

# SUPREME COURT OF QUEENSLAND

CITATION:	<i>Minpro Australia Pty Ltd v Rokonma (M) SDN BHD</i> [2011] QSC 199
PARTIES:	<b>MINPRO (AUST) PTY LTD</b> <b>ACN 126 746 487</b> (applicant)  <b>and</b>  <b>ROKONMA (M) SDN BHD</b> (respondent)
FILE NO:	S253/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	5 July 2011
DELIVERED AT:	Townsville
HEARING DATE:	17 June 2011
JUDGE:	Cullinane J
ORDERS:	<b>Application is dismissed with costs.</b>
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SUBSTANTIAL INJUSTICE
LEGISLATION	<i>Corporations Act</i> 2001 (Cth)
CASES	<i>Spencer Constructions Pty Ltd v G &amp; M Aldridge Pty Ltd</i> (1977) 76 FCR 452.
COUNSEL:	Mr C Coulsen for the applicant Mr P Tucker for the respondent
SOLICITORS:	Sajan Legal for the applicant Hopgood Ganim Lawyers for the respondent

- [1] This is an application by the applicant to set aside a statutory demand. The statutory demand is dated 14 March 2011 and was forwarded to the registered office of the applicant under cover of a letter from the respondent's solicitors dated 22 March 2011.

- [2] By the statutory demand the respondent claimed the sum of \$962,722.08 being the amount of the debt described in the schedule.
- [3] The schedule is in the following terms:
- “Balance moneys owing for goods sold and delivered by the Creditor to the Company during the period 17 December 2008 to 20 August 2009 as particularised in the invoices issued to the Company”*
- [4] The accompanying affidavit was by Chong Kak Fang described as sales director and who deposed to the fact that he had inspected the business records of the respondent in relation to the applicant's account with the respondent and that the sum of \$962,722.08 referred to in the statutory demand was due and payable by the applicant.
- [5] The material before the Court shows that the respondent provided certain machinery (rollers) to the applicant. It is clear that there were dealings between the respondent and companies associated with the applicant but the documentation and correspondence appears to distinguish clearly between the applicant and other members of the Minpro Group.
- [6] Exhibited to the affidavit of Chong Kak Fang are copies of what he deposes to as being the outstanding invoices, associated bills of lading and other documentation.
- [7] The period covered was from 17 December 2008 to 20 August 2009.
- [8] At pages 378 and 379 to the documents exhibited to Mr Fang's affidavit is an email from Mr Ruckman, who is a director of the applicant to Mr Fang, dated 6 August 2009 in the following terms:

*Thanks KF,*

*I know you have done everything you can, I would like to suggest that from now on we consolidate our orders and send them through a bank LC for 60 days from lading this will guarantee payment in a timely manner, and we will get the current balance payed off ASAP, Minpro should be able to be paid up completely within 90 days, NSW will take a bit longer but if we can get 100k a month it should reduce quickly. If Peter comes good to his promises it could happen fairly quickly.*

*Let me know your thoughts, are you going to be able to make it next week, timing might be hard with your guest from RIO which must come first.*

*Best Regards,*

*Jon Ruckman*

*General Manager*

- [9] The general ledgers of the applicant which are exhibited to Mr Ruckman's affidavit (commencing at page 47 and finishing at page 50) show payments up to September 2009.

- [10] Further correspondence between the parties which is set out in pages 384 and 385 of the exhibits to Mr Fang's affidavit resulted in the preparation of an agreement signed by Mr Ruckman on behalf of the applicant on the 20 November 2009 and the managing director of the respondent. It is in the following terms:

*Dear Sir,*

*RE: SCHEDULE FOR THE WEEKLY PAYMENT OF THE OVERDUE ACCOUNT AUD1,052,722.08 AS AT 31/8/09*

*Please find enclosed the schedule for the weekly payment of the overdue account of AUD1,052,722.08 (as at 31/8/09) as per email discussions and agreement between our companies effective from 1<sup>st</sup> Nov 2009.*

*We expect timely payment according to this schedule to be strictly adhered to.*

*Kindly sign and stamp on the space below together with the attached schedules as an indication of your acceptance to the terms and conditions, and return a set to us.*

- [11] Attached thereto was the schedule of weekly payments.
- [12] Mr Fang deposes to the fact that some \$90,000 was paid by the applicant and that no further payments have been made. The amount the subject of the statutory demand is the difference between \$1,052,722.08 and \$90,000.
- [13] Also exhibited to Mr Fang's affidavit (pages 386-394) are a number of demands by the respondent to the applicant seeking payment. Except for one occasion (page 387) these were not responded to.
- [14] The affidavit of Mr Ruckman in support of the application raises a number of matters.
- [15] In paragraph 4, he states that he was unable to determine from the supporting affidavit the nature of the alleged debt or when it was alleged to have been incurred. He goes on to say that it fails to show any obligation contractual or otherwise in respect of which the applicant may have incurred the alleged debt and as a result he was uncertain as to the precise basis of the allegation of debt.
- [16] He raises some other matters as to Mr Fang's authority and the status of the company but these were not pursued before me.
- [17] He alleged that substantial injustice would be suffered by the applicant if the demand stands because the applicant is placed in an unreasonable position where it is faced with the choices;

