

# SUPREME COURT OF QUEENSLAND

CITATION: *Calbeninka Pty Ltd v Vickers & Anor* [2019] QSC 28

PARTIES: **CALBENINKA PTY LTD**  
(applicant)  
v  
**DERRICK VICKERS AND SAM MARSDEN AS TRUSTEES FOR THE OSTWALD CONSTRUCTION MATERIALS CREDITORS TRUST**  
(respondents)

FILE NO: BS13857 of 2018

DIVISION: Trial Division

PROCEEDING: Application to set aside statutory demand

DELIVERED ON: 22 February 2019

DELIVERED AT: Brisbane

HEARING DATE: 6 February 2019

JUDGE: Mullins J

ORDER: **1. The statutory demand served on the applicant on 4 December 2018 is varied by reducing the amount of the demand to \$41,605.51.**

**2. It is declared that the demand, as so varied, to have had effect from 4 December 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 – VARIATION OF DEMAND – where the applicant traded with a company to which administrators were appointed and which became the subject of a deed of company arrangement – where a creditors’ trust was created pursuant to the deed of company arrangement and the debts owed to the company were assigned to the trustees of the creditors’ trust for collection – where the trustees served a statutory demand on the applicant for debts owed to the company from trading whilst under the deed of company arrangement – where the applicant seeks to set aside the statutory demand – whether there is a genuine dispute about the existence or the amount of the debt or offsetting claims– where statutory demand reduced on the basis of an offsetting claim

*Corporations Act 2001 (Cth), s 459H, s 553C*

*Dream Money Pty Ltd v Bernhard* [2006] WASCA 193, considered

COUNSEL: P W Hackett for the applicant  
A G Psaltis for the respondent

SOLICITORS: GTC Lawyers for the applicant  
Clayton Utz for the respondent

- [1] Mr Vickers and Mr Marsden as trustees for the Ostwald Construction Materials Creditors Trust (the trustees) served a statutory demand dated 4 December 2018 on the applicant for payment of a debt of \$46,605.51. The applicant applies to set aside the statutory demand pursuant to s 459H of the *Corporations Act* 2001 (Cth) (the Act) on the basis that there is a genuine dispute about the existence or the amount of the debt or there is an offsetting claim.

### **The nature of the claimed debt**

- [2] On 25 August 2017 the trustees were appointed voluntary administrators of Ostwald Construction Materials Pty Ltd (OCM) and Ostwald Bros Pty Ltd (OB). OB went into liquidation on 30 November 2017. On 1 December 2017 the creditors of OCM resolved that OCM enter into a Deed of Company Arrangement (DOCA). On 19 December 2017 OCM entered into the DOCA and the trustees were appointed joint and several deed administrators of the DOCA. Between 19 December 2017 and 9 March 2018 the trustees caused OCM to continue to trade (as a company subject to a deed of company arrangement), while the conditions of the DOCA were being satisfied.
- [3] The DOCA provided for a significant sum (defined as the Deed Contribution) to be paid by Messrs Ostwald to the trustees as the deed administrators. The objectives of the DOCA were to maintain the moratorium under clause 4 of the deed in respect of any claims by creditors admissible under the DOCA, to enable OCM to be solvent and to continue to trade at the conclusion of the DOCA, and to establish the deed fund and transfer it to a Creditors' Trust to form a trust fund from which creditors of OCM could be paid dividends. Under clause 4 of the DOCA, creditors were required to accept their rights and entitlement specified in the DOCA in substitution for all claims which they have, or claimed to have, against OCM. Clause 4.4 of the DOCA provided:

“Creditors may exercise against OCM those rights of set-off or cross-action to which the Creditor would have been entitled under section 553C of the Corporations Act had OCM been wound up in accordance with the Corporations Act on the Appointment Date.”

