

JUDGMENT : BARRETT J : New South Wales, Supreme Court, Equity Division. Corporations List. 27th February 2007

- 1 The plaintiff (which I shall call "Independent") applies for an order ostensibly under s.471B of the **Corporations Act** 2001 (Cth) that it have leave to commence and proceed with a cross-claim against JGE Earthmoving Pty Ltd ("JGE"), an insolvent company in the course of being wound up.
- 2 Because the winding up of JGE is a creditors' voluntary winding up consequent upon voluntary administration under Part 5.3A, I have assumed that the application is intended to be application for leave under s.500(2), since it is that section, rather than s.471B, that applies in such a case. I have approached the application accordingly.
- 3 The proceedings in question are proceedings 9255 of 2005 in the Local Court (Sydney Registry). They were commenced by statement of liquidated claim dated 23 August 2005. The plaintiff named in the statement of liquidated claim is JGE. It sued Stefanutti Construction Pty Limited ("Stefanutti") for the sum of \$50,371.62, being the aggregate of several amounts said to have been payable under tax invoices (alleged also to be payment claims under the **Building and Construction Industry Security of Payment Act** 1999) for the provision of excavation and related services. Stefanutti was apparently undertaking some kind of building project or development and retained JGE to provide those services. In substance, therefore, JGE's liquidated claim was upon a count for work done.
- 4 By a defence dated 27 September 2005, Stefanutti denied liability and put in issue the existence of any contract between JGE and Stefanutti, adding that Stefanutti was at all material times acting on behalf of Independent (then called Stefanutti Construction (Vic) Pty Limited) when it made arrangements to hire certain equipment; also that the tax invoices upon which JGE based its claim were issued to Independent. The allegation of Stefanutti, therefore, was that, to the extent that JGE had any claim for work done, it was a claim against Independent, not Stefanutti.
- 5 In May 2006, Stefanutti filed a cross-claim against Independent. It claimed indemnity or contribution from Independent in respect of any liability Stefanutti was found to have to JGE. The cross-claim refers to a deed of indemnity dated 14 September 2005 and the principle that an agent is entitled to be indemnified by his principal for liabilities incurred within the scope of the agency. The allegation of Stefanutti, clearly enough, is that it acted merely as the agent of Independent.
- 6 A defence to this cross-claim was filed by Independent on 7 June 2006. Independent denied liability to indemnify Stefanutti or to contribute to any amount Stefanutti might be ordered to pay JGE. The defence made it clear that Independent denied that Stefanutti had been the agent of Independent.
- 7 The cross-claim that Independent wishes to pursue against JGE (which I shall call "the proposed cross-claim") has already been filed: it bears a notation to this effect dated 23 October 2006, which presumably means that the application for leave to bring the proposed cross-claim should be regarded as an application for a grant of leave *nunc pro tunc*, even though the application for leave to proceed with it is wholly prospective.
- 8 Independent's proposed cross-claim against JGE is to the following effect:
 1. In mid 2004, Independent requested Stefanutti to supply certain equipment in connection with earthworks which were to be conducted by Independent at Barnawatha in Victoria.
 2. Stefanutti was unable to supply this equipment but undertook (presumably to Independent) to obtain it from JGE.
 3. JGE supplied equipment "to the site at Barnawatha at agreed rates for wet and dry hire".
 4. The equipment supplied by JGE included an excavator but, after Christmas 2004, JGE failed to provide an operator for the excavator, with the result that the excavator was idle and
 - (a) certain other equipment also had to remain idle but Independent had to continue paying hire charges for it; and
 - (b) a replacement excavator had to be brought from Melbourne at a cost of \$2,400.
 5. In addition, JGE invoiced Stefanutti for the supply of certain items at rates not agreed by Independent. Because of this
 - (a) there was a breach of contract by JGE as against Independent; or
 - (b) there was "a negligent breach of authority on the part of" Stefanutti, presumably as against Independent.
 6. Stefanutti was negligent "in that so far as it was acting on behalf of [Independent] it acted without authority and in excess of its authority in agreeing to any increase in rates".
 7. It was agreed between Independent on the one hand and Stefanutti and JGE on the other that certain employees of JGE should be paid wages and entitlements by Independent and the amount paid should be deducted from the invoiced cost of the supply of equipment.
 8. Independent paid the wages and entitlements (including superannuation) of certain employees of JGE but, in breach of the agreement, JGE did not make deductions for superannuation when rendering invoices.
- 9 I must confess at once to some difficulty in piecing together the picture that emerges from these pleadings (including the proposed cross-claim). The statement of liquidated claim seems to proceed on the basis of an allegation by JGE that Stefanutti was the proprietor or developer and had retained JGE to provide excavation or earthworks services – hence JGE's liquidated claim for work done. The position taken by Stefanutti is that, to

