

SUPREME COURT OF QUEENSLAND

CITATION: *Beeps Pty Ltd v Marketplace Communications Pty Ltd* [2003] QSC 347

PARTIES: **BEEPS PTY LTD (ACN 010 072 554)**
(applicant)
v
MARKETPLACE COMMUNICATIONS PTY LTD
(ACN 011 007 293)
(respondent)

FILE NO/S: SC No 7970 of 2003

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 9 October 2003

DELIVERED AT: Brisbane

HEARING DATE: 23 September 2003

JUDGE: McMurdo J

ORDER: **Statutory demand served upon the applicant by the respondent be set aside.**

CATCHWORDS: CORPORATIONS LAW – STATUTORY DEMAND - where application to set aside statutory demand – where money said to be owed under a consultancy agreement and a separate agreement to produce a strategic plan - where debt in part subject to a money back guarantee if applicant unsatisfied with services provided – where applicant contends strategic plan not completed - whether genuine dispute – whether statutory demand should be set aside

Corporations Act, s 459H(1)(a)
Trade Practices Act 1974 (Cth)

Eyota v Hanave (1994) 12 ACSR 785, considered

COUNSEL: M Martin for the applicant
R Bain QC for the respondent

SOLICITORS: Bennett & Philp Solicitors for the applicant
Raj Lawyers for the respondent

- [1] **McMURDO J:** This is an application to set aside the respondent's statutory demand, upon the ground that the debts are genuinely disputed.¹ The sum demanded was \$22,000, comprising \$19,800 alleged to be due for consultancy services provided under an agreement made in October 2002, and a balance of \$2,200 claimed for the preparation of a document described as a Strategic Plan pursuant to another agreement.
- [2] The agreement for the consultancy services is contained at least in part in a document dated 16 October 2002, under which the respondent was retained for a three month period commencing on that date at a fee of \$6,000 per month plus GST. The evidence indicates that the applicant was seeking assistance by way of grants or business from the State government for which the respondent represented that it could be useful as a go-between. The services to be provided however went beyond that particular service, and were said to "include government relations and funding advice, re-branding and corporate image development and new business strategy for BEEPS, incorporating a variety of marketing tools". Clearly, the respondent then did some work for the applicant over the three month period and there is evidence that as those services were being provided, at least some of the applicant's representatives expressed satisfaction with the respondent's work. At the end of those three months, the respondent's managing director sent a fax to Mr Cooper, a director of the applicant, in which he said, amongst other things:

"1. Retainer Agreement

We are very keen to continue our relationship with BEEPS and believe we have a lot to offer towards the future positioning and expansion of your business.

With this in mind, I would like to propose that MPC continues to progress all BEEPS activities outlined in the Activity Report 15/01/02 for the next three weeks, as time in lieu for the Christmas period. This extends our contract agreement until Thursday 6th February.

Key activities will include the completion of the QIDS and QIIS funding applications and progression of the proposed launch in April.

This work will be undertaken at NO COST to BEEPS."

Mr Cooper says that he agreed to this extension. By this time, the respondent had sent invoices for the first and second months but its invoice for the third month was not sent until 6 February 2003. The fax of 20 January also evidences the distinct retainer for the preparation of the strategic plan, which is discussed below.

- [3] Prior to the signing of the agreement of 16 October, the respondent had sent a letter to the applicant dated 9 September 2002, offering to provide the relevant services. In that letter, the respondent's managing director wrote:

¹ *Corporations Act, s 459H(1)(a)*

"We offer all of our clients a money back guarantee. If you are not satisfied with our services, we will refund your money. No questions asked."

The applicant contends that this formed part of the consultancy agreement or, alternatively, that the respondent is precluded from acting inconsistently with it, either through an estoppel or potential remedies under the *Trade Practices Act 1974* (Cth). For the purposes of this application, the respondent concedes the correctness of those contentions. In other words, the respondent concedes that the applicant was excused from payment if it was not satisfied with the services provided. Accordingly, the question becomes whether the applicant demonstrates that it genuinely claims not to be satisfied with the services.

- [4] The meaning of what constitutes a genuine dispute in this context was considered by McClelland CJ in Eq in *Eyota v Hanave* (1994) 12 ACSR 785 as connoting a plausible contention requiring investigation and as raising similar considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction. At p 787 his Honour said:

"This does not mean that the court must accept uncritically as giving rise to a genuine dispute, 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', not having 'sufficient prima facie plausibility to merit further investigation as to (its) truth' (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence': cf *South Australia v Wall* (1980) 24 SASR 189 at 194.

But it does mean that, except in such an extreme case a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute."

- [5] In the present case, there are extensive affidavits from the applicant's director, Mr Cooper, in which he swears that the applicant was not satisfied with the services and provides some reasons. The respondent contends that I should remain unsatisfied as to the genuineness of the applicant's disputation of the debt, because I should not accept Mr Cooper's evidence. It is said that his evidence is so inconsistent with other evidence that I should reject it as not having sufficient prima facie plausibility to merit further investigation. There are several circumstances which, taken together, are said to demonstrate the falsity of his evidence. One of those is the applicant's agreement to extend the three month retainer by some three weeks, as suggested in the respondent's fax of 20 January. The respondent's outline of argument characterised that as an affirmation in the sense of an election binding the applicant to pay for the three months' services. I do not see how it could have that character, but in any event the applicant's acceptance of the respondent's proposal is not inconsistent with Mr Cooper's evidence. Conceivably, the applicant could have been less than satisfied with the respondent's performance as at 20 January, but was prepared to see what came from another few weeks' work, especially given the

respondent's reference in its fax to what was likely to be achieved within those three weeks. There is also evidence that another officer of the applicant was heard at a Christmas party to express complimentary and appreciative remarks of the respondent's performance. Again, this is not necessarily inconsistent with the applicant's ultimately reaching a view, in good faith, that the respondent's performance had been unsatisfactory. There is also an absence of complaint by the applicant until July, when the respondent showed a firmer approach in requiring payment. There is sworn evidence from a Mr Croke that the applicant's Mr Cooper in discussions with him or at meetings he attended "indicated the company was experiencing tight financial circumstances but there would be some relief from that situation upon the applicant receiving an outstanding payment from one of its debtors and from the new business opportunities which may arise (and) indicated that the only reason the respondent's accounts had not been paid was because of cash flow difficulties and that he would be prepared to have discussions with (the respondent) and attempt to come to an arrangement to meet all or part of the outstanding sum over time." Although Mr Cooper swore an affidavit which disputed certain paragraphs of Mr Croke's affidavit, this part was left unanswered. Against all of this, there is substantial evidence by Mr Cooper to the effect that he was and remains dissatisfied with the respondent's performance. All of these matters, considered together, cause me considerable doubt as to Mr Cooper's evidence but ultimately I am unable to conclude the applicant's case is not plausible enough to merit further investigation. By Mr Cooper's evidence, I am satisfied that there is a genuine dispute as to the sums totalling \$19,800.

- [6] That leaves for consideration the distinct claim for \$2,200 for the preparation of a Strategic Plan. This was not subject to the "refund if dissatisfied" proviso. The applicant's contention is that the Strategic Plan was not completed. Mr Cooper's evidence supports that contention and again, the contention is plausible enough for me to be satisfied that this debt is genuinely disputed.
- [7] The result is that the statutory demand should be set aside. I shall hear the parties as to costs.

