**Supreme Court**
**New South Wales**
**Equity Division**

| | |
|---|---|
| Case Name: | Arora Markets Pty Ltd v Workers Compensation Nominal Insurer |
| Medium Neutral Citation: | [2015] NSWSC 107 |
| Hearing Date(s): | 21 November 2014 |
| Date of Orders: | 27 February 2015 |
| Date of Decision: | 27 February 2015 |
| Jurisdiction: | Equity |
| Before: | Robb J |
| Decision: | 1. Order that the plaintiff's amended originating process be dismissed<br><br>2. Order the plaintiff to pay the defendant's costs of the proceedings |
| Catchwords: | CORPORATIONS – debts – statutory demands – application by plaintiff to set aside statutory demand for premiums for workers compensation insurance payable to defendant under *Workers Compensation Act 1987* (NSW) – genuine dispute ground under *Corporations Act 2001* (Cth), s 459H – where debt not capable of being subject of "genuine dispute" because effect of *Workers Compensation Act* is that debt is payable in same way as a judgment debt – "some other reason" ground under *Corporations Act*, s 459J – circumstances not sufficiently similar to claim for payment of judgment debt that may be set aside on appeal – consideration of question whether determination of amount of premiums payable made by defendant or defendant's agent susceptible to judicial review |
| Legislation Cited: | *Building and Construction Industry Security of Payment Act 1999* (NSW)<br>*Corporations Act 2001* (Cth), ss 459E, 459G, 459H, 459J<br>*Supreme Court Act 1970* (NSW), s 69 |

| | |
|---|---|
| | Supreme Court (Corporations) Rules 1999 (NSW), r 5.2<br>*Workers Compensation Act 1987* (NSW), ss 169, 170, 172 |
| Cases Cited: | *Employers Mutual Indemnity (Workers Compensation) Ltd v A Donald Pty Ltd* [1997] NSWCA 102<br>*Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785<br>*GIO Workers Compensation (NSW) Ltd v Rigby Jones Pty Ltd* [1998] NSWCA 93<br>*L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15<br>*Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140<br>*Re A.C.E.S. Sogutlu Holdings Pty Ltd* [2014] NSWSC 140<br>*Rigby Jones Engineering Pty Ltd v GIO Workers Compensation (NSW) Ltd* (Supreme Court (NSW), 24 July 1998, unrep)<br>*Staging Connections Pty Ltd v WorkCover Authority of New South Wales* [2004] NSWCA 357 |
| Texts Cited: | |
| Category: | Principal judgment |
| Parties: | Arora Markets Pty Ltd (plaintiff)<br>Workers Compensation Nominal Insurer (defendant) |
| Representation: | Counsel: C D Wood/J K Raftery (plaintiff)<br>S Bogan (defendant)<br><br>Solicitors: Madison Marcus Law Firm (plaintiff)<br>Woods & Day (defendant) |
| File Number(s): | 2014/209053 |
| Publication Restriction: | None |

## JUDGMENT

1 The plaintiff applies under s 459G of the *Corporations Act 2001* (Cth) for an order setting aside a statutory demand served on it by the defendant.

2 The statutory demand was served on the plaintiff by the defendant under cover of its solicitor's letter dated 20 June 2014. The plaintiff is an employer for the purposes of the *Workers Compensation Act 1987* (NSW) ("the Act"),

and the debt claimed in the statutory demand is for premiums and late payment fees for workers compensation insurance payable under the Act. The defendant acted by its scheme agent, Allianz Australia Workers' Compensation (NSW) Ltd ("Allianz").

3 The amount claimed in the schedule to the statutory demand is $763,094.53. The schedule divides the total amount claimed into six components. The Court was informed by the plaintiff at the hearing that, in fact, the plaintiff only disputes three of those components, and concedes that an amount of $257,800.27 set out in the statutory demand was payable.

4 The total amount challenged by the plaintiff is therefore $505,294.26. The challenged components of the statutory demand are described in the schedule to the statutory demand as follows:

| | |
|---|---|
| Wage Audit Extra Premium 19 April 2012 to 19 April 2013 | $453,282.88 |
| Late Payment Fees on Audit | $19,810.00 |
| Plus late payment fees pursuant to s 172 of the Workers Compensation Act 1987 which at 31 May 2014 amount to | $28,868.55 |

5 The plaintiff's originating process and supporting affidavit were filed on 15 July 2014, I infer within the 21 day period after service of the statutory demand required by s 459G(2) of the *Corporations Act*. The plaintiff sought an order setting aside the statutory demand under s 459H on the ground that there was a genuine dispute about the actual amount of the debt, and the existence of the debt, to which the statutory demand relates.

