Brodyn P/L v Dasein Constructions P/L [2004] Adj.L.R. 12/15

Brodyn P/L t/as Time Cost & Quality v Dasein Constructions P/L (1) Brian Raymond Silvia (D2)

JUDGMENT : **Young Cj in Eq.** Equity Div. New South Wales Supreme Court. 15th December 2004.

1 The plaintiff, by its further amended summons, seeks a declaration that it is entitled to set off an amount in excess of $183,493.64 against a District Court judgment obtained by the defendant against it under s 25 of the **Building and Construction Industry Security of Payment Act** 1999 (the BCISP Act).

2 The background facts can be shortly stated. Brodyn, who trades as Time Cost and Quality, sometimes TCQ, entered into a construction contract with Dasein to which the BCISP Act applied. On 13 June 2003, Brodyn gave Dasein notice alleging that the latter had repudiated the contract and purporting to accept that repudiation as putting an end to the contract.

3 On 27 June 2003, Dasein served Brodyn with a document stated to be a payment claim under the BCISP Act. Brodyn duly responded. There was a further round of these documents in August and September 2003. The payment schedule served by Brodyn in September 2003 contended, inter alia, that money should be deducted for incomplete work and for rectifying defects and that Dasein had breached the contract by not furnishing a statutory declaration as to payment of workers.

4 In October 2003, Dasein made an adjudication application. The adjudicator made his determination on 16 October 2003 giving reasons that did not refer to the contentions in Brodyn's notice. The adjudicator's certificate was issued on 17 October 2003 and filed in the District Court and that gave rise to the judgment for $183,493.64.

5 Brodyn sought to set aside the District Court judgment. This was refused by Gzell J and the appeal to the Court of Appeal indexed as **Brodyn Pty Ltd v Davenport** [2004] NSWCA 394 was dismissed on 3 November 2004.

6 On 30 October 2003, Brodyn issued a statement of liquidated claim in the District Court against Dasein claiming damages of $385,441.93. On 31 October 2003, Dasein went into voluntary administration.

7 On 4 December 2003, Dasein became subject to a deed of company arrangement (DOCA). Brodyn lodged a proof of debt in the administration which was rejected in full by the deed administrator.

8 After the appeal from Gzell J had been lodged and on 10 May 2004, Dasein undertook to take no steps to enforce the District Court judgment upon the condition that Brodyn lodge with the Registrar a bank guarantee to pay to Dasein $265,000 in accordance with the order of the Court of Appeal in the event that the appeal was unsuccessful or abandoned.

9 The present proceedings were commenced on 25 November 2003.

10 The vital questions in the present proceedings are the effect of any claim for set off where there is a judgment debt under s 25 of the BCISP Act in place and also what should happen to the bank guarantee. However, before I deal with these matters it is necessary to consider the terms of the BCISP Act and also briefly to consider the facts as to the alleged repudiation of the contract.

11 The evident purpose of the BCISP Act is to address what Parliament perceived to be a mischief in subcontractors not being able to achieve proper cash flow because payments apparently due to them were withheld by the head contractor or proprietor.

12 The scheme that the Act embraced was that under a construction contract, persons whom I will call subcontractors (the Act actually covers a wider class) would provide a claim for a progress payment in the proper manner, and that that should be paid in accordance with the contract, or if there was no provision, within 10 business days after the claim was served. However, the person on whom it was served might reply by providing a payment schedule in the proper form which was to include the reasons for non-payment. The subcontractor may then apply for adjudication.

13 The adjudicator is not a professional lawyer and it is now recognised that any such adjudication may well provide some rough justice, if it provides any justice.

14 However, the scheme of the Act is that the adjudicator issues his or her certificate, the respondent has a very limited time to pay up and if he or she does not, then the adjudication certificate may be filed as a judgment for debt in the District Court, or sometimes the Local Court, and the subcontractor is entitled to execute on that judgment.

15 However, it is recognised that even though there may be execution under the judgment, in a very real sense the judgment is a provisional judgment which may be set aside in due course after all the contractual claims have been properly considered.

