SUPREME COURT OF QUEENSLAND

CITATION:	*Everlight Resources Ltd v Barnett & Ors* [2018] QSC 244
PARTIES:	**EVERLIGHT RESOURCES LTD ACN 609 289 750** (applicant) **v** **ROGER JOHN BARNETT AND ROSLYN JUNE BARNETT AS TRUSTEES FOR ROGER BARNETT SUPERANNUATION FUND** (respondent) **EVERLIGHT RESOURCES LTD ACN 609 289 750** (applicant) **v** **SPURGIN SHARES PTY LTD ACN 605 087 312 AS TRUSTEE FOR THE SPURGIN SHARES TRUST** (respondent) **EVERLIGHT RESOURCES LTD ACN 609 289 750** (applicant) **v** **PGP (QLD) PTY LTD ACN 101 499 209 AS TRUSTEE FOR THE PGP TRUST NO. 2** (respondent)
FILE NO/S:	BS Nos 10285/18 10289/18 10291/18
DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	31 October 2018
DELIVERED AT:	Brisbane
HEARING DATES:	11 October 2018 19 October 2018
JUDGE:	Dalton J
ORDER:	**Draft Orders to be filed**
CATCHWORDS:	CORPORATIONS — WINDING UP — WINDING UP IN INSOLVENCY — STATUTORY DEMAND — APPLICATION TO SET ASIDE DEMAND — GENUINE DISPUTE AS TO INDEBTEDNESS — OTHER PARTICULAR CASES — where the Applicant Company

applied to set aside three statutory demands of its creditors — where the demands were based on a promise to repay monies pursuant to convertible notes — where the Applicant company alleges that the creditors assigned their rights to the debts and could not call for payment — whether there is a genuine dispute between the Applicant Company and the creditors about the existence of the debt to which the demand relates
EQUITY — EQUITABLE ASSIGNMENTS — WHAT AMOUNTS TO AN EQUITABLE ASSIGNMENT — GENERALLY — whether there has been a valid equitable assignment of the debt the subject of the statutory demands to the note trustee
EQUITY — TRUSTS AND TRUSTEE S — APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES — RETIREMENT AND REMOVAL — RETIREMENT — where an Applicant Creditor seeks to be removed from the proceeding and to substitute a related company as trustee — where the Application was resisted on the basis that the debt the subject of the statutory demand was assigned to the trustee noteholder — whether s 15 of the *Trusts Act 1973* (Qld) applies

Corporations Act 2001 (Cth), s 459G, s 459H(1)(a)
Property Law *Act 1974* (Qld), s 199
Trusts Act 1973 (Qld), s 15

Booth v Federal Commissioner of Taxation (1987) 164 CLR 159; [1987] HCA 61, cited
Creata (Aust) Pty Ltd v Faull [2017] NSWCA 300, applied
Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq) [2015] VSCA 330, cited
Manks v Whitely [1912] 1 Ch 735, cited
McVeigh v National Australia Bank Limited (2000) 278 ALR 429, cited
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9; [1963] HCA 21, cited

COUNSEL: PP McQuade QC with MA Taylor for the applicant on 11 October 2018.
M A Taylor for the applicant on 19 October 2018.
B W Wacker for the respondents

SOLICITORS: Ramsden Lawyers for the applicant
Frigo Adamson for the respondents

[1] This is an application by Everlight Resources Ltd (the company) to set aside three statutory demands. The demands were made by PGP (Qld) Pty Ltd; Roger and Roslyn

Barnett, and Spurgin Shares Pty Ltd. I will call these three the applicant creditors, except where it is necessary to refer to them individually.

[2] The statutory demands were based on a promise to repay monies advanced to the company pursuant to convertible note agreements. It was not contentious between the parties that on 31 December 2016 the amounts demanded became payable by the company, and that the amounts had not been paid. The point taken on behalf of the company was that the applicant creditors had assigned the rights to their debts and so were unable to call for payment. To examine this proposition it is necessary to look at two commercial documents: a convertible note agreement (CNA) and a general security agreement (GSA). Both were apparently prepared in haste, and both are poorly drafted.

