

SUPREME COURT OF QUEENSLAND

CITATION: *Re: CSSC (Qld) Pty Ltd* [2018] QSC 282

PARTIES: **IN THE MATTER OF CSSC (QLD) PTY LTD ACN 147 224 342 AS TRUSTEE FOR THE CSSC (QLD) TRUST**

CSSC (QLD) PTY LTD ACN 147 224 342 AS TRUSTEE FOR THE CSSC (QLD) TRUST
(applicant)
v
STEPHANIE ELIZABETH COMMONS
(respondent)

FILE NO: BS10476 of 2018

DIVISION: Trial Division

PROCEEDING: Application to set aside statutory demand

DELIVERED ON: 3 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 29 November 2018

JUDGE: Mullins J

ORDER: **1. Upon the undertaking of Mr Scroope to indemnify the applicant for the costs of the proceeding, the creditor's statutory demand dated 5 September 2018 is set aside.**

2. No order as to the costs of the application.

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where one director issued the statutory demand against the company for repayment of the loan made by the director to the company – where the other director did not have authority to bring the application on behalf of the company to set aside the statutory demand – where the other director could not show there was a genuine dispute as to the debt – where the dispute between the directors was a dispute between the members of the company – where it was an abuse of process for one director to issue the statutory demand

Corporations Act 2001 (Cth), s 237, s 459G, s 459H, s 459J, s 1305

Rinfort Pty Ltd v Arianna Holdings Pty Ltd (2016) 111 ASCR

607; [2016] NSWSC 251, considered

COUNSEL: G W Dietz for the applicant
G Handran for the respondent

SOLICITORS: Taylor David Lawyers for the applicant
Murdoch Lawyers for the respondent

- [1] The applicant CSSC (Qld) Pty Ltd is the trustee of the CSSC (Qld) Trust (the trust) pursuant to a deed of trust dated 5 November 2010. The respondent Ms Commons served a statutory demand dated 5 September 2018 on the applicant as trustee for the trust for the amount of \$688,938.43 which was described in the schedule to the statutory demand as a loan from the respondent to the applicant in or about December 2010 and acknowledged in the financial statements of the trust for the year ended 30 June 2014.
- [2] The respondent and Mr Scroope are the only directors and shareholders of the applicant.
- [3] The applicant (on the instructions of Mr Scroope) applies pursuant to s 459G of the *Corporations Act 2001 (Cth)* (the Act) to set aside the statutory demand. The grounds ultimately relied on for the application are that, pursuant to s 459H of the Act, there is a genuine dispute about the existence of the debt to which the statutory demand relates and, pursuant to s 459J(1)(b) of the Act, the issue of the statutory demand by Ms Commons was an abuse of process due to her position as a director of the applicant.
- [4] There was a further ground raised in correspondence sent on Mr Scroope's instructions on behalf of the applicant that, if there were a loan from the respondent to the applicant, it was made in December 2010 and was therefore statute barred. That ground was addressed by the subsequent acknowledgment of debt, as at 30 June 2014, made by all directors on behalf of the applicant in the financial statements for the year ended 30 June 2014 that is effective against the applicant: *In re Gee & Co (Woolwich) Ltd* [1975] Ch 52.
- [5] Although Mr Scroope in his supporting affidavit that was filed with the application asserted that the respondent was using the statutory demand process in furtherance of a dispute between the respondent and Mr Scroope that appears to have developed after their personal relationship ended in February 2016, Mr Dietz of counsel on behalf of the applicant disavowed any reliance on an allegation that the statutory demand procedure was being used by the respondent for an ulterior purpose.
- [6] To the extent that the respondent challenges Mr Scroope's authority to give instructions for the applicant to bring this application, if necessary Mr Scroope proposes filing an application seeking leave to bring the current application on behalf of the applicant pursuant to s 237 of the Act. Mr Scroope has also given an undertaking to indemnify the applicant against the costs of the originating application by which the proceeding was commenced with retrospective effect from the commencement of the proceeding. It is convenient, however, to consider first whether there is, in fact, any ground for setting aside the statutory demand.

Is there a genuine dispute about the debt?

