

JUDGMENT WHITE J. Supreme Court of New South Wales, Equity Division, Corporations List. 17th November 2006

- 1 This is an application under s 459G of the *Corporations Act* 2001 (Cth) to set aside a statutory demand served on the plaintiff on or about 17 March 2006.
- 2 In the demand, the defendant requires payment of a debt of \$1,336,567.48. The debt is described as the amount for which the plaintiff is indebted to the defendant pursuant to a judgment of this Court.
- 3 The defendant formerly carried on business as a builder. It seems that at about the end of February 2004, it entered into voluntary administration pursuant to a resolution of directors under s 436A of the *Corporations Act*. On 29 March 2004, it entered into a creditors' voluntary winding-up.
- 4 On 24 December 2002, the defendant had entered into a building contract with the plaintiff for the carrying out of construction works at a hotel and bottle shop in Rouse Hill, New South Wales. On 2 September 2003, the defendant delivered a progress claim under that contract (progress claim no. 8) in the sum of \$832,726.87. On 2 October 2003, it delivered progress claim no. 9 in the sum of \$1,852,672.69. This included the amount claimed under progress claim no. 8.
- 5 On 29 September 2003, the architect issued a progress payment certificate no. 8 in the sum of \$6,162.02. This included an allowance in the proprietor's favour of \$596,000 for liquidated damages.
- 6 On 31 October 2003, the architect issued a progress payment certificate no. 9 in the sum of \$560,933.33. The difference between the value of work claimed by the builder and the value of work allowed by the architect was \$1,168,703. Of this difference, \$596,000 was due to the architect's allowance for liquidated damages. The balance related to the architect's assessment of the percentage of work completed and the architect's allowance for claimed variations, both of these being different from the amounts claimed by the builder.
- 7 Progress claims nos. 8 and 9 were stated by the builder to be payment claims made pursuant to s 13 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the *Security of Payment Act*"). The plaintiff did not serve payment schedules as permitted by s 14 of the *Security of Payment Act*. The plaintiff thereby became liable under s 14(4) to pay the amount claimed by the defendant.
- 8 In due course, on 11 March 2004, McDougall J held that the defendant was entitled to summary judgment for \$1,336,567.48. This is the amount in the statutory demand. The difference between this sum and the amount claimed in progress claim no. 9 was due to the plaintiff's having paid \$516,105.41 in respect of the progress claims.
- 9 In giving judgment, McDougall J said that the evidence did not disclose the amount of interest to which the defendant was entitled or the daily rate at which interest ran. His Honour directed the parties to bring in agreed minutes of order quantifying the judgment to which the defendant was entitled and providing for costs.
- 10 The evidence of Mr O'Brien of the plaintiff on this application is that no formal order was entered. Nonetheless, there is no dispute that the plaintiff is indebted to the defendant pursuant to s 14(4) of the *Security of Payment Act* for the amount of \$1,336,567.48. Nor is it material whether that debt should be properly classified as a judgment debt. The statutory demand was accompanied by an affidavit as required by s 459E(3) of the *Corporations Act*, even if the debt is not properly classified as a judgment debt.
- 11 The procedures provided by the *Security of Payment Act* were designed to alleviate difficulties which builders experienced in their cash flow whilst their claims for payment under building contracts were mired in litigation or arbitration. The remedies provided by the *Security of Payment Act* are interim in the sense that the Act does not affect the rights of parties to a construction contract at general law or otherwise under the contract. So much is clear from s 32.
- 12 Whilst there can be no dispute that the plaintiff is indebted to the defendant for the amount claimed in the statutory demand, the plaintiff will nonetheless have an offsetting claim equal to the amount of that debt if there is a genuine dispute that the defendant was not contractually entitled to the amount claimed in the payment claims made under s 13 of the *Security of Payment Act* (see *Max Cooper & Sons (Builders) Pty Limited v M & E Booth & Sons Pty Limited* (2003) 202 ALR 680; *M & D Demir Pty Limited v Graf Plumbing Pty Limited* [2004] NSWSC 553; *Greenaways Australia Pty Limited v CBC Management Pty Limited* [2004] NSWSC 1186; *Aldoga Aluminium Pty Limited v De Silva Starr Pty Limited* [2005] NSWSC 284; *Plus 55 Village Management Pty Limited v Parisi Homes Pty Limited* [2005] NSWSC 559; and *CCD Group Pty Limited v Premier Drywall Pty Limited* [2006] NSWSC 1012).
- 13 Section 459H of the *Corporations Act* provides:

