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NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED *v.* OASIS DEVELOPMENTS PTY. LTD.

[1981 Nos. 1756, 4984; 1982 Nos. 5053, 5054]
Pets. 61, 62/1983

Supreme Court, Brisbane (McPherson J.)

6 May, 1983

B

Companies – Winding up – Inability to pay debts – Unsatisfied judgments – Large sums unpaid – Petition – General allegation of insolvency – Insolvency not denied – Counterclaim or set-off – Substantiality – Whether petitioner's debt disputed – Whether company should be wound up – Companies (Queensland) Code, s. 364(1)(e) – *Companies Rules* 1963, *r.* 20(2)*; Form 3.*

C

Practice – Judgment in default of appearance – Setting aside – Lapse of time – What applicant must show – The Rules of the Supreme Court, O. 15, r. 10.

A petition for the winding up of a company invoked the ground specified in s. 364(1)(e) of the *Companies (Queensland) Code*, viz. that the company was "unable to pay its debts". The petition did not allege service of a notice of demand pursuant to s. 364(2)(a) of the *Code*; the petitioner relied instead on the company's persistent failure to pay its debts after demands for payment.

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The company raised against the petitioner a claim which allegedly exceeded the debt on which the petitioner relied.

Held: (1) That in all the circumstances the company was unable to pay its debts within the meaning of s. 364(1)(e) of the *Companies (Queensland) Code*.

Re Gold Hill Mines (1883) 23 Ch.D. 210, 214, and *Re Tweeds Garages Ltd.* [1962] Ch. 406, 410, referred to.

Quaere to what extent and for what purpose it is relevant to consider whether or not a petitioner's debt is disputed once it is concluded that a company is unable to pay its debts.

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Re London & Paris Banking Corporation (1874) 19 Eq.444; *Mann v. Goldstein* [1968] 1 W.L.R. 1091; *Re Tweeds Garages Ltd. (supra)*; *Re Jeff Reid* (1980) 5 A.C.L.R. 28, 31; and *L. & D. Audio Acoustics Pty. Ltd. v. Pioneer Electronic Australia Pty. Ltd.* (1982) 7 A.C.L.R. 180, 183, referred to.

(2) That it was necessary in this case to determine whether the debt upon which the petitioner relied could properly be said to be disputed because (i) the company raised as against the petitioner a claim which exceeded the debt on which the petitioner relied to establish its status as a creditor, and (ii) in reaching the conclusion that the company was insolvent the non-payment of the debt due to the petitioning creditor had been taken into some account.

F

(3) That the principal question was whether the company's claim was founded on a substantial ground, that is whether it raised serious issues and had prospects of success and that in the circumstances substantial grounds for defeating the petitioner's debt had not been shown.

Re Clem Jones Pty. Ltd. [1970] Q.W.N. 6; *Re K. L. Tractors Ltd.* [1954] V.L.R. 505, 512; *Re Welsh Brick Industries Ltd.* [1946] 2 All E.R. 197, 198; *Re Douglas Griggs Engineering Ltd.* [1963] Ch. 19, 23, and *Re L. H. F. Wools Ltd.* [1970] Ch. 27, 36, 42, referred to.

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Held further: (1) That an applicant pursuant to O. 15, r. 10 of *The Rules of the Supreme Court* to set aside a judgment obtained against him in default of appearance is required to show by affidavit a defence on the merits, that is a "prima facie" or "substantial" defence.

Evans v. Bartlem [1937] A.C. 473, 480, and *Saunders v. Hammond* [1965] Q.W.N. 39, followed.

(2) That it will not be often that a defendant who has an apparently good ground of

defence will be refused the opportunity of defending, even though a lengthy interval of time had elapsed in making his application provided no irreparable prejudice is thereby done to the plaintiff. A

Aboyne Pty. Ltd. v. Dixon Homes Pty. Ltd. [1980] Qd.R. 142; *Attwood v. Chichester* (1878) 3 Q.B.D. 722; and *Rosing v. Ben Shemesh* [1960] V.R. 173, referred to.