16 The purpose of the Act is to enable the subcontractor to have access to actual monies whilst those disputes are being considered. Accordingly, section 25(4) of the BCISP Act provides that the respondent is not entitled in any proceedings to have the provisional judgment set aside: (i) to bring any cross claim against the claimant; or (ii) raise any defence in relation to matters arising under the construction contract; or (iii) to challenge the adjudicator's determination, and further is required to pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

17 Section 32 of the BCISP Act makes it clear that virtually nothing in the Act affects any right that a party to a construction contract may have under the contract or may have, apart from the Act, in respect of anything done or

omitted to be done under the contract nor does the Act affect any civil proceedings arising under the contract. In such proceedings, a court or tribunal must allow for any amount paid to a party to the contract under the BCISP Act and make such orders as it considers appropriate for restitution if that be required.

18 I now must turn my attention to the proof of debt. The effect of the deed of company arrangement is dealt with in Division 10 of Part 5.3A of the **Corporations Act** 2001. Section 444D provides that DOCA binds all creditors so far as concerns claims arising on or before the specified day.

19 The DOCA is dated 4 December 2003. The commencement date is 31 October 2003. The deed incorporates the prescribed provisions, namely those in Schedule 8A to Regulation 5.3A.06 of the **Corporations Regulations** 2001 with certain exceptions and clause 2.2 of the DOCA provides that these are included as if the same were set forth in full in the deed.

20 The deed fund is to be held by the administrator and is to consist of all property and assets of the company of whatsoever kind or nature. It is significant that no monies seem to be being contributed by the controllers of the company, so that the fund consists of such monies as the administrator can obtain from the company's debtors.

21 Clause 4.1 provides for the administrator to adjudicate upon proofs of debt, and in the case of differences between his adjudication and a proof of debt, to notify the adjudication to the creditor.

22 Clause 8 of Schedule 8A to the Regulations provides as follows:
"8. Subdivisions A, B, C and E of Division 6 of Part 5.6 of the Act apply to claims made under this deed as if the references to the liquidator were references to the administrator of this deed."

That regulation incorporates the provisions of ss 553 to 554J and ss 563B to 564 of the **Corporations Act.**

23 Section 553C of the **Corporations Act** reads as follows, so far as is relevant:
"Where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
(b) the sum due from the one party is to be set off against any sum due from the other party; and
(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be."

24 By proof of debt filed on 15 December 2003, Brodyn claimed $461,882.36. This was wholly rejected by the administrator.

25 The administrator's grounds for rejecting the claim were basically:
(1) there had been no adequate response to the administrator's request for particulars;
(2) that the administrator had retained the services of a Mr Robert Farrell who had reviewed the claim and Mr Farrell had advised that none of it should be admitted.

26 Mr Farrell's report of 20 April 2004 is annexed "A" to the rejection. The notice of rejection is dated 21 April which makes the inference fairly certain that the administrator himself did not determine the claim but merely adopted Mr Farrell's report.

27 As I remarked during the hearing, this procedure is not in accordance with the **Corporations Act.** The administrator carrying out an assessment of proofs of debt under a DOCA is in the same position as a liquidator. In performing the function of assessing the validity of a proof of debt, the administrator acts in a quasi judicial capacity: ***Re Britton & Millard Ltd*** (1957) 107 LJ 601. As Brennan and Dawson JJ commented after citing this case in ***Tanning Research Laboratories Inc v O'Brien*** (1990) 169 CLR 332, 339, the liquidator or administrator acts "according to standards no less than the standards of a court or judge". See also **Commissioner for Corporate Affairs v Harvey** [1980] VR 669 at 696.

28 Just as a court or judge cannot delegate to an expert the task of deciding a claim, neither can an administrator. An administrator can, of course, seek expert advice, but almost always if he or she does this, the expert advice must be put to the claimant so that the claimant can have an opportunity of making comments on it or countering it by other evidence. What the administrator did here appears to be no proper assessment of the proof of debt at all.

29 However, this is of little moment because the Court is presently hearing an application under s 1321 of the **Corporations Act** which provides to a person aggrieved by a decision of an administrator under a DOCA a right of appeal to the Court. In applications under that section the Court conducts a rehearing de novo; see the ***Tanning Research case*** supra at 341 and ***Re North Sydney District Rugby League Football Club*** (2000) 34 ACSR 630, 631 [3].

