SUPREME COURT OF QUEENSLAND

CITATION:	*BTBF Plumbing P/L v Workers Compensation Nominal Insurer & Anor* [2011] QSC 394
PARTIES:	**BTBF PLUMBING PTY LTD ACN 056 282 494** (plaintiff) **v** **WORKERS COMPENSATION NOMINAL INSURER** (first respondent) and **CAMBRIDGE INTEGRATED SERVICES AUSTRALIA PTY LTD ACN 111 480 141** (second respondent)
FILE NO/S:	BS4984/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	15 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2011
JUDGE:	Douglas J
ORDER:	**That the statutory demand dated 19 May 2011 in the name of "Workers Compensation Nominal Insurer of c/- Cambridge Integrated Services Australia Pty Ltd t/as Xchanging, Level 2, 201 Elizabeth Street, Sydney NSW 2000" as creditor be set aside pursuant to the *Corporations Act* 2001 (Cth).**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – where application to set aside statutory demand based on judgment debt – where money said to be owing by plaintiff as a premium payable for its workers' compensation insurance – where plaintiff filed appeal with WorkCover – where WorkCover appeal not determined at time of application to set aside demand – where respondents found to have agreed not to proceed to enforce default judgment pending determination of WorkCover appeal – whether respondents' conduct constitutes "some other reason" to set aside demand – whether affidavit of creditor manager of second respondent verifying demand constitutes a defect in demand or "some other reason" to set

aside demand – whether demand ought be set aside pursuant to the *Corporations Act* 2011 (Cth)

Workers Compensation Act 1987 (NSW), ss 170(2), 172(4)
Corporations Act 2001 (Cth), ss 459H, 459J(1)(b)

Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd & Ors [2008] HCA 41; (2008) 237 CLR 473, referred
Employer's Mutual Indemnity (Workers Compensation) Pty Ltd v A Donald Pty Ltd, New South Wales Court of Appeal, No. 40508 of 1995, Priestley, Cole and Stein JJA, 23 October 1997, BC9705385, unreported, cited
Meehan v Glazier Holdings Pty Ltd [2005] NSWCA 24, cited
Neutral Bay Pty Ltd & Ors v DCT [2007] QCA 312, considered
Rapcivic Contractors Pty Ltd v Maypole Nominees Pty Ltd [2009] 1 Qd R 21, distinguished

COUNSEL: G Handran for the applicant
D de Jersey for the respondents

SOLICITORS: Shand Taylor Lawyers for the applicant
Jones King Lawyers for the respondents

[1] **Douglas J**: BTBF Plumbing Pty Ltd has applied to set aside a statutory demand based on a judgment debt obtained by "Workers Compensation Nominal Insurer by its Scheme Agent Cambridge Integrated Services Australia Pty Ltd ACN 111 480 141" for money said to be owing by BTBF as a premium payable for its workers' compensation insurance. The issues raised are whether the respondents' conduct in respect of the claim constitutes "some other reason" to set aside the demand and whether confusion said to surround the identity of the creditor or an allegedly defective affidavit verifying the demand constitutes a defect in the demand or "some other reason" why it should be set aside.

Background facts

[2] BTBF carried on a plumbing business where it employed staff in New South Wales. That made it liable to pay premiums for compulsory workers' compensation insurance in that state. The premiums had been demanded on or about 13 August 2008. They were not paid and BTBF did not seek a review of the demands within one month as it was entitled to do pursuant to s 170(2) of the *Workers Compensation Act* 1987 (NSW).

[3] On 30 March 2010 BTBF was served with a statement of claim issued from the New South Wales District Court and instructed its solicitors to obtain further details of the claim with a view to defending the proceedings. Correspondence ensued between the parties' solicitors, amendments were made to the statement of claim, BTBF's solicitors made further requests for particulars and advised, on 23 November 2010, that they would file a defence within 21 days of receiving the particulars requested.

[4] Particulars were forwarded by the respondents' new solicitors on 10 December 2010 and further requests were made by BTBF's solicitors for better particulars on

22 December 2010. BTBF's solicitors' office was then closed for a period between mid January and February 2011 due to the floods affecting Brisbane and the respondents' solicitors forwarded further particulars on 18 February 2011. BTBF's solicitors then requested further particulars on 1 March 2011. Mr Ahern, the sole director of BTBF, says he had received enough detail by 18 February 2011 to start to investigate the calculations of the amounts claimed.

