SUPREME COURT OF QUEENSLAND

CITATION:	***RE: Queensland Premier Mines PTY LTD*** **[2002] QSC 114**
PARTIES:	***QUEENSLAND PREMIER MINES PTY LTD (A.C.N. 010 614 552)*** (Applicant) v **RUSTY FRENCH** (Respondent)
FILE NO:	S72/2002
DIVISION:	Trial Division
DELIVERED ON:	30 April 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	19 April 2002
JUDGE:	Dutney J
ORDERS:	**That the statutory demand served by the respondent on the applicant on 22 January 2002 be set aside. Costs to abide the result in action S187/2002 between Queensland Premier Mines PTY LTD and Rusty French.**
CATCHWORDS:	CORPORATIONS LAW – STATUTORY DEMAND – sufficiency of supporting affidavit – whether supporting affidavit identifies the nature of the dispute as being as to the existence of a contract between Marminta and the respondent – whether applicant's affidavit is a supplementary affidavit according to S459G Corporations Law. CONTRACT – FORMATION – offer and acceptance – whether necessary elements of a contract exist - intention to be bound. STAMP DUTIES – INSTRUMENTS LIABLE – whether letter proposes terms of conditional contract dutiable.

Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1996) 70 FCR 452 – FAA.
Haque v Haque (1965) 114 CLR 98 – CON.
Howard v Miller [1915] AC 318 – CON.
Re Morris Catering (Aust) Pty Ltd (1993) 11 ACSR 601 – FAA.

Corporations Law (Cth), s459G.
Stamp Act 1894, ss4A, 25.

COUNSEL: J.F. Curran for the Applicant
P.E. Hack SC for the Respondent

SOLICITORS: Robert Harris and Co Solicitors for the Applicant
Hopgood Ganim Lawyers for the Respondent

[1] **Dutney J** This is an application to set aside a statutory demand. The applicant is the mortgagor of land on the Capricorn Coast. The respondent is the registered mortgagee.

[2] The respondent acquired the mortgage by assignment from the original mortgagee, Seventeenth Febtor Pty Ltd.

[3] The alleged dispute in relation to the debt claimed by the respondent arises because of an alleged contract between the respondent and a company, Marminta Pty Ltd. By which the respondent agreed to assign the mortgage to Marminta Pty Ltd for a consideration of $950,000. Marminta is a company related to the applicant in having common directors. Both describe themselves as being in the "Beckinsale Company Group".

[4] The agreement on which the applicant relies is partly written and partly oral or by conduct. Insofar as the agreement is written it comprises a letter from Marminta Pty Ltd to the respondent dated 4 January, 2000 and a facsimile from the respondent to Marminta Pty Ltd dated 5 January, 2000

[5] The earlier letter contains an offer to buy the mortgage for $950,000 by means of a non refundable deposit of $50,000 within 14 days, a payment of $450,000 on 30 April, and a final payment of $450,000 on or before 30 June, 2000.

[6] In the responding facsimile, the respondent, after referring to the letter of the previous day wrote:

> "I hereby accept your offer as set out in the above mentioned fax, on the provision that your non-refundable deposit of $50,000.00 is received in my office within 14 days of this letter. Should the deposit not be received in the agreed period, this acceptance of your offer will no longer be valid."

[7] In my view this facsimile should properly be categorized as a counter offer capable of acceptance by payment of the deposit.

[7] According to Mrs Beckinsale's affidavit, she spoke to the respondent on 19 January, 2000, the date for payment of the deposit and informed him that she couldn't pay it that day but "would be depositing the money first thing tomorrow". Mrs Beckinsale records that Mr French's response was "That will be OK."

[8] The deposit was in fact paid by telegraphic transfer to Mr French's solicitors in Melbourne on the following day, 20 January. In support of her contention Mrs Beckinsale exhibits to her affidavit telephone accounts showing a lengthy conversation with Mr French on 17 January 2000 and two short telephone calls on 19 January 2000.

[9] The solicitors for Marminta Pty Ltd sent transfer documents to Mr French's solicitors on 7 January 2000 for execution. Discussions ensued over the fact that the transfer provided for an immediate assignment even though payments were spread over a 6 month period. Further drafts were exchanged in mid January. In mid January Mr French went out of Australia and remained so until mid February. On his return he says he heard nothing further in

relation to the negotiations until April when he asked Mr Beckinsale if he could apply the Marminta deposit towards rates on the mortgaged properties.

[10] In contrast, Mr Beckinsale says that in early April he met with Mr French and an accountant, a Mr Wharton, in Melbourne at which time Mr French affirmed the contract but asked for the payments to be deferred until after 30 June 2000. On 26 April 2000 Marminta confirmed in writing that the deposit could be applied towards rates previously paid in relation to the land by the respondent.

[11] The next contact recorded in the material was not until June 2001 when Mr Beckinsale asked Mr French if he would sign off on the transfer. Mr French refused denying the existence of any contract. Apart from the deposit Marminta has not paid anything to the respondent.

[12] Apart from a legal issue concerning stamping to which I will come in due course the argument between the parties was as to the existence of a contract to assign the mortgages and as to whether it was sufficiently raised in the material filed within the time prescribed by s459G of the *Corporations Law*.

