SCANDON PTY LTD v POWERMATE (AUSTRALIA) PTY LTD

SUPREME COURT OF VICTORIA

SENIOR MASTER MAHONY

6 October 1995 — Melbourne

Statutory demands — Defect — Setting aside demand — "Some other reason" — Failure to include ACN — Corporations Law ss 219(3), 459G, 459J(1)(b).

A statutory demand served on the applicant was set aside by the Supreme Court of Victoria on the grounds that the creditor had failed to include its ACN, had not used its correct name and had failed to include an address for service in the state in which it was served: see *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 17 ACSR 662; 13 ACLC 1256. The Victorian agents for the solicitors for the respondent were instructed to issue a further demand (the second demand) immediately upon the handing down of the judgment in the earlier proceedings. The second demand included an address for service of the respondent in Victoria as well as the correct name of the respondent but did not include the respondent's ACN. The applicant sought to have the demand set aside on the grounds that this constituted a defect in the demand and that this defect constituted "some other ground" for setting aside the demand: CL s 459J(1)(b).

The respondent conceded that the failure to include its ACN was a defect in the demand but submitted that it was not of such significance as to warrant the setting aside of the demand especially in the circumstance where the respondent had used its correct name in the demand.

Held, dismissing the application:

(i) For a defect which is not productive of "substantial injustice" to constitute "some other reason" for setting aside the demand under CL s 459J(1)(b) it must have a significance as compelling as would "substantial injustice".

Scandon Pty Ltd v Dome Supplies Pty Ltd (1995) 17 ACSR 662, applied.

(ii) The omission from a demand of the creditor's ACN cannot be regarded as being of sufficient gravity as to constitute "some other ground" warranting the setting aside of the demand (*obiter*: it may have been otherwise had the omission been contumelious).

Re Macro Constructions Pty Ltd (1992) 8 ACSR 719, applied.

Scandon Pty Ltd v Dome Supplies Pty Ltd (1995) 17 ACSR 662, distinguished.

Applications

This was an application for orders setting aside a statutory demand served on the applicant. The facts appear sufficiently from the judgment.

A Rodbard-Bean instructed by *Moores* for the applicant.

S Horovitz instructed by *Purves Clark Richards* for the respondent.

Senior Master Mahony. This proceeding arises out of the sequel to *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 17 ACSR 662; 13 ACLC 1256. In that proceeding I made an order setting aside a statutory demand served by the respondent in this proceeding on the applicant because the statutory demand (the first demand) specified an address for service on the respondent which was

outside Victoria the State in which the statutory demand was served on the applicant; and because, in the first demand, the respondent gave neither its current name nor its Australian Company Number (ACN). (It used a former name which had not been its name since 15 June 1993.)

The sequel to that proceeding was the service on the applicant of a further statutory demand by the respondent (the second demand). The second demand specified an address for service in Victoria and stated the respondent's full and correct name as creditor. Its ACN, however, was omitted again.

By this proceeding the applicant seeks an order that the second demand be set aside. Counsel for the parties agreed that in order to avoid costs which may prove unnecessary, a contention of the applicant should be argued as a preliminary point. It was that the second demand should be set aside because of the failure of the respondent to specify its ACN.

The circumstances in which the second demand was prepared were set out in an affidavit of Paul Stuart Morris, an employee of the Queensland principal of the solicitors acting for the respondent.

It appears that Mr Morris was instructed "to issue" a further statutory demand for service on the applicant "immediately upon the handing down" of the reasons for judgment in *Scandon Pty Ltd v Dome Supplies Pty Ltd* and "prior to having the opportunity to peruse" the reasons for judgment. Mr Morris deposed:

> . . . I took particular care in following the Form 509H for the purposes of the current statutory demand and I note that Item 1 of the form did not stipulate the inclusion of the ACN in contrast to the guidelines set out in the form relating to the addressee of the form.

I infer that, while Mr Morris was aware of the principal point argued with respect to the first demand, that is, that it should be set aside for failure to specify an address for service in Victoria, his not having the opportunity to peruse the reasons for judgment meant that he was unaware of the full impact of that case so far as it concerned the name and ACN of his client. (I also infer, however, that he was sufficiently aware of the points argued that, in drawing the second demand, he was astute to ensure that the current name of his client appeared as that of the creditor.)

