

JUDGMENT: SOUTHWOOD J SUPREME COURT OF THE NORTHERN TERRITORY 5 February 2007

Introduction

- [1] This is an application pursuant to Div 3 of Pt 5.4 of the Corporations Act (Cth) for an order that a creditor's statutory demand issued by the defendant against the plaintiff be set aside. The statutory demand is dated 21 December 2006. In it the defendant demands that the plaintiff pay the defendant the sum of \$332,803.20 being the amount of a debt owed by the plaintiff to the defendant pursuant to an adjudicator's determination under s 33 of the Construction Contracts (Security of Payments) Act 2004 (NT).
- [2] The plaintiff has applied to set aside the statutory demand on the grounds that the amount claimed in the statutory demand is genuinely disputed; the plaintiff has offsetting claims against the defendant; and because Jokhil Pty Ltd, the owner of Char Restaurant, is adversely affected by the existence of workmen's liens on the property on which the restaurant is situated.

Factual background

- [3] The background to the application is as follows. On or about 5 April 2006 the plaintiff and the defendant entered into a construction contract for alterations and additions to Old Admiralty House in Darwin to accommodate a restaurant and bar known as Char Restaurant. The property is owned by a company called Jokhil Pty Ltd. The work was extensive and included the demolition and removal of various sections of the old building as marked on the plans, structural upgrading of the old building and the area under the old building, construction of new building work for a kitchen, associated service area and toilets, construction of a perimeter fence, and associated stormwater, electrical and hydraulic works. There was also associated work done by other entities which the defendant was to co-ordinate.
- [4] The parties' construction contract incorporates Australian Standard General Conditions of Contract 4000-1997 ("the General Conditions of Contract"). The General Conditions of Contract enable the contractor to make progressive claims for payment of the adjusted contract price. The claims are to be paid by the principal on account after certification by the superintendent.

- [5] Clause 37 of the General Conditions of Contract provides, inter alia, that:

37 Payment

37.1 Progress claims

The contractor shall claim payment progressively in accordance with Item 28.

An early progress claim shall be deemed to have been made on the date for making that claim. Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract.

37.2 Certificates

The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:

a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and

b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

- [6] The defendant made nine progress claims by issuing invoices for work it says it completed under the construction contract including undertaking and completing variations to the original scope of work under the construction contract. The contract superintendent accepted the invoices as progress claims under the construction contract and issued progress certificates in respect of progress claims numbered 1 to 6 inclusive. However, the superintendent did not issue progress certificates for progress claim invoices numbered 7, 8 and 9. Nor did he do so for the final progress claim dated 26 September 2006. The final progress claim included claims for parts of the works that were included in earlier progress claims but had not been certified by the superintendent or paid by the plaintiff.
- [7] As a result of the superintendent's failure to issue progress certificates for the progress claims referred to above and as a result of the plaintiff's failure to pay the progress claim dated 26 September 2006, the defendant by letter dated 3 November 2006 gave the plaintiff notice of a payment dispute as to the final progress claim dated 26 September 2006 and of the defendant's intention to have the payment dispute adjudicated under the Construction Contracts (Security of Payments) Act. On 10 November 2006 Mr Cameron Ford, a legal practitioner,

was appointed adjudicator of the payment dispute by the Territory Construction Association. On 15 December 2006 the adjudicator determined that an amount of \$328,128.40 was due and payable by the plaintiff to the defendant. He determined that the plaintiff should pay the defendant the sum of \$328,128.40 plus interest of \$4,674.80 being a total of \$332,803.20.

- [8] he plaintiff did not contest the adjudication on the merits of the payment dispute. Instead the plaintiff submitted in its response to the adjudicator that the defendant's claim for adjudication was not made in time and the dispute was too complicated a matter to be referred to adjudication. None of these arguments was pressed during this application.
- [9] t the same time that the defendant gave the plaintiff notice of the payment dispute the defendant also gave the plaintiff notice of a dispute pursuant to clause 42.1 of the General Conditions of Contract. As a result various disputes are in the process of being referred to arbitration including the defendant's applications for extensions of time to complete the work under the construction contract.

