

SUPREME COURT OF QUEENSLAND

CITATION: *Lunapas Pty Ltd v Palermo Seafoods Pty Ltd* [2018] QSC 301

PARTIES: **LUNAPAS PTY LTD ACN 104 180 743**
(applicant)
v
PALERMO SEAFOODS PTY LTD ACN 116 746 859
(a.k.a. ACN 116 746 859 PTY LTD)
(respondent)

FILE NO: BS11692 of 2018

DIVISION: Trial Division

PROCEEDING: Application to set aside statutory demand

DELIVERED ON: 14 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 10 December 2018

JUDGE: Mullins J

ORDER: **1. The statutory demand served on the applicant on 8 October 2018 is varied by reducing the amount of the demand to \$192,604.58.**
2. It is declared the demand, as so varied, to have had effect from 8 October 2018.

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – OFFSETTING AND OTHER LIKE CLAIMS – GENERALLY – where the applicant was the landlord of a premises operated as a restaurant and associated business by the respondent – where the respondent obtained judgment against the applicant in New South Wales for plant, stock and equipment from the business as well as a sum for interests and costs – where the debt is the subject of the creditor’s statutory demand – where the applicant seeks to set aside the statutory demand – whether the statutory demand can be set aside on the basis of an offsetting claim for an amount equal to or greater than the statutory demand or on the basis that there are defects in the statutory demand

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

ACN 116 746 859 (formerly known as Palermo Seafoods Pty Ltd) v Lunapas Pty Ltd [2017] NSWSC 1583, related

ACN 116 746 859 (formerly Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2018] NSWCA 203, related
Body Corporate Repairs Pty Ltd v Oakley Thompson & Co Pty Ltd (2017) 322 FLR 355; [2017] VSC 435, considered
Dream Money Pty Ltd v Bernhard [2016] WASCA 193, considered
Fleur De Lys Pty Ltd v Jarrett (2004) 51 ACSR 238; [2004] FCA 1357, considered
Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2015] NSWCA 149, related
Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2016] NSWCA 82, related
Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (No 2) [2014] NSWSC 1323, related
Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (No 3) [2015] NSWCA 359, related
Securicom (NSW) Pty Ltd v Charter Pacific Corporation Limited [2018] QSC 109, considered

COUNSEL: J M Nott (*sol*) for the applicant
 J R Moxon for the respondent

SOLICITORS: Jason Nott Solicitors for the applicant
 CJM Lawyers for the respondent

- [1] The parties to this application have been involved in litigation in courts in both Queensland and New South Wales and various levels of courts since 2013. The applicant was the landlord of premises operated as a seafood restaurant and associated business by the respondent. Possession of the premises was re-taken by the applicant on 8 May 2013. The respondent obtained a judgment against the applicant in the Supreme Court of New South Wales on 11 December 2017 for the sum of \$250,000 as damages for the plant, equipment and stock converted by the applicant on 8 May 2013, and also a judgment for interest of \$70,648.12 and costs of \$13,715.75, making a total of \$334,363.87. (The principal judgment dealing with the claim was given by Slattery J in *ACN 116 746 859 (formerly known as Palermo Seafoods Pty Ltd) v Lunapas Pty Ltd* [2017] NSWSC 1583 (the principal judgment). The total debt of \$334,363.87 was the subject of the creditor's statutory demand served on the 8 October 2018 which the applicant seeks to set aside.

The grounds

- [2] The primary ground pursued by the applicant at the hearing was that pursuant to s 459H(1)(b) of the *Corporations Act* 2001 (Cth) (the Act) it has an offsetting claim for a sum equal to or exceeding the total amount claimed by the respondent in the statutory demand.
- [3] The other ground relied on to set aside the statutory demand is that provided for in s 459J(1)(a) of the Act that there are defects in the statutory demand. The first defect is

that the demand identifies the respondent as “Palermo Seafoods Pty Ltd ACN 116 746 859” when the respondent had changed its name in December 2016 to “ACN 116 746 859 Pty Ltd”. The second defect is that the demand showed the address for service of any application and affidavit at the respondent’s solicitors’ office in Chinderah in New South Wales, where the address for service of the statutory demand on the applicant was in Queensland. No issue was taken by the respondent as to the manner of service of the application and supporting affidavit on the respondent’s solicitors. Even though the respondent’s name was shown incorrectly on the demand, it is apparent from the ongoing relationship of the parties that no confusion was caused to the applicant by that defect. In the circumstances, the applicant cannot show that either defect in the statutory demand would cause substantial injustice to the applicant, unless the demand were set aside, and the applicant cannot succeed on the alternative ground under s 459J(1)(a) of the Act.

