DEALING WITH STATUTORY DEMANDS ARISING FROM THE

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999.

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Presented by:

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CHAMBERS

(1) Introduction:

In formulating this seminar it has become clear that the topic as originally submitted is only part of the way of dealing with judgments and of course Statutory Demands (459E Notices) following the decision In the matter of *Douglas Aerospace Pty Ltd [2015] NSWSC 167 (9 March 2015).*

I have set out the speaking points and filled some of the detail in where it can be done so easily, I could write a book and still be open to the criticism that it is not comprehensive enough so this session is designed to assist with training our thinking when dealing with this difficult part of the Law.

(2) Sources of judgment under the Building and Construction Industry Security of Payment Act 1999 ("the Act")

2.1 The Act has often been referred to "*as a pay now argue later scheme"* which is designed to facilitate cash flow in the building industry.

2.2 The Act has a scheme for payments to be made quickly either by an ability to seek judgment (S15.2 and 16.2) or go to adjudication (S17).

2.3 Following adjudication, the nominating authority can issue a certificate S25 and that can be converted into a judgment S25(4).

2.4 Statutory Demands were ineffective as the judgment is an interim judgment .

2.5 Until *In the matter of Douglas Aerospace* the demand could be set aside with almost no effort.

2.6 This situation was changed by Brereton J by adopting the decision of the WA Court of Appeal *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91

2.7 In *Douglas Aerospace* Brereton J said*:*

> **"Genuine disputes and offsetting claims in the BACISOPA context**
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> 45. However, as I have foreshadowed, there is a significant issue as to whether "genuine disputes" and "offsetting claims" can be raised in respect of a judgment debt arising upon the filing of an adjudication certificate under BACISOPA, particularly in the light of the recent decision of the Western Australia Court of Appeal in *Diploma Construction (WA)*

Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91 (Pullin JA; Newnes and Murphy JJA concurring), **which has taken a somewhat different view, at least in one respect, from that which has until now prevailed in this State. [Tim Bland emphasis]**

Diploma v KPA

46 (WA) Construction Contracts Act 2004, s 43, relevantly provides:

43. ***Determinations may be enforced as judgments***

(1) In this section -

Court of competent jurisdiction, *in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.*

A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

47. The demand in question in Diploma was based on a judgment created by entry of two adjudication determinations under that provision. The application to set aside the demand relied, relevantly, on two grounds – that there was a genuine dispute as to the existence of the debt which had been the subject of the adjudication, and that there was an offsetting claim (which had been instituted in the District Court) for damages for breach of contract, and declarations that the sums referred to in the adjudications were not payable or alternatively ought to be repaid. At first instance, Master Sanderson accepted that there was a genuine underlying dispute in respect of the debts but dismissed the application, holding that just as, on the authority of Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd [2008] HCA 41; (2008) 237 CLR 473, the statutory demand procedure could be invoked by the Commissioner of Taxation to recover a tax debt even though an objection was on foot, so

too under the Construction Contracts Act, the "genuine dispute provisions in the statutory demand procedure were not available", and that the same reasoning applied to any offsetting claim.

48 In the Court of Appeal, the issues of present relevance were (1) whether the appellant's claim for the declarations that the adjudicated sums were not payable gave rise to a genuine dispute or an offsetting claim within the meaning of s 459H(1)(a) or (b), or provided "some other reason" for setting aside the statutory demand pursuant to s 459J(1)(b); and (2) whether the appellant's claim for damages was an offsetting claim within s 459H(1)(b).

49 As to genuine disputes, the Court held that an argument that the adjudicated amounts were not in truth as a matter of contractual right due and payable could not give rise to a genuine dispute about the adjudicated amount. In doing so, reliance was placed, as it had been by the Master, on Broadbeach:"

(3) The crux of the issue in *Douglas aerospace*.

His Honour said later:

"75 In Ettamogah Pub (Rouse Hill) Pty Ltd v Consolidated Constructions Pty Ltd (in liq) [2006] NSWSC 1450, White J again said:

' Whilst there can be no dispute that the plaintiff is indebted to the defendant for the amount claimed in the statutory demand, the plaintiff will nonetheless have an offsetting claim equal to the amount of that debt if there is a genuine dispute that the defendant was not contractually entitled to the amount claimed in the payment claims made under s 13 of the Security of Payment Act [12].'

……..."

