SUPREME COURT OF QUEENSLAND

CITATION:	*Thomasson Earthmoving Pty Ltd v Cyonara Snowfox Pty Ltd* [2010] QSC 48
PARTIES:	**THOMASSON EARTHMOVING PTY LTD** ACN 073540511 Applicant **v** **CYONARA SNOWFOX PTY** LTD ACN 079510795 Respondent
FILE NO/S:	S9 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	24 February 2010
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	1 February 2010
JUDGE:	McMeekin J
ORDER:	**The statutory demand be set aside.**
CATCHWORDS:	STATUTORY DEMAND - APPLICATION TO SET ASIDE DEMAND - GENUINE DISPUTE AS TO INDEBTEDNESS - ASSESSING GENUINENESS - TESTS TO BE APPLIED - where the demand arises from a deed - where the parties are in dispute as to the construction of the terms of the deed - whether the applicant's arguments as to the interpretation of the deed are sufficient to constitute a genuine dispute *Corporations Act* 2001 (Cth), s 459G, s 459H(1)(a) *Australian Energy Limited v Lennard Oil N.L.* (1996) 2 Qd R 216 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 *L Schuler A G v Wickman Machine Tools Sales Ltd* *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 *Solarite Air Conditioning Pty Ltd v York International*

Australia Ltd [2002] NSWSC 411

Spencer Construction Pty Ltd v G & M Aldridge Pty Ltd (1997) 76 FCR 452

COUNSEL: A Arnold for the applicant

JH Pitman (solicitor) for the respondent

SOLICITORS: Grant and Simpson solicitors for the applicant

Morgan Conley for the respondent

[1] This is an application made pursuant to s 459G of the *Corporations Act* 2001 (Cth) to set aside a statutory demand served on the applicant, Thomasson Earthmoving Pty Ltd, on 21 December 2009.

[2] The applicant contends that there is a genuine dispute between it and the respondent about the existence of the debt to which the demand relates, thus justifying the setting aside of the demand: see *Corporations Act* 2001, s 459H(1)(a). The application was brought within the 21 days stipulated in the legislation.

[3] The defendant contends that there is no genuine dispute on the evidence.

The Law

[4] I take the test that I ought to apply as that enunciated by McLelland CJ in Eq in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, where he described the expression "genuine dispute" as connoting "a plausible contention requiring investigation." He equated the expression to the criterion of "serious question to be tried," the familiar test applicable on an application for interlocutory injunction.

[5] The onus of course is on the applicant to establish that the dispute is bona fide and truly exists in fact and that the grounds alleging the existence of the dispute are real and not "spurious, hypothetical, illusory or misconceived": see *Spencer Construction Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452 at 464.

[6] Mr Arnold, counsel who appeared for the applicant, drew my attention to the comments of Barrett J in *Solarite Air Conditioning Pty Ltd v York International Australia Ltd* [2002] NSWSC 411 at [23] where he commented that "the task faced by a company challenging a statutory demand on the 'genuine dispute' ground is by no means at all a difficult or demanding one. The company will fail in that task only if it is found upon the hearing of its s 459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find

that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."

[7] To like effect are the comments of Thomas J in *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605, where his Honour emphasised that it was not the task of the court to "examine the merits or settle the dispute" and that "beyond a perception of genuineness (or lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed."

Submissions Concerning the Dispute

[8] The parties entered into a deed which had the effect of compromising another dispute that had earlier been before the courts. That deed provided in clause 2 as follows:

> "(a) Thomasson will cause, by third party payment, to be paid to Cyonara the sum of $24,000 within 14 days of this deed being executed by Cyonara.
>
> (b) Thomasson agrees to supply and deliver, at the reasonable direction of Cyonara, Roadbase Materials for stages 8 and 9 on lot 200 on SP19966 to the value of $100,000 (plus GST).
>
> (c) Thomasson will apply Market Rates (as varied from time to time), for the supply and delivery of the Roadbase Materials to Cyonara.
>
> (d) In the event that Thomasson has not supplied $100,000 (plus GST) of roadbase within twelve months of the date of this Deed, Cyonara has the right to demand from Thomasson the sum of $100,000 (plus GST) less the amount of the roadbase delivered pursuant to clause 2(b) to be paid to Cyonara within 30 days of receiving a Demand from Cyonara.
>
> (e) Thomasson reserves the right to pay to Cyonara, within the said twelve months, the difference between the market value of the roadbase supplied and $100, 000 (plus GST), the payment of which will be in full and final satisfaction of its obligations under this Deed.

[9] Cyonara did not make any request on Thomasson to supply and deliver any roadbase material at all. The twelve month period referred to in clause 2 of the deed expired and Cyonara demanded the sum of $110, 000 from Thomasson.

[10] Thomasson argues that there ought to be implied into the deed a term to the effect that Cyonara was under an obligation to order roadbase material from Thomasson and that in the absence of such demand the necessary precondition for the right to demand payment in cash did not arise.

