

**JUDGMENT Master Macready** New South Wales Supreme Court 14<sup>th</sup> November 2003

1 This is an application to set aside a statutory demand served by the defendant on the plaintiff dated 14 April 2003. The defendant seeks payment of \$51,341.23; the amount of an adjudication in proceedings under the **Building and Construction Industry Security of Payment Act 1999** (the Act).

2 The plaintiff seeks a variation of the demand in respect of an offsetting claim for damages for defective work in the sum of \$27,231. The plaintiff raises no dispute as to the balance of the demand, namely, \$24,110.23.

**History of the various proceedings**

3 I will incorporate in this judgment a summary of the background facts which have been prepared by the plaintiff and which appear in the affidavit evidence.

4 The claim by the defendant arises out of building work undertaken in respect of a project at 43 Fitzwilliam Street, Vaucluse, where the plaintiff was the builder and the defendant was a sub-contract plumber. The owner of the subject property was Seager Rex Harbour.

5 The plaintiff had sued Seager Rex Harbour in the Consumer Trader and Tenancy Tribunal of New South Wales in relation to payment for work carried out by persons including the defendant as sub-contractor to the plaintiff.

6 Seager Rex Harbour has defended the Consumer Trader and Tenancy Tribunal of New South Wales proceedings and has alleged, inter alia, by way of Points of Cross Claim dated 16 April 2003 that the work carried out by the plaintiff is defective and has caused delay and damage to Seager Rex Harbour. Seager Rex Harbour has claimed the cost of rectifying the allegedly defective work and damages caused by delay as a set-off against the plaintiff's claim for payment and otherwise as to damages.

7 In support of that claim Seager Rex Harbour had served a report of Hugh B Gage Pty Limited dated 26 March 2003 that estimates the costs of rectifying defects and completing the project as a total amount of \$290,040.

8 The evidence shows that Mr Cooper of the plaintiff has reviewed that report and isolated what he considers are references in the report to defects that relate to work carried out by the defendant. When those items are extracted and totalled the estimated costs of rectifying the works done by the defendant is \$15,786.10.

9 Seager Rex Harbour has also made a claim against the plaintiff for delay. That claim comprises the costs of engaging other consultants to advise in respect of, and complete, the project and loss of interest for delay. In the assessment of Mr Cooper of the plaintiff, the defendant's proportion of the defective work is 5.45%. That is, of the claim for \$210,000 by Seager Rex Harbour, the sum of \$11,445 is attributable to the time required to rectify the defects in the work carried out by the defendant. The evidence shows that this has been arrived at putatively by Mr Cooper by way of adopting the same ratio of the costs of defective work he says are attributable to the defendant to the costs of the whole job. While it is not a very precise or accurate measure, it was the best that could be done in the time available bearing in mind it was essentially a repeat of a claim made upon the plaintiff by Seager Rex Harbour and that claim had not been fully particularised at that time.

10 On or about 28 February 2003 the defendant submitted to the plaintiff a payment claim in the sum of \$50,051.16 for work done. The plaintiff did not pay in accordance with the claim and the defendant sought a determination of its claim under the Act by application dated 24 March 2003.

11 The plaintiff submitted a response that raised the matters of defective work. On or about 8 April 2003 the adjudicator gave a determination of the defendant's claim in the sum of \$50,051.16. An adjudication certificate was issued on 14 April 2003.

12 On 14 April 2003 the defendant instructed its solicitor to serve a statutory demand for payment of the amount claimed in the adjudication certificate and an affidavit in support of the statutory demand was sworn by Mr Booth dated 14 April 2003. At that time there was no judgment debt. The demand and affidavit were served on the plaintiff under cover of a letter dated 15 April 2003.

13 On 15 May 2003, after the application to set aside the statutory demand had been filed and served on 6 May 2003 the District Court certified that the adjudication certificate was registered as a judgment in the District Court on 29 April 2003 in the sum of \$51,341.23.

14 On 26 June 2003 the plaintiff commenced proceedings against the defendant in the Consumer Trader and Tenancy Tribunal of New South Wales claiming contribution or indemnity from the defendant in respect of that portion of the points of claim by Seager Rex Harbour as are attributable to what it says were the defendant's breaches of the subcontract.

