JUDGMENT HIS HONOUR YOUNG CJ in Eq : Supreme Court of New South Wales : 13th August 2001

1 This is an application under s 459G of the Corporations Law to set aside a statutory demand in rather odd circumstances. The plaintiff is a developer and the defendant is a builder. They entered into a standard form building contract on 2 February 2000 in respect of a project at Bourke Road Alexandria.

2 The parties were in serious dispute it would seem, from the material presented to me on this application, which, mercifully, was not the whole of the material, by October 2000.

3 The builder put in Progress Claim No 10 of 18 December 2000 for $617,674.05. It put in Progress Claim No 11 on 2 February 2001 in the amount of $582,467.01. In respect of Progress Claim No 11 the developer paid some $300,000, which meant that on 13 February 2001 revised Progress Claim No 11 was made in the sum of $269,945.28. That claim was, it would seem on the material before me, a proper Progress Claim under clause 35 of the building contract, which then would be picked up by s 11 of the Building and Construction Industry Security of Payment Act 1999, so that it would be due and payable fourteen days afterwards, ie on 27 or 28 February 2001.

4 The exact amount of revised Progress Claim No 11 was the subject of a statutory demand which was served on or about 15 February 2001.

5 The developer, on 7 March 2001, about twenty days after service and so within time, made application to set aside the statutory payment pursuant to s 459G of the Corporations Law.

6 The originating process claimed that the application was made based upon the developer's allegation that on 12 February 2001 the developer and the builder had reached an agreement that any indebtedness of the developer to the builder would be paid by way of a payment schedule, first payment on 31 March 2001.

7 I have looked at the evidence which has been presented by the developer and am abundantly satisfied that there was no such agreement; there was merely an exchange of possibilities. On all other ways of looking at the case, the developer also fails. Thus, if there was such agreement there was no consideration for it; if there was an agreement and there was consideration for it, it was terminated by acceptance of a repudiation. Alternatively, there was an agreement which could be classed as an Accord and Satisfaction and that no satisfaction was ever forthcoming. Whichever way one looks at it, the ground is just not made out.

8 On the opening of the case today, Mr O'Loughlin for the developer said that he wished to amend to add the words "and on the basis that there is an offsetting claim which exceeds the amount of the payment". Mr Pesman for the builder strongly resisted any such amendment, but it was agreed that I would hear the whole application and rule on the amendment when dealing with the matter finally.

9 The details of the alleged cross-claim are set out in the affidavit of Mr Peter D Harrison of 27 June 2001. The basis is liquidated damages for thirty-four weeks at $10,000 per week under clause 39 of the contract, being between 16 October 2000 and 8 June 2001, plus some $48,513.00 for damages for breach independently of the contract.

10 There is a lot of doubt about that claim for a number of reasons, the most significant of which is that there would have been, had that claim been correct, $170,000 worth of liquidated damages to be deducted from the revised Progress Claim No 11 in February, but there is not one mention of that in the letter of 19 February 2001 from the developer to the builder who promised to pay $100,000 at the end of March and April 2001 and any balance by 30 June 2001. There are other reasons that may be put up against it as well.

11 On perhaps a suggestion from the Bench, there was then a further application to amend by adding a further ground, and that is that the debt in the statutory demand was not due and payable at the date the statutory demand was issued.

12 This appears to be correct, because s 11 of the Act makes the amount in a progress certificate payable fourteen days after the demand and, on any view of it, that fourteen days had not expired. Mr Pesman tried to get over the point by submitting that Progress Claim No 10 would, in any event, have covered it, but it is a little difficult to move to the figures from the amount of the statutory demand if one is to base it on Progress Claim No 10. The statutory demand is based on Progress Claim No 11 as revised.

13 Mr Pesman puts, however, that the developer cannot be permitted to raise the matter at this stage. He says that the structure of s 459G and the authorities decided thereunder, particularly ***Calquid Pty Limited v A & DR Illes Pty Limited*** *(2000) 34 ACSR 523, 531* para [49] show that there must be a sufficient explanation of the grounds in the affidavit supporting the application which affidavit is to be filed within the 21 day period and "an affidavit that is fundamentally insufficient cannot be supplemented at a later date, though supplementation to a lesser degree is sometimes possible."

14 It is significant, however, that s 459G does not mention the word "ground" at all, nor does it, in so many words, say that one must specify a ground for setting aside the demand.

15 However, it is quite clear from the authorities that the affidavit must set out the facts and circumstances on which the applicant relies, and that must happen within the twenty-one days.

16 Mr O'Loughlin relied on dicta in the judgment of Lockhart J in the Federal Court in ***Topfelt v State Bank of NSW Ltd*** *(1993) 47 FCR 226, 242* that, if one can find the defects in the statutory demand to be so great, then the statutory discretion under section 459J(1)(b) may kick in.

17 Although the discretion under s 459J(1)(b) is not unlimited, it seems to me it does permit the Court to consider all the aspects of the matter and, in appropriate cases, make an order which is commercially sensible, even if the demand cannot be attacked on its face.

18 In the instant case, the builder itself went into liquidation on 10 May 2001. Mr Pesman says that was because the builder was not paid by the developer. That may well be so: I am not called upon to decide that matter. However, the situation is that there is precious little money to go around and the whole matter cries out for a resolution in as cheap and efficient a way as possible.

19 It seems to me that because of the s 11 point, there is some basis for suspecting the validity of the demand. This is relevant as to whether I should exercise my discretion under s 459J. The desirability of doing so is reinforced by the desire to solve this dispute as cheaply as possible.

20 Accordingly, I indicate that I would be prepared to set aside the statutory demand if, and only if, no later than 10am on 27 August 2001 the developer pays to the liquidator of the builder the sum of $75,000, and also lodges a proof of debt as to any claim it makes against the builder. I will then stand the matter over to 28 August 2001 at 9.50am and, provided that there is then an undertaking by the developer to pursue its claim against the liquidator with all due diligence and it submits to an order for the liquidator's costs of these proceedings, I will then set aside the statutory demand.

21 If, on the other hand, these strict conditions are not complied with, I will merely dismiss the suit.

P O'Loughlin (P) instructed by Taylor's (P)
M Pesman (D) instructed by Ian D Elvy & Associates (D)