The plaintiff's case

- [10] The plaintiff submitted as follows. There is a genuine dispute between the plaintiff and the defendant about the existence and price of the variations to the scope of the works claimed by the defendant in the statutory demand. The Construction Contracts (Security of Payments) Act (NT) acknowledges the plaintiff's continuing right to dispute the amounts of the variations claimed by the defendant in arbitration or court proceedings. If the plaintiff is successful in reducing the amount of the variations claimed under the contract, it can then claim restitution for any over payment made under the adjudicator's determination. The plaintiff's right to seek restitution has been held to be an offsetting claim for the purposes of s 459H: see s 47 of the Construction Contracts (Security of Payments) Act (NT) and *CCD Group Pty Ltd v Premier Drywall Pty Ltd* [2006] NSWSC 1012 at pars [48] to [53]; *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* [2003] NSWSC 929; (2003) 202 ALR 680; *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553. In addition the plaintiff has a number of offsetting claims against the defendant including a claim for liquidated damages caused by the defendant's delay in completing the construction works; the plaintiff's entitlement to retain a percentage of the contract sum as security during the defects liability period; and a claim based on proceedings in respect of certain workmen's liens.

The debt under the Construction Contracts (Security of Payments) Act

- [11] The defendant argues that under the Construction Contracts (Security of Payments) Act the plaintiff must pay the amount determined by the adjudicator. The determined amount is a statutory debt which cannot be contested as payable on account. The defendant says that there is no justiciable dispute that ought to be raised against the liability of the plaintiff to pay the amount determined by the adjudicator otherwise the express objects of the Construction Contracts (Security of Payments) Act would be defeated; and, that the plaintiff's right to pursue dispute of the substantive issues as may stand behind the progress payment obligation does not give rise to a genuine dispute as contemplated by the Corporations Act to this statutory debt.
- [12] I do not accept the defendant's argument. It is misconceived. The fact that it cannot genuinely be disputed that the determined amount is payable on account does not lead to the conclusion that there is no genuine dispute about the extent of the parties' respective liabilities under the construction contract for the purposes of s 459H of the Corporations Act: *CCD Group Pty Ltd v Premier Drywall Pty Ltd* (supra) at pars [48] to [53]; *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* (supra); *Demir Pty Ltd v Graf Plumbing Pty Ltd* (supra).
- [13] Before dealing with the relevant provisions of the Construction Contracts (Security of Payments) Act, it is helpful to note that the effect of clause 37 of the General Conditions of Contract is that either the progress certificate issued by the superintendent or the progress claim itself is to be the sole warrant of payment to the defendant and payment is to be made notwithstanding any argument as to the correctness of the progress certificate: *Graham Allen Earthmoving Pty Ltd v Woodwark Bay Investment Corporation Ltd* (unreported, (No 4304/1988) Queensland Supreme Court, Dowsett J, 15 December 1988); *Wulguru Heights Pty Ltd v Merritt Cairns Constructions Pty Ltd* [1995] 2 Qd R 521; *Blue Chip Pty Ltd v Concrete Constructions Group Pty Ltd* [1997] 1 Qd R 6; *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (1998) 14 BCL 215. If the superintendent fails to issue a progress certificate within the period specified by clause 37 of the General Conditions of Contract following the receipt of a progress claim, the progress claim is deemed by the General Conditions of Contract to be the progress certificate.
- [14] The payments of progress claims are made on account without prejudice to the subsequent entitlement of the plaintiff to challenge the amount of the progress certificate or the amount of the progress claim or the ultimate entitlement of the parties under the construction contract: *Pearl Bay Corp Pty Ltd v Lodur Pty Ltd* (2001) 19 ACLC 982 at par [12]. While such challenges as to the amount of a progress certificate or a progress claim cannot be relied on as a set-off or a bar to the defendant's entitlement to be paid the amount of a progress certificate or the amount of a progress claim, such challenges may be pursued subsequently against the defendant.
- [15] There is considerable authority to support the proposition that an offsetting claim or a dispute can be raised on an application to set aside a statutory demand even though the company was contractually prevented from raising it in a proceeding for the debt claimed, provided it could have been disputed or raised in a separate proceeding: *Pearl Bay Corp Pty Ltd v Lodur Pty Ltd* (supra) at par [12]. While the defendant's contractual entitlements may mean that a counterclaim cannot stand in the way of a progress payment that does not mean that the plaintiff is precluded from bringing a claim in relation to the construction contract against the defendant in separate proceedings.

