

Set Off and the Security of Payment Act: A Case Note on Brodyn Pty Ltd v Dasein Constructions Pty Ltd [2004] NSWSC 1230

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Introduction

In the recent decision of *Brodyn v Dasein Constructions*, the NSW Supreme Court held that a head contractor was entitled to set off an amount against a judgment obtained by a subcontractor under section 25 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('SOP Act') in circumstances where the subcontractor became subject to a deed of company arrangement (DOCA).

In this case, the DOCA incorporated prescribed provisions of the *Corporations Regulations 2001* which meant that section 533C of the *Corporations Act* applied to claims made under the DOCA. Section 533C provides a statutory entitlement to set-off mutual credits, debts and dealings between an insolvent company being wound up and a party who wants to have a debt or claim admitted against that insolvent company.

In the usual course, the head contractor would have had no entitlement to set off amounts against a debt under the SOP Act. Young J, however, decided that the protection of the SOP Act ceased at the point where the claimant went into administration and that the head contractor was entitled to the benefit of the statutory set off provisions.

Background

Brodyn (as head contractor) entered into a construction contract with Dasein (as subcontractor) to which the SOP Act applied. Dasein applied for adjudication of its payment claim upon receiving a payment schedule from Brodyn. The adjudicator made his determination. Dasein filed the adjudicator's certificate with the District Court which gave rise to a judgment debt of \$180,493.64. Brodyn sought to set aside the judgment debt. Gzell J refused Brodyn's application and Brodyn's subsequent appeal was dismissed.

About the same time, Brodyn issued a statement of liquidated claim in the District Court claiming damages of \$385,441.93. Soon after, Dasein went into voluntary administration and became subject to a DOCA.

A DOCA is a charter agreed upon by the creditors in a voluntary administration. Part 5.3A of the *Corporations 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.

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Brodyn lodged its proof of debt with Dasein's deed administrator for \$461,882.36. This was wholly rejected by the deed administrator. Brodyn made an application to the NSW Supreme Court appealing the deed administrator's decision.

Issue for determination

In determining that the deed administrator's decision should be reversed and that the deed administrator should have admitted Brodyn's proof of debt, the issue for determination by the Court was whether, in view of the SOP Act, the statutory right of set off was available under s 553C of the *Corporations Act* (as incorporated into the DOCA).

Argument

Brodyn argued that Dasein's judgment debt was automatically extinguished under section 553C because, in admitting its proof of debt, its claim exceeded Dasein's claim and because Dasein's judgment debt was only a provisional judgment which was to be finally determined when the whole of the dispute between the parties had been litigated.

On the other hand, Dasein argued that the policy of the SOP Act means that the only entitlement to judicial intervention once a judgment debt is made under the SOP Act is to commence proceedings to have it set aside under section 25(4) of the SOP Act. In those proceedings Brodyn may not bring a cross claim or raise any defence in relation to the matters arising under the construction contract nor challenge the adjudicator's determination.

Reasoning

Young J identified that there was a conflict between the scheme set out in the SOP Act and the scheme set out in the *Corporations Act* where a company is under a DOCA.

Young J held that the scheme set out under section 553C of the *Corporations Act* where a company is under a DOCA prevails over the scheme set out in the SOP Act and held that Brodyn was entitled to a declaration that Dasein's judgment debt was extinguished by set off under section 553C.

Young J commented that the two methods of approaching the problem gave the same result. That is, the first approach is that, in the event of an inconsistency between state and Commonwealth legislation, section 109 of the Australian Constitution provides that the Commonwealth legislation will prevail to the extent of the inconsistency.

The second approach is to construe the SOP Act and the mischief which it intended to address, which was to assist subcontractors and others who depend on cash flow for their continued existence by compelling the payment of monies owing. In construing the SOP Act, Young J stated 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.

Finally, in response to the deed administrator's argument that Brodyn should pay the full amount of the District Court judgment to the administrator for him to use to pay his own fees and to fund further litigation, Young J commented that, in circumstances where there would not be a 'ghost of a chance' of Brodyn's claim ever being paid, 'the [SOP Act] does not go that far'.