15 Those proceedings commenced by the plaintiff against the defendant as respondent in the Consumer Trader and Tenancy Tribunal of New South Wales are still proceeding for determination on their merits and have recently been the subject of an order for transfer to the Supreme Court of New South Wales along with the proceedings commenced by Seager Rex Harbour against the plaintiff.

**The offsetting claim**

16 The Court's task in assessing an offsetting claim has been dealt with in a number of cases. For instance, in **Edge Technology Pty Ltd v Lite-On Technology Corp** (2000) 18 ACLC 576, Santow J had the following to say at paras 24 and 25:

*"It is here again true (as it was in Goldspar Australia Pty Ltd v KWA Design Group Pty Ltd (1999) 17 ACLC 456) that it "is not my task in the present proceedings to seek to resolve the competing claims of the Plaintiff and the*

Defendant”: per Austin J at 462. Rather, it is to “resolve whether, for the purposes of s 459(H)(1)(a), there is a genuine dispute between the Plaintiff and the Defendant about the existence or amount of the debt to which the Defendant’s statutory demand relates”: Austin J at 462. Or alternatively, whether there is a genuine counter-claim, set-off or cross-demand against the Defendant and if so, in what amount. In particular, how should it be quantified; at a nominal \$1 or at a large figure and if the latter, how is the quantification to be arrived at? The latter question essentially asks whether the counter-claim or set-off is fictitious or merely colourable; **Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Limited (No 2)** (1994) 12 ACLC 490; 13 ACSR 787. In that context, to come up with a plausible contention to (sic) requiring further investigation which, if later established, would preclude there being an offsetting claim. That would not establish that the counter-claim or set-off was fictitious, or merely colourable. In that sense, the counter-claim or set-off is not the reciprocal of the statutory demand debt. Rather it is a means of offsetting the statutory demand debt with a genuine counter-claim or set-off.

I adopt the approach of the Full Federal Court in **Spencer Constructions Pty Limited v G&M Aldridge Pty Limited** (1997) 15 ACLC 1,001 at 1,011, (1997) 76 FCR 452 at 464; that a genuine dispute requires that “the dispute be bona fide and truly exist in fact” and that the “grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived”. The same applies to the counter-claim or set-off. One asks: Is it bona fide, is it real and not spurious?”

17 He later went on to say:- “For the demand to be set aside on the basis of the demand debt being genuinely disputed, it must be established by the Plaintiff that the dispute concerning its existence is bona fide and not spurious, hypothetical, illusory or misconceived: **Spencer’s Case** (supra). In other words, there must be a plausible contention requiring further investigation which genuinely puts in dispute the debt which grounds the statutory demand. But the merits are not now to be determined beyond the preliminary testing as to whether there is a serious question to be tried. The alternative basis for the demand to be set aside or reduced by reason of an offsetting claim involves, as I have said, a different test. The question is not whether there is a genuine dispute in the above sense against the offsetting claim. The question is rather whether the “offsetting claim” can be shown to be “not frivolous or vexatious”; **Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd** (1994) 13 ACSR 37. That places a heavier onus on the party seeking to maintain its statutory demand, than if it merely had to establish the reciprocal of a genuine dispute against the offsetting claim.

18 In **Macleay Nominees Pty Ltd v Belle Property East Pty Ltd** [2001] NSWSC 743 Palmer J referred to the need, in cases where an offsetting claim is advanced, to adduce some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. In terms of the amount of the offsetting claim the evidence to my mind is sufficient to demonstrate an offsetting claim in the sum of \$27,231. The real question that arises on this application is whether the plaintiff, in the light of the circumstances that have occurred, is still able to maintain that claim against the defendant. The defendant’s claim is that they have a final judgment in the District Court which has not been set aside pursuant to the provisions of section 25 of the Act. They submitted that this provision prevents the statutory demand from being set aside. They also submitted that the determination that gave rise to the judgment prevents the plaintiff from making its claim on the basis of the principles of res Judicata or issue estoppel.

19 This requires consideration of the scheme of the Act with particular attention being paid to its recent amendments.

20 Part 2 of the Act provides for a statutory right to receive progress payments for construction work. Following its recent amendment the Act now defines progress payment under s 4 (a) to include a final payment for construction work carried out under a construction contract such as is the case here. The definition of construction work has also been widened by s5 to apply not just to “buildings or structures” but to “buildings, structures or works”. Where a contract does not so provide the legislation deals with the intervals within which progress payments are to be made (s8), valuation of a progress payment and construction work (ss 9, 10) and the time allowed for a progress payment (s11).

