SUPREME COURT OF QUEENSLAND

CITATION:	*Mine & Quarry Equipment Pty Ltd (In liquidation)* [2004] QSC 402
PARTIES:	**MINE & QUARRY EQUIPMENT INTERNATIONAL LTD** (applicant) **v** **LACHLAN STUART McINTOSH as Liquidator of MINE & QUARRY EQUIPMENT PTY LTD (IN LIQ.)** (respondent)
FILE NO:	S2869 of 2001
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	8 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2004
JUDGE:	Wilson J
ORDER:	**Application dismissed with costs**
CATCHWORDS:	CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF LIQUIDATION – PROOF AND RANKING OF CLAIMS – MUTUAL CREDITS AND SET-OFF ESTOPPEL – FORMER ADJUDICATION AND MATTERS OF RECORD OR QUASI OF RECORD – FORMER ADJUDICATION – JUDGMENT INTER PARTES – RES JUDICATA – GENERAL MATTERS – where the applicant is a creditor of the respondent company in liquidation – where the parties have had a previous dispute over proof of debt – where that previous dispute has been litigated – where the respondent seeks to amend the amount of debt it will admit – whether the respondent is estopped from amending the amount of debt it will admit *Corporations Act* 2001 (Cth), s 553C *Corporations Regulations* 1990 (Cth), 5.6.54(2), 5.6.55 *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* [1998] 4 VR 888, followed *Gye v McIntyre* (1991) 171 CLR 609, followed *Ling v Commonwealth* (1996) 68 FCR 180, followed *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, discussed

Stein v Blake [1996] 1 AC 243, followed

COUNSEL: PE Hack SC for the applicant
M Daubney SC for the respondent

SOLICITORS: Hopgood Ganim Lawyers for the applicant
Tucker & Cowen Solicitors for the respondent

1) **WILSON J**: On 10 July 2000 Mine & Quarry Equipment Pty Ltd ACN 011 012 561 ("MQE") was ordered to be wound up. One of its creditors is Mine & Quarry Equipment International Ltd ARBN 079 139 683 ("MQEI"), which seeks –

> "a declaration that [the liquidator] is not entitled to set off against [its] Claim, admitted to proof in the sum of $627,954-46, the sum of $85,989-62 or any part thereof."

To understand the application, it is necessary to traverse a little of the background.

2) MQE was a repairer, reseller and broker of mining and quarry equipment. It was controlled by Mr Bill Robson. MQEI imported crushers and ball mills from overseas as well as engaging in a number of overseas joint ventures in relation to the attempted manufacture of mining and quarry equipment. It was controlled by Mr Gary Robson.

3) MQEI lodged the following proofs of debt in the liquidation of MQE –

11.09.00	$627,954 -46	plus	$634,975-60
06.12.00	$581,616-67.		

In February/March 2001 the liquidator accepted $627,954-46 of the first proof of debt, rejected the balance of the first proof of debt, and rejected the second proof of debt.

4) MQEI appealed against the rejections pursuant to reg 5.6.54(2) of the *Corporations Regulations* 1990. It subsequently reduced its claim made in the second part of the first proof of debt to $620,435-43, and abandoned its appeal in relation to the rejection of the second proof of debt.

5) The amount in dispute related to a series of discrete invoices for plant, freight and stock, together with interest. The appeal was heard by Atkinson J on 3 August 2001, and dismissed on 31 October 2001. Her Honour received evidence in relation to each component of the claim and, after careful analysis, rejected each component seriatim.

6) On 3 June 2002 the liquidator's solicitors wrote to MQEI's solicitors saying (inter alia) –

> "Your client's claim has been admitted to proof in the sum of $627,954-46. This claim is subject to any set-offs owed to the liquidator of Mine & Quarry Equipment Pty Ltd (In Liquidation)."

Then, after discussing certain costs orders which are not presently relevant, they continued –

> "Other Claims
>
> There are a number of outstanding invoice [sic] from Mine & Quarry Equipment Pty Ltd to Mine & Quarry Equipment International Ltd. These claims should be set-off against your client's debt.
>
> 1. Invoice 2121 – costs incurred in cleaning MQEI's ball mill - $2,620.00.
>
> There is now some evidence of a request by MQEI, and background evidence which suggests that the liability should be paid by MQEI.
>
> It would be helpful to have evidence of Ms Mulcahy has [sic] to what she was told by Gary Robson. We therefore consider that the claim has prospects of success, although they are probably only slightly better than even prospects. In favour of the claim being able to be made against MQEI is that it was its equipment, and that Gary Robson made the request. There is evidence to show that MQEI is liable for this invoice. It will be set-off against your client's dividend.
>
> 2. Invoice P257 – costs incurred in cleaning MQEI's ball mill - $3,205.00
>
> This amount is due to MQE and will be set-off.
>
> 9. Invoice 2398 – cost of repairing and maintaining MQEI's equipment $43,858.47
>
> This claim is due by MQEI to MQE and will be set-off against your client's dividend.
>
> 10. Invoice 2414 – cost to refurbish and overhaul MQEI's crusher - $7,743.55
>
> This claim is due by MQEI to MQE and will be set-off against your client's dividend.
>
> 11. Invoice 2419 – equipment purchased for MQEI India Joint Venture - $7,887.50
>
> This claim is due by MQEI to MQE and will be set-off against your client's dividend.
>
> 14. Invoice 2296 – crushing plant - $20,000.00
>
> This is in respect of an invoice for a crushing plant. The debt was part paid in 1999 and the balance of $20,000.00 remains outstanding.

