SUPREME COURT OF QUEENSLAND

CITATION:	*Ralph Lauren 57 Pty Ltd v Conley* [2015] QSC 90
PARTIES:	**RALPH LAUREN 57 PTY LTD (as trustee)** ACN 079 745 056 (applicant) **v** **MICHAEL CONLEY (as trustee for the Cindy Fleming Trust)** (respondent)
FILE NO/S:	SC Nos 2270 – 2273 of 2015 SC Nos 2275 – 2284 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating applications filed 5 March 2015
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2015
JUDGE:	Douglas J
ORDER:	**Applications to set aside 14 statutory demands dated 12 February 2015 granted**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – where the applicant applied pursuant to s 459G of the *Corporations Act* 2001 (Cth) to set aside 14 statutory demands – whether there had been several loans repayable on demand or a series of contributions of capital effectively into a partnership account – whether this was a genuine dispute about the indebtedness pursuant to s 459H(1)(a) of the *Corporations Act* 2001 (Cth) CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SOME OTHER REASON – where the applicant applied pursuant to s 459G of the *Corporations Act* 2001 (Cth) to set aside 14 statutory demands – where the subject of the statutory demands was both contested in and undetermined by the Family Court of Australia – whether this constituted some other reason why the demands should be set aside pursuant to s 459J(1)(b) of

the *Corporations Act* 2001 (Cth)

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SOME OTHER REASON – where the applicant applied pursuant to s 459G of the *Corporations Act* 2001 (Cth) to set aside 14 statutory demands – whether the applicant was solvent such that the statutory demands were not served for the purposes for which Part 5.4 of the *Corporations Act* 2001 (Cth) applies – whether in those circumstances the service of the statutory demands was vexatious, oppressive and constituted an abuse of process – whether the statutory demands were effectively served – whether the alleged defective service of the statutory demands constituted some other reason why the demands should be set aside pursuant to s 459J(1)(b) of the *Corporations Act* 2001 (Cth)

Corporations Act 2001 (Cth), s 459G s 459H(1)(a), s 459J(1)(b)
Family Law Act 1975 (Cth), s 90SM(4)(a)

Ambassador at Redcliffe Pty Ltd v Barreau Peninsula Property Pty Ltd [2007] 2 Qd R 199; [2006] QSC 247 referred
Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd (2013) 85 NSWLR 601; [2013] NSWCA 344 referred
Haller v Ayre [2005] 2 Qd R 410; [2005] QCA 224 referred
Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd [2002] NSWSC 411 applied

COUNSEL:	G A Thompson QC & S J Williams for the applicant P W Hackett for the respondent
SOLICITORS:	Barry Nilsson Lawyers for the applicant Hirst & Co Family Solicitors for the respondent

[1] The applicant applies to set aside 14 statutory demands dated 12 February 2015. Separate applications are required in respect of each statutory demand.[1]

Background

[2] The background facts were summarised in the applicant's written submissions in the following terms which were not controversial.

> "2. Robert John James (James) and Cindy Fleming-Conley (Fleming) resided together in a de facto relationship between 2002 and 2009.

[1] See *Ambassador at Redcliffe Pty Ltd v Barreau Peninsula Property Pty Ltd* [2007] 2 Qd R 199, 203; [2006] QSC 247 at [16]-[17].

Subsequent to the breakdown of that relationship, on 5 November 2011 Fleming commenced a proceeding in the Family Court of Australia against James seeking orders for the adjustment of property interests pursuant to section 90SM of the *Family Law Act* 1975 (Cth) (FCA proceeding).[2] The FCA proceeding is contested by James.

3. Fleming died on 3 September 2014. Michael Conley (the respondent), Fleming's husband at the date of her death, was appointed administrator of her estate and the trustee of the Cindy Fleming Trust. The respondent was substituted as Legal Personal Representative for Fleming by an order of the Family Court dated 10 November 2014 for the purposes of the FCA proceeding.

4. Trial directions were made in the FCA proceeding on 16 February 2015, and the FCA proceeding is listed for a compliance mention on 14 May 2015 for the potential allocation of the matter in that Court's June callover list for trial dates.[3]

5. James is the sole director of the applicant. The applicant is the trustee of each of the 13 unit trusts described in the heading to this application. Each unit trust is the holder of an interest as partner in the Centro 3, 4 & 6 Partnership (3, 4 & 6 Partnership).

