

Protection of the SOP Act and Companies in Administration

(A case note on *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1230)

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Introduction

In the recent NSW Supreme Court decision of *Brodyn v Dasein Constructions*, it was held that a person against whom a judgment had been obtained under section 25 of the Building and Construction Industry Security of Payment Act (**SOP Act**) could apply a set-off in circumstances where the claimant had become subject to a deed of company arrangement (**DOCA**).

The DOCA in this case provided for mandatory set-off by incorporating section 553C of the Act into the agreement. Whilst in the normal course the SOP Act would not allow for the application of a set-off so as to ensure contractors are paid, Young J formed the view that the protection of the SOP Act ceased at the point where the claimant went into administration.

Background

Brodyn (as head contractor) entered into a construction contract with Dasein (as subcontractor) to which the SOP Act applied. Under the SOP regime, a payment claim and payment schedule were served and the matter was taken to an adjudicator. The adjudicator made his determination that gave rise to a District Court judgment debt of about \$180,000 in favour of Dasein.

Brodyn had sought to set aside this District Court judgment. This was refused by Gzell J and the appeal heard in the Court of Appeal in the case *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 was dismissed.

Brodyn subsequently issued a statement of liquidated claim in the District Court claiming damages of around \$380,000. Soon after, Dasein went into voluntary administration and became subject to a deed of company arrangement (**DOCA**).

A DOCA is a charter agreed upon by the creditors in a voluntary administration. Part 5.3A of the Corporations Act (**the Act**) governs the powers of the deed administrator acting as agent for the company. The deed usually provides for a moratorium on the bringing of proceedings by certain creditors; and that such creditors cannot proceed with, or apply for, a winding up order, or bring or continue proceedings or enforcement processes in relation to company property.

By proof of debt, Brodyn claimed around \$460,000. This was rejected by Dasein's administrator. After considering the somewhat imbalanced evidence, Young J reversed the administrator's decision, finding that Brodyn owed Dasein at least \$300,000.

Main Issue

Thus, with Brodyn claiming \$300,000 in liquidated damages, and Dasein claiming \$180,000 under the SOP Act, Young J had to consider whether a set-off under s553C of the Act was available or whether s25 of the SOP Act prevailed.

Section 533C provides for set-offs and applies where there are mutual dealings, which includes the situation where one party has a damages claim for breach of contract entered into before the administration.

Argument

Brodyn argued that because its liquidated damages claim exceeded Dasein's SOP Act judgment debt, Dasein's claim was automatically extinguished under s553C of the Act.

On the other side, Dasein argued that the only entitlement to judicial intervention once a judgment under is made under s25(1), is to commence proceedings to have it set aside under s35(4) of the SOP Act.

Young J held that the scheme set out under s553C of the Corporations Act where a company is under a DOCA prevails. Thus Brodyn was entitled to a declaration that Dasein's judgment debt of \$180,000 was extinguished by set off under s553C of the Corporations Act.

Reasoning

Young J reached his conclusion that s533C could apply regardless of the SOP Act based on the following reasons:

- (a) Firstly, under section 109 of the Australian Constitution, in the event of an inconsistency between state and Commonwealth legalisation, Commonwealth legislation will prevail to the extent of the inconsistency.
- (b) Secondly, Young J looked at the purpose behind the SOP Act itself and noted that it is clear that the mischief which it is intended to address is to assist subcontractors and others who depend on cash flow for their continued existence by compelling the payment of monies owing.

Young J noted that Dasein's administrator argued that it is necessary for Brodyn to pay the full amount of the District Court judgment sum to the administrator who would then use it to pay his own fees and to fund further litigation "and there would not be a ghost of a chance of the just claim of the head contractor ever being paid."

In concluding, Young J noted that:

"[The SOP Act] only intends to operate when the head contractor and subcontractor are going concerns. Once the subcontractor ceased to be a going concern, it no longer needs cash flow and the mischief to be covered by the Act is not present in that situation.... [The subcontractor] elected to [go into voluntary administration] and in my view, the protection of the [SOP] Act ceased at that point and the Commonwealth law as to adjustments of rights under administration and later under a DOCA came into play."

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