Scope Data Systems v BDO Nelson Parkhill [2003] Adj.L.R. 03/13

Scope Data Systems P/L v David Gorman as Representative of the Partnership BDO Nelson Parkhill [2003] NSWSC 137

CATCHWORDS: Corporation - Winding up - application for order setting aside statutory demand - judgment debt - steps taken to appeal - whether statutory stay of execution, if in force, gives rise to genuine dispute as to existence of debt - whether appeal of itself gives rise to genuine dispute - whether statutory stay of execution represents some other reason why demand should be set aside - PROCEDURE - Local Court judgment for debt - avenue of appeal to Supreme Court - whether leave to appeal needed - whether appeal initiated within time - whether statutory stay of execution in force

ACTS CITED: Corporations Act 2001 (Cth) ss.459E, 459G, 459J
Justices Act 1902, ss.101, 104, 106, 107
Local Courts (Civil Claims) Act 1970, s.69
Local Courts (Civil Claims) Rules 1988
Supreme Court Rules, Part 51B

DECISION: Originating process dismissed with costs

JUDGMENT : Barrett J : Supreme Court, New South Wales. 13th March 2003.

Background

1 By an originating process filed on 5 November 2002, the plaintiff applies under s.459G of the **Corporations Act** 2001 (Cth) for an order setting aside a statutory demand served on it by the defendant on 15 October 2002. There are two supporting affidavits, being an affidavit of Ms Jarrett, the plaintiff's solicitor, sworn and filed on 5 November 2002, and an affidavit of Mr Gorczynski, a director of the plaintiff, also sworn and filed on 5 November 2002. The originating process and the two affidavits were served on 5 November 2002.

2 Because 15 October 2002 was the date of service of the statutory demand, the period of 21 days fixed by s.459G for the filing and service of the originating process and affidavit (or affidavits) in support expired after 5 November 2002, so that documents filed and served on that day were within time so as to cause the application to be in conformity with s.459G. A subsequent affidavit of Mr Gorczynski sworn on 13 December 2002 cannot be regarded as an affidavit in support as referred to in the section but was read by the plaintiff in the proceedings.

3 In her affidavit of 5 November 2002, Ms Jarrett refers to proceedings instituted by the defendant against the plaintiff in the Local Court for the recovery of fees for professional services. The proceedings were heard on 24 and 25 July 2001. On 23 November 2001, the court ordered a verdict for the present defendant (as plaintiff) in the sum of $8,681.15 and there was judgment accordingly. On 20 May 2002, the Local Court heard further applications which resulted in certain orders for costs on 29 July 2002, including an order that the present plaintiff pay certain costs of the present defendant. Those later orders are, however, irrelevant for present purposes since the statutory demand asserts a debt of $8,681.15 described as "Money verdict given in the Local Court Downing Centre on 23 November 2001", together with two sums for interest after judgment.

4 Ms Jarrett goes on to depose:

"7. The Plaintiff lodged a Summons and Statement of Grounds pursuant to Part 51B Rule 8 on 26 August 2002.

8. The Summons was amended by leave of the Court on 30 September 2002 to allow the Plaintiff leave to file the Summons out of time. Annexed and marked B is a copy of the Amended Summons."

Ms Jarrett's affidavit concludes:

"10. The substantive issue of appeal is the Magistrate erred in that his discretion miscarried; the Magistrate erred as to the admissibility of evidence and erred in misapplying the law to the facts."