6 The plaintiff filed an amended originating process on 21 November 2014. The amended originating process added an additional ground for setting aside the statutory demand under s 459J of the *Corporations Act*, being that there is a defect in the statutory demand or some other reason why it should be set aside. The amended originating process was filed outside the required 21 days.

7 As the plaintiff only challenges part of the debt claimed in the statutory demand, its application based upon the genuine dispute ground is, in reality, for an order of the Court varying the statutory demand under s 459H(4) of the *Corporations Act,* to reduce the amount of the debt to $257,800.27. Only the s 459J ground could support the statutory demand being wholly set aside.

8 The plaintiff engages in business as an operator of supermarkets for the retail sale of groceries and perishables to consumers. Before 2012, the plaintiff operated one supermarket at Quakers Hill that had operated as a Franklins supermarket. In 2012, the plaintiff acquired a further six supermarkets that had previously been operated by Franklins. Previously, Metcash had acquired 85 Franklins stores, and the plaintiff purchased six of those stores from Metcash.

9 On about 16 April 2010, the plaintiff engaged the defendant, by its agent, Allianz, to provide workers compensation insurance to the plaintiff. The evidence suggests that the debts claimed in the statutory demand, that are the subject of the alleged dispute, arose out of a process commenced in about August 2013, by which a wage audit of the plaintiff's books and records was conducted on behalf of the defendant.

10 Allianz delivered a workers compensation further adjustment account premium due notice to the plaintiff dated 26 November 2013, for the period 19 April 2012 to 19 April 2014, that claimed an adjusted increased premium of $314,645.89.

11 Apparently, Allianz undertook further enquiries, and on 5 May 2014, it sent a letter to the plaintiff in which it advised that the premium adjustment was $453,282.88, which is the same as the equivalent amount set out in the schedule to the statutory demand.

12 The letter contained the following explanation:

> Based on the amended figures advised by WorkCover and the auditors' report, the recent audit of your wages has revealed an overall increase of

> $456,859.48 to the total premium for the audited periods of insurance. For the 2012 to 2013 adjustment period, we have included predecessor history for the seven supermarkets that were purchased during this period. This overall premium amount is due to variance between the wages originally declared and the audited wages, details of which are set out as follows...

13 The $456,859.48 referred to in the letter is slightly larger than the $453,282.88 that is now contested, because it includes small amounts for the two previous years.

14 The details that are referred to in the extract from the letter set out above for the year following 19 April 2012 are relevantly:

| EST/DEC WAGES | AUDITED WAGES | WAGES VARIANCE | PREMIUM DR(CR) |
|---|---|---|---|
| $360,000* | $4,319,289 | $3,959,289 | $453,282.88 |

15 The letter stated that the meaning of the asterisk in the EST/DEC WAGES column was that the plaintiff had estimated its wages for the period at $360,000.

16 The letter advised the plaintiff that, if it disagreed with the results of the wage audit, it could lodge an appeal under s 170 of the Act with WorkCover, but that it was necessary to do so in writing within one month of the notification.

17 If the statements made in the letter are taken at face value, which is all that is necessary for the purposes of this application, they appear to suggest that the adjusted premium for the period came about because of the combined effect of the premium that the plaintiff was required to pay being calculated following an increase in the amount of the wages actually paid by the plaintiff for the period in comparison to the estimate that it had given, that was discovered in the audit process, plus the application of what the letter described as the "predecessor history for the seven supermarkets that were purchased during" the period 2012 to 2013.

18 The plaintiff claims, through the affidavit of Mr Vishal Gupta sworn on 14 July 2014, and served under s 459G of the *Corporations Act,* that there is a

genuine dispute about the amount of the debt claimed in the statutory demand, because Allianz, on behalf of the defendant, had wrongly applied the 'predecessor rule' to the calculation of the adjusted premium and that, irrespective of whether that rule applied, there was a dispute as to whether the cost of claims had been correctly estimated by the defendant.