In the light of Mr Morris' affidavit, the failure of the respondent to specify its ACN in the second demand could not be regarded as the consequence of a contumelious refusal on its part to observe the requirements of CL s 219(3).

Mr Rodbard-Bean of counsel for the applicant submitted that *Scandon Pty Ltd v Dome Supplies Pty Ltd* illustrated that the omission of a creditor's ACN in a statutory demand is, of itself, a serious breach of the Corporations Law and that, consistently with what I had said about it in that case, the same result should follow in this.

It will he appreciated from *Scandon Pty Ltd v Dome Supplies Pty Ltd* that the applicant did not seek the result in that case on the basis that "substantial injustice" would be caused in consequence of the omission, that is, under CL s 459J(l)(a). The applicant knew both the current name and the ACN of the respondent. The order in that case was made, for the reasons given, under s 459J(l)(b). Accordingly, it was under s 459J(l)(b) that the applicant sought the same order in this proceeding. In other words, the applicant's case was that the failure of the respondent to specify its ACN in the second demand constituted "some other reason" than that provided by s 459J(l)(a) for the setting aside of the second demand.

In support of his submission, Mr Rodbard-Bean referred me to the following passage from the judgment in *Scandon Pty Ltd v Dome Supplies Pty Ltd* (17 ACSR 662 at 674; 13 ACLC 1256 at 1266):

> A company seeking to obtain the benefit of provisions of Corporations Law by serving a statutory demand must observe basic requirements for disclosure of its identity which are imposed by the Corporations Law, particularly when those requirements are so serious that not to observe them attracts the operation of penal provisions.

He submitted that the proposition in that passage applied with equal force to the failure to observe one such requirement, the specification of a creditor company's ACN.

Ms Horovitz of counsel who appeared for the respondent – Ms Grigoriou of counsel who appeared for it in the first proceeding being unavailable – conceded that the failure to specify the ACN of the respondent was a defect in the second demand, but submitted that it was not of such significance in all the circumstances as to warrant the setting aside of the demand.

She referred me to Practice Note 47 of the Australian Securities Commission which set forth the views of the Commission on 5 April 1994 concerning "ACN, ARBN and Company Names" and to a number of cases. I shall refer specifically to some of the cases in due course, but, quite apart from them, I accept Ms Horovitz' submission.

The effect of the combination of (the presently relevant) defects in the first demand was significantly more grave than that of the defect in the second demand.

In the first demand the respondent used an alias. It did not use its name or its ACN. To uphold such a demand would have been to countenance a wholly unjustifiable flouting of the "basic requirements for disclosure of its identity which (were) imposed by the Corporations Law".

In the second demand, the respondent used its full and correct name. There could be no doubt as to its identity. In all the years until 1991 in which demands were used in order (if not complied with) to have a company deemed unable to pay its debts, no more would have been required in that behalf.

Since the inception of the Corporations Law in 1991, ACNs have been required in certain documents, including statutory demands, for further identification. To omit an ACN, however, is manifestly less grave than to give a false name. Recipients of statutory demands are much more likely to be confused by the latter than the former.

The stating of a creditor company's full and correct name is – as it always was – ordinarily sufficient to identify it. I leave aside as irrelevant for present purposes cases where a name change has occurred since the last communication with the company served; and cases where two companies with the same name have had transactions with the company served.

Section 459J(2) provides that a statutory demand is not to be set aside merely because of a defect except as provided in subs (1). In *Scandon Pty Ltd v Dome Supplies Pty Ltd* (17 ACSR 662 at 671-72; 13 ACLC 1256 at 1264), I said concerning subs (1)(b):

> The specification in subs 1(a) of 'substantial injustice' as the criterion for setting aside a defective demand must have the effect – quite apart from the operation of subs (2) – that for a defect which is not productive of 'substantial injustice' to constitute 'some other reason' for setting the demand aside under subs (1)(b), it must have a significance as compelling as would 'substantial injustice'.

