SUPREME COURT OF QUEENSLAND

CITATION:	*McElligott v Boyce & Ors* [2011] QCA 117
PARTIES:	**LORAIN RONDA McELLIGOTT** (applicant) **v** **PETER GERARD BOYCE** (first respondent) **ALAN WILLIAM CLARKE** (second respondent) **SIMONE ELIZABETH PEARCE** (third respondent) **GEOFFREY JOHN BARR** (fourth respondent) **BME UNIT TRUST – THE FIRM BUTLER McDERMOTT LAWYERS** ABN 77 931 309 637 (fifth respondent) **TERRY GRANT VAN DER VELDE** (sixth respondent) **DAVID MICHAEL STIMPSON** (seventh respondent) **SV PARTNERS PTY LTD** ABN 63 103 951 819 (eighth respondent)
FILE NO/S:	Appeal No 13837 of 2010 SC No 8960 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2011
JUDGES:	Muir, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to file and read an unsworn report as to the solvency of Westwood is refused.** **2. The application for an extension of time within which to file a notice of appeal is refused.** **3. The applicant pay the costs of the first to fifth respondents.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – where a statutory demand was served upon a company – where the applicant was the sole director and shareholder of the company – where the statutory demand did not contain a warning statement as prescribed in the statutory form – where the applicant did not contend that the statutory demand was defective at first instance – where no evidence was put forward to show that the company was solvent – where the applicant submitted that the statutory demand was "delivered in a misleading way" because it was under cover of a letter – where the applicant submitted that there was a genuine dispute as to the existence of a debt because she disputed the value of the advice given that gave rise to the debt – whether the defect in the statutory demand gave rise to a substantial injustice – whether the statutory demand should be set aside – whether the primary judge erred in ordering that the applicant's company be wound up in insolvency – whether an extension of time within which to file a notice of appeal should be granted

Corporations Act 2001 (Cth), s 109X, s 459J(2)

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, applied
Randall Pty Ltd v Chepan Pty Ltd (2009) 73 ACSR 267; [2009] NSWSC 783, followed
University of Wollongong v Metwally [No 2] (1985) 60 ALR 68; [1985] HCA 28, applied
Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited

COUNSEL: P Jensen for the applicant
M Jones for the first to fifth respondents
No appearance for the sixth to eighth respondents

SOLICITORS: The applicant appeared on her own behalf
Butler McDermott Lawyers for the first to fifth respondents
No appearance for the sixth to eighth respondents

[1] **MUIR JA**: **Introduction**
The applicant, Loraine McElligott, is the sole director and shareholder of Westwood Enterprises (Qld) Pty Ltd ("Westwood"). On 23 December 2010, the applicant applied for an extension of time within which to file a notice of appeal against orders made by a judge of the trial division of this court on 14 October 2009:

> "1. That Westwood enterprises (Qld) Pty Ltd ACN 083 054 139 be wound up by the court in insolvency under the provisions of the *Corporations Act* 2001 (Cth).
> 2. That Terry Grant van der Velde and David Michael Stimpson be appointed liquidators for the purpose of the winding up.

> 3. …The Applicant's costs of and incidental to this Application and the Creditors' Statutory Demand be … costs in the winding up."

[2] Messrs Van der Velde and Stimpson are respectively the sixth and seventh respondents to this application. The eighth respondent is the company through which the sixth and seventh respondents carried on their insolvency practice.

[3] The sixth, seventh and eighth respondents did not appear when the appeal was called for hearing, seemingly on the basis of an arrangement between them and the applicant.

[4] The first to fifth respondents, to express it colloquially, are members of the firm of solicitors, Butler McDermott Lawyers. They are described in the material as "trustees of the BME Unit Trust…which trades under the name of Butler McDermott Lawyers." For convenience, I will refer to these respondents as "Butler McDermott".

[5] On 8 July 2009, a statutory demand was served by Butler McDermott on Westwood claiming that Westwood owed Butler McDermott $5,270.62 on account of four matters which Butler McDermott had acted for Westwood. The first respondent, Peter Boyce, swore in an affidavit accompanying the statutory demand that Butler McDermott had acted for Westwood in the four matters and had rendered accounts to Westwood in the sum of $5,270.62. He swore that Westwood owed Butler McDermott $5,270.62 and to having a belief that there was no genuine dispute about the existence or amount of the debt. The statutory demand was not complied with by Westwood and, on 17 August 2009, Butler McDermott filed an application for the winding up of Westwood based on the deemed insolvency resulting from Westwood's failure to meet the statutory demand.

