JUDGMENT : AUSTIN J : Supreme Court of New South Wales. 7th May 2002

1 This is an application, made pursuant to s 459G of the Corporations Act by originating process filed on 8 June 2001, to set aside a statutory demand. The plaintiff alleges, under s 459H (1), that there is a genuine dispute between it and the defendant as to the existence or amount of the debt, or that it has an offsetting claim for an amount higher than the amount claimed by the defendant. The defendant denies that there is any genuine dispute or offsetting claim, and seeks to rely on some statutory provisions to prevent such matters from being raised.

2 The plaintiff is a hotel and motel developer and the defendant is a builder. The defendant carried out work pursuant to a building contract between the parties in respect of a motel property in Gundagai, dated 31 August 2000.

3 The statutory demand arose out of a claim for payment sent by the defendant to the plaintiff on 14 March 2001 in the amount of $177,960.28. The document was headed "Final Account" and was a statement setting out the balance of moneys that had become due, giving credit for payment made, and attaching a detailed summary of variations.

4 On 27 March 2001 the plaintiff responded to the Final Account by writing a letter, alleging that the defendant had failed to complete the work in accordance with the agreed program, causing the plaintiff significant revenue loss and damage. The letter estimated the revenue loss to be in the order of $66,240, although no particulars were given. It said that the damages component of the claim would be addressed subsequently.

5 The statutory demand was dated 17 May 2001 and was served on the plaintiff on 21 May 2001, claiming the amount of $177,960.28 owing to the defendant. The amount was described in the schedule to the demand as "the final progress payment" due under the contract.

6 On 30 May 2001 the plaintiff sent the defendant a letter enclosing a cheque for $90,000. The letter asserted that the amount paid did not make allowance for various claims that the plaintiff wished to make against the defendant. It said that the money was being paid before it had been established that this amount was owing, because of the time constraints imposed by the statutory demand. The payment reduced the amount claimed by the defendant to $87,960.28.

7 During the course of the building works, the plaintiff had complained to the defendant about the value of certain variations, failure by the defendant to complete the works in accordance with the construction schedule, and the type of timber used in construction of the buildings. The plaintiff decided not to rely, in the present proceedings, on the dispute about the type of timber used. Consequently the only matters for me to examine relate to variations and delay.

8 Mr Nott, managing director of the plaintiff, made some calculations with respect to variations, leading him to conclude that the plaintiff was owed $50,193.35, for variation credits. The calculations comprise 18 handwritten pages which are an exhibit to Mr Nott's affidavit of 7 June 2001, dealing item by item with claimed variations by the defendant and allowances by Mr Nott. In his affidavit made on 7 August 2001, Mr Nott revised his calculations upwards by $1295.08, and issued a revised schedule of calculations. It is unnecessary for me to set out the details, but I should record that although there is clearly some scope for argument about individual items, it cannot be said that Mr Nott's calculations are manifestly fanciful or unreasonable on their face.

9 As to delay, Mr Nott gave evidence that before the building contract was signed, he told Mr Martin on behalf of the defendant that it was of critical importance that the motel be open for the Christmas/New Year trading period. Under a schedule to the contract, the defendant was required to complete the structure for Stage 1 (for 31 motel rooms) by 26 November 2000. According to Mr Nott, this would have enabled other contractors to complete the fitting out of the rooms and other facilities. However, the defendant did not complete Stage 1 until 11 December 2000. Mr Nott said that this meant other contractors were unable to complete their work by 24 December 2000, when the building trade closed down for Christmas/New Year. The result was that the motel was not available for occupancy before the end of January 2001, and according to Mr Nott, 37 trading days were lost. He estimated that the motel would have had available to it 31 rooms for a 37 day period if the defendant had completed the Stage 1 work on time. Allowing $76 per room and a 76 percent occupancy rate, this would have yielded a revenue to the plaintiff of $66,250. He observed that during this period competitor motels displayed "No Vacancy" signs on most days. This suggests that a 76 percent occupancy rate is reasonable, allowing for the unfinished state of the premises.

10 Mr Nott says that Stage 2 of the motel, affecting an additional six rooms, was to be completed on 7 December 2000 but was not completed until 1 March 2001. Allowing for other contractors to complete their work, Stage 2 was not available for occupancy as motel rooms until 20 March 2001 and 78 trading days were lost, producing a revenue loss of $27,031.68.

11 The plaintiff's total claim against the defendant for variation credits and loss of revenue on Stages 1 and 2 is $143,475.03. It claims that the net amount owing by the defendant to it, after deducting the unpaid balance of the defendant's claim against it, is $55,514.75.