PETITION; SUMMONS

The respective parties to the actions with which this report is concerned were:

No. 1756/1981 B

Surfers Paradise International Convention Centre Pty. Ltd. Oasis Developments Pty. Ltd. and Garrick Lewis Gray – Plaintiffs.

The National Mutual Life Association of Australasia Limited – Defendant.

No. 4984/1981

The National Mutual Life Association of Australasia Limited – Plaintiff. C

Surfers Paradise International Convention Centre Pty. Ltd. and Oasis Developments Pty. Ltd. – First Defendants and Garrick Lewis Gray – Second Defendant.

No. 5053/1982

The National Mutual Life Association of Australasia Limited – Plaintiff. D

Surfers Paradise International convention Centre Pty. Ltd. – Defendant.

No. 5054/1982

National Mutual Life Association of Australasia Limited – Plaintiff. Oasis Developments Pty. Ltd. – Defendant. E

Petition No. 61/1983 sought that Surfers Paradise International Convention Centre Pty. Limited be wound up. Petition No. 62/1983 sought that Oasis Developments Pty. Ltd. be wound up. Facts relevant to this report sufficiently appear in the judgment reported *infra*.

P. de Jersey Q.C., with him *D. O. J. North*, for National Mutual Life Association. F

C. E. K. Hampson Q.C., with him *P. J. Lyons*, for Surfers Paradise International Convention Centre Pty. Ltd., Oasis Developments Pty. Ltd. and G. L. Gray.

Curia advisari vult

McPHERSON J.: The proceedings (which by consent were heard together) before me comprise the following: (1) a winding up petition 61/1983 by National Mutual Life Association of Australasia Limited ("the landlord") against Surfers Paradise International Convention Centre Pty. Ltd. ("the tenant"); (2) a similar petition no. 62/1983 by the same creditor against Oasis Developments Pty. Limited ("the other tenant"); (3) an application by the tenant as defendant in action no. 5053/1982 to set aside a judgment obtained against it in that action by G

A the landlord; (4) a similar application by the other tenant in action no. 5054/1982; (5) an application in an action no. 1756/1981 by both tenants against the landlord for an order consolidating the proceedings in (3), (4) and (5).

The circumstances out of which these proceedings arise are as follows. The landlord is the registered proprietor of certain building units in a building known as *Surfers International Hotel*, which units include an B area used as a convention centre and another area used as a restaurant/discotheque. Prior to November 9, 1979 both tenants were in occupation (I assume pending leases of those areas) and so became indebted to the landlord in considerable sums. Leases bearing the dates mentioned were executed and subsequently registered, by which the landlord granted terms of ten years terminating on October 31, 1989 at C rentals to be calculated in the manner specified in those leases. The lease in favour of the other tenant was by cl. 20.01 expressed to be collateral to the lease to the tenant and the rental payable under both leases was expressed to be one rental for both premises. On the same date the landlord, the tenant, and one Gray ("the guarantor") entered into a deed by which the tenant agreed to pay to the landlord $204,002.87 in respect D of what were described as "operating costs" of the premises at October 31, 1979, and Gray guaranteed such payment.

The business or businesses of the tenants (which, it may be said, have the same directors and shareholders) conducted on the premises were not successful, and at some stage they ceased to pay the rent to the landlord. On May 21, 1981 the tenants and the guarantor instituted proceedings in action no. 1756/1981 in which they claimed declarations that they were E entitled to abatements of rent due under the leases or alternatively damages for breach of the lease, and a declaration that the landlord's re-entry notice under s. 124 of the *Property Law Act* was invalid. The tenants' statement of claim delivered in those actions on July 10, 1981 alleges (paras. 5–7) that the areas leased required for the proper, efficient and profitable operation of the tenants' businesses an effective air F conditioning service, and were intended by all parties to be serviced by such a system; that it was an implied term of both leases that such a system or service be provided; and that for the period February 5 to March 11, 1981 the premises were substantially without air conditioning. This state of affairs was alleged to have caused loss of income and goodwill.

