

Statutory demands - The meaning of “debt” in s 459E of the Corporations Act 2001 (Cth)

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Introduction

1. Section 459E of the *Corporations Act 2001* (Cth) permits the service of a creditor’s statutory demand on a company where the demand relates to a “debt” that is owing, due and payable by the company to the creditor. A creditor, therefore, cannot make demand for something that does not have the characteristics of a “debt” within the meaning of that section.
2. The meaning of “debt” in the context of statutory demands has been considered by the courts in a number of cases over the years but most recently by the Supreme Court of Victoria in *Meales Concrete Pumping Pty Ltd v Probuild Constructions (Aust) Pty Ltd*.¹

Background

3. The defendant (**‘Probuild’**) was the head contractor under a construction subcontract agreement (**“Subcontract”**). The plaintiff (**“Meales”**) guaranteed to Probuild the performance of the subcontractor (**“Subcontractor”**) under the Subcontract.
4. The guarantee given by Meales (**“Guarantee”**) included provisions to the following effect:
 - Cl 3: Meales unconditionally and irrevocably guarantees to Probuild the due and punctual performance by the Subcontractor of all the Subcontractor’s obligations and liabilities to Probuild.
 - Cl 4: If the Subcontractor does not perform an obligation (other than payment of a monetary obligation to which cl 5 applies), Meales must perform or procure the performance of the obligation within 5 business days of receipt of a written demand from Probuild.
 - Cl 5: If the Subcontractor does not pay any monetary obligation when due, Meales must, within 5 business days of receipt of a written demand from Probuild, pay the amount to Probuild.
5. The Subcontract included provisions dealing with security, retention monies and performance undertakings. These provisions included the following:

¹ [2015] VSC 594.

- CI 9.2: The Subcontractor must provide security in the amount stated in Annexure Part A in accordance with cl 9 of the Subcontract.
 - CI 9.3: The security must be in the form of cash, unless permitted by Probuild to be an unconditional undertaking given by a trading bank.
 - CI 9.4: The security must be provided within 5 business days of the date of the Subcontract, failing which Probuild may retain cash retention in relation to the Subcontract works until the unconditional undertaking is provided and/ or withhold payment of any money that might otherwise be due to the Subcontractor.
 - CI 9.9: If the Subcontractor has provided security and/ or retention moneys, Probuild must, provided there is no unresolved claim for breach of the Subcontract by the Subcontractor, release them within 10 business days after the later to occur of the issue by Probuild of a final certificate and the final release of security under the head contract.
 - CI 9.10: Probuild shall own any interest earned on the cash security or retention moneys. Cash security, security converted to cash or retention moneys are not held by Probuild on trust.
6. The amount of the security was specified in the Subcontract as "... if in Queensland, 2.5% of the Subcontract sum, otherwise, if nothing stated, 5% of the Subcontract sum" (cl 9.2). The Subcontract sum was calculated as a fixed lump sum of \$10,600,000 excluding GST (cl 2.1).
7. The Subcontract also included a cl 52.12 which was to the effect that, if Probuild had a reasonable concern that an insolvency event might occur which could prevent the Subcontractor from proceeding with the Subcontract and pose a financial concern for the works, Probuild could give the Subcontractor a Show Cause Notice.
8. Probuild did not require security to be provided within 5 business days of the date of the Subcontract but served Show Cause Notices on the Subcontractor requiring it to provide security in the amounts of \$1,500,000 and \$2,900,000 pursuant to cl 52.12 of the Subcontract.
9. Subsequently, Probuild served demands on Meales under cl 5 of the Guarantee which:
- claimed that the Subcontractor had not remedied the financial concern by the provision of security as required by cl 52.12 of the Subcontract;
 - claimed that the Subcontractor had not paid a monetary obligation when due; and
 - demanded that Meales pay the monetary obligation.

10. Around this time, Probuild took over the remaining work to be carried out by the Subcontractor.²
11. Probuild subsequently served a statutory demand on Meales pursuant to s 459E of the *Corporations Act* which stated that Meales owed Probuild debts totalling \$4,400,000.

