

SUPREME COURT OF QUEENSLAND

CITATION: *Iseek Communications Pty Ltd v AJPP Pty Ltd* [2011] QSC 172

PARTIES: **IN THE MATTER OF ISEEK COMMUNICATIONS
PTY LTD ACN 094 230 467**
ISEEK COMMUNICATION PTY LTD ACN 094 230 467
(applicant)
v
AJPP PTY LTD ACN 104 273 243
(respondent)

FILE NO/S: 3486 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 June 2011

DELIVERED AT: Brisbane

HEARING DATE: 31 May 2011

JUDGE: Martin J

ORDER: **That the statutory demand be set aside.**

CATCHWORDS: CORPORATIONS – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SUBSTANTIAL INJUSTICE – where the applicant was the tenant and the respondent the registered proprietor and landlord of a property – where the applicant signed a form of lease in 2009 – where the respondent did not sign that lease until 2011 - where the applicant signed the agreement on the basis that a survey plan would be annexed signifying the lease area – where the parties disagreed about the correctness of the survey – where the Court declared a lease to exist – where the respondent subsequently served a statutory demand on the applicant for outstanding rent - whether in the circumstances the statutory demand should be set aside – whether a substantial injustice would be caused unless the demand was set aside

CORPORATIONS – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – where the applicant was the tenant and the respondent the registered proprietor

and landlord of a property – where the applicant signed a form of lease in 2009 – where the respondent did not sign that lease until 2011 - where the applicant signed the agreement on the basis that a survey plan would be annexed signifying the lease area – where the parties disagreed about the correctness of the survey – where the Court declared a lease to exist – where the respondent subsequently served a statutory demand on the applicant for outstanding rent - whether in the circumstances the statutory demand should be set aside – whether there is a genuine dispute between the company and the respondent about the existence or amount of debt to which the demand relates

Corporations Act 2001, s 459G, s 459J

Property Law Act 1974, s 130

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1977-78) 138 CLR 423, considered

Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785, cited
Fortrus Pty Ltd v Barraigh Pty Ltd [2010] QSC 478, cited
Jeppesons Road Pty Ltd v Di Domenico [2005] QCA 391, cited

Mibor Investments Pty Ltd v Commonwealth Bank of Australia (1993) 11 ACSR 362, cited

Re Morris Catering (Aust) Pty Ltd (1993) 11 ACSR 601, cited

Rohalo Pharmaceutical Pty Ltd v RP Scherer SpA & Pharmagel SpA (1994) 50 ACSR 347, cited

Roadshow Entertainment Pty Ltd v CEL Home Video Pty Ltd (1997) 42 NSWLR 462, cited

Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 76 FCR 452, cited

COUNSEL: M D Evans for the applicant
P W Hackett for the respondent

SOLICITORS: David K Lawyers for the applicant
H Drakos & Co for the respondent

- [1] The application seeks an order under s 459G of the *Corporations Act 2001* (“the Act”) setting aside a statutory demand.
- [2] The applicant relies on two grounds. First, it says that there is a defect in the statutory demand causing a substantial injustice. Secondly, it says that there is a genuine dispute about the existence or the amount of the debt.
- [3] At the material times the applicant was the tenant of part of a building at Ipswich Road, Woolloongabba. The respondent was the registered proprietor of the property and the landlord. In March 2009 the parties entered into an agreement to lease the property. On 27 April 2009 the applicant signed a form of lease. The respondent did not sign that lease until 4 April 2011.

- [4] When the applicant signed the lease in April 2009, it was on the basis that a survey plan was to be annexed to the lease which would signify the lease area. That plan was received by the respondent's solicitors in May 2009 and sent to the applicant's solicitors. The parties disagreed about the correctness of the survey and correspondence ensued between the parties and with the surveyor. An amended survey plan was received by the respondent in March 2010. After that there was a dispute as to whether the rental payable under the lease needed to be amended as a result of the increase in the leased area. That dispute continued through to February 2011.
- [5] On 4 March 2011 the applicant gave notice of its intention to terminate the tenancy under the agreement to lease pursuant to s 130 of the *Property Law Act 1974* (PLA) on the basis that:
- (a) The agreement to lease was said to have been entered into on the basis that the respondent would execute and register a lease for a term of six years; and
 - (b) The respondent had not so executed the lease or taken reasonable steps to do so, notwithstanding numerous requests.
- [6] The applicant asserted that the failure to sign the lease was a breach of the agreement to lease. In the letter in which the applicant gave notice of its intention, it also informed the respondent that it was withholding the rent for March and April 2011 and that it would vacate the premises on 15 April 2011.
- [7] The respondent, through its solicitors, disputed the right of the applicant to take the action referred to above and, following further correspondence, the respondent filed an originating application seeking declaratory relief as to the existence of a lease between the parties.
- [8] On 31 March 2011 Justice Boddice made the following declaration:
 "The Agreement to Lease between the applicant and the second respondent dated 23 and 27 March 2009 and being exhibit 'F' to the affidavit of John Sophios is a lease of the premises known as Level 2, 116 Ipswich Road, Woolloongabba in the State of Queensland for a period of 6 years from 1 June 2009 at an initial monthly rental of \$9,506.66 plus GST (calculated at the rate of \$310/m² for 368 metres/12 months) as that term is defined in s.123 of the *Property Law Act 1974*."
- [9] It is clear from his Honour's reasons that the declaration of the existence of the lease was made without prejudice to the applicant's right to assert that it had terminated any such lease.
- [10] Further disputation ensued between the parties and on 4 April 2011 the respondent served the statutory demand on the applicant.

Defect in statutory demand

- [11] Section 459J of the Act provides:

"Setting aside demand on other grounds

- (1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:

- (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
 - (b) there is some other reason why the demand should be set aside.
- (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.”

