FEDERAL COURT OF AUSTRALIA

Tesoro MB Pty Ltd v Total Building Group Pty Ltd [2009] FCA 802

CORPORATIONS - Statutory Demand - Application to set aside statutory demand - Demand withdrawn before hearing - Held no need to set aside a statutory demand which is no longer made

COSTS - Whether statutory demand should or should not have been issued - Adjudication before lower court registered as judgment of that court - Respondent advised by Applicant of appropriateness of withdrawing statutory demand - Respondent disputed underlying contract and purported counterclaim - Held reasonably apparent that demand would be set aside - Whether costs should be awarded on an indemnity basis - Held Respondent's conduct imprudent - Held Respondent imprudently put Applicant to the expense of making application to the Court - Held costs awarded on an indemnity basis

Corporations Act 2001 (Cth) ss 459G, 459K

Building and Construction Industry Payments Act 2004 (Qld)

Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd; Deputy Commissioner of Taxation v MA Howard Racing Pty Ltd; Deputy Commission of Taxation v Neutral Bay Pty Ltd (2008) 82 ALJR 1411 cited
Colgate-Palmolive Company v Cussons Limited (1993) 46 FCR 225 considered
Demir Proprietary Limited v Graf Plumbing Proprietary Limited (2004) NSWSC 553 followed
Peekhurst Proprietary Limited v Wallace (2007) 25 ACLC 1051 not followed
Re Chameleon Mining NL; Chameleon Mining ML v Atanaskovic Hartnell [2009] NSWSC 602 followed
Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Quin (1997) 186 CLR 622 cited
Soudan Lane Proprietary Limited v Glen Bradshaw (2007) NSWSC 772 followed

TESORO MB PTY LTD ACN 056 707 647 v TOTAL BUILDING GROUP PTY LTD ACN 089 156 927
QUD136 of 2009

LOGAN J
24 JULY 2009
BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QUD136 of 2009**
GENERAL DIVISION

BETWEEN:	**TESORO MB PTY LTD ACN 056 707 647** **Plaintiff**
AND:	**TOTAL BUILDING GROUP PTY LTD ACN 089 156 927** **Defendant**
JUDGE:	**LOGAN J**
DATE OF ORDER:	**24 JULY 2009**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The Application is dismissed.

2. The Defendant is to pay the Plaintiff's costs of and incidental to the application, to be taxed on an indemnity basis.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QUD136 of 2009**
GENERAL DIVISION

BETWEEN:	**TESORO MB PTY LTD ACN 056 707 647** **Plaintiff**
AND:	**TOTAL BUILDING GROUP PTY LTD ACN 089 156 927** **Defendant**
JUDGE:	**LOGAN J**
DATE:	**24 JULY 2009**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

1 By an application filed on 11 June 2009, Tesoro MB Proprietary Limited (hereafter "Tesoro"), made application under s 459G of the *Corporations Act 2001* (Cth) (Corporations Act) for an order setting aside a statutory demand served on it by the Defendant, Total Building Group Pty Ltd (hereafter "Total Building Group"). The orders sought were that the statutory demand dated 14 May 2009 be set aside and that the Defendant pay the Plaintiff's costs.

2 The evidence before me establishes that the statutory demand, though dated 14 May 2009, was not in fact served until 21 May 2009. If only by a statement made in open Court today by its counsel, if not earlier, in terms of correspondence, it is also now the case that Total Building Group has withdrawn the statutory demand in question. In other words, that demand is no longer made. In my opinion, that has the effect of rendering it unnecessary to set aside the demand. The demand no longer exists. Section 459K of the Corporations Act provides that a statutory demand has no effect while there is in force an order under s 459H or s 459J setting aside the statutory demand. As I have just observed, it seems to me that there is no need to set aside a demand which is no longer made. There remains a question of costs.