[3] The company was established to purchase the Gallego Lithium Brine Project, which it was thought might make a lot of money producing lithium in Argentina. Numerous investors, including the applicant creditors, entered into CNAs with the company. The applicant creditors provided money to the company in return for convertible notes. The terms of conversion were that:

(a) there was to be automatic conversion to shares on the defined maturity date – cl 3.1(a);

(b) if the company was to be listed on the ASX noteholders would be given an option to convert their holdings to part cash/part shares two weeks before the prospectus issued – cl 3.2(a);

(c) two weeks before the company accepted any extremely lucrative offer to buy the business (for example, at $30 million) noteholders were given the option of a cash payment in lieu of their holdings – cl 3.3(a), and

(d) there was a longstop date of 31 December 2016. If one of the three conversions mentioned at (a), (b) and (c) had not happened by this date, the notes were repayable in full on this date – cl 3.4(a).

[4] At cl 4.1 of the CNA there was a list of events of default. The first was Everlight failing to pay or repay any amount due by it under the CNA. Clause 4.2 provided:

> "**4.2 Consequences**
>
> Upon becoming aware of the occurrence of an event of default, the Note Trustee may give written notice to Everlight of such default and, if this occurs, Everlight must repay the Note together with all interest and other outstanding moneys within 7 days of receiving such notice."

[5] There had been no previous mention of a "Note Trustee" in the agreement to this point. However, cl 5 was headed "Security Deed" and bore a subheading "Convertible note secured by a charge over Everlight". After reciting that the company was to buy the Gallego Lithium Brine Project, cl 5.1 continued:

> "(b) The Note holder [sic] will register a first ranking general security charge over its assets and undertakings in favour of a recognised Trustee to be appointed on behalf of Note Holders as soon as practicable.

(c) Everlight warrants that it will duly execute the General Security Agreement between Everlight and the Note Trustee.

…"

Clause 5.1(b) must mean that the company, rather than the noteholder, will register a first ranking general security charge over its assets, and I read it that way.

[6] The evidence is that the company entered into CNAs in these terms with each of the three applicant creditors on 5 May 2016. The only parties to each CNA were the company and one of the applicant creditors. On 6 May 2016 the company entered into the GSA with PGP as trustee for the noteholders. The only parties to the GSA were the company and PGP. The GSA was prepared in a rush, at the last minute. PGP was only contemplated to be the trustee for the noteholders until a professional trustee could be found.

[7] The GSA defined 28 separate individuals or companies as noteholders. It defined "secured money" as money which was owing by the company to the trustee on behalf of noteholders or which would in the future become owing by the company to the trustee or noteholders in connection with, *inter alia,* the CNAs. The secured property was all the property of the company. Clause 1.3 was as follows:

"**1.3 Creation of Trust**

The Trustee is appointed as the trustee for the Noteholders. The Trustee agrees to hold in trust for the benefit of Noteholders:

(a) the right to enforce Everlight's duty to pay the Secured Money on all the Notes issued to Noteholders on the due date for payment;

(b) the charge or security for repayment (if applicable) contained in this document; and

(c) the right to enforce any other duties that Everlight has under the terms of the Notes,

and to act in the interests and for the benefit of Noteholders."

[8] Clause 3.1 provided that:

"To secure the punctual payment of the Secured Money, Everlight grants to the Trustee a security interest in and over all Secured Property."

[9] Clauses 8 and 9 of the GSA provided:

"**8. Events of Default**

An event of default occurs if an Event of Default occurs under the Note Deed …

9. Default powers

9.1 General

(a) If an Event of Default occurs and while it is subsisting each security interest created under this document will become immediately enforceable.

(b) The Trustee may at any time while an Event of Default is subsisting exercise any or all of the rights set out in this clause in any manner and at any time that it thinks fit, even if a Receiver has been appointed.

…

…

9.4 General dealings

The Trustee may while an Event of Default is subsisting:

(a) enter, take possession of, take control of and get in the Secured Property.

…"

[10] On 19 August 2016 the company, PGP and a Mr Justin Lee Broad entered into an agreement whereby Mr Broad was substituted for PGP as the note trustee. By October 2016 the Lithium Brine Project had run into trouble. On 7 October 2016 the company's board wrote to the convertible noteholders. They were told that in July 2016 the company's sole shareholder had exercised his rights to remove the company's two directors on the grounds that they were not expeditiously executing the business plan of the company and had appointed two new directors who he believed would do so. It was said that the company was involved in litigation against one of the removed directors in the New York Supreme Court to recover funds following that director's "gross misconduct".