Nature of the offsetting claim

- [4] The offsetting claim identified in the supporting affidavit of Mr Menniti who is the sole director and shareholder of the applicant can be summarised as follows:
- (a) the amount of the claim made by the applicant against the respondent in Southport Magistrates Court proceeding No 50064 of 2017 (the Southport proceeding) for rent of \$75,428.57 for the period 3 February 2012 to 8 May 2013 together with interest in the sum of \$41,230.72 plus costs;
 - (b) a costs order made in the applicant’s favour against the respondent on a security for costs application determined by Leeming JA in *Palermo Seafoods Pty Ltd v Lunapas Pty Ltd* [2015] NSWCA 149;
 - (c) a costs order in favour of the applicant against the respondent of the notice of motion dismissed by Leeming J in *Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (No 3)* [2015] NSWCA 359;
 - (d) the order for costs in favour of the applicant against the respondent made by New South Wales Court of Appeal in *ACN 116 746 859 (formerly Palermo Seafoods Pty Ltd v Lunapas Pty Ltd* [2018] NSWCA 203 (the 2018 Court of Appeal judgment);
 - (e) three costs orders in three separate proceedings in this court and two costs orders in another two proceedings in the Supreme Court of New South Wales all in favour of the applicant against the respondent.
- [5] Mr Menniti deposes to an estimated range of costs that the applicant is likely to recover from the respondent in respect of matters (b), (c) and (d). No estimate is made in respect of the five costs orders in matter (e).
- [6] Mr Nott who is the solicitor acting for the applicant in this proceeding swore two affidavits on 10 December 2018 that supplemented Mr Menniti’s affidavit and were

filed by leave, without objection, for the purpose of the application. In one of those affidavits, Mr Nott refers to the judgment of Young AJ in *Palermo Seafoods Pty Ltd v Lunapas Pty Ltd (No 2)* [2014] NSWSC 1323 at [34] where reference was made to the taking of possession by the landlord on 8 May 2013 and that both parties accepted that put an end to any tenancy for the purpose of showing that it was common ground between the parties that the rental claimed in the Southport proceeding was for the period that ended on 8 May 2013. Mr Nott also sets out his opinion as a solicitor of more than 10 years' experience and from his conduct of the Southport proceeding and carriage of the proceeding that resulted in the 2018 Court of Appeal judgment that the costs estimates set out in Mr Menniti's affidavit "are a fair and reasonable estimate of the costs incurred by the applicant in which the adverse costs orders have been made".

- [7] I expressed concern during the hearing of the application that the applicant was seeking to set off costs orders in its favour, when it appeared that there may have been further costs orders against the applicant in favour of the respondent. The respondent's solicitor, Mr James, therefore filed by leave an affidavit affirmed on 10 December 2018 for the purpose of the hearing of the application that detailed costs orders made in favour of the respondent against the applicant that had not been assessed and for which payment had not yet been sought by the respondent from the applicant.
- [8] Mr James identified four costs orders made in favour of the respondent against the applicant. The first was an order in Southport Magistrates Court proceeding No 2040 of 2013 on 2 March 2015 where the respondent and Mr J Palermo and Mr F Palermo succeeded on an application in having a default judgment obtained by the applicant set aside, in addition to the enforcement proceedings. The order was for the applicant to pay the costs of the respondent and the other two defendants of the application on the standard basis for claims in excess of \$50,000 to be agreed or failing agreement to be assessed. Mr James exhibits a letter from the solicitors who acted on the respondent's behalf that shows invoices rendered by that firm for a total of \$14,416.03, but there is no evidence that the respondent paid those invoices and that costs order can be disregarded for the purpose of this proceeding.
- [9] The second costs order was made by the New South Wales Court of Appeal in *Palermo Seafoods Pty Ltd v Lunapas Pty Ltd* [2016] NSWCA 82 in which the applicant and Mr Menniti were ordered to pay the respondent's costs of a successful appeal against the orders made by Young AJ on 26 September 2014 and where a new trial was ordered to be limited to the respondent's claim for damages by reason of the applicant's use and failure to return the respondent's plant and equipment. Mr F Palermo appeared with another legally unqualified person on behalf of the respondent and the applicant was given a certificate, if otherwise qualified, under the *Suitors' Fund Act 1951* (NSW). Any costs payable by the applicant as a result of the second order are likely to be minimal, if any, and can be disregarded.
- [10] The re-trial was before Slattery J. After the principal judgment was delivered, the questions of interest and costs were dealt subsequently and the applicant and Mr Menniti endeavoured to claim a set off for the unpaid rent that is the subject of the Southport proceeding or a stay to the extent of the amount claimed in the Southport proceeding. That application was refused: *ACN 116 746 859 (formerly known as Palermo Seafoods Pty Ltd) v Lunapas Pty Ltd (No 3)* [2018] NSWSC 539. It was that

