

SUPREME COURT OF QUEENSLAND

CITATION: *Rapcivic Contractors P/L v Mapol Industries P/L T/A Amalgamated Painting Services* [2008] QSC 310

PARTIES: **RAPCIVIC CONTRACTORS PTY LIMITED**
ACN 112 141 986
(applicant)
v
MAPOL NOMINEES PTY LTD T/A AMALGAMATED PAINTING SERVICES
ACN 122 253 687
(respondent)

FILE NO/S: 10726 of 2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 27 November 2008

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2008

JUDGE: de Jersey CJ

ORDER: **1. In relation to the primary application filed 24 October 2008 by Rapcivic Contractors Pty Limited: Order that the statutory demand of the respondent Mapol Nominees Pty Ltd dated 24 September 2008 in the amount of \$1,828,969.09 be set aside pursuant to the *Corporations Act 2001 (Cth)*, and that the respondent Mapol Nominees Pty Ltd pay the costs of Rapcivic Contractors Pty Limited of and incidental to Rapcivic's application filed 24 October 2008.**

2. As to the application filed 5 November 2008 by Mapol Nominees Pty Ltd: Order that Rapcivic Contractors Pty Limited pay any costs of Mapol Nominees Pty Ltd associated with the preparation and filing of the application.

CATCHWORDS: CORPORATIONS – GENERALLY – application to set aside statutory demand – deficiency in accompanying affidavit – importance of stating sources of the deponent's knowledge set out in accompanying affidavit – whether deficiencies constituted reason to set aside demand – whether applicant should be permitted to rely on that deficiency where it had expressly raised only another different ground not now pursued

Corporations Act 2001 (QCth), s 459
Corporations Proceedings Rules 2000 (Cth), r 5.2

Graywinter Properties Pty Ltd v Gas and Fuel Corporation Superannuation Fund (1996) 70 FCR 452, considered
Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd (1998) 16 ACLC 1609, applied
Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd (1996) 14 ACLC 1095, applied
Zenaust Imports Pty Ltd v Alembic Chemical Works Co Ltd (1998) 28 ACSR 465, applied

COUNSEL: T Houghton for the applicant
D Campbell SC for the respondent

SOLICITORS: Clayton Utz for the applicant
Adamson Bernays Kyle & Jones for the respondent

- [1] **de JERSEY CJ:** On 24 October 2008, the applicant (“Rapcivic”) filed an application returnable 2 December 2008. Dissatisfied with the return date so far in advance, the respondent (“Mapol”) filed a cross application on 5 November 2008 for an order dismissing Rapcivic’s application, to be heard on 13 November 2008. There was no apparent justification for the lengthy lead time for the hearing of Rapcivic’s application. In the event, Rapcivic did not oppose my hearing the primary application on 13 November.
- [2] Rapcivic sought the setting aside of a statutory demand dated 24 September 2008, under s 459J and G of the *Corporations Act 2001 (Cth)*. The demand claimed payment of debts totalling \$1,828,969.08. Section 459E(3) of the Act requires that a demand be accompanied by an affidavit verifying the debt. The accompanying affidavit in this case, by Ms Poletto, referred to a different amount, an amount of \$1,835,551.63, less by \$6,582.55 than the amount demanded. In his affidavit in support of the application for the setting aside of the demand, the director of Rapcivic, Mr Raptis, expressly relied only on that discrepancy as rendering the demand relevantly defective.
- [3] Section 459J of the Act provides as follows:
- “1. On an application under s 459G, the Court may by order set aside the demand if it is satisfied that:
 - (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
 - (b) there is some other reason why the demand should be set aside.
 2. Except as provided in sub-s (1), the Court must not set aside a statutory demand merely because of a defect.”

- [4] As things developed, counsel for Rapcivic did not at the hearing rely on the disparity between the amounts. On the basis the amount sworn to was the correct amount, with the amount demanded erroneous, that defect in the demand would not warrant setting aside the demand, because the amount demanded was less than the amount sworn to as due, with the consequence that no “substantial injustice” would be caused were the demand to stand.
- [5] Counsel for Rapcivic took a different point, based on the affidavit accompanying the demand. The body of that affidavit read:
- “1. I am the Director of the Creditor named in the Statutory Demand, which this Affidavit accompanies, relating to the debts owed by Rapcivic Contractors Pty Limited (ACN 079314122).
 2. The Creditor provided painting services to the Debtor Company. The Creditor rendered invoices with respect to these services which remain unpaid.
 3. The total of \$1,835,551.63 is due and payable by the Debtor Company.
 4. I believe that there is no genuine dispute about the existence or amount of the debt.”
- [6] As mentioned, s 459E(3) provides:
- “(3) Unless the debt...is a judgment debt, the demand must be accompanied by an affidavit that:
 - (a) verifies that the debt...is due and payable by the company; and
 - (b) complies with the rules.”
- [7] Rule 5.2 of the *Corporations Proceedings Rules 2000* (Cth) relevantly provides:
- “For the purposes of sub-section 459E(3) of the *Corporations Act*, the affidavit accompanying a statutory demand relating to a debt... owed by a company must:
 - (a) be in accordance with Form 7 and state the matters mentioned in that Form; and
 - (b) be made by the creditor or by a person with the authority of the creditor or creditors; and...”
- [8] The body of the Form 7, the form of affidavit to accompany a statutory demand, contains these paragraphs:
- “1. I am [*state deponent’s relationship to the creditor(s), eg, ‘the creditor’, ‘(name), one of the creditors’, ‘a director of the creditor’, ‘a director of (name), one of the creditors’*] named in the

statutory demand, which this affidavit accompanies, relating to the *debt/*debts owed by [*name of debtor company*].