- (a) *comply with the Demand by the payment of a large sum of money in respect of an alleged debt which carries no particularisation or certainty and in respect of which the Applicant genuinely disputes;*  
or

(b) *refuse to comply with the Demand which will then result in the Applicant being deemed insolvent by operation of law, (and it is my view that the Company is in fact solvent, being able to pay its debts as and when the fall due).*

[18] In his affidavit Mr Ruckman refers to the fact that there were dealings also between the respondent and other members of the Minpro Group.

[19] He summarises the various matters he raises in paragraph 23 of his affidavit:

*"Further and in any event I do not believe that the applicant is indebted to the respondent as alleged or at all. To the extent goods or equipment may have been supplied by the Respondent, they were supplied to the Respondent to Minpro Mining and Engineering Pty Ltd and to Minpro Supplies. And they were supplied on the basis of consignment; such that the intention of the parties to the arrangement was that the ownership in the goods never passed to the recipient and at all times remained with the respondent until such time as they were on sold to the ultimate end users."*

[20] The affidavit goes on to complain of other matters such as a lack of particularity making it impossible for him to accurately determine what if any money was due and owing to the respondent and by whom.

[21] The contents of Mr Ruckman's affidavit would on its facts appear to give rise to a claim that there was a genuine dispute between the parties for the purposes of section 459H of the *Corporations Act*.

[22] Counsel for the respondent presented to the Court an outline which was prepared almost entirely on this basis.

[23] However, counsel for the applicant disavowed any reliance upon there being a genuine dispute. He relied solely upon section 459J of the *Act*.

[24] This provides as follows:

***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.*

[25] It was the contention of counsel for the applicant that the demand was defective and that substantial injustice would be caused unless it was set aside and that because of the corresponding defect in the supporting affidavit, there was for the purposes of section 459J(1)(b) some other reason why the demand should be set aside.

- [26] In argument it was the applicant's contention that the debt described in the schedule to the statutory demand could not be substantiated and that any rights which the respondent had against the applicant could only arise from the agreement of 1 November 2009.
- [27] Section 459E(2) sets out the requirements of a demand and section 459(E)(3) requires the demand to be accompanied by an affidavit.
- [28] 'Defect' is defined in section 9 of the *Act* in the following terms:
- 'defect', in relation to a statutory demand, includes:*
- (a) *an irregularity; and*
  - (b) *a misstatement of an amount or total; and*
  - (c) *a misdescription of a debt or another matter; and*
  - (d) *a misdescription of a person or entity.*
- [29] There is some diversity in the authorities as to the proper construction of section 459J. I take the correct position to be that stated in the judgment of the Full Federal Court in *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1977) 76 FCR 452.
- [30] In summary a defect in the statutory demand itself can be the basis for setting aside the demand only if it meets the terms of section 459J(1)(a) namely that it is productive of substantial injustice. A defect in the accompanying affidavit cannot constitute "any other reason" for the purposes of section 459J(1)(b).
- [31] That is to say a defect in form per se whether in the demand or accompanying affidavit cannot be a basis for setting aside the statutory notice.
- [32] The agreement which the parties reached in November 2009 in relation to the repayment by the applicant of its indebtedness appears on the face of things to be in the nature of a concession by the respondent to the applicant. When counsel for the applicant was asked what consideration there was for the agreement he referred to there being "an issue about whether some stock was on consignment". It was contended that the debt was up until that time disputed.
- [33] The difficulty with this argument is that in all of the material placed before the court, no suggestion of any such dispute whether relating to consignment or otherwise appears. The contemporary evidence shows in fact an acknowledgment by the applicant of its indebtedness to the respondent. Its own financial documents exhibited to Mr Ruckman's affidavit are inconsistent with the notion of delivery on consignment.
- [34] In addition to the other matters to which I have already referred Mr Ruckman's emails of 9 November 2009 (page 384 of the exhibits to Mr Fang's affidavit) and his email of 7 January 2010 (page 387 of the exhibits) are inconsistent with such a claim.
- [35] In my view the complaints made about the alleged defects in the statutory demand and the accompanying affidavit are without foundation.

- [36] However I should for the sake of completeness say that had I accepted that there was any basis for the claim made by the applicant the material could not justify a finding of substantial injustice in view of the matters already set out.
- [37] There is nothing which could have lead the applicant to be mislead or confused or inadequately informed about the claim made against it. The evidence is to the contrary.
- [38] The application is dismissed with costs.