- [4] Pursuant to the DOCA, the Ostwald Construction Materials Creditors Trust (the Creditors' Trust) was created. The fund constituted under clause 7 of the DOCA comprising the Deed Contribution and the property of OCM other than the Retained Assets (as defined in the DOCA) was transferred to the Creditors' Trust for the purpose of forming a trust fund from which creditors of OCM would be paid dividends. The definition of Retained Assets specifically excluded “any money due to OCM under any

contract which becomes payable on or before the satisfaction of the obligations in clause 7.4". Pursuant to the DOCA, all debtor balances invoiced by OCM to and including 9 March 2018 were assigned to the Creditors' Trust and became the property of the Creditors' Trust. Notice of the assignment of the debts owed by the applicant to OCM was eventually given by the trustees to the applicant by their solicitor's letter dated 23 November 2018. To the extent the trustees rely on their letter addressed to Thercalben Pty Ltd trading as Boodle's Sand & Gravel dated 31 May 2018, that letter was not notice to the applicant of the assignment to the trustees of the debts owed by the applicant to OCM. On 15 March 2018, the DOCA was completed in accordance with its terms, control of OCM was restored to its directors, and the Creditors' Trust became effective in accordance with terms of DOCA and the trust deed for the Creditors' Trust.

- [5] During the administration period, the applicant and OCM continued to trade and OCM obtained supplies from the applicant in respect of which the trustees paid the invoices. The applicant also traded with OB whilst it was in administration and liquidation and all invoices issued by the applicant to OB during that period were paid by the administrators and/or liquidators.
- [6] The trustees claim that the sum of \$46,605.51 is owed to the trustees in respect of the following invoices rendered by OCM to the applicant for materials supplied and plant hire on the following dates during the administration for the following amounts:

Invoice No	Invoice Date	Amount
43301	31/01/18	\$25,292.30
43308	15/02/18	797.94
43299	19/02/18	3,997.00
43302	28/02/18	9,350.00
43319	09/03/18	7,168.37
		\$46,605.51

- [7] The trustees are seeking to collect these debts which they claim are owed to them as the trustees of the Creditors' Trust, so that a distribution can be made to the creditors of OCM.

### **The nature of the dispute**

- [8] The applicant trades under the name "Boodles" and since 2010 has been a supplier to the Ostwald group of companies including OB and OCM. During the same period OB and OCM have also been suppliers to the applicant and at least one other company in the Boodles Group called Thercalben Pty Ltd. It appears that the applicant trades as Boodle's Concrete and Thercalben Pty Ltd trades as Boodle's Sand & Gravel. From time to time accounts between the applicant and Thercalben Pty Ltd, on the one hand, and OB and OCM, on the other hand, have been offset against each other.
- [9] The matters raised by the applicant on the application to dispute the debts can be summarised as follows:
- (a) the existence of an overarching offsetting agreement between the Ostwald companies and the Boodles companies that applied to the debts owed

between the groups of companies before the administration of OCM commenced;

- (b) whether the applicant was owed \$69,884.11 by OCM rather than OB at the commencement of the administration of OCM;
- (c) whether the subject debts were incurred at all by the applicant;
- (d) whether the invoices issued by the applicant in the sum of \$24,080.14 between 16 March and 3 July 2018 related to debts incurred while OCM was subject to the DOCA and therefore should be offset against debts owed by the applicant to the trustees;
- (e) whether an estimate of the amount owed by the Creditors' Trust to the applicant pursuant to the costs order made on 5 December 2018 after the first statutory demand dated 8 October 2018 was withdrawn by the trustees on 4 December 2018 (as it was wrongly issued in the name of "Ostwald Construction Materials Creditors Trust" as the creditor instead of the trustees) is an offsetting claim.

[10] Although Mr Boodle who is the executive officer of the applicant expressed frustration in his affidavits about what he describes as OCM and associated entities continuing "to chop and change their company names", the fact remains that there is a change of status of a company when it enters administration or liquidation, or is the subject of a DOCA, and debtors and creditors are affected by the particular status of the company with which they are dealing. This is an unusual matter, as the trustees can only pursue the debts owed by debtors to OCM before the DOCA came to an end on 15 March 2018 that fall within the exclusion to the definition of Retained Assets in the DOCA.

