

# SUPREME COURT OF QUEENSLAND

CITATION: *Kern Group (Paddington) Pty Ltd v Armstrong* [2011] QSC 133

PARTIES: **KERN GROUP (PADDINGTON) PTY LTD**  
**ACN 135 813 964**  
(applicant)

v

**THOMAS BERNARD ARMSTRONG AND CLAIR**  
**THERESE ARMSTRONG AS TRUSTEES FOR THE**  
**ARMSTRONG SUPERANNUATION FUND**  
(respondent)

FILE NO/S: BS 3509 of 2011

DIVISION: Trial Division

PROCEEDING: Setting aside statutory demand

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 27 May 2011

DELIVERED AT: Brisbane

HEARING DATE: 19 May 2011

JUDGE: Boddice J

ORDER: **The application is refused.**

CATCHWORDS: CORPORATIONS LAW – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – where the applicant makes application to set aside a statutory demand on the ground it is a nullity – where the applicant contends the demand was issued without authority of the respondent – whether demand ought to be set aside pursuant to s 459J(1)(b) of the *Corporations Act 2001* (Cth) – whether substantial injustice will be caused unless the demand is set aside

PROCEDURE - MISCELLANEOUS PROCEDURAL MATTERS - CROSS-CLAIMS: SET-OFF AND COUNTERCLAIM - SET-OFF - WHAT MAY BE SET-

OFF - EQUITABLE SET-OFF – where the applicant further contends there is a genuine dispute as to the existence of the debt – whether demand should be set aside pursuant to s 459G of the Act – whether the applicant’s claim impeaches the title of the respondent to the moneys the subject of the statutory demand

*Corporations Act 2001 (Cth)*

*Trade Practices Act 1974 (Cth)*

*Capital Finance Australia Limited v Aistar Aviation Pty Ltd* [2003] QSC 151

*Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 3]* [2009] WASC 52

*Doherty v Murphy* [1995] VSC 76

*Dulhunty v Dulhunty* [2010] NSWSC 1465

*Forsyth & Anor (as trustees for the C&S Forsyth Superannuation Fund) v Gibbs* [2009] 1 Qd R 403

*Hill Corcoran Constructions Pty Ltd v Navarro* [1992] QCA 017

*Horizon Star Pty Ltd v Carina Holdings Pty Ltd* [2003] WASC 94

*Indrisie v General Credits Ltd* [1985] VR 251

*Lean v Tumut River Orchard Management Ltd* [2003] FCA 269

*Meehan v Glazier Holdings Pty Ltd* [2005] 53 NSWCA 24

*Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439

*Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed) (Receivers Appointed)* [2010] FCA 1444

*Popular Homes Ltd v Circuit Developments Ltd* [1979] 2 NZLR 642

*Re Billington; Union Trustee Company of Australia Ltd v Billington* [1949] StR Qd 102

*Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143

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

*TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* [2008] VSCA 70

COUNSEL: Collins, AP for the applicant  
 Kelso, K for the respondent

SOLICITORS: Morrow Petersen for the applicant  
 Michael Drummond for the respondent

- [1] Kern Group (Paddington) Pty Ltd (“the applicant”) makes application pursuant to s 459G of the *Corporations Act 2001* (Cth) (“the Act”) to set aside a statutory demand dated 5 April 2011 issued by Thomas Bernard Armstrong and Clair Therese Armstrong as Trustees for the Armstrong Superannuation Fund (“the respondent”). The applicant contends the statutory demand should be set aside either on the ground it is a nullity, and ought to be set aside pursuant to s 459J(1)(b) of the Act, or that there is a genuine dispute and the statutory demand should be set aside pursuant to s 459H of the Act.

### **Background**

- [2] By a written agreement dated 19 December 2008 (“the sale agreement”), the applicant agreed to buy from Ryan Armstrong Quinn Pty Ltd (“RAQ”) an accounting practice located at Paddington. Subsequent to entering into the sale agreement, discussions took place between the parties as to the provision of vendor finance to complete the purchase of the business from RAQ. On 2 April 2009, a deed of variation and ratification of the contract of sale was entered into between the applicant, RAQ, and their guarantors (“the variation agreement”).
- [3] Relevantly, cl 2.1.1 of the variation agreement provided:

“That clause 3.2 “terms of payment” of the contract be deleted and the following inserted:

‘The purchaser shall pay the purchase price as follows:

