SUPREME COURT OF QUEENSLAND

CITATION:	*Ambassador at Redcliffe P/L & Anor v Emerald Constructions Aust P/L & Ors* [2006] QSC 247
PARTIES:	**AMBASSADOR AT REDCLIFFE PTY LTD ACN 108 206 837** (first applicant) and **EMERALD CONSTRUCTIONS AUSTRALIA PTY LTD ACN 102 339 748** (second applicant) v **BARREAU PENINSULA PROPERTY PTY LTD ATF THE BARREAU PENINSULA PROPERTY TRUST** (first respondent) and **AMBRON PTY LTD ATF THE AJ AND M NORMAN FAMILY TRUST** (second respondent) and **BARREAU PENINSULA PROPERTY PTY LTD ACN 091 191 221 ATF THE BARREAU PENINSULA TRUST** (third respondent) and **KANEBAY PTY LTD ACN 064 140 236 ATF THE NORMAN AMBASSADOR TRUST** (fourth respondent)
FILE NO:	BS2718/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	7 September 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	28 April 2006
JUDGE:	Douglas J
ORDER:	**Application dismissed.** **Further submissions invited as to costs.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND- PROCEDURAL REQUIREMENTS – OTHER MATTERS –

where applications to set aside four statutory demands brought together – whether application has been properly brought

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – TECHNICAL DEFECT – where supporting affidavit sworn 18 days before demands made – whether demands defective and should be set aside

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DESPUTE AS TO INDEBTEDNESS – ASSESSING GENUINESS – TEST TO BE APPLIED – where existing agreements giving rise to debt were replaced by new agreements with options – where assurance given that new agreement did not waive rights under previous agreement – whether a genuine dispute as to obligation to pay amounts due under previous agreement exists

Corporations Act 2001 (Cth), s459E(3)(a), s459G, s459J(1)(b)
Uniform Civil Procedure Rules 1999 (Qld), r.65

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485, cited
B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd (1995) 15 ACSR 433, cited
Calquid Pty Ltd v A & D R Illes Pty Ltd (2000) 34 ACSR 523, cited
Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd (2005) 53 ACSR 645, cited
Cooloola Dairys Pty Ltd v National Foods Milk Ltd [2005] 1 Qd R 12, cited
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265, cited
Femley Pty Ltd v Salken Engineering Pty Ltd (1999) 17 ACLC 828, cited
Filaria Pty Ltd v Carlisle [2004] ACTSC 95, cited
Fraser Escape 4 x 4 Tours Pty Ltd v DCT [2005] QSC 352, cited
Help Desk Institute Pty Ltd v Adams (Supreme Court of NSW, 18 November 1998, unreported), applied
Hoare Bros Pty Ltd v DCT (1996) 135 ALR 677, cited
Isaco Pty Ltd v Davey (2003) 47 ACSR 483, cited
KW & KM Quinn Investments Pty Ltd v DCT [2004] QCA 91, cited
McDermott Projects Pty Ltd v Chadwell Pty Ltd [2002] 2 Qd R 363, cited
R v Gardiner [1981] Qd R 394, cited

Technology Licensing Limited v Climit Pty Limited [2002] 1 Qd R 566, cited
WEC Pty Ltd v Cypriot Community of Queensland Inc [2002] QCA 506, applied
Wildtwon Holdings Pty Ltd v Rural Traders Co Ltd (2002) 172 FLR 35, cited

COUNSEL: G Thompson SC with H Bowskill for the applicants
C Wilson for the respondents

SOLICITORS: Suthers Taylor for the applicants
Mullins Lawyers for the respondents

[1] **Douglas J**: This is an application to set aside statutory demands served by the respondents on the applicants on 13 March 2006. There is a variety of reasons why they are said to be defective and a preliminary issue raised by the respondents to the effect that an application to set aside a statutory demand which is not jointly owed must deal with one demand only. This application deals with four separate demands and is, therefore, said to be defective and unable to be remedied.

Background

[2] The background facts were usefully summarised by the respondents. By contracts dated 5 March 2004 the first applicant ("Ambassador") entered into a contract to purchase land at 41 Redcliffe Parade, Redcliffe from the first respondent ("BPPT") and the second respondent ("Ambron"). The second applicant ("Emerald") guaranteed Ambassador's obligations under the contract to sell the land.

[3] Also on 5 March 2004, Ambassador as purchaser entered into a contract in respect of the hotel business conducted on the land, with the third respondent ("BPT") and the fourth respondent ("Kanebay") as vendors. Again, Emerald guaranteed Ambassador's obligations under the hotel business contract but also accepted a primary liability under that contract.

