[1994] 2 VR 290, (1993) 11 ACSR 362, (1993) 11 ACLC 1,062, 1993 WL 1405720

[1994] 2 VR 290
Supreme Court of Victoria

Mibor Investments Pty Ltd v Commonwealth Bank of Australia

Hearing: 10 September 1993
Decision: 14 September 1993
Hayne J

HEADNOTE

Companies — Winding up — Statutory demand — Setting aside — Whether "genuine dispute" as to debt — Whether application interlocutory or final — Corporations Law, s459G, s459J.

The respondent bank issued proceedings in the Commercial List against three companies, seeking moneys allegedly due and payable under guarantees given by the companies. Eleven days later, the bank served statutory demands for the same moneys. The companies filed and served defences and counterclaims in the Commercial List proceeding. They also applied pursuant to s459G of the Corporations Law to have the statutory demands set aside, inter alia, on the ground that there were genuine disputes as to the existence or amount of the debts. Each of the applicants filed an affidavit verifying the truth of certain allegations in its defence.

Held, allowing the applications: (1) Division 3 of Pt5.4 of the Corporations Law did not require the court to embark upon an extended inquiry to determine whether there was a genuine dispute as to the debt or to weigh the merits of that dispute. The enquiry was whether there was a dispute that is a genuine dispute. However, in some limited cases, the court might have to make some investigation of the factual basis of the claim that a debt was disputed before it could be satisfied that the dispute was a genuine dispute.

(2) Although recent amendments to the Corporations Law made a number of substantial changes to the law relating to statutory demands, the question whether there was a "genuine dispute" raised considerations that were similar to those relating to whether there was a "bona fide dispute".

(3) The statutory demands should be set aside on the ground that there were genuine or real disputes as to the debts. The following factors all supported this conclusion:

(a) The bank had chosen to commence civil proceedings first, rather than issue statutory demands; this was a powerful indication that the bank expected there to be genuine disputes.

(b) The bank bad chosen to commence its civil proceedings in the Commercial List, a list in which debt recovery actions were not permitted to remain unless there was a genuine belief that the debt was disputed.

(c) The bank had not sought to remove the case from the Commercial List and move for summary judgment.

(d) The applicants' defences contained positive allegations of fact, not bare denials. ****291**

(e) The applicants had gone on oath as to the truth of some of the facts alleged in the defences.

(4) An application to set aside a statutory demand pursuant to s459G was an interlocutory proceeding. The proceeding determined only whether the demand might stand or not; it did not finally determine rights. Accordingly, the applicants could rely on affidavits sworn on the basis of information and belief.

Applications

Each of the applicants applied under s459G of the Corporations Law for an order setting aside a statutory demand which had been served on it by the respondent. The facts are stated in the judgment.

RL Rosenberg for the applicant Mibor Investments Pty Ltd. AC Archibald QC and ML Sifris for the applicant Mideb Nominees Pty Ltd. DMB Derham for the applicant Elli Nominees Pty Ltd. AH Goldberg QC and PW Collinson for the respondent.

Judgment

Hayne J.:

On 27 July 1993 the Commonwealth Bank of Australia served a statutory demand on each of Mibor Investments Pty Ltd., Mideb Nominees Pty Ltd and Elli Nominees Pty Ltd. Each demand sought payment of more than $81 million allegedly due under guarantees given by each of the companies in support of financial accommodation given by the bank to Redlock Pty Ltd and Lamina Pty Ltd.

Eleven days earlier, on 16 July 1993, the bank had commenced several actions in the Commercial List, each of which (so far as presently relevant) claimed the amount of $81 million. One action was commenced against Mibor, Mideb and Elli and other, separate actions, were commenced against other parties. Each of the actions came on for directions on 23 July 1993 and directions were given about pleadings and lists of discoverable documents. Each of Mibor, Mideb and Elli was directed to file and serve its defence and counterclaim on or before 12 August 1993. Mibor and Elli filed and served their defences and counterclaims on that day; Mideb sought and obtained an extension of time for provision of its pleading until 30 August 1993, on which day it was filed and served.