30 As Brennan and Dawson JJ said in the ***Tanning Research* case** at 341: *"In such a proceeding, a liquidator who defends his decision to reject a proof of debt is no longer acting in a quasi-judicial capacity; he is cast in the role of an adversary, defending the assets available for distribution against a liability which, according to the view he forms when acting quasi-judicially, is not legally enforceable. The liquidator may defend those assets against the creditor's claim on any ground on which the company might have defended the claim had it been sued by the creditor."*

31 The question then arises as to what evidentiary material the Court considers.

32 This was considered to some extent by Templeman J in ***Westpac Banking Corp v Totterdell*** (1997) 25 ACSR 769. His Honour said at 772: *"I understand a hearing de novo in this context to be one in which the parties are not bound by the evidence at the previous hearing, but may supplement it as they think fit. … But despite the admission of further evidence, the onus remains with the party who challenges the decision."*

At 774 his Honour said: *"Because the onus of proof is on the person claiming to be aggrieved by the liquidator's decision, and because he will not succeed unless he adduces evidence to demonstrate that the decision was wrong. … (the court Rules) require the appellant to support his application with an affidavit."*

33 As far as my researches go, there is no rule or practice whereby the material before the liquidator or administrator is automatically material before the court when considering whether to affirm the administrator's decision or not: cf the position with an appeal from a Master under the Supreme Court Rules.

34 The point is of some significance in the instant case because Mr Farrell was never called to give evidence, though his brief report was annexed to the rejection of the proof of debt.

35 The plaintiff's evidence consisted of two affidavits; one of a Mr Matterson, one of the principals of the plaintiff, and another of a Mr El Safty, an expert. On the defendant's side, there were read two affidavits of the administrator, Mr Silvia, and an affidavit of one of his employees, Andrew Cummins.

36 None of this material in fact annexes Mr Farrell's report or the reasons for it. However, as I have said, the report was in evidence because it was annexed to the rejection of the proof of debt.

37 Mr Silvia's affidavit of 10 August 2004 makes it quite clear that he never discussed the Farrell report with Mr Matterson or anyone else on behalf of the plaintiff, but rather that his staff met with Mr Farrell, Mr Karam who was a former director of the company in administration, and Mr Taddio who was the company's foreman, seeking their views, and accepted the advice of his solicitor, Mr Bard, whom he said, "has had significant experience in legal matters pertaining to the building and construction industry". Just what Mr Bard told the administrator has never been revealed.

38 Accordingly, there is not before the Court the material that was before the administrator when he was making his decision other than Mr Farrell's report.

39 There is a flavour in many of the authorities one reads that what the Court is doing on a hearing de novo from the rejection of a proof of debt is considering whether the administrator was wrong in his decision and not whether the plaintiff succeeds in his claim against the company. However, if that were really what one was doing, one would expect that the liquidator or administrator would have to furnish the Court with all the material that was before him. In the instant case he has not done that. He has not set out what Mr Karam and Mr Taddio said about the claim. He has not given any idea of what Mr Bard told him about the claim, and all we have is Mr Farrell's report which, when one reads it, one can see that Mr Farrell relied to a very great extent on what he was told by officers of the company. None of this material was ever put to the plaintiff; none of it was put before the Court in a form in which it could be cross-examined.

40 There is also the further complication that Mr Bard appears to have been treated by the administrator as an expert in building construction contracts. However, he is also a solicitor. When he advised the administrator acting in a quasi-judicial capacity, there would be no privilege in what he said. However, at the present time he is an adviser to an adversarial litigant and what Mr Bard said may now be privileged.

41 All these complications tend to suggest to me that although there exists in the authorities words to the effect that what one is doing is working out whether the administrator's decision was wrong, there is no obligation on the administrator to put before the Court all the material which was before him. The Court is to consider the matter as if the question was whether the proof of debt should be allowed in whole or in part on the material that is before the Court.