G By specially indorsed writs 5053/1982 and 5054/1982 the landlord claimed against each tenant recovery of the lands leased, rent amounting to sums in excess of $150,000, unpaid levies, and interest thereon. No appearance was entered for the defendant in either action and on October 25, 1982 the landlord recovered judgment, in default of appearance in both actions, for possession and amounts of rent, etc., to be assessed. It is these judgments which the tenants now seek to have set

aside (see (3) and (4) above); but in each case only as to the money amounts and not as to the judgment for possession. A

Each of the petitions is based on inability to pay debts, the landlord's title as creditor to present the petition being founded on its claim (in petition 61/1983) to be owed $151,490.89 on account of arrears of rent, levies in the sum of $8,400.00, and other amounts under the lease to be assessed; and (in petition no. 62/1983) the sum of $153,730.89, levies and other amounts to be assessed. In the case of the tenant, paragraph 16 of petition 61 refers to a number of sums, five in all, varying in amount from $680.00 to $69,035.00, in respect of which judgment has been entered against the tenant in various courts in Queensland. With respect to these sums, a Mr. Schlicht, a solicitor of the firm acting for the tenant, deposes that four of the five judgment debts have now been either paid or accounted or provided for. The fifth is the judgment debt of $69,035.00 owing to Standard Chartered Finance Limited of which the Brisbane manager, a Mr. Hawkins, deposes that the sum in question forms part of a total in excess of $250,000 due to that company. Negotiations have been proceeding with guarantors (including Mr. Gray) of those liabilities regarding satisfaction of the debt or the provision of security, but at the date of the manager's affidavit no compromise had been reached in relation to satisfying that debt. No such judgment debts are in petition 62/1983 alleged against the other tenant, but in each petition various sums forming parts of the relevant totals alleged to be due to the landlord as petitioner are alleged to have been demanded from but not paid by the tenants, and each petition contains the allegation that "the company is unable to pay its debts". B C D

The first matter for consideration is whether, without reference to the question of any set off, counterclaim or cross-demand by the tenants, the landlord has in each petition established a ground for winding up. The ground invoked is that specified in s. 364(1)(e) of the *Companies (Queensland) Code*, namely, that "the company is unable to pay its debts". Service of a notice of demand pursuant to s. 364(2)(a) of the *Code* is not alleged, so that the statutory presumption set up by s. 364(2)(a) cannot be called in aid. Instead, the petitioning landlord relies upon the tenant's persistent failure to pay its due debts after demands in that behalf, and, in the case of petition no. 61/1983, the judgment debts, principally that for $69,035.00 in favour of Standard Chartered Finance Limited which according to the uncontradicted evidence of Mr. Hawkins forms part of a very much larger sum. E F

Paragraphs (a), (b) and (c) of s. 364(2) of the *Code* correspond to paragraphs (a), (b) and (c) of s. 223 of the United Kingdom *Companies Act* 1948. Of those provisions *Buckley on the Companies Act*, 13th ed. (1957) p. 460 remarked that "they are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it". This passage was approved by Plowman J. in *Re* G

A *Tweeds Garages Ltd.* [1962] Ch. 406, 410, in a case in which His Lordship proceeded to say:

> "In this case there is, in my judgment, abundant evidence that the company is insolvent and I so find. For example, at the date of the presentation of the petition there were at any rate three employees or ex-employees of the company in addition to Brown to each of whom a sum somewhere in the neighbourhood of £100 was owed B for arrears of wages, although it is true to say that they have in fact since been paid. Further, the Post Office had obtained judgment against the company for telephone bills on three accounts amounting to some £118 in all and the company's telephone was cut off. I understand that £60 of that judgment debt has been paid, but the remainder is still owing. The Eastern Electricity Board C had obtained judgment for £45 odd against the company and the company had its electricity supply cut off. The amount of that judgment is said to have been paid about three weeks ago and I am told (though it is not in evidence) that the electricity supply was in fact restored. British Oxygen Co. Ltd. had obtained judgment against the company and so had Pet Petroleum Co. Ltd. D All these are apart altogether from the petitioners' alleged debt. As I said, I am satisfied on the evidence that this company is insolvent."

