

JUDGMENT : Barrett J. Supreme Court of New South Wales. Equity Division Corporations List. 9th March 2007

- 1 The plaintiff, by its originating process, makes application under s.459G of the **Corporations Act 2001** (Cth) for an order setting aside a statutory demand served on it by the defendant. The defendant has filed an interlocutory process seeking an order striking out the originating process. It is the contention of the defendant that no reasonable cause of action is disclosed or, to put this another way, that the plaintiff's case is so manifestly weak that it would be futile to allow it to go to trial.
- 2 When the matter came before me for hearing on 2 February 2007, evidence was presented and I was taken to the merits of the case in a way that, in essence, bypassed the defendant's interlocutory process and dealt, in a substantive way, with the plaintiff's originating process.
- 3 The case the plaintiff ultimately sought to make upon its s.459G application is one based on s.459H(1) and the proposition that it has against the defendant an "offsetting claim" of an amount at least equal to the debt the subject of the statutory demand. The position the defendant took was that the plaintiff simply could not show any such "offsetting claim".
- 4 There was, at the hearing, some preliminary uncertainty as to what the plaintiff was trying to achieve. The debt the subject of the statutory demand is a judgment debt in the sum of \$470,405.97 awarded pursuant to provisions of the **Building and Construction Industry Security of Payment Act 1999**. Judgment in that sum was ordered by Nicholas J in this court against the present plaintiff and in favour of the present defendant on 10 August 2006. The judgment has been entered.
- 5 Mr Veitch of counsel, who appeared in these proceedings for the present plaintiff, initially sought to make an oral application for an order setting aside the judgment of 10 August 2006. In doing so – and in response to the suggestion that the challenge to a final order that has been entered should normally be by way of appeal – he referred to rule 36.15(1) of the **Uniform Civil Procedure Rules 2005**: "*A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.*"
- 6 Mr Veitch did not, however, refer to any matter which might indicate in any way that the judgment of 10 August 2006 was "given or entered ... irregularly, illegally or against good faith".
- 7 Mr Veitch then referred to the decision of the Court of Appeal in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 which concerned the interaction of provisions of the **Building and Construction Industry Security of Payment Act 1999** regarding payment claims and provisions of the **Trade Practices Act 1974** (Cth) with respect to misleading or deceptive conduct. It is not apparent just how any imputation of misleading or deceptive conduct against the defendant with respect to matters concerning a payment claim (such a claim and non-response to it being the basis of the judgment of 10 August 2006) could possibly be relevant to any question posed by rule 36.15. In the end – and not least because no claim for an order setting aside the judgment was before the court – Mr Veitch did not seek to proceed with that aspect.
- 8 Mr Veitch went on to say that, upon the s.459G application, he intended to advance a case of offsetting claim within s.459H(1)(b). Referring still to the *Bitannia* case, Mr Veitch indicated that an offsetting claim might be based on s.82 of the **Trade Practices Act** but, confronted by the need dictated by s.459H(2) to identify the "amount of" the claim, he did not persist in that direction. Rather, he eventually made it clear that the offsetting claim the plaintiff asserted was a claim for the cost of work necessary to rectify defects in a building constructed by the defendant for the plaintiff.
- 9 As the foregoing account suggests, the plaintiff retained the defendant as a builder to carry out construction work. The defendant was to construct a block of home units. Affidavits filed by the plaintiff within the 21 day period made relevant by s.459G(2) refer to various aspects of the building which the plaintiff says are defective and require rectification. Many of these are referred to in a report of 23 August 2006 prepared by Mr Philpott. His qualifications to be an expert witness were challenged but I accepted his expert status and admitted his report. Mr Philpott estimates the cost of rectification at somewhat more than \$488,000.
- 10 Mr Philpott's assessment is challenged by expert evidence led for the defendant but it is not my task on an application such as this to come to any final view about the ultimate merits of the competing opinions. It is necessary only to see that the claim based on Mr Philpott's evidence is sufficiently cogent as to be not fanciful.
- 11 The defendant says that, even if the prima facie position based on Mr Philpott's evidence is accepted, there are three countervailing matters that must lead to a conclusion that the plaintiff has no remotely viable claim against the defendant in respect of the allegedly defective works. The first reason is that the certifying authority has issued a final occupation certificate for the building and, in that connection, the engineers to the project provided several certificates, as did other consultants.
- 12 Second, the defendant says that, in terms of the building contract between the parties, the defects liability period has already expired, so that the defendant, as builder, is no longer required to rectify the defects alleged by the plaintiff, being defects that were not notified in accordance with those provisions.
- 13 The third point the defendant makes is that, because the strata plan has been registered and most of the units have been sold by the plaintiff, the plaintiff can no longer claim to have suffered loss or damage in respect of the alleged defects.