- (a) on the making of this agreement the purchaser shall pay the initial deposit to the stakeholder by ordinary cheque;
- (b) the further deposit shall be paid by the purchaser to the vendor by bank cheque at completion;
- (c) on completion the purchaser shall pay the sum of \$610,000 of the purchase price (adjusted as required by clause 18) to the vendor;
- (d) the contract is subject to and conditional upon:
  - (i) Thomas Bernard Armstrong and Clair Therese Armstrong (‘the Armstrongs’) as trustee for the Armstrong Superannuation Fund providing loan funds of \$110,000 to the purchaser on

completion ('loan funds') pursuant to a loan agreement ('the loan agreement');

- (ii) the purchaser and the purchaser's guarantors executing the loan agreement prior to the date for completion; and
  - (iii) the Armstrongs and the purchaser's bank reaching agreement no later than one (1) business day prior to completion, on terms satisfactory to the bank and the Armstrongs, on the terms of any deed of priority, subordination deed or other document in relation to the loan agreement, required by the purchaser's bank as a condition of advancing funds to the purchaser on completion'
- (e) if the loan funds are not available to the purchaser as required by clause 3.2(d)(i) or the conditions in clause 3.2(d)(ii) or (iii) are not fulfilled by the required time then either party may terminate the contract by giving notice in writing to the other and the vendor must authorise the prompt return of the deposit to the purchaser;
- (f) the purchaser and the purchaser's guarantors shall execute the loan agreement no later than one (1) business day prior to the date for completion;
- (g) subject to the fulfilment of clause 3.2(d)(iii) the Armstrongs will sign any deed of priority or subordination deed or other document in relation to the loan agreement that the purchaser's bank may require them to sign prior to completion."

The clause 3.2 "retention" shall be renumbered to read clause 3.3 and the clause 3.3 shall be renumbered to read clause 3.4."

- [4] After execution of the variation agreement, a separate agreement was entered into between the applicant and the respondent ("the loan agreement"). The respondent was not a party to either the sale agreement or the variation agreement. At the time of entry into all contracts, Thomas Bernard Armstrong was a co-trustee of the Armstrong Superannuation Fund with his wife, and was the sole director of RAQ.
- [5] By the terms of the loan agreement, \$110,000 vendor finance was repayable by two instalments of \$55,000, the first payable with accrued interest on the anniversary of

the date of advance, and the second payable with accrued interest two years from the date of advance.

[6] Relevantly, the loan agreement contained the following further clauses:

“5.4 Payment and repayments under this agreement must be made by the borrower without set-off or counterclaim (subject to subclause 5.5) free and clear of, and without any deductions of any kind irrespective of:

- (a) any express or implied term in this agreement; and
- (b) any rule of law; and
- (c) any course of conduct.

5.5 All payments and repayments to be made under this agreement (whatever the nature) must, to the full extent permitted by law, be made by the borrower without any deduction.”

[7] The sum of \$110,000 was advanced on or about 31 March 2009. The first repayment of \$55,000, with accrued interest, was paid on or about 31 March 2010 in accordance with the loan agreement. On or about 9 March 2011, the respondent demanded payment of the second instalment of \$55,000 plus interest pursuant to the loan agreement. It was not paid.

[8] On 16 March 2011, proceedings were instituted by the applicant and its director, Gregory James Kern, against Thomas Bernard Armstrong, RAQ and the respondent claiming damages for breach of contract or alternatively orders pursuant to the *Trade Practices Act 1974* and other relief, including an equitable set off. The applicant’s claims for relief are based on allegations Mr Armstrong and his daughter have engaged in conduct in breach of representations made at the time of entry into of the contract, and in breach of covenants given by them. Those proceedings were served on RAQ on 23 March 2011. They were served on Mr Armstrong and the respondent on 6 April 2011.

[9] On 5 April 2011, the respondent issued the statutory demand. It is not in dispute that the amount of \$55,000 plus accrued interest remains outstanding.

### **Applicant’s submissions**

[10] The applicant submits the statutory demand is a nullity as the respondent has two trustees, and the demand was signed only by one trustee, Mr Armstrong. The applicant submits that the relevant Trust Deed does not contain any provision authorising one trustee only to act and that in the absence of a joint decision or a signature of both trustees the demand is a nullity on the basis it was issued without authority of the respondent. A person who executes a statutory demand must be properly authorised to do so.<sup>1</sup> Multiple trustees must act jointly in respect of the

---

<sup>1</sup> *Horizon Star Pty Ltd v Carina Holdings Pty Ltd* [2003] WASCA 94 at 14-21.

one authority.<sup>2</sup> It is further submitted that the affidavit material is deficient in failing to establish the requisite authority.