"459H Determination of application where there is a dispute or offsetting claim

(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:

- (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
- (b) that the company has an offsetting claim.

(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

Admitted total – Offsetting total

where:

admitted total means:

- (a) the admitted amount of the debt; or
 - (b) the total of the respective admitted amounts of the debts;
- as the case requires, to which the demand relates.

offsetting total means:

- (a) if the Court is satisfied that the company has only one offsetting claim—the amount of that claim; or
 - (b) if the Court is satisfied that the company has 2 or more offsetting claims—the total of the amounts of those claims; or
 - (c) otherwise—a nil amount.
- (3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.
- (4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:
- (a) varying the demand as specified in the order; and
 - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(5) In this section:

admitted amount, in relation to a debt, means:

- (a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt—a nil amount; or
- (b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt—so much of that amount as the Court is satisfied is not the subject of such a dispute; or
- (c) otherwise—the amount of the debt.

offsetting claim means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

respondent means the person who served the demand on the company.

(6) This section has effect subject to section 459J”

14 In this case, the plaintiff claims that it has a number of "offsetting claims" within the meaning of subs 459H(5), the total of which substantially exceeds the amount of the debt claimed in the statutory demand. First, it denies that the defendant was contractually entitled to the amounts claimed in the progress claims, which also comprise the payment claims, under s 13 of the *Security of Payment Act*. Clause 10.1 of the construction contract provided for the builder to submit progress claims to the architect. Clause 10.2 provided for the architect to issue a progress certificate after receipt of a progress claim. Clause 10.4 required the proprietor to pay the builder the amount stated in the progress certificate.

15 In other words, under the contract, the defendant was entitled to be paid the amounts as assessed by the architect in the progress certificate. It was not entitled to progress payments merely on the issue of its progress claims. On this ground alone, the plaintiff has what is at least a seriously arguable claim to relief pursuant to s 32 of the *Security of Payment Act* in an amount at least equal to the amounts claimed in the statutory demand.

16 The plaintiff says that it has two further offsetting claims. It makes a claim for liquidated damages. Clause 10.10 of the construction contract provides that:

“10.10 LIQUIDATED AND ASCERTAINED DAMAGES

If the Builder shall fail to bring the Works to Practical Completion by the Date for Practical Completion then:

10.10.1 *The Architect may give notice in writing to the Builder and the Proprietor not later than 20 days after the date of Practical Completion that in the Architect’s opinion the Works ought reasonably to have been brought to Practical Completion on some earlier date stated in that notice not being earlier than the Date for Practical Completion.*

10.10.2 *If such notice is given the Architect using the rates stated in Item P of the Appendix shall calculate and advise the Builder and the Proprietor of the total value of the Liquidated and Ascertained Damages. The Proprietor shall then organise and advise the Builder if damages will apply, and the Builder, if so required shall pay or allow the Proprietor the sum calculated by the Architect.*

The Proprietor shall have no right to damages for delay apart from that expression in this clause.”

17 The date for practical completion specified in the contract was 17 April 2003 in respect of portion one of the works, and 24 June 2003 in respect of portion two. On 18 December 2003, the architect gave notice, apparently in conformity with clause 10.1.1, that the works for both portions ought reasonably to have been brought to practical completion on the Dates for Practical Completion specified in the contract for each portion.