6. The 3, 4 & 6 Partnership was formed in July 2003 and is registered for business and taxation purposes.[4] It acquired real property at 23, 27 and 31 James Street, Fortitude Valley in August 2003 for $9,200,000.00, funded by a combination of commercial borrowings (NAB loan $6,300,000.00) and equity contributions.[5] The equity contributions were required to meet the National Australia Bank's loan to value ratio as part of its lending criteria.[6]"

[3] The applicant's assertion that the assets held by the 3, 4 & 6 Partnership (comprising the James Street and other properties) were part of the property in dispute in the Family Court proceedings was not conceded. The respondent's argument was that that property, since the death of Mrs Fleming, was held by the respondent in trust for his and Mrs Fleming's children as to two-thirds and for himself as to one-third. Accordingly, it was submitted that it was not part of the property in dispute in the Family Court proceeding, although Mr Hackett conceded that the value of that property could be taken into account by the Family Court in adjusting rights as between Mr James and Mrs Fleming's estate. Mr Conley also conceded in his oral evidence that his contention in the Family Court proceedings was that his wife had contributed a lump sum equity contribution to the 3, 4 & 6 Partnership.[7]

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2 Affidavit of Robert John James sworn 26 March 2015, para 3.
3 Affidavit of Robert John James sworn 26 March 2015, paras 4, 5.
4 Affidavit of Robert James filed 5 March 2015 (proceeding 2270/15), para 32.
5 Affidavit of Robert James filed 5 March 2015 (proceeding 2270/15), para 34.
6 Said to be based on the affidavit of Robert James sworn 26 March 2015, para 15 but perhaps derived from his affidavit filed 5 March 2015 in proceeding 2271/15.
7 See T1-23 ll 1-5.

[4] The statutory demands fall into two categories. First, there is a demand for the sum of $1,530,000 in proceeding 2270 of 2015, which the applicant contends was money invested by Mrs Fleming as her original equity contribution through the Cindy Fleming Trust in the 3, 4 & 6 Partnership. Secondly, there are 13 separate demands in the remaining 13 proceedings each for $90,694 which the applicant contends are the cumulative retained earnings derived from the 3, 4 & 6 Partnership by the Cindy Fleming Trust's interests in the 13 unit trusts whose trustees comprise the partners. The applicant's argument is that the retained earnings were agreed to be reinvested back into the 3, 4 & 6 partnership on a long term basis to enable the partnership to expand its property interests.

[5] The applicant has applied pursuant to s 459G of the *Corporations Act* 2001 (Cth) to set aside each of the statutory demands on three bases:

(i) first, that there is a genuine dispute about the existence of a "debt" to which each of the demands purports to relate;[8]

(ii) secondly, that there is "some other reason" why the demands should be set aside, namely:[9]

(1) the matter of each statutory demand is the subject of contested litigation in the Family Court proceeding;

(2) there is no suggestion that the applicant cannot pay its debts and it may therefore be inferred that the statutory demands were not served for the purposes for which Part 5.4 of the Act was intended; and

(3) in the circumstances, service of the statutory demands was vexatious, oppressive and constituted an abuse of process;

(iii) thirdly, it was argued that the demands were not effectively served.

The statutory demand procedure

[6] The statutory demand procedure is not designed to facilitate the recovery of debts where there is a genuine dispute about whether they are then payable. As Barrett J said in *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd*:[10]

> "[23] It is appropriate to dwell for a moment on the guidance provided by these cases. The tests of 'plausible contention requiring investigation', 'real and not spurious, hypothetical, illusory or misconceived' and 'perception of genuineness (or lack of it)', applied in the context of a summary procedure where 'it is not expected that the court will embark on any extended inquiry', mean

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8 See s 459H(1)(a) of the Act.
9 See s 459J(1)(b) of the Act.
10 [2002] NSWSC 411 at [23].

> that the task faced by a company challenging a statutory demand on the 'genuine dispute' ground is by no means at all a difficult or demanding one. The company will fail in that task only if it is found upon the hearing of its s 459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."

See also *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd*.[11]

The nature of the dispute

[7] In this case, the applicant asserts that the initial capital sum of $1,530,000 was paid by Mrs Fleming pursuant to a strategy of purchasing "undervalued properties with significant unrealised potential or rental upside" and using the initial capital contributions to finance the acquisition of further properties without the need for additional equity contributions by stakeholders where the funds were treated as "locked up".[12] Mr James also described those funds as equity contributions, a description used in some of the books of account kept by the 3, 4 & 6 Partnership, although he also described them as loans elsewhere.[13] He also says that the earnings attributable to the unit trust holders in the 3, 4 & 6 Partnership would be distributed for taxation purposes to the unitholders but would then be re-contributed as equity by each unitholder in effect in pursuance of the same original strategy.[14]

[8] That treatment of those distributions was criticised as inconsistent with the trust deeds governing the entitlements of unitholders by the respondent's counsel, Mr Hackett, on the basis that cl 14.4 of each deed prevented the variation of the interest of unitholders in the net income to which the unitholder had become absolutely entitled pursuant to the deed. Mr James has also sworn, however, that Mrs Fleming had agreed to these arrangements before the formation of the 3, 4 & 6 Partnership in a recent affidavit.[15] It was further submitted for the applicant that if the treatment of the distributions was in breach of the trust deed, that would more appropriately be dealt with in a proceeding for the proper administration of the trust.