- [11] The applicant also submits the statutory demand should be set aside as there is a “genuine dispute” between the applicant and the respondent as to the existence of the debt, and that this dispute is “real and not spurious, hypothetical, illusory or misconceived”.<sup>3</sup>

### **Respondent’s submissions**

- [12] The respondent submits that any question as to the authority of Mr Armstrong to issue the statutory demand constitutes, at best, a defect and does not render it a nullity. The respondent relies on cl 16.3 of the Trust Deed to support a contention the trustees have a wide discretion as to how to exercise their powers which would include one trustee signing the statutory demand.
- [13] The respondent further contends there is not a genuine dispute between the parties as the matters contended for by the applicant do not constitute a lawful equitable set-off as it does not impeach the title of the respondent to legally demand repayment of the funds pursuant to the loan agreement.<sup>4</sup> The agreement between the applicant and the respondent is separate and distinct to any agreement between the applicant and RAQ. Further, the loan agreement expressly provided that repayments must be made without set-off or counterclaim.

### **Conclusions**

#### *A nullity?*

- [14] The Court has power to set aside a statutory demand if it is satisfied that because of a defect in the demand substantial injustice will be caused unless the demand is set aside or there is some other reason why the demand should be set aside.<sup>5</sup> Subject to that provision, a Court must not set aside a statutory demand merely because of a defect. Defect is defined in s 9 of the Act as follows:

“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 other matter; and
- (d) a misdescription of a person or entity.”

Section 459J constitutes a code for dealing with defects or purported demands.<sup>6</sup>

<sup>2</sup> See, generally, *Re Billington; Union Trustee Company of Australia Ltd v Billington* [1949] StR Qd 102; *Dulhunty v Dulhunty* [2010] NSWSC 1465.

<sup>3</sup> See *Spencer Construction Pty Ltd v G&M Aldridge Pty Ltd* (1997) 76 FCR 452 at 464; see also *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* [2008] VSCA 70.

<sup>4</sup> See *Indrisie v General Credits Ltd* [1985] VR 251 at 254; *Forsyth & Anor (as trustees for the C&S Forsyth Superannuation Fund) v Gibbs* [2008] QCA 103 at [8]-[16].

<sup>5</sup> *Corporations Act 2001* (Cth), s 459J(1).

<sup>6</sup> *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452.

- [15] The applicant relies on s 459J(1)(b) of the Act, namely, that there is some other reason why the demand should be set aside.<sup>7</sup> The discretionary power to set aside the demand “for some other reason” should only be activated where supported by some sound or positive ground or good reason to do so.<sup>8</sup> It applies whenever there is a need to counter some attempt at subversion of the statutory scheme.<sup>9</sup>
- [16] A statutory demand must be signed by the creditor or the creditor’s solicitors. It may be signed on behalf of the partnership by a partner, and on behalf of a corporation by a director or by the secretary or an executive officer of the corporation. Where the creditor is a trust, there is no reason why a co-trustee could not sign a statutory demand on behalf of a creditor trust if that co-trustee was authorised to do so.
- [17] The statutory demand was signed by Mr Armstrong. It stated his capacity as ‘Co-Trustee of the Creditor’. The supporting affidavit was also signed by Mr Armstrong. It asserted he “is authorised by the creditor to make this affidavit on its behalf”.<sup>10</sup> Whilst the statutory demand, on its face, does not record that Mr Armstrong signed with the authority of his co-trustee, the statutory demand refers to Mr Armstrong’s affidavit verifying the amount due and payable to the trust. That affidavit expressly states he is authorised by the creditor to make the affidavit. The creditor therein referred to is the respondent.<sup>11</sup>
- [18] Whilst multiple trustees must act unanimously, unless the Trust Deed specifically authorises to the contrary, cl 16.3 of the present Trust Deed gives a wide discretion to the trustees as to the exercise of their powers. This wide discretion would include authorising one co-trustee to sign a statutory demand on behalf of the trust. Mr Armstrong, in his supporting affidavit, deposes to being authorised by the trust to make the affidavit which is referred to in the statutory demand. The failure to specifically record that the demand was itself issued with the authority of the trust does not constitute a good ground or sound reason to set aside the statutory demand.
- [19] The applicant’s first bases to set aside the statutory demand fails.

*A genuine dispute?*

- [20] In its statement of claim, the applicant contends the loan agreement entered into between the applicant and the respondent was part of the same transaction as the sale agreement and variation agreement, and the respondent was a party to the arrangements in respect of the method of funding and had full knowledge of the circumstances and that such an arrangement does not preclude an equitable set-off against the respondent.
- [21] The claim for relief against the respondent is as follows:

- “(a) an equitable set-off for the amount of the damages and interest and the balance of the account and/or compensation payable to the first plaintiff by the first and second defendants;

<sup>7</sup> Applicant’s outline of submissions, para 4.

<sup>8</sup> *Meehan v Glazier Holdings Pty Ltd* [2005] 53 NSWCA 24 at [59]-[61].