[11] The terms on which OCM traded with the applicant, after OCM returned to trading as a company under the control of its directors and was no longer under administration when the DOCA had been carried out on 15 March 2018, is irrelevant to the arrangements that may have existed between the trustees (when in control of OCM as administrators) and the applicant or between OCM and the applicant prior to the commencement of the administration of OCM. The offset arrangement implemented by OCM in relation to debts owed by the applicant to OCM on 31 July 2018 as shown in exhibit BB2 to the affidavit of Mr Boodle filed on 17 December 2018 (Mr Boodle's first affidavit) does not refer, or purport to be pursuant, to any overarching offsetting agreement that was operative prior to the administration of OCM. It was, in fact, the subject of a specific request on behalf of OCM made on 27 June 2018, as to whether the applicant was happy to proceed by way of offset in request of identified invoices. It should also be noted that the four invoices totalling the sum of \$24,080.14 issued by the applicant to OCM which were offset against invoices from OCM to the applicant issued after OCM resumed trading on the completion of the DOCA are the same invoices that are now the subject of the applicant's submission that it is arguable those invoices related to debts incurred by OCM, while OCM was subject to the DOCA.

- [12] At the time that OCM went into administration, the applicant claimed it was owed \$69,884.11, but the supporting documentation it provided to the trustees that is exhibit BB1 to Mr Boodle's first affidavit showed that it was OB that owed \$69,884.11 to the applicant, as each of the applicant's invoices is directed to OB. The solicitors for the trustees in their letter dated 23 November 2018 to the applicant assert that the applicant lodged a proof of debt in the liquidation of OB for this debt of \$69,884.11. That is consistent with the applicant's own invoices for the total debt of \$69,884.11 issued to OB and inconsistent with the debt being owed by OCM. Mr Boodle does not deny that the applicant lodged the proof of debt as a creditor of OB for the sum of \$69,884.11. Neither party deals, however, with whether the applicant's proof of debt was accepted in the liquidation of OB. One of the invoices that comprises this debt of \$69,884.11 is invoice C7104067 dated 24 April 2017 for an amount of \$25,954.50. This invoice appears to have been generated after a contra agreement proposal had been put on behalf of OCM to Thercalben Pty Ltd by letter dated 2 February 2017 which I will deal with below in relation to the evidence relied on by the applicant to establish the overarching offsetting agreement.
- [13] The applicant therefore wishes to pursue a claimed entitlement to offset the debt owed by OB to the applicant for \$69,884.11 in respect of the debts owed by the applicant to OCM, on the basis the offsetting agreement applied, irrespective of the Ostwald entity or Boodles entity involved at the time or that the debt of \$69,884.11 was, in fact, owed by the applicant to OCM rather than OB, despite what the applicant's own invoices show.
- [14] Mr Boodle in exhibit BB2 to his affidavit filed by leave on 6 February 2019 (Mr Boodle's second affidavit) exhibits a number of documents that the applicant relies on to assert the offsetting agreement, without providing any further explanation about the underlying transactions. Mr Boodle exhibits a letter dated 9 July 2013 on OB letterhead to Thercalben Pty Ltd in which reference is made to the sum of \$78,541.83 owed by Thercalben Pty Ltd to OCM and the proposal put by OCM in that letter that Thercalben Pty Ltd "consents to complete their debt to [OCM] to the value of \$78,541.83" and "consents to a reduction in the debt owed to them by [OB] to the value of \$78,541.83 by applying the contra to the Invoices listed in the attached sheet". The summary of invoices shows OB as the creditor and OCM as the debtor. Although Mr Boodle does not depose to his acceptance of the offer from OB and OCM to participate in the offset, it appears that the purpose of Mr Boodle exhibiting this letter is to show an offsetting transaction that took place to illustrate his general assertion in paragraph 3 of his first affidavit that the accounts between the companies were offset against one another.
- [15] Mr Boodle also exhibits as part of exhibit BB2 to his second affidavit a letter dated 16 October 2013 on OB letterhead to Thercalben Pty Ltd where a proposal is made to perform a contra of the debt owed by Thercalben Pty Ltd (which is shown as trading as "Boodle's Sand & Gravel Concrete") to OCM in respect of the sum of \$119,221.96. (Mr Boodle exhibits this letter and attached summary of invoices twice in exhibit BB2.) Someone has in handwriting altered the letter, so that the reference to the debt owed by OB to Boodle's Sand & Gravel Concrete has had the trading name struck through and replaced with "Boodles Concrete". Again, the summary of invoices attached to this letter shows the amounts payable to OCM and the amounts payable by OB. It appears

that Mr Boodle also included this letter to support his general assertion about offset transactions.

