JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	NEW ENERGY MINERALS LTD -v- ARENA STRUCTURED PRIVATE INVESTMENTS (CAYMAN) LLC [2019] WASC 259
CORAM	**:**	MASTER SANDERSON
HEARD	**:**	27 MARCH 2019
DELIVERED	**:**	16 JULY 2019
PUBLISHED	**:**	18 JULY 2019
FILE NO/S	**:**	COR 209 of 2018
BETWEEN	**:**	NEW ENERGY MINERALS LTD Plaintiff AND ARENA STRUCTURED PRIVATE INVESTMENTS (CAYMAN) LLC Defendant

Catchwords:

Corporation law - Application to set aside statutory demand - Turns on own facts

Legislation:

Corporations Act 2001 (Cth)

Result:

Demand set aside

Category: B

Representation:

Counsel:

Plaintiff : Mr M D Cuerden SC & Mr C R Bailey
Defendant : Mr A P Young QC & Mr P H Murray

Solicitors:

Plaintiff : Williams & Hughes
Defendant : K & L Gates

Case(s) referred to in decision(s):

Accordent Investment Pty Ltd v RMBL Investments Ltd (2009) 229 FLR 87
Complete Hire and Sales Pty Ltd v Terrafirma Constructions Pty Ltd [No 2] [2018] WASCA 111
Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2013] WASCA 36

MASTER SANDERSON:

1 This is the plaintiff's application to set aside a statutory demand. A copy of the demand appears as attachment 'CLJ-7' to the affidavit Christiaan Luyt Jordaan sworn 19 November 2018 and filed in support of the application. The amount of the demand is $5,187,421. Under the heading 'Description of the debt' in the schedule to the demand there appears the following:

> Debt owing by the company to the creditor pursuant to the unsecured Convertible Note Deed dated 5 January 2018 and amended on 20 May 2018 and on 13 August 2018.

2 Before dealing with the plaintiff's case there are two preliminary matters which require consideration. Both were matters of evidence which I dealt with at the commencement of the hearing. I indicated I would provide reasons for my rulings in these reasons.

3 At the commencement of the hearing counsel for the defendant objected to certain paragraphs in Mr Jordaan's affidavit. This issue had not been raised by the defendant's solicitors with the plaintiff's solicitors prior to the hearing. There was nothing in the defendant's written submissions which indicated the defendant took exception to any of the plaintiff's evidence. In fact the first time that counsel for the plaintiff heard of these objections was when they were raised by counsel for the defendant immediately after the hearing was called on.

4 When a party takes objection to parts of an opponent's evidence there are two courses which can be adopted. The first is to have the matter listed so that questions of evidence can be dealt with as a preliminary matter. This is not a course I favour. It effectively means the case has to be heard twice - once dealing with the evidence and once dealing with the substantive issues. There are rare occasions when this is an appropriate course. The objections may be so substantial that the only way the substantive hearing can sensibly proceed is if further supplementary affidavit material is lodged. But given the nature of interlocutory proceedings, it is rare that this happens.

5 The better course is for a party objecting to attach to their written submissions a schedule of the paragraphs to which objection is taken with the grounds of each objection set out. That allows for the issue of the evidence to be considered at the commencement of the hearing. It is often the case that the objections raised are that the material is

hearsay (and in the case of interlocutory matters no detail of the deponents' information and belief are provided) or the material is irrelevant or submissions. If objection is taken on these grounds, I generally tell the parties that rather than deal with the objections I will note objection has been taken and deal with particular paragraphs as and when necessary in the reasons.

6 Occasionally an objection will be more fundamental. For instance objection may be taken to an affidavit on the basis it is not properly sworn. If that objection is raised in the written submissions the opposing party, rather than argue the point, may simply have the affidavit re-sworn. If the objection taken really goes to the essence of a party's case then it can always be argued in full at the commencement of the hearing. The important point is to ensure that not only is notice given of the objection but the grounds upon which the objection is made are set out. Then the playing field is level and all matters at issue between the parties can be canvassed at the hearing.