Each of Mibor, Mideb and Elli now applies under s459G of the Corporations Law to set aside the statutory demand. Each company applied on the basis that the making of the demand was an abuse of process and should be set aside under s459i and on the further basis that there is a genuine dispute between the company and the bank about the existence or the amount of the debt demanded.

With the consent of the parties the three applications were heard together, and although some separate matters arise in connection with the particular applications, it is convenient to state my reasons for decision on all three applications. ****292**

It is necessary to notice a little about the material upon which the applicant companies relied.

Mibor made its application by notice of motion dated 16 August 1993 supported by an affidavit of D. W. Marriner sworn the same day in which Marriner said (among other things) that in so far as the defence and counterclaim that had been filed on behalf of the company made allegations of fact, subject to some presently immaterial exceptions, he verified that those facts were true and correct. He gave no further details. Later, Marriner swore a further affidavit in which he gave more detailed evidence about matters alleged in the defence and counterclaim including material bearing upon an allegation made in the defence that the dispute between bank, customers and guarantors had been compromised in June 1993.

Mideb made its application by notice of motion dated 13 August 1993 supported by an affidavit of the solicitor for Mideb in which the solicitor deposed to the history of the litigation and sought to argue that the making of the demand was an abuse of process. By a further affidavit sworn on 24 August 1993 the solicitor described (in general terms) the kinds of defence which he anticipated that Mideb would make to the claim made by the bank in the action brought in the Commercial List. A third affidavit of the solicitor was filed on 8 September 1993. The defence which Mideb had filed was exhibited to that affidavit and the solicitor said that he had been told by the principal of Mideb (who was then in Los Angeles) that he had read the defence and counterclaim and that "in so far as the facts and matters therein refer or relate to Mideb and himself they are true and correct".

On the adjourned hearing of the motion a facsimile copy of an affidavit sworn by Joseph Hellen (the principal of Mideb) in Los Angeles on 9 September 1993 was tendered and received in evidence by consent. In that affidavit Hellen swore that he had read the defence and counterclaim and that to the extent that the facts and matters set out in that document were within his knowledge, they are true and correct.

Elli made its application by a notice of motion dated 17 August 1993 supported by an affidavit of a principal of that company which recorded the history of the Commercial List proceeding, exhibited a copy of the defence and counterclaim filed on behalf of Elli, and asserted that there was a genuine dispute between the bank and Elli about the existence of the debt and the amount of the debt but did not go so far as to verify any of the facts alleged in the defence. Later, by affidavits sworn 8 September 1993 the same deponent affirmed the truth of certain of the facts alleged in the (by then amended) defence and counterclaim of Elli, giving some detail of facts bearing upon those matters.

Counsel for the bank sought leave to cross-examine the deponents. It was said that the cross-examination would deal with two subject matters: first that the defences filed on behalf of the companies were a recent invention in that on the day that the statutory demands were made there was no suggestion that liability to repay the facility provided by the bank to Redlock and Lamina was in issue or that the guarantees of that facility were not then on foot, and secondly, that there was material which would demonstrate that the allegation that the dispute between the bank, its customers and the guarantors had been compromised was untenable. I refused the bank leave to cross-examine the deponents. In my view neither of the matters which it was sought to explore by cross-examination goes to any issue arising on the companies' applications to set aside the statutory demands. ****293**

Whether the defences can be described in the sense used in the bank's submissions as "recent inventions" does not in my view bear upon the existence in this matter of a genuine dispute. That is to be judged according to whether there is now a genuine dispute about the alleged debt - not according to how recently that dispute may have arisen. Furthermore, cross-examination on this issue of so-called "recent invention" or on the validity of the companies' contention that the dispute was compromised in June 1993 in the end would be no more than cross-examination about the merits of the dispute, not about its existence or whether it is genuine. I do not say that in no case can cross-examination be permitted of a deponent of an affidavit filed in support of an application under s459G. It may very well be that such cases are rare - perhaps very rare indeed: However it is enough for me to say that the cross-examination which was proposed in this matter did not in my judgment go to any issue falling for decision in the present matters.