- [16] The third example of an offset transaction that is included in exhibit BB2 to Mr Boodle's second affidavit is the letter dated 6 December 2013 on OB letterhead that is again addressed to Thercalben Pty Ltd where it is proposed that the sum of \$166,136.92 owed by Thercalben Pty Ltd to OCM be offset against the debt owed by OB to what is described in the letter as "Boodle's Sand & Gravel Concrete", but is described in the list of invoices in the attached summary to the letter as Boodle's Concrete. (Mr Boodle exhibits this letter and attached summary of invoices twice in exhibit BB2.) Again Mr Boodle does not depose to his acceptance of the offer from OB and OCM to participate in the offset, but I infer that by exhibiting the letters Mr Boodle is intending to show that another offset transaction took place and the offset for the sum of \$166,136.92 is then verified by a bill payment history showing the contra payment method for the total amount of \$166,136.92.
- [17] There is another example in exhibit BB2 to Mr Boodle's second affidavit of a contra agreement proposed by letter dated 20 May 2014 on OB letterhead to reduce the debt owed by Boodle Sand & Gravel to OCM by \$54,173.27 by a contra of the debt owed by OB to Boodle Sand & Gravel. Again the list of attached invoices has been annotated by one list being noted as invoices of the applicant. By exhibiting this letter Mr Boodle appears to intend to show that another offset transaction took place that was completed for the sum of \$54,173.23.
- [18] There is another example of a proposal on OB letterhead to Thercalben Pty Ltd trading as Boodle Sand & Gravel Concrete dated 2 February 2017 in respect of an amount owed by Boodle Sand & Gravel Concrete to OCM of \$12,735.94 by performing a contra for hire by Boodle Sand & Gravel Concrete to OCM of an agitator to the value of \$12,735.94 with any additional debt owed to Boodle Sand & Gravel Concrete after the contra has been processed to be subject to OCM's standard supplier agreement. The hire of the agitator appears to be the subject of the applicant's invoice C7104067 for \$25,954.50 directed to OB which did not appear to reflect the contra entry for the debt owed by Thercalben Pty Ltd to OCM of \$12,735.94. There is no specific explanation by Mr Boodle, as to why the hire of the agitator was invoiced to OB. There is a general assertion in paragraph 10 of Mr Boodle's first affidavit that "Boodles was merely told who to make the invoices out to, by the Accounts receivables at Ostwald's". Mr Boodle does not state that was what happened in relation to invoice C7104067 (or in respect of the other invoices that comprise the debt of \$69,884.11). I could not infer that the proposal for a contra agreement in the letter of 2 February 2017 was accepted when the invoice C7104067 does not in any way refer to the specific contra agreement that was proposed in the letter of 2 February 2017. There are no other documents disclosed by the applicant which confirm the implementation of the contra agreement for that invoice. In fact, the email that is also included from OB dated 26 April 2017 shows that OB disputed the invoice which charged for hire for 143 hours, when OB asserted that the hire was for a total of 72 hours only. There is no basis to go behind the applicant's own invoice C7104067 that is directed to OB. There is also no basis for going behind the other invoices directed to OB by the applicant that comprise the debt of \$69,884.11.