By that standard, the omission from the second demand of the respondent's ACN cannot be regarded as being of sufficient gravity as to constitute "some other reason" warranting the setting aside of the second demand. It may well have been otherwise if the omission had been contumelious. The gravity of the defect in the second demand, however, simply cannot be compared with that of the omission of both name and ACN from the first.

A case to which Ms Horovitz referred me and to which, had I found it, I certainly would have referred in *Scandon Pty Ltd v Dome Supplies Pty Ltd*, was *Re Macro Constructions Pty Ltd* (1992) 8 ACSR 719; 10 ACLC 1722, a decision of Derrington J of the Supreme Court of Queensland.

In that case, a creditor company was identified in a statutory demand only by its registered business name. The case preceded the amendments of the Corporations Law which inserted s 459G to provide for an application to set aside a demand; and the company served with the demand made its objections to the demand on the hearing of the application that it be wound up. Two of those objections were that the demand was not effective because the identity of the creditor was not properly stated, there being no legal person whose name was the business name; and that the creditor's ACN had been omitted.

As to the first of these objections, Derrington J observed (at ACSR 722; ACLC 1723):

> There was a legal person behind the name and it was lawful for it generally to use that name in its dealings with the company because of the provisions of the Business Names Act 1962-1979 (Qld).

That would be sufficient to distinguish the case from *Scandon Pty Ltd v Dome Supplies Pty Ltd* where, as I have mentioned, the respondent used an alias for which it had no lawful justification.

Subsequently, Derrington J said (at ACSR 722; ACLC 1724):

> Where the [business] name is used in such a notice, it has the purpose, and no more, of precisely identifying the creditor which claims that debt referred to in the notice is due to it, and if the name used correctly identifies that party, . . ., then it is impossible to say that there is any difficulty in identification of it for the purposes of the notice.

Ms Horovitz' submission in this case, which I have already stated I accept, was, in effect, supported by the proposition that this passage from the judgment of Derrington J, could be applied a fortiori in this case where the creditor's full and correct name was used.

The objection in *Macro Constructions* of particular relevance to this proceeding, however, was that made with respect to the omission of the creditor's ACN. As to that, Derrington J questioned whether, there having been "accurate identification of the creditor company", the failure to state the full name of the creditor and its ACN "amounted to a defect in any relevant sense at all" (at ACSR 724; ACLC 1725). Even if it did, he was of the opinion that it was "of such a nature that it should not be regarded as invalidating the notice" (ibid).

Of course, this is a different proceeding from *Macro Constructions*, being an application under s 459G to which s 459J applies; and the validity of the applicant's contention must be determined in accordance with the terms of that section. Ms Horovitz did not argue otherwise, accepting, as I have mentioned, that the failure to specify the respondent's ACN was a defect in the demand for the purposes of s 459J.

The issue in this case is not one of illegality or invalidity of the second demand. It is whether the defect from which it suffers is such that under s 459J(1) the second demand ought be set aside.

Ms Horovitz argued that, in broad terms, the decision of Derrington J supported her submission that the second demand should not be set aside. I agree.

Ms Horovitz also referred me to *Moreland Metal Co Ltd v Cowlishaw* [1919] 19 SR (NSW) 231 and *Westpac Banking Corporation v Dawson* (1990) 2 ACSR 316; 8 ACLC 681, both cases also tending to support her submission. In the circumstances, it is unnecessary to examine them in any detail.

At the conclusion of the oral submissions on 6 October 1995, I expressed orally my reasons for accepting Ms Horovitz' submission; and ordered an adjournment to enable the completion of affidavit evidence in this proceeding. No recording of the reasons had been made and both Mr Rodbard-Bean and Ms Horovitz expressed the view that, having regard to the distinction drawn between this case and *Scandon Pty Ltd v Dome Supplies Pty Ltd*, it would be desirable for my reasons to be committed to writing. I agreed; and these are the reasons so committed. I shall publish them on 17 November 1995 when the further hearing of the motion is called on.

JUSTIN SMITH
SOLICITOR