

JUDGMENT : Austin J. New South Wales Supreme Court. Equity Div. 17th May 2006

- 1 By an originating process filed on 18 November 2005, the plaintiff ("Equipped") seeks to set aside a statutory demand served upon it by the defendant ("Form"). The statutory demand is dated 26 October 2005 and is for an amount of \$18,444.94. That amount is broken down into two invoice claims. The claim in respect of invoice number 24060125 issued on 2 June 2004 is \$16,500. The claim in respect of invoice number 24040113 issued on 16 April 2004 is \$1,944.94.
- 2 Equipped contends that there is a genuine dispute in respect of the whole of the amount claimed, and therefore in respect of both invoices, and consequent upon s 459H the court ought to set the demand aside. I note that under s 459H the statutory minimum is \$2,000, and if the substantiated amount of the demand is less than that amount, s 459H(3) requires the court to set aside the demand. Consequently, if the court reaches the conclusion (as I do for the reasons I shall explain) that there is no genuine dispute in respect of the invoice for \$1,944.94 but there is a genuine dispute in respect of the invoice for \$16,500, then the court is required to set the statutory demand aside *in toto*.
- 3 Equipped acquired a property in Fairfield and contracted with Frassetto Design Pty Limited ("Frassetto Design") to provide architectural design services with respect to a proposed development on the Fairfield land.
- 4 In August 2003 Frassetto Design obtained some quotations for the supply of an urban design report. One of the quotations was provided by Form, addressed to Equipped care of Frassetto Design and dated 22 August 2003. The scope of the work was defined in the letter that set out the quotation, which was for an amount of \$19,000.
- 5 The urban design report was prepared and made available by Form and was used by Frassetto and Equipped for the purposes of Equipped's development application with Fairfield Council. It was dated December 2003. There is no dispute about the urban design report. The quoted amount for the provision of that report included the following two items:
 - "4. Attendance at meetings with Council officers and presentation of urban design principles;
 - 5. Attendance at meeting with Fairfield City Council Design Review Panel and presentation of urban design principles."
- 6 An invoice was raised dated 16 April 2004, and directed to Equipped care of Frassetto Design, for a sum including GST of \$1,944.94 (invoice number 24040113, one of the two invoices the subject of the proceeding). The invoice describes the work done as "Meeting with client, designer and Council". It was conceded during argument that the reference to the "client" was a reference to Equipped (probably Mr Chiha) and the reference to the "designer" was a reference to Frassetto Design (probably Mr Frassetto). Therefore this invoice was for attending a meeting, presumably at some time later than the completion of the urban design report, and the charge made was for the attendance of a representative of Form (probably Mr Edgar) at that meeting.
- 7 The evidence includes a description of the meeting. It is a facsimile from Mr Edgar to Equipped dated 8 November 2004. Mr Edgar said that the invoice was "for meetings with Council, Equipped and Frassetto to argue the proposal's merits and to facilitate changes necessary during the assessment of the development application". So described, the meeting (or perhaps meetings) for which the invoice was issued cannot have been within the descriptions in paras 4 and 5 of the quotation set out above.
- 8 There is other evidence that there was a meeting attended by Mr Chiha, Mr Frassetto, Mr Nelson Mu of Fairfield Council and Mr Edgar on 11 March 2004. That is given in Mr Edgar's affidavit, but it is not clear that this was the meeting to which the facsimile referred and which was the subject of the invoice. It seems to me, on the basis of all that evidence considered together, that the only reasonable inference to be drawn was that Mr Edgar attended a meeting in order to advance the proposals of Equipped with the Council and that he did so at the request of Equipped or Mr Frassetto on Equipped's behalf. That meeting, according to the evidence, was not a meeting covered by the quote for provision of the urban design report and in the circumstances there arose an implied contract under which Equipped was obliged to pay the reasonable fees of Form for the attendance.
- 9 The correspondence, in which various invoice matters are disputed, does not include any argument about the reasonableness of the charge in that invoice. There is a facsimile to Mr Edgar from Mr Rodrigues of Equipped dated 9 November 2004 in which the basis for objecting to this invoice is set out, namely that "the particulars of the invoice are in contradiction to the clearly defined scope of work outlined in the fee quotation". I do not agree with this assertion.
- 10 The position is, in my view, that there is no contradiction between the claim in the invoice and the meetings envisaged by the quote. It is plain that the claim in the invoice relates to a meeting not covered by the quote, and therefore separate from the contract arising when the quotation was accepted. In the circumstances my view is that there is no genuine dispute so far as the invoice for \$1,944.94 is concerned, and to that extent Equipped has not succeeded. As I have said, however, because that amount is less than the statutory minimum of \$2,000, the court will be obliged to set aside the whole statutory demand if the balance of the demand relates to a matter the subject of a genuine dispute.
- 11 The other invoice is for the sum of \$16,500 (invoice number 24060125, dated 2 June 2004). The description of the work on the invoice is "**Design verification certificate**". The evidence indicates that after the urban design report had been supplied to Fairfield Council, there was a meeting of Mr Mu of Fairfield Council, Mr Chiha, Mr Frassetto and Mr Edgar on 11 March 2004. Mr Mu informed the others about a number of difficulties the Council had with the development application. One of the things he said was that, since the development application was

