

# SUPREME COURT OF QUEENSLAND

CITATION: *Building Solutions and Waterproofing Pty Ltd v Robin H Wright Pty Ltd* [2017] QSC 110

PARTIES: **BUILDING SOLUTIONS AND WATERPROOFING PTY LTD ACN 132 264 156**  
(applicant)  
v  
**ROBIN H WRIGHT PTY LTD ACN 009 424 033**  
(respondent)

FILE NO/S: No 4337 of 2017

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 8 June 2017

DELIVERED AT: Brisbane

HEARING DATE: 24 May 2017

JUDGE: Boddice J

ORDER: **1. I shall hear the parties as to the form of orders and costs.**

CATCHWORDS: CORPORATIONS – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENERALLY – where applicant seeks to set aside statutory demand on basis of alleged offsetting claim against respondent for amount exceeding total amount of debts claimed – whether genuine dispute exists – whether debts are due and payable – whether statutory demand should be set aside

*Corporations Act* 2001 (Cth) s 459H, s 459J

*Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2007) 63 ASCR 300

*Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ASCR 785

*Intag Microelectronic Pty Ltd v AWA Ltd* (1995) 18 ASCR 284

*JJMMR Pty Ltd v LG International Corp* [2003] QCA 519

*John Shearer Ltd & anor v Gehl Company* [1995] 60 FCR 136

*NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359

*Re Morris Catering (Aust) Pty Ltd* (1993) 11 ASCR 601

*Re Judd; ex parte Sydney pike* (1924) 24 SR (NSW) 537  
*Rohalo Phamaceutical Pty Ltd v RP Scherer SpA* (1994) 15  
 ASCR 347  
*Total Beverage Australia Pty Ltd v Corporate Link Australia  
 Pty Ltd* [2013] SASC 45

COUNSEL: G W Dietz for the applicant  
 S B Whitten for the respondent

SOLICITORS: Minter Ellison for the applicant  
 ClarkeKann Lawyers for the respondent

- [1] By originating application filed 3 May 2017, the applicant seeks orders setting aside a statutory demand served on it by the respondent on 10 April 2017. At issue is whether the applicant has an offsetting claim against the respondent for an amount that exceeds the total amount of the debts claimed in the said demand whether, in any event, a genuine dispute exists as to the amount of the debts claimed in the demand and whether the debts claimed in the demand are not presently “due and payable”.

### **Background**

- [2] In early 2014, the applicant was engaged by the body corporate of an apartment complex to undertake specified remedial works to the apartment building. At or around the time of the applicant’s engagement, the applicant’s director Mark Anttilla met with the respondent’s director, Robin Wright. They discussed the performance of a project management role by the respondent.
- [3] On 14 February 2014, the respondent provided to the applicant a written document entitled “Proposal for Consultant Project Management Services to Minc”. That proposal was never signed by the applicant. However, on 19 February 2014, the applicant by its director sent an email “agreeing with everything basically” but requesting a change to clause F of the proposal.<sup>1</sup>
- [4] Mr Anttilla says he subsequently made an oral request in late February 2014 for the respondent to provide documentation explaining and substantiating the time charged by the respondent. No such documentation was provided by the respondent. Instead, the

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<sup>1</sup> Affidavit of M Anttilla (Court Document 2), p 92.

respondent undertook project management work for the applicant and issued monthly invoices to the applicant in relation to that work.

### **Statutory demand**

- [5] The statutory demand claims amounts which were the subject of monthly invoices issued by the respondent between June 2014 and March 2017 in respect of work undertaken in the project management role for the applicant.
- [6] Invoices had been rendered from February 2014. Some were paid by the applicant. The statutory demand relates to invoices which were not paid.

### **The current application**

#### *Offsetting claim*

- [7] The applicant submits that it fell into dispute with the body corporate over delays in performing the relevant remedial works. The applicant contends it suffered loss and damage of approximately \$461,000 which was attributable to delays in the remedial work outside the applicant's control and which the body corporate has refused to pay on the basis of the non-provision of prescribed notices in accordance with the works contract. The applicant contends the giving of such notices was the responsibility of the respondent.
- [8] Mr Anttilla alleges he spoke to Mr Wright in May 2014 about the delays. Mr Wright assured him the delays could be dealt with at the end of the project and that the delays "had been minuted in meetings".<sup>2</sup> Mr Anttilla says he asked Mr Wright to ensure that was the case.
- [9] The applicant contends the respondent's failure to comply with those notice provisions was in breach of the contractual works the respondent was requested to perform for the applicant and contrary to the representations made by the respondent's Mr Wright as to the minuting of those delays. It was also contrary to the direction of the applicant's Mr Anttilla to ensure the delay claims could be dealt with at the end of the project.