<sup>9</sup> *Safe Rack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143 at [33].

<sup>10</sup> Affidavit of P E Frost; exhibit PEF-6.

<sup>11</sup> cf *Horizon Star Pty Ltd v Carina Holdings Pty Ltd* [2003] WASCA 94.

- (b) further or alternatively orders pursuant to former s 87 of the *Trade Practices Act 1974* (Cth) now s 87 of the *Competition and Consumer Act 2010* by way of:
- (i) a declaration that the first plaintiff has no liability to the third defendants under the loan agreement or that any such liability has been discharged; and
  - (ii) alternatively by way of varying the loan agreement as may be appropriate in the premises;
  - (iii) alternatively by way of restraining the third defendants from enforcing the loan agreement against the first plaintiff. ...<sup>12</sup>

- [22] For an equitable set-off to be available to the applicant, its claim must impeach the title of the respondent to the moneys the subject of the statutory demand.<sup>13</sup> Equity will allow a set-off of the damages caused by breach where two claims are so closely related as to make it unconscionable for the one party to recover without allowing a set-off.<sup>14</sup> Such a claim may be made in respect of different transactions if there is a sufficient connection between the transactions, such as the misleading conduct having caused the defendants to enter the transaction on the terms they did,<sup>15</sup> but will not be available where there is no sufficient connection between the party's claims to regard the claim as impeaching an entitlement to recover the debt.<sup>16</sup> In short, a claim may be maintained where the respective transactions, although not arising out of the same transaction, are so closely related that the transactions can properly be seen as one.<sup>17</sup>
- [23] The respondent contends an equitable set-off is not available as the transactions are separate and distinct, with the parties to the loan agreement being different to the parties to the sale agreement. Whilst that may be so, the variation agreement specifically requires the applicant, as purchaser in the sale agreement, to receive finance from the respondent or all parties to the sale agreement have an entitlement to terminate the contract. This establishes an interrelation between the two contracts such that the two transactions can properly be seen as one transaction. As such, if an equitable set-off would otherwise be available to the applicant, that claim could constitute a genuine dispute within the meaning of s 459H of the Act.
- [24] Whether an equitable set-off is available to the applicant must be considered in the context of the terms of the loan agreement entered into between the applicant and the respondent. That loan agreement expressly provided that the loan funds were to be repaid, irrespective of any other claims, without any set-off, counterclaim or deductions. That clause is clear and unambiguous in its terms. It specifically excludes any set-off, irrespective of "any rule of law".<sup>18</sup> Clauses to similar effect

<sup>12</sup> Affidavit of PE Frost, exhibit PEF-1

<sup>13</sup> *Hill Corcoran Constructions Pty Ltd v Navarro* [1992] QCA 017

<sup>14</sup> *Popular Homes Ltd v Circuit Developments Ltd* [1979] 2 NZLR 642.

<sup>15</sup> See *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439 at 467; *Doherty v Murphy* [1995] VSC 76; *Lean v Tumut River Orchard Management Ltd* [2003] FCA 269.

<sup>16</sup> See *Forsyth (as trustees for the C&S Forsyth Superannuation Fund) v Gibbs* [2009] 1 Qd R 403.

<sup>17</sup> *Norman v FEA Plantations Ltd* [2010] FCA 1444.

<sup>18</sup> Affidavit of GJ Kern, exhibit GJK-4

have been held to exclude an equitable set-off.<sup>19</sup> Such a clause is to be distinguished from a clause merely requiring repayment “without any deductions.”<sup>20</sup>

- [25] Having regard to the terms of the loan agreement, there is no basis for the applicant to assert an entitlement to refuse to repay the loan moneys on the basis of an entitlement to an equitable set-off. Such a finding does not prevent the applicant from bringing proceedings for damages against the respondent.<sup>21</sup>
- [26] In its written submissions, the applicant also contends the issue of the statutory demand after the institution of proceedings was an abuse of process. Whilst the statutory demand was issued after the institution of proceedings, there is no basis to find it is an abuse of process. The parties agreed, in clear and unequivocal terms, to repayment without any set off counterclaim or deduction.
- [27] The applicant has not established there is a genuine dispute between the parties such as to justify setting aside the statutory demand.

### **Conclusion**

- [28] The applicant has not established any basis to set aside the statutory demand. The application is refused.
- [29] I shall hear the parties as to the form of orders and costs.

---

<sup>19</sup> *Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 3]* [2009] WASC 52 at [173].

<sup>20</sup> cf *Norman v FEA Plantations Ltd* [2010] FCA 1444 at [48].

<sup>21</sup> cf *Capital Finance Australia Limited v Airstar Aviation Pty Ltd & Ors* [2003] QSC 151 at [12].