7 In this case, senior counsel for the plaintiff indicated he could deal with the defendant's objections at the hearing. After hearing argument I determined a number of paragraphs of Mr Jordaan's affidavit should be struck out. There were pars 45.2, 47.1 to 47.5, 59, 60 and the first two sentences of par 61. These paragraphs or parts of paragraphs were either submission, argument or conclusion of law. None of the paragraphs concerned are of particular importance to the evidentiary narrative. Had I declined to deal with the objections because of the lack of notice, it is unlikely the defendant would have been adversely affected. Nonetheless, in the circumstances I did deal with the objections and ruled in the defendant's favour.

8 The second matter of evidence concerns a report which the defendant sought to tender. Again this was done at the commencement of the hearing. The document in question was not referred to in the defendant's written submissions. The defendant filed no evidence in opposition to this application and the first the plaintiff heard of this evidence was at the commencement of the hearing. I refused to admit the report into evidence. I was told by counsel for the defendant the document was part of the public record. Be that as it may, the plaintiff was not put on notice the defendant intended to tender the report. There was no indication of what use might have been made of the report. It is simply unfair and unreasonable to expect in those circumstances a document can be tendered and relied upon. For these reasons I refused the defendant leave to rely upon the report.

9 Turning then to the relevant facts in pars 30 - 47 of his affidavit, Mr Jordaan gives his version of the facts, coloured somewhat by his opinion as to the proper interpretation of those facts. As I have said the defendant filed no evidence. However, attached to a schedule to the defendant's submissions is a chronology which confirms actions which took place on the relevant dates. In fact the submissions acknowledge the chronology is largely taken from Mr Jordaan's affidavit. Rather than summarise Mr Jordaan's evidence, I will include it in full:

> 30. On 10 January 2018, in consideration of Arena paying the sum of $1.9m to New Energy (**Tranche 1**), New Energy issued a convertible note to Arena with a face value of $2m.
>
> 31. On 14 May 2018, New Energy received a conversion notice from Arena seeking to convert $100,000 of its Tranche 1 note. A true copy of the conversion notice dated 14 May 2018 is annexed and marked as '**CLJ-10**'. By reason of this notice, New Energy was due to make a post-conversion payment to Arena, in accordance with cl 11.2(b) of the Deed.
>
> 32. New Energy intended to make this payment from Tranche 2. To the best of my knowledge, there is no clause in the Deed which prevents New Energy from using subsequent tranches to pay accrued interest.
>
> 33. New Energy was, at the time, in a position to demand payment of Tranche 2 (face value $4m, cash value $3.8m) as of 20 May 2018. This is based on clause 4.2 of the Deed. New Energy was entitled to deliver an Issue Notice 4 months after 10 January 2018 (being the First Issue Date), that is on or after 10 May 2018. By clause 4.2(a), Arena then had 10 days to pay the cash value of Tranche 2 (ie 20 May 2018).
>
> 34. On 8 May 2018, I received a call from Shahid Ramzan (managing director of Arena). Mr Ramzan said words to the effect of:
>
> > We do not want to fund Tranche 2 until we have reduced our risk by converting more of our Tranche 1 notes and selling down our shareholding in New Energy.
>
> 35. I said words to the effect of:
>
> > This will put New Energy under immense financial pressure given our budgets have been prepared on the timings set out in the Deed.
>
> 36. My statement was in fact true.

37. Mr Ramzan said words to the effect of:

> I don't care, I don't want to fund Tranche 2.

38. I said words to the effect of:

> We need to find a solution. You can't leave us without any part of Tranche 2. You at least need to give us some funds end of May as we urgently need funds to continue operations.

39. Mr Ramzan agreed. We then discussed splitting Tranche 2 into two roughly equal payments. I proposed, in effect, half at or around the existing due date, and the rest a month later. I said words to the effect that we needed funds 5 days before month end in May and June as we had unavoidable financial obligations at the end of each calendar month such as salaries.

40. Mr Ramzan said words to the effect of:

> That's too early for the second payment.

41. I said words to the effect of:

> It has to be then, or we will go under. We will use up the first payment on salaries and existing creditors, and if we don't get the rest by June, we will go under.