3 One proposal that is advanced on behalf of Total Building Group is that any order for costs made ought to abide the result in other proceedings to be instituted in respect of an offsetting claim. Even if, in theory, there is a power to make an order on those terms, it seems to me that it is not appropriate, in this case, to make such an order. The reason why that is so is that whether or not a costs order ought to be made turns not so much on the merits of any offsetting claim, but, rather, on matters of practice and procedure in relation to the circumstances in which the statutory demand in question should or should not have been issued, with the consequence that it became incumbent then for Tesoro to bring the application to set it aside.

4 The statutory demand in question was based on an adjudication which was subsequently registered as a judgment of the District Court of Queensland. That adjudication was made under a Queensland statute, the *Building and Construction Industry Payments Act 2004* (Qld) (the Building and Construction Industry Payments Act). In the affidavit accompanying the statutory demand, an affidavit sworn by Mr Young, a solicitor, which is found in the exhibit bundle to the affidavit of Benjamin Steven Maggiolo filed on 11 June 2009, the following statement is made, that Total Building Group:

> … obtained an Adjudication decision pursuant to the *Building and Construction Industry Payments Act 2004* (Qld) …

5 It is further stated, in that accompanying affidavit, that Total Building Group:

> …was awarded the sum of $68,050.62, inclusive of costs and interests, in the adjudication decision, of which the debtor, ie, Tesoro, has been the sum of $40,268.22.

6 The statutory demand, then, was for the sum of $27,782.40. There was a prompt response on behalf of Tesoro by way of a letter sent by its solicitors, Cooper Grace and Ward, to Total Building Group's solicitors, Winchester Young & Maddern, dated 22 May 2000:

> **Calculation of amount payable**
>
> 1. Our letter of 30 March 2009 set out calculation of the amount payable under the adjudicator's decision. Given that you did not respond to this letter, we assumed your client agreed with that calculation.
>
> 2. If your client seriously maintains that it can double-recover the $27,782.40 which was paid from your trust account as a result of the adjudicator's decision, we note that our client may apply under s 28(1) of the Building and Construction Industry Payments Act 2004 (Qld) to correct a "material miscalculation of figures", which – if your client's understanding of the

decision is correct – would plainly exist in light of the passage set out below.

3. At this stage we see that such an application is unnecessary because your client's statutory demand is clearly liable to be set aside for various reasons, including those set out below. However, if your client tries to take any other action in relation to the $27,782.40 which has already been paid, our client reserves its right to make an application under s 28(1)(c).

Statutory Demand

Already Paid

4. As noted above, the $27,782.40 claimed has already been paid to your client.

5. Paragraph 63 of the adjudicator's decision stated:

> As I have already noted, two payments have been made by the respondent since the progress claim 9 on 24 December 2008, namely $35,279.50 on 8 January 2008, which included the sum of $27,825.77 on account of variations not yet agreed, and a further $53,548.11 on 23 January 2008 to be held on trust pending adjudication of that claim, which was withdrawn. I have no information as to whether that sum, or the balance of it not released by consent to the claimant, is still held on trust or has been returned to the respondent. I will set out here what I have found is due to the claimant under this payment claim. I will leave it to the parties and their solicitors to decide how payment is to be made, whether by deduction from funds held or otherwise, but it appears to me that credit must be given by the claimant at least for the sum of $35,279.50 paid on 8 January 2009.

6. It is clear that the Adjudicator was effectively saying that if part of the $53,548.11 trust monies were released in payment of the payment claim then they would reduce the amount owing.

7. Our client's letter of 13 February 2009 authorised you to pay $27,782.40 of the $53,548.11 to your client. Unless those funds are still in your trust account, then the adjudicated amount has been paid in full (as explained our letter of 30 March 2009).

Offsetting claim

8. We refer you to paragraph 3(d) of our client's payment schedule dated 9 April 2009 and the reports referred to in those paragraphs.