12 The motel has, since it opened for business, been carried on by Sovereign Motor Inns Pty Ltd, as the tenant of the plaintiff. Mr Nott is the managing director of Sovereign. However, his evidence is that if the motel had been completed on time, the plaintiff would have been the motel operator for the Christmas/New Year period and

Sovereign would have taken over once the motel was fully completed. Consequently, according to Mr Nott, the loss suffered by the defendant's delay was the plaintiff's loss.

13 However, Mr Nott gave evidence that if, on proper analysis, the loss of revenue was Sovereign's loss rather than the plaintiff's, then the plaintiff had suffered loss of rental income from Sovereign. He said in his affidavit that the loss of rental was $24,000 for the period to 31 January 2001. But in answer to a notice to produce the plaintiff produced a letter dated 12 July 2000 stating that the rental was $26,000 per annum or $2165 per month.

14 The defendant has given evidence to refute the plaintiff's claims. Mr Martin said that the alleged delay was caused partly by wet weather, for which the contract allowed additional days, partly by variations of the scope of the works, and partly because construction workers engaged by the plaintiff on work unrelated to the defendant's work interrupted and altered the critical path of the construction program. Further, Mr Martin pointed out that approval to occupy the premises was given by Gundagai Shire Council only on 22 January 2001. Of course, this last fact does not of itself exonerate the defendant from delay, since its delay may have caused or contributed to the Council's delay in issuing the approval.

15 Counsel for the defendant contended that in his oral evidence, Mr Nott had abandoned the claim that the plaintiff was entitled to recover lost revenue for the December-March period, relying instead on loss of rental income from Sovereign. Then counsel submitted that the claim for loss of rental income was not credible, since no lease document had been produced and there was contradictory evidence about the amount of rental. He said that in light of the material produced in response to the defendant's notice to produce, the lost rental income could not be as high as $24,000. Further, there was no evidence of any rental loss after 22 January 2001, or thereabouts, when the motel became commercially operational, even though the remaining six rooms were not available. Therefore, according to this submission, the total offsetting claim would be substantially less than the balance of the defendant's claim in the sum of $87,960.28 (accepting the plaintiff's variation credits at face value of $56,637.27).

16 It is not necessary for me to decide, for the purposes of the present case, whether Mr Nott's variation calculations are correct. The dispute between the parties with respect to variations turns on the assessment of numerous specific allegations and counter allegations of a type common in building disputes. Nor is it necessary for me to decide, for present purposes, whether there were culpable delays by the defendant, having regard to the terms of the building contract and the relationship between the contract and the construction schedule. That issue also depends, in part, on disputes on matters of detail, such as whether specified wet weather days were Saturdays or Sundays. Proceedings of the present kind are totally inappropriate for the resolution of such matters.

17 The issue for me to determine is whether there is a genuine dispute or genuine offsetting claim. The standard I am to apply was stated in the well-known observations of McLelland CJ in Eq in ***Eyota Pty Ltd v Hanave Pty Ltd*** (1994) 12 ACSR 785, where his Honour said at 787: *"In my opinion [the expression "genuine dispute"] 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 undisputed contemporary documents or other statements by the same the deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth" (cf* ***Eng Mee Yong v Letchumanan*** *[1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of facts unsupported by evidence": cf* ***South Australia v Wall*** *(1980) 24 SASR 189 at 194.*

But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute."

18 The same test is applied in determining whether the company has an offsetting claim. In effect, the word "***genuine",*** but not the word ***"proven",*** is implied as a qualification to the word "claim". In ***Re-Morris Catering (Aust) Pty Ltd*** (1993) 11 ACSR 601 at 605, in a passage quoted with the approval by McLelland C J in Eq in the ***Eyota*** case (at 787-8), Thomas J said: *"There is little doubt that Division 3 ... prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a* "genuine dispute" and whether there is a "genuine claim".

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond the perception of genuineness (or the lack of it), the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.

The essential task is relatively simple - to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it)."

19 I am satisfied that the plaintiff has a genuine though disputed claim with respect to the variations, and that the genuine dispute extended to the whole of the $56,637.27 claimed by the plaintiff. During his submissions counsel for the defendant handed up a page of calculations by him which was designed to show that the plaintiff's claim

was for no more than $46,709. In my opinion, the evidence before the Court does not enable me to substitute counsel's figures for the plaintiff's contentions.