21 Part 3 of the Act details the procedure for recovering progress payments and the adjudication process. In particular, ss 15 and 16, deal with the consequences of not paying a claim where a payment schedule is or is not in existence. Following the recent amendments sections 15 (4) and 16 (4) provide that defences and cross claims cannot be raised by a respondent where it has failed to pay a claimed amount and the claimant has commenced proceedings to recover that amount as a debt. These provisions are mirrored by s 25 (4) which has also been recently inserted into the Act. This provides, relevantly:

25 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

- (iii) to challenge the adjudicator's determination, and  
(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.
- 22 According to the defendant section 25 (4), as it prohibits any cross claim or defence from being raised in respect of judgment for debt, effectively prevents the plaintiff from raising its offsetting claim by attempting to have the statutory demand set aside. This however on its face appears inconsistent with the words at the commencement of s 25 (4) which limit its operation to a particular form of proceeding.
- 23 There has been some discussion of ss 15, 16 and 25 and the tension they create with s32 of the Act, see: **P Dawson "Security of Payment in the Building and Construction Industry: from 'Security' to 'Payment'"** (2003) 19(2) *BCL* 107. Section 32 still preserves any contractual rights the parties may have and still allows for the application of normal civil law remedies in the event of a dispute. It 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.
- 24 According to the plaintiff s32 indicates that an adjudicator's decision is not exempt from normal civil law remedies and its entitlement in law to assert a genuine dispute under s459G of the **Corporations Act** 2001 (Cth) remains unaffected. In his second reading of the **Building and Construction Industry Security of Payment Amendment Bill** 2002 before the New South Wales Parliament dated 12/11/02, the Minister said at 6541 of the new provisions: "By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work, some respondents have been able to delay making a progress payment for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. To overcome the problem, the bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross claim against the claimant and will not be able to raise any defence in relation to matters arising under the construction contract. A respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the Act, or in separate proceedings. "
- 25 While the Minister was very clear in emphasising the importance of the new provisions in preventing procedural abuse it is apparent from his closing words that where a respondent wished to make a cross-claim or raise a defence they were still entitled to do so in separate proceedings. What does not seem to have been addressed is the situation that occurs in this case where there is sought to be an enforcement of the judgment by some other procedure.
- 26 The various amendments brought in by the amending Act to further the purpose of the Act are in their terms specifically limited to matters under the Act. In **Musico v Davenport & Ors** [2003] NSWSC 977 McDougall J held that there was no basis for reading the prohibitions in s25 (4) (a) as extending beyond the context to which they were expressed to apply: namely an application to set aside judgement. He was there dealing with an application for prerogative relief against an adjudicator. In view of this, s25 (4) must only apply to the proceedings actually brought to set aside a judgment debt and not, as is the case here, where the plaintiff in separate proceedings seeks to set aside a statutory demand made in respect of the debt. In such proceedings the plaintiff is simply relying upon the rights that he has under a construction contract to raise an offsetting claim. The raising of an offsetting claim, unlike the raising of a genuine dispute in respect of a debt, does not in any way challenge the existence of the judgement debt and in fact concedes it. It is to be remembered that the scheme in respect of statutory demands comprehends offsetting claims of all descriptions and not only ones in some way connected to the claim in the demand. It is a far wider situation than the evil to which the Act is directed which is exemplified in **Modern Engineering v Gilbert-Ash** [1974] A.C. 689 at 717-718.
- 27 This finding, although perhaps arbitrary, accords with the preservation by s32 of the parties' rights to bring proceedings apart from the Act and also with the original intention of the legislature in respect of adjudication under the Act which was that it should only be an interim step which did not prevent application to the courts in respect of the final amount due. In his second reading speech of 8 September 1999 to the passage of the Act the Minister said, at 105:  
"If no payment schedule is provided to the claimant within time and the full amount of the payment claim is not paid on time, or the payment schedule says that a particular amount will be paid and that amount is not paid on time, there is immediately a debt for the unpaid amount. The claimant can seek payment of that debt by way of proceedings in the Fair Trading Tribunal – for residential building work – the Local Court, the District Court or the

Supreme Court as appropriate. The respondent cannot raise defences of defective work or cross-claims in order to delay judgment in these proceedings, therefore ensuring a prompt decision by the court. If the claimant obtains judgment for the amount of the payment claim or any part thereof, the respondent must pay the judgment debt. This does not prevent either party from arguing in other legal proceedings or by any dispute resolution process detailed in their contract that the final amount is more or less...Adjudication under the Bill provides a much faster process by giving an interim decision on disputes over progress payments, and fixing the amount of the debt."