[4] Therefore, the land contract gave rise to claims by BPPT and Ambron against Ambassador as purchaser and Emerald as guarantor. The business contract gave rise to claims by BPT and Kanebay against Ambassador as purchaser and Emerald as guarantor. Completion of the contracts was due on 21 June but, on 23 April 2004, the parties agreed to extend completion to 30 September 2004.

[5] On 22 September 2004 the parties entered into a deed of variation which provided, among other things, that a further $50,000 non-refundable deposit was payable by 30 September 2004, and that the date of completion for each contract was extended to 7 December 2004. Importantly, clause 2.1.7.1 of the deed provided that interest for the period 1 October 2004 to 31 October 2004 in an amount of $53,252.05 was payable by Ambassador on or before 31 October 2004, in relation to the land contract. Clause 2.2.12 of the deed made similar provision for payment of interest in respect of the business contract, in that interest for the period 1 October 2004 to 31 October 2004 in an amount of $52,912.33 was payable by Ambassador to the vendors of the hotel business. By clause 4 the guarantor, Emerald, agreed to and consented to each variation to the principal contracts and acknowledged its liability in relation to them. The deed of variation was executed by or on behalf of all parties.

[6] The relevant interest instalments were not paid and both contracts of sale were terminated by notice given on 19 November 2004. After negotiations the same parties entered into put and call agreements in relation to the land and the hotel business, which were executed on or about 22 February 2005. The put and call agreements make no reference to the terminated contracts and do not mention any compromise of the vendors' rights against Ambassador and Emerald arising out of the terminated contracts.

[7] Importantly, at the vendors' request, Ambassador and Emerald provided a written acknowledgement dated 22 February 2005 that the entry into new land and business contracts was not a waiver of any breaches under previous contracts and that any rights were specifically reserved by the vendors. Ambassador and Emerald noted however that settlement of the new contracts would be a bar to any claim arising under the terminated contracts.

[8] On 14 March 2005 the vendors exercised the put option. On 22 March 2005 the vendors terminated the put and call agreements relying upon the default of Ambassador, such default being a failure to execute and deliver sale contracts relating to the land and the hotel business.

[9] By the statutory demands the vendors of the land, BPPT and Ambron, claimed the sum of $53,252.05 against Ambassador as purchaser and against Emerald as guarantor. As to the hotel business, BPT and Kanebay delivered statutory demands to Ambassador as purchaser in the amount of $52,912.33 and against Emerald as guarantor.

Does the Court have jurisdiction? – Failure to comply with s 459G of the *Corporations Act* 2001 (Cth)

[10] The respondents' submission is that, as the statutory demands are directed in each case to one only of the applicants and relate to a separate debt arising under a separate contractual liability, the joint application was fatally defective. There should, instead, have been four separate applications. The applicants' response to that argument relied upon r. 65 of the *Uniform Civil Procedure Rules* 1999. That rule permits two or more persons to be applicants in the one proceeding if a common question of law or fact may arise in all the proceedings or all the rights to relief arise out of the same series of transactions or events. The decision relied upon principally by the respondents is one of Young J in the New South Wales Supreme Court in *Help Desk Institute Pty Ltd v Adams* (Supreme Court of NSW, 18 November 1998, Young J, unreported, BC9806553).

[11] In *Help Desk*, Young J's initial reaction was that the objection to joinder of applications to set aside statutory demands in the one proceeding was unattractive but, nonetheless, held that it was correct. He did so on an analysis of s 459G of the *Corporations Law* which is, relevantly speaking, in the same terms as s 459G of the *Corporations Act* 2001 (Cth). It provides as follows:

> "Company may apply
>
> (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company."

[12] When his Honour construed that section in the light of the construction of the statute adopted by the High Court in *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265 he concluded as follows:

> "But the real difficulty comes from subs(2) of s459G. The legislature has made it clear, and the High Court in *Grant's case* (supra) has underscored this, that the section itself limits the way in which applications can be made and the section talks about a strict time limit 'after the demand is so served'.
> If more than one demand was contemplated, one would have expected the legislature to have said 'after the demand is so served, or if more than one demand is served, by 21 days after the first of such demands is so served'.
> In the instant case both demands were in fact served on the one day, but it does not seem to me that that fact would affect the construction of the section, which is to cover all cases. Furthermore, the regime set up by Pt 5.4 of the Law is that, essentially without litigation, a person can make a demand on a company, the company then has a definite period to apply under s459G, the demand must be accompanied by supporting verification, as must the application and a Judge or Master in a summary way then considers those matters and either sets aside the demand or does not. It is only in exceptional cases that the court will grant leave under s459S to allow matters to be raised on the final hearing of the winding up summons if the statutory procedure has not been followed.
> The court was not expected to have to deal with supporting affidavits which included a whole lot of extraneous matters…
> It seems to me that when one adds all those matters together a contrary indication is given in the statute, that is, there can be only one summons dealing with one demand. In the instant case the two demands deal with similar disputes which might have been joined under Pt8 of the Supreme Court Rules. The case is really one of joinder of causes of action rather than joinder of parties, but it would fit within Pt8 r5 of the Supreme Court Rules. However, despite Mr Warren's submissions that the rules have not been displaced by s459G of the Corporations Law, it seems to me that the approach taken by the High Court in *Grant's case* (supra) is that the statute has set up a very closely knit regime and that regime does displace many

> of the ordinary provisions of the Corporations Law and the Supreme Court Rules."

[13] His Honour's reference to Pt 8 of the New South Wales *Supreme Court Rules* encompasses one of Mr Thompson SC's submissions in this case, that r. 65 of the *UCPR* contemplates the joinder of these parties. Part 8 r. 2 of the New South Wales *Supreme Court Rules*, however, also dealt with the joinder of parties in similar terms to those of r. 65.

[14] *Help Desk* has been distinguished by Santow J in *Femley Pty Ltd v Salken Engineering Pty Ltd* (1999) 17 ACLC 828, where the applications related to a joint debt of a partnership of companies, but was followed, again by Santow J, in *Calquid Pty Ltd v A & D R Illes Pty Ltd* (2000) 34 ACSR 523, where his Honour discusses the issues usefully at [39]-[47]. It has also been applied in the Australian Capital Territory; *Filaria Pty Ltd v Carlisle* [2004] ACTSC 95.

[15] *Help Desk* and *Calquid* were also distinguished by Barrett J in *Isaco Pty Ltd v Davey* (2003) 47 ACSR 483 where his Honour treated the debts as joint and several at [16] to allow the application to be read distributively with the accompanying affidavit consistently with the reasoning in *Femley*.

[16] Here, however, each of the two applicants faced separate demands as purchaser and guarantor in respect of a contract for the sale of land and a separate contract for the sale of a hotel business from two separate groups of respondents. The liabilities claimed are not joint, nor joint and several, and were ones where each of the applicants was seeking to set aside more than one statutory demand against it arising out of separate liabilities. It seems to me to be a case falling squarely within the reasoning of Young J in *Help Desk* in circumstances where his Honour's reasoning is persuasive and has been followed on several occasions. Although Chesterman J in this Court, in *Cooloola Dairys Pty Ltd v National Foods Milk Ltd* [2005] 1 Qd R 12 at [24], has expressed the view in an aside that a debtor can, in the one application, seek orders that all or some of the demands against it be set aside, his Honour did not have to decide this issue nor did he discuss the relevant authorities.

[17] This is a Commonwealth statute where I should treat the earlier decisions that have considered the issue as highly persuasive, even if they do not include a decision of an intermediate appellate court; cf *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 and *R v Gardiner* [1981] Qd R 394, 412. It is, therefore, my view that the application fails at the threshold because of the form in which it was brought. I shall, nevertheless, deal with the arguments made by the applicants that the demands should have been set aside.

Failure to comply with s 459E(3)(a)

[18] The applicants sought to set aside the statutory demands because the affidavits purporting to verify them were sworn on 13 February 2006 when each of the demands was dated 2 March 2006, 17 days after the affidavits were sworn. The argument was that the affidavits do not speak to the time when the demand was made and that, therefore, the mandatory requirement of s 459E(3) that the affidavit verify the debt and that it is due and payable by the company had not been satisfied.

[19] There is a conflict of authority in Queensland on that issue. Chesterman J in *Technology Licensing Limited v Climit Pty Limited* [2002] 1 Qd R 566 held that where the affidavit accompanying a demand predated it by four days it would be set aside; see at [24]-[25]. In *McDermott Projects Pty Ltd v Chadwell Pty Ltd* [2002] 2 Qd R 363, 364-365, however, Holmes J concluded that:

> "the nonconcurrence of the respective dates of the statutory demand and verifying affidavit does not invalidate the statutory demand but rather constitutes a 'defect' within the meaning of s. 459J of the *Corporations Act*. In circumstances where there is no suggestion that any part of the debt was paid in the intervening four days, I do not consider that the situation is one where the defect in the demand will cause substantial injustice. This ground, therefore, does not justify a setting aside of the statutory demand under s. 459J of the *Corporations Act*."