- submitted after 31 November 2003, the Environmental Planning and Assessment Act required that the processing of the application could not be finalised until the full provisions of the SEPP 65 had been met, "especially the requirement for the verification to be certified by a qualified designer". The evidence indicates that Mr Frassetto was not qualified to give such certification.
- 12 There were negotiations, at a meeting on 15 March 2004, between Mr Chiha on behalf of Equipped and Mr Frassetto and Mr Edgar. According to Mr Edgar's evidence, Mr Frassetto asked him to provide the verification certificate that was required and he said he would do so for a fee of \$15,000 plus GST. He said Mr Chiha argued that this cost was too high, but that he insisted on the cost because of the work involved. He said Mr Chiha responded by saying "I understand your position. Could you provide the verification?" and Mr Edgar agreed to do so.
- 13 That is evidence of an oral contract for the provision of the verification certificate for a fee of \$16,500. I can see nothing in the conversation to suggest that it was an agreed variation of the contract to provide the urban design certificate. It seems on the face of the evidence to have been a separate contract.
- 14 Mr Edgar's evidence as to the conversation on 15 March was challenged by Mr Chiha, who denied that any such conversation occurred. As counsel for Equipped correctly submitted, there is therefore an issue of credit between the parties. In *Aldoga Aluminium Pty Limited v De Silva Starr Pty Limited* [2005] NSWSC 284 Palmer J, applying the well established principles about the setting aside of a statutory demand on the ground of genuine dispute as to evidence concerning an alleged oral contract, observed ([at 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 ... will depend largely upon an assessment of the credit and accuracy of recollection of [the witnesses concerned]. Quintessentially, that is the type of dispute which this Court will not determine in an application under s 459G."
- 15 To the extent that the contention between the parties as to the invoice for \$16,500 boiled down to a dispute as to the credit of their respective witnesses, Palmer J's observations are directly applicable. It was contended on behalf of Form, however, that there was additional evidence in the present case, upon which the court should conclude that there is no genuine dispute with respect to the invoice for \$16,500. Form's solicitors referred to evidence concerning the completion and delivery of the verification certificate report. According to Mr Edgar the verification certificate report was concluded on 31 May 2004. He says that on 1 June 2004 he had a telephone conversation with Mr Rodrigues from Equipped in which he told Mr Rodrigues that the design verification was ready to be submitted. According to Mr Edgar, Mr Rodrigues replied, "We will collect it from your office tomorrow". On 2 June 2004 Mr Edgar created the invoice to which I have referred. Like the other invoice and the quotation for the urban design report, the invoice for \$16,500 was directed to Equipped care of Frassetto Design. Mr Edgar says he placed the certificate report and the invoice in an envelope and left the envelope at the front desk of Form. I infer that the envelope was collected. What is not clear however is whether it was collected by someone on behalf of Equipped or someone on behalf of Frassetto. Mr Chiha's evidence is that he did not see the invoice until much later. It is possible that it was collected and delivered to Mr Rodrigues who omitted to show it to Mr Chiha, and it is equally open on the evidence to draw the inference that Mr Rodrigues arranged for Frassetto Design to collect the documents.
- 16 Consistent with the latter conclusion is some evidence as to discussions between Equipped and Frassetto Design, in which Mr Chiha asserted on behalf of Equipped that any payment obligation that may have arisen in respect of the verification certificate report was an obligation to be borne by Frassetto Design. I note that there is evidence that a deed of release was eventually entered into between Equipped, Form and Frassetto Design dated 17 November 2005 in which, by cl 2.1, Frassetto Design covenanted to pay Form a total aggregate amount of \$16,500. By cl 2.2 the deed provided that the parties agreed that the payment referred to in cl 2.1 was not an admission of liability by Equipped or Frassetto Design. As counsel for Equipped pointed out, cl 2.2 does not say that the payment did not involve any implied admission by Form. I set these matters out not in order to determine the question whether the verification certificate report and invoice were collected on behalf of Equipped or on behalf of Frassetto Design on 2 June 2004, but rather to make the point that there is ground for questioning and further investigation and therefore a basis for concluding that there is a genuine dispute with respect to that question.
- 17 Correspondingly, the contention made on behalf of Form - to the effect that the receipt of the invoice addressed to Equipped in June 2004 followed by any absence of challenge to the invoice until November 2004, implies that there had been an agreement that Equipped would be responsible for that amount - is likewise open to questioning and further investigation and is a matter for genuine dispute.
- 18 Form's solicitor drew the court's attention to the endorsement on the invoice as follows: "Note: licence for use of the documents produced is withheld until receipt of payment in full as per 'the terms of commission'."
- 19 The submission seemed to be that this endorsement on the invoice had contractual effect, either because the invoice itself constituted a contract or because it gave effect to or varied some prior arrangement.
- 20 It was contended that in the absence of payment there could have been no authority for Equipped (or for that matter Frassetto Design) to use the verification certificate report by supplying it to Council. My view is that the significance of that endorsement on the invoice is far from clear and there is scope for a variety of submissions about it. One important matter to bear in mind is that the endorsement does not reflect Mr Edgar's own evidence