See also *Re Globe New Patent Iron & Steel Company* (1875) 20 Eq. 337, of which Palmer says: "This case has been frequently followed": (*Palmer's Company Precedents*, Part II, (17th ed) p. 27. Factually, the circumstances alleged in petition no. 61/1983 bear a close resemblance E to those which led Plowman J. in *Re Tweed's Garages Limited (supra)* to be satisfied that the company was insolvent in the commercial sense. Furthermore, it is a noteworthy feature of each of these cases, as it was of that, that the company has adduced no evidence to suggest that the judgment debts or their non-payment are not due to insolvency in the commercial sense, the only explanation offered in respect of them being F that of a director of the company, a Mr. Sinn, who states that in three out of the five cases the tenant knew or knows nothing of the claim in question.

In addition there is, in the case of each petition, the allegation of the inability of the company to pay its debts. The petitions are verified by affidavits in the statutory form in accordance with rule 20 and Form 3 of G *The Companies Rules* 1963. Rule 20(2) of those Rules concludes by providing that "such affidavit shall be sufficient prima facie evidence of the statements in the petition". One of the few judicial references to the effect of this provision is to be found in *Re Gold Hill Mines* (1883) 23 Ch.D. 210, 214, where Lindley L.J. said:

> "The statutory affidavit strictly is no proof of anything. It is hearsay as to almost everything alleged in it, but it is sufficient to

require an answer."

From this it is not to be thought that, simply by presenting a petition alleging that the company is insolvent, the petitioner will succeed in obtaining a winding up order in the absence of proof by the company of a solvent financial position or details of its ability to meet current demands. Other remarks of the Lords Justices in that case, including those of Jessel M.R. *in arguendo* at p. 213, show that it is sufficient for the company to meet the general allegation of insolvency in the petition by an equally general allegation of solvency. That was indeed done in that case by the secretary of the company in saying that the company was perfectly solvent and able to pay anything that was justly due to the petitioner, but that the company disputed that there was anything due to him at all (see 23 Ch.D. 210, 211). Here, however, there is not even any general allegation from those, who include the directors, whose affidavits have been read on behalf of the tenants, that those companies are solvent; or are able to pay current demands; or the petitioner's claims; or, in the case of the tenant in petition no. 61/1983, that that company is able now to pay the judgment debt of $69,035.00 due to Standard Chartered Finance or the total sum amounting to more than $250,000 which, according to the uncontradicted evidence of Mr. Hawkins, is owing to the entity of which he is the manager in Brisbane. In these circumstances I consider that I am justified in concluding in respect of both companies that they are "unable to pay their debts" within the meaning of s. 364(1)(e) of the *Code*.

Once that conclusion is reached it may be doubtful to what extent and for what purpose it is relevant to consider whether or not the petitioner's debt is disputed. There are decisions which suggest that even an insolvent company will not be wound up if the petitioner's debt is in dispute: cf. *Mann v. Goldstein* [1968] 1 W.L.R. 1091 and perhaps also *Re Glenbawn Park Pty. Ltd.* (1977) 5 A.C.L.R. 288, although in those and perhaps some other cases the distinction has not always been observed between the effect of a dispute (whether as to the existence or amount) of a debt which has been made the subject of a statutory demand pursuant to s. 364(2)(a), and the effect of a dispute where no such demand has been made and the fact of insolvency is established by other evidence. In the former class of case, the presumption of insolvency under s. 364(2)(a) will not arise if there is a genuine dispute of substance as to the amount (and *a fortiori* the existence) of the debt the subject of the demand: *Re London & Paris Banking Corporation* (1874) 19 Eq. 444. It is different where there is satisfactory evidence of insolvency independently of a failure to comply with a demand under s. 364(2)(a). *Re Tweeds Garages Ltd.* [1962] Ch. 406 is an instance of the latter sort. In such a case the dispute as to the debt is at most relevant only to the status of the petitioner as a "creditor" and to whether he is entitled as such to apply under s. 363(1)(a) in the capacity of a

