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Date: 25 October, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 6738 of 2004

THE PULSE GROUP CORPORATION LIMITED (ACN 106 022 173) Applicant

and

MULTIPULSE (IN LIQUIDATION) (ACN 090 130 046) Respondent

BRISBANE

..DATE 14/10/2004

JUDGMENT

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HER HONOUR: The respondent was wound up on 24 May 2004 and Mr Rangott was appointed liquidator. The respondent and the applicant are two companies within a group of companies known as The Pulse Group. Mr Marler, Mr Matthew Lambert and Mr Reginald Lambert were existing directors and shareholders of the companies at the time they entered into a shareholders' agreement made on 10 September 2003 ("the shareholders' agreement") to raise additional capital for the further commercialisation of the wireless technology applications being developed by The Pulse Group.

One of the parties to the shareholders' agreement is UKI Investments Pty Ltd, a company associated with Mr Kinneally who is also a solicitor and a principal of the firm that acts for the respondent. Mr Marler is also a solicitor, his firm acts for the applicant.

On 14 July 2004, Mr Rangott conducted a public examination of Matthew Lambert who produced a disc to the Court which contained a number of MYOB files relating to the accounts of the applicant. That disc had been given to Mr Lambert by the applicant's then accountant, Mr Cotter, on 27 February 2004. Those files have been printed out and are Exhibit WBR1 to Mr Rangott's affidavit filed on 12 October 2004.

These accounts show a loan of $5,000 made by the respondent to the applicant on 30 September 2003 and a further loan of $12,500 made by the respondent to the applicant on 15 December 2003. On the same day as the public examination, Mr Rangott's

firm sent a letter, erroneously dated 13 July 2004, making demand of the applicant on behalf of the respondent for repayment of the total sum of $17,500 on or before 3 p.m. on 14 July 2004.

The respondent's statutory demand for the sum of $17,500 was then served on the applicant, also on 14 July 2004. Mr Marler was overseas between 12 July and 26 July 2004. On his return he wrote a letter dated 29 July 2004 which asserted that the loan amounts had been repaid in full by the payment by the applicant of debts of the respondent. Mr Rangott requested specific details of those debts and payments.

The application to set aside the statutory demand was filed by the applicant on 4 August 2004 with a return date of 13 October 2004. A supporting affidavit of Mr Marler was also filed on 4 August 2004. Mr Marler referred to his inability to access the files on the copy of the disc that had been handed to the liquidator at the public examination, because he did not have the computer program necessary to read it.

Mr Marler explained that the moneys advanced by the respondent were used to pay the respondent's debts including some payments to the creditor, Langman, on whose petition the respondent was wound-up and that for administrative convenience all payments and financial transactions in the Multipulse group of companies were conducted through the applicant.

Mr Marler exhibited a spreadsheet which set out cash flow forecasts for the applicant for August 2003 to June 2004. Mr Marler stated that, given appropriate time, he believed he could undertake a reconciliation of the books and accounts of the respondent and the applicant and would be able to demonstrate precisely what amounts were paid through the applicant of the respondent's debts.

A further affidavit of Mr Marler was sworn on 8 October 2004, as was an affidavit of Mr Duncan, a solicitor employed by Mr Marler's firm. Both affidavits were sought to be relied on by the applicant on the hearing of the application. Objections were taken by Miss Watson, the solicitor employed by Mr Kinneally's firm who appeared on behalf of the respondent on the application.

The ground of objection was that these affidavits went further than providing additional evidence of the issues raised by Mr Marler's affidavit filed on 4 August 2004. Mr Marler's affidavit filed on 4 August 2004 raises two issues. First, that the loan was repaid as a result of payments made by the applicant of debts of the respondent in the context of the applicant being the company in The Pulse Group through which the financial transactions were conducted. Second, time was required to undertake the necessary reconciliation of the books and accounts of the applicant and the respondent.

To the extent that Mr Duncan's affidavit deals with the relationship within The Pulse Group of companies in paragraphs

2 to 8, it is relevant to the issue raised by the applicant that depends on establishing the arrangements for payments of debts within The Pulse Group. The balance of the affidavit is also relevant to placing the respondent's service of the statutory demand on the applicant in the context of the wider disputes between the parties and entities associated with The Pulse Group.

At the hearing of the application, Mr Duncan who appeared on behalf of the applicant, sought to rely on abuse of process and foreshadowed, if necessary, an amendment to the application to seek an injunction to restrain the filing by the respondent of the winding-up application in respect of the applicant. Mr Duncan's affidavit is also relevant to the allegation of abuse of process.

Objection was taken specifically to paragraphs 2, 4, 6, 7, 8 and 9 of Mr Marler's affidavit sworn on 8 October 2004. All of the impugned paragraphs, except for paragraph 8, are relevant to the relationship amongst the companies within The Pulse Group. Paragraph 8 is relevant to the allegation of abuse of process. Curiously, the objection includes those paragraphs that deal with the shareholders' agreement when the respondent chose to put that document before the Court as an exhibit to Mr Cotter's affidavit filed on 12 October 2004.