as to the terms of the discussion on 15 March 2006, at which he said an agreement was made for the commissioning of the verification certificate report. In my view the submissions made on behalf of Form concerning the endorsement simply go to underline the conclusion that there is a genuine dispute about the existence of the debt for \$16,500 claimed in the invoice.

- 21 Reference was also made to a letter from Mr Frassetto to Mr Chiha of Equipped dated 12 November 2004 in which he said that: *"Frassetto Design confirms that all and any copyright privileges held by it by way of preparing the approved development... are waived and all such privileges transferred to Equipped to utilise as they see fit in preparation of their...drawings."*
- 22 It was contended that this was evidence of some illegality but I cannot see that it is so. It appears to be an attempt to transfer or assign in writing intellectual property rights, if any, possessed by Frassetto Design. I cannot see that the terms of the letter of 12 November 2004 are of direct assistance to me in deciding whether there is a genuine dispute as to the claim for \$16,500.
- 23 There were also some submissions about the effect of the Building and Construction Industry Security of Payment Act 1999 (NSW) and about failure to hold any arbitration between the parties as contemplated by cl 3.07 of the contract constituted by acceptance of the quotation for the urban design report. I do not regard the arbitration clause as having any relevance to the claim for \$16,500 because it seems to me those provisions are inapplicable for reasons I have given. The fact that the demand does not in terms purport to be based on any determination under the Act, it appears to me to be consistent with the conclusion that I have reached that there is a genuine dispute. Form has not followed the provisions of the Act in asserting its claim.
- 24 In all the circumstances my conclusion is that there is a genuine dispute with respect to the claim for \$16,500 but not with respect to the claim for \$1,944.94. Section 459H(3) requires in those circumstances that the statutory demand be set aside. It may seem to Form and its directors that there is an element of unfairness in this conclusion, given that there is no dispute they have carried out the work required to produce the verification certificate report and that the report was used by Equipped for the purposes of its development application. But they must bear in mind that the statutory demand procedure is not provided by the law as a mechanism for the recovery of debt. The function of a statutory demand is to facilitate proof of insolvency in a winding-up application by creating a presumption of insolvency if the demand is properly served and not met. Courts have said, time and again, that the statutory demand procedure should not be used as a mechanism to apply pressure on a party who genuinely disputes the existence of the debt that is claimed. The proper procedure for determining entitlement to an amount claimed but genuinely disputed is to take proceedings for recovery of the alleged debt, where defences may be raised and a decision may be made by the court.
- 25 Finally, Equipped contends that because there is a genuine dispute sufficient to justify setting aside the statutory demand, the court should award it costs against Form on an indemnity basis. Sometimes indemnity costs are appropriate - for example where it appears to the court that the statutory demand procedure has been used abusively and without any justification in order to enforce recovery of a disputed debt. Here, however, the statutory demand related to two invoices and in respect of one of them I have found that there was no genuine dispute. Furthermore this is a case where the conclusion that there is a genuine dispute is one that arises only after consideration of evidence about conversations as well as documents, and in circumstances where it is plain that the work the subject of the claim was done by Form and used by Equipped. I do not think indemnity costs are appropriate in such a case. It does seem to me however that costs should follow the event in the normal way.
- 26 My orders are:
 - (1) The creditor's statutory demand issued by the defendant to the plaintiff and dated 26 October 2005 be set aside under s 459H of the Corporations Act 2001 (Cth).
 - (2) Defendant to pay the plaintiff's costs of the proceedings.

R Glasson (P) instructed by MJD Legal
S Ryan (Sol)(D) instructed by Frontier Lawyers (D)