- 14 The building contract is in evidence. The central obligation upon the defendant as builder is in clause 21 which is in these terms: *"The Contractor with due care and skill and subject to these Conditions, will carry out and [complete] the Works shown on the Contract Drawings and Described in the Specification."*
- 15 That clause incorporates into the contract a standard builder's warranty as to the quality of workmanship. Such a term is usual, and indeed otherwise ordinarily to be implied, in contracts of this nature. It represents a contractual promise by the defendant, breach of which will ground an action in damages. Prima facie, therefore, the plaintiff will have a claim in damages against the defendant if the works were not carried out and completed in accordance with the drawings and specifications and with "due care and skill". It is a claim of that kind that the plaintiff puts forward as an "offsetting claim" to which should be attached an "amount" of \$488,000 by reference to the evidence of Mr Philpott. The claim is, in effect, that, because on Mr Philpott's evidence, the new building supposedly constructed with "due care and skill" by the defendant is in need of remedial work to the tune of \$488,000, there has been, in reality, a breach of clause 21 grounding a claim in damages in that sum.
- 16 It is then necessary to decide whether any of the three matters put forward on behalf of the defendant so convincingly counters or negates the viability of such a claim as to lead to the conclusion that the claim cannot properly be regarded as "a cause of action advanced in good faith, for an amount claimed in good faith", to quote words used by Palmer J in *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743 to describe the "genuine claim" concept reflected by the definition of "offsetting claim" in s.459H(5).
- 17 The first of the potentially countervailing or defeating circumstance is that a final occupation certificate and various other certificates have issued. That, it is said, must mean that there is no work left to be done.
- 18 The particular certificates relied on are not certificates contemplated by the contract, as I understand it. There is provision in clause 37 for a notice of practical completion to be given, but this is something different. The status or significance of the particular certificates, from the perspective of the defendant's primary contractual obligation, seems to be that considered by the Court of Appeal in *Triden Properties Ltd v Capital Financial Group Ltd* (1996) 12 BCL 402.
- 19 In that case a document alleged to have been a certificate of completion was issued after the defects period had elapsed. This document was issued pursuant to clauses in the contract specific to the defects period. Sheller JA (with whom Clarke and Powell JJA agreed) said that the architect was bound to issue the certificate if, after the expiration of the defects period or a set time after the completion of rectification of any actual defects, the architect was reasonably satisfied that there were either no defects or such defects had been made good. This was in large part because it was important for developer and owner to know at what point in time the developer had (ostensibly) completed its obligations pursuant to the agreement. However such a certificate was not, in the absence of express contractual provision, to be taken to be conclusive evidence that there were in fact no defects. The law will not deem a building to be completed according to the contract merely because an engineer's inspection discloses no faults.
- 20 The primary obligation, that is, the obligation actually to execute the works in the manner set out in the contract, remains primary. Sheller JA referred to *National Coal Board v William Neill and Son (St Helens) Ltd* [1985] QB 300 where it was held that there is no special rule of construction in relation to building contracts that, if the architect has expressed satisfaction with the work, the duty to perform to specification is deemed satisfied. Everything turns on the construction of the particular contract. In some circumstances, the certificate may be conclusive, as a matter of contract: *East Ham Corporation v Bernard Sunley and Sons Ltd* [1966] AC 406.
- 21 In the present case, the contract does not appear to contain any provision by which the primary contractual obligation imposed by clause 21 is made to yield to or be overborne by the issue of any certificate regarding completion. There is accordingly no apparent basis for a conclusion that the issue of the certificates on which the defendant relies may be seen as making unavailable the claim in contract upon which the plaintiff relies.
- 22 It is next necessary to consider whether the primary contractual obligation in clause 21 yields to or is overborne by the circumstance that a specified defects liability period has expired. In the *Triden Properties* case, Sheller JA dealt with such a question by reference to *Hancock v BW Brazier (Anerley) Ltd* (1966) 1 WLR 1317. Lord Denning MR (with whom Danckwerts and Salmon LJJ agreed) said in that case (at p.1334): *"And I must say I think that if a builder has done his work badly, and defects afterwards appear, he is not to be excused from liability except by clear words. I am of opinion that clause 11 is no defence to the builder here. It applies only to defects which the purchaser discovers within six months, not those which he discovers afterwards. Even with regard to those discovered within six months, it only compels the vendor to make them good. It does not excuse him from liability in damages. There is nothing in clause 11 to take away the right of a man to sue in respect of structural defects which were not discoverable within six months. It does not, therefore, take away the right of the purchaser here."*
- 23 These observations seem to me to apply here also where the defects clauses are to the same effect.
- 24 I turn then to the third proposition advanced on behalf of the defendant, that is, that, because the plaintiff has sold most of the units in the building, it will not suffer the full impact of the damage indicated by Mr Philpott's assessment. The plaintiff will be affected, it is said, only according to the proportion represented by the units still in its ownership.
- 25 This, it seems to me, is too simple an approach. It may be that, in an immediate sense, the plaintiff will suffer only in respect of units it retains. But the capacity for new unit owners and the body corporate to sheet home to the

