

JUDGMENT HAMMERSCHLAG J Supreme Court New South Wales Equity Div. Corporations List 13th August 2007

- 1 This is an application under s 459G of the *Corporations Act* 2001 (Cth) to set aside a statutory demand.
- 2 As is now frequently the case, the application is in the context of the operation of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act").
- 3 The statutory demand is dated 21 June 2007 and claims \$48,737.79 being the amount of a summary judgment ("the judgment") which the defendant ("Wesgordon") obtained against the plaintiff ("Ozy") in the Local Court at Sutherland, New South Wales on 20 June 2007. Ozy has appealed the judgment. I was informed from the Bar table that a stay of the judgment is proposed to be sought tomorrow in the Local Court.
- 4 The judgment amount is the sum of two claims, \$39,389.35 and \$7,863.35, arising respectively out of separate building contracts between Ozy and Wesgordon in relation to work done by the Wesgordon firstly at Salamander Bay and secondly at Charlestown Square.
- 5 The learned Magistrate applied s 15 of the Act in giving judgment.
- 6 Under s 15(2) of the Act, Wesgordon was entitled to recover the claimed amounts from Ozy as a debt due to it because it had served a payment claim as provided for in s 13 of the Act in respect of them and Ozy had not responded as provided for in s 14(4) of the Act.
- 7 The object of the Act, as set out in s 3, is to ensure that a person, in this case Wesgordon, is entitled to receive a progress payment by way of a statutory entitlement regardless of whether the relevant construction contract makes provision for progress payments.
- 8 Section 15(4)(b) of the Act precluded Ozy from bringing any cross-claim against Wesgordon in those proceedings or from raising any defence in relation to matters arising under the construction contracts in respect of which the claims were made and judgment given.
- 9 Because of this preclusion, s 32(3) of the Act provides, in effect, that in any proceedings before a court in relation to any matter arising under a construction contract, the court must allow for any payment which has been made in consequence of the operation of the Act and may make such orders for the restitution of any amount so paid.
- 10 This ensures that the payer ultimately has the opportunity of restoring the balance given that it has had to pay before any dispute on the contract has been ventilated with the payee.
- 11 In this application, the plaintiff relied on the affidavit evidence of its director Mr David Tonkin.
- 12 As to the Salamander Bay claim, Mr Tonkin's evidence was that the defendant rendered an invoice dated 10 February 2005 which he says was rendered before the work was completed when the agreement was that the work would only be paid for if that was done to the reasonable satisfaction of a third party, Stockland. He says the work was not completed and he says that Ozy itself ended up having to complete the work after Wesgordon failed to do so.
- 13 In relation to the Charlestown Square work Mr Tonkin says that the claim is for variations which were not agreed.
- 14 It is necessary only to state briefly the test to be met by a plaintiff in establishing a genuine dispute as to a debt the subject of a statutory demand.
- 15 To satisfy the Court that there is a genuine dispute as to the existence or amount of a debt to which the demand relates the plaintiff need only show one issue having a sufficient degree of cogency to be arguable. That test is by no means a difficult or demanding one. It is not expected that the Court will embark upon any extended enquiry, this being a summary procedure. The Court does not seek to resolve competing claims, but to determine whether the claim is made in good faith – which means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful: see *Macleay Nominees Pty Ltd v Belle Property East Pty Limited* [2001] NSWSC 743 per Palmer J; *Solarite Airconditioning Pty Ltd v York International Australia Pty Ltd* [2002] NSWSC 411 at [23] per Barrett J.
- 16 The matters raised by Ozy in relation to both claims meet that low threshold. Lack of agreement with respect to the claim for variations and the rendering of an invoice before the work was completed where the agreement was that payment would be due only when the work was completed (leaving aside any defects) would, if true, be defences, and, if permitted to be raised, satisfy the requirements for a genuine dispute.
- 17 However, Mr Walsh of counsel for Wesgordon put that because the amount claimed is the subject of a judgment debt, Ozy could not assert a genuine dispute that it was owing. He relied on *Barclays Australia (Finance) Limited v Mike Gaffikin Marine Pty Limited* (1996) 21 ACSR 235 in which McLelland CJ in Eq held that the fact that there was an appeal on foot did not create a genuine dispute with respect to a debt which was the subject of a judgment of a court of competent jurisdiction. The reasoning is that absent any stay, even pending an appeal, there can be no genuine dispute as to the existence of the judgment debt because the fact of the debt is res judicata between the parties. In the present case there is a judgment debt and no stay, although Ozy has instituted an appeal from the judgment.
- 18 In *Eumina Investments Pty Limited v Westpac Banking Corporation* (1998) 84 FCR 454 at 459 Emmett J held as follows:
"One circumstance where it may be unjust for a demand to stand, in my opinion, is where there is a judgment or order which precludes a contention that there is a genuine dispute or an offsetting claim, but there is on foot a bona fide

appeal from that judgment or order. In those circumstances, the Court may, if justice requires, and subject to the possibility of imposing conditions as contemplated by s 459M, set aside a demand which is based on the judgment or order which is subject to appeal or in respect of which, if an appeal succeeds, there would be an offsetting claim."

