

SUPREME COURT OF QUEENSLAND

CITATION: *All Type Developments Pty Ltd v Hickey* [2009] QSC 224

PARTIES: **ALL TYPE DEVELOPMENTS PTY LTD**
ACN 121 286 708
(applicant)
v
ROSS HICKEY
(respondent)

FILE NO: BS 2045 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 11 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2009

JUDGE: White J

ORDER: **Set aside the statutory demand dated 2 February 2009**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN
INSOLVENCY – STATUTORY DEMAND –
APPLICATION TO SET ASIDE DEMAND – GENUINE
DISPUTE AS TO INDEBTEDNESS – OFFSETTING AND
OTHER LIKE CLAIMS – GENERALLY – where the
applicant entered into a building contract with the respondent
builder – where the respondent served a payment claim on the
applicant and subsequently obtained an adjudication decision
for payment of the claim – where the adjudication decision
amount was registered as a judgment debt and partially
satisfied – where the respondent served a creditor’s statutory
demand on the applicant for the unsatisfied judgment debt
amount – where the applicant applies to set aside the statutory
demand on the basis that it has an offsetting claim – whether
the statutory demand should be set aside pursuant to s 459H
of the *Corporations Act* 2001 (Cth)

Building and Construction Industry Payments Act 2004
(Qld), s 17, s 18, s 19, s 21, s 24, s 31, s 100
Corporations Act 2001 (Cth), s 459G, s459H

BBB Constructions Pty Ltd v Frankipile Australia Pty Ltd
[2008] NSWSC 982, applied

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (2004) 61 NSWLR 421, cited
Demir Pty Ltd v Graf Plumbing Pty Ltd [2004] NSWSC 553, cited
Edge Technology Pty Ltd v Lite-On Technology Corporation (2000) 34 ACSR 301, cited
Peekhrst Pty Ltd v Wallace & Anor [2007] QSC 159, cited
Roadtek, Department of Main Roads v Philip Davenport and Ors [2006] QSC 047, cited

COUNSEL: Ms N Martin for the applicant
 Mr JH Sive for the respondent

SOLICITORS: Harris Sushames Lawyers for the applicant
 Direct access brief for the respondent

- [1] All Type Developments Pty Ltd (“All Type”) has applied to set aside a creditor’s statutory demand dated 2 February 2009 pursuant to s 459G of the *Corporations Act 2001* (Cth) on the ground that it has an offsetting claim.
- [2] The statutory demand is based on a judgment entered in the Magistrates Court at Beaudesert pursuant to an adjudication certificate registered under s 31(1) of the *Building and Construction Industry Payments Act 2004* (Qld) (“the *BCIP Act*”) on 19 December 2008. The amount registered as a judgment debt was \$45,815.23. Enforcement orders returned \$37,981.15 to the judgment creditor leaving \$7,834.08 outstanding and in respect of which the statutory demand was made.
- [3] All Type contends that it has an offsetting claim such that the amount outstanding is below the statutory threshold and the statutory demand ought therefore to be set aside. The respondent contends that the claim is not genuine and that All Type is insolvent.
- [4] All Type entered into a written building contract with the judgment creditor, Mr Ross Hickey, who is a registered builder, on 11 February 2008 to build a two story unit duplex. On 21 October 2008 Mr Hickey served a payment claim on All Type pursuant to s 17 of the *BCIP Act* for \$42,400 (including GST).
- [5] All Type, through its solicitors, wrote to Mr Hickey by letter dated 31 October 2008 setting out numerous alleged defects in the work or lack of completion of the work. No mention was made in that letter of a payment schedule in response to the payment claim. However, there is a letter exhibited to Mr Appleyard’s¹ affidavit from All Type’s solicitor headed “Payment Schedule” dated 10 November 2008 and addressed to Mr Hickey. It contains the following:

“This schedule relates to the Payment Claim you served on our client on 4 November 2008 in the form of Tax Invoice No 108 dated 3 November 2008.”

Mr Hickey denies that there was any payment schedule response and the adjudication decision would support that assertion. This application did not canvass those issues relating to the adjudication decision, and whether there was a breach of natural justice. There has been no application by All Type to set aside the adjudication decision.

¹ Managing director of All Type Developments Pty Ltd.