42 This means I must now examine the contract and some of the facts.

43 Basically, Brodyn entered into a construction contract with Dasein to which the BCISP Act applied. On 13 June 2003 Brodyn gave notice to Dasein alleging repudiation of the contract by Dasein and purporting to accept that repudiation. Brodyn's claim in the District Court filed on 30 October 2003 in proceedings 5068 of 2003 claimed $385,441.93 in relation to defects and breaches of contract by Dasein. The matter did not proceed, as on the next day Dasein went into administration.

44 The proof of debt was for $461,882.36 made up of four categories of claim as dealt with in the rejection, viz:

(i) liquidated damages/delay claims $296,106.11
(ii) claims for defects $ 99,468.76
GST $ 42,079.30
and other claims $ 24,228.19

45 Before this Court the evidence from the plaintiff was given by Mr El Safty who was cross-examined.

46 Mr El Safty provided the Court with eight volumes of material containing all the relevant documents and his discussion on them as well as his opinion. As plaintiff's counsel pointed out, Mr El Safty was not one-eyed about the result in that he disallowed a number of significant claims of Brodyn's.

47 On the other side, all that I was given was Mr Farrell's report as attached to the rejection of the proof of debt (Mr Farrell was not made available for cross-examination), plus the administrator's comments in the body of the rejection document such as "Advice given to me by Mr Farrell is that in the circumstances the request by Brodyn for a programme some two months after execution of the subcontract and some two months prior to completion of the project was unreasonable having regard to the circumstances" or "Mr Farrell expresses the view that in the circumstances the request by Brodyn on 29 January 2003 was unreasonable because of the circumstances outlined".

48 This imbalance in the evidence makes it extremely difficult for me.

49 The administrator's counsel pointed to some remarks made by the Court of Appeal *in* ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394 [65] that "*It seems strongly arguable that, if Brodyn was not entitled to terminate, Dasein did by this document accept the repudiation that the purported termination would in these circumstances constitute.*" Unfortunately for me, I do not just have to speculate about possibilities. I actually have to make the decision as to whether Brodyn has a proper claim in the light of the evidence before me.

50 On the hearing I was assisted by Mr R Harper SC and Ms R Rana for the plaintiff, and by Mr P G Fisher for the defendant. Both sets of counsel put in helpful written submissions. I, however, cannot do anything but bristle with the following submission that Mr Fisher made: "*What must be considered in this matter is whether the deed administrator, at the time of rejecting the proof of debt, was entitled to the view that he took. The court now has before it the report of Mr El Safty, but that report does not properly assist the court's consideration of the proof of debt. Primarily this is because Mr El Safty never considered the claim that formed the basis of the proof of debt. Instead Mr El Safty proceeded to determine and assess a totally different claim. The claim was totally different to the one before the deed administrator. The report of Mr El Safty should not be accepted by the court or, if accepted, given little weight as to any claim by Dasein for a number of reasons … ".*

(Nine matters were then set out which I will consider in due course). The submission then continued:

"31. The only basis that Brodyn appears to seek to attack the decision of the deed administrator is that he should [?should not] have accepted matters as where [sic] accepted by Mr El Safty. That is not a fair consideration of the task of the deed administrator or indeed the court in the present hearing."

51 It is an impossible task for the Court to be told that it cannot rely on the evidence before the Court because it was so different to what was before the administrator and yet the administrator refuses to tell the Court what was before him. It is difficult in any event to uphold a claim by an administrator who has made his decision, on the material that he gleaned from Mr Bard and Mr Farrell and from the officers of the company without even securing comments from the claimant, let alone even informing the Court what that material was. Then to dismiss seven volumes of detailed evidence as being more or less irrelevant because it was never considered by the administrator is, with respect, the height of absurdity. It would appear that the administrator has made a deliberate forensic decision not to put before the Court any proper evidence, he has chosen to cross-examine Mr El Safty by his counsel, and for him then to say that the material is worthless because it was never before the administrator is, with respect, quite absurd.

52 A practical solution is to send the matter back to the administrator to decide on the proof of debt according to law by informing the plaintiff of the matters told to him by Mr Farrell, Mr Bard and the officers of the company which influenced his decision, allow time for proper comment and then for the administrator to consider also Mr El Safty's report. However, one has got to be financially realistic about all this. The company has no money, it is never likely to be able to pay the plaintiff even one cent, the plaintiff has already spent, according to the evidence over $130,000 in fighting the administrator or the company in three courts, a deliberate forensic decision has been made by the administrator, and although I have no real desire to decide a building case on inadequate evidence, in my view, justice requires that the matter be determined now without further expense.