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<sup>2</sup> Affidavit of M Anttilla sworn 23 May 2017 at [3].

- [10] The applicant asserts that this conduct supports an offsetting claim against the respondent for the amount of the delay loss. That offsetting claim, based on a breach of the terms of the proposal, misleading or deceptive conduct and negligence, exceeds the amount of the statutory demand, thereby justifying its setting aside pursuant to s 459H(3) of the *Corporations Act 2001* (Cth) (“the Act”).
- [11] The respondent disputes there is any basis for an offsetting claim. The respondent contends it was not within the scope of the agreement between the parties for the respondent to be responsible for the giving of the notices in respect of any delay loss. The respondent also denies Mr Wright made the alleged representations or that the respondent was negligent in the performance of the services.

#### *Genuine dispute*

- [12] The applicant further contends a genuine dispute exists between the parties in respect of the amount of the statutory demand. The applicant disputes the respondent performed the work the subject of the non-paid invoices. The applicant contends Mr Anttilla questioned Mr Wright as to the work being undertaken and requested documentation substantiating the claimed hours. Those requests have not been met by the respondent.
- [13] The respondent denies requests have ever been made for substantiation and denies there is any basis to dispute the debt, noting no dispute was raised until after service of the statutory demand.

#### *Due and payable*

- [14] The applicant also contends the statutory demand should be set aside pursuant to s 459J(1)(b) of the Act. The applicant submits the Court would be satisfied the sums claimed are not due and payable. The applicant alleges an agreement was reached between the applicant and the respondent that the amounts of the debt the subject of the statutory demand would not be paid until after finalisation of the applicant’s dispute with the body corporate. That dispute is ongoing. The respondent denies the existence of any such agreement.

#### **Relevant principles**

[15] Section 459H of the Act provides:

**“Determination of application where there is a dispute or offsetting claim**

- (1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
  - (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
  - (b) that the company has an offsetting claim.
- (2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

**Admitted total – Offsetting total**

where:

*‘admitted total’* means:

- (a) the admitted amount of the debt; or
- (b) the total of the respective admitted amounts of the debts;

as the case requires, to which the demand relates.

*‘offsetting total’* means:

- (a) if the Court is satisfied that the company has only one offsetting claim--the amount of that claim; or
  - (b) if the Court is satisfied that the company has 2 or more offsetting claims--the total of the amounts of those claims; or
  - (c) otherwise--a nil amount.
- (3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.
  - (4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:
    - (a) varying the demand as specified in the order; and
    - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.
  - (5) In this section:

*‘admitted amount’*, in relation to a debt, means:

- (a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt--a nil amount; or
- (b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt--so

much of that amount as the Court is satisfied is not the subject of such a dispute; or

(c) otherwise--the amount of the debt.

*'offsetting claim'* means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

*'respondent'* means the person who served the demand on the company.

(6) This section has effect subject to section 459J.”

[16] The applicant bears the onus of establishing that a genuine dispute exists on the balance of probabilities.<sup>3</sup> In *Re Morris Catering (Aust) Pty Ltd* the Court’s function was explained:<sup>4</sup>

“It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed ... The essential task is relatively simple – to identify the genuine level of ... an offsetting claim (not the likely result of it).”

[17] An offsetting claim includes a claim for unliquidated damages in tort or for breach of contract.<sup>5</sup> The claim must exist at the time the application to set aside the statutory demand is made and be for a monetary amount capable of quantification, whether or not it arises from the same transaction or circumstances.<sup>6</sup>

[18] To be a valid offsetting claim, it must be based on more than mere assertion. It must be shown as having some real chances of success.<sup>7</sup> If it is, it is not the Court’s role to determine the merits of the claim or its likely success.<sup>8</sup>

[19] The observations of McPherson JA in *JJMMR Pty Ltd v LG International Corp*<sup>9</sup> are apposite:

“Anyone can make a claim to a right of set-off against a creditor. What the definition in s 459H(5) requires, however, is that it be “genuine”. The same word in s 459H(1) has already elicited so many synonyms and shades of

<sup>3</sup> *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2007) 63 ACSR 300 at [140].