19 Section 169 of the Act provides that the premium payable by an employer for a policy of workers compensation insurance to which an insurance premiums order applies shall be calculated in accordance with the order. The following is the submission made on behalf of the plaintiff in relation to the application of the 'predecessor rule' under the relevant insurance premiums order (written submissions par 12):

> The 'predecessor rule' allows the insurer to charge a higher premium by reason of the claims history of a previous owner of the business. The rule is set out in paragraph 10 of the Workers Compensation Insurance Premium Order 2012 – 2013... That only applies to a situation where an employer has acquired or came into possession of the main part of the business of a person, or the employer has employed the majority of the vendor's personnel. The plaintiff did not acquire the business of Franklins. Metcash purchased 85 of the Franklins stores. The plaintiff purchased six stores (only a small part of the Metcash business) from Metcash. The plaintiff acquired the lease and rights attaching to individual stores. The plaintiff operated those stores as IGA stores, not as Franklins stores... It has not acquired the whole nor the main part of the Franklins business and employed a limited number of former Franklins staff.

20 As the present issue is only whether there is a genuine dispute as to whether part of the debt claimed in the statutory demand is payable, so that it is not necessary in any precise way to resolve the dispute, it will be sufficient to accept this submission as an arguable statement of the effect of the 'predecessor rule', and the basis of what the plaintiff asserts is the genuine dispute. I must note that the defendant rejects the argument that the plaintiff's submission accurately summarises the effect of the rule, or describes the process by which Allianz calculated the adjusted premium.

21 The plaintiff's principal argument appears to be that Allianz calculated the adjusted premium by taking into account the total wages paid by Franklins to its employees for a two-year period, on the basis that the 'predecessor rule'

entitled Allianz to take that course, when in fact the rule did not apply because the plaintiff had not acquired the whole of Franklins' business, or employed all of its employees.

22 A submission was made on behalf of the defendant, by reference to the definition of "predecessor" in cl 10(2) of Sch 1 of the Insurance Premiums Order 2011-2012, that Allianz was indeed entitled to apply the rule, because the individual supermarkets that had been acquired by the plaintiff were separate and distinct businesses. It was not necessary for the rule to apply that the plaintiff had acquired the whole or the main part of the entirety of the Franklins supermarket business. Clause 10(2) provides:

> Subclause (1)(a) applies whether the business acquired is the whole or main part of the business of the person or is the whole or main part of a separate and distinct business of the person, and whether or not the business acquired is carried on at the same location

23 It is not, however, necessary to delve further into the resolution of this argument. That is so not only because the issue is whether a genuine dispute arises, but also because, at least as I read the evidence, it does not disclose with clarity how Allianz derived the adjusted premium that it claimed on behalf of the defendant.

24 The plaintiff made a submission that, where s 172 of the Act imposes an obligation upon an employer to pay an insurance premium, "premium", as a matter of statutory interpretation, should be understood to mean only a premium calculated properly in accordance with the relevant insurance premium order. Accordingly, so the plaintiff says, if there is a defect in the method of calculation, the premium is not actually payable, so that a statutory demand based upon the calculated premium may properly be the subject of a genuine dispute, if the employer has a genuine basis for arguing that the order has not properly been applied.

25 As I understand the effect of ss 169,170 and 172 of the Act, as well as authority binding on me, the plaintiff's submission that an amount claimed is

not a "premium" for the purposes of the Act, if it has not properly been calculated in accordance with the relevant order, must be rejected.

26 Section 169 provides:

> (1) The premium payable by an employer (or a person who proposes to become an employer) for a policy of insurance to which an insurance premiums order applies shall be calculated in the manner fixed by the order.
>
> (2) An insurer breaches an insurance premiums order if the insurer demands or receives:
>
> (a) for the issue of a policy of insurance to which the order applies, or
>
> (b) for the renewal of any such policy,
>
> an amount which is, or amounts the sum of which is, different from a premium which is payable in accordance with subsection (1) by the employer (or the person who proposes to become an employer) to whom the policy relates.
>
> (3) An insurer who wilfully breaches an insurance premiums order is guilty of an offence and liable to a penalty not exceeding 1,000 penalty units.