53 I thus turn to Mr El Safty's report. He says in his summary and recommendations that he has assessed the plaintiff's claim and analysed it with specific reference to the general conditions of contract, notices issued by the plaintiff, correspondence from the company and other forms of supporting documents. He then says: *"With regards to consequential loss, this related largely to the question of the termination of the agreement and the conduct of both parties. The question of repudiation must be answered from a legal perspective, [sic] as neither party followed the correct procedure set down in the contract. In any case the costs associated with the contract termination have been verified from a cost perspective [sic] only and is shown in italics in the summary schedule."*

54 The claims for liquidated damages/delays fall into 10 sub-heads. Of the 10 sub-heads, three, namely items (d), (e) and (ll) relate to delays before 13 June 2003 when the contract terminated. The other seven relate to matters after the termination.

55 On the three claims that relate to prior delays, the plaintiff claimed $148,683.91 of which Mr El Safty was only prepared to consider, for the good reasons that he gave, a total of $45,288.55.

56 Of the other seven items (f) straddles the line. This is for additional crane hours from 27 May to 30 July. The amount allowed by Mr El Safty seems to be for the early period so it was $7,132.81 (as against the $28,0783.70 claim) which should be added to the $45,288.55, so as to make a total of $52,421.36.

57 Mr El Safty calculated as nothing for value of claims (b), (c) and (jj) so that they can be removed from further consideration.

58 The three remaining claims are (ii) which Mr El Safty assessed at $10,108; (kk) which he assessed at $35,000 and (mm) which he assessed at $17,150, a total of $62,250.

59 Mr El Safty's total assessment of the claim was $486,371.57. If one deducts the $62,250 one still gets a claim in excess of $400,000. Mr El Safty himself says that he considered $169,996.92 was subject to "legal opinion with regards to repudiation/contract termination", but even accepting this figure, there would be due to the plaintiff if Mr El Safty's figures are accepted, over $300,000.

60 I will say something about Mr El Safty's report generally and then come back to the issue of repudiation/termination.

61 As I have said earlier, the ultimate question is whether the administrator's decision should be reversed. Particularly in situations where the liquidator or administrator has not put before the Court the material before him, this amounts to whether the plaintiff's claim has been established. The only material that I have is Mr El Safty's material, plus the comments allegedly made by Mr Farrell to Mr Silvia or a member of his staff which have not been subject to cross-examination. Mr El Safty was cross-examined, and with respect, no dint was made on the reliability of his evidence. The evidence is supported by seven volumes of calculations and attachments. I see no reason why I should not accept Mr El Safty's evidence.

62 It follows that the plaintiff is owed in excess of $300,000 and there must be reversal of the administrator's decision, at least to that extent.

63 So far as repudiation is concerned, I am left to consider the raw material which is annexed to Mr El Safty's report, particularly that in volume 6. The volume shows that there were continuous complaints by the plaintiff from at least March. On 4 June 2003, the plaintiff faxed the company a letter which included: *"The step down heights to the above slab on ground are not in accordance with the contract requirements, and as such follow on work is unable to continue until this is rectified. This area of work is on our critical path to the project and as such your incomplete works are delaying the progression and completion of work to this project. Please be advised the liquidated damages … are effective as at 10 am today … ".*

64 On 11 June Mr Taddio, the Dasein construction manager, faxed back that there had been an unco-operative meeting and that Mr Matterson "did not elevate our concerns about receiving payments still outstanding to Dasein Constructions, in the spirit of common sense and doing our best to keep this whole idiotic mess out of the courts we are prepared to provide an olive branch and provide TCQ with time to Friday 13 June 03 to assess and process all the outstanding variation and back charges".

65 On 11 June Mr Matterson faxed Mr Karam of Dasein, referred to the meeting of 10 June and said, "At this meeting Mr Carl Karam commenced the cancellation of the concrete pour scheduled for today. Mr Carl Karam whilst in the meeting telephoned the concrete pump operator, the concretor and concrete supply cancelling all orders and arrangements which had been put in place to pour the Attic slab today the 11-6-03, when asked by Brett Matterson what he was doing Carl Karam stated 'you are going to hear your site go to shit'." Mr Matterson said that the plaintiff considered that Dasein had repudiated the contract and that it had 48 hours to remedy its default.

