



Transcript of Proceedings

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Date 15/7/02

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 4062 of 2002

ANDERSON FORMRITE PTY LTD

Applicant

and

HEADLINK PTY LTD

Respondent

ACN 09 015 744

TRADING AS WORKFORCE ONE

BRISBANE

..DATE 03/07/2002

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 an application to set aside a statutory demand pursuant to section 459G of the Corporations Law.

The applicant has complied with the formal requirements of section 459G sub 3. It contends that it has an offsetting claim against the creditor which exceeds the amount of the claim. The creditor for its part contends that the claim is not genuine, is contrived and is a means to avoid paying its due debt.

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There is no dispute about the applicable principles, namely that the Court on such an application is concerned to identify if there is a dispute about the debt or if there is an offsetting claim and if there is if it is genuine. It is not expected that the Court will embark upon an extended inquiry in order to determine the merits of the dispute.

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The applicant was the formwork subcontractor to a large project undertaken by Balderstone Hornibrook in Perth last year. The subject sub-contract was worth approximately \$12 million. It commenced in about September last year.

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There is a great deal of material about the background to winning the contract and other matters immaterial for this application. There is also a great deal of assertion, counter-assertion and denial in the extensive affidavit material which is impossible to resolve on this application.

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The creditor agreed to provide labour for the formwork to

the applicant, on one view until it had sufficient cashflow to employ those labourers direct. The terms on the applicant's part are said to be oral and include provisions which virtually gave it little control over which labourers it retained and which it could remove.

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It also contends that it was a representation and/or a term of the contract that the workforce provided by the creditor would be highly skilled. The creditor says that the terms of the agreement were in writing and allowed unsatisfactory workers to be terminated. It is the alleged unsatisfactory nature of the labour force provided by the creditor which is at the heart of the applicant's offsetting claim.

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Balderstone Hornibrook terminated the subcontract in May this year due, according to its media release, to the applicant's difficulty with meeting productivity.

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A number of deponents on each side have sworn to the rate of productivity for this job and what might be expected of a competent workforce. The creditor uses the basis upon which the applicant undertook the subcontract, that is the number of hours allowed to do the formwork, the extent per square metre of the work, and concludes that a rate of .65 square metres per hour was proposed. Indeed, the creditor contends that over some periods the workers did much better. The expected rate is said by one of the applicant's deponents, Mr Pask, to be about one square metre per hour.

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Mr Passione, project manager for the applicant, used detailed tables to demonstrate productivity rates as low as .41 of a square metre per hour up to the end of December 2001 in the course of this job where he deposes there were no other factors other than the productivity of the workmen provided by the creditor. His expertise is limited but he has, he deposes, gained considerable experience on this job.

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Mr Hastie, for the creditor, submits that whilst there is much in dispute which cannot be resolved on this application, nonetheless there are certain indisputable facts which would allow the conclusion to be drawn that the claim is not genuine.

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First he submits that the material reveals no discontent, at least in writing, with the quality of the labour supplied until about February 2002. The applicant's deponents, on the other hand, say that regular complaints were made orally well before that time.

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Then Mr Hastie submits that when Balderstone Hornibrook terminated the applicant's subcontract it is said that it would finish the formwork using the applicant's labourers and that this indicates that they were regarded as satisfactory.

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In January 2002 the applicant took over the creditor's

labour force. Mr Hastie submits that at the time the subcontract was terminated the applicant was employing some 42 labourers who had previously been provided by the creditor to the applicant which demonstrated that the dissatisfaction was not great. However, as Mr Thompson indicated, at times there were as many as 100 labourers, it seems, working on the project.

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Mr Reich, a very experienced formworker who was employed by the applicant on this project, has many critical things to say about the applicant's capacity to do the job and, in particular, is critical of Mr Passione's experience and management skills. He deposes that the labour force was skilful.

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Other creditors of the applicant have not been paid for which the applicant has apparently blamed their want of productivity. There are issues raised by the applicant about the role of the CFMEU and representations made by the creditor about its influence with that union which was not borne out but which is denied by the creditor's deponents.

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While there is much to cause unease that this may, indeed, be a contrived dispute to avoid paying a significant debt of some \$1.71 million for the outstanding costs of labour supplied, nonetheless the extensive range of the disputes, from the terms of the contract to the applicable productivity rate for this job, to the actual rate achieved, over what period and the nature and quality of the labour

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force, makes it difficult to conclude that the claim for lost profits by the applicant cannot be said to have that want of genuineness which would permit the application to be dismissed.

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Whilst the quantum of the claim is quite general, being said to be in the vicinity of \$2 million to perhaps \$4.5 million, it is not so vague as to be a stab in the dark and meets the creditor's claim.

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Accordingly, I grant the application to set aside the statutory demand.

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HER HONOUR: The order is that the costs of this application be the costs in the proceedings to be commenced by the creditor.

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