27 Section 170 relevantly provides:

> (1) An employer from whom an insurer has demanded a premium for the issue or renewal of a policy of insurance may dispute an aspect of the insurer's determination of that premium on the basis that it is not in accordance with the relevant insurance premiums order. The employer may apply to the Authority for a review by the Authority of that aspect (*the disputed aspect*) of the insurer's determination.
>
> (2) Any such application must be made within 1 month after the date of the demand for the premium concerned, or within such further period as the Authority may, in special circumstances, approve in relation to the application.
>
> (3) When any such application is made, the Authority:
>
> (a) shall notify the insurer of the making of the application,
>
> (b) shall consider the application and may have regard to such oral or written evidence or representations as it thinks fit,
>
> (c) must dismiss the application if the Authority decides that:
>
> (i) the policy is not a policy to which a relevant insurance premiums order applies, or

(ii) the disputed aspect was determined by the insurer in accordance with the relevant insurance premiums order,

or must in any other case determine the disputed aspect in accordance with the relevant insurance premiums order, and

(d) shall, in such manner as it thinks fit, inform the employer and the insurer of its dismissal of the application or its determination, as the case may require.

(3A) The Authority's determination of the disputed aspect is to be made as a review of the insurer's determination and accordingly is to be made as if it were the determination required to be made by the insurer at the time of the determination of the premium concerned.

(3B) When the Authority makes a determination on a review under this section, the insurer must redetermine the relevant premium in accordance with the Authority's determination.

(4) Where:

(a) the insurer redetermines a premium following the Authority's determination, and

(b) the employer has already paid to the insurer the premium to which the application relates,

the employer may recover from the insurer, in a court of competent jurisdiction as a debt due to the employer, so much of the premium paid as exceeds the premium as redetermined, together with interest on the amount of premium recoverable calculated at the prescribed rate.

(5) Where:

(a) the Authority makes a determination,

(b) the insurer does not within 1 month after the date of the determination of the Authority:

(i) in the case of the issue of a policy of insurance—issue to the employer a policy of insurance having effect for such period (not exceeding 1 year) and from such date as the Authority determines, or

(ii) in the case of the renewal of a policy of insurance—effect the renewal of the policy for such period (not exceeding 1 year) as the Authority determines from the date of expiry referred to in subsection (2) (b),

at such premium as would result from a redetermination by the insurer of the premium in accordance with the Authority's determination, and

(c) the employer does not otherwise agree or request,

the insurer shall be deemed to have issued to the employer a policy of insurance at that premium and having effect for the period and from the date referred to in paragraph (b) (i) or (ii).

(6) The insurer shall forthwith supply to the employer a document setting out the provisions of a policy of insurance deemed by subsection (5) to be issued to the employer.
Maximum penalty: 20 penalty units...

28 Section 172 provides:

(1) Where:

(a) an employer has not elected under section 171 to pay a premium by instalments and fails to pay the full amount of the premium within 1 month after service on the employer of a notice that payment of the premium is due,

(b) an employer who has elected under section 171 to pay a premium by instalments fails to pay an instalment by the due date, or

(c) an employer has failed to pay an adjustment of premium within 1 month after service on the employer of a notice that payment of the amount of the adjustment is due,

the full amount of the premium (in the case referred to in paragraph (a)), the balance of the premium unpaid or, where no instalment has been paid, the full amount of the premium (in the case referred to in paragraph (b)) or the amount of the adjustment (in the case referred to in paragraph (c)) together with a late payment fee calculated at the prescribed rate may be recovered as a debt in a court of competent jurisdiction.

(2) The payment of a late payment fee under this section may be waived by the insurer concerned, but only with the approval of the Authority.

(3) In proceedings under this section for the recovery of any unpaid premium with a late payment fee, the court may, if satisfied that a notice for payment was delayed because of delay of the employer in providing returns to the insurer, for the purpose of assessing the premiums, treat the notice as having been served on an earlier date.

(4) The making of an application to the Authority under section 170 (determination of premium to be charged) does not affect the entitlement of an insurer under this section to recover the premium (or part of premium) concerned except to the extent that:

(a) the Authority otherwise directs in a particular case, or

(b) the regulations otherwise provide.