The Graywinter question

5 The defendant questions whether the identification of grounds in the supporting affidavits was sufficient to satisfy the principle emerging from ***Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund*** (1996) 70 FCR 452. In the light of the decisions of the Full Court of the Supreme Court of Western Australia *in* ***Meadowfield Pty Ltd v Gold Coast Holdings Pty Ltd*** [2001] WASC 360, ***Energy Equity Corporation Ltd v Sinedie Pty Ltd*** (2001) 166 FLR 179 and ***Financial Solutions Australasia Pty Ltd v Predella Pty Ltd*** (2002) 167 FLR 106, that principle must be regarded as applicable to cases of this kind. In ***POS Media Online Ltd v V B Family Pty Ltd*** [2003] NSWSC 147 (12 March 2003), Austin J examined the development of the "***Graywater*** principle" in some detail and confirmed that the supporting affidavit (or affidavits) must disclose facts sufficient to show the ground relied upon in seeking to have the statutory demand set aside. It is necessary, as I see it, that what is said should convey a message that would reasonably be understood as referring to the particular ground upon which the plaintiff places reliance.

6 In the present case, the statements in Ms Jarrett's affidavit of 5 November 2002, particularly paragraphs 7, 8 and 10, are sufficient to justify attack upon the statutory demand on such grounds made available by ss.459H and 459J as are activated by the steps taken to appeal from the Local Court judgment, the content of the summons and amended summons and the description of the grounds of appeal. Although the affidavit does not refer to particular **Corporations Act** provisions by number as being as relevant to the identified grounds, the basis of the attack is obviously twofold: first, the plaintiff asserts the ground specified in s.459H(1)(a), namely, the existence of a genuine dispute as to the existence or amount of the relevant debt; and, second, it asserts the ground in s.459J(1)(b) based on the proposition that "there is some other reason why the demand should be set aside". These are the logical inferences from the steps taken to appeal.

The appeal from the Local Court decision

7 The action the plaintiff has taken to appeal from the decision of the Local Court should now be outlined. On 26 August 2002, the plaintiff filed in the Common Law Division of this court a summons and statement of grounds expressed as being pursuant to Part 51B rule 8 of the **Supreme Court Rules**. Exercising leave granted by Master Malpass on 30 September 2002, the plaintiff later filed an amended summons and statement, those originally filed having been struck out.

8 Based on these circumstances, the plaintiff says that s.107(1) of the **Justices Act** 1902 has come into operation in relation to the order of the Local Court which is the source of the judgment debt upon whch the statutory demand is based. Section 107(1) is as follows: *"The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when a notice of appeal is given in accordance with this Division."*

9 Section 107(3) says: *"The stay of execution continues until the appeal is finally determined, subject to any order or direction of the Supreme Court and section 111 (3)."*

The effect of any stay of execution under s.107 of the Justices Act

10 The question whether ss.107(1) and (3) of the **Justices Act** operate in the present case may usefully be deferred. For the moment, I shall assume that the sections do operate in relation to the order that is the source of the judgment debt upon which the defendant's statutory demand is based. What then is the significance, from the perspective of the present application, of the statutory stay of execution effected by s.107?

11 The nature and effect of a stay of execution were described by Denning J in ***Clifton Securities Ltd v Huntley*** [1948] 2 All ER 283 as follows: *"A stay of execution only prevents the plaintiffs from putting into operation the machinery of law – the legal processes of warrants of execution and so forth – in order to regain possession. It does not take away any other rights which they have. It does not prevent their exercising any right or remedy which they have apart from the process of the court."*

12 The analogous expression "stay of enforcement of the judgment" in the District Court Rules was approached in the same way by Pincus J in ***Re Pollack; Ex parte Deputy Commissioner of Taxation*** (1991) 102 ALR 133: *"Counsel for the Commissioner argued that the debt was payable immediately within the meaning of s 44(1)(b)(ii) [of the Bankruptcy Act]. He said that if there was a stay of enforcement of the judgment, the debt nevertheless remained payable. That appears to me to be correct. I have found no authority in support of the proposition that a stay of enforcement of a judgment produces the result that the debt ceases to be payable; surely the judgment creditor could, despite the stay of enforcement, plead the debt as a common law set-off. Counsel for the Commissioner aptly, in my view, contrasted the wording of s 44(1)(b)(ii) with that of s 40(1)(g) of the Act, which has the effect that an act of bankruptcy is committed by failure to comply with the requirements of a bankruptcy notice. That provision uses the expression: 'if a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed....'. A stay under r 2(8) has the effect that the obligation subsists, but enforcement of the judgment cannot take place."*