18 The architect said that the works were then still not practically completed. Pursuant to clause 10.10.2, the architect advised that the value of liquidated damages to 12 December 2003 was \$1,208,000. The defendant objected

- to this. It claimed it was entitled to extensions of time which had been wrongly refused. It said that the two portions had been brought to practical completion on 9 August 2003 and 1 October 2003.
- 19 On 22 December 2003, the plaintiff demanded \$612,000, being the difference between the sum of \$1,208,000 payable by the defendant under clause 10.2.2 and the \$596,000 previously deducted in the progress certificates issued by the architect. On 2 February 2004, the architect advised that the amount of liquidated damages to 30 January 2004 was \$1,502,000. On 4 March 2004, the plaintiff gave notice of termination of the building contract.
- 20 A good deal of evidence was adduced on this application in relation to this cause of action for liquidated damages. The liquidator of the defendant deposed that portion one of the works had been occupied by the plaintiff on 9 August 2003, and that portion two had been occupied by the plaintiff on 1 October 2003. The liquidator deposed that this was done without the written consent of the builder. He asserted that this meant that practical completion had been deemed to occur pursuant to clause 9.1 of the building contract. However, clause 9.1 was amended by special conditions and did not have the effect for which the liquidator contended.
- 21 The liquidator also referred to claims made by the defendant for extensions of time. These have been rejected by the architect. There is a seriously arguable case that the plaintiff is entitled to liquidated damages in an amount of at least \$1,502,000 less \$596,000 deducted from the progress certificate. The plaintiff may be entitled to further liquidated damages up to the time of its termination of the building contract.
- 22 The design and project manager retained by the plaintiff has assessed the value of this claim for liquidated damages in the sum of \$1,030,900, or \$434,900 after allowance of the deduction of liquidated damages in the progress certificate. This is still a very substantial sum. I am satisfied that there is a seriously arguable case that the plaintiff is entitled to at least that amount.
- 23 The plaintiff also says that it has a claim to damages of \$1,327,049 for the cost of rectifying defects or to complete uncompleted work. There are disputes about this claim.
- 24 The plaintiff served a list of defects in October 2004 claiming the sum of \$1,172,700. The liquidator retained a former manager of the defendant company to investigate the claim. He assessed the value of the defects as \$116,000. The liquidator says that this is more than adequately covered by a provision of cash of \$122,288 to the plaintiff in substitution of a bank guarantee.
- 25 The liquidator also complains that the plaintiff has failed to provide him with copies of invoices showing how much the plaintiff has paid to date to rectify the defects. He submits that this reflects on the genuineness of the claim made by the plaintiff. The value of this claim has been considered by the design and project manager retained by the plaintiff. In my view, his opinion that the plaintiff has a good claim in excess of \$1,327,000 shows that there is a serious question to be tried that the plaintiff is entitled to damages in that amount.
- 26 The fact that the claim is disputed, particularly by the subcontractors who did work which is claimed to be defective, and by the manager of the building company who, it is contended, failed to complete the work, or carried out defective work, does not mean that there is not a genuine claim. However, it is unnecessary to go into the further details of these claims.
- 27 On any view, it is clear that the plaintiff has a seriously arguable cause of action against the defendants for amounts which substantially exceed the amount of the debt claimed in the statutory demand.
- 28 Indeed, I did not understand counsel for the defendant to contend otherwise. Rather, he submitted that the liquidator's complaint is that the plaintiff has failed to lodge a proof of debt in the liquidation of the defendant notwithstanding that it has been invited to do so. It was argued that, because no proof of debt had been lodged, the plaintiff was precluded from raising the offsetting claims. No authority was advanced for this proposition, and, put in this form, it cannot be sustained.
- 29 Ultimately, the argument came down to this: that because the plaintiff had not lodged a proof of debt I should find that its asserted offsetting claims were not genuine. There may be force in that contention, if there were any real doubts as to whether the plaintiff's asserted causes of action were arguable. However, extensive evidence was led on this application in relation to the merits of the plaintiff's claims. Indeed, far more evidence was led on that question than is usual on applications of this kind. Some parts, at least, of the plaintiff's claim appear reasonably strong. Thus counsel for the defendant did not seek to advance an argument to demonstrate that the defendant has a contractual entitlement to the debt of \$1,336,567.48 which is the subject of the statutory demand.
- 30 The second difficulty in concluding that the offsetting claims are not genuine because no proof of debt was lodged is that the plaintiff did seek to have its rights under the contract determined by the dispute mechanisms provided by the contract. One such dispute mechanism was the appointment of an expert for the expert determination of matters in dispute. The plaintiff nominated an expert pursuant to that procedure. The defendant did likewise. The expert determination did not proceed, but this was apparently because the defendant had entered into voluntary administration and subsequently into liquidation. However, the fact that the plaintiff invoked the contractual mechanism for asserting its claims is consistent with its holding the belief that the claims were well based. It tends to negate an inference, which, it was said I should draw, that its offsetting claims are not genuine because it has not lodged a proof of debt.

