



WA Court of Appeal upholds a contractor's right to enforce, by statutory demand, a judgment obtained following the adjudication of a payment claim under the *Construction Contracts Act 2004 (WA)*.

Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91

Summary

On 24 April 2014, the WA Court of Appeal confirmed that the statutory demand process is available to enforce a determination and a judgment obtained following the adjudication of a payment claim under the *Construction Contracts Act 2004 (WA)*. The Court also clarified the law around the bases upon which statutory demands may be set aside by the Court pursuant to the *Corporations Act 2001 (Cth)*.

It is now clear that a statutory demand will not be set aside simply on the basis of a contention that a genuine dispute exists as to the debt, if that debt is based on a determination or judgment obtained under the Act. Likewise, only a genuine offsetting claim, sounding in money, with sufficient evidence to establish its existence, will be capable of reducing or setting aside a statutory demand.

Facts

KPA Architects Pty Ltd (**KPA**) were contracted by Fabcot Pty Ltd (**Fabcot**) to provide architectural services for the Kwinana Hub Shopping Centre Redevelopment (**Consultancy Agreement**). In late 2011 Diploma Construction (WA) Pty Ltd (**Diploma**) entered into a Design and Construct Contract with Fabcot. As part of that arrangement, the Consultancy Agreement was novated to Diploma and KPA was required to provide the remaining architectural services on the project to Diploma.

Under the Consultancy Agreement KPA issued a number of invoices to Diploma. Diploma did not pay those invoices thereby creating a "payment dispute" under the *Construction Contracts Act 2004 (WA)* (**the Act**). KPA referred (separately) the payment disputes to an adjudicator for determination in accordance with the Act and secured adjudication determinations in its favour (**the Determinations**). The amount of the Determinations was \$504,545.29. Diploma did not pay Determinations.

Alongside the payment dispute process initiated by KPA, Diploma issued a District Court writ against KPA. The writ claimed damages for breach of contract and negligence in the performance of architectural services alleging dimension discrepancies resulting in delay costs. The alleged loss and damage was stated to be \$287,905.40. KPA filed a defence to that writ denying the allegations.

In order to recover the Determination amounts, KPA obtained leave of the District Court to have the Determinations entered as judgments under s 43 of the Act¹. Diploma did not pay the Judgment Debt

¹ *KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd [2013] WADC 106*

and on 6 August 2013 KPA served a statutory demand on Diploma under s459E of the *Corporations Act 2001 (Cth)* (**Corporations Act**) for the recovery of the Judgment Debt and two other debts.

On 28 August 2013, Diploma applied to have the statutory demand set aside under s 459G of the *Corporations Act*, which was supported by two affidavits sworn by Diploma's Managing Director and CEO.

On the same day, Diploma also filed a "Substituted Statement of Claim" in the District Court Proceedings. The Substituted Statement of Claim added a claim to the effect that if the Determinations had to be paid, Diploma would suffer loss and damage. Diploma pleaded KPA was "not entitled" to the amounts of the Determinations as they were "not due and payable". Diploma also sought various declarations from the Court that the Determinations were not due and payable to KPA, alternatively that the sums in question be repaid by KPA to Diploma.

The application to set aside the statutory demand was heard by Master Sanderson on 7 November 2013². The Master dismissed the application citing the High Court decision of *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*³ (**Broadbeach**) as the "complete answer" to Diploma's submissions that there was a genuine dispute as to the debt and to its argument that there was an offsetting claim.

Diploma sought leave to appeal against the Master's decision.

Decision on appeal

The WA Court of Appeal granted Diploma leave to appeal but unanimously dismissed the appeal on all four grounds.

In his reasons for decision, Appeal Justice Pullin reiterated that the purpose of the Act, *'insofar as it relates to payment disputes, is to ensure that, in construction contracts, progress claims are paid on time and that principals obliged to pay do not act as their own judge and jury and hold up payment on their own assertion that they have a defence warranting refusal to pay. It is a "pay now argue later" system with the primary aim of keeping the money flowing by enforcing timely payment'*⁴.

Applying by analogy the principles in *Broadbeach* to determinations under the Act the Court made it clear that despite being described as 'interim' in nature with no recourse to any res judicata in later proceedings, a determination and a subsequent judgment under the Act does give rise to a debt which is due and payable. Accordingly, if the adjudicator makes a determination that a payment has to be made, then that determination gives rise to a debt 'presently due' and payable by the principal. As a result, the contractor may, with the leave of the Court, enter a determination as a judgment under s 43 of the Act and 'enforce' the determination or a consequential judgment under the *Civil Judgments Enforcement Act 2004* (WA). The contractor may also 'enforce' the judgment by serving a statutory demand pursuant to s 459E (1) of the *Corporations Act* and apply to wind up a company if it does not make payment in response to the demand.

Significantly, the Court of Appeal disagreed with a number of single judge decisions from other Australian States which supported the proposition that a person who owes a debt which is due and payable by reason of an adjudicator's determination and subsequent judgment, can raise a genuine offsetting claim merely by contending that it is not 'in truth, indebted for the amount' determined as due and payable or that, despite the determination, the contractor was not 'contractually entitled' to the amount determined or certified to be due by the adjudicator.⁵

² *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2013] WASC 407

³ (2008) 237 CLR 473

⁴ *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASC 91 at para 55

⁵ *Ibid* at para 73 to 77; *The Court disagreed with the proposition advanced by White J in Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559

The Court of Appeal observed that these cases were decided prior to *Broadbeach* and also emphasized that a 'cross-claim' for the purpose of establishing a genuine offsetting claim under s459H (1) (b) must be capable of being quantified in money terms.

The declarations sought by Diploma could not be so quantified and Diploma was not entitled to claim the amount of the judgment as restitution as it had not paid the amounts.

Commentary

This is the first time since the introduction of the State and Territory security of payments regimes in the early 2000's that an Appeal Court has been called on to deal with the specific interaction between the effect of a determination or judgment under the Act, and the statutory demand procedure under the *Corporations Act*. As a consequence of this decision a successful contractor in Western Australia (and potentially other States and Territories) can obtain a determination and judgment under the Act and then issue a statutory demand for payment of the adjudicated amount. It is not limited to applying to the Court for enforcement by the appointment of receivers or by the other means contemplated by the *Civil Judgments Enforcement Act (WA)*.

It is also now clear that a statutory demand will not be capable of being set aside simply on the basis of a contention that a genuine dispute exists as to the debt, if that debt is based on a determination or judgment obtained under the Act. Likewise, only a genuine offsetting claim, sounding in money, with sufficient evidence to establish its existence, will be capable of reducing or setting aside a statutory demand.

The decision should provide significant comfort to a contractor who obtains an adjudication determination that there is a quick and cost effective means to enforce the determination under s43(2) of the Act. The Court here has confirmed that whilst a determination may be an "interim decision", the determination and judgment based on it, does give rise to a debt due and payable, so that the contractor can take enforcement action. As such, the decision upholds the purpose and intent of the Act and should discourage principals from avoiding the requirement to pay determinations and judgments under the Act simply because they do not like the adjudicator's determination.

Richard Edwards (Partner) and Barbara Watroba (Senior Associate) acted for KPA Architects in this matter.

This decision is available online at:

<http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=5EE18FD9166D886E48257CC40013285E&action=openDocument&SessionID=DRNVALI76Q>

Jessica Stokes is a Solicitor at DLA Piper.