13 In the same case, Gummow J observed that the existence of a "stay of enforcement" did not, of itself and without more, deprive the judgment debt of its character of an obligation that is payable immediately. His Honour also said: *"The debt may be payable by the debtor although the means of enforcement are denied to the creditor."*

14 In ***Re Hughes; Ex parte Westpac Banking Corporation*** (unreported, FCA, Merkel J, 28 November 1997), Merkel J considered the status of a debt arising from a judgment in respect of which the Supreme Court of Victoria had ordered a stay of execution. His Honour began by observing: *"In my view, a distinction is to be drawn between a stay **of execution** of a judgment and a stay **on the operation** of the judgment. In principle, a stay of execution relates solely to a stay in respect of the legal processes of enforcement which are available in respect of the judgment but does not, of itself, suspend or otherwise affect the validity or operation of the judgment. A stay on the operation of the judgment, suspends the operation and the legal effect of, and the rights conferred under, the judgment." [emphasis in original]*

15 After referring to the observations of Denning J, Pincus J and Gummow J, as well as other authorities, Merkel J concluded: *"In my view the stay of execution on the judgment and orders under which the judgment debt was payable did not suspend or stay the operation of the judgment or orders with the consequence that as at 9 January 1997 and 28 April 1997 Westpac was a creditor of Hughes and the judgment debt was a liquidated sum which was immediately payable by Hughes to Westpac. Accordingly, Westpac has the necessary standing to be substituted as the petitioning creditor in the present matter."*

16 Having regard to these judicial statements as to the nature of a "stay of execution" and its effect upon a judgment debt, it must follow that any stay of execution effected in the present case by s.107 of the **Justices Act** has not deprived the judgment debt of its character as a debt "that is due and payable" as referred to in s.459E of the **Corporations Act**. The statutory stay of execution, if it operates, does no more than preclude resort by the judgment creditor to remedies entailing execution upon the judgment. It therefore cannot so call in question the "existence" of the judgment debt so as to be the source of which s.459H(1)(a) refers to as "a genuine dispute ... about the existence of" the debt.

Does the appeal alone represent a genuine dispute?

17 That, however, is not the end of the matter so far as the s.459H(1)(a) ground is concerned. The next question is whether the initiation and existence of the appeal to this court is, quite apart from any effect that s.107 may have by way of stay of execution, properly to be regarded as the source of a genuine dispute as to the existence or amount of the judgment debt. That question is, to my mind, disposed of by the analyses made by Master Adams in ***Wilden Pty Ltd v Greenco Pty Ltd*** (1995) 13 ACLC 1029 and by McLelland CJ in Eq in ***Barclays Australia Finance Ltd v Mike Gaffikin Marine Pty Ltd*** (1996) 21 ACSR 235.

18 Master Adams said in ***Wilden***: *"It is a judgment which is under appeal and the question is whether the existence of that appeal, and in this case, if it makes any difference, the fact that the appeal has now been heard and a decision awaited, can amount to a genuine dispute between these parties about the existence or amount of the judgment debt. In my view it cannot.*

The question of whether there is a dispute between these parties as to the debt the subject of the judgment has been resolved. There is a judgment of the Court, the District Court, which has determined the matter as between the parties. It matters not that the matter is under appeal for the purposes of this particular application, that may well be an issue that might have an impact, should there be a winding-up application made and the matter go to a hearing, but that is not the matter before me. All I need to do is to decide whether the demand should be set aside.

It is clear that an appeal does not operate as a stay of the judgment. There is no stay of the judgment. That is a matter to which I will turn in a moment, but I accept the submissions of the respondent that until it is set aside on appeal the judgment stands and concludes the issue between these parties as to whether there is a disputed debt. That therefore disposes of the first ground that was put forward, as to whether there can be a genuine dispute."