Pallets - $584.10

Your client removed some of its equipment from the land at Tile Street when it removed its equipment. Despite demand, your client has failed to either pay or return those pallets. They are worth $584.10.

Summary and Conclusions

Your client's claim		$627,945.46 [sic]
Less outstanding invoices	2121	$2,620.00
	P257	$3,205.00
	2398	$43,858.47
	2414	$7,743.55
	2419	$7,887.50
	2296	$20,000.00
Pallets		$584.10
Total		$85,989.62

Accordingly, your client's claim will be assessed for a dividend on the amount of $541,964.84 (by $627,000.00 less $85,898.62). [sic]"

7) MQEI's solicitors asserted that the liquidator's approach was not open, either as a matter of fact or as a matter of law, referring to s 553C of the *Corporations Act* 2001 and the principle in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. On 13 June 2002 the liquidator's solicitors advised that the liquidator's decision to set off valid claims stood. They relied on the liquidator's powers under the *Corporations Act*, the *Corporations Regulations* (particularly reg 5.6.55), the fact that there had not been litigation concerning the claim for $627,954-46 (but only in relation to the balance of MQEI's proofs), and –

> "[that] our client has always admitted that amount subject only to ascertain its value, and subject to any available set-offs."

They said –

> "The liquidator is however prepared to investigate the factual matters to determine the validity of such set-offs. We invite your client to respond within 7 days of the date of this letter in relation to that.
>
> In the absence of any response, our client will proceed to calculate the dividend entitlements based upon the set-off amounts previously raised."

8) The claims sought to be set off all relate to the maintenance and acquisition of equipment. At least the first two had been discussed in correspondence between MQEI and the liquidator in October 2003. MQEI claimed not to have previously received some of the invoices, and raised factual disputes in relation to the last two.

9) Section 553C of the *Corporations Act* provides –

> "**SECTION 553C INSOLVENT COMPANIES—MUTUAL CREDIT AND SET-OFF**
>
> 553C(1) [Company insolvent] Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
>
> (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
>
> (b) the sum due from the one party is to be set off against any sum due from the other party; and
>
> (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
>
> 553C(2) [No set-off where knowledge that company solvent**]** A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent."

The section is self-executing, that is, its operation does not depend on the option of either party; where there is a set off due from one party to the other, only the balance of the account is admissible to proof against the company, and cross-claims as choses in action cannot continue to exist: *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* [1998] 4 VR 888; *Gye v McIntyre* (1991) 171 CLR 609; *Stein v Blake* [1996] 1 AC 243.

10) I do not accept the submission of senior counsel for MQEI that the set off did not survive the statutory process that operated when the liquidator admitted a proof of debt or claim. The submission equates the amount which is admissible to proof (namely the balance of the account) with the amount which the liquidator admits to proof. That the liquidator may err is recognised in the regulations, which provide that a creditor who considers that all or part of its proof of debt has been wrongly rejected may appeal (reg 5.6.54 of the *Corporations Regulations)*, and that a liquidator who considers that a proof of debt or claim has been wrongly admitted may revoke or amend his or her decision (reg 5.6.55).

11) Regulation 5.6.55 provides –

> "Revocation or amendment of decision of liquidator

(1) If the liquidator considers that a proof of debt or claim has been wrongly admitted, the liquidator may:

(a) revoke the decision to admit the proof and reject all of it; or
(b) amend the decision to admit the proof by increasing or reducing the amount of the admitted debt or claim.

(2) If the liquidator considers that all of a proof of debt or claim has been wrongly rejected, the liquidator may:

(a) revoke the decision to reject the proof of debt or claim; and
(b) admit all of the proof or admit part of it and reject part of it.

(3) If the liquidator:

(a) revokes a decision to admit a proof of debt or claim and rejects all of it; or

(b) amends that decision by reducing the amount of the admitted debt or claim;

the liquidator must inform the creditor by whom it was lodged, in writing, of his or her grounds for the revocation or amendment.