Section 459H Corporations Act: Genuine Dispute

[11] The company primarily relied upon s 459H(1)(a) of the *Corporations Act* (the Act) to set aside the statutory demands. It argued that there was "a genuine dispute between the company and the respondent about the existence … of [the] debt to which the demand relates", in each case before the Court.

[12] The approach of the Courts in cases where the question is the existence or non-existence of a genuine dispute is well known. In *Creata (Aust) Pty Ltd v Faull*[1] the New South Wales Court of Appeal restated the test from *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)*[2] as follows:

> "The terms of s 459H of the Corporations Act and the authorities make clear that, on an application to set aside a statutory demand, the applicant is required only to establish a genuine dispute or offsetting claim. The applicant is required to evidence the assertions relevant to the alleged dispute or offsetting claim only to the extent necessary for that primary task.

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1 [2017] NSWCA 300, [17].
2 [2015] VSCA 330, [47]-[50].

> It is not necessary for the applicant to advance a fully evidenced claim. Therefore, the task faced by an applicant is by no means at all a difficult or demanding one.
>
> In determining such an application, it is not necessary or appropriate for a court to engage in an in-depth examination or determination of the merits of the alleged dispute. This is because an application alleging a genuine dispute or offsetting claim is akin to one for an interlocutory injunction and requires the applicant to establish that there is a 'plausible contention requiring investigation' of the existence of either a dispute as to the debt or an offsetting claim. It is therefore not helpful to perceive that one party is more likely than the other to succeed or that the eventual state of the account between the parties is more likely to be one result than another. Further, the determination of the 'ultimate question' of the existence of the debt at a substantive hearing should not be compromised.
>
> The court is required to determine whether the dispute or offsetting claim is 'genuine'. It has been said that the criterion of a 'genuine' dispute requires that the dispute be bona fide and truly exist in fact and that the grounds for alleging the existence of a dispute be real and not spurious, hypothetical, illusory or misconceived. It has also been observed that the dispute or offsetting claim should have a sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion. It must also have sufficient factual particularity to exclude the merely fanciful or futile. A rigorous curial approach is essential to the effective operation of the statutory scheme.
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> The court is not required to accept uncritically 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, as it may not have sufficient prima facie plausibility to merit further investigation as to its truth. The court is also not required to accept uncritically a patently feeble legal argument or an assertion of facts unsupported by evidence, although this should not be read as suggesting that the applicant must formally or comprehensively evidence the basis of its dispute or off-setting claim. Except in such extreme cases, the court should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on by the applicant to set aside a statutory demand."

[13] A Mr Frederick Alexander Witherow, a director of the company swore (inappropriately) to the basis upon which the company sought to set aside the statutory demands as follows:

> "The applicant seeks to set aside the PGP Statutory Demands, Barnett Statutory Demands and Spurgin Statutory Demands (together **'Statutory Demands'**) on the following grounds referred to herein, and:
>
> (a) There is no debt due and owing by the Company under the Convertible Note Agreements referred to in the Statutory Demands to either PGP, Barnetts or Spurgin;

(b) Neither PGP, Barnetts nor Spurgin has an entitlement to issue the Statutory Demands for the claims made in such demands;

(c) Upon a proper construction of the Convertible Note Agreements and the General Security Agreement referred to in clause 5 of those Convertible Note Agreements, PGP, Barnett and Spurgin appointed PGP (and then from 19 August 2016, Mr Justin Lee Broad) as trustee of the rights and entitlements to any chose in action they may have under the Convertible Note Agreements with respect to payment of monies by the Company;

(d) Any monies owing by the Company pursuant to the terms of the Convertible Note Agreements were owing to PGP as trustee for the Everlight Interim Convertible Notes Trust or from 19 August 2016 are owing to Mr Justin Broad as trustee for that trust.

(e) It is only Mr Justin Broad as trustee that is entitled to issue a statutory demand for payment of monies the subject of the Statutory Demands."[3]

[14] It was further sworn by Mr Witherow that the amount demanded by the Barnetts was $6,575.34 more than was due by the company because an interest payment on 18 August 2016 had been overlooked in calculating the amount of that demand.

