# SUPREME COURT OF QUEENSLAND

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| CITATION: | *SJG Developments Pty Ltd v NT Two Nominees Pty Ltd (in liq)* [2020] QSC 104 |
| PARTIES: | **SJG DEVELOPMENTS PTY LIMITED ACN 605 605 918**<br>(applicant)<br>**v**<br>**NT TWO NOMINEES PTY LIMITED (IN LIQUIDATION) ACN 163 965 062**<br>(respondent) |
| FILE NO/S: | BS 421 of 2020 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 8 May 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 February 2020 |
| JUDGE: | Bond J |
| ORDER: | **The orders of the Court are:**<br>**1. The liquidators of the respondent must pay the applicant's costs of and incidental to the applicant's application to set aside the respondent's statutory demand, to be assessed on the indemnity basis.**<br>**2. The liquidators of the respondent must pay the applicant's costs of and incidental to the applicant's application for a non-party costs order against them, to be assessed on the standard basis.** |
| CATCHWORDS: | CORPORATIONS – WINDING UP – LIQUIDATORS – DUTIES AND LIABILITIES – IN VOLUNTARY WINDING UP – LIABILITY FOR COSTS – where liquidators caused the respondent company to issue a statutory demand in respect of payments allegedly made by the respondent to a third party on the applicant's behalf – where applicant successfully applied to set aside statutory demand because of genuine dispute as to existence of debt – whether liquidators should be personally liable for costs<br>PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – OTHER PARTICULAR CASES – where applicant foreshadowed grounds to be relied upon to set aside statutory demand and application for indemnity costs – where respondent given opportunity to withdraw statutory demand – whether costs should be ordered on |

indemnity basis

*Insolvency Practice Schedule (Corporations)*, s 45-1, s 45-5, s 90-15

*Arawak Holdings Pty Ltd v King Tide Company Pty Ltd* [2018] QCA 148, cited
*Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477; [1999] QCA 2, cited
*Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225; [1993] FCA 801, applied
*International Cat Manufacturing Pty Ltd (in liq) v Rodrick (No 2)* [2013] QSC 307, considered
*Knight v FP Special Assets Ltd* (1992) 174 CLR 178; [1992] HCA 28, cited
*Silvia v Brodyn Pty Ltd* (2007) 25 ACLC 385; [2007] NSWCA 55, considered
*Ultra Tune Australia Pty Ltd v McCann* (1999) 30 ACSR 651; [1999] VSC 58, cited

COUNSEL: S E Seefeld for the applicant
N J Shaw for the respondent

SOLICITORS: Hickey Lawyers for the applicant
Shand Taylor Lawyers as town agents for Pateman Legal & Corporate Services for the respondent

**Introduction**

[1] On 3 February 2020, the applicant company sought and obtained an order from me pursuant to s 459G of the *Corporations Act* 2001 (Cth) setting aside the respondent's statutory demand dated 20 December 2019.

[2] The respondent was itself a company in liquidation and, accordingly, it was the respondent's liquidators who had caused the respondent to issue the statutory demand. Consequent upon the applicant's success in setting aside the demand, the applicant applied orally for an order for indemnity costs against the liquidators personally.

[3] The liquidators were not parties to the application. However, counsel for the respondent obtained instructions to appear for them and I heard oral argument from each side. Pursuant to directions which I made at the hearing, I subsequently received written submissions from each side.

[4] For the reasons which follow, I think the applicant is entitled to the orders which it seeks.

**The facts**

[5] The applicant was a special purpose vehicle incorporated for the purchase and development of land for use as a childcare centre in the Northern Territory. Its sole shareholder was Mr Simmons and he was one of three directors. The respondent owned and operated two childcare centres in the Northern Territory. Its sole shareholder and director was Mrs Simmons, Mr Simmons' now-estranged wife. Before their relationship had deteriorated, Mr Simmons had also acted as an accountant for the respondent and had been granted access to its bank accounts.