66 On 13 June 2003, Mr Matterson again faxed Mr Karam: *"Dasein … have made no effort to return to the site to complete its contractual obligations to the main contractor. TCQ have no alternative but to accept that the conduct of Dasein Constructions Pty Ltd amounts to repudiation of the agreement. With this acceptance, TCQ will immediately put in place alternative arrangements to have the work completed."*

67 On 17 June 2003, Mr Matterson faxed Mr Karam that it was pointless continuing a paper war as the plaintiff's position was very clear and it noted that Dasein's successfully disrupted and postponed the planned concrete pour on Monday 16-6-03.

68 On 17 June 2003, Mr Matterson faxed: *"We deny the contract was terminated by TCQ and that we are in breach of contract, we remind you that the contract was wrongfully repudiated by Dasein Constructions Pty Ltd and TCQ had no alternative but to accept the repudiation after notices and opportunity was given to Dasein Constructions Pty Ltd to remedy the repudiation."*

69 On 19 June 2003, there is an e-mail from an officer of the plaintiff to Mr Matterson: *"Tony [I assume this is Mr Taddio] rang me on the mobile after meet with TCQ at H/O to tell me they would not be pouring any concrete at W/craft job as we had previously programmed on site."*

70 I appreciate that I do not have full information, but that has been a result of a forensic decision made by the administrator. I appreciate also that the method of dealing with the alleged repudiation was not in accordance with the printed contract. In the end I do not think that matters too much. The parties had got to the stage where, on the material before me, the concrete pour was critical to the whole project, the company had refused to pour any concrete and indeed had cancelled the planned pour and this was as big a disruption to the project as could be imagined. I know that one does not lightly infer repudiation, but on the material before me there would seem to be a clear repudiation.

71 Accordingly, one should accept Mr El Safty's figures and find that the administrator should have admitted the proof of debt for $486,371.57. However, I repeat that even if I were wrong in this, the minimum for which the proof should have been allowed was $316,374.65 being the total of Mr El Safty's calculations less his $169,996.92.

72 Plaintiff's counsel are content to have the proof admitted for $262,388.65. This sum is certainly the minimum sum due to the plaintiff.

73 I said that I would come back to Mr Fisher's objections to Mr El Safty's report. These were:
(a) the different quantum of the claim;
(b) no consideration of the notice of rejection of the claim and the contentions of the deed administrator;
(c) no consideration of Dasein's payment claim and judgment entered in the District Court for more than $183,000;
(d) consideration of matters that were not before the deed administrator including the head contract between Brodyn and a third party (main contractor);
(e) consideration of unsupported assertions of Brodyn as to various claims including those relating to practical completion and the like;
(f) consideration of claims never placed before the deed administrator;
(g) heavy reliance and perhaps bias towards accepting the assertions of Brodyn;
(h) consideration of claims made by entities related to Brodyn;
(i) the contradictions made by Mr El Safty to his own evidence (for instance considering (mm) to be subject to a finding as to any proper termination of the contract by the parties but not putting it in italics as with such other claims).

74 Some of these are fatuous, particularly the last, that some claim was not put in italics. Others go on the basis that somehow or other I have to examine the material before the administrator which his own counsel would not put before me. It may be that there was heavy reliance on accepting the assertions of Brodyn, but the administrator did exactly the same by only consulting the officers of the company about the claim and not the plaintiff. In the present case Mr Matterson did give evidence, as did Mr El Safty. No-one gave evidence on the other side except the administrator and his assistant.

75 Accordingly, in my view the attacks made by Mr Fisher are just not sufficient to alter the assessment I have made.

76 This now means I must turn my consideration to the question as to whether, in view of the BCISP Act, there is a set off under s 553C of the **Corporations Act** as incorporated into administration of a DOCA in the way in which I have set out earlier.