[12] The relevant part of the statutory demand was in the following form:

“Description of the debt	Amount of the debt
Rent payable to the creditor As at 4 April 2011	\$37 520.69
DESCRIPTION	AMOUNT
Rent outstanding for the period 01.06.2009 to 30.06.2009;	10,457.34
Rent outstanding for the period 01.07.2009 to 31.07.2009;	10,457.34
Rent outstanding for the period 01.08.2009 to 30.08.2009;	10,457.34
Rent outstanding for the period 01.04.2011 to 30.04.2011;	<u>9,000.67</u>
Total	40,372.69
Less amount paid -	<u>Nil</u>
Total due and owing:	\$ ”

- [13] The applicant argues that the statutory demand is, in part, inconsistent with the assertion in the supporting affidavit that a debt of \$40,372.69 was due and payable. The statutory demand can be seen to contain two different amounts for the rent owing.
- [14] The applicant says that the statutory demand is confusing and leaves it in doubt as to what is required. Further, it is argued that the claim incorporates a claim for payment of rent for a three month period from 1 June 2009 to 30 August 2009 which was to be a rent free period.
- [15] I do not consider that the inclusion of a claim for rent for an alleged “rent free” period creates an injustice in the sense in which that word is used in s 459J. Rather, if the applicant was entitled to that rent free period then it might, subject to other matters I will consider, give rise to a genuine dispute.
- [16] A fair reading of the relevant part of the demand leads to the conclusion that the debt for which payment was demanded is the amount of \$40,372.69, that being the amount set out next to the word “total” and corresponding with the addition of the sums of rent set out immediately above that.
- [17] The applicant did not satisfy me that, on this ground, a substantial injustice would be caused unless the demand was set aside.

Is there a genuine dispute?

[18] Section 459H of the Act provides circumstances in which a court may be satisfied that it is appropriate to set aside a statutory demand. Section 459H(1) provides:

- “(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
- (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
- ...”

[19] So far as is relevant to this case, the following principles apply to the determination of whether or not there is a genuine dispute:

- (a) The role of the court is to decide whether or not there is a dispute and if that dispute is genuine. The court should not embark upon any extended inquiry and not attempt to weigh the merits of the dispute.¹
- (b) For a “genuine” dispute to exist the dispute must be bona fide and the grounds for supporting the existence of the dispute must be real and not spurious, hypothetical, illusory or misconceived.²
- (c) In order to raise a dispute there must be more than the mere assertion of a dispute or the mere making of a claim.³ The test of whether the dispute is genuine has been equated with the test as to whether the creditor would be entitled to summary judgment on the claim⁴. It should be noted that this reference was to summary judgment in the Federal Court which has a different test to that which applies under the *Uniform Civil Procedure Rules*.
- (d) The expression “genuine dispute” connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the “serious question to be tried” criterion which arises on an application for an interlocutory injunction.⁵
- (e) The essential task involved is relatively simple – to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).⁶

[20] The applicant says that there is a genuine dispute because:

- (a) The applicant claims to have terminated any agreement to lease in March 2011; and
- (b) The amount claimed for the first three months rent is inconsistent with a term of the agreement to lease that that was to be a rent-free period.

[21] I am satisfied on the material that the applicant has, at all relevant times, asserted that it both has and had the right to terminate the agreement for lease. Further, I am satisfied that the declaration made by Justice Boddice was made without prejudice to the capacity of the applicant to have that point determined.

¹ *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362; *Fortrus Pty Ltd v Barraigh Pty Ltd* [2010] QSC 478.

² *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452.

³ *Rohalo Pharmaceutical Pty Ltd v RP Scherer SpA & Pharmagel SpA* (1994) 50 ACSR 347

⁴ *Ibid* at 353-354.

⁵ *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785.

⁶ *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601.

- [22] The respondent submits that it has never refused to sign a lease; rather, it was in the same position as is described by the High Court in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*⁷ where the court said (at 432):

“No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him.”

- [23] Thus, the respondent says that, although it has not signed the lease, it was not in default because there was a matter which needed to be resolved with respect to the rent, that is how it was to be calculated and upon what area.
- [24] The respondent argues that the applicant was not entitled to terminate the agreement for lease because it was, itself, in breach of the agreement to lease. Clause 11 of the agreement to lease (in clause 47 of the lease) both required that the applicant provide a bank guarantee in respect of the rent which would be current for the entire term of the lease. The applicant did not provide such a guarantee. It provided a guarantee which expired on 27 April 2010.
- [25] Mr Evans, who appeared for the applicant, quite properly accepted that he could not argue against the proposition that his client was in breach for that reason. He went on, though, to say that it was necessary to characterise the breach and to assess whether it disqualified his client from relying upon the respondent’s alleged repudiatory conduct. A party who is in breach may still have a right to terminate provided that the breach is not repudiatory or of an essential term or of a type which deprives the other party of a substantial benefit of the contract.⁸
- [26] The matters which have been referred to above demonstrate to me that there remains a dispute between the parties as to the capacity of the applicant to terminate and the right of the applicant to terminate. If the applicant was in breach, then it may not be able to claim the rent-free period because it was conditional upon the tenant not being in breach. To go further, though, would be to engage in an exercise of determining the issues rather than in assessing the nature and genuineness of the dispute. That is inappropriate for these types of proceedings.
- [27] I find that there is a genuine dispute between the applicant and the respondent about the existence or amount of the debt to which the demand relates. I order that the statutory demand be set aside. I will hear the parties on costs.

⁷ (1978) 138 CLR 423.

⁸ *Roadshow Entertainment Pty Ltd v CEL Home Video Pty Ltd* (1997) 42 NSWLR 462; *Jeppsons Road Pty Ltd v Di Domenico* [2005] QCA 391.