Re MORRIS CATERING (AUSTRALIA) PTY LTD

SUPREME COURT OF QUEENSLAND

THOMAS J

23, 28 September 1993 — Brisbane

Statutory demand — Application to offset demand — Calculation by court of "substantiated account" — "admitted total" — "offsetting total" — Court's function to ascertain genuineness of claim and of any offsetting claims — Corporations Law Pt 5.4, ss 459G-459T — Corporate Law Reform Act 1992 s 57.

Morris Catering (Australia) Pty Ltd (the applicant) applied to set aside a statutory demand by North Shore Helicopter Ltd (the respondent) for $110,883.67 for arrears of payments and demobilisation costs. These payments and costs arose in relation to the termination of the respondent's contract to supply a helicopter for the applicant's catering work for the United Nations. The termination occurred after the respondent had withdrawn its helicopter and declined to provide further services because of arrears of payment for the use of the helicopter.

The application to be considered was should this statutory demand be set aside on the basis of an offsetting claim by the applicant. The offsetting claim by the applicant was that there had been an oral agreement that the respondent would "stay for at least 12 months"; the respondent's departure breached the agreement; and the applicant validly terminated the contract by reason of the respondent's breach. There is a contest between the parties as to which party effectively terminated the contract by reason of the other's default.

The respondent conceded that a genuine dispute existed in relation to part of the sum claimed and that an offsetting claim has been made which together with the amount in dispute exceeded the amount of the demand. The respondent does not however concede that the offsetting claim is genuine.

Held, in ordering that the demand be set aside and that the unsuccessful respondent should pay the applicant company's costs:

(i) The court has the power and in appropriate circumstances the obligation (pursuant to Div 3 of Pt 5.4 of the Corporations Law) to recalculate the "substantiated amount" of a statutory demand and in the event that it finds such an amount to exceed $2000, may make an order varying the demand so that it remains a potentially effective means of winding up the company. The court is required to examine the claim, assess the undisputed parts of the debt that has been demanded and deduct from it any offsetting claims of the debtor company.

(ii) Division 3 is intended to be a complete code in prescribing a formula that requires the court to assess the position between the parties and to preserve demands where it can be seen that there is no genuine dispute and no sufficient offsetting claim. The specific limits of the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".

(iii) The applicant's claim for $35,000 mobilisation expenses because a replacement aircraft had to be obtained was found to be a non-genuine claim as the company was committed to the expenditure independently of the actions of the respondent.

(iv) The applicant's entitlement to a $31,500 repayment of the mobilisation charge under the original contract was an arguable claim and its repayability will depend upon an oral extension and the question of an entitlement to rescind.

(v) The final offsetting component is for $96,752.25 claimed as additional expenditure as a result of the respondent not completing the full term of its contract,

but the circumstances would permit an arguable claim of a little over $83,500 after adopting the rates of loss alleged by the applicant.

(vi) Although the respondent's demand seems more solidly based than the cross-claim, the facts lead to a finding that the "admitted total" of the claim is $91,858.85 and that the "offsetting total" is $115,000 which means that there is no "substantiated amount". Section 459H(3) therefore requires that the demand be set aside.

Application

This is an application to set aside a statutory demand (served by the respondent on the applicant) on the basis of an offsetting claim by the applicant.

R Oliver instructed by *Hemming and Hart* for the applicant.

M Daubney instructed by *Mallesons Stephen Jaques* for the respondent.

Thomas J. This is an application to set aside a statutory demand on Morris Catering (Australia) Pty Ltd (the Company). The respondent North Shore Helicopter Ltd (the creditor) served the company with a statutory demand for $110,883.67 (US) on 24 August 1993. The creditor concedes that a genuine dispute exists in relation to part of the sum claimed, and that an offsetting claim has been made which, together with the amount in dispute, exceeds the amount of the demand. It does not however concede that the offsetting claim is "genuine".