42. This conversation is referred to in an email dated 8 May 2018 I sent to Mr Ramzan following the telephone call. Annexed and marked as '**CLJ-11**' is a true copy of an email chain between myself and Mr Ramzan ending 11 May 2018, which includes the 8 May email. Although I say in the 8 May email 'we propose', the original request to delay Tranche 2 came from Mr Ramzan, as set out above.

43. I reported the content of this discussion to the other directors of New Energy and I told them words to the effect that we didn't have any choice but to agree to the proposed variation because we needed to keep Arena happy. I said words to the effect that we could tell Arena to get stuffed but they would likely withhold funds and we would be worse off.

44. These communications led to the drafting of the Amendment Deed and its execution on 20 May 2018, which was agreed to by New Energy's board.

45. The main effect of the Amendment Deed was to:

    45.1 split Tranche 2 into two separate tranches, Tranche 2A and Tranche 2B;

46. This is based on clauses 6 and 7 of Schedule 1 of the Amendment Deed, which specified new 'not before' dates for New Energy to deliver Issue Notices, and reduced the period of notice required by an Issue Notice from 10 days to 5 days.

47. I consider New Energy has an offsetting claim against Arena on the basis that the Amendment Deed was unconscionable because, amongst other potential reasons:

    47.6 New Energy had no realistic option other than to accept the Amendment Deed because, without receiving Tranche 2, New Energy did not have the means to pursue legal proceedings against Arena and would become insolvent.

Arena's breaches of the Deed (as amended)

48. New Energy delivered an Issue Notice for Tranche 2A on 21 May 2018. Annexed and marked as '**CLJ-12**' is a true copy of the Issue Notice dated 21 May 2018.

49. New Energy did not receive the Tranche 2A sum of $1.995m in cleared funds until 29 May 2018 (that is, 3 days late). This added to the financial strain on New Energy as critical payments in South Africa and Mozambique had to be completed prior to month end which simply could not be processed in time, with funds only being received into New Energy's account on 29 May.

50. New Energy used Tranche 2A almost immediately for salaries and existing creditors relating to the Montepuez and Caula projects. By around 13 June 2018, only $55,000 remained in New Energy's bank account. New Energy was not able to use Tranche 2A to pay any outstanding interest to Arena. New Energy had not received any demand for payment from Arena by this time. I assumed, from the discussion referred to in paragraphs 34 - 41 above, Arena understood New Energy would not be paying it interest until we received Tranche 2B. Had New Energy known that Arena would treat our late payment of interest as an event of default, and use that as a reason to withhold Tranche 2B (if that is in fact the reason), then New Energy would not have executed the Amendment Deed.

51. Arena converted further portions of its Tranche 1 note and as a result further post-conversion Interest became payable on the following dates:

    51.1 25 May 2018;

    51.2 1 June 2018; and

51.3 8 June 2018.

52. On 15 June 2018, New Energy received an invoice from Arena in the amount of $29,052.05 for the interest accrued up to that date. Annexed and marked as '**CLJ-13**' is a true copy of the invoice dated 15 June 2018. It remained New Energy's intention to make the post-conversion payments to Arena out of Tranche 2B.

53. On 20 June 2018 (ie the earliest possible date pursuant to the Amendment Deed), New Energy delivered an Issue Notice to Arena for Tranche 2B. Annexed and marked as '**CLJ-14'** is a true copy of the Issue Notice dated 20 June 2018.

54. On 20 June 2018, New Energy provided Arena with a confirmation letter as required by items 7 and 8 of Part 2 of Schedule 1 of the Deed. I reissued the confirmation letter (with minor amendments) on 25 June 2018. Annexed and marked as '**CLJ-15**' are true copies of the confirmation letters dated 20 and 25 June 2018.

55. Arena has never paid Tranche 2B to New Energy. I consider this to be in breach of the Deed, as amended by the Amendment Deed. I am not aware of any legal justification relied on by Arena for this failure. On 28 June 2018, Bernard Olivier and I had a telephone call with Mr Ramzan. I asked why Arena had not paid Tranche 2B. Mr Ramzan said words to the effect of:

> It is due to our internal risk limits. Giving you more money will cause us to have too much exposure to Mustang.

56. I said words to the effect of: Your internal risk limits have nothing to do with our legally binding agreement and you cannot disregard that agreement.

