SUPREME COURT OF QUEENSLAND

CITATION:	*SGR Pastoral Pty Ltd v Christensen (No 2)* [2019] QSC 239
PARTIES:	**SGR PASTORAL PTY LTD** (Applicant) **v** **GJ, LE, & JN CHRISTENSEN** (Respondents)
FILE NO/S:	BS No 8386 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	24 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Bowskill J
ORDER:	**1. The respondents pay the applicant's costs of the application, to be assessed if not agreed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – COSTS – consideration of appropriate order for costs of application under s 459G of the *Corporations Act* 2001 (Cth) to set aside statutory demand, where application heard on its merits, including challenge to jurisdiction on the basis of ineffective service, the applicant was wholly successful, the respondents were aware of general nature of dispute prior to issuing the demand, and there was no evidence of the applicant's insolvency *Corporations Act* 2001 (Cth) s 459N *Uniform Civil Procedure Rules* 1999 (Qld) r 681
COUNSEL:	S P Colditz for the applicant KN Wilson QC for the respondents
SOLICITORS:	PHV Law Solicitors and Consultants for the applicant Australian Property Lawyers for the respondents

[1] On 13 September 2019 I delivered my reasons for making an order that the respondents' statutory demand be set aside under s 459H of the *Corporations Act* 2001 (Cth): *SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229.

[2] The applicant seeks an order that the respondents pay its costs of the application. The respondents oppose that, and contend that either there be no order as to costs, or alternatively that costs should be reserved.

[3] Section 459N of the *Corporations Act* provides that "[w]here, on an application under section 459G, the Court sets aside the demand, it may order the person who served the demand to pay the company's costs in relation to the application".[1]

[4] The respondents submit that, because s 459N deals specifically with the costs of such an application, the "usual rule as to costs", in r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld), does not apply. Rule 681(1) provides that "[c]osts of a proceeding… are in the discretion of the court but follow the event, unless the court orders otherwise".

[5] I do not see any inconsistency between s 459N and r 681. Both provisions confer a discretion on the court; both contemplate costs following the event (relevantly, the court setting aside the demand) (r 681, expressly; s 459N, implicitly), subject to the court's discretion to order otherwise. As Heerey J said in *Felkro Nominees Pty Ltd v Austissue Pty Ltd* (1993) 11 ACSR 607 at 608:

> "… creditors have to realise that if they invoke winding up provisions by issuing a statutory demand they run the risk that if a debtor establishes that the amount claimed is subject to a genuine dispute, the debtor will get an order for costs, as s 459N expressly contemplates."[2]

[6] In pressing either for no order, or an order that costs be reserved, the respondents rely on a summary of authorities which appears in a decision of Black J in *Dynamics Co Pty Ltd v G & M Nicholas Pty Ltd* [2012] NSWSC 206 at [15]-[26] as supporting a principle that, in exercising the discretion, the court looks at the reasonableness of each party's position.[3] In *Dynamics*, the statutory demand was set aside by agreement between the parties. Many of the authorities surveyed by Black J are in a similar category (that is, applications for costs where there was no hearing or determination of the application to set aside on the merits).[4] In that context, there are well established

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1 See also s 1335(2) of the *Corporations Act* as to the general discretion of the court in relation to the costs of any proceeding under that Act.

2 See also *BGC Contracting Pty Ltd v Whitsunday Crushers Pty Ltd* [2004] WASC 209 at [8] per Newnes M (as his Honour then was).

3 See also Black J's more recent decisions in *Re Pierotti & Fanani Pty Ltd* [2018] NSWSC 457 at [19]-[28] and *Re Twigg Investments Pty Ltd* [2019] NSWSC 336 at [20]-[23].

4 Including *Jem Number Four Pty Ltd v Southern Cross Construction (NSW) Pty Ltd* [2006] NSWSC 602; *Soudan Lane Pty Ltd v Glen Bradshaw t/as Pacific Coast Digital* [2007] NSWSC 772; *Felkro Nominees Pty*

principles (for example, as summarised in the judgment of McHugh J in *Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622 at 624-5).

[7] In the present case, there was a hearing on the merits of the "service" issue; and also as to the existence of a genuine dispute and/or offsetting claim. Accordingly, the principles summarised by McHugh J, governing an application for costs when a party elects not to pursue an action because they have achieved the relief they sought by agreement, do not arise.

[8] Nevertheless, it may be accepted that reasonableness is still a relevant consideration, in particular in terms of issuing the demand.

[9] Another of the cases referred to by Black J in *Dynamic* is the decision of Higgins J in *Ayrton Investments Pty Ltd v Andrlik* (2000) 34 ACSR 643. In that case, the application to set aside the statutory demands was heard and determined by the court. Following the hearing, the demands were set aside, and the costs were reserved "on the basis that subsequent litigation might shed light on the bona fides of [the applicant's] claim that there had been a 'genuine dispute' as appeared established on the face of the supporting material" (at [12]). In the course of the subsequent litigation, the evidence of the applicant's controlling shareholder was rejected as untruthful. In later dealing with the costs application, Higgins J referred to authority governing the exercise of the costs discretion where a summary judgment application fails because the defendant shows a genuine possibility of defence to the claim,[5] and said:

> "[26] Applying the underlying principle thus enunciated to an application to set aside a statutory demand, the focus is on the reasonableness of the decision to issue it. Whether on the material known to the creditor before the notice issued, it should have been apparent that there was a dispute which, viewed objectively, was 'genuine', that is, warranting further inquiry. If so, the creditor must expect to pay costs in any event once the notice is set aside. If it was reasonable to issue the notice, but thereafter it appears that there is a genuine dispute then, as soon as that appears, the creditor must withdraw or cease to oppose the setting aside of the notice. Otherwise, the creditor risks an adverse costs order.
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> [27] It must also be borne in mind that, although the proceedings to set aside a demand notice are interlocutory, they relate to winding up proceedings, not debt recovery proceedings. Thus, even if it appeared to a creditor that there was no genuine dispute as to the existence of the debt, an adverse costs order might also be made if the creditor had no genuine belief that the

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Ltd v Austissue Pty Ltd (1993) 11 ACSR 607; *BGC Contracting Pty Ltd v Whitsunday Crushers Pty Ltd* [2004] WASC 209; and *Chameleon Mining NL v Atanaskovic Hartnell* [2009] NSWSC 602.