- [6] To understand Mr Hickey’s contention that the alleged dispute raised by All Type is not genuine, it is necessary to refer to the scheme under the *BCIP Act* for resolving progress payment claims quickly and how that scheme fits within ordinary civil litigation.
- [7] It is not in contention that the contract between the parties was a construction contract within the meaning of the *BCIP Act*. Under the *BCIP Act* a person who claims to be entitled to a progress payment may serve a progress claim on the person who, under the relevant construction contract, may be liable to make the payment. Section 17 sets out what must be included. A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.² By s 18(4):

“Subsection (5) applies if –

- (a) a claimant serves a payment claim on a respondent; and
- (b) the respondent does not serve a payment schedule on the claimant within the earlier of –
 - (i) the time required by the relevant construction contract; or
 - (ii) 10 business days after the payment claim is served.”

Subsection (5) provides:

“The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.”

- [8] Section 19 sets out the consequences of not paying a claimant if there is no payment schedule. It provides relevantly:

“(1) This section applies if the respondent –

- (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
- (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.”

In that event:

“(2) The claimant –

- (a) may –
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or

² *Building and Construction Industry Payments Act*, s 18.

- (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; ...”

[9] Mr Hickey chose the method provided for in s 19(2)(a)(ii) and applied to an authorised nominating authority for an adjudication of his payment claim. Section 21(1)(b) provides:

- “(1) A claimant may apply for adjudication of a payment claim (an *adjudication application*) if –
- (a) ...
 - (b) the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.”

By s 21(2):

- “An adjudication application to which subsection (1)(b) applies can not be made unless –
- (a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim; and
 - (b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant’s notice.”

By s 21(5) a copy of an adjudication application must be served on the respondent.

[10] By s 24 a respondent to an adjudication application may give the adjudicator:

- “(1) ...a response to the claimant’s adjudication application (the *adjudication response*) at any time within the later of the following to end –
- (a) 5 business days after receiving a copy of the application;
 - (b) 2 business days after receiving notice of an adjudicator’s acceptance of the application.
- (2) The adjudication response –
- (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) may contain the submissions relevant to the response the respondent chooses to include.
- (3) The respondent may give the adjudication response to the adjudicator only if the respondent has served a payment

schedule on the claimant within the time specified in section 18(4)(b) or 21(2)(b).

...”

The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.³

- [11] If an adjudicator decides that the respondent is required to pay an adjudicated amount the respondent must pay that amount to the claimant on or before a stipulated time.⁴ If the respondent fails to do so the claimant:

“(a) may ask the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section; ...”⁵

- [12] By s 31 an adjudication certificate may be filed:

“as a judgement for a debt, and may be enforced, in a court of competent jurisdiction.”

By s 31(4):

“If the respondent commences proceedings to have the judgement set aside, the respondent –

- (a) is not, in those proceedings, entitled –
 - (i) to bring any counterclaim 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 decision; and
- (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings.”

- [13] The adjudication decision is exhibited to Mr Hickey’s affidavit. The adjudicator noted that the Australian Institute of Quantity Surveyors (“AIQS”) had referred the application to him on 18 November 2008. He accepted the application on 19 November 2008 “and the AIQS notified my acceptance to the parties on the same day”. The adjudicator noted that the payment claim date of 21 October 2008 was served on the respondent on the same day. The adjudication decision notes that the adjudicator requested further submissions from the parties under s 25(4)(a) of the *BCIP Act*. Although the respondent had not provided a payment schedule, the adjudicator noted that he “should not just rubber stamp the payment claim”. He proceeded to make an adjudication decision in favour of Mr Hickey in the sum of \$42,400 plus interest and adjudication fees. The amount registered as a judgment debt was \$45,815.23. An enforcement order dated 19 December 2008 was returned partly unsatisfied being a cheque for \$37,981.15. The difference constitutes the amount of the statutory demand.

³ *Building and Construction Industry Payments Act*, s 24(4).

⁴ *Building and Construction Industry Payments Act*, s 29.

⁵ *Building and Construction Industry Payments Act*, s 30(1).

- [14] Mr Appleyard deposed in his affidavit filed by leave on the day of this hearing that an application had been filed in the Commercial and Consumer Tribunal wherein All Type claims a set-off for damages for the amount of \$9,070.13 against the outstanding payment claims. He does not say when the application was filed nor that it had been served on Mr Hickey. The application, which he exhibits, although signed is not dated. It does not bear a stamp indicating that it has been filed in the Tribunal. The statement of claim attached to the application details the contract and a dispute over certain work and items not provided. The notice to remedy the breach dated 31 October 2008 and the particulars of the breaches set out in that letter are set out as particulars in the statement of claim. All Type pleads that on about 10 November 2008 All Type served Mr Hickey “a Payment Schedule pursuant to s. 18 of the *Building and Construction Industry Payment [sic] Act 2004*”. The statement of claim then pleads that:

“The respondent [Mr Hickey] refused, neglected or otherwise failed to respond to the Payment Schedule referred to in paragraph 9 above,”

and:

“With no notice to the applicant [All Type], the respondent [Mr Hickey] filed an online adjudication application in respect of a payment claim under the Act.”

and

“...did not provide to the adjudicator with any of the applicant’s correspondence...”

