

SUPREME COURT OF QUEENSLAND

CITATION: *13 Manning Street P/L v Charlie Woodward Builder P/L*
[2010] QSC 151

PARTIES: **13 MANNING STREET PTY LTD**
(applicant)

v

CHARLIE WOODWARD BUILDER PTY LTD
(respondent)

FILE NO/S: 2083 of 2010

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 April 2010

DELIVERED AT: Brisbane

HEARING DATE: 14 April 2010

JUDGE: Fryberg J

ORDERS: **1. The Creditor's Statutory Demand for payment of debt dated 05 February 2010 issued against the Applicant by the Respondent be set aside on the following conditions:**

(a) That within 14 days of the date of this Order the Applicant file in the District Court proceedings relating to its offsetting claim;

(b) That within 7 days of filing the District Court proceedings, the Applicant pay into the District Court (in those proceedings) the sum of \$74,282.78 to abide the outcome of those proceedings.

2. That the costs of and incidental to the Application and proceeding 2083/10 follow the event and outcome of the District Court proceedings referred to in Order 1.

CATCHWORDS: Corporations – Winding up – Winding up in insolvency – Statutory demand – Application to set aside – Genuine dispute as to indebtedness – Offsetting and other like claims – Generally – Offsetting claim alleged – *Corporations Act 2001* (Cth), s 459H – Relevant considerations

Building and Construction Industry Payments Act 2004
(Qld), s 100
Corporations Act 2001 (Cth), s 459H, s 459M

J Hutchinson Pty Ltd v Galform Pty Ltd [2008] QSC 205,
cited

COUNSEL: S McNeil for the applicant
D P Gardner for the respondent

SOLICITORS: Maunsell Pennington Solicitors for the applicant
Eaton Lawyers for the respondent

HIS HONOUR: I have before me an application pursuant to s 459H of the *Corporations Act* to set aside a statutory demand served on the applicant company and based on a judgment debt in the District Court. That debt is the result of the registration in that Court of an adjudication certificate which in turn was the result of proceedings between the parties under the *Building and Construction Industry Payment Act*, which culminated in an adjudication on the 15th of January this year.

Under that adjudication it was held that the present applicant was obliged to pay the respondent some \$76,000 which was an amount determined by the adjudicator after taking into account claims and cross-claims made by both parties. The applicant has not applied to set aside the judgment and on the material before me it does not appear that it has any entitlement to make such an application.

There appears to be nothing irregular in what has transpired leading up to the judgment debt and unlike the usual situation the applicant is not in a position to seek to set the debt aside on the merits by relying on any defence or counterclaim which it might claim it has against the respondent.

The applicant is however entitled, having regard to s 100 of that Act, to bring proceedings to establish any merits which it claims it has under the building contract. Relying on the decision of Chesterman J in *J Hutchinson Proprietary Limited v Galform Pty Ltd* [2008] QSC 205, the respondent submitted that

an estoppel arose or some principle of res judicata applied to prevent the applicant in the present proceedings from challenging the decision of the adjudicator.

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After an interesting discussion, focusing on the words of s 459H, and particularly the definition of offsetting claim, counsel did not press the argument that the applicant would not be able to bring such proceedings nor did it seek to argue that in any such proceedings an issue estoppel would arise. I therefore need say no more about that aspect of the matter, save that I think counsel's concession was correctly made.

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I must, therefore, determine whether the applicant has a genuine claim or cross-demand, that is, a genuine cross-demand in the circumstances of the present case to raise against the judgment debt. The amount of material in relation to that is fairly voluminous.

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There are differing views about it. The respondent drew my attention, in particular, to the fact that, contrary to the applicant's assertion, there had not been any acceptance by the respondent of the applicant's contention of what was owing. On its face there seems some force in that.

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It drew my attention also to the fact that the applicant had not put any reports or evidentiary material from experts before the Court to support the genuineness of its claims. Nonetheless, in my judgment, the applicant has put forward enough material to show that there is a genuine cross-claim,

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that is, a genuine building dispute on foot and one which, if it cannot be resolved by other means, ought to be resolved by the decision of a court.

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On its face therefore, the applicant is entitled to have the statutory demand set aside. I am, however, entitled pursuant to s 459M of the *Corporations Act* to impose conditions on so doing. It seems to me this is an appropriate case for the imposition of such conditions.

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The factors which lead me to that conclusion are first, that if the respondent had sought to have the judgment debt set aside it would have been required to pay into Court as security the unpaid portion of the adjudicated amount. That is in the present case the whole of the adjudicated amount.

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The evident intent of the *Building and Construction Industry Payments Act* is to provide some sort of security for contractors. The respondent would evade the whole operation of the Act were I simply to set aside the statutory demand unconditionally. I do not think the applicant should be able to thumb its nose at the legislation in that way. There have been, moreover, substantial delays in this matter and while I do not wish to attribute blame to either party for them, at the end of the matter there will be substantial amounts of interest to be accounted for.

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In my judgment there should therefore be a condition on the order setting aside the statutory demand that the applicant

pay into the District Court in the file of the judgment debt
the amount of that debt to lie in Court to abide the outcome
of the applicant's proposed proceedings.

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I would ask that the parties prepare a draft order which will
meet the requirements of these reasons.

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