19 McLelland CJ in Eq said in ***Barclays Australia v Mike Gaffikin***: *"The assertion that there is a genuine dispute about the existence of the debt is in turn based on two grounds. The first relies on the existence of the undetermined appeal, in which orders are sought by Dan (inter alia) that the proceedings brought by Gaffikin Marine be dismissed and that Gaffikin Marine pay the costs of those proceedings. If the appeal succeeds, it is possible that the costs orders of 16 July 1995 (including the order against Barclays, although it is not an appellant) may be set aside. The answer to this submission is that the possibility that a presently existing and enforceable debt may be set aside in the future pursuant to a subsisting appeal does not give rise to a genuine dispute about the*

*existence of the debt within the meaning of s459H (see eg **Hoare Bros v Deputy Commissioner of Taxation of the Commonwealth of Australia** (1995) 13 ACLC 358; **Wilden Pty Ltd v Greenco Pty Ltd** (1995) 13 ACLC 1,039). The position would of course be different if there were a stay of proceedings under, or stay of execution of, the costs order against Barclays, but there is not, and in the absence of any such stay and notwithstanding the pendency of the appeal, the costs orders of 16 July 1995 against Barclays (together with the judgment of 16 May 1996), unless and until set aside on appeal, operate as res judicata determining the matter of Barclays' costs liability to Gaffikin Marine (see **Spencer-Bower & Turner Res Judicata** 2nd ed p144, **Lahoud v B & M Quality Constructions** (22 July 1994, McLelland CJ in Eq, unreported)).*"

20 There is, in each of these extracts, clear recognition that the existence of an appeal does not constitute or give rise to any genuine dispute as to the existence of the judgment debt. There is also, in each case, a reference to the effect that a stay may have in producing a contrary result. However, for reasons already stated, the particular stay that may exist in this case (a stay of execution effected by s.107 of the **Justices Act**) cannot be the source of any genuine dispute as to the existence of the debt.

21 These conclusions regarding the effect of any stay of execution and the existence of the appeal to this court are sufficient to dispose of the aspect of the case based on some supposed "genuine dispute" activating s.459H(1)(a). It remains to consider whether those circumstances would represent "some other reason why the demand should be set aside" as referred to in s.459J(1)(b).

Does the existence of the appeal enliven s.459J(1)(b)?

22 The nature of the jurisdiction created by s.459J(1)(b) was referred to by the Full Federal Court in ***Hoare Bros Pty Ltd v Deputy Commissioner of Taxation*** (1996) 19 ACSR 125. The breadth of the jurisdiction was confirmed by the court: "*Whatever view is taken of the relationship between s 459J(1)(a) and (b), the court has a discretion in a case which does not involve a defect in the demand to set aside the demand, if some appropriate reason is shown. The discretion may be exercised in favour of a company, even without a showing that substantial injustice would otherwise be caused ...*"

The court considered it "unwise to attempt to mark out the limits of the jurisdiction conferred by s.459J(1)(b)".

23 An example of circumstances in which the court may exercise the power given by s.459J(1)(b) was given by Austin J in ***Moutere Pty Ltd v Deputy Commissioner of Taxation*** (2000) 34 ACSR 533: "*The policy underlying s 459H is that the statutory demand procedure should not be used to coerce a person to pay a disputed amount. A statutory demand is not an instrument of debt collection. By analogy, the commissioner should not use the statutory demand procedure to apply coercive pressure to a taxpayer who genuinely objects to the commissioner's decision. To do so would be to take unfair advantage of those provisions of the taxation legislation (such as ss 14ZZM and 14ZZR of the TAA) which say that an amount owing in consequence of the commissioner's decision is recoverable, notwithstanding that an objection has been lodged against the decision.*

If the commissioner decides not to await the outcome of the objection, the proper course will often be for him to take proceedings for recovery of the debt rather than to summon up the spectre of liquidation by issuing a statutory demand. If the court forms the view that the commissioner has acted oppressively or unfairly by issuing a statutory demand in such circumstances, the appropriate course is for the court to set the demand aside under s 459J (1) (b). By doing so the court does not deny that the debt is recoverable although an objection has been made, but it thereby insists that the statutory demand procedure should not be used to apply pressure for payment of an amount which might ultimately be found not to be payable."