(5) In this section:

prescribed rate means:

(a) the rate prescribed by the regulations, or

(b) if no rate is prescribed by the regulations—a rate specified by the relevant insurance premiums order in relation to the amount or balance outstanding, or

(c) if no rate is prescribed by the regulations or specified in an insurance premiums order—the rate of 1.2% of the relevant amount or balance per month compounded monthly.

*relevant insurance premiums order*, in relation to an amount or balance outstanding, means the insurance premiums order that applies to the policy of insurance that gave rise to the obligation to pay the outstanding amount or balance.

29 The Authority referred to in these statutory provisions is WorkCover.

30 In my view, the effect of these statutory provisions, as relevant to the present application, is now settled, and it is not necessary for me to restate the process of reasoning that has led to the established position. The relevant principles have been established by the New South Wales Court of Appeal in *Employers Mutual Indemnity (Workers Compensation) Ltd v A Donald Pty Ltd* [1997] NSWCA 102 and *GIO Workers Compensation (NSW) Ltd v Rigby Jones Pty Ltd* [1998] NSWCA 93; and by the decision of Bryson J (as his Honour then was) in *Rigby Jones Engineering Pty Ltd v GIO Workers Compensation (NSW) Ltd* (Supreme Court (NSW), 24 July 1998, unrep). Relevantly, an employer who receives a claim from the defendant Workers Compensation Nominal Insurer for a premium for a workers compensation insurance policy is obliged to pay the full amount of that premium as claimed, as a debt. If the employer wishes to challenge the amount payable, then the employer must dispute the determination by application made in writing to WorkCover within one month of receiving the determination. The initiation of a dispute does not absolve the employer from the need to pay the whole of the amount originally determined. If WorkCover reduces the amount payable, then the employer is entitled to receive a refund from the defendant for the difference. Only WorkCover has power to review and vary the amount of

premium determined by the defendant. The amount and proper calculation of the premium cannot be determined by any Court.

31 Accordingly, it is an incorrect interpretation of the statutory provisions to say, as the plaintiff says, that the amount determined by the defendant as having been calculated in accordance with the order is not payable under s 172 of the Act, if it is not in fact calculated in accordance with the order. On the contrary, it is payable as a debt, and the correctness of the calculation cannot be challenged in any Court. It is payable even if the employer disputes the determination of the premium by application made to WorkCover in accordance with s 170. The only avenue available to the employer is to require repayment from the insurer, if WorkCover determines that there has been an incorrect determination and, accordingly, an overpayment.

32 In the present case, the plaintiff failed to dispute the determination of the adjusted premium, and the late payment fees, by making an application to WorkCover within the one month required by s 170 of the Act. Consequently, it is no longer possible for the plaintiff to challenge the existence or amount of the debt by any means allowed by the Act.

33 The plaintiff has sought to meet this impediment to its case by claiming that the nature of the defects in the way Allianz, on behalf of the defendant, determined the adjusted premium, is such that the determination is amenable to judicial review, presumably under s 69 of the *Supreme Court Act 1970* (NSW). The essence of the argument is that, for the purposes of s 459H of the *Corporations Act*, a genuine dispute can exist concerning the existence or amount of a debt claimed in a statutory demand, if the process by which the debt was determined is liable to be set aside by appropriate judicial review orders made by this Court.

34 In fact, if there are any avenues for judicial review available to the plaintiff, it has not instituted any proceedings to avail itself of that right.

35 Not only that, but the plaintiff has not offered an undertaking to institute proceedings for judicial review, or to pay into court the amount that it claims is the subject of a genuine dispute, in order to secure the position of the defendant pending the outcome of the judicial review proceedings.

36 Furthermore, the fact that it has also not taken advantage of its right to have WorkCover review the determination by Allianz has had the effect that the question whether any avenue for judicial review is available, and if so what the effect of proceedings of that nature being taken might be, has to be considered in the context that the determination that would be reviewed is a determination of the defendant undertaken by its agent Allianz, and not a determination of WorkCover.

37 The plaintiff, correctly in my view, did not argue that, if its submission that an incorrectly calculated "premium" was not a valid premium failed, the determination by Allianz on behalf of the defendant was void for the purposes of administrative law. The plaintiff submitted that it would be entitled to an order setting aside the determination. It follows that the determination would be effective unless and until it was set aside. It could hardly be argued, given the terms of the Act set out above, and the principles derived from the authorities that I have discussed, that the debt made payable by s 172(1) of the Act is void *ab initio* because of a defect in the method of calculation of the premium. The determination by the defendant does not create the liability to pay; rather, the statute does.

