence to demonstrate that, in my opinion, the existence of the contract alleged by the Defendant which supports its Statutory Demand is open to question and further investigation. That question, as I have said, will depend largely upon an assessment of the credit and accuracy of recollection of Ms Roytblat and Mr De Silva. Quintessentially, that is the type of dispute which this Court will not determine in an application under s.459G.
- 21 I conclude, therefore, that the Plaintiff has sufficiently demonstrated the existence of a genuine dispute such as to warrant the setting aside of the Statutory Demand. I make an order accordingly.

Costs

- 22 The Plaintiff seeks an order for costs on an indemnity basis. I do not think the circumstances of this case call for such an order. It is true that in this case the primary submission of the Defendant depended on a construction of the BACISOP Act which did not succeed. I would not go so far as to say, however, that the Defendant's submission was unarguable. In addition, the Defendant made a second submission which did not depend upon the validity of its first submission. The second submission was that the Plaintiff had not demonstrated that the existence of a contract giving rise to the Defendant's debt was genuinely disputed.
- 23 The evidence put forward by the Plaintiff was met by evidence from the Defendant. There was clearly a contest as to whether the Plaintiff was able to surmount the relatively low threshold required in order to demonstrate a genuine dispute. However, I do not think the Defendant can be criticised for requiring the Plaintiff to put forward its evidence in this proceeding in order to demonstrate that, indeed, there was a genuine dispute as to the existence of the debt.
- 24 I have dealt with these considerations in *Redglove Holdings Pty Ltd v GNE & Associates Pty Ltd* (2001) 165 FLR 72, (2002) 20 ACLC 304, paras 28 and 29 and I will not repeat them here. It is sufficient for me to say that there was a substantial issue to be determined in these proceedings, that is, whether or not the Plaintiff had succeeded in showing a genuine dispute and, for those reasons, I cannot conclude that it was improper for the Defendant to maintain its position and to defend the Originating Process.
- 25 For those reasons, I decline to order costs on an indemnity basis. The Defendant will pay the Plaintiff's costs of the proceedings on the party/party basis. The exhibits may be returned.

P.J. Dowdy – Plaintiff instructed by Deacons
Ms V. Culkoff - Defendant instructed by J. Biady & Associates