19 Emmett J went on to hold that:

"It is, in my opinion, appropriate for a Court to exercise the discretion conferred by s 459J(1)(b) where the Court is satisfied that there is an appeal based on reasonable and arguable grounds which, if successful, would result in the existence of an offsetting claim. The expression "reasonable and arguable grounds" is suggested by the decision of the Full Court in *Ahern v Deputy Commissioner of Taxation* (Qld)(1987) 76 ALR 137 at 148."

20 In *Midas Management Pty Ltd v Equator Communications Pty Ltd* [2007] NSWSC 759 the defendant had a final judgment in the Local Court but had appealed it to a single judge of this Court. I imposed, as is permitted by s 459M of the Corporations Act 2001 (Cth), as a condition of the setting aside of the statutory demand, a requirement that the plaintiff pay into Court the amount of the judgment debt.

21 Mr Walsh put that this was the appropriate course to take in this case.

22 However, neither in *Midas Management Pty Ltd v Equator Communications Pty Ltd* nor in *Eumina Investments Pty Limited v Westpac Banking Corporation* was the judgment debtor precluded by statute or otherwise from putting its defence or any cross-claim in the court which gave judgment against it and upon which the statutory demand was based. In this case, Ozy was precluded from so doing by the provisions of the Act.

23 It is apparent from the judgment that the Magistrate correctly applied s 15(4)(b) of the Act holding that Ozy was not permitted to bring any cross-claim against Wesgordon or to raise any defence in relation to matters arising out of the contracts in question.

24 In *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559 White J held at [11] – [12] that because of the provisions of s 32 of the Act which provide for restitution of amounts paid because of the operation of the relevant Part of that Act, a party against whom a judgment is entered can maintain its claim for restitution as an offsetting claim under s 459H(1)(b) of the Corporations Act 2001.

25 His Honour did not make reference to either *Barclays Australia (Finance) Limited v Mike Gaffikin Marine Pty Limited* or *Eumina Investments Pty Limited v Westpac Banking Corporation*.

26 Having regard to the provisions for restitution in the Act, it seems to me doubtful that a judgment which comes about because of the statutory regime in the Act in circumstances where a defendant cannot raise a defence or any cross-claim which might nullify it is a final judgment creating a *res judicata* between the parties so as to preclude a genuine dispute in relation to the judgment debt for the purposes of s 459H (as opposed to not precluding the raising of an offsetting claim).

27 It is not necessary to decide that question now because, in my view, the present circumstances are "some other reason why the demand should be set aside" within the provisions of s 459J(1)(b) of the Corporations Act 2001.

28 In *Eumina Investments Pty Limited v Westpac Banking Corporation* it was the existence of an appeal based on reasonable and arguable grounds which, if successful, would have expunged the debt, which constituted the "other reason". Here, it is the fact that the Act prevented Ozy from raising a defence or offsetting claim which would have had the same effect.

29 In *Midas Management Pty Ltd v Equator Communications Pty Ltd* there was a judgment after a full contest. Also, in *Midas Management Pty Ltd v Equator Communications Pty Ltd* if the appeal succeeded there would be no debt, whereas if it failed, the plaintiff would have conclusively been indebted to the defendant.

30 In this case, if the appeal fails, it does not mean that Ozy is conclusively indebted to the defendant. It will still be entitled to litigate its defences or cross-claims and obtain restitution.

31 The circumstances are distinguishable from those in *Midas Management Pty Ltd v Equator Communications Pty Ltd* and I do not consider that they warrant the imposition of a condition to the setting aside of the demand that Ozy pay money into Court.

32 The order of this Court will be that the statutory demand dated 21 June 2007 for the sum of \$48,739,79 served by the defendant on the plaintiff on 22 June 2007 be set aside.

33 On the question of costs, Wesgordon tendered two letters from the defendant's solicitors to the plaintiff's solicitors. Mr Walsh put that the convenient course was suggested that there should be a stay in relation to the enforcement of the judgment debt in the Magistrate's court provided the amount was paid into Court and that consequently the order as to costs should, in the circumstances, not follow the event but be costs in the appeal.

34 It seems to me, however, that the plaintiff has been successful in these proceedings and that the ordinary rule that costs should follow the event has not been displaced.

35 The defendant is to pay the plaintiff's costs of the proceedings.

F. Austin (Plaintiff) instructed by Lyons & Lyons

M.J. Walsh (Defendant) instructed by Macedone Christie Willis