judgment which also dealt with the costs of the re-hearing and the principal judgment that was the subject of the appeal that resulted in the 2018 Court of Appeal judgment. The respondent had limited success on this appeal obtaining only a variation of the costs order in its favour and that was why the applicant was successful in obtaining the order for costs against the respondent of the appeal that is matter (d) in the offsetting claim.

- [11] The third costs order referred to by Mr James is the costs order made by Slattery J on 30 April 2018, as a result of the principal judgment that was varied by the fourth costs order made in the 2018 Court of Appeal judgment. The third and fourth costs orders are reflected in the costs sought in the statutory demand. My concern about outstanding costs orders against the applicant in favour of the respondent was therefore unfounded.

What substantiation was required for the offsetting claim?

- [12] The first issue of principle that needs to be resolved is the point taken by the respondent that there was not sufficient substantiation by the applicant of the amount of the costs it relied on for its offsetting claim for those costs orders to be taken into account on this application.
- [13] The respondent placed reliance on the decision of Randall AsJ in *Body Corporate Repairs Pty Ltd v Oakley Thompson & Co Pty Ltd* (2017) 322 FLR 355 at [60]-[61] to support the submission that a nominal value of \$1 should be contributed to each of the costs orders relied on by the applicant for an offsetting claim. In *Body Corporate Repairs*, the plaintiff relied on two costs orders in its favour where the plaintiff's director deposed to believing that a proper estimate of those costs orders was in the vicinity of \$50,000 to \$70,000 without detailing the basis for the information and belief. It was held that stating an approximation of the costs orders without deposing to the basis of the belief in that approximation or submitting any additional evidence was not sufficient evidence to substantiate the offsetting claim. The respondent also relied on the refusal of Martin J in *Securicom (NSW) Pty Ltd v Charter Pacific Corporation Limited* [2018] QSC 109 at [70] to treat a "bald assertion" as to the amount of a claim under a costs order that was unsupported by any detail as an offsetting claim.
- [14] The applicant relied on the approach of Hely J in *Fleur De Lys Pty Ltd v Jarrett* (2004) 51 ACSR 238 who noted at [30] that "the fact that costs have not as yet been taxed does not necessarily prevent the costs from constituting a debt" and was satisfied the plaintiff had an offsetting claim against the defendant for a costs order where the bill of costs had been prepared on behalf of the plaintiff, but not conveyed to the defendant or been the subject of taxation.
- [15] *Dream Money Pty Ltd v Bernhard* [2016] WASCA 193 was an appeal from the decision of a master who found that there was no evidence upon which an assessment could be made of a costs order in favour of the appellant where the appellant relied on that costs order as an offsetting claim against the judgment sum claimed in the statutory demand. In their joint judgment Newnes and Murphy JJA found there was sufficient evidence before the master to enable him to estimate the amount the appellant would be entitled on a taxation of its costs and noted at [26] that it was permissible for the master to

estimate the amount the appellant would be allowed on the taxation of its costs of the counterclaim and that:

“In making that estimate, the court was entitled to bring to bear its own knowledge and experience of the assessment of costs in light of the evidence as to the nature, scope and complexity of the proceedings.”

- [16] There is a divergence in the authorities as to the extent of supporting documentation that is required to enable a costs order in favour of the company which has received the statutory demand to be treated as an offsetting claim. Clearly, what is sufficient substantiation in relation to a costs order will depend on all the material that is available to the court in the particular matter to ascertain whether the costs order can be the subject of an appropriate estimate or assessment for an offsetting claim.
- [17] Although Mr Menniti’s affidavit by merely deposing to his belief as to estimated costs in respect of the costs orders in matters (b), (c) and (d) without any attempt to produce supporting invoices or detail of the legal work undertaken that is the subject of the costs orders is similar to the facts in *Body Corporate Repairs*, Mr Menniti’s assertion as to the estimated costs must be considered in the context of the greater detail about the proceedings between the applicant and the respondent that resulted in the making of the costs orders that can be gleaned from the series of judgments that both parties have provided relating to those costs orders.