- 31 The next relevant matter is that in December 2004, the liquidator, through his solicitors, threatened to serve a statutory demand for the amount payable pursuant to subs 14(4) of the *Security of Payment Act*. This led to negotiations between the solicitors for the liquidator and the solicitors for the plaintiff with a view to seeking to resolve the dispute.
- 32 The plaintiff clearly evinced the attitude that it was not contractually indebted to the defendant and that it had a claim against the defendant for substantial damages. Again this attests to the genuineness of the claim.
- 33 The reason that the plaintiff did not proceed with the contractual dispute resolution procedures was that its director, Mr O'Brien, on the advice of the company's solicitors, decided not to pursue its claims because he considered the cost of doing so outweighed any return which the plaintiff might receive, owing to the fact that the defendant was in liquidation.
- 34 Although he does not expressly say that the same considerations have dictated his approach to the question of the lodgement of a proof of debt, it is reasonable to infer that if the liquidator rejected a proof of debt for the claims which the plaintiff has already advanced in correspondence, the plaintiff might reasonably apprehend that the costs of litigating an appeal from the rejection of the proof of debt would outweigh any likely return to the plaintiff when proving alongside other unsecured creditors. I do not conclude from the fact that the plaintiff has not lodged a proof of debt that it does not believe that its claims are genuine. The materials on this application show that the causes of action it asserts are seriously arguable.
- 35 It was also submitted by the defendant that even if the statutory demand were to be set aside on the ground that the total of the offsetting claims exceeded the amount of the debt claimed in the statutory demand, any order setting aside the statutory demand should be made subject to conditions (s 459M of the *Corporations Act*). The condition it was submitted ought to be imposed was one requiring the plaintiff to submit a proof of debt.
- 36 I do not think it appropriate to impose such a condition. I think it is a matter for the commercial judgment of the plaintiff whether or not it lodges a proof of debt. One might think it would be well advised to do so, but it is a matter for the plaintiff to assess what may be the costs which might be incurred as a result of its doing so.
- 37 I do not think it appropriate that a creditor issue a statutory demand when it is apparent that there are substantial offsetting claims which exceed the amount of the demand, in order to attempt to force the plaintiff's hand as to whether or not it chooses to lodge a proof of debt. If it does not lodge a proof, it presumably will not be entitled to participate in distributions to creditors. Whether or not the defendant would be entitled now to have judgment entered for the amount of the debt, together with interest, and would be entitled to execute such judgment, is not a question which I need determine.
- 38 For these reasons, I order that the statutory demand dated 14 March 2006 served on the plaintiff by the defendant be set aside. I order that the defendant pay the plaintiff's costs.
- 39 I order that the exhibits may be returned forthwith, but they are to be kept for 28 days.

Plaintiff: M Aldridge SC, B Miles instructed by Colin Biggers & Paisley
Defendant: A Skinner instructed by Mony de Kerloy