77 Section 553C applies where there are mutual credits, mutual debts or other mutual dealings. It seems now accepted that the inclusion of "mutual dealings" covers the situation where one party has a damages claim for breach of contract entered into before the administration. In such a case the claim arises out of a prior dealing between the parties; see eg ***Booth v Hutchinson*** (1872) LR 15 Eq 30; ***Mersey Steel & Iron Co v Naylor, Benzon & Co*** (1884) 9 App Cas 434.

78 The vital question is whether, in the light of s 25 of the BCISP Act, one can apply s 553C.

79 Mr Harper and Ms Rana say that because the claim of the plaintiff exceeds the claim of the company the company's claim was automatically extinguished by s 553C. This means that the District Court provisional judgment under s 25 of the BCISP Act must now be set aside or stayed. This is because it is clearly a provisional judgment which is to be dealt with when the whole of the dispute between the parties has been litigated as has now occurred.

80 On the other hand, Mr Fisher says that the policy of the BCISP Act means that the only entitlement to judicial intervention once a judgment is made under s 25(1) is to commence proceedings to have it set aside under s 25(4). In those proceedings the applicant is not to bring a cross claim or raise any defence in relation to matters arising under the construction contract nor challenge the adjudicators to termination. The applicant also has to pay into court security for the unpaid portion of the adjudicated amount.

81 He points to the fact that Austin J said in ***Jemzone Pty Ltd v Trytan Pty Ltd*** [2002] NSWSC 395 at [41] that the BCISP Act offers to a claimant special statutory rights which override general contractual rights and place the claimant in a privileged position.

82 There is a conflict of legislative provisions in the instant case and the scheme set out in the BCISP Act and the scheme set out in the **Corporations Act** where a company is under a DOCA do conflict. However, in my view, the two methods of approaching the problem each give the same result, and that is that the scheme set out in s 553C of the **Corporations Act** prevails.

83 The first reason is s 109 of the Australian Constitution. It provides that: *"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

The **Corporations Act** is a Commonwealth Act, the BCISP Act is a State Act, so if there is any inconsistency, the former prevails.

84 In ***Demir Pty Ltd v Graf Plumbing Pty Ltd*** [2004] NSWSC 553, Campbell J said that if a person obtains a judgment under the BCISP Act and "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 Division 3 of Part 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."

85 The second approach is to construe the BCISP Act itself. It is clear that the mischief addressed by the Act was to assist subcontractors and others who depended on cash flow for their continued existence. The Act was to alter the effect of delays in adjudicating claims between head contractors and subcontractors by compelling the payment of monies to the subcontractors in advance of settling the real dispute so that the subcontractor would have cash flow so that his business could continue. The Minister said when introducing the Bill that it was to prevent, inter alia, pressure being put on subcontractors because of delays in adjudication where there was a cross claim. The Minister said: "There will be no more legal delays". He then went on to say that the changes "will improve cash flow throughout the building and construction industry". Of course, I should remark that whilst it is true that there are no more legal delays, unfortunately legal delays are usually necessary in order to do justice. In the instant case the head contractor has already been in three courts and spent $130,000 and has not been able to have its claim adjudicated upon because, as soon as it did raise its claim, the subcontractor went into voluntary administration.

86 It is now faced with a situation where although it has established its claim on the evidence before me, the administrator is arguing that it is necessary for it to pay the full amount of the provisional District Court judgment to the administrator who will then use it to pay his own fees and to fund further litigation and there will not be a ghost of a chance of the just claim of the head contractor ever being paid.

87 To my mind the Act does not go that far. It only intends to operate when the head contractor and the subcontractor are going concerns. Once the subcontractor ceased to be a going concern, it no longer needs cash flow and the mischief to be covered by the Act is not present in that situation. No-one forced the subcontractor to go into voluntary administration. It elected to do so and in my view the protection of the BCISP Act ceased at that point and the Commonwealth law as to adjustments of rights under administration and later under a DOCA came into play.

88 This has been the general approach taken by this Court in corporate insolvency matters.

89 T he cases in this respect do not bear out Mr Fisher's submission that the present exercise is one properly classed as enforcement.