9. Our client has an offsetting claim, namely its claim to enforce its rights under the Contract to adjust the overpayment ordered by the adjudicator. The value of this claim appears to be in the order of $150,000 according to the report from Currie & Brown.

10. Further our client has an offsetting claim for the defective works identified in the report of Crossley Architects and a claim for the delays caused by your client.

"Other reason"

11. Our client's rights in relation to the Contract (which are maintained under s 100 of the *Building and Construction Industry Payments Act 2004* (Qld)) constitutes sufficient "other reason" within the meaning of s 459J of the Corporations Act 2001 (Cth) for the demand to be set aside.

7 The letter sought a response by 4 pm on 25 May 2009.

8 There was a prompt response by Winchester Young & Maddern to Cooper Grace Ward on 25 May 2009:

> The Adjudication decision was made on 11 March 2009. In this decision, the Adjudicator took into account the payment by your client of $35,279.50 on 8 January 2008 and the depositing of $53,548.11 into our trust account on 23 January 2008. The Adjudicator stated that he was not aware of the status of these sums of money and would go on to set out what he found due under the payment claim and leave it to the parties and their solicitors to decide how payment was to be made.
>
> Our client acknowledges the receipt of $27,782.40 paid to our clients prior to the lodgement of Adjudication Application 10 which was lodged on 26 February 2009 and the decision made on 11 March 2009. Our client had returned the sum of $25,765.71 being the balance of $53,548.11, to your client on 20 February 2009. In its Adjudication Application our clients acknowledged and deducted the sum o f$27,782.40 from its claim.
>
> At paragraph 64 of the adjudication decision, the adjudicator has set out the amounts he has found due and which the parties acknowledge with costs and interest to be $68,050.62. As your client has paid $40,286.22 the balance of $27,782.40 remains owing and our client seeks the payment of these monies.
>
> Our client will not withdraw the statutory Demand.
>
> In relation to your client's alleged (unliquidated) offsetting claim, we are instructed that our client disputes that the Contract was properly terminated and further instructs that our client has an equal, if not greater counterclaim against your client. Be that as it may, our client's position is that your client's offsetting claim does not diminish your client's liability under the Adjudication Certificate and our client will not withdraw the Statutory Demand unless balance monies owing under the Certificate are paid.
>
> We await your client's response.

9 There was a further letter then in response, sent the following day on behalf of Tesoro by Cooper Grace Ward:

> We are seeking instructions to apply to set aside the demand. We put you on notice that if we receive those instructions we will be making the application without any further reference to you.
>
> To avoid any argument that our client has not made its position completely clear, we

respectfully note that the following points in response to your letter:

1. We do not necessarily admit that our client's claim would be unliquidated. However, the point is irrelevant because "offsetting claims" for the purposes of s 459H can include claims for unliquidated amounts, particularly where there is evidence to substantiate the quantum of the claim in relation to the amount claimed in the statutory demand: see, eg *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743 at [18].

2. The fact that your client claims to have "an equal, if not greater counterclaim against [our] client" is also irrelevant:

   (a) Section 459H(3) requires a consideration of whether the "substantiated amount" is below the prescribed minimum.
   (b) The "substantiated amount" equals the "admitted amount" minus the "offsetting total": s 459H(2).
   (c) The "admitted amount" here would be nil. We respectfully refer you to the various decisions which have held that a company can rely upon disputes in relation to a construction contract to offset a purported statutory demand based on a decision under the Building and Construction Industry Payments Act, including *Max Cooper & Sons (Builders) Pty Ltd v M&E Booth & Sons Pty Ltd* (2003) 212 ALR 680; *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 at [15]-[22]; *Ozy Homewares Pty Limited v Wesgordon Pty Limited* (2007) 25 ACLC 1,239.
   (d) However, for the purposes of discussing the irrelevance of your client's alleged counterclaim, we will assume that the Court does not accept that there is a genuine dispute about the amount outstanding in relation to the judgment certificate (ie that the "admitted amount" is $27,782.40).
   (e) The "offsetting total" is the total of any "offsetting claims": s 459H(2). An "offsetting claim: is a "genuine claim" that the company has against the respondent: s 459H(5). The genuineness of our client's claim is shown by the various correspondence exchanged in relation to the BCIP application, and by the expert reports referred to in our letter of 22 May 2009.
   (f) Therefore, even if your client did have a counterclaim which exceeded our client's offsetting claim (which is denied), and even if our client could not challenge the Adjudication Certificate, any alleged counterclaim by your client would be irrelevant because such counterclaim is not taken into account in calculating the "substantiated amount" for the purposes of s 459H.
   (g) Applying the substantiated amount formula referred to in sub-paragraph (b) above, the "substantiated amount" is the result of deducting the "offsetting total" (in the order of the $150,000) from the "admitted amount" (on the assumption set out in sub-paragraph (d) above, being $27,782.40).