- [16] The Construction Contracts (Security of Payments) Act establishes a summary dispute resolution process that facilitates the rapid resolution of payment disputes arising under a construction contract and a mechanism for the rapid recovery of payments under a construction contract: s 3(2). Relevantly a payment dispute arises, inter alia, when the amount claimed in a progress claim is due to be paid under the contract and the amount has not been paid: s 8. The adjudicator's determination is final in the sense that the adjudicator cannot subsequently amend or cancel the dispute and a party to the dispute cannot later apply for adjudication of the dispute: s 43. The adjudicator's determination is binding on the parties to the construction contract under which the payment dispute arose even if other proceedings relating to the payment dispute have been started before an arbitrator or another person or a court: s 40; a party that is liable to pay an amount under a determination must do so on or before the date stated in the determination: s 41(1); and the determination may be enforced as a judgment for a debt in a court of competent jurisdiction: s 45.
- [17] However, payments made by a principal in accordance with the determination of an adjudicator are payments on account: s 42. Payment of the amount of the determination is taken to be an advance towards the total amount payable under the construction contract by the principal to the contractor: s 42(2). The provisions of the Construction Contracts (Security of Payments) Act do not prevent a party to a construction contract from starting proceedings before an arbitrator, another person or a court in relation to a dispute or other matter arising under the construction contract. An arbitrator or other person or a court dealing with a matter arising under a construction contract may make an order for the restitution of the amount paid or any other appropriate order relating to the determination: s 47(1) and (4). Except for a review a determination to dismiss an application without making a determination of its merits, a decision or determination of an adjudicator arguably cannot be appealed or reviewed: s 48(3).
- [18] The Construction Contracts (Security of Payments) Act is primarily concerned with maintaining a contractor's cash flow, not with determining its ultimate rights: *Demir Pty Ltd v Graf Plumbing Pty Ltd* (supra) at par [19]. The Act does not affect the ultimate recovery of final amounts due between the parties based on their legal rights: *CCD Group Pty Ltd v Premier Drywall Pty Ltd* (supra) at par [48].
- [19] As against the above, the provisions of Div 3 of Pt 5.4 of the Corporations Act establishes a regime whereby a statutory demand is set aside whenever there is a genuine dispute or offsetting claim as defined. Even if it cannot be disputed that the amount of an adjudicator's determination is to be paid on account, the provisions of the Corporations Act cannot be construed so that they do not relate to a genuine dispute about the ultimate amount to be paid to the defendant under the construction contract or to a claim alleged to offset the adjudicator's determination: *CCD Group Pty Ltd v Premier Drywall Pty Ltd* (supra) at pars [48] to [53]; *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* (supra); *Demir Pty Ltd v Graf Plumbing Pty Ltd* (supra).

The test for "genuine dispute" under Div 3 of Pt 5.4 of the Corporations Act (Cth).