The court now has the power, and in appropriate circumstances the obligation to recalculate the "substantiated amount" of a statutory demand and in the event that it finds such amount to exceed $2000, may make an order varying the demand so that it remains a potentially effective means of winding up the company. The regime governing this new system is contained in Div 3 of Pt 5.4 of the Corporations Law, comprising ss 459G to 459T.

Before turning to the specifics of these sections the facts should be briefly stated.

The company has, since January 1992, provided catering services to the United Nations Forces stationed in Cambodia. In order to carry out its operations it was necessary to obtain aviation support services. After calling for tenders, the company entered into a contract with the creditor in July 1992. Under the contract, the creditor was to provide one Squirrel helicopter for use for transportation services throughout Cambodia as directed by the company. The contract refers mainly to US dollars and so shall I.

The contract provided for an early payment by the company to the creditor of a "mobilisation fee" of $31,500. This sum was to be credited to the company "if the contract is extended for one year". The duration of the agreement was for a minimum period of 8 weeks from commencement of operations. There was provision for further payment by the company of a "demobilisation fee" to cover the creditor's cost of repatriation of staff and other actual demobilisation expenses. That provision however was not to apply "if the contract is extended to one year or more". There was a "default" clause which gave the creditor the right to terminate the

agreement in the event of default in payment of moneys due thereunder by the company, if such default was not remedied within 3 days.

The company's obligation as varied on 1 September 1992 was to make payments of $12,000 weekly, 10 days in arrears, with reconciliation at the end of each month based on total hours flown.

The material before me shows that the creditor performed its services between 29 July 1992 and 7 June 1993, which was a period of a little over 10 months. On that date the creditor withdrew its Squirrel helicopter from Cambodia, and has declined to provide further services. The company has purported to treat this as a repudiation and to terminate the contract.

During the period while the contract was being carried out, the company's payments were slow, and generally later than the period provided in the contract. This produced numerous requests and demands by the creditor for the company to bring its payments up to date.

The demands were not challenged, and the company remained in arrears. The creditor claims to have exercised its right to terminate the agreement on this ground. There is some evidence to the contrary suggesting that the withdrawal of the helicopter on 7 June 1993, in the midst of the Cambodian elections was motivated by other reasons, including insistence by the company that the helicopter be used for purposes involving unacceptable risks.

In the result, there is a contest between the parties as to which party effectively terminated the contract by reason of the other's default.

The creditor's demand is for a total of $91,858.85 for arrears of payments, and for a further $19,024.82 for demobilisation costs. Plainly its entitlement to the latter item depends upon its ability to show that its termination was valid, and there is a genuine dispute about this. There is however no true dispute with respect to the component of $91,858.85.

The company however has made a number of offsetting claims, on evidence suggesting that:

(a) in November 1992 there was an oral agreement that the creditor would "stay for at least 12 months";
(b) the creditor's departure on 7 June 1993 breached the agreement; and
(c) the company then validly terminated the contract by reason of the creditor's breach.

These are all arguable claims, and I cannot at this point identify them as non-genuine.

One of the claims of damage sustained by the company in consequence of the creditor's breach is that a replacement aircraft had to be obtained, and that $35,000 mobilisation expenses were thereby incurred. As to that, the evidence before me shows that the company had already made arrangements for the introduction of that aircraft before any breach by the creditor, and that the company was committed to such expenditure independently of any breach by the creditor. Indeed, the aircraft may well have been in commission even before the breach. I can, and do identify that as a non-genuine claim.

The next offsetting claim is an alleged entitlement to $31,500 repayment of the mobilisation charge under the original contract. That is certainly an

arguable claim, and its repayability will depend upon the oral extension and the question of entitlement to rescind.

The final offsetting component is $96,752.25, claimed as additional expenditure "as a result of (the creditor) not completing the full term of their contract". This is allegedly based on the cost of obtaining another aircraft to do the equivalent work of the helicopter over the balance of the term which the company says the creditor orally agreed to complete. Even accepting the company's figures, there is an error in claiming 2 full months, as the period involved was only 52 days. However, adopting the rates of loss alleged by tile company, the circumstances would permit an arguable claim of a little over $83,500.