A "creditor": see *Re Jeff Reid* (1980) 5 A.C.L.R. 28, 31; *L. & D. Audio Acoustics Pty. Ltd. v. Pioneer Electronic Australia Pty. Ltd.* (1982) 7 A.C.L.R. 180, 183, *per* McLelland J. With His Honour's views as there expressed I respectfully agree, subject only to the addition that in the case of a debt that is wholly, and not merely in part, disputed, the petitioner may nevertheless remain a "contingent creditor" within s. 363(1)(b): see *Community Development Pty. Ltd. v. Engwirda* B *Construction Company* (1969) 120 C.L.R. 455.

In the present instance the landlord does not advance his case in the character of a "contingent creditor". If it had done so, it would have been necessary for it to comply with s. 363(3) of the *Code*. However, the tenants raise against the landlord a claim which, it is said, "overtops" in amount the debt on which the latter relies to establish its status as a C "creditor". Both because of this, and because in reaching the conclusion that the tenants are insolvent I have taken some account of the non-payment of the debt due to the landlord, it is necessary in this case to determine whether that debt, on which the petitions rely, can properly be said to be disputed. In reaching a conclusion on this question it is, I think, clear from the authorities that the mere existence or pendency of D litigation about the matter is not sufficient to establish a dispute: see *Re Welsh Brick Industries Ltd.* [1946] 2 All E.R. 197, 198; *Re Douglas Griggs Engineering Ltd.* [1963] Ch. 19, 23. What is required is a dispute that is not only genuine but also based on a substantial ground: see e.g. *Re Welsh Brick Industries Ltd. (supra)*; *Re K. L. Tractors Ltd.* [1954] V.L.R. 505, 512; adding that, for this purpose, a set off or counterclaim based on a substantial ground may suffice: *Re Clem Jones Pty. Ltd.* E [1970] Q.W.N. 6. The decision of the Court of Appeal in *Re L.H.F. Wools Ltd.* [1970] Ch. 27, which was relied on by the tenants in this case, does not seem to me to be at all inconsistent with the principles stated in the other authorities. The basis on which the appeal in that case was allowed was the trial judge's assumption that the company had a claim under foreign law against the petitioner in excess of the amount of F the judgment debt on which the petition was based, which claim raised "serious issues" and had "prospects of success" in Belgium: see [1970] Ch. 27, 36, 42. Both Harman and Edmund Davies L.JJ. in that case accepted that the test was "whether there was a genuine cross claim with substance in it": see [1970] Ch. 27, 36, 42.

The principal question in this case therefore is whether the tenants' G claim for damages or an abatement of rent arising out of the condition of the air-conditioning system is founded on a substantial ground; that is, whether it raises serious issues and has prospects of success. That claim is, as I have said, one that relies at least in part on the implication in the leases of a term to the effect that the air conditioning system would, briefly stated, operate efficiently. Whether such an implication is possible depends upon the terms of those leases. Clause 5.01 of the lease

with the tenant (the leases are alike in their terms) provides that the tenant shall not use the demised premises A

"… other than for the purpose of operating therefrom –

(b) A Restaurant and Convention Centre with entertainment facilities."

