Toorallie Pty Ltd v Stuart Alexander Black, Vaughn Lee Chapman & Andrew Phillip Carter t/as Chapman & Eastway

JUDGMENT : HIS HONOUR: BARRETT J : Supreme Court of New South Wales. 28th November 2001.

Background

1 Toorallie Pty Limited (which I shall call "Toorallie") seeks to invoke the jurisdiction created by s.459H of the **Corporations Act** 2001. That section applies where statutory demands are challenged on the basis of either genuine dispute about the debt the subject of the demand or the existence of an offsetting claim. These proceedings concern the offsetting claim aspect only. They therefore turn upon s.459H(1)(b) and the ancillary provisions later in s.459H.

2 The statutory demand is a demand by three persons, Mr Black, Mr Chapman and Mr Carter, carrying on business as "Chapman & Eastway". It alleges a debt of $62,179.95 for professional fees rendered to Toorallie between January 1999 and February 2001. Chapman & Eastway are a firm of chartered accountants.

3 Toorallie, for its part, alleges that it has an offsetting claim, being a claim evidenced by proceedings it has commenced in the District Court.

The offsetting claim

4 By an amended statement of claim filed in the District Court in March 2001, Toorallie added four persons as defendants in an action already commenced against members of a firm of solicitors. Those four were Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon trading as "Chapman and Eastway". It was alleged against these second defendants that they were guilty of breach of contract, negligence and conduct proscribed by s.42 of the **Fair Trading Act** by reason of allegedly deficient advice on certain matters concerning payroll tax.

5 The events relevant to the claim against the second defendants in the District Court action took place in late 1994. The amended statement of claim is in evidence. It shows that the person who performed the acts or committed the defaults said to warrant a finding of liability against the second defendants was Mr Carter, then an employee of those second defendants. It is common ground, I believe, that it is this Mr Carter who is one of the parties to the statutory demand, he having become a partner of Mr Black and Mr Chapman, carrying on business under the name "Chapman & Eastway". This happened after the partnership which existed in 1994 (being a partnership among Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon) had been dissolved. An agreement by which the dissolution of 1995 was effected is in evidence. It shows that, after the dissolution, Mr Black and Mr Chapman carried on practice in partnership under the name "Chapman & Eastway" to the exclusion of Mr Armstrong and Mr McKeon. It is not disputed that, at some subsequent point, there emerged a partnership trading as "Chapman & Eastway", the members of which were Mr Black, Mr Chapman and Mr Carter.

6 The action in the District Court is an action for unliquidated damages. The amended statement of claim does not seek to quantify damages but does refer to heads of damage, being, respectively, interest on unpaid payroll tax, inability to obtain a rebate under certain payroll tax rebates legislation (or, alternatively, loss of the chance of obtaining such a rebate), accountancy and other fees incurred and cost of employees and agents in dealing with relevant matters. A letter from the solicitors for Toorallie, apparently sent in response to a request for further and better particulars of the District Court claim, details some, but not all, of the amounts said to represent damages under the several headings. There are ten items under this heading, of which four have sums of money ascribed to them and the remaining six are designated "$TBA", obviously indicating that particulars in respect of those items will be provided at a later date. The four amounts which are given total $70,152.35.

The defendants' contentions

7 The defendants resist the setting aside of the statutory demand on two bases.

8 First, they say that the claim evidenced by the originating process in the District Court is not, in terms of s.459H, an "offsetting claim" because the second defendants in the District Court action (Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon) do not correspond with the parties by whom the statutory demand was issued (Mr Black, Mr Chapman and Mr Carter).

9 Secondly, the defendants say that there is clear evidence that the items totalling $70,152.35 in the particulars given by Toorallie's solicitors in the District Court proceedings include items attributable to two trusts of which Toorallie is alleged in the amended statement of claim to be the trustee, whereas the trustee is in reality a different company, Toorallie Pastoral Co Pty Limited. Exclusion of those items would reduce the particularised total of $70,152.35 to something of the order of $42,000, that is, some $20,000 less than the amount the subject of the statutory demand. Mr Lynch, who appeared for Toorallie, conceded that the sum would be of the order of $42,000 if it was Toorallie Pastoral Co Pty Ltd, rather than Toorallie, which was the trustee of the two trusts.