[6] The hearing date specified in the originating application was 2 September 2009. The application, however, was adjourned by consent to await determination of a complaint made by the applicant to the Legal Services Commission in relation to one of the four accounts the subject of the statutory demand. The complaint was dismissed and, in a letter of 30 September 2009 to the applicant and Westwood, Butler McDermott again demanded payment of $5,270.62. No payment was made.

[7] When the application came on for hearing Butler McDermott was represented by counsel. The applicant was given leave to appear on behalf of Westwood. The applicant filed no affidavits and did not tender any documents. It was clear from the evidence that the statutory demand had been served on Westwood by registered post no later than 14 July 2009. There being no material before him to cast doubt on the existence of the debt alleged in the statutory demand, no evidence of Westwood's solvency and no contention that the statutory demand was defective, the primary judge made the orders referred to earlier.

[8] On 12 November 2009, the applicant made application to terminate Westwood's winding up. After two adjournments, the application was heard on 16 and 17 June 2010, together with an application by the sixth and seventh respondents for their appointment as receivers and managers of property held by Westwood as trustee of the McElligott Discretionary Trust. On 17 July 2010, the applicant's application was dismissed. The sixth and seventh respondents' application succeeded.

Application for extension of time and proposed notice of appeal

[9] In her application for an extension of time within which to appeal, the applicant relied on these grounds.[1]

> "**A. LATE DISCOVER OF IMPORTANT NEW EVIDENCE**
>
> - Late Discovery of a serious defect in the statutory demand and service
> - Late discovery of compelling circumstantial evidence leading to linking of delivery of statutory demand on Westwood Enterprises by Peter Boyce at Butler Mcdermott Lawyers with the blacklisting and boycotting actions of 'all the valuers on the sunshine coast' against Westwood in 2005 as a result of my complaints to the The **Valuers** Registration Board of Qld and reports produced by me called *Towards Consistency* (2002)and a second report called *Toward Transparency* (2005) in what amounts to perjury and abuse of process and misrepresentation to the court. It is now clear that the statutory demand was bought against *Westwood Enterprises* by way of a retaliatory action and in order to silence and punish me as a result of my attempts to bring attention to the potential for fraud misdealings and corruption in the valuations and finance industries due to the lack of the transparency and accountability in the relationship between the banks and the valuers.
>
> **B. DIFFICULTY IN OBTAINING PROPER LEGAL REPRESENTATION**
>
> **C. LACK OF FINANCES AND FINANCIAL HARDSHIP**
>
> **D. NECESSITY IN SELF-REPRESENTING AND LACK OF RESOUCES FOR RESEARCH ETC**
>
> **E. LACK OF CO-OPERATION BY SV PARTNERS**"

[10] The accompanying proposed notice of appeal listed the same ground A and grounds C and D as follows:

> "C. **UNSATIFACTORY CONDUCT OF [THE PRIMARY JUDGE]**
>
> A) discourtesy in the courtroom,
> B) impatience and brusqueness
> C) inappropriate comment.
> D) Unfairly criticising a myself
> E) failing to give a fair hearing,
> F) and perceived bias
>
> D. **ERRORS OF LAW AND FACT BY [THE PRIMARY JUDGE]**"

---

[1] Without grammatical corrections.

The alleged late discovery of new evidence

[11] The statutory demand was before the primary judge and is before the court on this application. There is nothing to be served by further evidence as to its contents. The document speaks for itself. It is not disputed that it did not contain the following statement which appears in the statutory form in bold type:

> **A failure to respond to a statutory demand can have very serious consequences for a company. In particular, it may result in the company being placed in liquidation and control of the company passing to the liquidator of the company.**

[12] A defect in the form of a statutory demand is not necessarily fatal to the validity of a statutory demand in the absence of proof of substantial injustice.[2] The absence of the warning statement has been held not to require the setting aside of a statutory demand.[3] There is no basis for concluding that the absence of the warning statement led to any injustice to Westwood, substantial or otherwise. There is clear evidence that the debt supporting the statutory demand was due and owing. Moreover, the applicant admitted that Westwood had no assets. There was an assertion by the applicant in the course of the hearing at first instance that a bank account existed, but it was not revealed whether that bank account was Westwood's, the applicant's or in the name of some other person or entity. Nor was anything said about whether the account was in credit and, if so, to what extent.