57. I note that New Energy did not receive any demand for payment or notice of default from Arena until the·'Notice of Event of Default' dated 3 October 2018.

10 Against that factual background the plaintiff makes a number of submissions. First, it is said that the demand relates to two or more debts. On 19 October 2018 (seven days prior to the statutory demand) the defendant served on the plaintiff a notice of demand.[1] The notice referred to three amounts which were said to be 'now due and payable'. They were a principal amount of $2.5 million, accrued interest as set out in the schedule of $108,241, and a termination payment of

[1] Annexure 'CLJ-9' to the affidavit of Christiaan Luyt Jordaan filed 19 November 2018.

$2,535,000. The plaintiff says that there were, based upon this notice, three separate and distinct 'amounts' allegedly due under the deed. It was said the principal and interest are separate debts, notwithstanding they arise from the same instrument: see ***Accordent Investment Pty Ltd v RMBL Investments Ltd*** (2009) 229 FLR 87. The plaintiff says that a party on whom a demand is served must be able 'to identify with precision the debt - or each and every one of several debts upon which the statutory demand is based'.[2] Failure to provide the means of identification of such debts means that there will be 'substantial injustice' within s 459J(1)(a) of the *Corporations Act* (Cth) (the Act) and the demand should be set aside.

11 In answer to that submission, the defendant says the demand relates to a single debt which is due and payable under cl 16.2(a) of the Unsecured Convertible Note Deed (the Deed).[3] That submission cannot be accepted. The better view is that there are at least two separate debts - the principal sum on one hand and the interest on the other. It may be the termination payment, as a sum fixed and certain, can be said to form part of the principal. But the interest must be regarded as a separate debt. The question then is whether or not the failure to state the two separate debts as being distinct and separate will cause substantial injustice.

12 The defendant says not. It says, viewed in the light of what the plaintiff already knew, the plaintiff had sufficient information to assess its liability for the amounts demanded. This is particularly so when the previous course of dealing between the parties is taken into account. In support of this proposition, the defendant relied upon the Court of Appeal decision in ***Complete Hire and Sales Pty Ltd v Terrafirma Constructions Pty Ltd [No 2]*** [2018] WASCA 111 [91] - [96].

13 The plaintiff's answer to that submission is to say it is not possible for the plaintiff to calculate the basis upon which the defendant is claiming interest. The plaintiff accepts there is no difficulty with either the principal sum or the termination payment. But it says, and I accept, it is not possible to work out just how the interest component is calculated. The plaintiff's position is set out in pars 12 - 15 of their written submissions.[4] It is not necessary for me to repeat what is contained in those submissions. The defendant's submissions do not actually address this difficulty. They seem to proceed on the basis the

[2] Plaintiff's submissions filed 15 March 2019 at par 10.
[3] Annexure 'CLJ-4' to the affidavit of Christiaan Luyt Jordaan filed 19 November 2018.
[4] Plaintiff's written submissions filed 15 March 2019.

amounts concerned are relatively small and the calculation could, if the plaintiff wished, be easily made. The fact that the interest calculation found in the 19 October 2018 default notice does not square with the amount claimed in the statutory demand and is not in the defendant's submissions is not a defect which would occasion substantial injustice. The defendant submits, were it necessary to do so, the amount of the demand could be reduced to reflect any confusion in relation to the interest calculation.

14 There is no doubt that in referring just to a lump sum in the statutory demand, the defendant left the plaintiff with no clear idea of what amount of interest it was claiming. But in my view that was not productive of 'substantial' injustice. A reading of the Court of Appeal's decision in ***Complete Hire and Sales***, particularly those paragraphs to which I have referred above, make it clear their Honours adopted a common sense approach. That is to say they looked at the demand holistically and asked what could be expected of a plaintiff who receives such a demand. If, by applying reasonable accounting techniques, it was possible to work out what invoices had been paid and what invoices were outstanding, then no substantial injustice occurred. Here there was a real difficulty about the plaintiff working out what interest it was expected to pay. But the use of the word 'substantial' in the section suggests aspects that are both qualitative and quantitative. By far the bulk of this alleged debt was made up of the principal amount and the termination payment. It was open to the plaintiff to work out what interest it thought was owing on these amounts pursuant to the terms of the contract. It could then have made payment and argued about the difference. The difference would have been relatively small.