At the heart of the bank's submissions lay the proposition that the only method by which a company could prove that there is a genuine dispute about the existence of a debt is for a company to prove on oath the company's defence to the claim made upon it. I do not consider that Div. 3 of Pt5.4 of the Corporations Law requires the court to conduct a trial of the kind described in order to determine whether a dispute is a genuine dispute. It may be that in some, perhaps limited, circumstances the court may have to make some investigation of the factual basis of the claim that a debt is disputed before it could be satisfied that that dispute is a genuine dispute. Each case will fall for decision upon its own facts.

Now it has long been held that as a matter of discretion, a winding-up order will not be made on a debt which is bona fide disputed, provided that the dispute is based on some substantial grounds. (See e.g. Re The Brighton Club and Norfolk Hotel Company (Ltd) (1865) 35 Beav. 204, at p. 205; 55 ER 873; Re The Imperial Silver Quarries Co Ltd (1868) 16 WR 1220, at 1221; Re King's Cross Industrial Dwellings Co. (1870) LR 11 Eq. 149, at 151; Re The Imperial Hydropathic Hotel Co., Blackpool, Ltd. (1882) 49 LT 147; Re Great Britain Mutual Life Assurance Society (1880) 16 Ch. D. 246, at 253; Re KL Tractors Ltd [1954] VLR 505, at 509; McPherson, The Law of Company Liquidation, 3rd ed., p. 63. The existence of this general discretion stood apart from the questions presented under the previous provisions relating to statutory demands about whether there had been a "neglect" to pay the debt demanded when the debt was disputed (as to which see Re London and Paris Banking Corporation (1874) LR 19 Eq. 444, at 446; Re Convere Pty Ltd [1976] VR 345; Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83; McPherson, The Law of Company Liquidation, pp. 52-3).

It was submitted on behalf of the bank that the recent amendments to the Corporations Law sought to establish wholly new and different arrangements concerning statutory demands and that it follows that it would not be right to adopt earlier authorities coming from a different legislative context without regard to the circumstances which gave rise to them. So much may be accepted. It is therefore desirable to say a little about the new statutory scheme.

It does make considerable changes to the law. Thus, it is clear that s459H of the Corporations Law requires the court to calculate what is called the "substantiated" amount of the demand if it is satisfied that the company has an off-setting claim. ****294**

The court may then vary the demand. Further, the court is directed by s459J(2) not to set aside a statutory demand merely because of a defect (which is defined to include, an irregularity, misstatement of an amount or total, misdescription of a debt or other matter, and a misdescription of a person or entity) except as provided by s459j(1). Thus the difficulties presented under the former law when a demand sought too much have been largely, if not entirely, swept away.

Next it is to be noted that an application to set aside a statutory demand "may only be made within 21 days after the demand" is served (s459G(2)) and in so far as an application for a company to be wound up and insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without leave, oppose the application on a ground that the company could have relied on for the purposes of an application by it for the demand to be set aside but upon which it did not so rely: s459s(1). The court is directed not to grant such leave unless it is satisfied that the ground is material to proving that the company is solvent: s459s(2).

Thus it is clear that the changes made to the provisions governing statutory demands by the Corporate Law Reform Act 1992 are substantial. However, the basic question remains - whether the court is satisfied that there is a genuine dispute between the company and the respondent about the existence or amount of the debt to which the notice relates - and that question obviously raises considerations that at the least are similar to those arising under the old rule that a winding-up order would not, as a matter of discretion, be made on a debt which was bona fide disputed.