Clause 5.02 converts this duty into a positive obligation to "cause the businesses to be carried on from and in the demised premises in proper and businesslike manner." B

There is evidence that, as is often the case with air conditioned premises nowadays, the windows were sealed and could not be opened even when the air conditioning failed. One needs little evidence that conducting a restaurant, entertainment centre, or discotheque in such circumstances in Queensland in summer would lead to a falling off of patronage with consequent loss of income and goodwill. However, it is C well settled that there is, in a lease of premises (other than furnished premises intended for habitation), no condition, term or warranty that the premises are fit for the purpose for which they are let: see *Hill v. Harris* [1965] 2 Q.B. 601, 614; *Pampros v. Thanos* (1967) 87 W.N. (Pt. 2) (N.S.W.) 161, 164. Even if, in some manner, this difficulty could be overcome, cl. 10.01 of this lease expressly provides: D

"The landlord does not expressly or impliedly warrant that the demised premises are at the date of commencement hereof or will remain adequate for all or any of the purposes of the tenant and all warranties (if any) as to the suitability fitness and adequateness of the demised premises implied by law are hereby negatived."

See also cl. 10.03. The expression "demised premises" is in cl. 1.08 of E the lease defined to include certain fixtures the property of the landlord specified in the first schedule to the lease, and these include air conditioning ducts and units. Despite this, it is clear that, and the fact is (as the tenants allege), that the air conditioning "system", in relation to which the implied term is alleged, is not on the demised premises but is on the common property over which the council of the body corporate and not the landlord has control. Finally, in relation to the claim for F abatement of rent, reliance was placed by the tenant on cl. 8.01, which provides:

"In the case of the total or partial destruction of the premises by fire flood storm tempest explosion riot civil commotion war or otherwise by inevitable accident or act of God and without any neglect or default on the part of the tenant whereby the demised G premises shall be rendered wholly or partially infit for occupation or use by the tenant in the conduct of its business" –

payment of the rent shall abate, and the covenant to repair should be suspended. Even assuming that the air conditioning system is to be treated as part of the demised premises, there is a distinct difficulty about attempting to fit the claim for abatement of rent into the terms of cl.

A 8.01. The expression "unfit for occupation or use" in the context of cl. 8.01 is not one that is readily applicable to an air conditioning system; there is no suggestion that any malfunction in it was caused by any of the matters referred to in the introductory words of cl. 8.01; and it was not something to which the covenant to repair extended.

For the tenants to found their claim upon either cl. 8.01, or some such implied term as alleged, may not be quite impossible, even if it is very B nearly so; but that is not the question. The question is whether that claim is based on "substantial grounds"; raises "serious issues" or has "prospects of success". In my view, none of those tests is satisfied in the present case. The same is also true of certain further claims made by the tenants or one of them that (1) the landlord had in breach of contract failed to cause a nominee of the tenants to be appointed to the Council of C the body corporate, with consequential loss to the tenants; and (2) the landlord had in breach of contract agreed to use its best endeavours to cause the body corporate to enter into an agreement with the tenant for the management of the common property, with consequential loss to that tenant. These two claims appear in a counterclaim delivered in yet another action (4984/1982) by the landlord against the tenants and the D guarantor, which is based upon the deed dated 9th November 1979 with respect to "operating costs". In respect of all these claims very substantial amounts of loss have been particularized although not sworn to in any way. It is, I think, sufficient to say that none of them raises what, to my mind, can be described as "substantial grounds" for defeating the landlord's otherwise acknowledged claim for rent.

E It follows, in my opinion, that those claims afford no reason either for questioning the entitlement of the landlord, in the capacity of a "creditor", to present the petitions; or for revising my earlier conclusion that the tenant companies are insolvent. In these circumstances I propose to exercise my discretion to order that those companies be wound up.

