SUPREME COURT OF QUEENSLAND

CITATION:	*Re MJ Arthurs Pty Ltd* [2018] QSC 15
PARTIES:	**IN THE MATTER OF MJ ARTHURS PTY LTD ACN 145 344 056 AND AN APPLICATION BY QS LAW PTY LTD trading as QUINN & SCATTINI LAWYERS ACN 151 393 654**
FILE NO/S:	BS No 13650 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2018
JUDGE:	Martin J
ORDER:	**1. The statutory demand is set aside.**
CATCHWORDS:	CORPORATIONS – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – where applicant has been served with a statutory demand by the respondent – where respondent alleges it overpaid the applicant's solicitor's fees - where applicant seeks to set aside statutory demand on the basis that there is a genuine dispute as to the existence or amount of the debt - whether genuine dispute exists – whether court should exercise restraint where a question of construction has element of rational controversy – whether statutory demand should be set aside
	Corporations Act 2001 (Cth), s 459G, s 459H *Uniform Civil Procedure Rules* 1999 r 740, r 743A, r 743H *Legal Profession Act* 2007 s 335(3)
	Building Solutions and Water Proofing Pty Ltd v Robin H Wright Pty Ltd [2017] QSC 110 *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & Ors* [2017] QCA 297

Spacorp Australia Pty Ltd v Myer Stores Ltd (2001) ACLC 1270; [2001] VSCA 89
Creata (Aust) Pty Ltd v Faull [2017] NSWCA 300

COUNSEL: A J H Morris QC for the Applicant
D L K Atkinson for the Respondent

SOLICITORS: Quinn & Scattini Lawyers for the Applicant
Irish Bentley Lawyers for the Respondent

[1] The applicant seeks an order under s 459G of the *Corporations Act* 2001 setting aside a statutory demand served on it by the respondent, MJ Arthurs Pty Ltd.

[2] The applicant trades as a firm of solicitors, Quinn & Scattini Lawyers (Q&S). It provided legal services to the respondent concerning litigation in the District Court and charged the respondent $946,370.95 for the work. That sum was paid.

[3] MJ Arthurs applied to the District Court under r 743A of the *Uniform Civil Procedure Rules* 1999 for an order for a costs assessment of the work performed by Q&S. A consent order was made appointing Mr Peter Arthur to conduct the assessment.

[4] On 23 October 2017, Mr Arthur issued a certificate in which he assessed the costs payable as $432,989.01.

[5] On 2 November 2017, the respondent's solicitors demanded that Q&S pay MJ Arthurs the sum of $514,081.94 on the basis that:

(a) it was the difference between the amount paid by MJ Arthurs and the amount assessed as being payable, and

(b) it was held by Q&S on a constructive trust for MJ Arthurs.

[6] Q&S engaged in correspondence with Mr Arthur in which they sought reasons for his decision. On 17 December he declined to provide them. Whether he should have done so is the subject of a separate application.

[7] On 15 December, MJ Arthurs issued a statutory demand for the sum of $419,430.85. The debt was described in the statutory demand in this way:

> "The debt constitutes an undisputed debt owing by the Company to the Creditor pursuant to the legal fees and disbursements under a Cost Assessor's Certificate issued on 23 October 2017."

[8] The difference between the amount in the statutory demand and the overpayment claimed in November 2017 is explained by the respondent "allowing" the total amount

of costs the subject of the applicant's specific complaints – $94,651.09 – and reducing its claim by that amount.

[9] On 21 December 2017, an order was made in the District Court by a Deputy Registrar to this effect:

> "The Applicants pay the Respondent costs pursuant to:
>
> (a) The Order of the Court dated 28 September 2016,
>
> (b) The Certificate of Costs Assessor filed 24 October 2017 assessed at $432,289.01."

[10] In that order, the applicants referred to are MJ Arthurs and Michael James Arthurs. The respondent is Q&S.

[11] Q&S have filed another application seeking to set that order aside. It is to be determined separately. For the purposes of this application, the order is irrelevant as it issued after the statutory demand was made.

The principles

[12] Section 459H of the *Corporations Act* relevantly provides that a court must set aside a statutory demand where there is a genuine dispute as to the existence or amount of the debt. It is for an applicant to prove the existence of such a dispute, but the burden of proof has been described as being no more onerous than would confront a party seeking to meet an application for summary judgment.[1]

[13] The task for a court on an application such as this is "to determine whether there exists a genuine dispute about the debt in question; it is not to determine whether the debt exists. The bar for establishing a genuine dispute is not set high; a 'plausible contention requiring investigation' will suffice."[2]

The contentions – a summary

[14] The applicant argued that the following matters supported its application:

(a) The statutory demand was based on a costs order which, at the date of the demand, had not been perfected as a judgment or order of a court. A costs order is a pre-requisite.

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1 *Building Solutions and Waterproofing Pty Ltd v Robin H Wright Pty Ltd* [2017] QSC 110 at [16].

2 *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & Ors* [2017] QCA 297 per Holmes CJ at [20].

(b) While the costs assessment was in favour of two parties jointly, the demand was made in the name of only one of them.

(c) The applicant is entitled to pursue its rights to seek reasons for the assessment and to have the assessment reviewed by the court.

(d) The claim is based, in part, on the assessment which, at the time of the demand, was little more than the opinion of the assessor.

[15] The respondent submits that there is a debt due and payable capable of supporting the statutory demand. It relies upon an overpayment and says that it has, therefore, paid money by mistake and has a right to reimbursement.