20 With respect to the alleged delays, Mr Nott's calculations seem to be open to objection in some ways. For example, the claims in respect of delays do not make any allowance for the time to be taken by other contractors in fitting out the rooms after the building work was completed, and they assume that the Council would have issued its approval for occupancy in a timely fashion. However, these matters do not entitle me to conclude, on the *Eyota* standard, that there is no genuine offsetting claim for an amount exceeding (when added to the claim for variation credit) the balance claimed by the defendant.

21 Mr Nott's calculations put forward two alternatives. Version 1 sought to recover lost revenue due to delays, and Version 2 sought to recover lost rental. Counsel for the defendant submitted that in cross-examination, Mr Nott effectively abandoned Version 1. I do not believe that Version 1 was abandoned. While the cross-examination identified some difficulties in sustaining it, Mr Nott's affidavit evidence that the plaintiff would have conducted the motel business during the Christmas/New Year period, remains as a plausible contention. The defendant has not persuaded me to conclude, applying the *Eyota* test, that Version 1 could not plausibly be advanced.

22 As to Version 2, counsel contended that the lost rental could only have been of a very small amount, having regard to the evidence, so that the offsetting claim based on variations and loss of rental would be substantially less than the balance owing on the defendant's claim. Again, the evidence indicates that the plaintiff may well have some difficulty in persuading a court, on the balance of probabilities, that the lost rental was any more than $2165 per month for a period of less than two months. But Mr Nott's evidence was that the lost rental would be much higher, and that evidence was not discredited.

23 It therefore seems to me that the plaintiff has offsetting claims which are, on one version, in excess of the balance of the defendant's claim, established to the level required by the *Eyota* standard, the validity of which depends on the resolution of disputed questions of fact. Time and again, courts have made it clear that where that is so, it is inappropriate to issue a statutory demand. The dispute should be tested in proceedings for recovery of the debt claimed by the defendant. But for one matter, I would therefore conclude that the plaintiff has made out its case for a genuine dispute as to the existence or amount of the debt or that it has a genuine offsetting claim.

24 The one matter requiring further examination relates to the Building and Construction Industry Security of Payment Act (NSW) 1999 ("the Act"). The defendant claims that a final progress claim was made to the plaintiff pursuant to the Act, and the plaintiff failed to issue a payment schedule within the required time of 10 business days. Consequently, according to the defendant, the Act produces the result that the plaintiff owes a statutory debt to the defendant in the amount of the claim, regardless of whether it has any genuine dispute about the debt or any genuine offsetting claim.

25 The Act was assented to on 5 October 1999 and commenced on 26 March 2000. Its object 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"*: s 3 (1). In his Second Reading Speech (Hansard, Council, 22 September 1999, page 1012-3), the Minister referred to *"the Government's intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction"*. He said: *"It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families."*

26 Although the emphasis of these remarks is on the position of subcontractors, there is no doubt that the Act extends to the relationship between a proprietor and a builder. It is clear that in the present case the building contract between the parties is a construction contract for the purposes of the Act.

27 The structure of the Act, so far as relevant, is as follows. Part 2 introduces a statutory right to receive progress payments for construction work (s 8(1)), and makes default provisions (operating if the construction contract is silent) dealing with matters such as intervals within which progress claims are made (s 8(2)), time for payment following a progress claim (s 11) and how to value work for progress payments (ss 9 and 10). Part 3 deals with the procedure of claiming for progress payments (s 13) and describes the adjudication process if a dispute arises over payment (ss 17-26). It provides for the respondent to the claim to issue a payment schedule within 10 business days if he or she does not intend to pay the full amount of the payment claim (s 14). Then the claimant has five business days to give notice requiring adjudication under the Act (s 17). If no payment schedule is provided to the claimant within the specified time and the full amount of the payment claim is not paid on time, there is immediately a debt for the unpaid amount, regardless of whether the respondent in fact has a genuine dispute about the amount claimed or an offsetting claim (ss14, 15).

28 The building contract used in the present case was document BC3 (Commercial) (December 1983 1990 Print) issued by the Master Builders' Association of NSW. By clause 17 the defendant was entitled to progress payments upon request, provided that requests could not be made more frequently than every two weeks. The defendant's entitlement was to the value of work actually performed (including variations) together with the value of any unfixed materials and goods as defined in clause 17. Clause 18 entitled the plaintiff as proprietor to retain 10 percent of each progress payment as a Retention Fund.

