

JUDGMENT: BRERETON J. Supreme Court New South Wales, Equity Division, Corporations List. 17th October 2008.

- 1 On 2 May 2008, the defendant Bidnia Group Pty Ltd ("Bidnia") served a creditor's statutory demand pursuant to (CTH) *Corporations Act* 2001, s 459E, dated 29 April 2008, on the plaintiff Construction Management Services Pty Ltd ("CMS"), demanding payment of a debt of \$28,036.80 for which CMS was said to be indebted pursuant to an invoice dated 26 March 2008, for concreting works done by Bidnia at Lawson pursuant to a building contract dated 20 September 2007. By originating process filed on 19 May 2008, CMS seeks orders pursuant to *Corporations Act*, s 459G, setting aside the creditor's statutory demand.
- 2 Bidnia completed the works under the contract in about March 2008. It rendered its first invoice for \$19,089.40 on 12 October 2007, which was paid. On 24 February 2008, at a site meeting, Mr John Tanner of CMS identified a number of areas of concrete work with which he was unhappy. He raised the issue with Mr Paul Galea of Bidnia. His complaints were not resolved.
- 3 On 3 March 2008, CMS wrote to Bidnia, forwarding a copy of a note of that site meeting. On 12 March, CMS advised Bidnia that it had met with the owners of the site, who were disappointed with the workmanship, and that the Concrete Paving Association had been asked to inspect the site. On the same day, 12 March 2008, Mr Carlow Edwin Garofali inspected the concrete finishes at the request of CMS. He reported noticeable variations in the type and quality of finishing due to differences or inconsistencies between areas where machine trowels had been used and areas that had been finished by hand, and also that there had been a lack of attention to detail at joints and slab edges. He concluded that the overall result was suboptimal, but that this affected the aesthetics and not the structural integrity of the concrete work. He said that there was no justification for the work to be re-done and that it was fit for its purpose. He recommended that it would be appropriate for the concreter to offer a discount for delivering a result with which the owner was (justifiably) less than satisfied.
- 4 On 26 March, Bidnia rendered its invoice for \$28,036.80. On 31 March, CMS forwarded a copy of Mr Garofali's report to Bidnia, indicating that the owners were "very unhappy with the very poor finish to the carpark and are holding CMS responsible and are currently holding moneys against our company awaiting your response to the report...". The letter concluded, "Your early response would be appreciated as your current invoice number 56 is held awaiting your response." On 24 April, the owner wrote to CMS, confirming that it was withholding payment until advised of CMS's intentions "with regards to this most disappointing workmanship by your subcontractor".
- 5 Bidnia has done the work it was contracted to perform. Defective work may sound in damages for breach of warranty or for negligence, but it provides no basis for any suggestion that there has been a total failure of consideration. The contract price is payable, and there is no genuine dispute in respect of the debt. The only real question is whether there is any offsetting claim for damages for breach of warranty or negligence.
- 6 In respect of offsetting claims, Palmer J said in *Macleay Nominees Pty Ltd v Bell Property East Pty Ltd* [2001] NSWSC 743 (at [18]):
In my opinion, a genuine offsetting claim for the purposes of [Corporations Act] s.459H(1) and (2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. "Good faith" means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of s.459H(1) and (2).
- 7 On the present application, which was first listed for hearing before me on 15 August 2008, CMS adduced no evidence that would show the basis on which, or how, the loss was calculated. There was no evidence that in any way permits me to quantify even on the most preliminary way the amount of the alleged offsetting claim. On any view, any offsetting claim must have been significantly less than the value of the works and the outstanding invoice, and could not conceivably have reduced the amount of the debt below the statutory minimum.
- 8 When the matter came before me for hearing on 15 August, it was apparently settled, and I noted an agreement between the parties by which CMS agreed to pay Bidnia sums totalling \$32,500 in three instalments, the last of them due by 5:00pm on 15 October 2008, and that upon receipt of the last payment the parties would execute an agreed minute of orders disposing of the proceedings. The proceedings were adjourned to today on the basis that the settlement would take effect, or if it did not, the hearing would proceed.
- 9 I am informed today that the instalments were not paid. CMS did not appear, save that its former lawyers attended to mention that they were no longer instructed to appear in the proceedings today, and were thereupon excused from further attendance.
- 10 For the reasons I have given, I am not satisfied that there is any such offsetting claim as would justify the relief claimed in the originating process.
- 11 I order that the originating process be dismissed with costs.

D P O'Connor (defendant)
Lou Baker & Associates (defendant)