- [7] The financial statements of the trust for the year ended 30 June 2014 include a trustee's declaration which was made by the directors of the applicant and signed by both Mr Scroope and the respondent on 12 December 2014. That declaration includes a statement that "the financial statements and notes, present fairly the trust's financial position as at 30 June 2014 and its performance for the year ended on that date in accordance with the accounting policies described in Note 1 to the financial statements". There is nothing in Note 1 that allows for any interpretation of the entry in the balance sheet under unsecured non-current liabilities "Loans-S.Commons \$688,938.43" other than that it records an unsecured loan owed by the trust to the respondents for the amount specified. The respondent exhibits to her affidavit affirmed on 29 November 2018 copies of the trust's financial statements for the years ended 30 June 2012 and 2013 which show the identical indebtedness of the trust to the respondent. The balance sheet as at 30 June 2012 shows in the column for comparative figures as at 30 June 2011 the same amount for the loan from the respondent to the trust. The respondent also exhibits a copy of the trust's 2014 tax return signed by Mr Scroope on 20 February 2015 that declares the total liabilities of the trust to be \$1,408,725 which accords with the sum shown in the applicant's 2014 financial statements for liabilities (that includes the amount of the loan to the respondent recorded in those statements). The trust did not return any income for the 2014 year. It is also apparent from the financial statements for the years ended 2012, 2013 and 2014 that it was not a trading trust.
- [8] Mr Scroope in his supporting affidavit filed on 27 September 2018 and in a further affidavit sworn on 27 November 2018 seeks to go behind those financial statements and allege that the financial statements do not truly reflect the state of the accounts between the applicant and the respondent.
- [9] In December 2010 the trust completed the purchase of an apartment at Kangaroo Point. The contract price was \$1.31m, but the adjusted amount paid at settlement was \$1,317,088.63. In the balance sheet as at 30 June 2012, the freehold land is shown as a non-current asset at cost of \$1.31m with holding costs and stamp duty and legal fees totalling \$71,662.55. The holding costs increased in each of the years ended 31 June 2013 and 2014.
- [10] Mr Scroope explained in his affidavit what his intention was in relation to the provision of funds to enable the applicant to purchase the Kangaroo Point property and that was that he and the respondent would invest in the trust. It appears that a company associated with Mr Scroope, MCC Pty Ltd (MCC) contributed all the funds for the purchase of the apartment in the first instance, but to the extent that the respondent was to provide funds, I infer that MCC contributed her share of the funds on her behalf and that is why there is a loan from the respondent to the applicant in the sum of \$688,938.43. Apart from that loan, the balance sheet as at 30 June 2012 showed a loan to the applicant from MCC of \$695,474.12 which was the balance of the funds required for the applicant's purchase of the property. One would expect that that there was a loan recorded in the books of MCC of \$688,938.43 made to the respondent, but the

relevant financial statements of MCC have not been adduced by Mr Scroope. Mr Scroope asserts that the respondent subsequently borrowed from the Commonwealth Bank of Australia and supplemented by her own funds repaid the sum advanced to her by MCC. There is a mortgage on the title of the trust property in favour of the CBA that was registered on 25 October 2011 that is not shown as a liability of the trust. Mr Scroope's explanations as to intention at the time of the purchase are irrelevant in light of what the trust's financial statements record as to the provision of funds to the applicant. In any case, on one view Mr Scroope's description of the transactions in relation to provision of funds is consistent with what the financial statements record, and it is Mr Scroope's characterisation of those transactions that is inconsistent with the financial statements.

- [11] There is no suggestion in Mr Scroope's affidavits that there have been any dealings between the parties subsequent to 30 June 2014 that affect the status quo shown in the balance sheet as at 30 June 2014. I infer from the fact that the respondent relied on the balance sheet of the trust as at 30 June 2014 that was the last set of financial statements obtained by her from the trust's accountants. Mr Scroope does not recall that he and the respondent signed the 2015 and 2016 financial statements for the trust, and states that the financial statements for the trust for the years ended 30 June 2017 and 2018 have not yet been prepared.
- [12] Pursuant to s 1305(1) of the Act, the trust's financial statements are *prima facie* evidence of any matter recorded in them. As the only financial statements of the trust that have been adduced for the purpose of the application consistently deal with the loan by the respondent to the applicant in the same way that has been acknowledged by all directors as fairly reflecting the trust's financial position, there is not a not a genuine dispute as to the existence of the subject debt owed by the applicant to the respondent for the purpose of setting aside the statutory demand.

Was the issue of the statutory demand an abuse of process?