the extent that it had requested or obtained services from JGE, it had done so as Independent's agent, so that it was Independent that had any liability for the services provided by JGE; and, moreover, Independent was liable to indemnify Stefanutti in respect of any such liability. Independent, in its defence to Stefanutti's cross-claim, denied that Stefanutti was Independent's agent and denied any liability to indemnify Stefanutti accordingly. So far so good, but when it comes to the proposed cross-claim that Independent wishes to pursue against JGE, Independent seems to accept that JGE was to do the work (although it does not say for whom) and says that Independent asked Stefanutti to supply certain equipment in connection therewith. Perhaps Independent is saying that it was itself the proprietor or developer and that, although Stefanutti was never its agent, it did retain Stefanutti to do certain things as a principal contractor – particularly to supply equipment, which equipment Stefanutti sourced from JGE. The picture that seems to emerge, so far as allegations by Independent go, is that JGE was in a contractual relationship with Stefanutti which was in turn in a contractual relationship with Independent; that JGE overcharged or otherwise committed breaches of contract against Stefanutti; and that the contract between Stefanutti and Independent was such that Independent somehow had to bear the burden of JGE's overcharging of Stefanutti. The basis on which Independent thereby acquired a cause of action against JGE is not stated with any great clarity. It appears, however, to be either or both of breach of contract (that is, some contract direct between JGE and Independent) or breach of a duty of care in negligence owed by JGE to Independent.

- 10 I therefore approach the matter on the basis that the claims Independent wishes to pursue against JGE by means of the proposed cross-claim are either or both of a claim for damages for breach of a contractual obligation owed by JGE to Independent and a claim for damages for breach of a duty of care in negligence owed by JGE to Independent – and that each such claim arises, in part at least (and perhaps it is a substantial part), from the facts, matters and circumstances which form the foundation of the existing pleadings.
- 11 On the footing that the circumstances giving rise to these perceived claims by Independent against JGE arose before the commencement of JGE's winding up in June 2006 (something that does not appear to be questioned), the claims are admissible to proof in that winding up. They are within the s.553(1) description "claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages) ...".
- 12 It is necessary next to refer to events of January 2007. It appears that, on 18 January 2007, the legal representatives of JGE and Stefanutti (but not Independent) appeared in the Local Court upon the hearing of a contested motion that James Leslie Godfrey be substituted as plaintiff in the proceedings. That application was granted and an order was made accordingly. At that point, therefore, JGE ceased being a party to the proceedings and Godfrey became a party in its place.
- 13 The background to the order made on 18 January 2007 is a deed dated 13 December 2006 between JGE and its liquidator, of the one part, and Godfrey, of the other part. JGE was the "assignor" and Godfrey was the "assignee". I should set out in full the recitals to that deed (noting that the references therein to "Stefanutti Victoria" are references to the company I am calling "Independent"):
- "A. The assignor holds the legal and beneficial interest in a claim and cause of action arising from the provision of certain earthworks, excavation and associated services at a site in Barnawartha in the State of Victoria (the 'works') pursuant to an agreement with and on behalf of Stefanutti Construction Pty Limited ('Stefanutti').*
- B. As a result of the provision of the works by the assignor the assignor became entitled to claim from Stefanutti the sum of \$50,371.62 (the 'claim').*
- C. On 23 August 2005 the assignor commenced proceedings No. 9255 of 2005 in the Local Court against Stefanutti Construction Pty Limited claiming monies arising from the works and asserting its claim (the 'proceedings').*
- D. Stefanutti has sought to defend the proceedings and has joined a cross defendant (the 'cross-claim') Stefanutti Construction (Victoria) Pty Limited ('Stefanutti Victoria').*
- E. On 10 July 2006 Christopher Damien Darin was appointed liquidator of the assignor pursuant to a majority vote of creditors.*
- F. The assignor wishes to assign to the assignee all of its right title and interest in the claim and the proceedings pursuant to the terms of this deed."*
- 14 Then followed several operative provisions, of which the first was: *"In consideration for the parties entering into this deed the assignor hereby assigns all of its right title and interest whether legal or equitable in any and all claims arising between it, Stefanutti, Stefanutti Victoria or any other person or entity arising in association with the works, the claim or the proceedings."*
- 15 The order of the Local Court substituting Godfrey as plaintiff in place of JGE was no doubt made on the footing that the written assignment, of which notice was presumably given to Stefanutti, was effective as an assignment at law, so as to deprive the JGE of the rights assigned and to vest them in Godfrey.
- 16 The assignment by JGE to Godfrey occurred after the commencement of JGE's winding up. It follows that, when clause 1 of the deed referred to JGE's right title and interest in and to *"any and all claims arising between it [ie, JGE], Stefanutti and Stefanutti Victoria [ie, Independent] ..."*, it operated, so far as JGE and Independent are concerned, upon such claim as JGE had against Independent after allowing for any operation and impact of

