JOHN HOLLAND CONSTRUCTION AND ENGINEERING PTY LTD v KILPATRICK GREEN PTY LTD

SUPREME COURT OF NEW SOUTH WALES – EQUITY DIVISION

YOUNG J

8 August 1994 – Sydney

Statutory demand – Debt – Whether genuine dispute – Time required to produce accurate figures – Notice set aside – Corporations Law s 467A.

The appellant was successful in obtaining a very large construction contract. In the course of obtaining it, the respondent did work for it on the expectation that it would obtain a sub-contract. The parties had agreed that in any event the respondent would be paid for the work it did associated with obtaining the principal contract which was awarded to the appellant.

In fact no sub-contract was awarded to the respondent, and a large amount of correspondence then passed between it and the appellant as to the project, the invoices, the work that the respondent was alleged to have done or not done, and the damage which the respondent was alleged to have caused to the project by the way in which it had conducted itself.

By a statutory demand of 14 April 1994 the respondent claimed $1,023,654.06 based upon three invoices. Although the amount claimed was said by the appellant to be in dispute, the master before whom the matter came in the first instance took the view that there was no adequate material before him to substantiate the claim that the dispute was genuine. The master proceeded on the basis that the amount claimed was uncontested. He dealt with the demand by reducing the amount on account of cross-claims.

Held, allowing the appeal:

(i) It remains the law that the Companies List should not be used as a convenient way of bringing disputed debts before the court.

(ii) In all cases, in order to show that there is a dispute it is necessary to produce something between a mere assertion and the proof that would be necessary in a court of law. Consideration given to what may be necessary to adequately show that there is a dispute.

> *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)* (1994) 13 ACSR 787; 12 ACLC 490, considered.

(iii) In a sizeable construction case such as the present where the contemporaneous correspondence between the parties shows a dispute as to the figures, the court should accept that there is a genuine dispute without needing to examine those figures or to examine the evidence that backs them up. A similar position holds with respect to off-setting claims.

(iv) In any event, by looking at the figures it seems that there is no undisputed amount which can be said to be owing under s 459H of the Corporations Law.

Appeal

This was an appeal from a master of the Supreme Court of New South Wales to a judge of that court. The facts are set out in the following judgment.

R V Gyles QC and *J Nicholas* instructed by *Baker & McKenzie* for the appellant.

N C Hutley instructed by *Colin Biggers & Pailey* for the respondent.

Young J. This is an appeal from Master Macready. Normally if I were differing from the opinion of that learned master I would take further time to consider the matter, but in this particular case I think it is appropriate to give a decision now because I regret to say that I do not think that the learned master's decision can stand no matter which way one looks at this particular case.

Prior to the amendments to the Corporations Law by the Corporations Reform Act No 210 of 1992, the way in which the Companies Court approached disputed debt applications was relatively clear, though it was sometimes difficult to work out cases that were on the boundary line. The clear principle was that the Companies Court was not to be the place where litigation was to be conducted about disputed trading debts. The Companies List is designed to wind up insolvent companies in the public interest, not as a way of getting a dispute between companies in the marketplace on before a court quickly. Generally speaking, if it could be seen from the conduct of the parties that there was an honest dispute between them, then they would be expected to have that dispute resolved in the normal channels, that is in litigation in the Common Law Division or the District Court or before an arbitrator, and not in the Companies List.

The main reason for restructuring the provisions made by the 1992 Act was because there had grown up in different states different attitudes to cases where a statutory demand had misstated the amount. There was also a problem in the approach by different judges as to how one dealt with a counter-claim. The legislature endeavoured to set out very definite provisions on these matters in an attempt to minimise the amount of litigation that would be produced in such circumstances. Unfortunately, that attempt appears to have failed, judging from the number of cases that have been reported in the last three volumes of the standard series of company reports. That is by the by. The important thing to realise is that the basic attitude that the Companies Court is not to be the court which deals with disputed debts remains the principle.

There will be various types of commercial relationships that will produce debts between traders. Sometimes the debt is very easy to compute, such as the situation where there are a limited number of buying and selling transactions between the parties to the dispute. However, on the other end of the scale can be large construction contracts where it is sometimes difficult, at least in the short term, to work out just what is owing by one party to the other.

Those words "in the short term" are significant because the statutory scheme, and for this one can focus on s 459G of the Corporations Law, is that there are only 21 days after a statutory demand is served to set it aside, and there are a series of decisions of various courts to say that time may be of the essence in that regard, subject at least to the court applying s 467A of the Corporations Law. Could it, therefore, really have been intended by the legislature that in the case of a complicated construction dispute there would only be a very short time of 21 days for the issuing of a statutory

demand for a person to get together all the appropriate evidence to back up what that person said was the dispute between the parties? I do not think that one could say that the legislature had that in mind at all.

I, accordingly, approach this present problem with that background. The present is a dispute between a contractor and a sub-contractor over an arrangement made to do work on the Glenfield to Ingleburn railway line. It was thought that in due course the appellant would be awarded a contract by the National Rail Corporation and that it would let a sub-contract to the respondent. The appellant was awarded a contract, but the sub-contract never came into existence. By letter from the respondent to the appellant of 13 January 1992 the respondent asked for confirmation:

> ... that should a contract not be concluded for any reason between [the appellant] and [the respondent] that [the appellant] will reimburse [the respondent] for any costs and expenses that may be incurred related to this project.