I turn to the requirements of the Corporations Law. If a statutory demand is to be challenged, the company must apply to the court within 21 days to set it aside (s 459G(1) and (2)). If the court is satisfied that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates, or that the company has an offsetting claim, the court is required to calculate the "substantiated amount" of the demand (s 459H(2)). This is to be done in accordance with the formula "admitted total minus offsetting total".

The following definitions apply:

"admitted amount", in relation to a debt, means:

(a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt — a nil amount; or

(b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt — so much of that amount as the Court is satisfied is not the subject of such a dispute; or

(c) otherwise — the amount of the debt;

"offsetting claim" means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

"Admitted total" means:

(a) the admitted amount of the debt; or

(b) the total of the respective admitted amounts of the debts; as the case requires, to which the demand relates;

"Offsetting total" means:

(a) if the Court is satisfied that the company has only one offsetting claim — the amount of that claim; or

(b) if the Court is satisfied that the company has 2 or more offsetting claims — the total of the amounts of those claims; or

(c) otherwise — a nil amount. (ss 459H(2) and 459H(5)).

If the substantiated amount is less than the statutory minimum the court must set aside the demand. If it is equal to or greater than the statutory minimum:

... the Court may make an order:

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company. (s 459H(4))

The statutory minimum is currently $2000 (per s 9 as amended by Corporate Law Reform Act 1992).

Other grounds are preserved for the setting aside of a demand (s 459J), but it is not necessary to examine these for the purposes of the present case.

The order may be made subject to conditions ss 459H(4) or 459J(1), and 459M.

Broadly speaking the court is required to examine the claim, assess the undisputed parts of the debt that has been demanded, and deduct from it any offsetting claims of the debtor company. If the result is $2000 or more, the court has a discretion to vary the demand and to declare the varied demand to have had effect from the time when the original demand was served. It is possible to discern an intention that a company should pay the undisputed part of a demanded debt even if the demand may have been excessive, but that it should not be placed under pressure of being wound up with respect to any part of the debt that is genuinely disputed, or where there is any genuine contra-claim, whether or not it arises out of the same transaction as the debt to which the demand relates. The courts are now required to play a part in ascertaining the level of disputed entitlement. The provision goes far beyond the well recognised problem of statutory demands being set aside on the basis of a minor overstatement of the amount due. It lays to rest the judicial differences of opinion that surfaced in the early 1980s and remained unsettled to the present time. (*Cardiff Preserved Coal and Coke Co v Norton* (1867) 2 Ch App 405; *Re The Daily Pty Ltd* (1980) 5 ACLR 275; *Re Great Barrier Reef Flying Boats Pty Ltd* (1982) 6 ACLR 820; *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd* (1983) 7 ACLR 956; *Re Gem Exports Pty Ltd* (1984) 8 ACLR 755; *Re Wildtrek Ltd* (1987) 12 ACLR 398; *Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd* (1991) 5 ACSR 10; *Hassgill Investments Pty Ltd v Newman Air Charter Pty Ltd* (1991) 5 ACSR 321).

There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.

The essential task is relatively simple — to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).

The present case is a reasonably illustrative one, in that the creditor's demand seems more solidly based than the cross-claim, and one has the initial impression that a final analysis of the position between the parties will probably lead to some balance in favour of the creditor. That however is not to the point. The facts which have earlier been recited lead inevitably to a finding that the "admitted total" of the claim is $91,858.85; and that the "offsetting total" is $115,000. There is therefore no "substantiated amount". Section 459H(3) requires that I set aside the demand. There was no element

of surprise in the raising by the company of its disputes and its claims, and it is appropriate that the unsuccessful respondent should pay the applicant company's costs.

S HORGAN
SOLICITOR