38 It is not necessary to restate the test for a genuine dispute that has been established by cases such *as Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787, the number of which is legion. The test is by no means a demanding one.

39 The present circumstances are, however, as I have noted above, that the amount said to be in dispute is a debt presently payable, and it will remain so unless and until the determination of the defendant is set aside in proceedings for judicial review, that have not yet been commenced.

40 In my view, in these circumstances, the plaintiff can be in no better position than if the debt claimed had arisen by order of a court, that was subject to being set aside following a successful appeal. Here and now the debt exists, and the defendant has a statutory right to recover it.

41 A number of cases have considered the application of ss 495H and 495J in circumstances where the debt is a judgment debt, and an appeal is pending. It is sufficient to note the recent decision in *Re A.C.E.S. Sogutlu Holdings Pty Ltd* [2014] NSWSC 140, decided by Brereton J, where his Honour said:

> **[16]** Let me say at the outset that it cannot be contended that, by seeking to enforce a judgment that has not been stayed, notwithstanding that an appeal is pending, a judgment creditor thereby engages in an abuse of process or unconscionable conduct. To the contrary, prima facie a judgment creditor, even pending an appeal, is entitled to the fruits of the judgment, and a judgment debtor that wishes to procure a different position is bound to apply to the court in which the judgment was given, or its appellate division, for a stay of the judgment pending appeal. No such application has been made in this case.
>
> **[17]** In *Barclays Australia (Finance) Limited v Mike Gaffikin Marine Pty Ltd* (1996) 21 ACSR 235, it was said that in a case where a judgment that founded a creditor's statutory demand was being appealed, the pendency of an appeal did not constitute "some other reason" within s 459J(1)(b) whereby the statutory demand should be set aside, unless the Court of Appeal were actually to stay enforcement of the judgment; see also *Sajepe Pty Ltd v Lawler* (2000) 18 ACLC 457 ; [2000] NSWSC 262.
>
> **[18]** In *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24; (2005) 53 ACSR 229, Santow JA in the Court of Appeal cited those cases and said:
>
> > Glazier has to date held back from seeking any stay of the costs order. It instead participated in the costs assessment. Even if it might now belatedly engage in yet further litigation by seeking to persuade the Court of Appeal to grant a stay, that consideration carries little weight. There is, of course, no certainty that the Court of Appeal would grant any such stay. The position is analogous to the case where a judgment, the basis of the demand, has been appealed. That fact was held not to constitute some other reason within s 459J(1)(b) whereby the statutory demand should be set aside unless the Court of Appeal were actually to stay enforcement of the judgment.
>
> **[19]** In *Timberland Property Holdings Pty Ltd v Schindler Lifts Australia Pty Ltd* [2011] NSWSC 466, Barrett J, as his Honour then was, referred to those decisions and to the judgments of Hammerschlag J in *Midas Management Pty Ltd v Equator Communications Pty Ltd* [2007] NSWSC 759 and of Ward J in *Cranney Farm Pty Ltd v Corowa Fertilizers Pty Ltd* [2011] NSWSC 9, as establishing that the existence of arguable grounds of appeal did not, in the absence of a stay, constitute "some other reason" within s 459J(1)(b), but that

such reason would exist if the amount of the judgment were paid into court. His Honour said:

> As things stand "some other reason" within s 459J(i)(b) does not exist, but if the amount of the judgment debt is deposited so as to be available to meet the judgment if the Court of Appeal proceedings extinguish the possibility of the judgments being set aside, then "some other reason" will exist.

**[20]** The cases therefore establish that a pending appeal (or application for leave to appeal from, or to set aside) a judgment, even one in which the grounds are considered arguable, does not of itself provide sufficient reason to set aside a creditor's statutory demand; see *Cranney Farm Pty Ltd v Corowa Fertilizers Pty Ltd*, [18]; *Barclays Australia (Finance) Ltd v Mike Gaffikin Marine Pty Ltd*; *Midas Management Pty Limited v Equator Communications*; *Timberland Property Holdings v Schindler Lifts*.