[5] His investigations made him believe that there were possibly serious discrepancies in an audit that had been carried out for the year 2004 to 2007 which had led to the making of the claim against BTBF. He says he believed that he would be given a reasonable amount of time to check the claim and to respond to it because of the communications his solicitors had had with the solicitors for the plaintiff in the District Court proceedings. Nonetheless, the respondents' solicitors notified BTBF's solicitors on 2 March 2011 that they were instructed to apply immediately for default judgment and obtained it later that day.

[6] Mr O'Sullivan, BTBF's solicitor, earlier on 2 March 2011 had sent the following email to the respondents' solicitor saying:

> "We have advised your client (through its former solicitors) of our client's intention to defend these proceedings on more than one occasion. We also note that our request for particulars of the claim dated 10 November 2010 remains unanswered. In those circumstances, your threat to make application for default judgment 'immediately' is unreasonable and unhelpful.
>
> For the sake of clarity, we repeat that it is our client's intention to defend the proceedings commenced by your client on the basis that your client has relied upon improperly audited wage amounts. We also maintain that the current version of the statement of claim is deficient and it remains our client's intention to defend the proceedings once the deficiencies in the statement of claim have been rectified. If you are now indicating that you require our client's defence notwithstanding the previously identified deficiencies in the statement of claim, please confirm and we will obtain our client's instructions. Otherwise, please advise of your client's intentions in relation to the deficiencies in the statement of claim that we have been complaining about for a number of months.
>
> We also reject the implication in your latest email that our client has been responsible for any delays in this matter. To the contrary, our client has been the one actively attempting to bring the matter to a resolution. We refer to the numerous facsimiles sent to your client's former solicitors between April 2010 and November 2010 in that regard. The only delay that can be attributable to our client occurred as a result of the enormous disruption experienced in South-East Queensland as a result of the floods in January of this year - circumstances beyond our client's control.
>
> As indicated in our previous correspondence, it remains our client's intention to provide you further details of our client's concerns about the wages audit, even though the onus is upon your client to establish its claim.
>
> In the event that your client proceeds with an application for default judgment without first giving our client a reasonable opportunity to prepare and file a defence, an immediate application will be made to have that default judgment set aside and costs will be sought against your [sic] on the indemnity basis. A copy of this and our numerous previous

communications with you and your client's former solicitors will be produced to the Court on any such application.

I look forward to hearing from you as to your client's intentions."

[7] In reply, Ms Heng, the respondents' solicitor said (emphasis added):

"The District Court is the [sic] not the jurisdiction to deal with dispute in relation to quantum and calculation of the premium payable resulting from a wage audit conducted. Please refer to Employer's Mutual Indemnity (Workers Compensation) Ltd v A Donald Pty Ltd. BC9705385.

We have in our previous telephone discussion on 20th January 2011 requested that you put all of your clients' disputes to the wage audit in writing, so that we can take it to our client for further instructions but you have chosen not to provide such information, instead, you continually chose to frustrate settlement of this matter by bringing up bits and pieces of information each time we attempt to derive at a conclusion for our respective clients. We believe we have answered all of your queries in your previous letters and in view of the decision of EMI v A Donald, we are of the view that the Amended Statement of Claim is sufficiently pleaded.

In the meantime, We would suggest that your client appeals to WorkCover immediately even though it has past the 30 days within which to lodge its appeal. Your client can at this time provide all of its objections to the wage audit in its entirety to WorkCover for its determination. We ask that you provide us with an Appeal Cast No as soon as you have lodged this appeal.

Please note that we are instructed to proceed with judgment and has [sic] done so, **however, once your client has lodged its appeal, we shall await WorkCover's instructions and determination before proceeding to the next step**."

[8] Then, almost three weeks later, by an email of 21 March 2011, Mr O'Sullivan said (emphasis added):

"I refer to our previous communications. Your communications over recent days have been a little unclear about where your client stands and what its intentions are. To avoid being taken by surprise (again) by your client's actions, I thought I would clarify my understanding of the current position.

We disagree with your latest suggestion that your client's offer to set aside the judgment has somehow lapsed, but it seems from a practical point of view, that is not an issue we need to be further distracted by at this time.

I note your letter of 2 March 2011 stated '*once your client has lodged its appeal, we shall await WorkCover's instructions and determination before proceeding to the next step*' - this was not an offer, but a clear statement of intention. This is also consistent with your letter of 10 March 2011 which stated your client is bound to follow the Authority's directions and that our client should resolve this matter by appealing to the Authority. Now that our client has taken that step, we are therefore proceeding on the basis that your client will be taking no steps to enforce the judgment while our client's appeal to the Authority is pending, unless your client is otherwise directed by the Authority in the meantime. We have spoken with the Authority and they have indicated it is not their practice to direct Agents in

> relation to recovery proceedings, so it would appear very unlikely that any such direction will be forthcoming.
>
> **As no steps will be taken to enforce the judgment while the appeal is being determined, our client will not go to the trouble and expense of seeking to have the judgment set aside during that time - it seems sensible for both parties to simply allow the WorkCover Appeal process to be completed before dealing further with the District Court proceedings.**
>
> We will communicate directly with the Authority in relation to our client's appeal and expect we will be in further communication with you once the appeal has been determined as to how the District Court proceedings (and any indebtedness our client may still have to your client) should be dealt with.
>
> We must, however, reserve our rights in relation to the judgment which we maintain was improperly obtained (and is being improperly maintained) in the meantime."

