

COURT OF APPEAL

GOTTERSON JA

**Appeal No 11803 of 2013
SC No 8239 of 2013**

**OCNR (AUSTRALIA) PTY LTD
ABN 46 142 238 828**

Applicant

v

**CONVERGENCE TEAM PTY LTD
ACN 140 286 586**

Respondent

BRISBANE

DATE 28/02/2014

JUDGMENT

- [1] **GOTTERSON JA:** On the 19th of September 2013, the Chief Justice made orders setting aside some four statutory demands which OCNr (Australia) Pty Ltd had served on Convergence Team Pty Ltd for amounts which totalled a little more than \$82,000. OCNr was ordered to pay costs on an indemnity basis.
- [2] On the 9th of December 2013, OCNr filed two applications in this Court. One was to extend time for the filing of a notice of appeal. That application is one for argument before the Court of Appeal in due course. The other was for a stay of both the order setting aside the statutory demands and the costs order. It is this application that was argued before me on 27 February 2014 with an application filed by Convergence Team for security for costs.
- [3] As to the stay application, his Honour was satisfied that a genuine substantial dispute existed as to indebtedness and it was on this basis that he set aside the statutory demands under s 459H(1)(a) of the *Corporations Act*. His Honour also made a finding that certain email correspondence written by Mr Dwyer, a director of OCNr, was being used in a coercive way so as to engage s 459J(1)(b) thereof. The statutory demands were set aside under that provision also. His Honour was influenced to make the indemnity costs order by the approach evidenced by the emails which, in his view, made the case “an extreme and unusual” one.

- [4] There is authority of this Court¹ that the power to grant a stay in r 761(2) of the *Uniform Civil Procedure Rules* is inapplicable in circumstances where, as here, no timely notice of appeal has been filed and an application for extension of time to file is pending. Notwithstanding, this Court has an inherent power to grant a stay.² It is a moot point whether it is exercisable by a judge of appeal. I propose to consider this application on the footing that it is.
- [5] I turn first to the order setting aside the statutory demands. In my view, the factor which weighs conclusively against the grant of a stay of it is that OCNR will not be disadvantaged if the stay is refused. The statutory demands have been set aside. No court would order a winding up of Convergence Team based upon a noncompliance with them while ever that order stands. The granting of a stay pending the determination of an appeal would not incline the Court otherwise. In short, the stay would be unavailing for OCNR. There is no point in granting it.
- [6] That factor itself mandates the refusal of a stay. However, I would add that OCNR has not satisfied me that it has a good arguable case that the order was made in error. To do that, it would need to show arguable error with respect to both findings of a bona fide dispute of indebtedness and of coercion.
- [7] Before me, as it did before his Honour, OCNR, by Mr Dwyer who appears for it, has referred to factual matters as well as assertions of motive and conspiracy. None of it calls seriously into question the following finding that his Honour made:
 “None of Mr Dwyers material can exclude what emerges from the affidavit of Mr Macdonald, that there is a sufficiently arguable case that the amounts were not owing as to raise a genuine and substantial dispute about those alleged debts, and that warrants setting aside the demands leaving (OCNR) in a position where it might seek to recover those amounts those amounts by proceedings in the Magistrates Court in the ordinary way.”
- [8] Moreover, OCNR has not mounted a plausible argument that his Honour’s finding with respect to coercion is flawed.
- [9] I turn now to the indemnity costs order. OCNR has not ventured to advance a viable argument that the exercise of the discretion to award indemnity costs miscarried. As well, there is no material before me which would justify a conclusion that its application for an extension of time would be stifled by having to comply with the order or that there is a risk that Convergence Team would not be able to repay in the event of a successful appeal. A stay of this order ought also be refused.
- [10] For the foregoing reasons, the application for a stay must be refused. On the application for a stay, the orders of the Court are:
1. That the application is refused;
 2. That the applicant is to pay the respondent’s costs of the application on the standard basis.
- [11] I now turn to the application for security for costs which is made under r 760 of the UCPR in the circumstances where there is no appeal yet on foot. The application

¹ *Stone v Copperform Pty Ltd* [2002] 1 Qd R 106; approved in *Bell v Bay-Jespersen* [2004] 2 Qd R 235.

² *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255 at 257, 259.

should properly be seen as one for security for costs of the application for an extension of time.

- [12] OCNR has no business operations in Australia. It does not own any Australian real property. It has no Australian-based directors. Mr Dwyer himself does not own any real property in Australia. OCNR has not put on any material as to its financial position. As noted, it has not established that an order for security would stifle its application for an extension of time. It has a costs order outstanding against it.
- [13] In light of the observations I have already made with respect to its proposed challenge to the order setting aside the statutory demands, these circumstances justify the making of an order for security for costs as sought. I fix the amount of the security at \$12,000. The order for security that I am about to make is made without prejudice to any application that Convergence Team might subsequently seek to make in respect of costs of an appeal.
- [14] On the application for security for costs, the orders of the Court are:
1. That by 4 pm on Friday 14 March 2014, OCNR (Australia) Pty Ltd give security for the costs of Convergence Team Pty Ltd in respect of the application for extension of time for filing a notice of appeal, in an amount of \$12,000 and in a form satisfactory to the Registrar;
 2. That the costs of the application be costs in the cause.