plaintiff as developer liability for defects (and for the developer likewise to claim upon the builder for indemnity) must be recognised: see, for example, the way in which the District Court proceedings considered in **Carre v Owners Corporation – Strata Plan 5302** (2003) 58 NSWLR 302 at [12] were constituted.

- 26 In summary, I am of the opinion that clause 21 of the building contract is the source of a genuine claim for damages by the plaintiff against the defendant, that the evidence of Mr Philpott warrants a conclusion that the “amount” of the genuine claim is \$488,000 and that none of the three potential barriers put forward on behalf of the defendant can be regarded as so substantial and conclusive as to block altogether the advancing of the offsetting claim in good faith.
- 27 That being so and since the debt the subject of the statutory demand is \$470,405.97, the “substantiated amount”, as defined by s.459H(2), is less than the statutory minimum, and the court must, in obedience to s.459H(3) set aside the statutory demand.
- 28 I should add, in conclusion, that the suggestion by the defendant that the genuine dispute ground had not been raised within the 21 day period referred to in s.459G and in the manner contemplated by **Graywinter Properties Pty Ltd v Gas and Fuel Corporation Superannuation Fund** (1996) 70 FCR 452 cannot be accepted. It was sufficiently articulated in Mr Mees’ affidavit of 13 September 2006 which expressly referred to Mr Philpott’s assessment and quantification. And this is so despite the difficulty the plaintiff’s counsel had at trial in coming to the real point of his case.
- 29 The orders of the court are as follows:
1. The statutory demand served on the plaintiff by the defendant be set aside.
 2. The defendant pay the plaintiff’s costs of the proceedings.

Mr W.S. Veitch – Plaintiff instructed by Al Legal
Mr J.T. Johnson – Defendant instructed by Dennis & Company