Further his Honour went on to say**;**

"*78. There is another reason why the decisions are, with respect, wrong. In Plus 55, White J stated that the company was litigating to determine "whether it*

was liable to pay the amount the adjudicator determined was payable" [10]. That is not a cross-claim for a money sum which will exceed or reduce the amount of the demand. The cross-claim must be capable of being quantified in money terms before it can qualify as a genuine offsetting claim: Chase Manhattan Bank Australia Ltd v Oscty Pty Ltd [1995] FCA 1208; (1995) 17 ACSR 128 at 135 (Lindgren J); Ozone Manufacturing Pty Ltd v DCT [2006] SASC 91 [45] (Debelle, Besanko & Layton JJ agreeing); Innovision Developments Pty Ltd v Martorella [2012] VSC 390 [20] and [21]. In 96 Factory Bargains Pty Ltd v Kershel Pty Ltd [2003] NSWSC 146 [27], Barrett J said that an offsetting claim:

[M]ust be one capable of being quantified in money terms. It need not be a liquidated claim but it must be one to which a monetary liability can be attached. This is because of the directive in s 459H(2) that the court determine, among other things, "the amount of that claim" or, where there are several claims, "the total of the amounts of those claims". It follows that only claims sounding in debt or damages or other monetary consequences ... may be taken into account for the purposes of s 459H.

79 See also BMG Poseidon Corp Pty Ltd v Adelaide Bank Ltd [2009] FCA 404 [82]; Canpoint International Pty Ltd v Anar International [2008] FCA 4 [42]. The appellant's claims for declarations are not quantified in money. The plea is that "if" the October 2012 invoices and the January 2013 invoices had to be paid, the appellant would suffer loss (see paras 24 and 37 of the statement of claim)."

While the decision appears to create a situation where a Judgment under the Act effectively becomes a final judgment by the issue of a Statutory Demand, it has always been required that the adjudicated amount be accounted for in the *final curial proceedings (s.32 of the Act).*

Brereton J reopens the door that appeared closed, by saying:

"88 The New South Wales authorities have been followed, in respect of similar legislation, in Queensland. In Reed Construction (Q) P/L v Dellsun P/L [2009]

QSC 263, Martin J referred to and followed the New South Wales cases to which I have referred, and concluded:

> ***[46]*** *It would be a curious, indeed unsatisfactory and inconsistent, construction of BCIPA which would result in a contractor being estopped from raising a dispute or an offsetting claim in an application under s 459G of the Corporations Act in circumstances where it is specifically allowed to do so in an action contemplated by the provisions of s 100. The reasoning advanced by Macready As. J in Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd has been adopted and refined by the authorities which have followed it. The terms of BCIPA cannot be used to constrain the operation of a Commonwealth statute such as the Corporations Act. It is sufficient, for the purposes of this decision, to hold that s 100(1)(c), by providing that nothing in Pt 3 of BCIPA affects any right that a party to a construction contract may have apart from the Act in relation to anything done or omitted to be done under the contract, is sufficient to allow (if it is otherwise needed) a party to raise a genuine dispute or an offsetting claim under s 459G of the Corporations Act. "*

(4) Can a Statutory Demand be set aside following ***Douglas Aerospace?***

4.1 Are there still challenges available?

There are now limited avenues of challenge to a demand. After distinguishing one aspect of *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91* as plainly wrong Brereton J then summarised the position in NSW saying:

> *"96 Accordingly, the position that a genuine cross-claim for damages for negligence or breach of contract or restitution will result in a statutory demand being set aside or varied is undisturbed by Diploma. Thus while a demand for an amount adjudicated under BACISOPA is not amenable to a "genuine dispute" under s 459H(1)(a), it remains vulnerable to a genuine "offsetting claim" under s 459H(1)(b)."*

That limited avenue of challenge was successful in *In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607 (30 October 2015).* In that matter the adjudication determination led to a raft of litigation:

(a) An application for stay in the District Court unsuccessful and advised against.

(b) S32 final rights claims in the District Court and

(c) an application to set aside or vary the Statutory Demand in the supreme Court.

After two days of argument and evidence Justice Robb found that J Group had established a genuine offsetting claim and the Demand was varied from about $175,000 to about $7,000.

His Honour relied upon the proceedings in the District Court to base the findings.

4.2 Defence, to an application for judgment sought pursuant to S15(2) or 16(2) of the Act

4.2.1 Re: S15(2) of the Act .

S.15(4) of the Act provides:

"(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract."