3. For those reasons, we maintain that your client has no legal basis to rely upon the demand.

4. We will be relying upon this letter to make a submission that our client should have indemnity costs because your client's refusal to withdraw the demand was in wilful disregard of clearly established law and because your

client's position is doomed to fail.

5. We against request the trust account statement as requested in letter of 22 May 2009.

10 It suffices to note that after this exchange of correspondence there was some further correspondence by Cooper Grace Ward that in the absence of any withdrawal of the demand, Tesoro was proceeding on the basis of having to institute proceedings for the setting aside of the demand. Those proceedings then were instituted, the application for the setting aside of the demand being accompanied by a comprehensive affidavit sworn by Benjamin Stephen Maggiolo, also filed on 11 June 2009.

11 As it happens, after the application had been filed, further correspondence between the parties transpired. In particular, in a letter dated 24 June 2009 sent by Winchester Young & Maddern to Cooper Grace Ward, the following statement is made:

> Our client has instructed us to withdraw the statutory demand, and accordingly we hereby withdraw the statutory demand. In relation to the application, ie, the application to set aside the statutory demand, our client instructs us to propose that, "(a) Our client undertake to the court to institute proceedings in respect to the termination of the contract within 21 days after 26 June 2009; (b) the costs of the application be the costs in the cause of those proceedings; (c) the application be dismissed on commencement of the proceedings by our client."

12 There was some concern on behalf of Tesoro by its solicitors about whether, having regard to the terms of that letter, there was an unequivocal or unconditional withdrawal of the statutory demand. It is perhaps moot whether that concern was necessary and in any event there can be no doubt now, having regard to the statement made in open court, that the statutory demand has been withdrawn and hence no longer exists.

13 In *Re Chameleon Mining NL; Chameleon Mining ML v Atanaskovic Hartnell* [2009] NSWSC 602 at [65], Austin J had occasion to consider the question of whether or not to award costs in circumstances where a statutory demand fell for dismissal. His Honour observed:

> In a case such as this the court's discretion as to costs will be influenced by an examination of the conduct of the parties prior to the commencement of the proceedings, with a view to determining whether either party has acted unreasonably and has thereby brought about the need for the proceedings to be taken.

14 *In Soudan Lane Proprietary Limited v Glen Bradshaw* [2007] NSWSC 772, White J cited the well known observations of McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Quin* (1997) 186 CLR 622 at 624-625 concerning the correct approach for a court to take on an application for costs where there has been no hearing on the merits. White J applied the principles stated by McHugh J to statutory demand proceedings in observations (at para 4 of *Soudan Lane*) that I respectfully adopt:

> These principles are applicable to proceedings to set aside a statutory demand, but special features of such proceedings need to be taken into account in judging the reasonableness of the parties' conduct. A company faced with a statutory demand in relation to a debt, disputed in whole or in part, has no option but to commence an action under s 459G to set aside the demand within 21 days, even if the ultimate order sought will be an order under s 459H(4) varying the demand to the amount which is not genuinely in dispute. If a company were merely to pay the amount which was not genuinely in dispute, without securing or compromising the balance to the reasonable satisfaction of the creditor, it would face the prospect of winding up proceedings being brought against it, of its being presumed to be insolvent (s 459C(2)(a)) and of its being unable to oppose the winding up application on a ground upon which it could have relied for the purposes of an application to have the demand set aside unless leave is given (s 459S).

