

SUPREME COURT OF QUEENSLAND

CITATION: *Bidjara Aboriginal Housing & Land Co Ltd v Bidjara Motor Corp P/L (in liq)* [2005] QCA 196

PARTIES: **BIDJARA ABORIGINAL HOUSING & LAND COMPANY LIMITED (RECEIVER AND MANAGER APPOINTED)** ACN 010 017 955
(appellant/applicant)

v

BIDJARA MOTOR CORPORATION PTY LTD (IN LIQUIDATION) ACN 090 968 988
(respondent/respondent)

FILE NO/S: Appeal No 10628 of 2004
SC No 9616 of 2004

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 26 May 2005

JUDGES: McMurdo P, Williams JA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal allowed**
2. The orders at first instance be set aside
3. The Statutory Demand dated 13 October 2004 be set aside
4. The respondent to pay the costs of the appellant of and incidental to the application and appeal to be assessed

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – SUBSTANCE OF DISPUTE – where statutory demand issued by the respondent to the appellant for the amount of \$576,751.80 – learned trial judge refused to set aside the statutory demand pursuant to s 459G of *Corporations Act 2001* (Cth) – where the debt involved a shareholders' agreement to which the respondent was not a party and which depended for its application to the respondent on s 55 *Property Law Act 1974* (Qld) – whether

there is a genuine dispute about the existence or amount of the debt

Corporations Act 2001 (Cth), s 459H

Property Law Act 1974 (Qld), s 55

COUNSEL: L A Stephens for the appellant
C A Wilkins for the respondent

SOLICITORS: Clewett Corser & Drummond (Brisbane) acting as Town Agents for Frank Jongkind & Co (Charleville) for the appellant
Tucker & Cowen for the respondent

- [1] **McMURDO P:** I agree with Williams JA that the appeal should be allowed with costs to be assessed, the order at first instance should be set aside and instead the application to set aside the statutory demand of 13 October 2004 should be granted with costs.
- [2] Under s 459H *Corporations Act 2001 (Cth)*, to set aside the respondent's statutory demand the appellant had to satisfy the primary judge that there was a genuine dispute between the parties as to the existence or the amount of the debt claimed in the statutory demand. As the learned primary judge rightly noted, the material relied upon by the appellant at first instance to meet that requirement was scant. The debt on which the respondent based its statutory demand was, however, unusual: it involved a shareholders' agreement to which the respondent was not a party and which depended for its application to the respondent on s 55 *Property Law Act 1974 (Qld)*. Because the debt claimed by the respondent was itself not straightforward, I am finally persuaded that, for the reasons given by Williams JA, Mr Robinson's affidavit filed on behalf of the appellant at first instance sufficiently raised a genuine dispute about the existence of the debt which needs to be resolved at a trial. The appellant's application to set aside the statutory demand should have been granted.
- [3] **WILLIAMS JA:** This is an appeal from a decision of a judge of the trial division refusing to set aside a statutory demand pursuant to s 459G of the *Corporations Act 2001 (Cth)*. The issues raised were somewhat unusual because of the circumstances alleged to give rise to the indebtedness; the situation was vastly different to the more common circumstance where the creditor can particularise the debt by referring to a judgment or the contract evidencing it.
- [4] The statutory demand was issued by the present respondent Bidjara Motor Corporation Pty Ltd (in Liquidation), hereinafter referred to as "Bidjara Motor", alleging that the present appellant Bidjara Aboriginal Housing & Land Company Ltd, hereinafter referred to as "Bidjara Housing", owed the amount of \$576,751.80 "being the total of the amounts of the debts described in the Schedule." That Schedule then provided the following particulars: "60% of the total losses, being \$961,253.00, incurred by Bidjara Motor Corporation Pty Ltd (in Liquidation), payable by the Company to the Creditor pursuant to Shareholders Agreement dated 28.03.00". The affidavit verifying the statutory demand was sworn by the liquidator of Bidjara Motor. Relevantly that affidavit asserted:
"The Debtor company and Badman Motor Group Ltd entered into a written shareholders agreement . . . on 28 March 2000.

Pursuant to clause 9 of the agreement the Debtor Company agreed to "accept responsibility for 60% of any financial losses relating to all trading of the Corporation (as defined in the agreement to be Bidjara Motor Corporation Pty Ltd).

The Creditor accepted the benefit of the agreement by trading its business and incurring liability."