This letter was answered the next day by one confirming that there would be such reimbursement. The respondent submitted an invoice 107667 on 25 February 1994 for $577,807.22. This invoice was plainly rendered on the basis that in due course there would be a sub-contract because the invoice was on the basis of what the respondent might be entitled to charge were such a contract in existence. In due course it became plain that such a contract would never come into existence, the appellant maintaining that the respondent's work and attitude was completely unsatisfactory.

Before a statutory demand was issued on 14 April 1994 there was a large amount of correspondence between the parties as to the project, the invoices, the work that the respondent was alleged to have done or not done, and the damage which the respondent was alleged to have caused to the project by the way in which it conducted itself. It was put in that correspondence that the client had valued the work for which the respondent had billed some $577,000 as in the order of $150,000. By the time the matter came before the learned master it would seem that the contention of the proprietor was that the value of the work done, forgetting about the counter-claim, was only $286,236.95.

In the statutory demand of 14 April 1994 the respondent claimed $1,023,654.06 based on three invoices. The first I have already referred to. The second simply said, "Total value of work to date as per attached", and then deducted claim no 1, and the third was in very similar form. The respondent maintained this demand on the basis that even though invoice no 1, at least, was framed on the basis that the contract was still to be deemed to have been entered into, when that situation was exploded the amount claimed still bore some close resemblance to the work actually done.

There is some question about this because the amount invoiced did include a profit margin, which is rather strange in respect of a reimbursement claim, and certain other amounts which without any further information one would think were rather suspect.

Before the learned master the assumption seemed to have been made that the claim was undisputed and that all that the learned master needed to do was to assess the offsetting total which should be put against that claim. The learned master assessed the offsetting total by reducing the claim

to $654,114.63. It seemed to be conceded by both parties that on his reasoning he should have merely reduced it to $732,049.59 because he counted one amount of $77,000-odd twice.

The learned master in his reasons does not appear to have paid much, if any, significance that there was a dispute as to the claim. Mr Hutley, who appeared both here and below for the respondent, put that the learned master's approach really was correct. He put that when one looks at the challenge to the claim one could see that there was the client's assumption which had no figures to back it up, on the one hand, and the claim that had been put forward from the beginning, on the other hand. He put that a mere assertion that there is a dispute about the claim was not sufficient and in the absence of proper details before him, the learned master really could just treat the claim as being not the subject of any genuine dispute.

With great respect, I would differ from this approach. There may be cases, and indeed it may be the majority of cases, where the court will look not only to an assertion of a dispute, but some sort of material short of proof which backs up the claim that is made that the amount is disputed. It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt.

On the other hand, if proof of a claim was required then one would be doing the very thing that one is not to do, and that is to try this sort of dispute in the Companies Court. What more than assertion is required is something that may differ from case to case. In *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)* (1994) 13 ACSR 787; 12 ACLC 490 I indicated that so long as the claim is not fictitious or merely colourable and is genuinely believed to exist one can ordinarily take that as sufficient. That is something more than mere assertion. Even if the proposition in *Jesseron (No 2)* goes too far, as Mr Hutley submits, it would seem to me that in a sizeable construction case, where the contemporaneous correspondence between the parties shows that there is a disputing of the figures, then one can say, without looking at the figures, or without looking at the evidence that backs up the figures, that there is a genuine dispute between the company and the respondent about the amount of the debt. A similar thing can be said about any offsetting claim.

Thus, in the instant case it seems to me that the way in which the learned master should have approached the case was to say that so far as the claim was concerned there was a genuine dispute disclosed on the correspondence and in the evidence between the appellant and the respondent about the amount of the debt. The master would then have to see under s 459H(5) and s 459H(2) what was the "admitted total" and to do that one would have to find the amount that the court was satisfied is not the subject of such a dispute.

It would seem to me that in the present case, where the proprietor has asserted that a particular amount only is the value of the work, and that amount is put forward by the contractor to the sub-contractor, then even if there is nothing before the court to show how the amount is made up, there is a genuine dispute between the contractor and the sub-contractor as to the amount of all sums over and above that admitted value of the work.

Accordingly, one would start off with adjusting the claim to $286,236.95. Then one has to look at the offsetting total. Mr Hutley has made various submissions about that, which may or may not be correct. However, even on the figures the learned master found, there must be an adjustment of $289,604.47, which reduces the amount to less than nil. This is even without taking into account the fact that on about 3 June the appellant in fact paid $250,000.

It may be that I am doing a disservice to this court in approaching the matter in this mathematical way. It may be that it is far more appropriate in the instant sort of case for the court to just take a broad brush approach. Thus the court might just say that because this is not a debt collecting court, where there is a construction case of this nature, the demand should be set aside under s 459J(1)(b) whenever it can be seen from the correspondence that there are honestly held views on either side which have brought a dispute between the parties. Thus, the matter can be dealt with in the ordinary way in which construction disputes are dealt with without the time and expense that is involved in running this sort of litigation ahead of that dispute. If I were to do that in the instant case, I would come to the same result.

Accordingly, in my view the appeal should be allowed with costs both here and below. The statutory demand should be set aside. The exhibits may be returned.

JENS LICHTENBERGER
BARRISTER