24 Reference may also be made to the decision of Mullins J in ***Re Softex Industries Pty Ltd*** (2001) 187 ALR 448 which concerned a statutory demand which included a sum on account of disputed tax in respect of which there had been a hearing before the Administrative Appeals Tribunal. The Tribunal's decision was reserved. Her Honour said "it was oppressive for the respondent to serve a statutory demand incorporating that disputed sum". On that basis, the statutory demand was set aside.

25 If, in the present case, a stay of execution of the Local Court orders is in force by operation of s.107 of the **Justices Act**, reliance upon the statutory demand to produce a statutory presumption of insolvency as a basis for seeking a winding up order will entail for the plaintiff consequences of a serious and adverse kind. The defendant, as a judgment creditor to whom the remedy of execution upon the judgment is expressly denied pending determination of the appeal to this court, will nevertheless be permitted to rely on the judgment as a basis for bringing to bear the pressure for payment and threat of serious and adverse consequences inherent in a statutory demand and a winding up petition, notwithstanding the legislative policy that precludes direct resort to execution. That legislative policy would thereby be circumvented.

26 If Parliament sees fit to provide that, where a certain type of appeal is initiated in respect of a judgment debt, the judgment creditor is not to be allowed to exercise ordinary judgment creditor remedies by proceeding to execute the judgment, it would, in my view, be inconsistent with the position Parliament has striven to create if the judgment creditor could nevertheless proceed with impunity to initiate winding up proceedings on the basis of the mere existence (even though technically not subject to "genuine dispute") of that judgment debt. Such a course would, in my view, be oppressive in the sense referred to by Austin J in ***Moutere*** and by Mullins J in ***Softex***. The circumstances would therefore warrant an order under s.459J(1)(b) setting aside the statutory demand, even though the initiation of action towards winding up was not technically within the black letter operation of s.107 of the **Justices Act** (cf ***Australian Cherry Exports Ltd v Commonwealth Bank of Australia*** (1996) 39 NSWLR 337).

But is there a stay of execution in this case?

27 It is therefore necessary to return to and to address the question whether s.107 of the **Justices Act** has, in reality, come into operation in this case so as to cause execution of the judgment of the Local Court to be statutorily stayed. The existence of a stay depends on notice of appeal having been given "in accordance with" Division 2 of Part 5. That is the effect of s.107(1) itself. Section 106 says that an appeal is to be made and conducted "in accordance with the rules"; also that it is to be made within a period identified by reference to "the rules". By virtue of a definition in s.101, "rules" means rules of the Supreme Court. Attention must therefore be focussed, in these respects, on the **Supreme Court Rules**, in particular Part 51B.

28 The defendant says that there are two reasons why the appeal supposedly initiated by the plaintiff does not conform with applicable provisions and should therefore be regarded as not having produced a stay of execution under s.197. First, it says that there is a need for leave to appeal and no leave has been granted. Second, it is contended that the supposed appeal was instituted after the period allowed for appeal had expired.

29 Sections 106 and 107 are located in Part 5 of the **Justices Act**. Part 5 becomes relevant to an appeal such as that involved in this case only via s.69(2) of the **Local Courts (Civil Claims) Act** 1970. That section says that, subject to exceptions not immediately relevant, a party to proceedings under the **Local Courts (Civil Claims) Act** who is dissatisfied with the judgment or order *"as being erroneous in point of law"* may *"appeal to the Supreme Court therefrom"*. Section 69(3) then brings the provisions of Part 5 of the **Justices Act** into play in a particular way: *"The provisions of Part 5 of the **Justices Act** 1902, apply, to the extent to which they are applicable, to appeals under subsection (2) in the same way as they apply to appeals to the Supreme Court under those provisions."*