[6] The respondent's joint liquidators were appointed on 18 July 2019. The liquidators first raised the proposition that the applicant owed monies to the respondent by correspondence

dated 13 December 2019. They alleged that the debt was $135,703.46, which amount represented unauthorised payments which had been made by Mr Simmons out of the respondent's account, together with interest. They based the respondent's claim on Mrs Simmons' advice that the payments were not authorised and on the absence of any company records supporting a basis for the payments having been made. The liquidators demanded the debt be paid before 4:00pm on 20 December 2019 or else the liquidators reserved the right to take action without further notice.[1]

[7] The applicant's solicitors responded on 20 December 2019 requesting the unequivocal withdrawal of any demand on the basis that:

(a) the respondent had acknowledged that it did not retain any records;

(b) the demand was made reliant upon advice of Mrs Simmons 'without any substantiation';

(c) the applicant had had no direct dealings with the respondent and had no knowledge of the recording of the relevant transactions in the respondent's books; and

(d) any money advanced to the applicant was advanced by Mr and Mrs Simmons personally (and not by the respondent) and was repaid in full by a bank cheque (evidence of which was provided[2]) payable to Mrs Simmons in the sum of $122,886 issued 4 February 2019.

[8] The respondent served a statutory demand under cover of correspondence dated 20 December 2019, demanding payment of $60,000, representing payments allegedly made by the respondent to a third party on the applicant's behalf. There was no explanation why the respondent now claimed only the reduced amount. Attached to the statutory demand was an affidavit of one of the joint liquidators by which he testified to his belief that there was no genuine dispute about the existence of the total amount of the debt.[3]

[9] The applicant filed an originating application on 13 January 2020 seeking, among other things, orders that:

(a) the statutory demand be set aside;

(b) the respondent pay the applicant's costs on an indemnity basis; and

(c) the respondent's liquidators personally indemnify the applicant with respect to any costs order made against the respondent.

[10] The applicant then sent correspondence dated 20 January 2020 to the respondent which:

(a) stated the applicant's view that there was no foundation for the liquidator to depose to there being no genuine dispute about the existence of the debts;

(b) stated that unless the respondent withdrew the statutory demand by 4:00pm on 22 January 2020, the applicant would rely on the correspondence with respect to recovering costs on an indemnity basis; and

(c) stated that the applicant would seek an order that any costs payable by the respondent be paid personally by the respondent's liquidators.[4]

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1 Affidavit of Steven Luke Mitchell sworn 10 January 2020, Exhibit SLM-2.
2 Affidavit of Steven Luke Mitchell sworn 10 January 2020, Exhibit SLM-3.
3 Affidavit of Steven Luke Mitchell sworn 10 January 2020, Exhibit SLM-6.
4 Affidavit of Steven Pateman sworn 3 February 2020, Exhibit SMP-1.

[11] The applicant reiterated in correspondence dated 31 January 2020 that it would rely on its correspondence dated 20 January 2020 with respect to the issue of costs.[5]

[12] The respondent's contention in respect of the debt was that Mr Simmons caused three transfers totalling $60,000 to be made from the respondent's funds to De Silva Hebron, a law firm. The respondent alleged De Silva Hebron acted on behalf of a vendor from whom the applicant had purchased land. The respondent alleged that Mr Simmons, who had been given control over the respondent's accounts by Mrs Simmons, made these transfers without authority from Mrs Simmons and without her knowledge.

[13] The respondent based this contention on the respondent's bank statements which recorded three payments that:

(a) contained in the payment description a lot number matching the property purchased by the applicant; and

(b) were made to a payee described as 'DE SILVA H' at a BSB number corresponding to a branch located in Darwin.

[14] When the respondent's solicitors attempted to verify with the law firm whether these payments had been received, the firm indicated that it was:[6]

> …unable to release any information to you without written authority from the Purchaser or orders from a Court of competent jurisdiction.

[15] Notably, the respondent's enquiry was only made by email sent at 4:45pm on 20 December 2019, the day the statutory demand was issued. The above reply from the law firm was not received until 14 January 2020.

[16] It was common ground between the parties that there had been no direct dealings between the applicant and the respondent prior to the first letter sent by the respondent's liquidators referred to at [6] above.[7]

**My judgment on the application to set aside the statutory demand**

[17] My reasons for setting aside the statutory demand were given *ex tempore*.

[18] I found that the evidence before me did not clearly identify the true position of the state of relevant obligation as between the applicant, the respondent, Mr Simmons, Mrs Simmons, and the recipient of the transferred monies. However I pointed out that the issue before me did not require resolution of those issues, but merely required my determining whether I was satisfied that there was a genuine dispute concerning the existence of the alleged debt, as between the applicant and the respondent.