15 Like Austin J in *Chameleon Mining*, I respectfully agree with the approach evident in the passage from White J's judgment in *Soudan Lane*. Total Building Group had the benefit of an adjudication in its favour under the Building and Construction Industry Payments Act. It also had the benefit, as a consequence of that Act, of being able to register that adjudication as a judgment of the District Court.

16 In *Peekhurst Proprietary Limited v Wallace* (2007) 25 ACLC 1051, Douglas J observed, in relation to a statutory demand, the foundation for which was, ultimately, an adjudication determination made under the Building and Construction Industry Payments Act, at para 22:

> Although recourse to the use of a statutory demand may be oppressive, for example, in the pursuit of a tax debt which is disputed by a taxpayer who has objected and is seeking a review of the assessment, it does not seem to me that this regime should necessarily apply to an attempt to rely upon a statutory demand in circumstances such as these. The intention of the Act is clear in seeking to "fast track" progress payments even where it is likely that the parties will continue to dispute the decision made by an adjudicator. Where the party against whom judgment has been given has not sought to set it aside nor commence civil proceedings pursuant to its rights under s 100, and where, as here, has delayed in identifying and quantifying the alleged defects it does not seem to be an oppressive use of a statutory demand made in reliance upon the judgment obtained under the Act. In my view, it is a different situation from that which applies where the demand is used in support of a tax debt clearly still the subject of a genuine dispute; cf F *Re Softechs Industries Proprietary*

> *Limited* (2001) QSC 377 and *KW and KM Quinn Investments Proprietary Limited v Commissioner of Taxation* (2003) QFC 336 at paragraph 4.

17 Two things may be said, with respect, in relation to that passage in *Peekhurst*. Firstly, it is predicated upon what has later been shown to be a false line of Queensland authority in respect of statutory demands for taxation debts; see *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd; Deputy Commissioner of Taxation v MA Howard Racing Pty Ltd; Deputy Commission of Taxation v Neutral Bay Pty Ltd* (2008) 82 ALJR 1411. Secondly - and more pertinently for present purposes - it is evident from the passage quoted that his Honour's attention was not drawn to a line of New South Wales authority in respect of legislation in that State analogous to the Building and Construction Industry Payments Act and the interrelationship between adjudications under that Act and the setting aside of statutory demands pursuant to the Corporations Act on the basis of there being, in terms of that legislation, a dispute or offsetting claim.

18 Of those New South Wales authorities it suffices, for present purposes, to refer to but one, namely, *Demir Proprietary Limited v Graf Plumbing Proprietary Limited* (2004) NSWSC 553 at [20] where Campbell J stated:

> Next, it was submitted that, if it were possible to rely upon an offsetting claim to set aside a statutory demand, the object of the [analogous New South Wales Act] would not be achieved. I do not accept that this is so. There are means of enforcement, short of a winding up action, which are open to a judgment creditor. When a judgment has been obtained pursuant to the analogous New South Wales Act, if the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of the Commonwealth Act, the Corporations Act 2001 (Cth) to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Div 3 of Pt 5.4 of the Corporations Act 2001 (Cth) set out a regime whereby a statutory demand to set aside *whenever* there is an offsetting claim, as defined.