I therefore overrule the respondent's objections to these two affidavits.

In paragraphs 10 to 14 of Mr Marler's affidavit sworn on 8 October 2004 he identifies specific transactions of the applicant in respect of which he expresses the opinion that they were debts of the respondent paid by the applicant. He has been unable to reconcile the accounts by reference to the accounts on the computer disc that was handed to Mr Rangott on 14 July 2004.

Mr Marler also explains how the spreadsheet of cash flow forecasts that was exhibited to his affidavit filed on 4 August 2004 shows that it is a forecast for the combined business of the companies in The Pulse Group.

Much was made by Miss Watson of the fact that the accountants had given Mr Matthew Lambert the computer disc containing the MYOB accounts of the applicant on 27 February 2004 and that the applicant had done nothing about the reconciliation of the accounts before the statutory demand was served on 14 July 2004. There is nothing in the material to suggest that the applicant was forewarned that on the very day that the disc was produced at the public examination, not only would demand for repayment be made of the loan of $17,500 shown in the accounts of the applicant, but that a statutory demand would also be served on the same day.

The respondent relies on the affidavits of Mr Rangott and Mr Cotter both filed on 12 October 2004. Mr Rangott expresses the professional opinion that in the accounts and financial records of the respondent with which he has been provided in

the course of the liquidation, there is no other information to suggest that the loans made to the applicant are not due and owing to the respondent.

Mr Cotter is a chartered accountant who asserts that his firm, the KARM Group, was retained as accountants for The Pulse Group from mid August 2003 to 27 February 2004. This is a matter which has been put in issue in the proceedings in the Beenleigh Magistrates Court by which the assignee from the KARM Group of the fees that the KARM Group claim are owing by the applicant for work done by the KARM Group is suing the applicant for those fees and the applicant has issued third party proceedings against Mr Kinneally's company, relying on the terms of the shareholders' agreement.

What Mr Cotter purports to do is controvert the claims of Mr Marler. What Mr Cotter's affidavit, in fact, does by endeavouring to show there is no substance to Marler's claim is to give some substance to the claims. Mr Cotter exhibits the shareholders' agreement and the letters of appointment of employees, Mr Marler, Matthew Lambert, Reginald Lambert, Iain Simms and Graham Knowles with the applicant.

Mr Cotter relies on his interpretation of provisions in the shareholders' agreement and the letters of appointment for his conclusions the repayments made by the applicant for back salaries or pursuant to clause 8.1 of the shareholders' agreement, which were liabilities of the respondent at the time the letters of appointment and shareholders' agreement

were entered into, lost that character. This does not necessarily follow from the express terms of the relevant provisions.

It should be noted that the parties to the letters of employment are, in each case, the employee and the applicant and not the company which owed the back pay. It should also be noted that clauses 7.4 and 8.1 of the shareholders' agreement do not necessarily deal with the accounting between the applicant and the other companies in The Pulse Group for payments made by the applicant pursuant to those clauses. In addition, Mr Cotter acknowledges that rather than the applicant paying the other companies in The Pulse Group including the respondent, a management fee as contemplated by clause 8.1 of the shareholders' agreement, some payments were made by the applicant to third party creditors for "convenience". That is not that different to Mr Marler's explanation that payments were made by the applicant on behalf of the respondent for administrative convenience.

It will be necessary in order to ascertain the validity of Mr Marler's claims to analyse each of the payments made, compare them against the obligations assumed under clauses 7.4 and 8.1 of the shareholders' agreement and ascertain whether any further accounting is required between the applicant and the respondent in respect of each of these payments.

The minute dissection of the accounts undertaken by Miss Watson in her outline with a view to showing that, if there

were any substance to Mr Marler's claims, the respondent's accounts that were paid by the applicant could not result in a complete extinguishment of the loan amount, also serves to highlight the desirability of a proper investigation of the applicant's claims.

There was a significant amount of material relied on by both parties on this application. An application of this sort is not intended to result in any final determination of any dispute as to the subject debt, but is intended to be disposed of by determining whether there exists the requisite perception of genuineness about the dispute. A bona fide dispute must exist and the grounds of dispute must be real. See Spencer Constructions Pty Ltd v. G & M Aldridge Pty Ltd (1997) 76 FCR 452 at 464.

After considering all the material and the respective submissions, I am satisfied that in the context of the wider disputes that exist between the parties and entities associated with The Pulse Group, the contentions of the applicant are not so devoid of substance, as not to warrant further investigation.

It is therefore not necessary to consider the abuse of process allegations. I order that the statutory demand dated 14 July 2004 served by the respondent on the applicant be set aside.

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HER HONOUR: I order that there be no order as to costs.