s.553C, a provision to which Mr Chard, solicitor for JGE's liquidator, drew attention in submissions. Section 553C is as follows:

- “(1) Subject to subsection (2), 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.
- (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.”

17 It is now well-established that, in a case to which it applies, s.553C operates at the commencement of the winding up upon and in relation to debts and claims existing at that time so as to make provable in the winding up, or payable to the company, only the net balance of account. This is made clear by the decision of the High Court in *Gye v Mcntyre* (1991) 171 CLR 609 and that of the House of Lords in *Stein v Blake* [1996] AC 243. Those cases involved equivalent provisions of bankruptcy law (in Australia, s.86 of the **Bankruptcy Act** 1966 (Cth)). The way in which such provisions work emerges from the judgment of Buss JA of the Court of Appeal of the Supreme Court of Western Australia in *Krishell Pty Ltd v Nilant* [2006] WASCA 223 (at [116] to [120]).

18 This reasoning in bankruptcy cases is equally applicable to a case involving s.553C of the **Corporations Act**: see, for example, *Barton v Atlantic 3 Financial (Australia) Pty Ltd* (2004) 212 ALR 348.

19 If the deed of 13 December 2006 operated upon a net balance of account produced by s.553C as at the commencement of JGE's winding up, the present case is similar to *Pitt-Owen v Lenin* (2006) 24 ACLC 964. The following passage of the judgment in that case, quoted with apparent approval Buss JA, in *Krishell*, outlines the result reached upon an application of the same kind as is now before me:

“[17] ... The deed of 19 May 2004, if effective as an assignment, was to cause to be assigned to Mr Pitt-Owen any balance due by Mr Lenin to SAG after allowing for any sum due by SAG to Mr Lenin and set-off pursuant to s 553C. This is because the deed operated after the winding up had begun.

[18] But does it follow that ascertainment of the amount to be taken into account against SAG (that is, the sum due by SAG to Mr Lenin) must — or ought most conveniently — be ascertained in the proceeding in which Mr Pitt-Owen, as SAG's assignee, sues Mr Lenin; or may it more appropriately be determined by proof of debt lodged by Mr Lenin in the winding up of SAG?

[19] In my opinion, the matter needs to be determined in the proceedings in which Mr Pitt-Owen, as assignee of SAG, sues Mr Lenin. This is principally because any concept of proof in SAG's winding up by Mr Lenin for the gross amount of any debt due to him is not, in the circumstances, a meaningful concept. Proof for what I have termed the gross amount is precluded by s 553C(1)(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'. Because the subject matter of the assignment is not ascertainable except by reference to this 'balance of account', and because the extant proceedings in which the subject matter of the assignment is pursued by Mr Pitt-Owen are necessarily the occasion for a determination in the first instance of the amount, if any, due by SAG pursuant to the causes of action asserted by Mr Pitt-Owen as assignee, it seems to me inevitable that the court must also determine in those proceedings the amount, if any, due to SAG by Mr Lenin in respect of the matters raised in the cross-claim.”