- [19] Apart from the proposal in the 2 February 2017 letter that was prospective in relation to the hire of an agitator that was yet to take place, the examples of offsetting transactions prior to the administration of OCM illustrate a specific offset agreement reached in respect of identified transactions. There was no suggestion by Mr Boodle of any communications or correspondence that set up the framework for offsets to apply when debts owed to one Ostwald company by a Boodle company were approximately equal in amount to debts owed by any Ostwald company to a Boodle company. No investigation is required of an overarching offset agreement that had the effect contended for by Mr Hackett of counsel on behalf of the applicant before the administration of OCM commenced, as any offset that was implemented was on a proposal by proposal basis with respect to identified invoices. Once the administrators were appointed to OCM, any question of offset was regulated by s 553C of the Act, until the DOCA took effect when clause 4.4 provided for set off equivalent to s 553C. None of the invoices that comprise the total sum of \$69,884.11 which were issued by the applicant to OB is capable of such a set off against the debts owed by the applicant to OCM.
- [20] To the extent it is asserted that there is a dispute as to whether the debts the subject of the statutory demand were incurred by the applicant, there is no material relied on by the applicant to assert the relevant supplies the subject of each of the invoices were not made to the applicant. To the extent that it is argued that invoice 43301 did not appear in the monthly statement issued by OCM for January 2018, that is explained by the fact that the invoice, though dated 31 January 2018, did not issue until 26 February 2018. The other invoices the subject of the statutory demand were rendered by OCM when it was subject to the DOCA and therefore were debts assigned to the trustees for their collection. That explains why those invoices were not in the first statement issued by OCM in April 2018 when it resumed trading under control of the directors. The invoices that are the subject of the statutory demand are not collectable by OCM.
- [21] It is indisputable on the material that the invoices that have been issued by the applicant to OCM for the total sum of \$24,080.14 between 16 March and 3 July 2018 were debts incurred by OCM after the DOCA ended and were therefore not debts for which the trustees could have been liable, as is shown by the fact that they were the subject of an offset transaction effected on 31 July 2018.
- [22] It appears that the trustees endeavoured to pursue the debt of \$46,605.51 in the first instance from Thercalben Pty Ltd instead of the applicant, by issuing a statutory demand to that company for a larger account that also included the debt of \$46,605.51. The trustees then made a mistake in issuing the first statutory demand against the applicant in the name of the Creditors' Trust instead of the trustees' name. The fact that the trustees have made errors in the past does not mean the court should infer that the current statutory demand is likely to be flawed, when the documents put forward by both parties do not otherwise suggest any error.
- [23] A genuine dispute, in the sense referred to in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787, as to the debts which are the subject of the statutory demand or an offsetting claim is not shown by the assertions made by Mr Boodle that are not reflected by the exhibited documents. There is not a genuine dispute that the issuing of invoices by the applicant to OB for the total sum of \$69,884.11 should be ignored and they

should be treated as invoices that should have been issued by the applicant to OCM instead.

- [24] The solicitors who currently act for the applicant were not the solicitors who acted in respect of the first statutory demand. That presumably explains why there is no quantification of the costs that are recoverable by the applicant from the trustees in respect of the application to set aside the first statutory demand. The trustees do not dispute that such a costs order was made against them, but rely on the fact the costs have not been quantified. Because that costs order arose out of the same process of recovery by the trustees that resulted in the statutory demand issued on 4 December 2018, it would be unfair in connection with this application not to allow some credit to the applicant for the beneficial costs order it has against the trustees. In the absence of any attempt by the applicant to provide any evidence of its costs, but applying a similar approach to that approved in the joint judgment in *Dream Money Pty Ltd v Bernhard* [2006] WASCA 193 at [26], I am inclined to allow only a conservative sum for the purpose of an offsetting claim based on my experience in fixing the quantum of costs on a standard basis for one relatively straightforward application in the Supreme Court. I have had regard to the fact that any substantial dispute relating to the first statutory demand had resolved when the first statutory demand was withdrawn the day before the application to set it aside was due to be heard in this Court. The sum of \$5,000 will be allowed as the estimated costs payable by the trustees to the applicant pursuant to the costs order.

### **Orders**

- [25] As the applicant has been successful in establishing an offsetting claim to the extent of \$5,000, the orders that should be made under s 459H(4) of the Act are:
1. The statutory demand served on the applicant on 4 December 2018 is varied by reducing the amount of the demand to \$41,605.51.
  2. It is declared that the demand, as so varied, to have had effect from 4 December 2018.
- [26] I will give the parties an opportunity to consider these reasons, before hearing submissions on costs.