Proceedings

Introduction

12. Meales then made an application under s 459G of the *Corporations Act* to have the statutory demand set aside.
13. The application was heard by Randall AsJ of the Supreme Court of Victoria.
14. The issue for determination was whether the amount set out in the statutory demand was a “debt” as that word was used in s 459E.³ Section 459E relevantly provides as follows:

“(1) *A person may serve on a company a demand relating to:*

- (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or*
- (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.”*

Meales’ submissions

15. Meales pointed to the distinction that had been drawn between two common types of guarantee:
 - The first, where the guarantor had agreed to pay a sum which the principal debtor had failed to pay. Under this type of guarantee, the guarantor’s liability only arose where the principal debtor had an obligation to pay and incurred a debt by failing to do so and the claim against the guarantor was for a money sum, not for damages.
 - The second, where the guarantor had agreed, more broadly, to carry out the contract if the principal debtor failed to carry it out. Under this type of guarantee, the guarantor’s liability was not dependent on a failure by the principal debtor to pay a debt owed but arose whenever the principal debtor

² The creditors of the Subcontractor later resolved that the Subcontractor be wound up and a liquidator appointed.

³ Above, n 1, at [5].

failed to complete the contract for whatever reason. In that case, the claim against the guarantor was for damages for the loss suffered by reason of the debtor's failure to carry out the contract.⁴

16. Meales submitted that the Guarantee fell within the second type of guarantee because the subject of the guarantee was the performance of an obligation other than a monetary obligation and that, therefore, Probuild's claim sounded in damages.⁵
17. Meales said that no debt was owed because assessment or calculation of any loss to Probuild was required and this could only occur after the building work was completed. Meales relied on provisions in the Subcontract which:
- required Probuild to estimate the costs incurred and losses suffered by it in completing work taken out of the hands of the Subcontractor and to issue a certificate; and
 - provided that, if the estimated costs incurred and losses suffered were greater than the estimated amount which would have been paid to the Subcontractor if the work had been completed by the Subcontractor, the difference would be a debt due from the Subcontractor to Probuild.⁶
18. Meales submitted that the work had not been completed and no certificate had been issued and that, therefore, the time for assessment of loss had not arisen.⁷

Probuild's submissions

19. Probuild made submissions as follows:

- Cl 5 of the Guarantee required Meales to pay any monetary obligation when due within 5 days of a written demand and, therefore, any debt owed by the Subcontractor to Probuild which was not paid was required to be paid by Meales.
- 'Debt' as used in s 459E had its ordinary meaning of a liability or obligation to pay and the Subcontractor's liability under the Subcontract was to make payment in the nature of security to Probuild.
- Although there would be an adjustment when the work was completed, that did not mean that security was not payable. The position was analogous to a tenant who was liable to pay a bond. The tenant might be entitled to recover

⁴ Above, n 1, at [18]. See *Beerens v BlueScope Distribution Pty Ltd* [2012] VSCA 209 at [64]; [180]-[181]; [186]-[187]; *Sunbird Plaza Pty Ltd v Malone* [1988] HCA 11; (1988) 166 CLR 245 at 255-256; *Moschi v Lep Air Services* [1973] AC 331.

⁵ Above, n 1, at [18]-[19].

⁶ Above, n 1, at [20]-[21].

⁷ Above, n 1, at [21].

all or part of the bond paid at the expiration of the lease but the tenant remained liable to pay the bond in the first place.⁸

The meaning of “debt”

20. Randall AsJ noted that no guidance as to the meaning of “debt” for the purposes of a statutory demand was provided by the Harmer Report.⁹ Nor, his Honour said, was any such guidance provided by the Second Reading Speech or Explanatory Memorandum on the Bill for the legislation which had introduced the new statutory demand regime.¹⁰
21. His Honour also noted that the *Corporations Act* did not provide a definition of “debt”.¹¹
22. His Honour reviewed a number of authorities which had held that “debt” as used in the *Corporations Act* had its ordinary and natural meaning of a liability or obligation to pay or render something.¹²
23. In particular, his Honour regarded the case of *Timberland v AbercrombieOakland (“Timberland”)*¹³ as providing a useful consideration of “debt”.¹⁴ In that case, Macready AsJ of the Supreme Court of New South Wales had surveyed a number of cases¹⁵ including the following:
- *Rothwells Ltd v Nommack (No 100) Pty Ltd*,¹⁶ where it had been said that a debt was a “liquidated sum” in money presently due owing and payable by one person called the debtor to another person called the creditor.
 - *Hansmar Investments v Perpetual Trustee Company Ltd*,¹⁷ where it had been said that where, under a contract, a person promised to pay a specific or readily calculable sum which did not depend upon an assessment, albeit that the sum was payable as liquidated damages for breach of contract, the person’s contractual liability was properly characterised as giving rise to a debt in that sum.
 - *Vimblue Pty Ltd v Toweel t/as Carpenters Core Building*,¹⁸ where it had been explained that a “liquidated sum” was an amount which could be ascertained by