20 Mr Chard questioned, however, whether s.553C operates in this case (or, more accurately, operated on 6 June 2006 upon circumstances then prevailing). The section is concerned with a case 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”. It is, of course, JGE that is the “insolvent company that is being wound up”. And it is Independent which, on the basis appearing from the proposed cross-claim, “wants to have a debt or claim admitted against” JGE. Section 553C will have operated to produce a set-off, with a net balance to be recognised in one direction or the other, as at the commencement of JGE's winding up (and, therefore, before the assignment by JGE to Godfrey), only if the quality made necessary by the word “mutual” is found to exist in relation to credits, debts or other dealings between JGE and Independent.

21 The relevant concept of “mutuality” was described in the following way in the joint judgment of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Gye v Mcntyre* (above) at p.623: “In the context of s 86, the word ‘mutual’ conveys the notion of reciprocity rather than that of correspondence. It does not mean ‘identical’ or ‘the same’. So understood, there are three aspects of the section's requirement of mutuality. The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the parties which must be considered: see, eg, *Hiley v The Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at p 497. The third requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable for the purposes of set-off under the section. That means that they must ultimately sound in money.”

- 22 I am not satisfied that these requirements are satisfied here. Returning to the Local Court pleadings, we find a claim for liquidated damages by JGE against Stefanutti (which claim is now vested in Godfrey), a claim for indemnity or contribution by Stefanutti against Independent and (in the proposed cross-claim) a claim for damages by Independent against JGE. Conspicuously absent is any money claim by JGE against Independent. Thus, while the several claims arise in a confined factual context, the way they are pleaded (and proposed to be pleaded) does not show a basis, as between JGE and Independent, for a conclusion that there is what s.553C(1)(b) refers to as “*the sum due from the one party*” and “*any sum due from the other party*”. If the proceedings continue and conclude in their present configuration (including the proposed cross-claim), JGE - or, rather, Godfrey as its assignee - may establish a payment obligation owed to JGE by Stefanutti, Stefanutti may establish an indemnification or contribution obligation owed to it by Independent and Independent may establish a payment obligation owed to it by JGE. But what will not emerge is any payment obligation owed by Independent to JGE.
- 23 On this basis, this case cannot be regarded as analogous with *Pitt-Owen v Lenin* (above). The question whether Independent should have leave to proceed against JGE therefore falls to be considered on the footing that the deed of assignment of 13 December 2006 operated not upon any net balance of account as between JGE and Independent but upon the undiminished whole, or gross amount, of any chose in action owed to JGE by Stefanutti.
- 24 The central question, therefore, is whether the applicant for leave has shown that the circumstances of this case are such that there is good reason why Independent’s claims against JGE should be pursued in court rather than through the proof of debt process. The fact that s.553C had operated upon and in relation to the claims, as in *Pitt-Owen v Lenin*, would be a good reason. But, as I have said, no basis is shown to conclude that s.553C has so operated. Furthermore, JGE is no longer a party to the existing proceedings. The claims which it originally asserted are now vested in Godfrey and he has become plaintiff in its place. The liquidator of JGE therefore has no need to concern himself in any way with the existing proceedings. Apart from the possibility that he may be drawn in by the proposed cross-claim, JGE’s liquidator can simply leave the proceedings to be fought out among Godfrey, Stefanutti and Independent.
- 25 Claims of the kind Independent wishes to pursue against JGE are provable in JGE’s winding up. Such claims (that is, claims for damages based on alleged liability in contract and tort) are, as a matter of course, typically pursued by way of proof of debt. The pendency of proceedings in relation to the same facts (or some of them) involving Independent but not involving JGE does not represent any reason for departure from that course. There is no reason why, in the interests of the due and efficient administration of the insolvent estate of JGE, the liquidator should be drawn into and distracted by the litigation among Godfrey, Stefanutti and Independent. The separate claim that Independent considers itself to have against JGE should become the subject of a proof of debt.
- 26 The application of Independent Civil Contractors Pty Ltd for leave under s.500(2) of the **Corporations Act** to commence and proceed with a cross-claim against JGE Earthmoving Pty Ltd in proceedings 9255 of 2005 (Sydney Registry) in the Local Court of New South Wales is dismissed with costs.

Mr W.J. Dalley – Plaintiff instructed by Slater & Gordon Lawyers
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