[13] The point is made by counsel for the first to fifth respondents that there is no reason to believe that had there been no defect in the statutory demand, matters would have turned out differently. The point is sound. Payment was demanded by Butler McDermott in their letter of 9 June 2009. They made plain their intention to sue and no attempt was made to pay the small amount in question before or after the winding up order was made. It would also appear that, if there was a genuine dispute about the amount claimed, it would only have been in respect of one of the four matters for which accounts had been rendered: the Land Court matters concerning real property valuations.

[14] There are other obstacles to the applicant's ability to raise defects in the statutory demand and its service at this late stage.

[15] There is a strong public interest in the finality of litigation and a party is bound by the conduct of his or her case at first instance. It was observed in the judgment of the court in *University of Wollongong v Metwally [No 2]* that: [4]

> "Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

[16] This passage was referred to with approval in the joint reasons in *Coulton v Holcombe* in which it was said:[5]

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the

---

2 *Corporations Act* 2001 (Cth), s 459J(2).
3 *Randall Pty Ltd v Chepan Pty Ltd* (2009) 73 ACSR 267.
4 (1985) 60 ALR 68 at 71.
5 (1986) 162 CLR 1 at 7 and 8.

> trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: see *Suttor v. Gundowda Pty. Ltd.*; *Bloemen v. The Commonwealth*." (citations omitted)

[17] This is not a case in which a party seeks to rely on a question of law which could not have been met in any way by the applicant at first instance. Had the defect in the statutory demand been raised, the first and fifth respondents could have sought to amend the grounds on which the winding up was sought.

[18] The application of the principles expounded in *Coulton v Holcombe* stand in the way of the applicant's success on this ground and the others considered below, even if the applicant were able to adduce evidence supporting any or all of the proposed grounds of appeal.

[19] The other "important new evidence" is the "compelling circumstantial evidence" alleged to have been discovered "leading to linking of delivery of statutory demand … by Peter Boyce … with the blacklisting and boycotting actions of 'all the valuers on the sunshine coast' against Westwood in 2005." These allegations would seem to have little, if anything, to do with the winding up application.

[20] There is evidence that Butler McDermott did the work for which it claimed in the statutory demand. It is fanciful to contend, as the applicant now does, that the statutory demand was made "by way of a retaliatory action and in order to silence and punish [her]." In any event, no evidence was put forward in support of the applicant's contentions in this regard. There is also no evidence that Butler McDermott made the statutory demand, not for the purpose of recovering its fees, but for the predominant purpose alleged by the applicant. There is thus no basis for finding that the making of the statutory demand was an abuse of process. [6]

The other grounds relied on in support of the application for extension of time

[21] Grounds B, C and D in the application encompass matters which may be relevant to an application for an extension of time but no attempt was made by the applicant to explain on oath relevant matters such as, when she first became aware of the matters on which she now wishes to rely, what she did about obtaining legal representation, and how she attempted to prepare and prosecute her proposed appeal. It will be seen from the earlier narrative that the applicant has expended energy and resources in another avenue of challenge to the winding up and it is highly relevant that the respondents have been permitted to conduct their affairs for a lengthy period on the basis that the winding up order was regularly made.

[22] As for the "lack of co-operation by SV Partners", it is impossible to see how the conduct of that respondent could have any possible bearing on the merits of an appeal against the winding up and related orders.

---

6 C.f. *Williams v Spautz* (1992) 174 CLR 509.

Consideration of the proposed grounds of appeal

[23] I turn now to paragraph C of the grounds of appeal. The complaints made by the applicant are not supported by the transcript. The hearing was brief. The primary judge gave the applicant appropriate opportunity to make any argument she wished to advance. He ascertained when the statutory demand had been received. The applicant admitted receipt, but said that she did not know that the document was a statutory demand and contended that "it was actually delivered in a misleading way" because, according to her, there was a covering letter which stated, "We intend to take legal action against you." She referred also to part of the letter which stated, "We intend to commence legal action without further notice." These statements, somewhat improbably, were said by the applicant to indicate to her that some other document was to be delivered before action would be taken. But, in any event, the applicant's contentions have no basis in fact. It is plain from the evidence that the statutory demand was served under cover of a brief letter stating that the enclosed statutory demand and affidavit of the first respondent was served in accordance with s 109X of the *Corporations Act.* The letter to which the respondent referred was sent separately by email. It concluded:

> "If all accounts are not paid by 16 June, 2009 we intend to commence action without further notice, particularly given that you admit that the monies are due and owing pursuant to our Client Agreement."