15 On that basis I am not satisfied it can be said the way the demand was structured, and the fact it did not breakdown the alleged debt into its component parts, caused the plaintiff a substantial injustice. The section is not engaged and the demand will not be set aside on that basis.

16 The plaintiff further claims there is a genuine dispute or an offsetting claim arising because of economic duress which taints aspects of the transaction or transactions said to give rise to the debt. In his affidavit, Mr Jordaan refers to undue influence. But the matter was put by counsel for the plaintiff on the basis of economic duress. The argument was framed in this way.

17 Under the original Deed the defendant agreed to subscribe for convertible notes in seven tranches. Tranche 1 was actually issued on 10 January 2018 and there were six 'follow on' tranches. Tranche 1 was for the issue of convertible notes with a 'principal amount' of $2 million. Tranche 2 was to be for the issue of convertible notes with a principal amount of $4 million. Once the defendant became obliged to subscribe for the issue of a tranche, it was required to pay the applicable portion of the 'purchase price' to the plaintiff in full and in immediately available funds without withholding or deduction on or before the issue of each tranche. The 'purchase price' was defined to mean a price equal to 95% of the principal amount. So Tranche 2 where the principal amount was $4 million required a payment of $3.8 million. The mechanism by which the plaintiff could trigger the defendant's obligation to subscribe for a tranche and to pay the relevant purchase price, was the delivery of an 'issue notice' to the defendant. An issue notice was required to provide no less than 10 days' notice in advance of the proposed 'issue date' of the relevant tranche.

18 The plaintiff was originally entitled to deliver an issue notice in respect of Tranche 2 on 10 May 2018. As the issue notice was required to give not less than 10 days' notice, the plaintiff was entitled to require the defendant to subscribe for the issue of Tranche 2 on 20 May 2018. That would have required the transfer of immediately available funds without withholding or deduction by 20 May 2018. It is the plaintiff's position that as at 10 May 2018, there was nothing in the agreement which stood in the way of the plaintiff requiring the defendant to take up Tranche 2. But the defendant, through its managing director, indicated it would not take that course. That emerges from the evidence of Mr Jordaan which I have quoted above. The plaintiff says those facts give rise to a claim for economic duress.

19 There was no dispute between the parties as to the basis upon which a claim for economic duress can be made. Both parties referred to the decision of McLure P in ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd*** [2013] WASCA 36. It was the defendant's position that there was no evidence of any illegitimate pressure applied by the defendant to induce the plaintiff to enter into the Amendment Deed. The defendant points to an email from the plaintiff to the defendant in which the plaintiff proposed amendments that resulted in the 20 May 2018 Amendment Deed.[5] Further the

[5] Annexure 'CLJ-11' to the affidavit of Christiaan Luyt Jordan filed 19 November 2018.

defendant points to the recitals to the Deed and notes that the parties 'wish' to amend the convertible note deed.

20 In their written submissions (par 36) the defendant says there is no evidence that at any time the defendant refused or threatened to refuse to comply with any of its contractual obligations. With respect, that is not borne out by the evidence of Mr Jordaan. He says quite plainly he was advised by the defendant it would not take up Tranche 2 despite it being contractually obliged to do so. The uncontradicted evidence is to the effect that not only was there a threat by the defendant to breach its contractual obligations, but that the plaintiff was in a position where it would be in financial difficulty if those conditions were breached. Arguably, that amounts to economic duress.

21 Once that point is reached, the matter cannot be taken any further in the context of the statutory demand regime. On the evidence as it stands, I could not conclude that the contentions are 'patently feeble legal arguments that assume the existence of matters of fact unsupported by evidence'.[6] The plaintiff has raised a plausible contention requiring further examination and on that basis it is entitled to have the statutory demand set aside.

22 Subject to hearing from the parties as to the precise form of orders I would order that the statutory demand be set aside and the defendant's pay the plaintiff's costs of the application including reserved costs.

[6] Defendant's submissions filed 21 March 2019 at par 38.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

DG
Associate to Master Sanderson

18 JULY 2019