[20] In *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* (2002) 172 FLR 35, 43, the Full Court of the Western Australian Supreme Court treated the execution of an affidavit two days before a statutory demand as "another reason why the demand should be set aside pursuant to s 459J(1)(b)" but appear to have at least contemplated that the filing of an updating affidavit may have been sufficient to cure the problem; see at 43 [58]. Higgins CJ in the Supreme Court of the Australian Capital Territory in *Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd* (2005) 53 ACSR 645 discussed the issue at 650-654 and also reached the conclusion, partly in reliance on *Wildtown*, that the use of an affidavit predating the demand notice was no mere defect.

[21] My own inclination is to conclude that reliance upon such an affidavit does create a defect in procedure which is, however, capable of being cured by the swearing of another affidavit dealing with the state of indebtedness at the time of the demand. To be effective, however, such an affidavit may need to be served either with the demand or, perhaps, a reasonable time before the expiration of the 21 days available to the debtor to apply to set aside the demand. As Higgins CJ points out, at 653 [52], taking the stricter of those possible views:

> "I can see no objection to the serving of an affidavit that is sworn some days before the demand is made, along with the demand and a further affidavit verifying that the debt, remained due and payable on the date the demand is made. In other words, re-affirming, as at the date of the demand, the matters stated in the prior affidavit. I do not think, however, that such an affidavit could rectify a demand that might otherwise be liable to be set aside for non-verification simply by the later delivery, after the demand is made, of an updating affidavit. A debtor only has 21 days to apply to set aside the demand. If a later 'updating affidavit' could be effective, a debtor could be deprived of its right to have the demand set aside save on the ground of 'genuine dispute'. It could mean, if the debtor did not raise and support a genuine dispute, comforted by the failure to deliver a demand prima facie complying with s 459E(3), that the debtor might then be out of time to raise the issue. This is quite apart from the shortening of the time within which to marshal evidence to support the existence of a 'genuine dispute or offsetting claim'."

[22] In these circumstances, therefore, where the affidavit was dated 17 days before the demand and was not supplemented by any affidavit dealing with the amount owed at the date of the demand, it is my view that the demand was defective.

Deponent's belief as to the existence of the debt

[23] The next argument is that the affidavit verifying the debts was sworn by a Mr Norman who was a director of one only of the creditor companies. He stated that he was authorised to make the affidavits on behalf of the other company of which he was not a director in each case and also swore that he had spoken to a director of the other company, of which he was not a director, who informed him, and which he believed, that he had custody and control of the accounting records of that company and the trust associated with the company including access to its banking records and that that company had not received the debt or any part of it from the debtor company or from any third parties. The affidavit in each case went on to swear that the debt was due and payable and that the deponent, Mr Norman, believed that there was no genuine dispute about the existence or the amount of the debt. As was submitted, accurately, however, the affidavits do not contain any statement by or sourced from the other creditor as to the absence of a genuine dispute about the existence or amount of the debt. Paragraph 7 in each case states Mr Norman's belief.

[24] Such a defect has been held to be sufficient "other reason" for the demand to be set aside for the purposes of s. 459J(1)(b); see *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1995) 15 ACSR 433, 435-436. McClelland CJ in equity in that case held that a statement of belief that there was no genuine dispute based solely on hearsay was unlikely to have anything like the same degree of reliability as one based on personal knowledge. He did not regard the failure in that case as a merely technical breach but one that went to the heart of what that part of the then New South Wales Supreme Court Rules was intended to achieve.

[25] I was referred to decisions of the Full Court of the Federal Court in *Hoare Bros Pty Ltd v Deputy Commissioner of Taxation* (1996) 135 ALR 677 and of the Court of Appeal of Queensland in *KW & KM Quinn Investments Pty Ltd v DCT* [2004] QCA 91 dealing with the width of the discretion to set aside a demand under s 459J(1)(b), particularly in the context of demands made by the Deputy Commissioner of Taxation where there had been an objection to his assessments or a review sought of them. The decision in *Hoare Bros* at 691-692 said that it would be unwise to attempt to mark out the limits of the discretion conferred by s 459J(1)(b) and referred to another decision where Olney J implied that he would have been prepared to exercise the discretion in the company's favour had it been shown that the Commissioner's conduct was unconscionable, an abuse of process or had given rise to substantial injustice. Mr Wilson relied upon that passage which was referred to also by the Queensland Court of Appeal in *Quinn Investments* to argue that it was not unfair to allow these demands to stand where the money claimed had not been paid and where, as he submitted, there was no genuine dispute about whether they should be paid.

