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BOURKE ROAD PTY LTD V BOXSTER CONSTRUCTIONS PTY LTD [2001] NSWSC 717

Supreme Court of New South Wales – 13 August 2001

FACTS

The case concerned an application under s 459G of the Corporations Law to set aside a statutory demand. Bourke Road Pty Ltd ('Bourke'), a developer, and Boxster Constructions Pty Ltd ('Boxster'), a builder, entered into a standard form contract on 2 February 2000 in respect of a project at Bourke Road, Alexandria.

Boxster submitted Progress Claim No 11 on 2 February 2001 in the amount of \$582,467.01. Bourke forwarded payment of some \$300,000.00, which meant that on 13 February 2001 a revised Progress Claim No 11 was made in the sum of \$269,945.28. The judge considered the revised claim to be a proper Progress Claim under the construction contract which would be picked up by section 11 of the Building and Construction Industry Security of Payment Act 1999 ('the Act'), so that the sum would be due and payable 14 days afterwards, on 27 or 28 February 2001. [*Note*: the period for payment under the Act has since been reduced to 10 business days].

On or about 15 February 2001, Boxster served on Bourke a statutory demand seeking payment of the amount in the revised claim. Bourke, on 7 March 2001 made an application to set aside the statutory demand pursuant to s 459G of the Corporations Law on a number of grounds. One ground was that Bourke alleged an agreement that payments would be made in agreed installments but this was rejected by the court. Bourke also relied on an offsetting claim but this was also rejected by the court.

A further ground was that the debt in the statutory demand was not yet due and payable under section 11 of the Act when the demand was issued.

ISSUE

- Should the statutory demand be set aside given that the debt was not yet due under section 11 of the Act (at the time the demand was issued)?

FINDING

Section 11 of the Act makes the amount in a progress claim payable 14 days after the claim is made. That period had not expired at the time the statutory demand for payment was issued. As such, there was "some basis for suspecting the validity of the demand". The statutory demand was set aside upon strict conditions.

QUOTE

Chief Justice Young at paragraph 19 stated: "It seems to me that because of the s 11 point, there is some basis for suspecting the validity of the demand. This is relevant as to whether I should exercise my discretion under s 459J. The desirability of doing so is reinforced by the desire to solve this dispute as cheaply as possible."

IMPACT

A creditor's statutory demand for a debt due under section 11 of the Act must not be submitted before the expiry of the prescribed time in the Act (currently 10 business days after the payment claim is made).

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NSW
Jim Doyle
P: 02 9283 5388
E: jdoyle@doyles-solicitors.com.au

QLD
Frank Nardone
P: 07 3221 2970
E: fnardone@doylescl.com.au

VIC
Elisa Hesling
P: 03 9620 0322
E: ehesling@doyles-solicitors.com.au

www.doyleslawyers.com