4.2.2 Re: S16(2) of the Act.

S. 16(4) of the Act provides:

"(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the

court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract."

Both these are limited by the provisions of the Act.
However the Court must be satisfied that the circumstances of Sub1 have been met.

In recent times, S13(7) of the Act [the requirement of a statement by a head contractor] has had the effect of causing judgment to not be given as the failure to include the certificate means that service of the payment claim has not been effected for the purposes of the Act.

This sets up its own problems in that where a certificate is not required by the contract the payment claim is valid under the contract but not under the Act.

S13(8) of the Act deserves some mention at this point as this is where a payment claim is served with a certificate but the certificate is "*knowingly wrong"*. Effectively a fraud is committed. Two recent decisions *J. Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, and *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd [2016] NSWSC 334* have both sought to challenge adjudication on the basis of a knowingly false certificate under S13(7). This would seem to be a high hurdle to get over. It has to be pleaded as a fraud, there is the need to establish that there are trades which are due and payable and finally the knowing conduct of the person who prepared and or signed the certificate, is required.

In Kyle Bay, whilst it doesn't feature in the judgment, Meagher JA in argument (sitting as a trial judge) indicated that if the S 13(8) offence was established it

would not be just a civil penalty for the offence but that it may also have the effect of negating service of the payment claim and thus being a jurisdictional question. However the point has yet to be established for the Court to determine its view.

4.3 **Preservation of Rights**

4.3.1 Because the Act is an *interim* scheme the parties' rights are preserved by S32, which provides:

"32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, an

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings."

A party is entitled to bring these proceedings but noting that a Statutory Demand has a very tight timetable any application needs to be brought within 21 days of the service of the demand. Proceedings begin with an application to stay the judgment and the application to stay is done by

notice of motion. Caution needs to be exercised as there is a conflict between origination in the Equity Division (Construction Technology) and the Corporations List.

4.3.2 The accepted position of the Court of Appeal in Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at paragraph 85, is to be noted:

"85 A court in which judgment for recovery of money has been given can stay execution of that judgment. A party against whom there was a substantial judgment could apply for a stay of execution on the grounds that it had a greater claim against the judgment creditor, for which it would shortly obtain judgment, and that, if the judgment money was paid, it would be irrecoverable; and the court could in its discretion grant a stay, on terms if it thought appropriate. I see no reason why a judgment under s.25 of the Act could not be stayed on that kind of basis, although the policy of the Act that progress payments be made would be a discretionary factor weighing against such relief."

4.4 **Challenging the Adjudication**

4.4.1 Jurisdictional challenges

As a note there is a real internal conflict with the application to set aside a Statutory Demand and the application to quash an adjudication. The application to deal with the adjudication is a summons however there are rules about the Corporations List matters and unless handled properly any proceedings brought may not be compliant with the Corporations rules and give rise to a submission that the proceedings were not commenced in time thus giving rise to a presumption of insolvency sufficient to found and an application to wind the company up.

4.4.2 Lack of procedural fairness

See *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2016] NSWSC 462.*

4.4.3 Service of a valid payment claim S13(7)

These are matters for a further paper as the body of law to be considered is vast. The usual cost of bringing a challenge to the adjudication is that the adjudicated amount is to be paid into court.

(5) Challenging the judgment directly by reason of a defence.

5.1 Defences are limited by reason of S15(4) & S16(4) Traditionally they have included "misleading & deceptive conduct" as well as defences which arise from the operation of the Act

This can have the effect of removing the underlying debt.

(6) Challenging the judgment by obtaining a stay of the "Security of Costs" judgment (S32 proceedings)

6.1 To obtain a stay you must either pay the disputed amount into court or otherwise to satisfy the Court that the amount is secured or show that there is a more likely than not a chance that if the debt is paid then you will be unlikely to recover the money paid. Paragraph 85 *Brodyn*

6.2 In doing so practitioners need to be mindful of the rules for a stay pursuant to S67 Civil Procedure Act

(7) Statutory challenges under the Corporation Act 2001

These are now limited to offsetting claims and it would seem that where under the Corporations Act you only need to demonstrate an off setting claim where the

judgment is based upon an adjudication, the Court will look a little more closely at the offsetting claim.

(8) Defect in the demand.

This would also be a further CPD however defects are not often up held see for example *JSBG Developments Pty v Kozlowski [2010] NSWSC 97 (18 February 2010)*

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