- [13] The applicant submits that the respondent by issuing the statutory demand has promoted her own personal interests to pursue a gain in conflict with her fiduciary duty as a director owed to the applicant. The applicant relies on the outcome in *Rinfort Pty Ltd v Arianna Holdings Pty Ltd* (2016) 111 ACSR 607 to assert that, by issuing the statutory demand, the respondent has promoted her own personal interests to pursue a gain in conflict with her fiduciary duty owed to the applicant.
- [14] In *Rinfort*, the debtor and creditor companies had been founded by the same person. At the time of the dispute, the directors were from the next generations. There was a common director of both companies who made the decision on behalf of the creditor company to make the loan by the debtor company repayable when in his capacity as a director of the debtor company he was aware that the debtor company could not repay the loan. It was held at [95] that there was a real possibility of conflict of duty and duty on behalf of the common director, as he owed duties to the creditor company to issue the demand and duties to the debtor company in respect of his response to the demand and he could not comply with both duties. Although Black J had also found another basis on which the statutory demand should be set aside as there was a limitation defence that gave rise to a genuine dispute, it was found at [96] that the issue of the

statutory demand in the circumstances was an abuse of the procedure and the demand should also be set aside on that basis.

- [15] I would not characterise the respondent's pursuit of the loan made by her to the applicant as seeking to make a gain at the expense of the applicant. That interest is not necessarily in conflict with her duty as a director of the applicant. The true nature of the dispute is between the respondent and Mr Scroope as the members of the applicant, because it appears that Mr Scroope does not countenance the applicant repaying the loan made by the respondent to the applicant. Any winding up should be on the just and equitable ground.
- [16] If there had been authority for Mr Scroope to authorise the applicant to bring this application, it would succeed in having the statutory demand set aside on the basis that it was an abuse of process for the respondent to issue the statutory demand to the applicant, when her action in doing so prevented the applicant from being able to respond to it.
- [17] Part 5.4 of the Act provides for a self-contained and streamlined process for proving insolvency of a company by the means of issuing a creditor's statutory demand and giving the company a strict timetable for setting to set aside the demand, as the presumption of insolvency otherwise arises if the demand is not set aside. The fact that the respondent's role as a director, in addition to claiming to be a creditor, precludes the applicant from responding to the creditor's statutory demand without the intervention of an application by the other director of the applicant under s 237 of the Act is strong indication that the use of the statutory demand procedure was not appropriate in this matter which can be characterised as a dispute between the members of the applicant for which there are other remedies provided by the Act.
- [18] Even though the factual circumstances of the dispute between the respondent and Mr Scroope in this case are not as patent an abuse of process as in *Rinfort*, they are sufficient to provide a reason for the purpose of s 459J(1)(b) of the Act to set the demand aside, if the proceeding had been instituted properly by the applicant.

Orders

- [19] There does not seem to be much point in requiring Mr Scroope to apply to join this proceeding as an applicant in reliance on s 237 of the Act and cause further expense to both Mr Scroope and the respondent, if the ultimate outcome is that the statutory demand is set aside. I will give the parties an opportunity to consider these reasons. On the face of the financial statements of the trust, the respondent is entitled to pursue her claim to be repaid the loan to the trust, but in a proceeding that allows the reality of the dispute between the members of the applicant to be canvassed properly. I would not be inclined to make any costs order in favour of the respondent, because of her choosing an inappropriate process for pursuing repayment of the loan, but Mr Scroope had no authority to commence this proceeding on behalf of the applicant. If the parties are agreeable, I propose that on the undertaking of Mr Scroope to indemnify the applicant for its costs of the proceeding, the creditor's statutory demand dated 5 September 2018 is set aside and that there be no order as to the costs of the application. In the meantime,

I will adjourn the further hearing on the terms of the orders to be made to reflect these reasons to a date to be fixed.

[20] After I published the above reasons, it was not necessary to adjourn the further hearing on the terms of the orders, as all parties concurred to my making the first order that I proposed in the preceding paragraph. In relation to costs, the respondent did not wish to be heard on the proposed order that there be no order as to costs. I was not persuaded by the applicant (and Mr Scroope) to change the provisional view I had reached on costs. Although I found that the respondent's issuing of the statutory demand was an abuse of process, the applicant was unsuccessful in disputing the debt and increased the costs by the material adduced to support that unsuccessful argument.

[21] I therefore make the following orders.

1. Upon the undertaking of Mr Scroope to indemnify the applicant for the costs of the proceeding, the creditor's statutory demand dated 5 September 2018 is set aside.
2. No order as to the costs of the application.