



## Transcript of Proceedings

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Date: 7 August, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 6076 of 2003

PANFORTA PTY LTD  
(ACN 096 734 851)

Applicant

and

INTERNATIONAL MARINE ELECTRICS  
PTY LTD (ACN 081 342 896)

Respondent

BRISBANE

..DATE 05/08/2003

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: This is the matter of Panforta and International  
Marine Electrics for judgment.

This is an application to set aside a statutory demand served  
on 18 June 2003. The demand was for \$38,189, moneys payable  
under a certain deed of agreement.

On the hearing of the application the applicant relied on two  
grounds to set aside the demand:

(a) that there is a genuine dispute as to the existence of  
the debt in that the completion of certain works was a  
condition precedent to payment and those works have not  
been completed: Corporations Act section 459H(1)(a); and

(b) that the application has an offsetting claim:  
Corporations Act section 459H(1)(b).

By an agreement made on or about 12 July 2002 the respondent  
was to provide marine electrical services to four parties  
including the applicant, referred to as "the recipients", on a  
vessel then under construction.

There were disputes between the parties about the alleged  
failure of the respondent to perform the works adequately or  
at all.

Ultimately by a deed of agreement made on 9 April 2003 between the applicant and the respondent and Mr and Mrs Clayton (two of the other recipients) as guarantors:

(1) the applicant acknowledged that \$44,189 described as the debt was owing to the respondent by the recipients for the provision of services pursuant to the agreement (clause 1.1);

(2) the applicant agreed to repay the debt to the respondent as follows:

(a) \$6,000 upon the signing of the deed by the applicant;

(b) \$10,000 on or before 29 May 2003;

(c) the balance including interest on or before 12 June 2003 (clause 2.1);

(3) in consideration of the payments in clause 2 the respondent agreed (inter alia) to complete all marine electrical services referred to in the agreement within seven days of the date of the deed (clause 6.1(d)).

Of the \$44,189 only the initial \$6,000 has been paid. Mr Clayton has sworn that clause 6.1(d) has not been complied with and particularised 10 items of incomplete and defective works.

The applicant has submitted that upon the proper interpretation of the deed the completion of those electrical services was a precondition to payment. However, in my view, there is no serious question to be tried as to the proper interpretation of the deed. The mere fact that the consideration for a covenant is the giving of another covenant does not make one a precondition of the other. Compliance with clause 6.1(d) is not a precondition to payment under clause 2. Non-compliance with clause 6.1(d) would sound in damages but would not affect the obligation to make the payment.

I am satisfied that there is no genuine dispute as to the existence of the debt.

What then of the offsetting claim?

In clause 19 of his affidavit Mr Clayton particularised 10 items of allegedly incomplete and defective works. However, he made no attempt to quantify the claim. They were disputed in an affidavit sworn by Mr Paulger on behalf of the respondent except for three minor items costing a total of \$312.

The applicant sought to rely on another affidavit, that of Barry Skinner, sworn on 1 August 2003 - that is, outside the 21 day period for making the applicant to set aside the demand prescribed by section 459G of the Corporations Act.

He set out 14 respects in which the electrical work allegedly did not comply with applicable standards or survey requirements. He did not attempt to quantify the claim being made. When the respondent objected to this evidence as raising fresh grounds not raised within the 21 day period, the applicant submitted that it consisted merely of further particulars of the following allegation in paragraph 13 of Mr Clayton's affidavit:

"13. At the time of swearing this affidavit the respondent has not complied with its obligation in clause 6.1(d) of the deed to 'complete all other marine electrical services referred to in the agreement (the contract) within seven days of the date of the deed'."

There is a considerable body of authority to the effect that if an affidavit filed within the 21 day period sufficiently asserts the existence of facts upon which an offsetting claim is grounded, a further affidavit filed outside that period may be relied on to fill out some of the detail in order to show the bona fides of the assertions in the original affidavit: Energy Equity Corporation Ltd v. Sinedie Pty Ltd (2001) 166 FLR 179; Process Machinery Australia Pty Ltd v. ACN 057 260 590 Pty Ltd [2002] NSWSC 45, Raffles Corporation Pty Ltd v. Cech [2001] QSC 129, and the cases cited therein.

As Justice Barrett observed in Process Machinery there can be a question about the nature and extent of the definition or assertion required in the first affidavit. He said:

"22. The real point is that the application and affidavit filed and served within the 21 day period must

fairly alert the claimant to the nature of the case the company will seek to make in resisting the statutory demand. The content of the application and affidavit must convey, even if it be by necessary inference, a clear delineation of the area of controversy so that it is identifiable with one or more of the grounds made available by section 459H and section 459J. That process of delineation may not be extended after the end of the 21 day period although it is open to the plaintiff to supplement the initial affidavit by way of additional evidence relevant to the area of controversy identified within the period."

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I doubt that the affidavit of Mr Skinner passes this test except in one comparatively minor particular, but it is not necessary for me finally to determine the point. He makes no attempt to quantify the alleged deficiencies. In *Macleay Nominees Pty Ltd v. Belle Property East Pty Ltd*, [2001] NSWSC 1088 at para [18], Justice Palmer referred to the need for some evidence of the basis upon which the loss is said to arise and how that loss is calculated before the Court can find that there is a genuine offsetting claim.

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There being no quantification of the claims made by Mr Clayton or Mr Skinner, I am not satisfied that the applicant has a genuine offsetting claim, other than as to \$312.

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Accordingly:

- (1) I make an order varying the demand by reducing the amount thereof to \$37,877;
- (2) I declare that that demand to have had effect as so varied from the time when it was served on the applicant.

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HER HONOUR: I order the applicant to pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

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