(4) If the liquidator revokes a decision to admit a proof of debt or claim and rejects all of it, or amends that decision by reducing the amount of the admitted debt or claim, the creditor must at once repay to the liquidator:

(a) the amount received as dividend for the proof; or

(b) the amount received as dividend that exceeds the amount that the creditor would have been entitled to receive if his or her debt or claim had been originally admitted for the reduced amount.

(5) If the liquidator:

(a) revokes a decision to reject all of a proof of debt or claim; or

(b) amends a decision to admit part of a proof of debt or claim;

by increasing the amount of the admitted debt or claim, the creditor by whom it was lodged is entitled to be paid, out of available money for the time being in the hands of the liquidator:

(c) the dividend; or

(d) an additional amount of dividend;

that the creditor would have been entitled to receive if all of the debt or claim had been originally admitted, or the increased amount had been admitted, before the available money is applied to pay a further dividend.

(6) The creditor is not entitled to disturb the distribution of any dividends declared before the liquidator revoked or amended the decision."

12) I understood senior counsel for MQEI then to concede that a liquidator could invoke reg 5.6.55 to amend his or her decision to admit a proof by reducing the amount on account of a set off due to the company. However, in his submission, the liquidator had not done so in the present case, and moreover he was estopped from doing so in accordance with the *Anshun* principle.

13) He submitted first, that it had not been established that the liquidator had formed the view that the amount of $627,954-46 had been wrongly admitted, and secondly that the liquidator had not informed MQEI of his grounds for amending his decision. The letter from the liquidator's solicitors of 3 June 2002 contained no reference to reg 5.6.55. While it did not contain an express statement that the liquidator considered the proof of debt had been wrongly admitted, it contained an assertion that the proof which had been admitted in the sum of $627,954-46 was "subject to any set-offs owed to the liquidator or Mine & Quarry Equipment Pty Ltd (In Liquidation)". (This application is not concerned with any set offs allegedly due to the liquidator, but only with set offs allegedly due to MQE.) And it contained this statement of the liquidator's intention –

"Accordingly, your client's claim will be assessed for a dividend on the amount of $541,964-84) (by $627,000-00 less $85,898-62)."

14) I assume the bracketed amounts contained typographical errors, and that they should read –

($627,954-46 less $85,989-62).

While imperfect, I think this is probably adequate evidence that the liquidator considered that the full amount of $627,954-46 had been wrongly admitted, and that he amended his decision. He was obliged to inform the creditor, in writing, of his grounds for the amendment. It was probably sufficient for him to assert the existence of the set offs.

15) Senior counsel for MQEI conceded that if the liquidator had not strictly exercised his power of amendment under regulation 5.6.55, he could still do so, but for the application of the *Anshun* principle.

16) Under that principle, a person may be estopped from raising a claim or defence which he or she could have raised in previous proceedings, where the Court

determines that it was unreasonable not to have done so. The majority of the High Court said at pages 602 – 604 –

> "Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings, eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few: see the illustrations given in *Cromwell v County of Sac* (94-US at 356–7)
>
> It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment
>
> …
>
> The likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments is obviously an important factor to be taken into account in deciding whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. By "conflicting" judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction."

17) The *Anshun* principle may apply to a cross-claim. However, as Wilcox J observed in *Ling v Commonwealth* (1996) 68 FCR 180 at 183 –

> "Some cross-claims have little or no connection with the claim in the action. There may be no more than an identicality of parties. It is difficult to see any justification for applying the *Anshun* principle to a case of that kind. Some cross-claims overlap the facts of the principal claim but involve additional facts. Where this occurs, a question of degree arises. It would be wrong to say that the *Anshun* principle is excluded whenever there are additional facts; to go so far would be to render it nugatory. However, where the additional facts are substantial, it may be appropriate to accept the reasonableness of separate proceedings."

18) Senior counsel for MQEI submitted that the set offs should have been raised in the proceeding before Atkinson J, and that the liquidator was in the position of a defendant now seeking to assert a defence that was available to be agitated in an earlier proceeding. But the proceeding before Her Honour was a creditor's appeal against the rejection of part of its proof of debt, and as senior counsel for the liquidator submitted, the fact of the liquidator having admitted $627,954-46 was common ground, and the matters raised were concerned entirely with components

of the proof of debt which the liquidator had rejected. He submitted, correctly in my view, that the issue determined by Her Honour was not the amount which MQEI was entitled to prove, but whether the disputed balance of the proof of debt had been properly rejected. The proceeding before Her Honour was not a general inquiry into the mutual dealings between the parties, and I have difficulty seeing how the issue of the set off could have been ventilated before her.

19) It follows that I do not consider that the liquidator is estopped from now amending his decision as to the amount of the debt he will admit.

20) The application is dismissed with costs.