5 Referring to *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 at 23-24 per Blackburn CJ.

> debtor was insolvent. It is not appropriate to invoke winding up proceedings merely as pressure upon a reluctant debtor to pay sooner rather than later."

[10] Black J in *Dynamics* described the view expressed by Higgins J at [26] as having "substantial force", and went on to say:

> ".. consistent with the approach adopted by Higgins J in *Ayrton Investments*, the reasonableness of a party serving a statutory demand must be determined by reference to what that party knew as to the nature of any dispute as to the debt; conversely, a debtor which fails to pay a debt which is apparently due and undisputed, and also fails to disclose the basis of any dispute, can scarcely complain when the statutory demand procedure is invoked by a creditor who is acting reasonably on the basis of the information which is then known to it."[6]

[11] Ultimately in *Ayrton,* no order as to costs was made. That was considered appropriate in circumstances where there was nothing from the respondent's viewpoint to enliven a realisation that there might be a genuine dispute until it was expressly raised, which was not until after the demand was served; when the respondent first demanded payment of the alleged debt, the applicant responded in terms that "would warrant a concern that the applicant might be insolvent" (thus it was reasonable to have issued the demand); and yet once the applicant's contentions were raised, the respondent should have been aware that the dispute could only be resolved at a trial.

[12] In the *Dynamics* case, the respondent was ordered to pay the applicant's costs, from the date on which the basis for the application to set aside the demand was disclosed, up until the respondent made an unconditional offer to set it aside. In that case, Black J was satisfied the respondent was not on notice of any dispute as to the debt or any offsetting claim about it, prior to the service of the demand, and therefore did not find that service of the demand was unreasonable.

[13] In contrast, in *Re Pierotti & Fanani Pty Ltd*, Black J found the defendant ought to have been aware of the likelihood of a genuine dispute as to the debt, and whether it was payable on demand, although the basis for that dispute was not clearly articulated by the plaintiffs in correspondence prior to service of the demands. His Honour found this was not a case where the existence of that dispute could have caught the defendant by surprise (at [41]). The defendant was ordered to pay the plaintiffs' costs of the application to set aside.

[14] In the present case, on the evidence before the court it is apparent the applicant had already paid the respondents a substantial amount of money in respect of previous invoices (just over $496,000[7]). The respondents claimed to be owed a further (approximately) $49,800 for remaining invoices. The statutory demand also incorrectly

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6 *Dynamics Co Pty Ltd v G & M Nicholas Pty Ltd* [2012] NSWSC 206 at [21] and [26].

7 Affidavit of Ritchie at [26].

included a claim for interest under the *Civil Proceedings Act* 2011 (Qld). On the evidence, there were verbal communications and email correspondence between the parties, prior to the demand being issued in July 2019, from which it was apparent there was a potential dispute about the amounts being charged by the respondents, due to the failure to provide weigh bridge dockets with invoices. A clear communication of the dispute appeared in the email from Mandy Ritchie to the respondents of 11 June 2019.[8] Even if the applicant (or its solicitors) did not articulate in correspondence the detail which ultimately was set out in Mrs Ritchie's affidavit, the respondents could not have been taken by surprise as to the nature of the dispute.

[15] In addition, there was no evidence in this case that the applicant was insolvent.

[16] Accordingly, it does appear the statutory demand was issued "simply in an endeavour to obtain prompt payment"[9] of the remaining unpaid invoices.

[17] In circumstances where the application proceeded to a hearing, and the applicant was wholly successful, those matters support an order that the respondents pay the applicant's costs of the application. I am not persuaded by the submission that, if the matters set out in Mrs Ritchie's affidavit had been set out in a letter from the solicitor, it is likely the statutory demand would have been withdrawn.[10] The demand was not withdrawn after service of the affidavit material; the application to set it aside was strenuously opposed, first on the basis of a challenge to the jurisdiction of the court and, in any event, on the basis there was no genuine dispute or offsetting claim shown.

[18] As to the challenge to jurisdiction on the basis of ineffective service, I do not suggest the respondents acted unreasonably in pressing that challenge. However, the fact that the application was filed and served (by email) at "the last minute",[11] giving rise to the respondents' arguments as to effective service, does not support a different exercise of the discretion as to costs. The issue was dealt with on the merits and the applicant was successful.

[19] Although the applicant referred in its submissions to authorities in which costs have been awarded on the indemnity basis, I did not read those submissions as pressing for such an order and, in any event, do not consider there are circumstances in this case warranting the exercise of the discretion in that way.

[20] The order will be that the respondents pay the applicant's costs of the application, to be assessed if not agreed.

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8 Affidavit of Ritchie, exhibit 10.
9 *BGC Contracting Pty Ltd v Whitsunday Crushers Pty Ltd* at [12].
10 Respondents' submissions at [16].
11 Respondents' submissions at [14].