19 In the correspondence directed to Total Building Group by its solicitors, Tesoro, by its solicitors, at some length made reference to the New South Wales authorities. It further set out in a considered way why it was that Total Building Group ought not to resist the setting aside of the statutory demand or, at least, ought to withdraw it. In the face of that correspondence, the response made on behalf of Total Building Group was to assert or at least put in dispute that the underlying building contract was properly terminated and further to relay instructions that Total Building Group had an equal if not greater counterclaim against Tesoro. The latter phraseology in particular was, in my opinion, or at least ought to

have been, pregnant with a realisation that the pressing further of the statutory demand was futile.

20 There was apparent from the correspondence which ensued prior to the filing of the application for the setting aside of the statutory demand on 11 June every reason, reasonably, to apprehend that the demand would be set aside. I have no doubt, having regard to the principles set out in the passage quoted from *Soudan Lane*, that this is a case where there ought to be an order for costs in favour of Tesoro on the dismissal of the application to set aside the statutory demand. The question is whether those costs should be awarded on an indemnity basis?

21 In that regard, there is a discretion to exercise. A case which has proved influential on the subject of the awarding of indemnity costs is *Colgate-Palmolive Company v Cussons Limited* (1993) 46 FCR 225. There, at pages 232 to 234, Sheppard J comprehensively summarises the effect of authorities in relation to the awarding of costs and, in particular, to the awarding of costs on an indemnity basis. His Honour gives some examples at item 5, page 233 to 234, of circumstances in which it has been regarded as appropriate to award costs on an indemnity basis. In so doing, his Honour is astute to preface the giving of those examples by reference to an overriding principle that there is a discretion, which is not relevantly fettered, to be exercised. This, his Honour observes that, at item 4, page 233:

> Most judges dealing with the problem have resolved the particular case before them by dealing the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule.

22 The categories in which the awarding of indemnity costs are appropriate are not closed. I accept, then, that though the discretion is, as I have said, unfettered in the sense that the categories are not closed, it is nonetheless a departure from a usual rule which would allow costs only on a party and party basis. One circumstance which has enlivened a disposition to award costs on an indemnity basis is the imprudent refusal of an offer to compromise. The correspondence which preceded the filing of the application was, in effect, a highly detailed rationale for why it was that a compromise of sorts ought to be achieved. That compromise may have been distasteful to Total Building Group, in light of an unfortunate falling out between it and Tesoro, but it was a compromise which had about it a

compelling quality, which was, "Withdraw the statutory demand and let us litigate our differences in a court of appropriate jurisdiction."

23 Ultimately, that realisation does seem to have come to Total Building Group, but belatedly. Part of the realisation to which it was asked to come was that the sum the subject of a statutory demand had indeed been paid to it. Perhaps that realisation also came to Total Building Group by 24 June 2009. In any event, it seems to me that the stance taken by Total Building Group in the face of the correspondence prior to 11 June 2009 was imprudent. It was submitted that the stance which came to be adopted by Total Building Group ought to be judged by reference to the material which is to be found in the affidavit filed in support of the application to set aside the statutory demand, ie, that of Mr Maggiolo. As I have already observed, that affidavit is detailed, indeed.

24 However, when one goes to it what one finds is reference to material which was already in the hands of Total Building Group in relation to why it was that there was substance in the submissions made in the correspondence from Cooper Grace Ward which preceded the application to set aside the statutory demand. In other words, it seems to me that Total Building Group's conduct in the face of the correspondence has been, imprudently, to put Tesoro to the expense of preparing that affidavit and filing the application. I recall as well that the time limit for a company to apply to set aside a statutory demand is strict. It is difficult to see how Tesoro could have done more, given that strict time limit, to put Total Building Group on notice as to why it was that the demand ought to have been withdrawn.

25 For these reasons, then, the case is one, in my opinion, which warrants the awarding of costs on an indemnity basis.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 30 July 2009

Solicitor for the Plaintiff:	Cooper Grace Ward Lawyers
Counsel for the Defendant:	Mr DW Marks
Solicitor for the Defendant:	Winchester Young & Maddern Solicitors
Date of Hearing:	24 July 2009
Date of Judgment:	24 July 2009