

JUDGMENT: Barrett J : Supreme Court of New South Wales. 14th May 2002

- 1 The plaintiff, Solarite Air Conditioning Pty Ltd ("Solarite"), applies under s.459G of the **Corporations Act** 2001 for an order that a statutory demand dated 11 January 2002 served on it by the defendant, York International Australia Pty Ltd ("York"), be set aside.
- 2 Solarite's claim is founded on s.459H dealing with genuine dispute and offsetting claim. Although there was some reference in the course of submissions (as well as in the evidence) to offsetting claim, I do not think that basis of challenge is seriously asserted; and if it is, I do not think it is sustainable on the evidence. The real issue is whether there is, in terms of s.459H(1)(a) "a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates".
- 3 The demand relates to an alleged debt of \$119,858.92, being the balance of \$229,858.92 for "goods sold and delivered during the period July 2001", less \$110,000 paid. It is common ground that the parties entered into a contract for the supply by York to Solarite of certain air conditioning units, being nine rooftop package units and one ducted split system air conditioning unit, these being items required by Solarite in order to perform work being carried out by it as a subcontractor for Paynter Dixon Constructions Pty Limited on the Penrith RSL Club.
- 4 In response to an invitation from Solarite, York submitted a quotation dated 5 December 2000 for supply of the units. A revision, affecting price only, was sent by York to Solarite on 20 December 2000. Solarite submitted an order dated 14 February 2001 which referred to the quotation and the revision. The order required compliance with certain Paynter Dixon specifications and drawings and with "York facsimile dated Feb 19, 01". The quotation of 5 December 2000 referred under a heading "Conditions of Sale" to York's conditions "document NB300250AS", the content of that document being mentioned in such a way as to show an intention on York's part that it should form part of any eventual contract. Solarite's order, as well as purporting to require compliance with the Paynter Dixon specification and drawings, said: "All works to be carried out in accordance with Solarite Air Conditioning construction program. All warranties are deemed to commence on the date of practical completion of this project."
- 5 Units were in due course supplied by York but Solarite took the view that they were damaged and did not accord with the contractual requirements. On 2 July 2001, Solarite wrote to York as follows: "We are extremely concerned at the level of damage to the units that arrived on site at the Penrith RSL project on Friday 29/6/01. Our main concern is that no matter what level of repairs are carried out the consultant may still not accept the units. Some damage is beyond repair and the units will not be brought back into it's original level. It is our intention to withhold part of your payment until all rectification works are carried out to a level that is acceptable to Solarite and the consultant."
- 6 Solarite also sent York a schedule setting out the shortcomings in which seventeen items were labelled "York problem", nine "York precautionary measure" and eight "non-York problem".
- 7 It is clear that York accepted responsibility to carry out remedial work. The basis on which York agreed to do this is said by Solarite to be found in a new contract (or, perhaps, a variation of the original contract) brought about by a conversation which took place in July 2001 and was confirmed by subsequent correspondence and dealings. The parties to the conversation were Mr Tsu, managing director of Solarite and Mr Daiken of York. Mr Tsu deposes that the conversation was as follows: "TSU: I will make a payment to you of \$110,000 now for the equipment. When all the defects are fixed, we will pay the balance. DAIKEN: OK."
- 8 Following this conversation the sum of \$110,000 was paid and York proceeded to carry out relevant work in late 2001 and early 2002.
- 9 By the about the end of November 2001, York took the view that all things necessary to entitle it to receive the unpaid balance of the price had been done. On 14 December 2001, York's solicitors wrote to Solarite demanding payment of the balance of the contract sum. Solarite wrote to York on 21 December 2001 referring to the solicitors' letter and asserting that rectification works were still not complete. The letter gave various details. Solarite also asserted a right to levy "back charges" on York for "cost incurred to Solarite Air Conditioning as a direct result of the above".
- 10 On 11 January 2002, York wrote to Solarite as follows: "I have had my technician confirm all works to increase air flows on the units at the above site as per your request are complete except for No 3 unit. The pulley and belts arrived so we fitted them but we have found that the AMP draw has exceeded the range of the overload. Could you please have the wiring, contractor and overload looked at so that they match the requirements needed. The AMP draw of the motor once the new pulley is fitted will be 14.0 to 15.0 AMPS and the current overload only goes to 12.0 AMPS. This is the last item needed. All other works including the repairs to the units have been completed including transport damage. The units are now as per factory standards and warranty is as per our normal conditions."
- 11 On 30 January 2002, York wrote to Solarite "This is to advise you that the following work has been completed.
· Transport damage – The completion of this was advised to you vide the fax from Ross Taylor dated 11-01-02 (copy of fax attached).
· Pulley changes – This is to advise you that the work has been completed.
Please call me should you need any further information."
- 12 On 6 February 2002, however, Solarite issued instructions to York to perform yet further rectification work.