30 The *"in the same way as"* specification in s.69(3) emphasises the separateness of appeals under s.69 of the **Local Courts (Civil Claims) Act** and appeals under Part 5 of the **Justices Act**. The right or ability to appeal created by s.69(2) of the **Local Courts (Civil Claims) Act** derives exclusively from that Act. This is recognised and confirmed by s.104(5) of the **Justices Act** which says that a party to any proceedings under the **Local Courts (Civil Claims) Act** may apply under Division 2 of Part 5 to the Supreme Court "as provided for by section 69 of that Act". The **Justices Act** does not purport to create an avenue of appeal. It merely confirms the existence of the separately existing avenue made available by s.69 of the **Local Courts (Civil Claims) Act**.

31 No appeal to the Supreme Court may be initiated by a party to proceedings under the **Local Courts (Civil Claims) Act** except as s.69 of that Act allows, with the result that an appeal can be based only on the proposition that it is "erroneous in point of law". It follows that, to the extent that provisions of the **Justices Act** contemplate appeals having some other basis, those provisions are not applicable to or in relation to an appeal founded on s.69(2). It further follows that to the extent that s.104(1)(b), being a provision in Part 5 of the **Justices Act**, imposes a requirement for leave to appeal where a ground of appeal involves a question of mixed law and fact, it has no application to an appeal initiated under s.69(2) of the **Local Courts (Civil Claims) Act**. Except to the extent provided in the exceptions identified in s.69 itself, the only appeals from judgments or orders in proceedings under that Act are appeals as of right on the ground of error of law.

32 These conclusions are not novel. They were, I think, first articulated by Sully J in ***Carr v Neill*** [1999] NSWSC 1263 and have since been re-affirmed by other members of the court, including O'Keefe J (***Pace v Read*** (2000) 179 ALR 437) and Kirby J (***R L & D Investments Pty Ltd v Bisby*** [2002] NSWSC 1082). In ***Carr v Neill***, Sully J said at [12]: *"The true relationship between s69 of the **Local Courts (Civil Claims) Act**, and Pt5 of the **Justices Act** is, in my opinion, that s69 of the **Local Courts (Civil Claims) Act** confers the jurisdiction which is relevant to the present case; while Pt5, and in particular s104, of the **Justices Act** provides the procedural machinery by means of which a s69 appeal is to be brought in fact before this Court."*

33 Section 69 creates its own requirement for leave to appeal in certain cases: see s.69(2B). The section itself therefore deals with the question of when leave to appeal is needed in a way that leaves no scope for the operation of any Part 5 requirement for leave to appeal.

34 The defendant's submission that no s.107 stay of execution has arisen in this case because a requirement for leave to appeal exists and no leave has been granted must be rejected. This is because the appeal is not, on any conceivable basis, one in respect of which s.69 imposes such a requirement and the requirement in s.104(1)(b) of the Justices Act does not apply in a s.69 case.

35 The next basis on which the defendant submits that no s.107 stay of execution operates in this case is that the procedures adopted by the plaintiff were such as not to conform to the timing requirements of the **Supreme Court Rules**, with the result that it was not in compliance with s.106 of the **Justices Act**, that being an essential circumstance contributing to a stay under s.107.

36 In order to be properly and regularly instituted, an appeal must confirm to Part 51B rules 7 and 8 of the **Supreme Court Rules**. This is the effect of s.106(1) of the **Justices Act.** Section 106(2) of the **Justices Act** says: *"An appeal is to be made within such period after the date that the relevant conviction or order is made, or the sentence imposed, as may be prescribed by the rules."*

37 Part 51B rule 6(1) of the **Supreme Court Rules**, read in conjunction with the definition of "material date" in Part 51B rule 3 as it applies in this case, lays down a general rule that an appeal must be instituted within 28 days after the date on which the "decision" appealed from is "pronounced or given". The term "decision" is defined by Part 51B rule 3 to include an "order" and a "judgment", they being the forms of determination also referred to in s.69(2) of the **Local Courts (Civil Claims) Act**.