[9] BTBF filed an appeal with the WorkCover New South Wales Appeals Branch on 4 April 2011 and was advised through its solicitor that the lodging of the appeal did not stay BTBF's obligations to the insurer and that it would still need to either pay the disputed premium or come to some other arrangement with the insurer. Mr O'Sullivan explained his belief that he had come to an arrangement with the insurer that involved things being put on hold once the appeal was lodged. An extension of time for the lodging of the appeal was granted by WorkCover by 11 April 2011.

[10] Section 172(4) of the *Workers Compensation Act* 1987 (NSW) provides that the making of an application to the Authority under s 170 "does not affect the entitlement of an insurer under this section to recover the premium … concerned except to the extent that … the Authority otherwise directs in a particular case …".

[11] The respondents' solicitors made further demands for payment of the judgment debt on 19 and 20 April 2011 before service of the statutory demand on 24 May 2011. Those demands were resisted by BTBF on the basis of the statement made by Ms Heng on 2 March that "once your client has lodged its appeal, we shall await WorkCover's instructions and determination before proceeding to the next step." It was argued that the statement was relied on by BTBF in not applying to set aside the judgment and in instituting its appeal so that the respondents should not be allowed to benefit by going back on its representation. The WorkCover appeal had not been determined when I heard this application.

Unconscionability?

[12] The first issue is the effect of the statement by Ms Heng in her email of 2 March 2011 that "once your client has lodged its appeal, we shall await WorkCover's instructions and determination before proceeding to the next step."

[13] The use of the word "determination" is a clear indication that the respondents intended to await the result of the appeal before proceeding to enforce the judgment they had obtained. Ms Heng, in her email of 12 April 2011[1], asserted that a

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1 Ex REO-38 of the annexures to Mr O'Sullivan's affidavit filed 10 June 2011 at p. 249.

representative of WorkCover had advised BTBF's solicitor, Mr O'Sullivan that, while the appeal was being considered, his client was required to pay the outstanding premium. That was consistent with s 172(4) of the Act but would not prevent the insurer from agreeing to forego such a right pending the determination of the appeal. That was what Mr O'Sullivan said had happened to Mr McMahon from WorkCover, namely that his client had come to "some other arrangement with the insurer."[2]

[14] That, on any sensible understanding of Ms Heng's email of 2 March 2011, is what had happened.

[15] Mr de Jersey for the respondents submitted that, nonetheless, the evidence relied on by BTBF did not establish that there was a genuine dispute for the purposes of s 459H of the *Corporations Act* 2001 (Cth) but, at best, was speculation that there might be errors in the calculations of the premiums owing by BTBF. He also submitted that any application by BTBF to set aside the judgment against it would fail because the District Court of New South Wales did not have jurisdiction to hear disputes in relation to the amount and calculation of the premium payable resulting from a wage audit conducted under the Act. He relied for that proposition on the decision of the New South Wales Court of Appeal in *Employer's Mutual Indemnity (Workers Compensation) Pty Ltd v A Donald Pty Ltd*[3] and ss 170 and 171 of the Act. Subject to the possibility of judicial review of WorkCover's decision, that proposition appears to be correct.

[16] There is evidence of a genuine dispute, however, as BTBF's appeal to WorkCover highlights many areas where it says the auditors misunderstood and wrongly changed BTBF's original wage declarations.[4]

[17] The question then becomes whether what I see as Ms Heng's departure from the original arrangement of awaiting WorkCover's determination before proceeding to the next step amounts to "some other reason" for preventing reliance upon the statutory demand procedure pursuant to s 459J(1)(b) of the *Corporations Act.*

[18] In that context BTBF relied on what was said by Keane JA in *Neutral Bay Pty Ltd & Ors v DCT*:[5]

> "It may, indeed, be preferable, as Mr Aldridge SC urged on behalf of the appellant, to avoid attempts to categorise a 'reason' for setting aside a statutory demand under s 459J(1)(b) of the Act in terms of 'unconscionability' or 'abuse of process' because reference to these legal categories tends to distract attention from the real question which is whether there is good reason to deny effect to a statutory demand as creating a ground for the winding up of the debtor company. Similarly, broad notions such as 'substantial injustice' or 'unfairness' may describe a judge's reaction to circumstances which may constitute a reason to set aside a demand without affording an explanation of the analysis which has led to that conclusion."

