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Transcript of Proceedings

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Date: 7 May, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 2185 of 2003

JJMMR PTY LTD Applicant

and

LG INTERNATIONAL CORPORATION Respondent

BRISBANE

..DATE 11/04/2003

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application to set aside the statutory demand dated 17 February 2003 served on the applicant. The respondent is LG International Corp. In November 2001, the applicant entered into a written contract with a company of that name. The contract was preceded by lengthy negotiations which are the subject of evidence from the applicant's managing director to the effect that the company made representations which found a claim for damages against that company.

However the statutory demand was issued in the name, "LG International Corporation". The applicant suggests that this is the name of a different company from that with which the applicant negotiated and contracted. Upon the premise that it is a different company, the applicant denies that it is indebted to it. But the only respondent to the application to set aside the demand is LG International Corp.

If I were of the view that there is a distinct company called LG International Corporation which had issued the demand, I should not set aside the demand without that company being duly served with an application to do so. The demand cannot be set aside absent an application to set it aside served "in the person who served the demand on the company", within a period of 21 days as prescribed by the Corporations Act, section 459(g).

As an application has been served within that period only upon the respondent, LG International Corp, the application can

affect the operation of the statutory demand only if it is accepted that it was the respondent which served the demand upon the applicants. Accordingly I shall determine this application upon that basis.

The respondent is a company incorporated outside Australia. It is not registered as a foreign company here. The applicant submits that it has carried on business in Australia contrary to section 601CD of the Corporations Act. The evidence shows the basis for a genuine claim that it has indeed carried on business here. In particular the evidence indicates that the respondent has had a place of business in Australia by which it would have carried on business here according to section 21 of the Corporations Act.

It is then submitted that by "using the statutory demand procedure" the respondent is contravening section 610CD. However that would not invalidate the statutory demand having regard to section 102(2) of the Corporations Act. There is no basis in my view for setting aside the demand for its being given in contravention of section 601CD, if the Corporations Act has expressly preserved its validity.

The applicant claims to have a claim for damages against the respondent in an amount greater than the debt demanded by the respondent. The respondent supplied washing powder to the applicant who then supplied it to Australian retailers. The debt claimed in the statutory demand is for the unpaid balance of the price of some of that product. The dealings between

the parties were governed by a written distributorship agreement made in November 2001. The applicant alleges that prior to the agreement, the respondent represented that the product to be supplied was or would be of a certain standard.

In particular it says that in effect, the respondent represented that the product was or would be as good as the rival product marketed as "Omo". It alleges that the product was not as represented, in consequence of which the applicant has traded at a loss. Its trading losses are said to be relevantly caused by the respondent's conduct of misrepresentation and to be recoverable at least as damages under section 82 of the Trade Practices Act for the misleading and deceptive conduct involved in the misrepresentations.

The applicant also asserts that the representations had the force of warranties collateral to the November 2001 agreement and that the applicant is entitled to damages for breach of warranty. The merit of that contractual claim is not apparent at least because the applicant's evidence does not reveal the likely amount of damages which would be awarded on a contractual measure.

It is difficult to see that the contractual claim could succeed if the corresponding claim under the Trade Practices Act could not, so that it is sufficient to assess the claim under the Act.

The evidence relevant to this proposed claim is contained in two affidavits sworn by the applicant's managing director, Mr Roberts. Only the earlier affidavit was filed and served within the prescribed time of 21 days from service of the demand. For the respondent, Ms Downes submits that the first affidavit does not establish the grounds for the alleged claim so that the second affidavit cannot be considered in relation to it.

Citing Raffles Co Pty Ltd v. CECH [2001] QSC 129 at [8] and the cases there cited by Wilson J, she nevertheless conceded that if the first affidavit sufficiently asserted the existence of facts upon which the claim is grounded, a later affidavit, filed outside the 21 day period, could be used to prove the claim sufficiently for the Court to be satisfied that there is an offsetting claim and that it is an amount to sufficiently reduce the substantiated amount to result in the setting aside of the demand.

The evidence of the making of the representations which is within the first affidavit is contained in paragraphs 15 to 21. That evidence consists of more than mere assertion by Mr Roberts. It contains evidence of some documents passing between the parties from which it fairly appears that the applicant was making it clear to the respondent that it was requiring a product "similar in quality to Omo".

The respondent was told that the product should be of the same standard of Omo with which the applicant could compete

successfully by its price being some five to ten per cent lower. The applicant was asked by the respondent to send to it samples of Omo, and it did so. By paragraph 20, Mr Roberts swears that:-

> "As a result of the meeting ... it was agreed that the detergent to be supplied by the respondent to the applicant would be of a similar standard to the OMO product referred to."