38 By the summons filed in the Common Law Division on 26 August 2002, the plaintiff claimed, as the first item of relief: *"An order that the decision of His Worship Mr Dillon in Local Court matter 157704/00 be set aside."*

39 In the Local Court proceedings thus identified, the Magistrate had made pronouncements on two days, being 23 November 2001 and 29 July 2002. The summons filed on 26 August 2002 has the capacity, in terms of timing, to be the vehicle for an appeal from any order or judgment included in the pronouncement of 29 July 2002. It does not, however, have that capacity in relation to any order or judgment included in the pronouncement of 23 November 2001. It is therefore necessary to refer to what was said by the Magistrate on each occasion.

40 On 23 November 2002, the Magistrate published a judgment in proceedings instituted by the present defendant's statement of liquidated claim for a sum of $12,169.90. The judgment concluded: *"There will be a verdict for the plaintiff [i.e., the present defendant] in a sum of $8,681.15 and judgment accordingly."*

41 A certificate of judgment, apparently issued under Part 26 rule 7 of the **Local Courts (Civil Claims) Rules** 1988, says: *"In this matter the plaintiff recovered judgment against the defendant on 23/11/2001 in the sum of $8,681.15."*

42 On 29 July 2002, the Magistrate published a further judgment. The opening paragraphs of that judgment make it clear that three matters were before the court for consideration: first, the question of costs of the "matter in which the plaintiff ultimately obtained judgment in his favour on 23 November 2001"; second, a submission by that plaintiff that the Magistrate had made "an error in calculating the damages which I concluded should be awarded to him"; and, third, "an issue concerning the interest to be applied (if any) to the judgment amount".

43 As to the second of these matters, the Magistrate held that, if there was any error, it was not an arithmetical error but an error of law and that, as a res judicata had arisen, any such error could only be corrected on appeal. In relation to the third matter, the Magistrate said that it was "only reasonable that an order for interest be made" and awarded interest from 12

November 1999. Costs orders were also made, each party being ordered to pay certain costs of the other party. For present purposes, the aspects concerning interest and costs may be left to one side since the issue is whether a stay of execution arose pursuant to s.107 of the **Justices Act** in relation to the judgment in the sum of $8,681.15, that being the principal sum referred to in the statutory demand.

44 The plaintiff submits that the Local Court judgment of 29 July 2002 is properly to be regarded as the source of the "judgment" or "order" requiring the payment of $8,681.15. This is so, it is submitted, because the way in which the Magistrate dealt with the submission that there had been an arithmetical error or error in calculation in relation to the sum of $8,681.15 awarded on 23 November 2001 involved some form of confirmation of the judgment or order of 23 November 2001.

45 I do not see how this can be so. The Magistrate said on 29 July 2002 that, since he had given a decision on 23 November 2001 as to the amount to be paid by the present plaintiff, the matter was res judicata and any error could only be corrected on appeal. That cannot be viewed as in any sense a confirmation or renewal of the judgment or order of 23 November 2001. On the contrary, it was an unambiguous statement that the earlier decision was in no way affected by anything decided on the later occasion. Nor did anything done by the Magistrate amount to a stay of the November 2001 judgment. The plaintiff's submission that the application by the present defendant seeking review of quantum by the Magistrate prevented the sum of $8,681.15 from being due and payable has no legal foundation. The submission that, pending the determinations of July 2002, the judgment or order of November 2001 had not been "pronounced or given" (as referred to in the definition of "material date" in Part 51B rule 3) is equally devoid of foundation.

46 It follows that, insofar as it purported to embody an appeal from the judgment or order of 21 November 2001 for the payment of $8,681.15, the summons filed by the plaintiff on 26 August 2002 did not initiate an appeal within the time limited by Part 51B rule 6. It remains to consider whether that position was in any way changed by the proceedings before Master Malpass on 30 September 2002, given that the time limit for appeal may be extended by this court pursuant to Part 51B rule 6(2)(a).