[15] The first outline of argument on behalf of the company contradicted the contention at paragraph 11(c) of the affidavit referred to above in that it said:

> "… neither respondent has an entitlement to issue the respective the statutory demand for the claim made in each demand [sic]. The right to enforce amounts claimed in each statutory demand, is the trustee of the trust created by the Security Agreement … Mr Justin Broad [sic]."[4]

[16] The hearing of this application before me was adjourned and on the second occasion the company advanced a different position: that cl 1.3 of the CNAs did not just assign the right to "enforce amounts claimed", as it was put in the earlier submissions, but the entire debt created by the convertible note transaction. It was said that cl 1.3(a) should be construed as though the words were: "all future debts or rights to damages arising pursuant to any default under clause 4.1 of the note agreement". Of course, this is a set of words very unlike the words actually used in cl 1.3(a).

[17] It was contended that the question of how to construe cl 1.3(a) of the GSA was one which I should not undertake on this application. The case of *Creata* (above) was relied upon. In that case Barrett AJA, with whom the rest of the Court agreed, said this:

> "[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,

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3 Paragraph 11, Court Document 2.
4 Court Document 11, paragraph 2.

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.

[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]:

> '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".

[28] Gleeson JA also referred to a similar formulation in *Wellnora Pty Ltd v Fiorentino* (2008) 66 ACSR 229; [2008] NSWSC 483 at [50] where attention was drawn to what was said by Brooking and Charles JJA in *Spacorp Australia Pty Ltd v Myer Stores Ltd* (2001) 19 ACLC 1270; [2001] VSCA 89 (*Spacorp*) at [4]:

> '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.'

[29] After referring to a summary of the position in in *Broadspectrum (Australia) Pty Ltd v Centauri Business Services Pty Ltd* [2016] NSWSC 1045 at [22] and the statement by this Court in *Ligon 158 Pty Ltd v Huber* (2016) 117 ACSR 495; [2016] NSWCA 330 (*Ligon*) at [11] concerning the restraint that a court should exercise in considering the 'ultimate question' of the indebtedness of a company served with a statutory demand (as distinct from the question whether genuine dispute exists), Gleeson JA said:

> 'The important points to be derived from the authorities are as follows. First, the court dealing with a s 459G application is not compelled to determine questions of construction of documents. Second, s 459G proceedings are not ordinarily the occasion for the court to construe a contract where there are competing views about its meaning. Third, cases in which it will be appropriate for the court to entertain a construction argument on a s 459G application are likely to be few in number. Fourth, the court's state of mind concerning the existence of a genuine dispute may range from a clear conviction that the debt does not exist to an opinion that the genuine dispute hurdle has only just been cleared.'"

[18] The company argued that the CNA and the GSA should be construed together as they were executed only a day apart and in effect formed different parts of one transaction. Although there is little case authority for it, it was argued that rule should apply here even though the CNA and the GSA were executed by different parties.[5] I am prepared to assume that in the company's favour for the purpose of this application. And I am prepared to assume, in the company's favour, although there is some factual controversy about this, that all the creditors knew of the provisions of the GSA at the time they signed the CNAs.

[19] It was argued on behalf of the company that if the CNA and the GSA were construed together as if they were one transaction, or alternatively if the GSA was considered as part of the context to the construction of the CNA, there could be discerned an intention on the part of each noteholder to assign to the note trustee either:

(a) "the expectancy (future chose in action) provided [at] cl 2.2 [of the CNA, re interest payments] and an agreement to assign the contingent expectancy provided for by cl 3.4(a) [of the CNA]", per Mr McQuade QC on the first hearing before the Court, or

(b) "All future debts or rights to damages arising pursuant to any default under cl 4.1 of the note agreement", according to Mr Taylor's oral submissions on the second hearing.

[20] I will accept for the purpose of this application that these are plausible contentions. Either way, the assignments were not legal assignments because they did not comply with s 199(1) of the *Property Law Act 1974* (Qld). The assignments contended for were not absolute within the meaning of that section.[6] At the time the CNA and the GSA were signed by the applicant creditors they had no presently existing rights to repayment pursuant to cl 3.4(a) of the CNA, or to interest pursuant to cl 2.2 of the CNA, as was acknowledged by Mr McQuade's submissions, see [19(a)] above. Additionally, it seems to me that there is a real question as to whether or not the assignment was of part of a chose in action. Certainly that is how cl 1.3(a) of the GSA is worded. Even if it were given the interpretation contended for by the company on the second hearing, it seems to me that there is a good argument that what is sought to be assigned is just one

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5 *Manks v Whiteley* [1912] 1 Ch 735, 754, and see *McVeigh v National Australia Bank Limited* (2000) 278 ALR 429, [30].