- [20] The test for determining whether a "genuine dispute" has arisen for the purposes of s 459H of the Act is stated in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785: per McLelland CJ at 787:
- It is however necessary to consider the meaning of expression "a genuine dispute" where it occurs in section of 459H. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with the undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to (it's) truth" (cf *Eng Mee Young v Letchumanan* (1980) AC 331 at 341) or "a patently feeble legal argument or an assertion of facts unsupported by evidence".*
- [21] All that the legislation requires is that the court concludes that there is a genuine dispute. A court must bear in mind that it is not expected to finally determine the rights and obligations of the parties or to express a view on the ultimate question or to form an opinion on the likely outcome of the proceedings: *Scolaro's Concrete Construction Pty Ltd v Schiavello Commercial Interiors (Vic) Pty Ltd* (1996) 62 FCR 319; *Spacorp Australia Pty Ltd v Myer Stores Ltd* (2001) 19 ACLC 1270 at pars [4] to [5].
- [22] The following principles apply when considering assertions about offsetting claims:
1. The offsetting claims must be "arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful": *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743; *Cooloola Dairys Pty Ltd v National Foods Milk Ltd* [2004] QSC 308; [2005] 1 Qd R 12
 2. "Anyone can make a claim to a right of set off against a creditor. What the definition in s 459H (5) requires, however, is that it be 'genuine'. The same word in s 459H (5) has already elicited so many synonyms and shades of meaning that it will not help to add more. Its antithesis is to be seen in the word 'artificial'. The claim for set off against the debt demanded must not have been manufactured or got up simply for the purpose of defeating the demand against the company. It must have an existence that is objectively demonstrable independently of the exigencies of the demand which evoked it.": *JJMMR Pty Ltd v LG International Corp* [2003] QCA 519 at par [18]; *Cooloola Dairys Pty Ltd v National Foods Milk Ltd* [2004] QSC 308; [2005] 1 Qd R 12

The existence of a genuine dispute/offsetting claim

- [23] The plaintiff relied on the following disputes and offsetting claims as the basis for setting aside the defendant's statutory demand:

1. Disputed variation claims totalling \$83,392.38. In this regard the plaintiff relied on clause 36 of the General Conditions of Contract and paragraphs 18 to 26 inclusive of the affidavit of John Harold Kilroy sworn on 11 January 2007.
 2. A claim for additional security retention of \$34,561.60 pursuant to clause 5 of the construction contract. In this regard the plaintiff relied on paragraphs 15 and 16 of the affidavit of John Harold Kilroy sworn on 11 January 2007.
 3. A claim for liquidated damages of \$84,000 for delay and failure to complete the contract works on time pursuant to clause 34.7 of the construction contract. In this regard the plaintiff relied on paragraphs 28 to 34 inclusive of the affidavit of John Harold Kilroy sworn on 11 January 2007.
 4. The existence of Workmen's Liens claims brought by sub-contractors against Johkil Pty Ltd totalling \$117,420.93. In this regard the plaintiff relies on paragraphs 36 to 44 inclusive of the affidavit of John Harold Kilroy sworn on 11 January 2007.
 5. A claim for additional security retention of \$2,500 for retention on the undisputed variations claims of, say, \$100,000 pursuant to clause 5 of the construction contract. In this regard the plaintiff relied on paragraph 17 of the affidavit of John Harold Kilroy sworn on 11 January 2007.
 6. A dispute as to the defendant's entitlement to the interest of \$4,674.80 determined by the adjudicator. In this regard the plaintiff relied on paragraph 35 of the affidavit of John Harold Kilroy sworn on 11 January 2007.
- [24] On the affidavit material before the court the superintendent has allowed \$137,253.62 of the total variations claimed by the defendant of \$185,566.80. On this basis I accept that there is a genuine dispute as to \$48,313.18 of the claimed variations. While the plaintiff asserts a dispute in relation to \$83,392.38 of the claimed variations the affidavit material does not provide sufficient evidence to show the basis of the dispute. The plaintiff relies on mere assertion. He has not been qualified to make such assertions. For example, it is said that of the \$71,532.45 claimed for electrical works only \$32,451 is allowable. The figure of \$32,451 is said to be based on a report from an independent assessor. However, the independent assessor is not identified, no report from the assessor was tendered in evidence and no explanation for the difference between the sum of \$71,532.45 and the sum of \$32,451 is given.
- [25] I accept that the plaintiff has an arguable offsetting claim for security retention in the sum of \$34,561.60 which is 2.5 per cent of the original construction contract price of \$1,382,520. Clause 5.1 of the General Conditions of Contract provided that security shall be provided in accordance with item 13 or 14 of the construction contract. Clause 5.4 of the General Conditions of Contract provides that upon the issue of the certificate of practical completion security shall be reduced by the percentage amount in item 13(f) or 14(d) of the construction contract namely, 50 per cent. The evidence reveals that retention monies were to be deducted at a rate of 5 per cent of the value of the work completed at the time that each progress claim was made and while no certificate of practical completion has been issued the plaintiff concedes that practical completion was reached on 18 August 2006.
- [26] The defendant made progress claims in such a manner that the amount claimed in each progress claim by the defendant was the total amount of the defendant's claim to the contract price to date less amounts paid by the plaintiff as at the date of the progress claim. The amounts paid by the plaintiff to the defendant were always net of the security retention monies. The effect of payment of the amount determined by the adjudicator would be that the plaintiff would not keep any security retention money which is arguably inconsistent with the provisions of clause 5 of the General Conditions of Contract.
- [27] I accept that the plaintiff arguably has an offsetting claim for liquidated damages of \$86,000. The date for practical completion stipulated in the contract was 30 June 2006. The evidence before the court arguably establishes that practical completion was not achieved until 18 August 2006 and that the superintendent only allowed an extension of time of six days. There was arguably a compensable delay of 43 days in achieving practical completion. Clause 34.7 of the General Conditions of Contract provided that if the work under the contract did not reach practical completion by the date for practical completion the superintendent shall certify as due and payable to the Principal, liquidated damages in item 24 being \$2000 per day for every day after the date for practical completion to and including the earliest date of practical completion. The defendant is in the process of submitting its claims for an extension of time to arbitration.
- [28] I do not accept that the plaintiff has an offsetting claim in respect of the workmen's liens claims that have been brought against Johkil Pty Ltd by the subcontractors of the defendant. Under the relevant provisions of the Corporations Law there is a requirement of mutuality. The offsetting claim must be a claim by the plaintiff against the defendant in the plaintiff's own capacity: *PCH Group Ltd v Hallbridge Pty Ltd* (2002) 20 ACLC 1298 at pars [13] to [18]. Nor do the claims by the subcontractors against Johkil Pty Ltd and the need for Johkil Pty Ltd to obtain finance constitute other reasons as to why the statutory demand should be set aside under s 459J(1)(b) of the Corporations Act. There are other procedural steps that the plaintiff and Johkil Pty Ltd can take to ensure that there is no double payment of the amounts claimed by the sub-contractors and that the defendant is not unjustly enriched.
- [29] I accept that the plaintiff arguably has a claim for additional security being 2.5 per cent of \$137,253.62 being the total amount of variations approved by the superintendent. That is, the plaintiff has an arguable claim for the amount of \$3,431.34.

[30] I do not accept that the plaintiff has an arguable claim to a reduction in the amount of interest determined by the adjudicator. Under s 35 of Construction Contracts (Security of Payments) Act interest is awarded on the amount of the overdue payment under the construction contract as determined by the adjudicator. The plaintiff has not asserted that it has any claim to payment of interest.

Adjustment

[31] Accordingly I determine that the substantiated amount of the statutory demand is \$160,497.08. I make an order reducing the amount of the statutory demand to the sum of \$160,497.08 and I declare the demand to have had effect, as so varied, from when the demand was served on the plaintiff.

[32] The fact that the amount of the statutory demand has been reduced does not of itself mean that the sum of \$332,803.20 does not remain due and payable under the provisions of the Construction Contracts (Security of Payments) Act. Nor does it mean that payment of the sum of \$332,803.20 may not be enforced by whatever other means are lawfully available to the defendant.

[33] I will hear the parties further as to whether there should be an order that extends the period for compliance with the statutory demand as to costs.

Plaintiff: J Reeves QC instructed by Morgan Buckley
Defendant: C Cureton instructed by Appellant: Minter Ellison