28 Even before the passage of the Amendment Act it was the intent of the legislature that cross claims or defences could not be brought in proceedings under the Act. The new provisions tighten this but they do not dispense with the parties' right to bring separate legal proceedings in reliance upon their contractual entitlements and therefore, and most important for the issues before this court, they cannot prevent action to set aside a statutory demand under s459G of the **Corporations Act**. Accordingly, I find that it is permissible for plaintiff to make that application subject to the next matter that I now address.

29 In respect of the defendant's claim that res judicata will apply as a result of the adjudicator's determination an initial question is whether the adjudicator's decision is a "final judicial decision". There were no submissions to the effect that the adjudication was not a "Judicial Tribunal" for the purposes of the rule. Normally, a domestic tribunal such as an arbitrator is such a body but the procedure under the Act is more akin to a statutory tribunal. In **Patstras v Commonwealth** (1996) 9 FLR 152 Lush J stated the test for distinguishing between decisions which are judicial for present purposes and those which are purely administrative. He said at 155:

"The underlying principle of this form of estoppel is that parties who have had a dispute heard by a competent tribunal should not be allowed to litigate the same issues in other tribunals. When the decision-making body is an administrative body not affording the opportunity of presenting evidence and argument, it seems to me there is no room for the operation of this principle. In *New Brunswick Railway Co. v. British and French Trust Corporation Ltd.* [1939] A.C. 1 Lord Maugham L.C. said this: "If an issue has been distinctly raised and decided in an action in which both parties are represented it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them".

It appears to me that both upon the general language of the authorities to which I have referred and upon the principle which I have endeavoured to describe, no estoppel can arise from a decision of an administrative authority which cannot be classed either as "judicial" or as "a tribunal", and that an authority cannot be given either of those classifications if it is one which is under no obligation to receive evidence or hear argument."

30 Given the procedure set out in sections 20 and 21 of the Act it is at least arguable that the adjudication is judicial in the relevant sense. A contrary view was mentioned in passing in **Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd** [2003] NSWSC 365 at Para [43]. Rather than decide the matter on this basis in the absence of argument I will consider the other aspects.

31 To be a final decision the decision must finally declare or determine the defendant's liability for an ascertained amount leaving nothing to be judicially determined, to fix the amount recoverable and render the judgment effective and capable of execution. See Spencer Bower, Turner and Handley "**The Doctrine of Res Judicata**" at 69.

32 It may be that an adjudicator's determination will be final for the purposes of payment of a progress claim under the Act but not in respect of the final determination of the contractual claim. The specific provisions for adjustment in s32 (3) (a) and (b) allow correction of the amounts ordered to be paid by an adjudicator. Such amounts may or may not have involved a consideration of claims for defective work. The terms of s32 (2) are:  
"(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)."

33 These are extremely wide words and on their face are apt to include the effect of res judicata between the parties. In **Beckhaus v Brewarrina Council** [2002] NSWSC 960 I analysed the nature of the statutory scheme and its interplay with the contractual rights of the parties. I concluded at para 60 in these terms:

The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement.

34 I note that there is a very limited right of challenge to an adjudicator's decision (see **Musico** above). But that does not mean it is not a final decision: see **McGregor v Telford** [1915] 3 KB 237. A proper construction of the Act as a whole would mean that the adjudicator's decision does not give rise to res judicata on such matters in respect of the latter civil proceedings. The adjudicator's decision is nothing more than an interim determination for the purpose of progress payments under the Act.

35 Accordingly, I find that there is an offsetting claim of \$27,231.00 and, pursuant to s459H of the **Corporations Act 2001**, I vary the statutory demand by reducing it to \$24,110.23.

36 I will hear the parties as to costs.

Mr J.B. Conomy for plaintiff instructed by Sachs Gerace Lawyers for plaintiff  
Mr L.J. Aitken for defendant instructed by Cutler Hughes & Harris for defendant