- 13 Mr Tsu deposes that another organisation was retained to test the units and that testing was completed on 2 and 3 March 2002. The result of the tests, he says, was that only two of the units complied with the required air distribution standard. On 11 March 2002, Solarite wrote to York requiring matters to be attended to.
- 14 This brief recitation of the facts is taken wholly from evidence adduced by Solarite. No evidence was adduced by York on the hearing of the application, although Mr Tsu was cross examined.
- 15 Several matters seem to me to be clearly in contention between Solarite and York. The first is as to the nature and content of the original contract, it being a contract for the sale of goods but with references in both the York quotation (as varied) and the Solarite order to other documents including York conditions of sale, Paynter Dixon specifications and drawings and, if it is a document, "*Solarite Air Conditioning construction program*". There is reference in the documents produced by both parties to warranties but it is by no means clear, on the material adduced upon the hearing of this application, what the terms of the applicable warranties are – or, indeed, whether York's purported injection of its standard warranties into the contractual matrix survived the purported imposition of the Paynter Dixon documents, Solarite's "*construction program*" (whatever that may be) and Solarite's stipulation as to the time at which all "*warranties are deemed to commence*".
- 16 The second matter in contention between the parties is as to the effect of the conversation between Mr Tsu and Mr Daiken and, in particular, whether it amounted to a new and distinct contract to the effect that, whatever might be the position under the original contract, Solarite was entitled to withhold all but \$110,000 of the agreed price until completion of all rectification works by York, with York, for its part, agreeing to carry out all those rectification works. An element of this aspect concerning the possibility of a second or supplementary contract is the question whether, on the face of the conversation or otherwise, there was consideration sufficient to support a contract.
- 17 The third area of controversy is as to the nature and scope of the obligations imposed upon York with respect to rectification, whether by the original contract or any later variation.
- 18 Fourth - and whatever might be decided about the content of the relevant contract or contracts - there is a question whether the further work York actually did in relation to the admittedly damaged units represented performance sufficient to entitle it to payment of the balance of \$119,858.92.
- 19 The legal principles to be applied in deciding whether the "genuine dispute" aspect of s.459G is satisfied emerge from a number of decided cases. In **Mibor Investments Pty Ltd v Commonwealth Bank of Australia** [1994] 2 VR 290, Hayne J said, after referring to certain factors which identify the summary nature of the s.459G procedure: "*These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark on any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.*"
- 20 In **Eyota Pty Ltd v Hanave Pty Ltd** (1994) 12 ACSR 785, McLelland J said: "*It is, however, necessary to consider the meaning of the expression 'genuine dispute' where it occurs in s.450H. In my opinion that expression 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 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.*"
- 21 The formulation preferred by Northrop, Merkel and Goldberg JJ in **Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd** (1997) 76 FCR 452 is as follows: "*In our view a 'genuine' dispute requires that the dispute be bona fide and truly exist in fact; the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.*"
- 22 In **Re Morris Catering (Aust) Pty Ltd** (1993) 11 ACSR 601, Thomas J emphasised that it is not the task of the court, in a case such as this, to "*examine the merits or settle the dispute*"; and that "*beyond a perception of genuineness (or 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.*"
- 23 It is appropriate to dwell for a moment on the guidance provided by these cases. The tests of "*plausible contention requiring investigation*", "*real and not spurious, hypothetical, illusory or misconceived*" and "*perception of genuineness (or lack of it)*", applied in the context of a summary procedure where "*it is not expected that the court will embark on any extended inquiry*", mean that the task faced by a company challenging a statutory demand on the "genuine dispute" ground is by no means at all a difficult or demanding one. The company will fail in that task only if it is found upon the hearing of its s.459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.
- 24 Application of the established principles to this case must result in a finding of genuine dispute. All four of the matters I have described as being in contention between the parties possess a sufficient degree of plausibility to require that

finding. The evidence shows that they are matters which need to be resolved in properly constituted proceedings in which all issues can be explored on the basis of relevant evidence properly adduced and fully examined. Only a debt established by that process can be, in this case, a safe foundation for any presumption of insolvency.

- 25 In terms of s.459H, I am satisfied that the “*substantiated amount*” is less than the “*statutory minimum*”, with the result that the court must proceed in accordance with s.459H(3). It is therefore ordered that the statutory demand be set aside. The defendant must pay the costs of the plaintiff.

Mr M.R. Tyson – Plaintiff instructed by Ebsworth & Ebsworth – Plaintiff
Mr J.T. Johnson – Defendant instructed by Sally Nash & Co – Defendant