**[21]** Relevant considerations include whether reasonable and arguable grounds for the application to set aside the judgment for the appeal have been shown, whether a stay is available and, if so, has been sought or refused, and whether there has been an offer to pay into court the amount of the demand pending the outcome of the application or appeal. In short, the court will at least ordinarily require either that a stay have been granted, or that the moneys be paid into court pending the outcome of the appeal. There may be an exception to this where the judgment is not amenable to a stay.

42 The debt said to be in dispute by the plaintiff in this case cannot genuinely be disputed, because the effect of the Act is that it is payable, no less than that a judgment debt is payable. The plaintiff therefore cannot succeed under s 459H. The question is whether a debt that is liable to be set aside by order of a court, in judicial review proceedings, should be treated in the same way as a judgment debt that may be set aside on appeal is treated for the purposes of s 459J. In my opinion, the answer to this question in principle is yes, given the width of the expression "there is some other reason why the demand should be set aside". I cannot see a relevant point of distinction between a judgment debt that may be set aside on appeal, and a debt created by an administrative determination, that may be set aside by a court by judicial review order.

43 If that proposition is correct, it does not, however, avail the plaintiff in the present case. First, there is no equivalent of a pending appeal in the present case, as the plaintiff has not commenced any proceedings for judicial review; it has not undertaken to do so; and it may never do so. Secondly, while there obviously could be no application for a stay of execution pending an appeal, it

is likely that, if there were a sufficiently arguable case for the making of a judicial review order setting aside an administrative determination, and the balance of convenience favoured the granting of relief, an applicant for judicial review could obtain an interlocutory injunction preventing the enforcement of the debt, pending the final hearing of the application for judicial review. Having such an injunction would, in my view, be equivalent to having a stay of execution, in the context of an appeal, for present purposes. The plaintiff in this case has not sought or obtained any interlocutory relief to prevent the defendant from recovering the debt. Finally, the plaintiff has not paid, or offered to pay, the amount said to be in dispute into court, pending the determination of judicial review proceedings commenced by the plaintiff to have the determination of the defendant upon which the debt is founded set aside.

44 In all of these circumstances, there is not an adequate reason for the Court to set aside the statutory demand under s 459J. If there were, it would be necessary to decide whether the plaintiff is entitled to rely upon s 459J, notwithstanding that it did not raise this ground for setting aside the statutory demand within the requisite 21 day period. It is not necessary to decide this question. It is not straightforward, as the plaintiff put the factual basis for setting aside the statutory demand on what I will call the judicial review ground in Mr Gupta's original affidavit, which was served within time. The plaintiff miscategorised its argument as being a "genuine dispute" one, when in reality, the argument that it wished to put involved "some other reason" within s 459J.

45 I also reject the plaintiff's argument that the plaintiff has "an offsetting claim", for the purposes of s 459H(1)(b) of the *Corporations Act*. The plaintiff argued that the existence of the right created by s 170(4) of the Act gave rise to the possibility that, if the plaintiff's arguments that underpinned its "disputed debt" submission in this case were correct, then even if the plaintiff were forced to pay the full amount claimed by the defendant, it would be able to recover the overpayment from the defendant. The plaintiff submitted that the situation was analogous to the "pay now, argue later" provisions of the *Building and*

*Construction Industry Security of Payment Act 1999* (NSW): see *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140. The plaintiff's argument is, with respect, misconceived. As the plaintiff did not make an application to WorkCover to review the determination made on behalf of the defendant within the prescribed one-month period, WorkCover will never in fact review the determination, so the plaintiff will never have a right under s 170(4) of the Act to recover money paid to the defendant, so there cannot be any offsetting claim. The plaintiff either has a right on administrative law grounds to set aside the determination made on behalf of the defendant, or it has nothing.

46 In these circumstances, it is not necessary for the Court to consider the difficult question of whether the plaintiff has demonstrated that the determination made by Allianz on behalf of the defendant is a determination that is sufficiently susceptible to being set aside on administrative law principles to justify an order being made setting aside the statutory demand on the ground in s 459J(1)(b). It must be remembered that this is a different ground to that which involves consideration of whether there is a genuine dispute as to the existence or amount of the debt.