[19] The critical part of my reasoning resolving that question in favour of the applicant was as follows:

> The respondent's case is that it points to its own business records which suggest that three payments, totalling $60,000, were made by the respondent to a solicitor's firm. The business records suggest something about the purpose of the payments, namely that they were made to a solicitor's firm, to what is thought must be its trust account, and that the payments had a connection to a particular block of real estate. The respondent says that the applicant company was seeking to acquire real estate from a vendor and the solicitor's firm which received the payments from the respondent acted for the vendor. The proposition that the respondent asked me to conclude is that the payments were made to the vendor's solicitor's trust account operating to discharge a debt that the applicant would otherwise have owed to the vendor for the acquisition of the land.

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5 Affidavit of Steven Pateman sworn 3 February 2020, Exhibit SMP-1.

6 Affidavit of David Solomons affirmed 30 January 2020, Exhibit DS-14.

7 Affidavit of Steven Luke Mitchell sworn 10 January 2020 at [7]; Affidavit of Kerry Simmons sworn 30 January 2020 at [49].

That is not clear at all. Although attempts have been made by the respondent to obtain information from the solicitor's firm, the solicitor's firm says that it is:

> …unable to release any information to [the solicitors for the respondent] without written authority from the purchaser or orders from a Court of competent jurisdiction.

The possibility does exist that the payment should be characterised in the way for which the respondent contends, but it is by no means clear that the money ever actually was received by the solicitor's firm or that it was for the purpose contended for by the respondent.

For its part, the applicant has the affidavit of one of its directors, Mr Mitchell. That affidavit swears that –

(a) the applicant had no direct dealings with the respondent;

(b) at no time did the applicant and the respondent enter into any loan agreement or transaction;

(c) all dealings by the applicant were solely limited to financial accommodations made between the applicant and Mr and Mrs Simmons; and

(d) those financial accommodations were personally repaid by a bank cheque in February 2019.

The evidence certainly supported the proposition that a sum in excess of the amount that the respondent asserts was paid to the vendor's solicitor's firm was paid to Mrs Simmons, and that the sum was paid at a time after the respondent made the payments to the solicitor's firm.

The respondent says that I should not construe the evidence of Mr Mitchell as negating the proposition for which the respondent contends. I am not persuaded that that is the appropriate course. To the contrary, I think that presently I should regard Mr Mitchell's affidavit as demonstrating a genuine dispute of the indebtedness that is said to support the statutory demand.

[20] Prima facie, in consequence of having succeeded in its application, the applicant was entitled to a costs order as against the respondent, because costs should follow the event. However, the applicant was not satisfied with accepting the risk that the respondent company in liquidation might have insufficient funds to meet such an order, hence the application for a costs order against the liquidators personally.

## Should the costs order be made against the liquidators personally?

[21] In *International Cat Manufacturing Pty Ltd (in liq) v Rodrick (No 2)* [2013] QSC 307, McMurdo J (as his Honour then was) followed *Silvia v Brodyn Pty Ltd* (2007) 25 ACLC 385 at 393-394 in which Hodgson JA (with whom Ipp and Basten JJA agreed) summarised the law in this way (emphasis added, some citations omitted):

> 50. **If proceedings are brought by a liquidator in relation to a company's affairs, generally an order for security for costs will not be made; but if those proceedings are unsuccessful, then an order for costs will generally be made against the liquidator personally**: *Re Wilson Lovatt & Sons Limited* [1977] 1 All ER 274. In that case, at 285, Oliver J said this:
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> > 'I think that a review of the authorities does disclose that a clear dichotomy between the case where the liquidator is sued and the case where the liquidator initiates proceedings, is established, and indeed it seems me to be a perfectly reasonable one. **I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants**. A trustee or a personal representative who institutes proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator, and the authorities which point that way seem to me, if I may say so respectfully, to be completely reasonable.
> >
> > **I can quite see that there may be very powerful reasons of policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally,**

> **because of course he cannot protect himself against claims being made**. Unless there were some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings, whether they be proceedings in the winding-up or otherwise.'
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> 51. The liquidator would generally be entitled to an indemnity from the assets of the company, although that may be denied if the liquidator has acted unreasonably: ….
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> 52. If proceedings brought against the liquidator are successful, generally a costs order will be made in such a way that the liquidator does not incur any personal liability. ….
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> …
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> 54. However, if the liquidator has acted unreasonably in defending the litigation, the liquidator may be made personally liable: …

[22] The applicant pointed out that the commencement of the present application against the respondent was necessitated by the liquidators' decisions to cause the respondent to issue a statutory demand and to refuse to withdraw it, despite the applicant's request to do so. In such circumstances the applicant submitted that the first principle identified in the quotation from *Silvia v Brodyn Pty Ltd* should be applied.