- [5] That affidavit also asserted that "the total liability of the Creditor is \$961,253.00" and in consequence "60% of the total liability of the Creditor is \$576,751.80."
- [6] Bidjara Housing applied within time to have that statutory demand set aside. The affidavit in support of the application was by R R L Robinson who relevantly deposed that the "Shareholders Agreement was not intended to confer any benefit on Bidjara Motor Corporation Ltd and on its proper construction does not do so." That affidavit also alleged that at no time did Bidjara Motor accept or purport to accept the benefit of the shareholders agreement.
- [7] L F Power, at material times the solicitor for Bidjara Housing, also swore an affidavit which was received at first instance. An issue was raised as to its admissibility but it is not necessary in order to dispose of the appeal to decide that question; the affidavit simply asserts that it was not the deponent's intention that the agreement should confer benefits on Bidjara Motor and also denies that Bidjara Motor accepted the benefit of that agreement. In other words it does not take the matter beyond what is asserted in the affidavit of Robinson.
- [8] The liquidator of Bidjara Motor filed an affidavit in reply relevantly asserting:
- "From the information available to me as Liquidator, I believe that [Bidjara Motor] did accept, by conduct, the benefit of the Shareholders Agreement in that:
- (a) Robert Raymond Lloyd Robinson was a director of [Bidjara Motor] as well as being a director of the Applicant at the time the shareholders' agreement was entered into. . .
- (b) [Bidjara Motor] began trading and incurring trading liability and trading losses from November 2000."
- [9] At least one thing is clear from all of that; the critical document is the Shareholders Agreement dated 28 March 2000. That Agreement is between Bidjara Housing and Badman Motor Group Ltd ("Badman"). Relevantly the Agreement can be summarised as follows:

"WHEREAS

A. [Badman] has the necessary skills, resources, expertise and experience acquired as a Nissan and Holden Dealer to contribute to this Agreement.

B. [Bidjara Housing] has sufficient ability to source funding and support the establishment of, and the ability to arrange commitments to co-ordinate and centralise buying of vehicles and services by Aboriginal, and other organisations to contribute to this agreement.

C. A company has been established known as [Bidjara Motor] .
..

IT IS AGREED

1. That the shareholding of [Bidjara Motor] is as follows-
60% shareholding to [Bidjara Housing] 40% shareholding to [Badman].

...

3. The parties agree that the term of this agreement is for a period of five (5) years from the effective date. . . .

4. That the profits generated by the trading of [Bidjara Motor] will be those profits resulted from the sale, by [Bidjara Motor] of new and used cars, service, finance and insurance, and spare parts related to the Dealership Operations of franchises owned and operated by [Bidjara Motor], and those profits generated by the distribution of vehicles to Aboriginal and/or other organisations deemed to be eligible to purchase under Fleet Discounted pricing . . .

5. That the distribution of profits generated by [Bidjara Motor] may be distributed from time to time at the discretion of the Board of Directors.

6. That the distribution of profits will be according to the following:-

[Bidjara Housing] receive the agreed 60% of the profits relating to all trading of [Bidjara Motor].

[Badman] receive the agreed 40% of the profit relating to all trading of [Bidjara Motor] less those profits generated by the service and spare parts divisions of the direct Dealer Operations owned by [Bidjara Motor] in Charleville or Roma, Queensland.

7. That management reports and accounting records be available on request within seven (7) days to the Board of Directors. The said reports and records to be compiled separately for Dealer Operations distinct from Vehicle Distribution Operations.

...

9. That liability for losses incurred by the trading of [Bidjara Motor] be according to the following:-

[Bidjara Housing] accept responsibility for 60% of any financial losses relating to all trading of [Bidjara Motor].

[Badman] accept responsibility for 40% of any financial losses relating to all trading of [Bidjara Motor] less any losses generated by the service and spare parts divisions of the direct Dealer Operations owned by [Bidjara Motor] in Charleville or Roma, Queensland.

10. That [Badman] contributes to [Bidjara Motor] support in excess of \$1.5million in the form of management, staff . . .

11. That [Bidjara Housing] provide premises for both direct Dealership Operations in Charleville/Roma and the Vehicle Distribution Operations.

12. That [Bidjara Motor] pay rental for the use of the said premises to [Bidjara Housing].

13. That [Badman] purchase, on behalf of [Bidjara Motor] start-up used car stock . . .

14. That this agreement is subject to the provision of funding to [Bidjara Motor] by ATSIC on satisfactory terms.

. . .

21. This agreement constitutes the entire agreement between the shareholders with respect to the management of the company and the business.

. . .

23. This agreement is effective from 1 April 2000."

[10] It is immediately obvious that Bidjara Motor is not a party to that Agreement. Considered in the light of the Agreement alone Bidjara Motor could not recover any of its losses from Bidjara Housing by suing on clause 9. But Bidjara Motor seeks to overcome that by relying on s 55 of the *Property Law Act 1974* (Qld). Relevantly that section is in these terms:

"(1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.

. . .

(3) Upon acceptance-

(a) the beneficiary shall be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor. . .

. . .

(6) In this section-

"acceptance" means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor . . .

. . .

"promise" means a promise -

(a) which is or appears to be intended to be legally binding; and

(b) which creates or appears to be intended to create a duty enforceable by a beneficiary...".

- [11] The learned judge at first instance after referring to the Shareholders Agreement and the issues raised by the application relevantly said:

"There is no doubt that clause 9 of the agreement contains such a promise which is enforceable by the beneficiary so long as the benefit has been accepted by the beneficiary.

