

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

P LYONS J

No 3571 of 2009

EL SAFTY ENTERPRISES PTY LTD Applicant

and

CHALLENGER ORGINATOR FINANCE PTY LTD Respondent

BRISBANE

..DATE 15/05/2009

ORDER

HIS HONOUR: In November 2001, Brothers Neilson Pty. Ltd. and Brothers Neilson International Pty Ltd. created fixed and floating charges in favour of BML of which the custodians were Perpetual Nominees Pty. Ltd. (*the BML charges*). 1

On 8th November, 2003, Brothers Neilson and Brothers Neilson International created fixed and floating charges, originally to Provident Trade Capital Ltd. of which the Challenger interests in these proceedings (*Challenger*) are the successor in title (*the Challenger charges*). 10

Between 8th February, 2007, and 15th April, 2008, El Safty Enterprises Pty Ltd. advanced in excess of \$2 million to Brothers Nielson. 20

On 14 June, 2007, El Safty Enterprises and Challenger executed a Deed of Assignment which provided that El Safty Enterprises would pay Challenger \$900,000 and Challenger would assign to El Safty Enterprises the Challenger charges. 30

\$100,000 was paid to Challenger under the Deed of Assignment but subsequently El Safty Enterprises defaulted, and the Challenger charges were re-assigned to the Challenger interests. 40

On the 29th of November, 2007, El Safty Enterprises and Challenger entered into a Deed of Settlement which provided that El Safty Enterprises would pay Challenger \$820,000 plus legal costs, and Challenger would assign to El Safty 50

Enterprises the Challenger charges on the performance by El Safty Enterprises of its obligations under the Deed of Settlement. 1

El Safty Enterprises has defaulted under the Deed of Settlement. On the 20th of March, 2009, Challenger served a statutory demand for the monies paid under the Deed of Settlement. On the 3rd of April, 2009, El Safty Enterprises filed an originating application to set aside the statutory demand, supported by an affidavit of Mr El Safty. 10

In Mr El Safty's affidavit he deposes that at the time he entered into both of the transactions with Challenger (that is the Deed of Assignment and the Deed of Settlement), he understood that the Challenger securities would have first priority, and that El Safty Enterprises would be acquiring a first ranking charge over the assets of Brothers Nielson, and Brothers Nielson International; and that was important to him because of the extent of the funds advanced to Brothers Nielson. 20

He also deposes to discussions with Mr Hoare of Challenger in relation to the acquisition of the Challenger charges. He says that in the course of those negotiations, Mr Hoare made representations which are set out in his affidavit which amount in effect to a representation that the Challenger charges had first priority without any qualification. 30

In fact, in 2003 Challenger had executed a Deed of Priority in relation to the BML charges which provided that the Challenger charge would have priority limited to \$750,000.

1

The Deed of Priority also required Challenger to require on the occasion of any assignment of its charges that the assignee enter into a Deed of Priority in similar terms. That did not occur at the time of either of the assignments to El Safty Enterprises.

10

The application made by El Safty Enterprises today is to set aside the Statutory Demand. A Statutory Demand is to be set aside where the Court is satisfied that the company to whom the demand was directed has an off-setting claim. An off-setting claim is a genuine claim, either by way of counter-claim, set-off or cross-demand, even if it does not arise out of the same transaction or circumstances as the debt on which the demand is based.

20

30

In my view, Mr El Safty's affidavit lodged with the originating application demonstrates a genuine claim against Challenger for an amount at least equal to or exceeding the amount claimed in the Statutory Demand.

40

As I read Mr El Safty's affidavit, he is there giving evidence of a representation that the Challenger charges had unqualified first priority over any other charge over the assets of Brothers Nielson and Brothers Nielson International; and that in reliance on that representation he caused El Safty

50

Enterprises to enter into both the Deed of Assignment and the Deed of Settlement. 1

If he is successful in establishing those matters at trial, he would either be entitled to relief under section 87 of the *Trade Practices Act 1974* (Cth) or alternatively, to damages under section 82 of that Act, which would be at least equal to the amount of the Statutory Demand, on the basis that but for the misleading conduct of Challenger, El Safty Enterprises would not have entered into either transaction and would therefore not have been liable for the debt the subject of the Statutory Demand. 10 20

I therefore set aside the Statutory Demand.

... 30

HIS HONOUR: I order that the respondents pay the applicant's costs of the application, to be assessed on the standard basis.

40

50