[23] For their part, the respondent and the liquidators submitted, correctly, that *International Cat Manufacturing Pty Ltd (in liq) v Rodrick (No 2)* concerned proceedings in which both the company in liquidation and the liquidators had been plaintiffs. In the present case, the liquidators were not parties and, in those circumstances, they relied on the principle which is, for present purposes, sufficiently stated in *Silvia v Brodyn Pty Ltd* in the paragraph which preceded the above quotation:

> 49. If proceedings are brought by a company in liquidation, with the liquidator not being a party, and if those proceedings are unsuccessful, an order for costs would generally be made against the company but not against the liquidator, unless the liquidator has acted unreasonably: *Mead v Watson* [2005] NSWCA 133, 23 ACLC 718. However, a defendant to such proceedings may be able to obtain, in advance of the hearing, an order for security for costs: *Hession v Century 21 South Pacific Limited (In Liquidation)* (1992) 28 NSWLR 120.

[24] I reject the submission that the jurisdiction to award costs against the liquidators personally, in a case in which they are not parties, is in all cases conditioned on demonstrating that the liquidators have acted unreasonably.

[25] The New South Wales authorities cited in *Silvia v Brodyn Pty Ltd* considered the power of the Court to make a costs order against a liquidator in terms of the Court's supervisory jurisdiction over its own officers, and in a procedural context which otherwise limited the Court's power to make costs orders against non-parties.[8] Within that context the cases articulated a legal standard which equated the rule which would govern when a liquidator could be required to bear costs which the company in liquidation had been ordered to pay, with the rule which would govern when the liquidator would lose what would otherwise be the liquidator's entitlement to indemnity for expenses including legal costs incurred in the liquidation.

[26] Whether that legal standard should still be regarded as governing the Court's supervisory jurisdiction over liquidators as now expressed in ss 45-1, 45-5 and 90-15 of the *Insolvency Practice Schedule (Corporations)*[9] does not need to be examined. It is sufficient to note that this Court has a well-established jurisdiction to make costs orders against non-parties where the interests of justice support such an order: see *Knight v FP Special Assets Ltd*

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8 See the discussion by White J in *House of Golf Chatswood Pty Ltd v McManus* (2005) 225 ALR 786 at [10] to [20].

9 Schedule 2 to the *Corporations Act* 2001 (Cth).

(1992) 174 CLR 178 and *Arawak Holdings Pty Ltd v King Tide Company Pty Ltd* [2018] QCA 148. Authority in Queensland has long recognised the exercise of that jurisdiction to justify costs orders against liquidators personally: see *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477 at [36].

[27] In my view considerations of justice do support such an order being made in the circumstances of this case, and they do so without my needing to form a view that the liquidators have acted unreasonably or otherwise in such a way as would affect their right of indemnity. In this case, the applicant could not have protected itself by a security for costs order. Rather, it was forced to commence litigation against the company in liquidation by the liquidators' conduct in relation to the statutory demand. Although the respondent and the liquidators concede that an order should be formulated which will afford the applicant priority in the winding up above even the liquidators' indemnity, why in the present circumstances should the liquidators be entitled to plead that they should not be responsible beyond the extent of the assets in their hands? If, as is suggested by the applicant, there is a risk of a shortfall,[10] it is the liquidators who should bear that risk because, as Hansen J observed in *Ultra Tune Australia Pty Ltd v McCann* (1999) 30 ACSR 651 at [84], it is the "… liquidator, and not an opposite party in litigation, [who] knows what the financial position of the company is and, in particular, whether the assets of the company will be sufficient to cover the costs and expenses of litigation (including unsuccessful litigation) and [the liquidator's] remuneration".

[28] The justice of the present case requires that a costs order be made against the non-party liquidators.