29 Clause 19 provided for practical completion. It permitted the defendant to give the plaintiff a notice that in its opinion the works were practically completed, and provided for the plaintiff to notify the defendant within 10 days thereafter of any matters and things required to be done for practical completion. Clause 20 provided that the defendant was entitled to receive all moneys due and payable under the contract when the works were practically completed, and required the money so due to be paid to the defendant within 10 days of the builder requesting the payment in writing. Clause 22 provided for a defects liability period of 13 weeks.

30 Clause 23 dealt with "final payment". The relevant provisions are as follows:

(a) Upon the expiration of the Defects Liability Period or upon completion of the making good of any defects or other faults which may have appeared and been notified to the Builder in accordance with Clause 22 (whichever is the later date) the Builder shall give notice thereof to the Proprietor and the Proprietor shall, within five days of receipt of that notice, release his interest in the Retention Fund or do all things that may be necessary to secure the release of any security held by the Proprietor in lieu of the Retention Fund. This notice shall be known as the Final Notice.

(b) Together with or after giving the Final Notice the Builder may issue a final account to the Proprietor containing particulars of the moneys remaining due to the Builder and the account shall be paid by the Proprietor within 10 days."

31 It will be seen that the subject of clause 23 (a) is the procedure for release of the Retention Fund or any other security to the Builder. The ***"Final Notice"*** to which the provision refers is a notice given by the Builder which triggers the obligation of the Proprietor to release the Retention Fund. Clause 23 (b) provides for the Builder to issue a "final account", but only together with or after giving the Final Notice. It seems that subclauses 23 (a) and (b), upon their proper construction, had no application to the present case. There is no evidence of any Retention Fund or notice to release it, nor any notification of defects. On the evidence, clauses 22 and 23 had no practical operation in the life of this contract.

32 The evidence indicates that Stage 2 was completed on 1 March 2001, and Stage 1 was completed on 11 December 2001. By 14 March 2001, when the "final account" was issued by the defendant, the plaintiff had taken possession of the works, and consequently practical completion had occurred under clause 19 (e). Therefore by that time, the defendant had become entitled to receive all money due and payable under the contract (clause 20 (a)), and the money so due was payable to the defendant within 10 days of the defendant requesting the payment in writing (clause 20 (b)). In those circumstances, the "final account" is to be treated as a request for payment under clause 20 (b).

33 Counsel for the plaintiff submitted that final payment under the contract was not due until after the expiration of the Defects Liability Period. In my opinion, that submission misreads the contractual provisions. Upon the expiration of the Defects Liability Period the Builder was entitled to give a notice, called the Final Notice, for release of the Retention Fund, and a final account could be issued under clause 23 (b) together with the Final Notice. But the Builder could also request payment of all moneys due and payable when the works were practically completed, under clause 20.

34 The contract draws a distinction between progress payments, which are assumed to be payments requested in respect of work carried out before practical completion, and the "payment on practical completion" to which the marginal heading to clause 20 refers. The distinction can be seen, for example, in clause 17 (f), which states that both progress payments and the final payment bear interest if payment is not made within 20 days. The drafter thought it appropriate to refer to the final payment as well as progress payments. A request for payment of all moneys due and payable under the contract under s 20 is not a request for a progress payment, as a matter of construction of the contract.

35 The provisions of the Act which give the contractor the statutory right to recover money by issuing a claim (especially ss 8 and 13) apply to a "progress payment" under a construction contract. Those provisions will apply to the "Final Account" issued by the defendant on 14 March 2001 if it is a claim to a "progress payment" for the purposes of the Act, notwithstanding its classification under the contract.

36 Section 4 of the Act defines "progress payment" to mean a payment to which a person is entitled under s 8. Section 8 (1) provides (for present purposes) that on and from each ***"reference date"***, the builder is entitled to a progress payment under the Act, calculated by reference to that date. In the present, case the reference date, as defined by s 8 (2), is the date determined in accordance with the construction contract as *"a date on which a claim for a progress payment may be made"*. Under clause 17, the reference date for a payment which is a ***"progress payment"*** under the contract, is the date of the request for payment. If, for the purposes of the Act, the payment on practical completion is a "progress payment", the reference date is the date of practical completion.

37 The definition of "progress payment" is unhelpful, because s 8 confers an entitlement to payment only for a "progress payment", without further defining or explaining those words. In my opinion the words "progress payment" when used in s 8 and other parts of the Act should therefore be given the meaning that they have under the construction contract. That accords with the structure of the Act itself, which generally leaves it to the construction contract to define the rights of the parties but makes ***"default provisions"*** to fill in the contractual gaps (see Second Reading Speech, at 1013). It also accords with the stated object of the Act. If the Act was intended to apply in the case of the final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s 3 (1) to refer to the entitlement to receive all payments due

under the construction contract, rather than only "specified progress payments". The Minister's concern with the cash-flow of subcontractors (Second Reading Speech, at 1012 and 1013) also suggests that attention was focused on progress payments rather than the final balancing of account between the contracting parties.