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2 Affidavit of Mr O'Sullivan filed 10 June 2011 par 43.

3 New South Wales Court of Appeal, No. 40508 of 1995, Priestley, Cole and Stein JJA, 23 October 1997, BC9705385, unreported at p. 11.

4 See, eg. ex REO-35 to Mr O'Sullivan's affidavit filed 10 June 2011 at pp. 240-243.

5 [2007] QCA 312 at [84].

[19] Although that decision was overturned by the High Court in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd & Ors*[6] the decisive issue in the appeal was whether there was a genuine dispute between the parties given the conclusive evidence provisions of the Commonwealth taxation legislation. It did not address circumstances such as this one where the respondents represented that they would not proceed to enforce their judgment while awaiting WorkCover's determination. As Keane JA said, the conduct of the respondents does not need to be characterised as unconscionable or an abuse of process to constitute some good reason for setting aside the statutory demand and I do not need to impose such an analysis necessarily here.

[20] This can be regarded as a representation that a statutory demand would not be resorted to pending WorkCover's determination which has reasonably induced a change of BTBF's position in lodging and pursuing that appeal.[7] All that Mr Handran asked for his client, BTBF, was that the respondent be held to the arrangement made on 2 March 2011. That seems to me to provide an appropriate reason to set aside the statutory demand.

Alleged uncertainty in the description of the creditor

[21] BTBF also relied on the uncertainties implicit in the description of the plaintiff in the District Court proceedings and then the statutory demand which described the creditor as "Workers Compensation Nominal Insurer of c/- Cambridge Integrated Services Australia Pty Ltd t/as Xchanging, Level 2, 201 Elizabeth Street, Sydney NSW 2000". That is a compendious description of two separate legal entities who are the respondents to this application, namely Workers Compensation Nominal Insurer as the first respondent and Cambridge Integrated Services Australia Pty Ltd ACN 111 480 141.

[22] It seems clear that Cambridge Integrated Services Australia was acting as Workers Compensation Nominal Insurer's agent. Workers Compensation Nominal Insurer is a legal entity capable of taking proceedings and of being proceeded against pursuant to s 154A of the Act. It also has scheme agents pursuant to s 154G. Cambridge Integrated Services Australia was such a scheme agent. The argument was that the demand, based on the judgment in favour of "Workers Compensation Nominal Insurer by its Scheme Agent Cambridge Integrated Services Australia ACN 111 480 141" made it unclear to whom payment should be made. Payments had been made historically to Cambridge Integrated Services Australia and the covering letter with the statutory demand made it clear that any payment should be made to that entity. Even if the description of the creditor in the demand did create confusion as to whom payment should be made, which I doubt, it was not such a defect as to lead to a substantial injustice requiring the demand to be set aside.

Compliance with Form 7 of the affidavit verifying the demand

[23] BTBF also argued that the affidavit verifying the statutory demand was defective because Sum Trinh, who swore it, was not the person on behalf of the creditor who had the relevant dealings and only identified the scheme agent's business records as the source of his or her knowledge. That was, however, in conformity with the

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6 [2008] HCA 41; (2008) 237 CLR 473.

7 See *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24 at [52] and Farid Assaf, *Statutory Demands: Law and Practice* (LexisNexis Butterworths, Australia, 2008) at pars 7.22-7.24.

statutory form, unlike the situation in *Rapcivic Contractors Pty Ltd v Maypole Nominees Pty Ltd*[8]. Sum Trinh was the credit manager of Cambridge Integrated Services Australia and swore that the creditor had authorised him or her to swear the affidavit and identified his or her source of knowledge as the scheme agent's business records as required by Form 7. That was sufficient and does not provide a reason to set aside the demand.

Conclusion and order

[24] Because of my view that the respondents agreed not to proceed to enforce the judgment obtained by default pending WorkCover's determination of the appeal to it, however, I shall order that the statutory demand dated 19 May 2011 in the name of "Workers Compensation Nominal Insurer of c/- Cambridge Integrated Services Australia Pty Ltd t/as Xchanging, Level 2, 201 Elizabeth Street, Sydney NSW 2000" as creditor be set aside pursuant to the *Corporations Act* 2001 (Cth). I shall hear the parties as to costs.

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8 [2009] 1 Qd R 21.