⁸ Above, n 1, at [23].

⁹ Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988).

¹⁰ Above, n 1, at [29].

¹¹ Above, n 1, at [30].

¹² Above, n 1, at [31]-[34]. See, for example, *HL Diagnostics Pty Ltd v Psycadian Ltd* [2005] WASC 234 at [27]-[28]; *IMO Leemon Pty Ltd* [2012] VSC 642 at [55]; *Commonwealth Bank of Australia v Garuda Aviation Pty Ltd* [2013] WASCA 61; (2013) 45 WAR 92 at [31].

¹³ [2012] NSWSC 379.

¹⁴ Above, n 1, at [37].

¹⁵ Above, n 13, at [28]-[33].

¹⁶ [1990] 2 Qd R 85; (1988) 6 ACLC 1199.

¹⁷ [2007] NSWSC 103; (2007) 61 ACSR 321 at [56].

¹⁸ [2009] NSWSC 494 at [13]-[20].

calculation or fixed by any scale of charges or positive data and that, for a “liquidated sum” to emerge, or to be distilled, from a “liquidated claim” or “liquidated demand”, there had to be a process of valuation or assessment or the application of some standard of measurement.

24. Randall AsJ noted that in *Timberland*, Macready AsJ had concluded that the liquidated claim made in that case was a liquidated sum because the contract contained a mechanism to determine the amount of the liquidated claim.¹⁹

Decision

25. Randall AsJ said that the difficulty in the matter before him was that the primary obligation of the Subcontractor was to provide security rather than to pay a monetary sum to discharge a “debt” and that, when read alone, cl 3 of the Guarantee imposed a primary obligation on Meales to guarantee the performance by the Subcontractor of all its obligations.²⁰

26. Although his Honour doubted that the legislature had had in mind the provision of security when it had formulated the framework to deem insolvency for the purposes of a winding up application, his Honour said that, notwithstanding this, the parties to the Subcontract had agreed to a mechanism for the provision of security which was to be in the form of cash unless otherwise permitted by Probuild. His Honour noted that Probuild was to own any interest earned on that cash security and that the cash security was not to be held on trust by Probuild. Therefore, his Honour determined that Probuild was entitled to appropriate the sum provided as cash security to the Subcontract by negotiating the same into an appropriate account.²¹

27. Accordingly, his Honour found that the parties to the Subcontract had agreed:

“as to a mechanism for the calculation of a specific sum by reference to clause 9 and the schedule. The parties agreed to the provision of the cash security (payment) within a specified time of providing the show cause notice.”²²

28. His Honour also found that cl 5 of the Guarantee was specific in relation to the requirement to perform a monetary obligation being the provision of the cash security and that this clause did not detract from, or was not inconsistent with, the provisions of cll 3 and 4 of the Guarantee.²³

¹⁹ Above, n 1, at [40].

²⁰ Above, n 1, at [41].

²¹ Above, n 1, at [41]-[42].

²² Above, n 1, at [43].

²³ Above, n 1, at [44]-[45].

Conclusion

29. His Honour, therefore, concluded that the amount set out in the statutory demand was a “debt” for the purposes of s 459E and dismissed the proceeding.
30. His Honour said that the amount was ascertainable and calculated by agreement between the parties to the Subcontract by reference to cl 9.2 and Annexure Part A to the Subcontract. It was payable within a specified time of service of the show cause notices and had become payable by Meales within 5 days of the demands being made under the Guarantee. The time for that payment had expired prior to the service of the statutory demand.²⁴

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²⁴ Above, n 1, at [47].