38 Section 13 (1) confers the right to serve a payment claim on "*a person who is entitled to a progress payment under a construction contract*". In view of my construction of the words ***"progress payment"***, the defendant did not have the statutory right to serve a payment claim under s 13 in this case. Consequently, the provisions of the Act for the plaintiff to reply by providing a payment schedule (s 14 (1)) and for the amount of the claim to be recoverable as a debt due by the plaintiff if, as in fact happened, no payment schedule was provided (ss 14 (4) and 15), have no application to the present case.

39 It follows that, in my view, the Act does not give the defendant the entitlement to recover the amount demanded in the "Final Account" of 14 March 2001 regardless of any genuine dispute or offsetting claim. Since there is a genuine dispute or offsetting claim with respect to the whole of the amount claimed by the defendant, for the purposes of s 459H (1), it follows that the plaintiff is entitled to have the statutory demand set aside under s 459H (3).

40 That being so, it is not necessary for me to decide whether the "***Final Account"*** of 14 March 2001 would satisfy the description of a payment claim under s 13 (2). However, since I received full submissions on the point, which is a matter of some practical significance, I intend to make some observations.

41 First, as a general matter, it seems to me that if a claimant wishes to take advantage of the special statutory rights offered by the Act, which override general contractual rights and place the claimant in a privileged position, the payment claim must on its face contain all the ingredients required by the Act. While the Court should not take an unduly strict approach to the construction of the claim, it ought not to cure defects in the claim document by reference to extraneous circumstances or previous communications. In the present, case there was some evidence given by Mr Nott suggesting that when he received the document dated 14 March 2001, he was able to identify the work to which it related. In my opinion, evidence of that kind does not relieve the claimant of the obligation of ensuring that the payment claim complies with s 13 (2) on its face.

42 The approach I have in mind is no different from the approach taken by Windeyer J in ***Hawkins Constructions (Australia) Pty Ltd v Mac's Industries Pipework Pty Ltd*** [2001] NSWSC 815, paragraph [8]. There his Honour rejected an argument that s 13 (2) had not been complied with because the payment claim contained an incorrect contract number. He rejected the contention on the ground that the claim adequately identified the work done. It was also argued that the payment claim did not properly identify the Act because it omitted the word "and" in the title to the Act and it abbreviated the word "Industry" to "Ind". As Windeyer J said, such an argument may have had some weight in 1800 but in 2001 it had no merit, and should not have been put. Acceptance of this argument would have implied a strictness of approach not justifiable by legislative policy or any principle of construction.

43 Section 13 (2) (a) requires the payment claim to identify the construction work to which the progress payment relates. In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to *"motel construction for Jemzone Pty Ltd"*. That falls well short of satisfying the requirement of s13 (2) (a). The letter sets out a table which calculates the amount due, but the table does not identify any particular construction work other than variations. It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim.

44 Section 13 (2) (b) requires that the progress claim must indicate the amount of the progress payment that the claimant claims to be due for the construction work done. This requirement is also not satisfied by the document in question. Since the document fails to identify the construction work to which the progress payment relates, it cannot, and does not, indicate the amount of the progress payment said to be due for that construction work. It merely identifies an overall balance owing and makes some adjustments to that balance.

45 Section 13 (2) (c) requires the payment claim to state that it is made under the Act. The document in question states: *"This invoice is subject to the Building and Construction Industry Security of Payment Act 1999, No 46"*.

46 This is not a statement that the document is a payment claim made under the Act. I do not accept the submission by the plaintiff that a payment claim should expressly draw the recipient's attention to the Act and the provisions concerning the issuing of a payment schedule. Section 13 (2) makes no such requirement. Since, however, the issuing of a proper payment claim has the serious consequences for the recipient of requiring full payment regardless of any genuine dispute or offsetting claim, unless a payment schedule is lodged within time, it must be clear on the face of the document that it purports to be a payment claim made under the Act. The defect on the face of the document is not overcome by evidence that the recipient was not misled. The requirement was not satisfied in the present case.

47 I shall make an order setting aside the statutory demand, and I shall hear the submissions of the parties with respect to costs.

Mr F Donohoe (P) instructed by Laurence & Laurence (P)
Mr M Pembroke SC with Ms T Catanzariti (D) instructed by Michell Sillar (D)