

ALDOGA ALUMINIUM PTY LTD V DE SILVA STARR PTY LTD [2005] NSWSC 284

Supreme Court of New South Wales – 1 April 2005

FACTS

Aldoga Aluminium Pty Ltd ('Aldoga') and De Silva Starr Pty Ltd ('De Silva') entered into an oral contract for the design and fit-out of new office premises for Aldoga. De Silva served a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') and Aldoga did not serve a Payment Schedule in response within the time specified.

De Silva then issued a statutory demand for debt in the amount of \$31,084.18 under the Corporations Act 2001 (Cth). Aldoga asserted that there was a genuine dispute as the existence of the alleged debt and therefore the statutory demand should be set aside. Aldoga contended that there was no oral contract for the fit-out of the office, rather there was an agreement whereby Aldoga was to prepare plans sufficient for the purpose of obtaining development approval for the fit-out. De Silva contended that even if the evidence was sufficient to support the existence of a genuine dispute as alleged, that dispute can now no longer be raised as it is precluded by sections 14 and 15 of the Act which creates a statutory debt.

ISSUE

Whether Aldoga was precluded from raising a genuine dispute as the existence of a debt.

FINDING

The Court disagreed with De Silva's contention and distinguished a debt under the Act and proceedings for winding up under the Corporations' Act. The provisions of section 15(2) and (4) of the Act do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside a demand under the Corporations' Act, even where the dispute has not been the subject of a Payment Schedule served in accordance with the Act.

QUOTE

Palmer J at paragraph 7 stated:

"The provisions of s.15(2) apply to the recovery of an amount claimed "as a debt due to the claimant in any court of competent jurisdiction". A proceeding for the winding up of a corporation under Pt 5.4 of the Corporations' Act is not a proceeding for recovery of a debt; it is a proceeding to wind up a company on the ground that it is insolvent: s.459A. It is true that s.459C(2)(a), which raises a presumption of insolvency in the case of non-payment of a statutory demand, has the effect in many cases of placing a great deal of pressure upon a company served with a statutory demand to pay the debt claimed. However, if the company does not pay the debt, does not comply with the statutory demand, and is therefore subjected to the presumption of insolvency which the Act provides, it is still able to resist a winding up order by demonstrating positively that, despite non-compliance with the statutory demand, it is in fact solvent: s.459C(3). If the company succeeds in proving its solvency, the winding up application is dismissed and the creditor is left to commence proceedings for recovery of the debt in a court of competent jurisdiction."

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Further, Palmer J at paragraph 11 stated, after considering the decisions as summarized by Barret J in *Greenways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186:

“As I have observed, in my opinion the rationale underlying those observations is not affected by the circumstance that the ground for setting aside a statutory demand is said to be an offsetting claim rather than a dispute as to whether the debt has been contracted in the first place. It seems to me, with respect, that both Campbell and Barrett JJ are correct in their conclusion that it is not possible for the provisions of the Corporations’ Act, a Commonwealth statute, to be limited by reference to the provisions of the BACISOP Act, a State Act, and that the question for the Court in an application under s.459G is simply whether, as a matter of fact, a genuine dispute exists.”

IMPACT

This case confirms the proposition that sections 14 and 15 do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside a demand under the Corporations Act, even where the dispute has not been the subject of a Payment Schedule served in accordance with the Act.

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