That rule was sometimes said to be grounded in part upon the fact that the applicant for winding-up may not be qualified to file an application for a winding-up order: the applicant may not be a creditor if the company were justified in refusing to pay. It may be doubted that that consideration is of great force (or for that matter was of great force under the old law). (Compare Re Bond Corporation Holdings Ltd (1990) 1 ACSR 250.)

In the present case the bank may still be a creditor of each of the companies (albeit a contingent or prospective creditor) even though the time for payment of the debt may not (on some arguments advanced by the companies) yet be due for payment. (On other ways in which the companies put their case the bank would not be even a contingent or prospective creditor.) However this may be, as McPherson says, at p. 63: " . . . The principal reason [for the rule is that a winding-up application is not to be used for the improper purpose of compelling a solvent company to pay a disputed debt which would certainly be discharged as soon as the company's liability was clearly shown to exist."

In my view this consideration applies equally to s459G as it did in relation to the former winding-up provisions and what is meant in s459G, by "a genuine dispute between the company and a respondent about the existence or amount of the debt" may be better understood in the light of this as well as some other considerations to which I now refer.

First, any application to set aside a statutory demand must be made very quickly: it must be made within 21 days. Secondly, the statute contemplates a summary procedure, the only outcome of which will be an order affecting the statutory demand, not any order or judgment declaring a debt to be owing or not to be owing or ordering payment of any money sum. Thirdly, the only significance that the statutory demand has is that if there is failure to comply with it then the company is deemed to be insolvent. ****295**

Thus the demand is no more than a precursor to an application for winding-up in insolvency. Fourthly, an application to wind up in insolvency must be determined within six months (unless the court is satisfied that special circumstances justify an extension of that time) (s459R). Fifthly, on the hearing of the application to wind up, the company may not oppose the application on grounds that it might have taken in any application to set aside the demand, unless those grounds are material to proving that the company is solvent.

These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.

The bank chose to institute proceedings in the Commercial List and only then, some days later, to make its statutory demands. It is well known that actions for the recovery of debts (including those arising pursuant to guarantees) are not permitted to remain in the Commercial List unless there is a genuine belief that the debt is disputed. (Guide to Commercial List Practice B.2.01.) In my view it is no answer to this for the bank to say that with a claim of the size of $81 million it should institute its proceeding in a 'fast track" list whether or not it has any belief that there is a genuine dispute between the parties. But again, however this may be, the fact that the bank chose first to commence ordinary civil process for recovery of the debt, rather than make a statutory demand on the companies, is in my view a powerful indication that the bank expected there to be a dispute about its claim. It may be said that the bank did not know whether that dispute would be genuine until it could see what defences were filed on behalf of the companies but I have little doubt in concluding that the bank expected at the time of commencement of the actions in the Commercial List that there would be a dispute about its claims.

Once the defences and counterclaims had been filed and served I consider that it was then apparent that there was a dispute between the parties which could not be resolved save by recourse to the ordinary processes of litigation. Issues were raised by each defendant which depended upon allegations of fact which would require proof in the ordinary way and would fall for investigation according to the ordinary interlocutory processes of the court. The defences which were filed did not stop at bare denial of allegations made by the bank; positive cases were put forward on behalf of each of the company defendants. No application was made or has been foreshadowed for summary judgment and although such applications are not encouraged in the Commercial List that is because the facilities of the list are reserved for cases in which there is a genuine dispute between the parties. If the bank is of opinion that there is no genuine dispute then its remedy is to have the case removed from the list and move for summary judgment. Its failure to do so is again a powerful indication of the existence of a genuine or real dispute. In my opinion there is a genuine or real dispute between each of these companies and the bank. Of course I express no view upon the merits of that dispute. No-one can until the evidence is heard and argument advanced. ****296**

The bank submitted that I should conclude from all the material that the contention by the companies that they had arrived at a compromise with the bank in June 1993 was a contention that must fail. Counsel for the bank acknowledged that so to conclude would be a 'bold" conclusion given the conflicting evidence given in the affidavits. In my view this issue is one to be resolved at trial after hearing oral evidence taken after the parties have concluded the usual interlocutory processes - not upon some preliminary assessment of whether one version of events put in an affidavit can stand with another version whether given by some other witness or given by the same witness on an earlier occasion. These are issues for trial; they are not issues that can be resolved now.