This pleading seems to misunderstand the process in the *BCIP Act*.

- [15] The balance of the statement of claim refers to the enforcement warrant, the statutory demand and All Type’s application to set aside the statutory demand. Further defects were alleged to have been found in the course of arranging settlement of one of the units at the end of May 2009. As a result of these alleged defects All Type expended \$7,570.13 for rectification work. All Type also alleges that in breach of the contract Mr Hickey installed a laminate bench top and not a stone bench top. The difference is \$1,500. The claim is for \$9,070.13 as damages for breach of contract.

- [16] Section 100 of the *BCIP Act* provides that nothing in part 3 (adjudication decisions) affects any rights that a party to a construction contract may have under the contract and:

“(2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).”

Subsection (3) allows any amount paid under any order or award made by an adjudicator to be taken into account in civil proceedings.

Offsetting claim

- [17] The prohibition against raising a counter-claim or any defence in relation to matters arising under the construction contract in s 31(4)(a) relates only to proceedings

brought to set aside a judgment debt entered after an adjudication certificate has been filed in a court.⁶ As is well-recognised, the *BCIP Act* adjudication process is a fast-track one to keep up a contractor's cash flow.⁷ The parties still have available to them the usual curial processes to determine their rights *inter se* including the right to have returned payments made through the adjudication process.

- [18] By s 459H of the *Corporations Act* an “offsetting claim” means “... a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand ...”. The offsetting claim must be genuine, that is not frivolous or vexatious.⁸ In *BBB Constructions Pty Ltd v Frankpile Australia Pty Ltd*⁹ Brereton J said:

“The test for determining whether there is a genuine offsetting claim is whether the Court is satisfied that there is a serious question to be tried that a party has an offsetting claim (*Scanhill Pty Ltd v Century 21 Australasia* (1993) 47 FCR 451) or that the claim is not frivolous or vexatious (*Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd* (1994) 13 ACSR 37). In other words, the claim must be *bona fide* and a truly existing fact and not spurious, hypothetical, illusory or misconceived (*Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* [2006] SASC 91; (2006) 94 SASR, [46]). In *Macleay Nominess Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743, Palmer J put it in the following terms (at [18]):

‘In my opinion, a genuine offsetting claim for the purposes of [Corporations Act] s. 459H(1) and (2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. “Good faith” means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful.’

- [19] Notwithstanding the surprising failure of All Type to participate in the adjudication process, the letter of 31 October 2008, sent well before the application for adjudication, does identify with particularity alleged defects including the failure to provide certain items such as water tanks and fireproof batts. The amount claimed as damages or set-off is \$9,070.13 particularised and a money amount for each item given.
- [20] The conclusion is that All Type has discharged its onus that it has an offsetting claim and, in that circumstance, by s 459H(3) the Court must set aside the demand.

Solvency

- [21] Mr Sive contended that even if the dispute were genuine, nonetheless, All Type is insolvent and ought to be wound up. The issue of a company's actual insolvency is

⁶ *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553. Also in proceedings brought to recover the unpaid portion of the claimed amount as a debt owing: *Building and Construction Industry Payments Act*, s 19(4).

⁷ *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 per Hodgson JA at para 51; [2004] NSWCA 394; *Roadtek v Davenport* [2006] QSC 047; *Peekhrst Pty Ltd v Wallace* [2007] QSC 159.

⁸ *Edge Technology Pty Ltd v Lite-On Technology Corporation* [2000] NSWSC 471; (2000) 34 ACSR 301 at 307.

⁹ [2008] NSWSC 982.

not to be resolved on an application to set aside a statutory demand.¹⁰ That is for any winding up application's final hearing.

Order

[22] Set aside the statutory demand dated 2 February 2009.

¹⁰ *Master Paving Pty Ltd v Heading Contractors Pty Ltd* (1997) 15 ACLC 1025; K O’Gorman ‘Sidestepping the statutory demand: is solvency a solution?’ (2002) 10 Insolv LJ 239.