[9] The credibility of the alleged oral agreement was criticised by Mr Hackett for the respondent; he described it as belated, contrary to the terms of the trust deeds and uncommercial. He also relied upon the characterisation of the initial payment as a loan

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11 [2013] NSWCA 344 at [47].
12 See, eg, the affidavit of Robert James in matter 2270 of 2015 filed 5 March 2015 at paras 14-16.
13 See the affidavit of Robert James in matter 2270 of 2015 filed 5 March 2015 at paras 36-39.
14 See the affidavit of Robert James in matter 2270 of 2015 filed 5 March 2015 at para 41.
15 See the affidavit of Robert James in matter 2270 of 2015 filed 26 March 2015 at para 21.

to argue that, in the absence of an arrangement specifying a time for repayment, it was repayable immediately.[16] Those submissions carry some weight.

[10] In my view, however, there is sufficient evidence to establish a genuine dispute about the character of the initial payment and the treatment of the distributions of annual profits. The issue raised on Mr James' evidence of whether the initial investment reflected a long term equity contribution into a "locked up" fund, realisable only upon dissolution of the partnership rather than at any earlier stage, seems to me to be an issue which prevents reliance upon a statutory demand for the resolution of the case. The same conclusion follows from the alleged agreement dealing with the treatment of the annual earnings thereafter.

[11] There has been no notice given purporting to dissolve the partnership nor any taking of accounts to ascertain what the individual partners' interests in the fund are. This may be because Mr James controls all the parties to the partnership; Mrs Fleming having been only, in effect, a minority unit holder in each of the 13 unit trusts controlled by trustee companies in turn controlled by Mr James. In that context, Mr Thompson QC submitted that the interests derived from Mrs Fleming could bring proceedings for the dissolution of the partnership based on the just and equitable ground even if they could not control proceedings at a meeting of partners. He also submitted that it was not appropriate for me to enter into an analysis of or make a decision about the true nature of the agreement between the parties in these proceedings.

[12] That seems to me to be correct. Whether the true understanding of the facts is that there have been several loans repayable on demand, rather than a series of contributions of capital effectively into a partnership account, is a genuine dispute for the purposes of the Act and not one that is proper to decide in proceedings of this nature. In reaching that conclusion I make no comment on the credibility of the competing conclusions available on the evidence as it stands at present.

Parallel proceedings in the Family Court of Australia

[13] It is also the case that these factual issues have been the subject of evidence in the Family Court regarding the adjustment of property interests between Mr James and Mrs Fleming, and now the respondent, Mr Conley, representing her estate. While the respondent as trustee, for example, of the Cindy Fleming Centro Unit Trust, is not a party to those proceedings, Mrs Fleming's previous interest in the assets of the trust may need to be taken into account in the determination of the result of those proceedings.

[14] Section 90SM(4)(a) of the *Family Law Act* 1975 (Cth) requires the Family Court to take into account in property settlement proceedings the contributions made to the acquisition of the property of parties to a de facto relationship, whether or not the property has, since the making of the contribution, ceased to be the property of the parties. It seems to be the case that the property ceased to be Mrs Fleming's on her death, and has now gone to her husband and children. However, the nature of her

[16] *Haller v Ayre* [2005] 2 Qd R 410, 417-423.

contributions and their proper characterisation may well need to be taken into account in those proceedings.

[15] The oral evidence of Mr Conley also established that his contention in the Family Court has been that the money had been paid by his wife as an equity contribution.

[16] Where, as seems apparent, the nature and effect of the transactions has been and is likely to continue to be the subject of argument in those proceedings, which have been on foot for some time, and which are likely to be set down from June this year, the applicant submitted that was another reason why the demand should be set aside. In my view there is a significant degree of merit in that submission.

Other matters

[17] There were also submissions that the applicant was solvent so that it could be inferred that the statutory demands were not served for the purposes for which Part 5.4 of the Act was intended. On this argument it would follow that their service was vexatious, oppressive and constituted an abuse of process. It was further argued that the demands were not effectively served and that the applicant had an offsetting claim affecting the amounts claimed under the demands.

[18] It seemed to me that it was likely that the demands had been effectively served based on the evidence of Mr Conley and that issue was not pressed significantly by the applicant.

[19] The solvency of the applicant depended to a large extent upon the ability of Mr James to repay a loan to him by the applicant and there was no evidence of that available to me. There was also a significant argument that the offsetting claim was not one available to the applicant.

[20] The other evidence has satisfied me, however, that there is a genuine dispute about the proper characterisation of the claim on behalf of Mrs Fleming's estate, something that is also likely to be considered in the Family Court proceedings.

Conclusion

[21] The result is that the applicant has satisfied me that there is a genuine dispute about the nature of the debt claimed and whether it is payable immediately. Nor is it appropriate to deal with the matter when the Family Court of Australia is likely to be required to deal with at least some of the factual issues sought to be debated here.

[22] The consequence is that the applications to set aside the statutory demands should be granted. I shall hear the parties as to costs.