<sup>4</sup> (1993) 11 ASCR 601 at 605.

<sup>5</sup> *Re Judd; ex parte Sydney Pike* (1924) 24 SR (NSW) 537 at 539.

<sup>6</sup> *John Shearer Ltd & anor v Gehl Company* [1995] 60 FCR 136 at 143.

<sup>7</sup> *Intag Microelectronic Pty Ltd v AWA Ltd* (1995) 18 ACSR 284 at 289.

<sup>8</sup> *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605.

<sup>9</sup> [2003] QCA 519 at [18].

meaning that it will not help to add more. Its antithesis is to be seen in the word “artificial”. The claim to set off against the debt demanded must not have been manufactured or got up simply for the purpose of defeating the demand made against the company. It must have an existence that is objectively demonstrable independently of the exigencies of the demand that evoked it.”

- [20] Whilst the expression “genuine dispute” requires a party to establish a bona fide claim, that expression “does not require the Court to embark upon an enquiry as to the credit of the witness making that contention”. As McLellan CJ in *Eq* observed in *Eyota Pty Ltd v Hanave Pty Ltd*,<sup>10</sup> the expression “genuine dispute”:

“...does not mean that the court must accept uncritically as giving rise to genuine dispute, every statement in an affidavit “however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be” not having “sufficient prima facie plausibility to merit further investigation as to [its] truth” or “a patently feeble legal argument or an assertion of facts unsupported by evidence”.

But it does mean that, except in such an extreme case [ie, where evidence is so lacking in plausibility], a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute ...” (citations omitted).

- [21] Section 459J of the Act provides:

“Setting aside demand on other grounds

- (1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
  - (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
  - (b) there is some other reason why the demand should be set aside.
- (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.”

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<sup>10</sup> (1994) 12 ASCR 785 at 787.

- [22] If the material placed before the Court satisfies it that there is a genuine dispute about whether the debt to which the demand relates was due and payable it is open to a Court to exercise its discretion to set aside the demand under s 459J(1)(b) of the Act.<sup>11</sup>

### **Discussion**

- [23] The burden placed on a party in establishing a genuine dispute is not high. It has been said to be no more onerous than that which would confront a party seeking to meet an application by a creditor for summary judgment.<sup>12</sup>
- [24] The applicant's contention that there is a genuine dispute about the existence or amount of the debt the subject of the statutory demand relies on Mr Anttilla's assertions. Those assertions are, first, that the respondent has been asked to provide documentation as to the services performed but has refused to do so and that the applicant accordingly genuinely disputes that the work has been undertaken by the respondent.
- [25] There is some contemporaneous documentation to support that assertion. Mr Anttilla sought details of the work undertaken in an email dated 13 November 2015. However, the request does not appear to have been pursued thereafter and invoices were paid subsequent to that request. That suggests any concerns as to the performance of the work were not considered a legitimate basis to refuse payment. That being the case, the applicant has not established the existence of a genuine dispute on that basis.
- [26] Second, Mr Anttilla's assertion that prior to the applicant entering into the project management arrangement with the respondent, Mr Wright made representations about the respondent's capacity to perform the project management role and its experience on large commercial projects.
- [27] Third, that in the course of performance of its obligations, Mr Wright on behalf of the respondent told Mr Anttilla that delays on site could be dealt with at the end of the project and that he had made sure the delays had been minuted in meetings.

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<sup>11</sup> *Total Beverage Australia Pty Ltd v Corporate Link Australia Pty Ltd* [2013] SASC 45 at [30], applying *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359 at 367.

<sup>12</sup> *Rohalo Pharmaceutical Pty Ltd v RP Scherer SpA* (1994) 15 ACSR 347 at 353-354.

