SUPREME COURT OF QUEENSLAND

CITATION:	*McDermott Projects Pty Ltd v. Chadwell Pty Ltd* [2001] QSC 322
PARTIES:	**McDERMOTT PROJECTS PTY LTD** (applicant) **CHADWELL PTY LTD** (respondent)
FILE NO/S:	S 7414 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application to set aside notice of statutory demand
ORIGINATING COURT:	Brisbane
DELIVERED ON:	4 September 2001
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2001
JUDGE:	**Holmes J**
ORDER:	**1. The application to set aside statutory demand is dismissed.**
CATCHWORDS:	MORTGAGES – COVENANTS – AGREEMENT TO EXTEND MORTGAGE – STATUTORY DEMAND FOR PAYMENT OF OUTSTANDING MONIES Application to set aside notice of statutory demand – whether statutory demand verified within s 459E(3) *Corporations Law* – whether amount claimed under statutory demand excessive – whether existence of agreement for payment of interest – whether respondent entitled to rely on agreement in serving notice to remedy default – whether agreement to extend mortgage reached. *Corporations Act 2001* *Property Law Act 1974* *Technology Licensing Limited v Climit Pty Limited* (2001) QSC 84 *Dolvelle Pty Ltd v Australian Macfarms* (1998) 43 NSWLR 717
COUNSEL:	Mr J Sweeney for the applicant

Mr Derrington for the respondent

SOLICITORS: Hickey Lawyers on behalf the applicant
Ebsworth & Ebsworth on behalf of the respondent

[1] This is an application to set aside a notice of statutory demand. The respondent was the vendor under ten separate contracts of ten lots of land on a single plan each selling at $100,000 each. The applicant purchased the lots paying 30 percent of the purchase price with the balance of 70 percent vendor financed and a second mortgage given as security. A first mortgage had been given to another entity GPS Management Ltd to obtain money for development purposes, and a priority agreement was reached as between the first and second mortgagees.

[2] A separate mortgage was given in respect of each of the individual lots. The mortgage document itself describes the debt secured as "a debt owed by the mortgagor to the mortgagee of $50,000" but the mortgagor's covenant with the mortgagee describes it as securing the whole of the "secured money". That term is defined to mean "all monies and damages which now or in the future are owing (actually or contingently), by the mortgagor to the mortgagee associated with (but not limited to) the sale by the mortgagee to the mortgagor of the land described in item 2 of the form 2 mortgage". In each case the land described was the lot the subject of the sale.

[3] The contract of sale provided, in its special conditions, that the debt was to be repaid within 12 months of the contract's settlement date, that is by 4 April 2001. As at 5 April 2001 the monies outstanding had not been paid. On that date notices of to remedy default were issued in respect of each of the ten mortgages demanding repayment of principal in an amount of $70,000 and interest, which it was said was due and owing and not paid on 4 April 2001. On 2 May 2001 the applicants requested an extension of the second mortgage facility by 12 months. The respondent replied on 4 May 2001 agreeing to extend the second mortgage and the priority agreement with the first mortgagee on terms and conditions which were that the amount secured under the first mortgage was not to be increased from $1.5 million; that all sale proceeds from the sale of the secured properties were to be applied to reduce the amount due under the first and second mortgages in accordance with the existing priority agreement; that the first mortgagee was to agree to make no more capital advances until the second mortgage was paid out; that any other payments were to be paid by way of cash from the applicant as and when they fell due; that a personal guarantee given by Mr Craig McDermott, a director of the applicant was to continue; and finally, that documentation satisfactory to the respondent's solicitors "implementing the above intention" be provided, and that the applicant agree to pay the respondent's legal costs in relation to that process.

[4] It was in issue on this application whether a concluded agreement had been reached in relation to the extension of the second mortgage.

[5] On 24 July 2001 a notice of statutory demand was served on the applicant. It was accompanied by an affidavit verifying the amount due and payable, that affidavit having been sworn on the 20 July, 2001.

[6] The applicant sought to have the notice of demand set aside on four grounds which I will deal with in turn:

That the demand was not verified

[7] Section 459E(3) of the *Corporations Act 2001* requires that a statutory demand be "accompanied by an affidavit that … verifies that the debt, or the total of the amounts of the debts is due and payable by the company". Relying on the decision of Chesterman J in *Technology Licensing Limited v Climit Pty Limited* (2001) QSC 84 the applicant contended that the requirements of s 459E(3) had not been met because the demand was not verified by an affidavit as to indebtedness existing at the time of demand. In that case his Honour decided that a mandatory requirement of s 459 E(3) had not been met where an affidavit was sworn four days before the demand was issued (as was the case here). He referred to a decision of Santow J in *Dolvelle Pty Ltd v Australian Macfarms Pty Ltd* (1998) 43 NSWLR 717, in which it was argued that a 2 day hiatus between an affidavit verifying the debt and the notice of demand took the notice of demand outside the proisions of Part 5.4 of the Corporations Act. However, he concluded firstly, that what was said in *Dolvelle* was dicta (because the point not having been taken on an application to set aside the statutory demand could not be taken on a winding-up application) and secondly, that it was "clear from his Honour's reasons" that had the point been taken at an appropriate time it would have resulted in a setting aside of the statutory demand.