[26] Where, however, this procedure is designed to allow a swift remedy against a company where the entitlement to the debt has not been established in a court, it seems to me that the other safeguards required by the rules, such as the coincidence in timing between the date of demand and the swearing of the affidavit in support

and the inclusion in that affidavit of a properly informed statement about the creditor's belief as to the absence of a genuine dispute, continue to provide good reasons why such demands should be set aside; see also *Fraser Escape 4x4 Tours Pty Ltd v Deputy Commissioner of Taxation* [2005] QSC 352 at [11].

Genuineness of the Dispute

[27] It seems clear to me that the effect of the document entered into between the parties was that the interest amounts of $53,252.05 in respect of the land contract and $52,912.33 in respect of the business contract continued to be obligations owed unless new contracts entered into pursuant to the put and call agreements executed on 22 February 2005 were completed. This seems to follow from the letter of 22 February 2005 from Mr Faress of the applicants which read as follows:

> "We hereby acknowledge that you reserve all rights against us pursuant to and arising out of the termination of the previous land and business contracts ("previous contract") between us for the above Hotel. We further acknowledge that the entering into of new land and business contracts for the same Hotel is in no way to be seen or treated as of a waiver of any breach or breaches by us under the previous contracts, and that any rights you may have a result are specifically reserved.
>
> However, our acknowledgment above is provided on the basis that in the event that the new transaction currently proposed by the parties settles, that such settlement will be deemed to be a bar to any claims that you may have pursuant to termination of the pervious [sic] contracts. In addition the seller will be estopped from making any claim in damages or otherwise in respect to the previous contracts."

[28] The test of the genuineness of a dispute was expressed by McMurdo P in *WEC Pty Ltd v Cypriot Community of Queensland Inc* [2002] QCA 506 at [11] in this form:

> "Something beyond implausible assertion is required from an applicant to demonstrate the genuineness of its claim. A genuine dispute is one that really exists in fact and is not spurious, hypothetical, illusory or misconceived. It was not necessary for the Court to be satisfied that the agreement deposed to … was reached but merely the existence of a genuine dispute as to the demand …"

[29] The essence of the applicants' argument on this issue is that the obligation to make interest payments referred to in cll. 2.1.7.1 and 2.2.12.1 of the deed of variation was compromised by the parties and replaced by new agreements for the payment of interest in relation to a proposed new land contract and new business contract with the result that the amounts referred to in those clauses were no longer due and payable. It was argued that there had been a compromise reached at a meeting on 29 November 2004 in respect of payment of $232,876.70 in January 2005 as the aggregate of interest amounts said to be previously payable pursuant to cll. 2.1.7.1 and 2.1.12.1 and that that compromise was later varied by the put and call option agreements to increase the total purchase price for the land and hotel business from $12.5 million to $13 million to incorporate interest in that sum of $232,876.70 and a further sum of interest subsequently payable.

[30] The acknowledgement by Mr Faress in his letter of 22 February 2005 was argued not to have any bearing on the matter when considered in the light of the preceding circumstances deposed to by Mr Doukakis which, it was submitted, were not challenged on the evidence before me. One of the features of those preceding negotiations to which my attention was drawn was that in each of the put and call option agreements the relevant special provisions dealing with interest payments were intentionally deleted.

[31] In my view, however, the terms of the letter were clear that the previously existing rights, including the rights to interest, were specifically reserved except in the event that settlement of the new contracts occurred. Mr Thompson SC's submissions in respect of that was that the obligation to pay interest had gone at the time the parties executed the put and call agreements and the letter of 22 February 2005 was provided. But the letter specifically contemplates the possibility that agreements pursuant to the put and call arrangement do not eventuate and does not limit the nature of the rights reserved arising from the previous agreements. Accordingly, the applicants have not satisfied me that there is a genuine dispute about the obligation to pay the amounts claimed in the demand.

Conclusion

[32] The result is that the application should be dismissed. It was formally defective in being brought as a single application in respect of the four separate demands. Although I would have set aside the demands had the application been brought properly for the reasons referred to above, namely the discrepancy between the date of the demand and the date of the supporting affidavit and the failure of the supporting affidavit to be sworn by a deponent who could provide more reliable evidence as to the belief that there was no genuine dispute about the existence of the debt, I was not satisfied that there was, in fact, a genuine dispute about the existence of the debts to which the demands related.

[33] Accordingly the applications will be dismissed and I shall hear further submissions as to costs.