2. [*If the deponent is not the creditor, state the facts entitling the deponent to make the affidavit, eg 'I am authorised by the creditor(s) to make this affidavit on its/their behalf*].
3. [*State the source of the deponent's knowledge of the matters stated in the affidavit in relation to the debt or each of the debts, eg 'I am the person who, on behalf of the creditor(s), had the dealings with the debtor company that gave rise to the debt', 'I have inspected the business records of the creditor in relation to the debtor company's account with the creditor'*].
4. *The debt of \$[*amount*]/*The total \$[*amount*] of the debts mentioned in the statutory demand is due and payable by the debtor company.
5. I believe that there is no genuine dispute about the existence or amount of the *debt/*any of the debts.”

- [9] It will be seen that the affidavit of Ms Poletto does not conform with Form 7 in that:
- (a) the deponent, not herself being the creditor, did not “state the facts entitling the deponent to make the affidavit”, such as that she was authorised by the company Mapol to make the affidavit on its behalf;
 - (b) the deponent did not “state the source of the deponent’s knowledge of the matter stated in the affidavit in relation to the debt”, in that she did not say, for example, that she was “the person who, on behalf of the creditor, had the dealings with the debtor company that gave rise to the debt”, or that she had “inspected the business records of the creditor in relation to the debtor company’s account with the creditor”, or disclose some other source.
- [10] Rapcivic relied on those deficiencies as amounting to “some other reason why the demand should be set aside”, in terms of s 459J(1)(b).
- [11] Mr Campbell SC, appearing for Mapol, challenged the entitlement of Rapcivic to rely on that deficiency, on the basis that it was not the point flagged by the affidavit of Mr Raptis supporting the application. In relation to the deficiency presently advanced, the affidavit of Mr Raptis did no more than exhibit the affidavit of Ms Poletto, from which the deficiency may be drawn: the affidavit of Mr Raptis did not go to the length of expressing what that deficiency was. Mr Campbell relied on *Graywinter Properties Pty Ltd v Gas and Fuel Corporation Superannuation Fund* (1996) 70 FCR 452 for the so-called “Graywinter principle”, requiring that an affidavit in support of an application to set aside a statutory demand must disclose facts that evidence a genuine dispute between the parties. But this is not a case of a dispute as to the debt. It is a case of a deficiency in the supporting affidavit, and that deficiency emerges on the face of that affidavit when read against the statutory

requirement. As said by Santow J in *Zenaust Imports Pty Ltd v Alembic Chemical Works Co Ltd* (1998) 28 ACSR 465, 471,

“It cannot be essential for the recipient of the statutory demand...to have...to state in that affidavit (the affidavit in support of the application to set aside) this self-evident fact; it intends to mount an attack under s 459J...by reason of the demand being either deficient or otherwise being subject to ‘some other reason why the demand should be set aside...’.”

- [12] In *Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* (1996) 14 ACLC 1095 at 1110 Bryson J regarded disclosing the grounds of the belief as of equal importance as the deponent’s being an authorised person. He said:

“The requirements that the deponent state the source of his knowledge and his belief that the matters stated in the affidavit concerning the debts were true and his belief that there was no genuine dispute are in at least the same order of importance as the requirement that the verification be made by a member or officer. The selection of the right person achieves nothing unless the facts required to be verified are actually verified.”

- [13] Austin J in *Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd* (1998) 16 ACLC 1609 also regarded stating the sources of the knowledge and belief importantly, considering a failure in that regard as a serious matter warranting the setting aside of a demand (p 1616), and taking the view that disregard of the rules in respect of verification went beyond a “mere” defect as referred to in s 459J(2).

- [14] Mr Houghton, who appeared for Rapcivic, submitted that the deficiencies in the accompanying affidavit, and particularly the deponent’s failure to state the source of her knowledge, warranted setting aside the statutory demand.

- [15] On the other hand, Mr Campbell for Mapol, submitted that a reader of the accompanying affidavit would readily infer that the source of the deponent’s knowledge of the matters to which she deposed in paragraphs two and three was her relationship with the transactions by force of her being a director of Mapol.

- [16] This accompanying affidavit was in my view plainly deficient because the deponent failed to state the source of her knowledge, as she may have done in the manner suggested in paragraph three of Form 7. That was a substantial deficiency, in the context of Rule 5.2 which is cast in mandatory terms requiring compliance with the form. The other deficiency, the failure to state that Mapol had authorised the deponent to give the affidavit, was of arguably less significance, although it is not to be assumed that a director of a company ipso facto would have such authority. In light of Rule 5.4 read with Form 7, I consider it is stretching the bow too widely to say that the omission may be supplied by a process of implication. This is an area of the law where, as is well known, there is need for substantial compliance with a raft of plain statutory requirements, if some of them are rather technical in nature.

- [17] In the result, I consider that the deficiencies in the accompanying affidavit amount to sufficient reason in terms of s 459J(1)(b) why the demand should be set aside, and that, should the consideration be relevant, it would be unjust to oblige Rapticvic to face the consequences of non-compliance with a demand as inadequately verified as this one was.
- [18] The orders I make are that the statutory demand of the respondent Mapol Nominees Pty Ltd dated 24 September 2008 in the amount of \$1,828,969.08 be set aside pursuant to the *Corporations Act 2001* (Cth), and that the respondent Mapol Nominees Pty Ltd pay the costs of Rapticvic Contractors Pty Limited of and incidental to Rapticvic's application filed 24 October 2008. As to the application filed 5 November 2008 by Mapol Nominees Pty Ltd, the only order I make on that application is that Rapticvic Contractors Pty Limited pay any costs of Mapol Nominees Pty Ltd associated with the preparation and filing of the application.