SUPREME COURT OF QUEENSLAND

CITATION:	*Anobis Pty Ltd v Magoffin* [2017] QSC 182
PARTIES:	**ANOBIS PTY LTD ACN 169 138 130** (Applicant) **v** **JOHN EDWARD MAGOFFIN AS TRUSTEE FOR DIAMANTINA TRUST** (Respondent)
FILE NO/S:	No S203 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	31 August 2017
DELIVERED AT:	Cairns
HEARING DATE:	26 May 2017, further written submissions filed 2 June 2017, 9 June 2017, 13 June 2017
JUDGE:	Henry J
ORDER:	**1. The respondent's statutory demand to the applicant dated 4 April 2017 is set aside.** **2. The respondent pay the applicant's costs of and incidental to the application on the standard basis.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – where the applicant had been served with a statutory demand by the respondent – where the respondent was the vendor and the applicant the purchaser in a property transaction – where the statutory demand related to an amount owing under a 'deed of rescission' – where the applicant argued amount due under the deed was a penalty – where the applicant further argued both misrepresentation and waiver by the respondent in relation to the deed – where the real estate agent acting for the respondent was also a director of the applicant – whether the statutory demand should be set aside *Corporations Act* 2001 (Cth) s128(4), s 129(4), s 180, s 459E, s 459G, s 459H *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty*

Ltd (2017) 118 ACSR 592, applied
El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685, cited
Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785, applied
Re Morris Catering (Australia) Pty Ltd (1993) 11 ACSR 601, applied
Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 147 ALR 444, applied
Wood v Richardson (1840) 49 ER 305, cited

COUNSEL: J Jacobs for the applicant
C Ryall for the respondent

SOLICITORS: Murray & Lyons for the applicant
Walkers Lawyers for the respondent

[1] The applicant company applies to set aside a statutory demand dated 4 April 2017.

[2] The statutory demand, for $250,000, was prima facie compliant with the requirements of s 459E *Corporations Act 2001* (Qld).

[3] The issue is whether there exists a "genuine dispute" within the meaning of s 459H *Corporations Act*.

Background

[4] The applicant was the purchaser of real property at 129 Abbott Street, Cairns ("the Abbott Street property"), a commercial property owned by two solicitors, Mr Magoffin and Mr Lagois, in their respective capacities as trustees. Their solicitors' practice, which was a tenant at the Abbott Street property, had acted for Sibona Kema and her husband Assik Tomscoll in the conveyance of two residential properties in Cairns. That connection prompted the idea of Ms Kema and Mr Tomscoll buying the Abbott Street property. Mr Magoffin's and Mr Lagois' real estate agent appointed for the purpose of selling the Abbott Street property was Robert Smith of Australian First Realty.

[5] Ms Kema and Mr Tomscoll decided to acquire the property through a corporate entity and to that end the applicant company was incorporated as a trustee for a discretionary trust on 16 April 2014. Ms Kema deposes this occurred "with the assistance of Mr Lagois" but she does not address the capacity in which he did so. The initial directors of the applicant company were Ms Kema, Mr Tomscoll and, remarkably, the real estate agent Mr Smith. Perhaps, Mr Smith was appointed director as a matter of convenience, to fill corporate governance residency requirements. If that was the underlying reason then it is surprising that, of all the residents in Australia who might have become a director of the purchaser, the decision was made to appoint the vendors' agent.

[6] A contract for the applicant's purchase of the Abbott Street property ("the first contract") for $4,264,000 was entered into on 21 April 2014. The first contract was due to, but did not, settle on 30 July 2014. Settlement extensions were granted by the vendors. Some 17 payments were made towards the purchase price between 3 March 2014 and 27 October 2015, usually at points when the vendors agreed to extend the

settlement date. The total of those amounts according to the payments listed in Ms Kema's affidavit was $1,745,930.06 and according to the total identified in the below discussed deed of rescission was $1,725,900.22, a difference of roughly $20,000.

[7] Ms Kema deposes that during this era, at Mr Smith's suggestion, Mr Lagois prepared a General Power of Attorney giving Mr Smith general power of attorney for the applicant company. Mr Smith suggested the first contract be rescinded and a second contract for a lower purchase price be entered into.

[8] On 14 January 2016 Ms Kema, Mr Tomscoll and Mr Lagois attended Mr Smith's office. On Ms Kema's account, the sole account of these events before the court, a number of documents were executed, including a second contract ("the second contract") to purchase the property for $2,540,000, a deed of rescission ("the deed") and a guarantee.