47 The orders made by Master Malpass on that occasion were as follows:

"1. I order that the Summons filed 26 August 2002 be struck out.
2. The Plaintiff is to have leave to file an Amended Summons. I direct tat any Summons be filed within 7 days.
3. I dismiss the Notice of Motion filed on 6 September 2002.
4. The balance of the relief sought in the Notice of Motion filed 17 September 2002 is dismissed.
5. The Plaintiff is to pay the costs of the proceedings to date.
6. It can be noted to the effect that the order that the Plaintiff pay the costs of the proceedings to date includes the costs of the two Notices of Motion."

48 Of particular significance, for present purposes, is order 3. By the notice of motion filed on 6 September 2002, the plaintiff sought the following order: "That the time for filing an appeal be extended pursuant to Part 51B r 6(2)(a) of the Supreme Court Rules."

By dismissing the notice of motion, as he did on 30 September 2002, the Master positively declined grant an extension of time for the initiation of an appeal. In light of that express determination, the grant of leave to file an amended summons cannot conceivably be seen as carrying with it, by implication, an extension of time pursuant to Part 51B rule 6(2)(a). Indeed, the amended summons filed on 8 October 2002 claims, as the first item of relief: "*An order for leave to be granted to file this summons out of time*."

That application has not been dealt with.

49 My conclusion is that, because of the timing factors to which I have referred, the steps taken by the plaintiff by way of filing of the summons and statement on 26 August 2002 did not constitute the giving of notice of appeal in accordance with Division 2 of Part 5 of the **Justices Act.** The subsequent step of filing an amended summons and statement cannot have any greater efficacy particularly since that summons seeks relief designed to rectify the plaintiff's timing problem. It follows that no stay of execution ever arose by operation of s.107(1) in relation to the judgment or order of the Local Court which is the source of the plaintiff's obligation to pay the sum of $8,681.15 which is the principal sum claimed by the statutory demand.

The interest components

50 I now consider, for completeness, the elements of the aggregate claimed by the statutory demand that consist of interest. The two items are described as follows: "Interest 24.11.01 – 28.02.02 @ 10% pa $228.32
Interest 1.3.02 – 2.10.02 @ 9% pa $462.36"

51 Section 39 of the **Local Courts (Civil Claims) Act** says that, unless a court orders in a particular case that interest be not payable, interest is payable on so much of the amount of a judgment debt as is from time to time unpaid. Under the rules, the applicable rate of interest is that prescribed under s.95 of the **Supreme Court Act** 1970. The two sums in the statutory demand have been calculated in accordance with these provisions and are properly regarded as additions to the judgment debt for the purposes of the statutory demand.

Conclusion

52 My finding that no stay of execution has ever been in force pursuant to s.107 of the **Justices Act** in relation to the Local Court judgment in the sum of $8,681.15 means that the considerations that influenced Austin J in **Moutere** and Mullins J in **Softex** in relation to s.459J(1)(b) have no part to play here. The purported initiation of the plaintiff's appeal was ineffective because made out of time. Moreover, an attempt to retrieve the situation by an order under Part 51B rule 6(2)(a) extending time was unsuccessful, this court having ordered on 30 September 2002 that it be dismissed. Another such application is pending but has not been determined.

53 In the circumstances I have described, the plaintiff has failed to make out its case for an order setting aside the statutory demand on the ground that the steps taken in an attempt to initiate an appeal from the judgment or order for the payment of the principal sum referred to in the demand are sufficient to amount to either a "genuine dispute" under s.459H(1)(a) or "some other reason" for setting aside the demand under s.459J(1)(b).

54 The originating process filed on 5 November 2002 is therefore dismissed with costs.

Mr C D Wood – Plaintiff instructed by Agostini Jarrett Pty Ltd. Mr J T Johnson – Defendant instructed by Sally Nash & Co