[8] I agree with his Honour's reading of Santow J's reasons as to the first but not as to the second matter. It seems to me that the point made by Santow J was that s 459E(3) was not mandatory in its effect: "The requirement (of exact coincidence of date for verification of the statutory demand) though important, is not to be treated as an essential integer of the relief sought" (p 727). In any event his Honour would have concluded that s 467A of the *Corporations Law* applied so as to prevent dismissal of the winding-up application, since no substantial injustice would be caused by the defect or irregularity (at 728).

[9] The decision of Justice Chesterman is not, of course, binding on me although there are strong arguments for comity. However, the reasoning of Santow J has considerable appeal, and with some reluctance I conclude that I should adopt it and depart from the view taken by Chesterman J. That is, I consider that the non-concurrence of the respective dates of the statutory demand and verifying affidavit does not invalidate the statutory demand but rather constitutes a "defect" within the meaning of s 4459J of the *Corporations Act*. In circumstances where there is no suggestion that any part of the debt was paid in the intervening four days, I do not consider that the situation is one where the defect in the demand will cause substantial injustice. This ground therefore, does not justify a setting aside of the statutory demand under s 459J of the *Corporations Act.*

Demand for excessive amount

[10] The applicant argued that the demand should be set aside for "some other reason" (s 459J(1)(b)), that reason being that the amount claimed in the notice of demand was excessive. This argument turned on the description of the debt in the mortgage itself as $50,000, as opposed to the amount provided for in the mortgagor's covenant by virtue of the definition of "secured money". Mr Derrington for the respondent made the point, which I think is a good one, that the respondent was entitled to issue its demand on the basis of the amounts owed by the mortgagor pursuant to its covenant. The amount due on the personal covenant was, by virtue of the definition of "secured money", the amount owed in connection with the sale of the land; that is to say, the amount specified in the notice of demand. Accordingly I do not think there is substance in this ground of the application.

No anterior demand

[11] By virtue of cl 3.1 of the covenant which was the schedule to the mortgage, the mortgagor undertook to pay the secured money "upon demand at any time and place and in the manner reasonably required by the mortgagee". It was argued for the applicant that by its invoice of 3 April 2001 the respondent had required payment of interest charges for the period 4 March 2001 to 3 April 2001 "within seven days". For the purpose of cl 3.1 of the covenant then, the time "reasonably required by the mortgagee" was 7 April and the interest monies did not therefore become due until that time, that is, not until a date after the issue of the notice to remedy default under the *Property Law Act*..

[12] However, cl 3.1 provides for the secured money to be paid "in accordance with any agreement" and it is only in the absence of agreement that the reasonable requirement of the mortgagee becomes relevant. Condition 4 of the special conditions of sale to the contract of sale required payment of interest "monthly in arrears with the first payment due one month after the settlement date and thereafter on the same day of each succeeding month". It seems to me therefore, that there existed an agreement for the payment of interest and the respondent was entitled to reply on that agreement in serving its notice to remedy default under the *Property Law Act*.

Genuine dispute

[13] Finally, the applicant argued that there was a genuine dispute as to whether an agreement had been entered by the parties for the extension of the mortgage for a further 12 months. The respondent's letter of 5 May 2001, it was argued, constituted an offer accepted by the conduct of the applicant. However there are a number of reasons why I do not consider that the dealings between, and actions of, the parties are capable of being construed in that way. Firstly, as the respondent points out, the applicant did not attempt to meet all the conditions set out in the letter of 5 May, one example being the requirement that it agreed to pay the respondent's legal costs of having its solicitors satisfy themselves as to the

documentation in relation to implementation of the arrangement. Secondly, the offer, as counsel for the respondent submitted, involved parties other than the applicant, so that it was necessary there be conduct on their parts in order to comply with the requirements of the letter; that is to say Mr McDermott as guarantor and GPS agreeing to the new arrangements. There was no evidence of agreement on the part of those parties. Thirdly, some conduct on the part of the applicant was inconsistent with acceptance of the offer, for example, its failure to apply all sale proceeds from the sale of secured properties to reduce the amount due. Finally, the respondent points out, and I accept, the correspondence between the parties is not consistent with the existence of a concluded agreement. As late as 22 June 2001 the principle of the respondent was speaking of determining "if we are prepared to extend our second mortgage". The applicant's own letter of 26 June 2001 speaks of a "proposed second mortgage". In the circumstances I do not think that the applicant has an arguable case for the existence of an agreement to extend the mortgage. It therefore fails on this ground also.

[14] It follows that I must dismiss the application to set aside the notice of statutory demand.