. . . Bidjara Motor Corporation began trading and incurring losses in November 2000 with at least its solicitor and its director, Mr Robinson, having full knowledge of the agreement and the benefit conferred upon Bidjara Motor Corporation. By its conduct in trading in those circumstances and incurring losses, it must be taken to have accepted by conduct the benefit of that agreement which had enabled it to be set up and formed its financial basis.

In those circumstances the argument that there is a genuine dispute which justifies setting aside the statutory demand has not been made out and would not be a reason to set aside the statutory demand."

- [12] As already pointed out the existence of the alleged debt is dependent upon a somewhat complex, and unusual set of circumstances. The indebtedness is not directly established by contract. It is only if s 55 of the *Property Law Act 1974* (Qld) is superimposed on the Shareholders Agreement, and the necessary pre-conditions prescribed by that Act are fulfilled, that one can reach the stage of saying that Bidjara Housing was indebted to Bidjara Motor.
- [13] Bidjara Motor is, as indicated, in liquidation. All the shares are fully paid and Bidjara Housing and Badman as the only shareholders would not therefore be liable under the general law to contribute to any losses in the winding up. Was the Agreement intended to alter that and create an obligation, enforceable by the liquidator, to meet all outstanding liabilities of Bidjara Motor in its winding up? Can the liquidator rely on s 55 when Bidjara Motor prior to liquidation has not overtly purported to accept or enforce any promise evidenced by clause 9?
- [14] Against that background a number of issues emerge. What is the "promise", if any, by Bidjara Housing evidenced by clause 9 of the Agreement? Does the expression "accept responsibility for" amount to a promise to pay? If it does, when does the promise become enforceable - at the end of each trading period, on cessation of business or only on liquidation? If there is a promise, is it for the "benefit of" Bidjara Motor? How could it be for the "benefit of" Bidjara Motor if the promise was only enforceable on the liquidation of that company? If the real beneficiaries are the creditors of Bidjara Motor can that mean that Bidjara Motor is the beneficiary of the promise? Was it intended by the agreement to create a duty enforceable by Bidjara Motor?
- [15] Assuming all the matters in the preceding paragraph in favour of Bidjara Motor, is it clearly established that there has been "acceptance" by that company so that the promise becomes enforceable by it? Given the nature of the promise in clause 9 what constitutes "acceptance" in those circumstances? Given the terms of the Shareholders Agreement is "acceptance" only established by full implementation of the terms of that Agreement? If that is so, then there is simply no evidence that clauses 7, 10, 11, 12, 13 and 14 were complied with. In those circumstances is it sufficient merely to say, as the learned judge at first instance did, that Bidjara Motor "began trading and incurring losses in November 2000. ...By its conduct in trading

in those circumstances and incurring losses, it must be taken to have accepted by conduct the benefit of that Agreement . . ."? There is no evidence that trading was in accordance with the terms of the Shareholders agreement.

- [16] If there was otherwise a promise to the benefit of Bidjara Motor, and that company duly accepted that promise, what was, in the circumstances, the indebtedness of Bidjara Housing to Bidjara Motor? Clause 9 refers to 60% "of any financial losses relating to all trading" of Bidjara Motor. The Statutory Demand refers to "total losses" and the affidavit verifying refers to "total liability". As was put to the learned judge at first instance by counsel for Bidjara Housing the statutory demand and affidavit verifying did not address the question whether the total losses were the same as "financial losses relating to trading". Particularly on a winding up the total losses or total liability of a company may not equate to trading losses.
- [17] The foregoing analysis demonstrates, in my view, that there were issues raised by the application to set aside the statutory demand which could not be simply answered. The operation of s 55 of the *Property Law Act 1974* (Qld) in the present circumstances required careful analysis of a particular factual situation. There was a clear assertion by Robinson who was at material times a director of Bidjara Housing and Bidjara Motor that the Shareholders Agreement was not intended to create a duty enforceable by Bidjara Motor and further that Bidjara Motor did not accept or purport to accept the benefit of the Shareholder Agreement. That in itself was, in my view, sufficient in the circumstances of this case to lead to the conclusion that there was a genuine dispute about the existence or amount of the debt to which the demand related.
- [18] Until the issues referred to above have been resolved by determination in appropriate proceedings it cannot be said that Bidjara Housing is indebted to Bidjara Motor either in the amount referred in the Statutory Demand or for some other amount. At this stage there is clearly a genuine dispute about the existence of the debt.
- [19] It follows that the appeal should be allowed, the orders at first instance should be set aside, the Statutory Demand dated 13 October 2004 should be set aside, and the respondent Bidjara Motor should be ordered to pay the costs of Bidjara Housing of and incidental to the application and appeal to be assessed.
- [20] **MULLINS J:** I agree with the reasons for judgment of Williams JA and the orders proposed by his Honour.