

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : HANNANS REWARD LTD -v- AVALON
MINERALS LTD [2016] WASC 130

CORAM : MASTER SANDERSON

HEARD : 22 MARCH 2016

DELIVERED : 3 MAY 2016

FILE NO/S : COR 278 of 2015

BETWEEN : HANNANS REWARD LTD
Plaintiff

AND

AVALON MINERALS LTD
Defendant

Catchwords:

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

Legislation:

Nil

Result:

Statutory demand set aside

Category: B

Representation:

Counsel:

Plaintiff : Mr T J Kavenagh
Defendant : Mr J M Healy

Solicitors:

Plaintiff : Hunt & Humphry
Defendant : O'Loughlins Lawyers

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

Nil

1 **MASTER SANDERSON:** This is the plaintiff's application to set aside a statutory demand. The application is supported by an affidavit of Damian Peter Hicks sworn 1 December 2015. The amount of the demand is \$81,509.77. Under the heading 'Description of the debt' found in the schedule to the statutory demand there appears the following:

1. The balance of Invoice 28 issued by the Creditor to the Company on 16 April 2015 (**the Invoice**), issued pursuant to the terms and conditions of the Binding Heads of Agreements [sic] (as varied) entered into by the Creditor and Company on 2 May 2013, of which the sum of \$81,509.77 remains due and owing by the Company.
2. The Invoice, and its corresponding documents, issued by the Creditor to the Company on 16 April 2015 is attached hereto and marked 'A'.

2 Prior to the hearing the defendant conceded the invoice should not have included a claim for GST and the amount of the statutory demand should be reduced to \$74,099.79. Beyond that concession the parties joined issue as to whether the statutory demand ought be set aside.

3 The plaintiff raised a number of different grounds upon which it said the statutory demand ought be set aside. One of these was a claim that the plaintiff had an offsetting claim against the defendant which exceeded the amount of the debt. For reasons which follow I am satisfied the plaintiff made good that argument. On that basis I do not propose to deal with other matters raised by the plaintiff in both its written and oral submissions.

4 The relevant facts can be shortly stated. On 2 May 2013 four parties, the plaintiff, Kiruna Iron AB, the defendant, and Avalon Minerals Adak AB entered into what was called a 'Binding Heads of Agreement'. The Binding Heads of Agreement was varied by a document styled the 'Variation Agreement'. It is common ground between the parties these two documents read together governed their contractual arrangement. The agreement between the parties had to do with a mining venture in Sweden known as the 'Discovery Zone Copper - Gold Project'. The title to this project comprised of a permit known as the 'Rakkurijärvi Permit' and the 'Discovery Exploitation Concession'. Throughout the documents these mining tenements are referred to as the 'Permit' and the 'Concession'. I will adopt that nomenclature.

5 The essential terms of the agreement between the plaintiff and the defendant were as follows:

1. the plaintiff was required to transfer the Permit and the application for the Concession to the defendant;
2. the defendant was required to pay the plaintiff the sum of \$2 million within five business days of the defendant becoming the registered holder of the Permit and the Concession application;
3. the defendant was entitled to explore and mine the area of land hatched in red on the plan in sch 1 of the agreement and the plaintiff was entitled to explore and mine the balance of the Permit which contained a significant iron ore project;
4. the defendant was required to do all things reasonably required to have the Concession application granted in an expeditious manner;
5. the parties to the agreement would contribute equally to all costs deemed by the defendant reasonably necessary to incur to satisfy any request from a government agency for further information or the like to support the grant of the Concession application;
6. if the Concession application was not granted within two years of the first payment the defendant could give the plaintiff notice requiring the plaintiff to refund the first payment to the defendant;
7. immediately upon the refund of the first payment either by cash or transfer of assets of similar value the defendant would transfer inter alia the Concession application and the Permit back to the plaintiff; and
8. the defendant gave its 'absolute undertaking' that it would not commence any recovery proceedings within 90 days of the plaintiff receiving the refund notice.

6 There is one further term of the Binding Heads of Agreement which is of some importance. It is found in cl 2 which reads, in part, as follows:

For the avoidance of doubt it is acknowledged that:

- (a) The Hannans Area is of critical importance to Hannans and that Avalon will do all things reasonably requested by Hannans to protect Hannans' interests.

7 In accordance with the Binding Heads of Agreement the plaintiff transferred the Permit and the Concession application to the defendant. The defendant did not pay the sum of \$2 million to the plaintiff and a dispute arose. That was resolved by execution of the Variation Agreement. By the Variation Agreement the first payment was reduced to \$1 million and the balance of \$3 million was to be paid on the grant of the Concession application. On 9 October 2013 the plaintiff received the first payment.

8 On 2 October 2015 the defendant was advised by the Mining Inspectorate of Sweden that if it did not lodge the 'Social Impact Statement (reindeer herding analysis that was carried out with the cooperation of Laevas Saamivillage)' by 28 October 2015 they would refuse the application. On 9 October 2015 the defendant advised the Mining Inspectorate of Sweden that it was no longer proceeding with the Concession application and it did not wish to be referred to as the applicant in the public domain. On the same day the defendant delivered to the plaintiff a letter purporting to be a refund notice under cl 4 of the Binding Heads of Agreement.

9 On 20 October 2015 the plaintiff sent a letter to the defendant advising the defendant that its failure to lodge a valid completed exploration concession application prior to terminating the agreement denied the plaintiff the opportunity of being paid \$3 million pursuant to the agreement.

10 On the same day the defendant sent to the Mining Inspectorate the Social Impact Statement. On 21 October 2015 the Mining Inspectorate removed the Concession application from further processing. On 12 November 2015 the defendant lodged an appeal in the Swedish Administrative Court against the decision of the Mining Inspectorate to remove the Concession application from further processing. The defendant and the Mining Inspectorate have both lodged their submissions in relation to the defendant's application but as yet no decision has been made.

11 In the circumstances it is the plaintiff's contention that because it will not be possible for the defendant to transfer back to it the Concession application it has potentially suffered a loss of \$3 million. As this is greater than the amount of the statutory demand the plaintiff says it is entitled to have the statutory demand set aside.

12 The defendant's response to this claim is to say that the plaintiff's claim is speculative - until the Administrative Court in Sweden has made a determination it cannot be said the plaintiff has suffered a loss of \$3 million. In answer to that the plaintiff says that this court must look at the position as at the date the application is heard. At present the plaintiff claims it is clearly entitled to damages in an amount of \$3 million and that will remain the position unless the Mining Inspectorate's decision is overturned.

13 In my view the plaintiff's argument should be accepted. In applications to set aside a statutory demand the argument is frequently put that if a plaintiff raises for the first time an argument as to the existence of the debt or as to an offsetting claim in the affidavit material filed in support of the application, the defendant will often argue that the plaintiff's claim should be rejected because it amounts to 'recent invention'. But so long as the plaintiff's arguments are actually raised in the affidavit material it does not matter that it is in the affidavit material that they are raised - even if there has been ample opportunity for a plaintiff to raise these matters prior to the issue of the statutory demand. This case is rather the converse of that position. It is of no consequence that at some stage in the future the offsetting claim may fall away. As at the date of the hearing the plaintiff has the offsetting claim and it is therefore entitled to have the statutory demand set aside.

14 For these reasons I would set aside the statutory demand. The defendant ought pay the plaintiff's costs of the application including reserved costs.