**If a personal costs order is made against the liquidators, should it be on the indemnity basis?**

[29] The parties agreed that circumstances which may be considered to warrant the award of indemnity costs include the following circumstances identified in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225:

(a) where proceedings were commenced for some ulterior motive;

(b) where proceedings were commenced in wilful disregard of known facts or clearly established law; and

(c) where there has been an imprudent refusal of an offer to compromise.

[30] My attention was drawn specifically to cases involving the award of indemnity costs in applications to set aside statutory demands. Features common to those cases, and which in my view were present in this case, included:

(a) it was obvious that there was a genuine dispute as to the debt;[11]

(b) the respondent was provided with fair warning of the grounds upon which the applicant would seek to set aside the demand;[12] and

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10 The applicant's submissions identified material which suggested that the liquidators had identified that the respondent had a "realisable value deficiency" of over $4.4 million.

11 *CGI Information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Ltd* (2003) 47 ACSR 100; *Professional Advantage Pty Ltd v Australian Broadcasting Commission* [2007] NSWSC 607; *Alliance Accounting & Business Consultants Pty Ltd v Australian Property Investment & Development Pty Ltd* [2007] NSWSC 775.

12 *Austrac Rail Pty Ltd v Hunter Premium Funding Ltd* [2001] NSWSC 654 at [23]; *CGI Information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Ltd* at [26].

(c) the applicant foreshadowed that it would apply for indemnity costs.[13]

[31] The respondent admits that the application to set aside the demand was preceded by correspondence which largely foreshadowed the matters upon which the applicant relied in setting aside the statutory demand. However, the respondent justified its decision not to withdraw the statutory demand (and its resistance to an indemnity costs order) by submitting that:[14]

(a) the applicant proffered no evidence as to its relationship with De Silva Hebron;

(b) the applicant made no direct reference to the transactions making up the $60,000;

(c) the applicant's evidence and assertions were vague and unsupported without reference to bank statements or other supporting documents;

(d) the applicant did not directly address the propositions in the demand and in the respondent's affidavit evidence; and

(e) no evidence was produced from Mr Simmons nor any explanation offered for his failure to give evidence.

[32] I am not persuaded by these contentions.

[33] The respondent had not presented evidence identifying the relationship between the applicant and De Silva Hebron, beyond circumstantial evidence that that firm acted on the other side of a transaction involving the applicant. Even less could the respondent demonstrate that those parties had an arrangement involving the respondent paying certain amounts on the applicant's behalf. In the circumstances, the lack of an explanation from the applicant of the nature of its relationship with De Silva Hebron is hardly a compelling factor that tends to prove the respondent's contention in respect of the debt beyond genuine dispute.

[34] Moreover, on the factual basis that the applicant and respondent had no direct dealings (as was common ground between the parties), it is not surprising that the applicant could not produce evidence or supporting documentation that can conclusively disprove the existence of such an alleged arrangement. This is all the more so when, as the applicant submits, the entirety of the respondent's affidavit evidence – representing the first time the respondent cogently particularised its contentions that the debts arose from payments made to De Silva Hebron – was sworn between 30 January and 3 February 2020, barely one business day before the hearing of the application on Monday 3 February 2020.

[35] More importantly, as the applicant submits, these objections misconstrue the nature of a statutory demand. The process should be invoked when there is no genuine dispute as to the existence of a debt. The question is not whether the applicant's position is vague or indirect. The evidence presented by the respondent did not negate the existence of any genuine dispute as to the existence of the debt and the applicant's evidence, consistent with its correspondence, supported it. In my view the conclusion that there was a genuine dispute was an obvious one. The respondent had ample opportunity to withdraw its statutory demand on notice of these matters raised by the applicant and did not do so.

[36] In the circumstances of this case a costs order on the indemnity basis in relation to the application to set aside the statutory demand is justified.

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13 *Austrac Rail Pty Ltd v Hunter Premium Funding Ltd* at [23].

14 Respondent and liquidators' submissions as to costs at [4]-[5].

**Conclusion**

[37] The liquidators of the respondent must pay the applicant's costs of and incidental to the applicant's application to set aside the respondent's statutory demand, to be assessed on the indemnity basis.

[38] The costs of and incidental to the applicant's application for a non-party costs order against the liquidators of the respondent must be dealt with separately. They should follow the event, but there is no reason why they too should be assessed on the indemnity basis. Accordingly, the liquidators of the respondent must pay the applicant's costs of the application for a non-party costs order against them, to be assessed on the standard basis.