[16] So far as the costs assessment is concerned, the respondent says:

(a) that a court order is not a pre-requisite to enforcement, and

(b) the applicant has not disputed the items assessed and no basis is given for the proposed challenge to the entire assessment.

Is there a genuine dispute about the debt in question?

[17] Section 335(3) of the *Legal Profession Act* 2007 allows a client of a law practice to apply for an assessment of legal costs even if the legal costs have been wholly or partly paid. That is the position which obtains here. Part 4 of Chapter 17A of the UCPR applies to those types of assessments.

[18] Q&S relies upon r 743H (which is within Part 4); it provides:

"(1) This rule applies if a certificate of assessment is filed in the relevant court.

(2) The court or any party may, on notice to all parties who participated in the assessment, have the application relisted before the court.

(3) In relation to any issue in dispute between the parties, the court may give directions or decide the issue.

(4) If there are no issues in dispute, the court may give the judgment it considers appropriate having regard to the certificate.

(5) The court may delay giving a judgment, or stay the enforcement of a judgment given, pending a review by the court of a decision of the costs assessor."

[19] Q&S contends that there can be no recovery of costs until a judgment is given under that rule.

[20] MJ Arthurs responds by contrasting r 743H with r 740. The latter rule applies to the assessment of party and party costs. It provides:

> "(1) After a certificate of assessment is filed, the registrar of the court must make the appropriate order having regard to the certificate.
>
> (2) The order takes effect as a judgment of the court.
>
> (3) However, the order is not enforceable until at least 14 days after it is made and the court may stay enforcement pending review of the assessment on terms the court considers just.
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> (4) Unless the registrar orders otherwise, the costs assessor's fees—
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> (a) are payable to the cost assessor in the first instance by the party who applied for the assessment; and
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> (b) are to be included in that party's costs of the assessment.
>
> (5) Amounts paid or payable under the order are charged with payment of the costs assessor's fees."

[21] There are obvious differences in the two rules. Rule 740 provides that a costs assessment must be the subject of an order of the Registrar, that the order takes effect as a judgment of the court, and that the order is not enforceable for 14 days. This, MJ Arthurs submits, emphasises the difference with r 743H which allows the court to give judgment if there are no issues in dispute. If there are, then other steps may be taken.

[22] This is not the time to determine whether r 743H can be used to protect Q&S from the claim of MJ Arthurs. As has been observed:

> "We think, if we may say so, that, except in a case in which it is as plain as a pikestaff that there is no debt (where bluntness may be in the interests of both sides), judges should, in general at all events, in dealing, whether at first instance or on appeal, with the question of genuine dispute, be at pains to perform the admittedly delicate task of disposing of that question without expressing a view on what we have called the ultimate question. For otherwise, on an application which resembles if it is not in law an interlocutory one, things may be said which embarrass the judge before whom the ultimate question comes."[3]

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[3] *Spacorp Australia Pty Ltd v Myer Stores Ltd* (2001) 19 ACLC 1270; [2001] VSCA 89 per Brooking and Charles JJA at [4]

[23] The argument advanced by Q&S on this point engages the debate about the correct construction of the relevant rules in Part 17A of the UCPR. For the purposes of this application, an analogy may be drawn with the remarks made in *Creata (Aust) Pty Ltd v Faull* [4] where Barrett AJA, with whom Gleeson and White JJA agreed, said:

> "[26] The grounds of appeal raise squarely the question of the extent to which it is open to the court to decide questions of construction in s 459H(1)(a) cases. In every such case, the issue is, of course, merely whether it has been shown that a "genuine dispute" exists. In determining that issue, the court is neither required nor expected to avoid all issues of construction. Where a contract contains a simple and unambiguous promise to pay, the court embarks on a task of construction (albeit not a difficult or controversial one) in determining that that promise creates a debt and no argument to the contrary is plausible. **But where the question of construction has any element of rational controversy to it, the court must exercise particular restraint**." (emphasis added)
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> [27] That matter was recently addressed by Gleeson JA in both *Re Litigation Insurance Pty Ltd* [2017] NSWSC 334 and *Re Linton Developments (Qld) Pty Ltd* [2017] NSWSC 336. In each of those cases, his Honour quoted the following passage in the judgment in *Drillsearch Energy Ltd v Carling Capital Partners Pty Ltd* [2009] NSWSC 1192 at [45]:
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> > 'A dispute as to the existence of a debt that is the product of a dispute about construction is not removed from s 459H(1)(a) just because the issue in contention is one of construction. While it has been said that "a short point of law or the construction of documents or agreed facts" may, unlike a disputed question of fact, be determined upon a s 459G application (see *Delnorth Pty Ltd v State Bank of New South Wales* (1995) 17 ACSR 379 at 384), it does not follow that the court is compelled to make such a determination. In the case of a legal argument, determination might be appropriate if it were, in the words of McLelland CJ in Eq in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, a "patently feeble legal argument".'"

[24] The construction argument advanced by Q&S has an element of rational controversy to it. It may not succeed on a full exploration of the meaning of the provisions of Part 17A but that is for another time.

[25] A complication which this case raises, which is not often present in other cases involving solicitor's fees, is that the fees have been paid. The dispute between the parties is as to the amount which Q&S may retain. The details of that dispute are not clear because Q&S has, in its letters to the respondent, said that it challenges the entire assessment but that the assessor's reasons are required before further details can be given. This amounts to an argument that Q&S can't particularise its challenge until the assessor provides his reasons.

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[4] [2017] NSWCA 300

[26] I'm satisfied that Q&S has established enough to demonstrate that, by reference to the question of the meaning of r 743H, there is a genuine dispute. The statutory demand is set aside.