[9] The deed is the source of the present controversy. The deed's recitals record that, pursuant to the first contract, referred to in the deed as "the Current Contract", the purchaser had paid the vendors the sum of $1,725,900.22 towards the purchase price on the basis that the amount was non-refundable. The recitals recorded the granting of numerous extensions of the settlement date and that the purchaser was still not in a position to effect settlement. Thus, the recitals recorded:

> "D. As a consequence, the parties have agreed to mutually terminate the Current Contract on the basis that the amount paid by the Purchaser to the Vendor of $1,725,900.22 is to be forfeited to the Vendor."[1]

[10] Curiously the recitals did not record that, in addition to the forfeiture of the amount of $1,725,900.22, the purchaser would pay default interest owing pursuant to the first contract in the amount of $500,000 at the date of settlement of the second contract. However, the ensuing provisions of the deed contained that obligation:

> "**5. Cancellation of Current Contract**
>
> 5.1 The Vendor and the Purchaser acknowledge that immediately upon execution of this Deed the Current Contract will be at an end with the express consent of the Purchaser and the Vendor (which is evidenced by the parties' execution of this Deed) and that:-
>
> (a) The sum of $1,725,900.22 paid to the Vendor by the Purchaser under the Current Contract shall be forfeited to the Vendor.
>
> (b) Subject to Clause 6 of this Deed, each party will release the other from all obligations imposed on the other under the Current Contract.
>
> (c) Subject to Clause 6 of this Deed, each party waives any rights that it might have, now or in the future, against the other party which arise out of or in relation to the Current Contract, whether that claim arose before or after the date of this Deed, and agrees that this waiver can be pleaded as an absolute bar to any such claim or proceeding brought by the other …

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[1] Affidavit of Sibona Kema court file document 3 ex SK5 p 22.

6. Payment of default interest under Current Contract

6.1 Notwithstanding the termination of the Current Contract and notwithstanding anything else to the contrary contained in this Deed, the parties agree that the Purchaser remains indebted to the Vendor for the payment of default interest in accordance with Clause 11 of the Current Contract.

6.2 The parties agree that default interest under the Current Contract (which has accrued at the rate of 10% per annum) is calculated at $500,000 as at the date of this Deed.

6.3 The Purchaser agrees to pay the default interest of $500,000 to the Vendor at the date of settlement of the new Contract.

6.4 The Purchaser and Vendor agree that this Clause 6 forms part of and is a fundamental term of the new Contract."[2]

[11] It was conceded in the course of argument by the applicant's counsel that the amount of $500,000 appears to accurately reflect the amount of default interest that would have been owing pursuant to the terms of the first contract.

[12] Ms Kema claims to have been unaware of the deed's inclusion of the obligation to pay $500,000 default interest. Ms Kema deposed:

"23. At no stage prior to or on 14 January 2016 were my husband and I informed that the Deed would be presented to us for signature nor were we informed that the Deed contained a clause that obligated Anobis and guaranteed by my husband and I, to pay the sum of $500,000 as "default interest" to Mr Lagois and Mr Magoffin at the date of settlement of the Second Contract.

24. The only page of the Deed that was presented and shown to us on 14 January 2016 was the execution page where we were requested to sign. No explanation of the document was given to us.

25. I recall that the Deed at this time already contained the signatures of the [sic] Mr Lagois and Mr Magoffin. …

31. Neither my husband nor I received a copy of the Second Contract or the Deed which was signed on 14 January 2016 until I contacted Mr Lagois on or about 28 October 2016 and requested copies of the documents. I attended at his office and collected copies of the documents on 28 October 2016. …

32. Upon collecting the documentation from The Law Office, neither my husband nor I read them in the belief that the documents reflected the agreement we made to purchase the property by signing the Second Contract. …

36. Upon receipt of [the] letter of demand, I had no knowledge that Anobis was required to pay default interest of $500,000 at settlement

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[2] Ibid pp 23-24.

> nor did I know that there was a personal guarantee by my husband and I to that effect."[3]

[13] The purchase price under the second contract was $2,540,000, a total which raises the possibility the earlier purchase price may have been discounted because of the payments already made under the first contract.

[14] The settlement date pursuant to the second contract was 29 January 2016. Once again it did not settle. Once again further extensions occurred and further part payments were made, totalling $840,687.81. Settlement finally occurred on 1 December 2016.

[15] Three noteworthy events occurred during 2016, a year during which the settlement date of the second contract was progressively extended and part-payments progressively made.