The principal question remaining is whether the judgments obtained F in default of appearance in actions 5053/1982 and 5054/1982 should be set aside. In *Aboyne Pty. Ltd. v. Dixon Homes Pty. Ltd.* [1980] Qd.R. 142, Kelly J. regarded an application to set aside such a judgment, when regularly entered, as requiring the court to consider whether the defendant had given a satisfactory explanation of its failure to appear, any delay in making the application; and whether the applicant G defendant had a *prima facie* defence on the merits. Speaking generally, it may be said that it is the last of these considerations that it is the most cogent. It is not often that a defendant who has an apparently good ground of defence would be refused the opportunity of defending, even though a lengthy interval of time had elapsed provided that no irreparable prejudice is thereby done to the plaintiff: *Attwood v. Chichester* (1878) 3 Q.B.D. 722; *Rosing v. Ben Shemesh* [1960] V.R.

173. Judged by these standards the defendant tenants are in a position of some difficulty. The writs issued on October 8, 1982 and were served on the same day, so requiring appearances to be entered on or before October 16, 1982. No appearance was entered, and on October 25, 1982 judgments in default were given. The summonses to set aside those judgments were not issued until April 26, 1983 (which was the first return date of the petitions). The judgments were obtained only after specific warnings, oral and written, had been given to the tenants' Brisbane solicitors of the intention of proceeding to judgment on the date in question. After obtaining judgment, the tenants were served and possession was taken. There is uncontradicted evidence that one of the directors of the tenant companies, Mr. Gray (the guarantor), was aware of these events. The tenants' Melbourne solicitors were informed, and responded by intimating that the judgments could easily be set aside. Nothing was done in that direction until the summons issued on April 26, 1983. The only explanation for this is that given by another director Mr. Sinn that, although he was aware of the actions, he assumed that they would be dealt with as claims in other proceedings then in being.

That is not a particularly good starting point from which to make an application of the kind referred to. But in any event the tenants are required to show by affidavit a defence on the merits; that is, what is described in *Evans v. Bartlam* [1937] A.C. 473, 480, as a "prima facie defence", and in *Saunders v. Hammond* [1965] Q.W.N. 39 as "a substantial ground of defence." The claim for damages for the alleged failure of the air conditioning system is the only claim that appears to be capable of being made the subject of a set off (cf. *Knockholt Pty. Ltd. v. Graff* [1975] Qd.R. 88) and so of constituting a defence to the actions in which judgments were obtained. As to that, I have already expressed the view that that claim cannot be regarded as substantial or as raising serious issues or as having prospects of success. The tests for determining this matter may not necessarily be the same as those with respect to the winding up petitions. But in any event I am not persuaded that that claim represents a "prima facie defence" to the landlord's claim for rent. When regard is had also to the fact that neither the quantum of that claim, nor of the others previously mentioned, is sworn to in accordance with the Rules, it does not seem to me that I should now exercise my discretion by setting aside the judgments and permitting the tenants to defend. They can, it may be added, continue to pursue all their claims as counterclaims in action 4984/1982, and, although the unsworn total of the quantum of those claims considerably exceeds the amounts claimed in the actions in which judgment was given, the landlord's claim for rent due has also increased since those actions were instituted and now stands (or so I was informed) at a sum in excess of $400,000.00. There is therefore every prospect that, if successful in their claim or counterclaim in another action, the tenants will be faced with an adequate target

A against which to set off their own claims. In these circumstances I have concluded that the applications to set aside the judgments should be dismissed with costs. For much the same reasons I do not think that there is any real justification for granting a stay of proceedings in respect of either of those judgments, the application for which was not much pressed in argument.

B There was no opposition to the application to have the various proceedings consolidated, and I am prepared to order pursuant to O. 61, r. 5 that action no. 1756/1981 and action no. 4984/1981 be heard together: cf. *Young v. Young* [1954] Q.W.N. 27. As the plaintiffs are different in each action, it does not seem to me to be appropriate that they be consolidated in the strict sense.

Orders accordingly

C Solicitors: *Henderson & Lahey* (N.M.L.A.); *Williams & Williams* (companies; Gray).

I.McG.W.

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