90 ***Greenaways Australia Pty Ltd v CBC Management Pty Ltd*** [2004] NSWSC 1186 was a case where a party had signed judgment under s 25 of the BCISP Act and had issued a statutory demand in respect of it. The claimant had gone into administration and thence creditors voluntary liquidation. The plaintiff sought to set aside the statutory demand on the basis of an offsetting claim.

91 The claimant protested that s 25 prevented that offsetting claim. Barrett J rejected that argument and said that the constraints of s 25 of BCISP: *"apply only in proceedings in which it is sought to have a judgment resulting from filing of an adjudication certificate under the Act set aside. It may be ignored in the present context as there is no suggestion that pursuit of the offsetting claim that the plaintiff considers itself to have involves any attempt to have the District Court judgment set aside.*

Section 32(3) of the (BCISP) Act deals with proceedings 'in relation to any matter arising under a construction contract'. Proceedings in which the plaintiff sought to agitate its offsetting claim would be proceedings of that kind. But all the section says is that the court must allow for any amount paid to a party to the contract under Part 3 of the Act when formulating the relief to be granted and may make restitutionary orders. Again, therefore the Act would not have any impact on the pursuit of the offsetting claim ."

See ***Tooma Constructions Pty Ltd v Eaton & Sons Pty Ltd*** [2002] NSWSC 514 and ***Demir Pty Ltd v Graf Plumbing Pty Ltd*** (supra).

92 Once one removes the influence of the BCISP Act, there is a clear case where s 553C applies.

93 The High Court said in **Gye v McIntyre** (1991) 171 CLR 609 at 622 with respect to the corresponding section in the **Bankruptcy Act** s 86: *"Section 86 is a statutory directive ('shall be set off') which operates as at the time the bankruptcy takes effect. It produces a balance upon the basis of which the bankruptcy administration can proceed. Only that balance can be claimed in the bankruptcy or recovered by the trustee. If its operation is to produce a nil balance, its effect will be that there is nothing at all which can be claimed in the bankruptcy or recovered in proceedings by the trustee."*

The same applies mutatis mutandis to administration under a DOCA and s 553C of the **Corporations Act**: **Metal Manufacturers Ltd v Hall** (2002) 41 ACSR 466.

94 A problem as to the formal orders arises in that one does not know what is the proper amount of Dasein's claim against the plaintiff. The adjudicator certified it at $183,829, but this is only a provisional amount. The plaintiff's claim is over double this amount so that it is unlikely that the result could be anything other than an extinguishment of Dasein's claim. So far as the overplus is concerned, this again cannot be calculated with precision.

95 Mr Harper and Ms Rana say that the balance owed in their favour is $78,459.65. On any view of the calculations, the claim must be at least this amount and as the plaintiff is unlikely to receive any cash in any event, one might just as well allow the proof in that amount. This is in one sense taking the easy way out, but it is a common sense approach.

96 This just leaves the question of the bank guarantee and the consequential orders.

97 As the bank guarantee was security for a debt owed to the company and as at the date when the guarantee was given there was no debt owing to the company because it had been extinguished under s 553C of the **Corporations Act**, the guarantee was security for nothing and accordingly must be discharged. It does not appear to have security for costs.

98 Accordingly, the plaintiff is entitled to

(1) declaration (2) in the further amended summons, that is that the judgment debt of $183,493.64 is declared to have been extinguished by set off under the provisions of the **Corporations Act**. It is also entitled to orders such as the following:

(2) An order allowing the claim against rejection of the proof of debt and certifying that after the extinguishment the administrator should admit the plaintiff's claim in the sum of $78,459.65.

(3) An order that the defendant consent with the plaintiff to discharge the judgment in District Court proceedings 4868 of 2003 with an injunction in the meantime from taking any steps to enforce that judgment.

(4) An order that the plaintiff is entitled to discharge of the bank guarantee and an order that the defendant pay the plaintiff's costs of the proceedings.

99 Ordinarily I would order that short minutes should be brought in. However, I doubt whether at this time of the year it is possible to do that. If there is any problem with the formal orders, I will give liberty to apply so that the matter can be mentioned before me probably early in the new term.

R R I Harper SC and R Rana (P) instructed by Schrader & Associates (P)
P G Fisher (D) instructed by Turnbull Bowles Lawyers Pty Limited (D)