[11] Mr Arnold had two arguments. His first submission was that the terms of the deed itself, properly construed, expressly imposed the obligation on Cyonara to seek roadbase material from Thomasson. In the alternative he submitted that to the extent there was any ambiguity in the terms of the deed, the factual matrix that applied at the time the deed was entered into would assist in the

determination of the proper meaning of the deed or of what terms should be implied into it and that would require further investigation.

[12] As to the first submission, Mr Arnold submitted that when combined with the the phrase in paragraph 2(d) "in the event that Thomasson has not supplied" the required quantity of roadbase, the reference to the "reasonable direction of Cyonara" in paragraph 2(b) of the deed strongly indicated that it was only Thomasson's failure to comply with a reasonable direction that triggered the right to demand payment of the money sum. He pointed out that the whole point of the compromise, from Thomasson's perspective, was to win the right to pay in kind rather than money.

[13] Mr Pitman, who appeared for the respondent, contended that the plain construction of the deed imposed no obligation on Cyonara to order any roadbase. The only precondition to the right to demand payment in money was the fact of non-supply by Thomasson - whether bought about by its inability to do so or Cyonara's failure to request any roadbase. He referred me to the well known principle that the court will not imply a term into the agreement which is contrary to an express term of that agreement. However, he did not identify in what way the term that Mr Arnold argues for was necessarily inconsistent with any express term of the deed.

[14] Mr Pitman's further submission related to certain emails that had passed between the offices of the respective companies. He pointed out that Mr Thomasson, on behalf of Thomasson Earthmoving Pty Ltd, had plainly offered to pay certain monies in two instalments. He argued that this demonstrated that Mr Thomasson's understanding of the agreement was that monies were owed and hence there was no genuine dispute about the existence or amount of the debt. One difficulty with that submission is that Mr Thomasson contends that the offers that he made were made by way of without prejudice response to the imminent prospect of litigation being launched against his company, despite the fact that he had not used the label "without prejudice" on the emails.

[15] A further difficulty with the submission is that it is really irrelevant what view Mr Thomasson takes of the terms of the deed. The deed stands to be construed objectively. If Mr Thomasson's conduct simply goes to his belief as to what the deed meant then it may not be used as an aid to construction: see *L Schuler A G v Wickman Machine Tools Sales Ltd* [1974] AC 235. It is possible that emails of the type sent by Mr Thomasson could constitute admissions by conduct which prove against the applicant the terms of the contract. But to reach that conclusion I would need to examine the evidence and know of all the circumstances and that, it seems to me, I am expressly excluded from doing. Where such emails are produced after what Mr Arnold described as a "threat" to "launch my exocets if we have got nowhere" made antecedently by a director of the respondent company, as seems to be the case, then I entertain considerable doubts that the emails can have any bearing on resolution of the question of the terms of the contract that were agreed upon.

Discussion

[16] The applicant would be plainly entitled on any trial to give evidence of the circumstances surrounding the entry into the deed as assisting the court in determining the presumed intention of the parties and potentially if need be, the appropriateness of the implication of any term: see *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350; *Australian Energy Limited v Lennard Oil N.L.* (1996) 2 Qd R 216. Similarly, the respondent may be entitled to lead evidence of Mr Thomasson's conduct if it is relevant as an admission.

[17] However, it is no part of my function on this application to weigh up the significance of such evidence. As Thomas J observed in *Re Morris Catering (Aust) Pty Ltd*, it is simply unhelpful for me to weigh up the prospects of the success of the competing arguments. I am concerned to determine whether the grounds alleged for the existence of the dispute are real and not "spurious, hypothetical, illusory or misconceived."

[18] In my view the arguments that the applicant wishes to mount as to the interpretation of the deed are not so untenable as to merit the description of "spurious, hypothetical, illusory or misconceived." The prospect that the factual matrix in which the deed was entered into could potentially impact upon the construction of the terms of the deed is sufficient, in my view, to require further investigation. Potential factual issues, in addition to those mentioned, which might be the fit subject of further enquiry include Cyonara's involvement in the development of the "stages 8 and 9 on lot 200 on SP19966" referred to in paragraph 2(b) of the deed, conversations that may have occurred about the potential demand for roadbase material in respect of that development, and Cyonara's own conduct subsequent to the deed, Mr Thomasson alleging that as late as a week before the expiration of the twelve month period he was led to believe by a senior officer associated with Cyonara that roadbase material would be required of him to the requisite amount, again conduct that may have the potential for impacting on the construction of the terms agreed.

Conclusion

[19] In the circumstances I accept that the applicant has satisfied the undemanding test of showing that there is a genuine dispute between the parties and that it is appropriate that the statutory demand be set aside.

[20] I will hear from the parties as to the appropriate order concerning costs.