[16] Firstly, on 10 April 2016 Robert Smith ceased being a director and his nephew Timothy Boswell commenced being a director of the applicant.[4] By this time the phase of progressive extension of the second contract's settlement date and part-payments was well underway.

[17] Secondly, in July 2016 Mr Lagois contacted Mr Treston of Murray & Lyons Solicitors, the applicant's present solicitors, arranging a meeting to refer "new clients" to Mr Treston. Mr Lagois then met with Mr Treston to discuss the transaction in which the clients were involved - the sale and purchase of the Abbott Street property. Mr Treston subsequently attended at Mr Lagois' practice at the arrangement of Mr Lagois and there met Ms Kema, Mr Tomscoll and Mr Smith. Mr Treston was formally retained on 3 August 2016 to act for the applicant in the purchase of the Abbott Street property.

[18] Mr Treston deposes that, despite his entry into the matter as the lawyer representing the applicant, he was told nothing of the deed:

> "6. At no stage during my involvement in acting for Anobis Pty Ltd in the conveyancing transaction was it brought to my attention that there was a Deed of Rescission and I was not provided with a copy of that Deed.
>
> 7. At no stage during my involvement in acting for Anobis Pty Ltd in the conveyancing transaction was a request made by the Solicitor for the Vendor for the payment of default interest.
>
> 8. The contract of sale for 129 Abbott Street, Cairns, settled on 1 December 2016 and no default interest was requested to be paid in the settlement adjustments."[5]

[19] Thirdly, Ms Kema deposes that Mr Lagois gave assurances when the applicant was releasing part payments of the purchase price to the vendors that there would be no

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3 Affidavit of Sibona Kema court file document 3.

4 Affidavit of Glen Allen Walker court file document 5, ex GAW1 p 2, affidavit of Sibona Kema court file document 3.

5 Affidavit of Martin Kevin Treston court file document 2.

penalties. She deposes to that effect after her affidavit's above quoted explanation that the contents of the deed were not explained to her:

> "45. All along while we were releasing part payments of the purchase price to the Vendors we made it clear to both Anthony Lagois and Robert Smith that we would not be liable for penalties for the delays in settlement and we were assured that there would be no penalties."[6] (emphasis added)

[20] In making the statutory demand the subject of the present application, Mr Magoffin's solicitor explained that the amount being demanded, $250,000, represented Mr Magoffin's "one-half proportional interest in the monies due and payable under the Deed", a reference to the total of $500,000.[7] Mr Lagois, who had markedly more involvement than Mr Magoffin in dealing with the purchaser, does not appear to have made a similar demand.

Section 459H – "Genuine dispute"

[21] Section 459H of the *Corporations Act* provides, relevantly to the present circumstances, that the court must, by order, set aside the demand if "satisfied…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".

[22] Mere satisfaction of the existence of a dispute is not enough under s 469H. As much is unremarkable given that in theory anyone minded not to pay a debt may choose, however disingenuously, to dispute the obligation to do so. Section 469H requires the court to be satisfied the dispute alleged is genuine. Satisfaction of genuineness will generally require there to be sufficiently particular evidence before the court to demonstrate there exists a bona fide dispute and that the claimed basis for the dispute appears plausible and real, not misconceived or mere bluster or assertion.[8] However, the evidence need not be so detailed as to allow for an informed assessment of relative prospects and nor should the court engage in such an assessment - the limit of the court's scrutiny is mere ascertainment of whether the applicant's dispute is genuine.[9]

Discussion

[23] Following the receipt of the demand the applicant's solicitor wrote to the respondent's solicitor, on 20 April 2017, advising that the applicant disputed that the alleged debt was owing, asserting the purported obligation to pay the $500,000 default interest pursuant to the deed of rescission was unenforceable because:

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6 Affidavit of Sibona Kema court file document 3.

7 Affidavit of Sibona Kema court file document 3, ex SK9, p 49.

8 *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACSR 601, 605; *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787; *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 147 ALR 444, 454-455; *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* (2017) 118 ACSR 592, 605.

9 *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACSR 601, 605; *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787.

(a) the words of the deed purportedly giving rise to the deed are vague and unenforceable;
(b) the amount due is a penalty;
(c) there was misrepresentation[10] by the vendors;
(d) the failure to seek payment at the time of settlement was an act of election and waiver.[11]

It should be noted, in fairness to Mr Lagois and Mr Smith, in turning to consider those allegations, that neither of them were parties to, or witnesses in, the present application.

