[2003] QSC 256

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Transcript of Proceedings

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Date: 31 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 6004 of 2003

SANDS: SECURITY AND SERVICES PTY LIMITED	Applicant
and	
PRO-SYSTEM CROWD MANAGEMENT (METRO NORTH) PTY LIMITED	Respondent

BRISBANE

..DATE 25/07/2003

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 a statutory demand under section 459G of the Corporations Act. The technical requirements of the Act have been met and no issue arises in that regard. The parties are agreed upon the appropriate test to be applied in this situation. The law is as is set out in the decisions which have been referred to in the outlines of both parties. Conveniently, in the applicant's submission, reference is made to WEC Proprietary Limited v. Cypriot Community of Queensland Incorporated [2002] QCA 506 and to Spencer Constructions Proprietary Limited v. G and M Oldridge Proprietary Limited (1997) 147 ALR 444.

The obligation upon the applicant is to establish the existence of a genuine dispute. Here the applicant says that the dispute is that it does not owe anything to the respondent. It says that there may have been some transactions but if there were any transactions giving rise to the amount claimed by the respondent they were between another company associated with the applicant and another company associated with the respondent.

The applicant's case in that regard is fairly baldly stated. It is careful not to identify any transactions which actually took place and to avoid making any admissions of what occurred. It is, in other words, a negative case. It confines itself to asserting what did not happen. It thereby suffers, in my view, somewhat in its persuasiveness.

The applicant seizes upon a letter of demand sent by the solicitors for the respondent to the solicitors for the applicant in which the solicitors say they are acting not for the respondent but for the associated company and its proprietor.

However a careful reading of the letter shows that the respondent was aware of who was involved but that there was one mistake of identification which is explained in the affidavit of Mr Carlyle as a mistake made in the solicitor's office.

That does not of course assist the respondent to prove its case, or, more accurately (since the onus may not accurately be reflected in that statement) it leaves neutral a point which otherwise might be relied upon by the applicant as an admission against interest on the part of the respondent.

The invoices giving rise to the claim have been exhibited and deposed to by Mr Clement, the relevant officer of the respondent, and although the delivery of the invoices is not asserted in terms which are wholly unambiguous, I am satisfied that the invoices were, in all probability, sent as well as drawn up.

The applicant asserts that it has never had any contractual dealings with the respondent, but, as I have said, it does not descend into detail of what contractual dealings it or its associates had and it does not condescend to any detailed

information relating to the particular transactions involved in the claim.

That, in my view, is deliberate and is explained to some extent by the letter which a director of the applicant sent to the respondent and which is the letter DHL4, an exhibit to the affidavit of Mr Locke. That letter casts genuine doubt on the bona fides of the applicant and, in my view, reinforces the case against it.

On all of the evidence, I have come to the conclusion that the applicant has failed to show that there is a genuine dispute for the purposes of the Corporations Act and therefore that the application should be dismissed. I will hear the parties in relation to the question of costs.

...

HIS HONOUR: The successful respondent has sought orders for costs on an indemnity basis. The application is made against both the applicant and against Peter Rex Sands, a director of the applicant, both of whom are represented by the same solicitors. Notice of intention to make the application was given by a letter sent to those solicitors on 24 July; that is, yesterday.

The basis of the application is that the proceedings were not motivated by a genuine dispute, but, rather, were simply an

exercise in building up costs and were not bona fide. I am conscious that one needs to be very careful before making an order for indemnity costs, let alone against a non-party. However, in the present case I think exceptional circumstances have been demonstrated.

The director, Mr Sands, wrote to a director of the applicant by facsimile message on 27th of June, a letter which, although headed "without prejudice", was not the subject of any objection in these proceedings. It is unnecessary to quote the letter at length. Relevantly, it says:

> "Let the games begin. As you already know, I have nothing left to speak of, but you guys do, so guess who has the most to lose. As of today, I do not care anymore about ethics or morals when it comes to you, your company or any associated entities, so I am going to have some fun myself."

In my judgment, the present application was motivated in that spirit. It is, in my view therefore, an appropriate case in which to order that the respondent's costs be assessed on the indemnity basis and be paid by the applicant and by the deponent, Peter Rex Sands.