6 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 26.

of the several rights which make up the bundle of rights which a noteholder has under the CNA. That is, it seems that there is a good argument that only part of the chose in action which the noteholder owned was assigned. But I need not come to a final view on that point.

[21] Even assuming everything else in favour of the company, there has not been any legal assignment of a debt or chose in action. Accordingly, the proper party to sue for monies outstanding is the applicant creditor in each case. I reject the submission made that the note trustee is the person who ought to have issued the statutory demand.[7]

[22] The outline of argument filed on behalf of the company initially did not address s 199 of the *Property Law Act* at all.[8] The supplementary outline of argument filed on the second hearing date did not contend that there was a legal assignment because s 199 had been complied with but, quite wrong-headedly, relied on s 15 of the *Trusts Act 1973* (Qld).

[23] The company contended that if there were not a legal assignment, there was an equitable assignment in each case before the Court. It was said there was consideration in the provision of security for the otherwise unsecured debts and that equity would consider as done what ought to be done.[9]

[24] To find that there was an equitable assignment would mean assuming the construction points above in favour of the company. If there were equitable assignments, the debts the subject of the statutory demands were held at law by each of the applicant creditors on trust for the note trustee who, in turn, held them on trust for each of the applicant creditors. That is, the legal and ultimate beneficial interest in the debts would reside in each of the applicant creditors. All the applicant creditors are *sui juris*. It seems to me that a Court of equity would regard this circularity as a reason for not following the law and therefore not treating what occurred as an equitable assignment. However, I need not delay on this point, it is academic.

[25] The company argued that the effect of an equitable assignment was to separate the legal and beneficial interests in the debts claimed by the creditors and that therefore, while the creditors might have had legal title to issue the statutory demand and apply for a winding-up, the Court ought not allow them to do so in circumstances where the beneficial interests in the debts were held by another, *viz* the note trustee. It was said that this was another reason to set aside the statutory demands – see s 459J(1)(b) of the Act. The situation was said to be analogous to one where only one of two joint creditors issues a demand. If it were contended that the note trustee would hold the beneficial interests in the debts for a third party after assignment, there might be some substance in this point. Here however, even if there were an equitable assignment, the note trustee would still hold the debts on trust for the applicant creditors. There is no substance in the point.

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7 See paragraphs 56-61 of the company's submissions, Court Document 11.
8 Court Document 11.
9 *Booth v Federal Commissioner of Taxation* (1987) 164 CLR 159, 178.

[26] I dismiss the company's application to set aside the statutory demands in proceeding numbers 10285/18, 10289/18 and 10291/18. I will ask that the parties bring in draft orders which deal with any difficulties with the amount of the demand in the Barnetts' case. I will hear the parties on costs.

[27] The applicant creditor PGP made a separate application to be removed from this proceeding and to substitute a related company, PGP Group (Australia) Pty Ltd ACN 628 083 330 as trustee for the PGP Trust No. 2. The application was made pursuant to rule 69. The factual circumstances underlying this are that the old trustee for the PGP Trust No. 2 retired on 10 September 2018 and the new company (PGP Group) was appointed trustee of the trust. Section 15 of the *Trusts Act 1973* (Qld) applies.

[28] This application was resisted firstly on the basis that the debt which is the subject of the statutory demand had been legally assigned to the trustee noteholder. As explained above, I reject that notion. Then there was an argument made that if there was no such legal assignment, the legal title to the debt remained in PGP (Qld) Pty Ltd. Again, I think this is a misunderstanding of the effect of s 15 of the *Trusts Act.* The result is that PGP (Qld) Pty Ltd has ceased to be a person whose presence is necessary in the proceeding and PGP Group (Australia) Pty Ltd has become a person whose presence before the Court is desirable and convenient. Therefore I will make orders in terms of the application which is Court Document 8 on file 10291/18. Again, the parties can bring in a draft.