Words vague and unenforceable

[24] The first of those bases of dispute lacks plausibility. The meaning of the words of the deed seem tolerably clear, at least to the extent of identifying the agreed ongoing indebtedness for the default interest. The argument to the contrary in submissions relied on the artifice of reading clauses in isolation, contrary to elementary principles of construction.

Penalty

[25] As to the second basis, that the amount due is a penalty, the position is less clear. It was acknowledged in argument that the quantum of the default interest nominated in the deed coincided with the likely amount owing pursuant to the first contract. The applicants contend the amount was out of all proportion to the loss that could have been suffered because of the applicant's failure to complete the first contract and that the amount is extravagant and unconscionable. That presents as a particularly plausible contention, against a background where the vendors were in addition forfeiting a total of about $1.7 million worth of part payments.

[26] It will be recalled the default interest clause of the deed was said by clause 6.4 of the deed to form part of and be a fundamental term of the second contract and the purchase price of the second contract was significantly less than the first. This suggests the possibility of an adjustment down in the purchase price by reason of what had been paid. However, the evidence is silent as to what extent that adjustment was in fact influenced by those past payments or the disputed future obligation to pay the $500,000 default interest or a change in value of the Abbott Street property.

[27] The respondent seeks to avoid these unknowns in the present state of the evidence by submitting no question of a penalty can arise because the agreement to pay the $500,000 was part of a separate and independent undertaking by the applicant to secure the vendors' agreement to enter into the second contract. However, the deed's separation of past and new obligations was not so complete. The deed's express link between the default interest of $500,000 and the second contract went only to the timing of its payment, viz, "the date of settlement of the new Contract", per clause 6.3. Clause 6.1 recorded the parties' agreement that the purchaser "remains indebted" to the vendors for the default interest notwithstanding the termination of the first contract and notwithstanding anything else to the contrary contained in the deed. On the deed's

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[10] Also described by the applicant as misleading and deceptive conduct.
[11] Affidavit of Sibona Kema court file document 3, ex SK10 pp 50-53 (letter of Mr Treston to Mr Walker).

terms the default interest remained an existing debt which was not extinguished in the event the second contract failed to settle.

[28] It may be the aforementioned unknowns could have been, and in the future may be, addressed by evidence demonstrating the contention that the default interest amount constitutes a penalty is completely wrong. However, on the evidence presently before the court, the fact it was agreed by the deed that the applicant's part payments of $1.7 million would be forfeited, but that it would also continue to be indebted to the vendors for $500,000 default interest, demonstrates the applicants have an apparently plausible basis to dispute the alleged indebtedness as constituting a penalty. This is not the only reason I would grant the application.

Misrepresentation, election and waiver

[29] It is convenient to consider the allegations characterised as misrepresentation, election and waiver collectively.

[30] In doing so some reference will be made to events involving Mr Lagois for which Mr Magoffin the respondent was not present. The respondent's submissions highlighted there was no basis for Mr Magoffin to have harboured concerns about the vendors' dealings with the purchasers. That may herald a potential issue as between him and Mr Lagois and Mr Smith but it is not to the point from the perspective of the purchasers. If Mr Lagois or the vendors' agent, Mr Smith, conducted dealings with the purchaser in such a way as to affect the enforceability of the agreement in the deed about the default interest debt then it infects the enforceability through the deed of the total amount, not just one vendor's half of it.

[31] The respondents submit there was no misrepresentation or unconscionability associated with the execution of the deed of rescission and accompanying documents. On the face of it that appears so. Even accepting Ms Kema and her husband failed to read what they were signing that cannot be said to be the fault of the vendors merely by reason of Mr Lagois allegedly not telling them about the content of what they were signing.

[32] The respondent also rightly submits that even if, as the evidence suggests, Mr Smith did not tell Ms Kema and her husband what he knew, it is reasonable to infer Mr Smith, one of the applicant's then directors, did know of the documents' content. Further the respondent emphasises the statutory assumption arising from s 129(4) *Corporations Act* that the vendors could assume the directors were properly performing their duties to the company, including appropriately informing themselves, per s 180, in executing the documents.