- [28] The respondent contends that neither assertion ought to be accepted by this Court as there is no objective evidence supportive of them and that such contentions were first made after service of the statutory demand. Further, there is no basis to conclude the respondent's conduct was in breach of any agreement reached with the applicant as the terms of that agreement have never been signed or specified by the applicant.
- [29] As to the second assertion, there is no contemporaneous recording of the representations or of any suggested concern as to the need for the respondent to have a particular capacity or experience. Further, the conduct of the parties appears inconsistent with any such concern.
- [30] The material relied upon by the applicant in respect of the second assertion constitutes no more than a mere assertion. There is no other substantial support for that assertion. I am not satisfied that the second assertion constitutes a basis for a finding that there is a genuine dispute between the parties.
- [31] The third assertion is in a different category. Whilst there is no contemporaneous recording of the basis upon which delays were meant to be dealt with at the end of the project, it is significant to note that the respondent included within the Project Management Services document provided by the respondent to the applicant on or about 14 February 2014 "co-ordination and programming of contract works", "providing an interface between Minc and the client and/or the client project manager during the works", "assisting Minc staff to carry out the works" and "any other issues that Minc may require assistance or advice on" project management services. Those categories could include ensuring that delays in the project were appropriately minuted and that the appropriate notices were given so that they could be dealt with at the end of the project.
- [32] Whilst the written document was never signed by the parties, the document was provided by the respondent and project management services were provided by the respondent to the applicant in relation to the remedial works after its receipt. Those factors amply support the basis for a claim by the applicant that project management services were performed by the respondent in accordance with the terms set out in that written document.

- [33] There is support for that conclusion in Mr Wright's affidavit. Mr Wright refers to the respondent having agreed to provide services on a date after 14 February 2014. At paragraph 18 of his affidavit, he asserts that "all other terms" were to remain as those contained in the document he had forwarded to the applicant.<sup>13</sup> Further, Mr Wright asserts that the respondent thereafter started to provide services to the applicant and the applicant began to make payments in accordance with the contract. There is no doubt that the contract referred to is the contract forwarded by Mr Wright. He sets out its terms in paragraph 20 of his affidavit.
- [34] Whilst Mr Wright asserts in his affidavit that the project management services to be performed by him did not include responsibility for the giving of notices and the administering of any delays, the breadth of the project management services was of such a nature that it is open to conclude that they fell within the terms of the contractual arrangement between the parties.
- [35] Once that conclusion is reached, it cannot be said that the applicant's contentions that the respondent had responsibility for ensuring proper notice was given for the delays and for the account of those delays at the end of the project was not within the terms of the retainer. That supports a conclusion that there is a genuine dispute in relation to this aspect of the applicant's claim.
- [36] The respondent contended that notwithstanding such a conclusion, there was no evidence placed before the Court that any dispute between the applicant and the body corporate arose because the body corporate had refused to recognise delays in the project due to the non-provision of notices. However, there is sufficient material placed before the Court to support the existence of that dispute.
- [37] First, the contents of the expert report prepared in respect of the dispute with the body corporate supports a conclusion that there was, as part of that dispute, an issue in respect of losses as a consequence of delay in excess of \$460,000. Second, Mr Wright specifically refers to the project dispute as arising when "payment of the delay claims were refused".<sup>14</sup>

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<sup>13</sup> Court Document 4.

<sup>14</sup> Affidavit of Mr Wright (Court Document 4) at [44].

- [38] As is observed in the authorities, an offsetting claim, if shown to have some real chances of success, will suffice to support a setting aside of a statutory demand without the Court being required to determine the merits of the claim or its likely success.
- [39] The material relied upon by the applicant is sufficient to satisfy the Court that the offsetting claim is far from artificial. It has not been manufactured and it has a sufficient basis. It exceeds the amount of the statutory demand. The applicant has satisfied the requirements of s 459H(1) of the Act. The statutory demand is set aside on that basis.
- [40] This conclusion renders it unnecessary to determine the final aspect of the applicant's claim. Had it been necessary to do so, I would not have been satisfied the applicant had established a sufficient reason to set aside the statutory demand pursuant to s 459J(1)(b) of the Act.
- [41] The applicant's assertion that an agreement was reached between the applicant and the respondent that the amounts the subject of the statutory demand would not be paid until after finalisation of the applicant's dispute with the body corporate is not supported by any independent, contemporaneously made documentation. It amounts to nothing more than a mere assertion. That assertion, in the circumstances, is insufficient to establish there is some other reason why the demand should be set aside.

### **Conclusions**

- [42] The applicant has established there is a valid offsetting claim which is of such a magnitude that it renders the substantiated amount of the claim less than the statutory minimum. On that basis, the statutory demand must be set aside.
- [43] I shall hear the parties as to the form of orders and costs.