The quantification of the offsetting claim

- [18] Dealing with matter (a) of the offsetting claim, on any view of the Southport proceeding which does not appear to have progressed past the pleadings, it is premature for the applicant to claim to set off the costs of that proceeding against what it owes to the respondent. The respondent’s defence to the Southport proceeding merely asserted that the matter was before the Supreme Court of New South Wales. It appears that the Southport proceeding was on hold while the re-trial before Slattery J and resulting appeal were underway.
- [19] When the applicant was unsuccessful before Slattery J in seeking to set off the rental claim against the amount of damages assessed in the principal judgment, Slattery J expressly contemplated that the applicant would pursue the final hearing of the Southport proceeding “so that it has a countervailing judgment in that court against the Palermo parties”: [2018] NSWSC 539 at [17]. The outstanding rent claim in the Southport proceeding must have been in contemplation of the respondent when the statutory demand was issued and should have been deducted as a matter remaining in dispute between the parties. In light of the view expressed by Slattery J when dealing with the rent claim, it is difficult for the respondent to contend that the claim for rent is the subject of an *Anshun* estoppel. There was no other substantial challenge to the quantification of the rent claim, and it is appropriate to allow the amount of the claim and interest of \$116,759.29 as an offsetting claim.
- [20] In relation to matter (b), the applicant was represented by solicitors and counsel for the security for costs application. The level of security ordered by Leeming JA of \$20,000 for the appeal gives some indication of the appropriate level of recoverable costs for the

security for costs application. In the absence of production by the applicant of the actual invoices rendered by its solicitors and counsel, but in the light of the detail concerning the application in the judgment, it is appropriate to assess that costs order for the purpose of the offsetting claim at \$10,000.

- [21] The costs order in matter (c) is in a different category. That was made in respect of the respondent's application for the issue of seven subpoenas for the purpose of the appeal against the judgment of Young AJ. The respondent was not represented by a lawyer and the applicant did not retain solicitors, but instructed A Lauchland of counsel who appeared by telephone. The application for the issue of the subpoenas to adduce new evidence on the appeal, as is apparent from the judgment on the application, was not one of any difficulty. Mr Menniti gives no explanation as to why he has not previously obtained an invoice from the counsel who appeared. Having regard to the nature of the application and that counsel's appearance was limited to the telephone, any costs must have been minimal, and therefore will be disregarded for the purpose of assessing the offsetting claim.
- [22] In relation to matter (d), I have difficulty with Mr Nott's endorsement of Mr Menniti's estimate of \$35,000 to \$60,000 for recoverable costs under the costs order made in the 2018 Court of Appeal judgment, when Mr Nott has not produced any memoranda of counsel's fees or his firm's invoices for acting in the appeal.
- [23] The judgments appealed against were made on 11 December 2017 and 30 April 2018. The appeal was heard on 14 September 2018. It is apparent from the 2018 Court of Appeal judgment at [43]-[45] that, because the applicant and Mr Menniti were "derelict" in their compliance with the orders of the Registrar for the conduct of the appeal, the costs order in their favour only related to the work undertaken by their lawyers from 29 August 2018 which coincided with the retainer of the lawyers on or around that date. That covered the filing of submissions on 10 September 2018 and the hearing of the appeal on 14 September 2018. In the absence of any attempt on the applicant's part to provide any other supporting documents or information about the quantum of the costs which is the subject of this order, it is appropriate on the material that is available to apply the approach approved by the majority in *Dream Money* and assess the recoverable costs under the limited costs order in the applicant's favour at \$15,000.
- [24] In relation to the other five costs orders under matter (e), the complete absence of any detail of the costs or any information about the circumstances in which those costs orders were made means that no offsetting claim can be assessed in relation to them.

Orders

- [25] The applicant has been successful in establishing an offsetting claim to the extent of \$141,759.29. It is therefore appropriate to make orders under s 459H(4) of the Act as follows:
1. The statutory demand served on the applicant on 8 October 2018 is varied by reducing the amount of the demand to \$192,604.58.
 2. It is declared the demand, as so varied, to have had effect from 8 October 2018.

[26] I will give the parties an opportunity to consider these reasons, before hearing submissions on the appropriate costs order.