47 The decision of the Court of Appeal in *Staging Connections Pty Ltd v WorkCover Authority of New South Wales* [2004] NSWCA 357 is, in my opinion, sufficient authority for present purposes to establish that, if WorkCover had been requested by the plaintiff to review the determination made by Allianz for the defendant, WorkCover's determination would be susceptible of judicial review. See also *L & B Linings Pty Ltd v WorkCover Authority of New South Wales* [2012] NSWCA 15.

48 In *Staging Connections*, Bryson JA (with whom Spigelman CJ and Beazley JA (as her Honour then was) agreed) said at [29]:

> **[29]** In my understanding the principles on which the Court should act are these. WorkCover was required to make its determination in accordance with law. Its determination may be set aside if it is shown that WorkCover made an error of law in the course of considering and making the determination. However the error of law must have been material to the decision, and not an

> error on some incidental matter which did not materially affect the outcome. It is an error of law to base a decision on some fact or consideration which is not relevant to the process of determination the power to make which is conferred on WorkCover by s 170 of the Workers Compensation Act 1987. As with other errors of law, an error of this kind must be material to the outcome. If there was an error of law the Court may make an order setting aside the determination which WorkCover made. The Court's power to do this is discretionary, and for sufficient reason the Court may allow a determination to stand even though there was a material error of law. The Court does not have power to make a determination itself, or to decide what is the correct classification in accordance with the Insurance Premium Order, including Sch 1 cl 2(4) and Table A. If WorkCover's determination is set aside, the Court should order WorkCover to proceed to make its determination on the correct basis. These principles were not in contention at the hearing of the appeal, and the arguments submitted related to their application.

49 The question is whether the determination by Allianz on behalf of the defendant is liable to judicial review. The defendant submits that it is not, as it is a commercial determination made as required by the Act, and there are no requirements that the defendant act in any way judicially such that the defendant's determination may be reviewed judicially.

50 The plaintiff did not, with respect, directly grapple with the problem of whether a determination by Allianz on behalf of the defendant may be subject to judicial review. It relied upon *L & B Linings* (above), and other decisions, that did not consider determinations made by commercial entities such as Allianz and the defendant.

51 I should say no more than that, a review of the provisions of the Act that govern the making of the determination by the defendant, causes me to doubt that it is amenable to judicial review. The defendant is required to calculate the premium in the manner set out in the relevant order under threat of contravention of the order and, in certain cases, criminal sanction. It is the statute itself that gives the defendant the right to recover an amount of premium that is calculated following the determination process, and the defendant acting through its agent is, in reality, a private, commercial entity acting in its own interests.

52 It is then necessary to consider whether the plaintiff is entitled to succeed on its alternative ground under s 459J, because of the manner in which the

affidavit supporting the statutory demand was executed does not comply with the requirements of s 459E(3) of the *Corporations Act*. Following the hearing, in response to a request for information that I made, to clarify a doubt that I had in relation to the evidence that was before the Court, the plaintiff abandoned an argument that it had put at the hearing that Mr Hollingshead, who executed the affidavit on behalf of the defendant, did not have the authority of the defendant to do so.

53 That left as the only remaining argument, that Mr Hollingshead did not have first-hand knowledge of the matters deposed to in the affidavit to establish that the debt claimed was due and payable. There is, in my opinion, no substance in this claim, as the affidavit complies with the requirements of s 459E(3) of the *Corporations Act*, r 5.2 of the Supreme Court (Corporations) Rules 1999 (NSW), and Form 7 in Sch 1 to those rules, and it states the matters mentioned in that form. Mr Hollingshead swore an affidavit in defence of the plaintiff's claim on 5 September 2014, that provides ample ground for satisfaction that he had sufficient access to, and was aware of, all of the necessary books and records of Allianz, to be able properly to swear the affidavit in support of the statutory demand.

54 It is not necessary to deal with the defendant's argument that the plaintiff is not entitled to rely upon s 459J, because it only sought to do so in its amended originating process, filed outside the 21 day period required by s 459E.

55 The orders that I will make are as follows:

(1) Order that the plaintiff's amended originating process be dismissed.

(2) Order the plaintiff to pay the defendant's costs of the proceedings.

**********

I certify that this and the 18 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Robb.

27 February 2015 A Mondello
DATED Associate