[13] On 17 April 2002, two days before the hearing of this application Marminta filed a Claim and Statement of Claim seeking specific performance of the agreement to assign the mortgages.

[14] It is not submitted that the application or supporting affidavit was not filed within the prescribed time.

[15] The principles governing applications of this nature are not controversial. The decision of Thomas J in *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605 is often cited in this context and to my knowledge has never been challenged as a correct statement of the law. What the applicant must show is a “genuine” dispute relating to the debt.

[16] It seems to me that there is a genuine dispute concerning the existence of a contract between Mr French and Marminta in relation to the assignment. The correspondence shows that the parties had agreed on terms, albeit subject to the condition precedent as to the date for payment of the deposit. The deposit was paid outside the time on which the contract depended but after an alleged oral variation negotiated between Mrs Beckinsale and the respondent. Negotiations over the form of transfer were then embarked upon and the deposit was retained. The supporting affidavit deposes to the subsequent acknowledgement of the contract by the respondent which assertion is expanded in the later affidavits of Messrs Beckinsale and Wharton. These matters are consistent with the acceptance of a contract by the parties. In light of this conduct I do not consider it is open to me to find that the dispute is not "genuine".

[17] The respondent seeks to exclude the evidence of Mrs Beckinsale on the basis that the critical feature of it, namely the agreement to vary the terms of the agreement regarding payment of the deposit is not something raised within the allowable time. The requirement that the affidavits be filed within the 21 days allowed by s459G was discussed by Sundberg J in *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452 at 459:

> "In order to be a 'supporting affidavit', an affidavit must say something that promotes the company's case. An affidavit which merely says 'I am a director of the company but am too busy at present to make a full affidavit, and I will do so later' would not support the application. It would in no way advance, further or assist the company's cause, which is to have the notice set aside. At the other extreme, the affidavit need not detail, in admissible form, all the evidence that supports the contention of a genuine dispute … That evidence must be available at the hearing of the application to set aside, because that application is for final and not interlocutory relief.
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> In a s459H(1)(a) case, the affidavit must in my view disclose facts showing there is a genuine dispute between the parties. A mere assertion that there is a genuine dispute is not enough. Nor is a bare claim that the debt is disputed sufficient. It follows from the fact that the affidavit need not go into evidence, which is the customary function of an affidavit, that it may read like a pleading."

[18] With respect, I agree. In this case the supporting affidavit identifies the nature of the dispute as being as to the existence of a contract between Marminta and the respondent. It exhibits the correspondence, alleges the payment of the deposit, discloses its retention and alleges the subsequent acknowledgement of the existence of the contract. In this case that is enough to support the application. The subsequent evidence fills out some of the detail in order to show the bona fides of the assertions in the original affidavit. This is legitimate but it does not alter the nature of the assertion made in the original affidavit.

[19] The respondent then relies on the absence of stamping of the correspondence as making its use impermissible by virtue of s4A of the *Stamp Act* 1894. Although repealed, the *Stamp Act* continues to apply in relation to transactions entered into before 1 March 2002. The current legislation, *The Duties Act* 2001 does not have any analogue to s4A.

[20] The duty payable on a transfer of a mortgage over realty under the old legislation is only $5.00. In years gone by it was considered sharp or unethical practice to take a stamping point of this nature against an opponent. Those days have obviously passed.

[21] In any event the point is not well taken. The contract between Marminta and the respondent if it exists is to be found in the facsimile of 4 January, 2000 from the respondent to Mr Beckinsale and the conversation between Mrs Beckinsale and the respondent on 19 January, 2000. Alternatively it is to be inferred from the facsimile and the subsequent conduct of Marminta in paying the deposit, albeit late, and the respondent in retaining the deposit and orally affirming the contract. In neither case is the facsimile an instrument by which anybody is legally bound so as to make it dutiable under s25 of the *Stamp Act.* It is not otherwise dutiable as a contract since it is a mere offer: see *MacRoberson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125. It is thus not caught by s4A and it is not necessary to decide whether this section continues to apply to instruments dutiable prior to 1 March 2002.

[22] During the course of argument I queried whether a contract between Marminta and the respondent could be set up to prevent the respondent demanding payment from the applicant. I agree with Mr Curran for the applicant that the contract if proven results in an equitable assignment of the benefit of the mortgage to Marminta commensurate with the right of Marminta to specific performance: see *Howard v Miller* [1915] AC 318 at 326 per Lord Parker; *Haque v Haque* (1965) 114 CLR 98 at 124-125 per Kitto J. Since the applicant by reason of the relationship between it and Marminta has notice of the assignment it must be at least debatable whether the respondent could give a discharge to the applicant for payment of the debt and thus could enforce the debt against the applicant.

[23] In all the circumstances I am satisfied that the applicant has raised a bona fide dispute in relation to the debt and the application should succeed. I do not, however, think that Marminta can be allowed to delay the resolution of the real issue by sitting on its action for specific performance and I am prepared to give directions in relation to that action to permit a trial to be held as early as is convenient and indicate that time could be made available as early as June for that purpose. I will hear counsel on that matter. The costs of this application will follow the result in the specific performance action. In other words, if Marminter succeeds in that action the respondent will pay the applicant's costs and if the respondent succeeds the applicant will pay his costs to be assessed on the standard basis.