[33] These points are not quite as uncomplicated as may appear at first blush. Mr Smith was a director of the purchaser but he was also an agent of the vendors. Section 128(4) provides a person is not entitled to make a statutory assumption in s 129 if the person knew or suspected the assumption was incorrect. There is no suggestion of knowledge by the vendors of impropriety but for present purposes it can be inferred the vendors knew their agent was a director of the purchaser and prima facie in a position of conflict of interest. It might be thought that would excite a degree of suspicion as to whether

that conflict contaminated the applicant's decision-making in entering into the deed, for instance by the vendors' agent exploiting his position of trust vis a vis Ms Kema and her husband so that they would trust in him without checking the documents.

[34] Confronting that prospect, the respondent in effect submits[12] that even if Mr Smith did mislead his fellow directors about the true nature of the transaction being entered into that would not have been in the context of his role as the vendors' agent but in his role as the applicant's director and thus it was not information it was in his interests to disclose, or which ought be imputed, to the vendors. The applicant submits equity would not enforce a contract entered into in breach of trust,[13] choosing to characterise the conflict of interest occasioning the breach as a conflict between Mr Smith's duties to his fellow directors and his personal interest in furthering his personal gain by securing a commission (although how his commission would be enhanced by a reduced purchase price is unclear). The applicant did not take up the argument that there was also a conflict as between Mr Smith's obligation to act in furtherance of the vendors' interests and his obligation to act in furtherance of the applicant's interest.

[35] It is unnecessary to analyse these points in further depth, bearing in mind the nature of the present task is not to determine prospects or merits but merely to determine whether the dispute is genuine. The very fact of Mr Smith's obvious conflict of interest certainly suggests there is likely a genuine foundation for dispute about the enforceability of the deed. However, the conclusion that there is a genuine dispute is in any event compelled by the accumulation of further events.

[36] It will be recalled that after the entry into the second contract and the deed on 14 January 2016 the applicants did not settle on the settlement date for the second contract, which was 29 January 2016. Throughout 2016 there followed further extensions of the settlement date and part payments by the applicants. Ms Kema on her presently undisputed account deposes she "made it clear to both Anthony Lagois and Robert Smith that we would not be liable for penalties for the delays in settlement and we were assured that there would be no penalties".

[37] That evidence could undoubtedly have been more specific but it is reasonable to interpret it as relating to the sequence of events subsequent to the entry into the deed. The assurance to which it refers was, inferentially, either given by Mr Lagois or Mr Smith or both. In any event it was an assurance given on behalf of the vendors. It is arguably ambiguous as to whether the assurance given was a reference to having to pay penalties in the sense of amounts additional to the purchase price alone or in the sense of amounts additional to the combined purchase price and $500,000 default interest amount.

[38] To the extent there is such ambiguity it falls away, in the context of the present analysis, once it is recalled that Mr Lagois actually sought out a solicitor to act on the applicant's behalf in the transaction yet mentioned nothing then, or later, to the solicitor acting for the applicant about the $500,000 default interest. Indeed, settlement came and went with the applicant's solicitor being unaware of it and not being asked by the vendors,

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[12] Citing, inter alia, Hoffman LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 703-704.
[13] Citing, inter alia, Langdale L in *Wood v Richardson* (1840) 49 ER 305, 306.

themselves solicitors, to arrange for the settlement to include the $500,000 purportedly payable on the date of settlement. Such conduct is obviously consistent with a view of the above mentioned assurance that it was a reference to having to pay any amounts additional to the purchase price alone. In fairness to Mr Lagois, it should be noted that there is no suggestion he has ever sought to press an entitlement to default interest.

[39] On the evidence before the court the view is reasonably open that as 2016 progressed the applicants had to decide whether or not to act, potentially to their detriment, by continuing to make belated payments. The view is also reasonably open that they made the decision to continue making such payments acting on the assurance given to them on behalf of the vendors that the vendors would not require them to pay amounts additional to the purchase price. The view is therefore reasonably open that by the giving of that assurance on their behalf the vendors elected to waive their entitlement to the $500,000 default interest.

[40] Once it is realised that such a view of the facts is reasonably open the court can be well satisfied there is a genuine dispute as to whether the alleged debt is owing.

Conclusion

[41] The application should succeed. Costs should follow the event.

[42] It was not suggested costs should be other than on the standard basis.[14]

Orders

[43] My orders are:

1. The respondent's statutory demand to the applicant dated 4 April 2017 is set aside.

2. The respondent pay the applicant's costs of and incidental to the application on the standard basis.

[14] While the letter of the applicant's solicitor of 20 April 2017 clearly put the respondent on notice of what I have concluded is a genuine dispute I do not detect in the respondent's contesting of this application unreasonableness of a kind calling for indemnity costs.