

**JUDGMENT : Master Macready.** Equity Division. Supreme Court New South Wales. 11<sup>th</sup> June 2002.

- 1 This is an application under section 459G of the Corporations Act to set aside a statutory demand which was served by the defendant on the plaintiff. The statutory demand claimed the sum of \$10,486.93 said to be for "balance of credit account for frames and trusses delivered to Bexley".
- 2 The genuine dispute is said to arise because the frames that were to be used in the construction by the plaintiff of a unit project at Bexley were warped on installation and some of the windows that were provided had not been correctly made or had not been made up at all. The materials were supplied on 25 November 2000 and according to Mr Frisoli he raised the problems with the defendant on 27 December 2000. A meeting was held on site on 24 January 2001 between Mr Frisoli and Mr Cairns, a representative of the defendant, when it is said that Mr Cairns acknowledged that there was a problem. The plaintiff says that despite attempts to replace the material it was eventually compelled to purchase a supply of timber from an alternate supplier.
- 3 Various reports on the problem were given in evidence and in addition there was an estimate of the costs for rectification of the frames which after allowing for the time of employees, cost of experts and repairs came to \$32,800. There is also material put on by the defendant to suggest that the timber was milled to the appropriate Australian standards and there were suggestions that the job was left unprotected and the warping was a result of this problem. The resolution of this factual difficulty is not for these proceedings and the question is whether there is a genuine dispute or an offsetting claim.
- 4 This matter is complicated because it is apparent that the plaintiff company was not the company that carried out the construction work. The plaintiff company at some earlier time was known as Yatooma Constructions Pty Ltd and was the company that applied for a credit account with the defendant. Its ACN number was 081 087 667. This is the ACN number shown on the common seal, which was applied to the application for credit even though the ACN number was wrongly filled out on the credit account. The company that did the development and building work was described in the contract as Yatooma Pty Ltd. Its ACN number was 002 073743. There was also another company which at one stage was called Yatooma Constructions Pty Ltd that had an ACN of 09308 6714. That was a company that corresponded with the defendant during the course of the dispute and is now known as **Tooma** Constructions Whetherill Park Pty Ltd. There is also another company now known as Yatooma Constructions Pty Ltd having an ACN number of 095841731.
- 5 One thing that seems clear from the recitation of the numbers referred to above is that the company that actually purchased the goods from the defendant is a different company from the company that used them in the construction of the units at Bexley. The plaintiff took no steps to explain any of these matters or suggest there was any relationship between the relevant companies. The plaintiff suggests that these matters were irrelevant as the timber had been supplied with various defects and accordingly this was an answer under the Sale of Goods Act. In the affidavit in support of the application a claim was made that there was a failure to provide materials, which were fit and proper for the purpose for which they were ordered. This was a reference to the provisions of section 19 (1) of the Sale of Goods Act. This was sought to be expanded in submissions to include a claim for a breach under section 19 (2) that the goods should be of merchantable quality.
- 6 That claim was resisted on the basis that it had not been raised in the affidavit in support filed within time. However that principle is not applicable to matters of law that would be open to the plaintiff if the facts set out in the affidavit demonstrated a breach of warranty of merchantable quality. See **Callite v Peter John Adams & Ors** [2001] NSWSC 52. The breach of warranty would allow a claim under s 54(a) of the **Sale of Goods Act** and thus raise a genuine dispute.
- 7 The other way in which the defendant suggested that there was no genuine dispute flowed from provisions in the invoices for the supply of the goods in question. Each of the invoices have the following words at the foot of the invoice: -- "*Invoices are claims for payment under the Building and Construction Industry Security of Payments Act 1999* "
- 8 It was submitted that under the Act and in particular under section 14 in the absence of an appropriate counterclaim there could be no dispute as to the amount that is due. This submission requires a consideration of the provisions of the Act.
- 9 The Act operates to grant a statutory entitlement to a progress payment in circumstance where the relevant construction contract fails to do so. The object of the Act is set out in s 3(1), which states: "*The object of this Act is to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.*"
- 10 Part 2 of the Act gives rights to progress payments both where the relevant contract does and does not provide for an amount of a progress payment. All that is required is that the relevant work or supply of goods and services is under a construction contract. Part 3 of the Act deals with the procedure for recovering progress payments. This procedure under Division 1 has provision for service of claims and responses thereto. Division 2 deals with adjudication of disputes which arise under the process dealt with in Division 1. Division 1 includes sections 13 and 14.
- 11 Section 13 provides:  
"(1) A person who is entitled to a progress payment under a construction contract (the claimant) may serve a payment claim on the person who under the contract is liable to make the payment.

- (2) A payment claim:
- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
  - (b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done (or related goods and services supplied) to which the payment relates (the claimed amount), and
  - (c) must state that it is made under this Act."
- 12 Section 14 reads:
- "(1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
- (a) must identify the payment claim to which it relates, and
  - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
- (a) a claimant serves a payment claim on a respondent, and
  - (b) the respondent does not provide a payment schedule to the claimant:
    - (i) within the time required by the relevant construction contract, or
    - (ii) within 10 business days after the payment claim is served,
 whichever time expires earlier,
- the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.
- 13 It is conceded that no payment schedule was provided.
- 14 The consequences of failing to make a progress payment in accordance with these sections is set out in sections 15 and 16. The remedy is to recover the unpaid portion of the "claimed amount" as a debt due to the claimant in any court of competent jurisdiction and serve a notice of suspension of work. The "claimed amount" is the amount of a progress payment claimed under s 13. What the sections do is give a right, inter alia, to recover progress claims where the contract makes no provision for such claims. Section 14 when it creates a liability does so in respect of the "claimed amount" and makes a sum payable as a progress amount. The section does no more than bring forward part of an amount which is normally not due in respect of an entire contract until completion of the whole of the work.
- 15 Even if the defendant's submission that no dispute could arise under the Act in the absence of an appropriate counterclaim were correct, s 32 makes it clear that the parties retain their rights arising under the contract and apart from the Act. That section provides:
- 32 Effect of Part on civil proceedings**
- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
- (a) may have under the contract, or
  - (b) may have under Part 2 in respect of the contract, or
  - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
  - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.
- 16 Therefore, even if it were the case that the plaintiff were not entitled to dispute the payment claim under the provisions of the Act, that would not affect their entitlement in law to assert a genuine dispute under s 459G.
- 17 This leaves the genuine dispute in respect of the claim for lack of merchantable quality. In my view the materials show a genuine dispute and there is evidence of costs incurred in rectification totalling \$32,818.85. Under s 54(3) the loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. This, however, is only a prima facie rule and where there is a defect which was hidden (as alleged here) the ordinary rule in s 54(2) would apply. Having regard to these matters I am satisfied that there is a genuine dispute as to the amount of the demand.
- 18 I set aside the demand and order the defendant to pay the plaintiff's costs.

Mr R.K. Newton for plaintiff instructed by The Law Partnership  
 Mr J.T. Johnson for defendant instructed by Sally Nash & Co