The bank contended that in determining whether there is a genuine dispute I am confined to looking at the affidavit evidence filed with the application to set aside the demand. It is to be noted that the section requires the application to be filed and served within a limited time and that that application must be accompanied by an affidavit in support. However, I do not read this as limiting the applicant to the material which it is able to gather together in the 21 day period permitted by the Act. Nevertheless even if I were confined to consideration of the affidavits filed with the applications to set aside the demands, I consider that it is shown on that material that there is a genuine dispute between these parties in each case.

That conclusion can only be reinforced by consideration of the later material. The fact that in each case a deponent has pledged his oath to some of the facts alleged in the defence can only strengthen the conclusion that a genuine dispute exists between the parties. (In the case of Mideb there may be doubt about exactly what facts the deponent Hellen has vouched as true.)

The bank contended that some of the evidence relied on by the applicants (especially the solicitor's affidavits filed on behalf of Mideb) were inadmissible because the deponent stated facts based on information and belief. It was submitted that the application was not an interlocutory application and reference was made to Licul v Corney (1976) 50 ALJR 439.

The question whether an application is interlocutory for the purposes of r43.03(2) is not to be decided according to whether the order made on determination of the application would be interlocutory for purposes of appeal: see e.g. Cowie v State Electricity Commission of Victoria [1964] VR 788, at 789. It is to be determined according to whether the application will decide the rights of parties or is " . . . made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties." Gilbert v Endean (1878) 9 Ch. D. 259, at 269, per Cotton LJ.

In my view this application is an interlocutory proceeding. Unlike the question in Cowie's Case (which was whether a statutory authority had immunity from suit in a particular case because of a failure to give notice under the Statute of Limitations) the present proceeding determines only whether a demand may stand or not. If the demand stands, the consequences are serious but there is no final determination of any right. ****297**

All that follows from the demand not being set aside is that the company will have a further perhaps short period within which it must meet the demand or face a conclusion that it is to be presumed insolvent (unless it proves the contrary). No order can be made under s459G which finally determines the rights of parties.

These conclusions are sufficient to dispose of the present application. It is therefore unnecessary for me to consider the separate arguments made by the company applicants under the general heading of "abuse of process", but it is perhaps desirable that I record some aspects of that argument. Nice questions may arise about how far principles developed in connection with abuse of the courts' process may extend to what is essentially an extra-curial step of giving a statutory demand which does not form any part of any pending proceeding. However, it would seem probable that considerations generally similar to those applied in cases where it is alleged that there is an abuse of the courts' process, may be taken into account under s459J. Thus it may well be that it would be appropriate to set aside a demand if it were demonstrated that the demand was made for a purpose other than that contemplated by the legislation. However it is by no means self-evident to me that the making of a demand after the institution of proceedings but before the filing and service of a defence demonstrates without more that the demand has been made for some collateral or improper purpose. It may have been, but it does not follow inevitably from the bare facts of the order of events I have mentioned. There is no material in the present cases that shows that the nature of the defences now taken by the companies had been described to the bank before the demands were made; so far as the material shows, the defences had not been put forward to the bank and all that the bank knew was (in effect) its own side of the case. However, as I have said, I do not consider that it is necessary for me to form any conclusion upon whether the making of the demands was an abuse of process.

In each case there will be an order setting aside the demand.

Statutory demands set aside.

Reported by EJ HOLLINGWORTH, BARRISTER-AT-LAW

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All Citations

SC Not Available, 31 December 1993, [1994] 2 VR 290, (1993) 11 ACSR 362, (1993) 11 ACLC 1,062, 1993 WL 1405720

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