Read alone, this is a mere assertion, but it must be read with the balance of the affidavit and by keeping in mind that it is legitimate for the section 459G affidavit to be sworn in terms which resemble a pleading. Although paragraph 20 refers to what was "agreed", paragraph 21 refers to representations. Within paragraph 21 there is a reference to, "The meeting referred to in paragraph 6 hereof." But this seems an intended reference to the meeting when item 6 of Exhibit PRR1 was presented, that being the meeting, the subject of paragraphs 19 and 20 of the affidavit.

When paragraphs 15 to 21 are considered together in the context of the whole affidavit, it seems to me that the affidavit sufficiently evidences for present purposes the making of the representations relied upon. Although the critical conduct of the respondent may have been engaged in outside Australia, there is evidence within this affidavit showing the basis for a genuine claim that the respondent carried on business within Australia, so as to make that conduct relevant for the purposes of section 52 of the Trade Practices Act.

The first affidavit also sufficiently demonstrates the existence of a case that the representations were misleading and deceptive or likely to mislead or deceive and that the applicant made its agreement with the respondent and set about the business of importing the product as a wholesaler in reliance upon the representations.

There is no specific evidence here, or in the second affidavit, of words used by representatives of the respondents in terms that the respondent's product was or would be of the required quality, that is, as good as Omo.

However, assuming that they did not do so, nevertheless to have made the agreement and supplied the product after the applicant had made it clear that the product should be of the standard of Omo, and after apparently there had been some testing by the respondent to that end, with no negative result reported to the applicant, would, in my view, be likely to be conduct involving a contravention of section 52, assuming that the product was not of that standard.

In WEC Pty Ltd v. Cypriot Community of Queensland, Court of Appeal No 2929 of 2002, the President, with whom the other Members of the Court agreed, said at paragraph 11:

> "The mere assertion of an oral agreement deposed to in an affidavit will not necessary suffice to set aside a statutory demand. Something beyond implausible assertion is required from an applicant to demonstrate the genuineness of its claim. A genuine dispute is one that really exists in fact and is not spurious, hypothetical, illusory or misconceived."

Miss Downes submitted, in effect, that the misrepresentation cases sought to be raised was nothing beyond implausible assertion.

One matter on which she placed particular reliance was the assertion that all of the applicant's trading losses were recoverable as damages. However the applicant has adduced evidence of its profit and loss statement for July 2002 to March 2003 which demonstrates for present purposes its losses during that period and that they were solely attributable to this business of importing the respondent's product.

As the distributorship agreement was made only seven months prior to the commencement of this period, that statement is of some value in demonstrating the applicant's losses from this venture. The losses during the period were approximately 1.95 million Australian dollars.

The first affidavit does not show the trading figures for the period to June 2002, so that absent other evidence, the applicant has not purported to quantify its losses from the entire venture to date. However, in the present context, the applicant has, by this first affidavit, sufficiently disclosed facts showing a genuine counterclaim of the order of 1.95 million dollars.

There may be other causes of the applicant's trading losses, but, in principle, that is not a bar to recovery of all of the losses under section 82 if they have been relevantly caused by

the section 52 contraventions: Henville v. Walker (2001) 206 CLR 459.

The applicant's claim might ultimately fail for a number of reasons, at least some of which can now be specifically anticipated, but it is not to say that the claim is not a genuine one in the required sense. It is not clearly spurious, hypothetical, illusory or misconceived.

It is then permissible to consider the second affidavit. I had reserved the question of whether leave should be given to file and read that affidavit, having regard to the submissions made by Miss Downes that I can not go to that affidavit unless I was satisfied that the relevant grounds for a claim had been sworn to in the first affidavit. As I am so satisfied, I shall give leave for the second affidavit to be filed and read.

It is legitimate to have regard to the matters sworn to in the second affidavit insofar as they go to any claim properly raised by the first affidavit.

The second affidavit refers to some discussions prior to the contract, at least some of which concerned another product of the respondent. But read with the first affidavit, the second does not detract from the misrepresentation claim, but instead adds some strength to it, and from that affidavit it becomes clearer that the claim exceeds the debt claimed by the demand.

I therefore conclude that there is a genuine claim which the company has against the respondent for damages under section 82 in an amount of the order of Australian dollars 1.542 million.

The respondent's debt, calculated in Australian dollars at an exchange rate of .60, is clearly less than this. In the circumstances, it is unnecessary to consider the other challenges to the demand.

I order that the statutory demand dated 17 February 2003, served on the applicant, be set aside.

...

HIS HONOUR: As to costs, Miss Downes has rightly pointed out that the second affidavit, which was to some extent material to the outcome here, was served very late. Nevertheless, from my reasons, I have indicated that the claim was fairly revealed by the first affidavit, and, in any case, and notwithstanding the late service of the second affidavit, the respondent's attitude to this application was unchanged. In the circumstances, I think the result should be that the respondent must pay the applicant's costs of the application to be assessed.