[24] The primary judge raised with the applicant the lack of evidence in respect of Westwood's solvency. The applicant said, "I do have our bank account" and, a little later said, "Well, I have the bank account here…I have the bank account." The primary judge again referred to the applicant's lack of any affidavit material. The respondent did not seek an adjournment in order to file an affidavit or attempt to tender any documentary evidence. She did state that "the company itself … doesn't own any assets as such. It owns nothing as such."

The applicant's outline of legal argument

[25] The applicant filed and relied on an 11 page document headed, "Outline of legal argument".

[26] The document strayed beyond the grounds for an extension of time or the proposed grounds of appeal. It made many assertions which were unsupported by the evidence in the appeal record. After some introductory matter, the outline addressed five specific points. I consider it desirable that they be addressed, albeit briefly, even though counsel for the applicant confined his submissions to the defect in the statutory demand and its consequences and to the way in which the proceedings at first instance were conducted. In my respectful opinion, the course taken by counsel was that best suited to advance his client's interests.

[27] Point 1 contained assertions concerning the quality of the work done by Butler McDermott on Westwood's behalf and the history of the accounts rendered in relation to it. There is nothing in the arguments in respect of point 1 which casts doubt on the subject debt. If the applicant could show an arguable case that Butler McDermott was in breach of its duty to exercise due skill and diligence in doing the subject work, she would have an offsetting claim or a set-off, but there was no attempt to quantify any such claim or set-off.

[28] Point 2 concerns dealings between the applicant and Mr Boyce of Butler McDermott concerning Butler McDermott's accounts and demands for payment.

These matters do nothing to disprove the existence of the subject debt. Point 3 concerns the statutory demand. This matter has been considered above. Not content with advancing an argument that the statutory demand was a nullity because of the absence of the warning statement (and of notes 4 and 5 of the statutory form),[7] the applicant made allegations of abuse of process and perjury which were completely unsupported by the evidence.

[29] Point 4 contains allegations of perjury against Mr Boyce. It was asserted that when Mr Boyce swore that "there is no genuine dispute about the existence or amount of the debt", there was "unarguable evidence that there was a genuine dispute." In an email to Butler McDermott of 3 June 2009, the applicant said that she "[did] not dispute the fact that the account was not charged out according to a contract" but did dispute "the value of the advice given." Mr Boyce gave a reasoned response in an email of 9 June, in which he threatened action if the account was not paid. Merely to assert the existence of a "genuine dispute" is not to bring one into existence. Nothing before the primary judge or before this Court casts any doubt on Mr Boyce's entitlement to hold the belief that there was no genuine dispute as to the existence and amount of the subject debt and, as I have said already, any dispute appears to have concerned only one of the four matters in respect of which the account was rendered.

[30] Point 5 deals with the hearing at first instance. One complaint not addressed earlier is that the applicant was not offered the opportunity of seeking an adjournment or swearing an affidavit or paying the "disputed account into the Court's Trust account". The winding up application had been adjourned for some weeks prior to its coming on for hearing. The applicant therefore had ample time to prepare for the hearing. She did not seek an adjournment and did not attempt to file any affidavit or, it would seem, prepare one. She made no attempt to pay money into court. If she wished to contest the winding up application effectively, it was incumbent on her to undertake the preparation required. There is no evidence that she sought legal advice or assistance or that she took any steps to familiarise herself with court procedures or any statutory provisions or laws relevant to winding up applications.

[31] Point 6 concerns allegations about the performance, or lack thereof, of SV Partners in connection with the liquidation and subsequent receivership. As mentioned earlier, that can have no relevance to an appeal against the winding up order.

Conclusion

[32] Counsel for the applicant applied for leave to file and read an unsworn report as to the solvency of Westwood. The application was opposed as the first to fifth respondents did not have any opportunity to consider or respond to it. I would refuse leave for that reason. But even if the document had gone into evidence, it would not have proved the present solvency of Westwood. In the absence of such proof, it is difficult to see how this court could be justified in setting aside the winding up order.

[33] I would refuse the application for an extension of time within which to file a notice of appeal and order that the applicant pay the costs of the first to fifth respondents. The delay is extremely extensive. It has not been satisfactorily explained. Westwood has been in liquidation and receivership for a considerable period of time, during which other applications have been brought by the applicant and

---

[7] All of the notes to the statutory form were included in the subject demand.

dismissed. None of the grounds of appeal to be relied on by the applicant, should the application for leave be granted, offer any reasonable prospect of success.

[34] **CHESTERMAN JA**: I agree with the orders proposed by Muir JA for the reasons given by his Honour.

[35] **WHITE JA**: I have read the reasons for judgment of Muir JA and agree with the orders proposed by his Honour for the reasons which he gives.