The relevant amount

10 I shall deal first with the second of the contentions. Mr Stoljar, who appeared for the defendants, submitted that, in light of the matters I have just mentioned, the **"offsetting total"**, for the purposes of s.459H, should be the sum of $42,000 or thereabouts to which I have referred. He accepted, for the purposes of this submission (but not, of course, for the purposes of the submissions to which I shall come presently about identities of parties), that the claim the subject of the District Court proceedings is properly to be regarded as an **"offsetting claim"** as defined by the section. That being so, it is necessary, in order to discover the **"offsetting total"**, to establish the **"amount"** of that **"offsetting claim"**. These are essential steps in giving effect to sub-s.(2) of s.459H.

11 The section contains no explicit guidance as to how one is to discover the "amount" of an "offsetting claim". Where that claim is itself for debt or some other form of liquidated claim, the process will generally not be difficult. In the present case, however, the claim is unliquidated in nature. The only amount which anyone has attempted to ascribe to it is the incomplete and provisional amount of $70,152.35 appearing from the reply to the request for particulars. The several items "$TBA" show that there is no admission on the part of Toorallie that the $70,152.35 figure is final and complete or represents any upper limit of its claim.

12 The correct approach to the application of s.459H where the offsetting claim is a claim for unliquidated damages has been discussed in two decisions of the present Chief Judge in Equity, being **Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA** (1994) 13 ACSR 263 and **Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd** (1994) 13 ACSR 787. In the latter case, Young J said: "*Section 459H(1) speaks in terms of there being an offsetting claim, not of there being an offsetting claim of a certain amount. It falsely makes the assumption that the offsetting claims are easy to calculate, but it does not seem to suggest that when one is thinking of a claim one must also think of it in terms of an amount.*"

13 His Honour also proceeded on the basis that, in the case of a claim for unliquidated damages, the "amount of the claim" for the purposes of s.459H means the amount claimed in good faith, so long as that claim is not fictitious or merely colourable.

14 A differently expressed, but essentially similar, approach to the issue of the "amount" of a claim for unliquidated damages emerges from a passage in the judgment of Palmer J in **Macleay Nominees Pty Ltd v Belle Property East Pty Ltd** [2001] NSWSC 743 which also encapsulates the essential nature of a "genuine" claim: "*In my opinion, a genuine offsetting claim for the purposes of CA s.459H(1) and (2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. 'Good faith' means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of s.459H.*"

15 This passage makes it clear that, in proceedings such as the present, the court must look sufficiently closely at the asserted claim to assess its general viability in the light of the evidence.

16 The one factor Mr Stoljar put forward as relevant to the assessment of the reliability of the incomplete quantification of the alleged damages was the point about the identity of the trustee of the two trusts to which I have already referred. On this, he tendered originals of the trust deeds and a copy of the certificate of registration of the company now called Toorallie Pastoral Co Pty Ltd. The certificate shows that the company was registered in April 1979 under the name Menine Pty Ltd, that the name was changed to Toorallie Pty Ltd in January 1980 and that the present name, Toorallie Pastoral Co Pty Ltd, was adopted in July 1992. One trust deed was made in August 1979 and names Menine Pty Ltd as trustee. The other was made in June 1984 and names Toorallie Pty Ltd. This means that, unless there was, in each case, some intervening change of trustee, the trustee at the time relevant to the advice the subject of the District Court proceedings was the present Toorallie Pastoral Co Pty Ltd. Mr Black gave evidence that this reflects the present position. It is also reflected in a letter from the Office of State Revenue, although that letter is presumably only as reliable as information furnished to that Office.

17 Toorallie also adduced evidence on this issue. It put in evidence the notice of grounds of defence and notice of cross-claim filed by Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon in the District Court proceedings. In the former, there is an admission of the allegation in the amended statement of claim that Toorallie is the trustee of the trusts and in the latter that allegation in the amended statement of claim is repeated. It was suggested from the bar table, however, that the admission had been made without adequate instructions.

18 This leaves me in a difficult position so far as concerns the application of the ***"not fictitious or merely colourable"*** or "***bona fide"*** test to the particularised total of $70,152.35. It is common ground that, if it is Toorallie Pastoral Co Pty Ltd which is the trustee of the trusts, that total is reduced to about $42,000. The documentary evidence points clearly to a conclusion that Toorallie Pastoral Co Pty Ltd is the trustee (absent some change of trustee) and counsel for the defendants says that an admission to the contrary in the District Court proceedings may have been made without adequate instructions.

19 It is clear that the admission is at odds with the position asserted by the present defendants and that their contentions are supported by documentary evidence. Under the District Court's rules, as under our own, the provisions with respect to amendment exist to ensure that the true controversy between the parties is brought out in the pleadings. On that footing, one can be confident that the second defendants in the District Court proceedings could successfully withdraw the admission. I shall return to these matters later.

The "mutuality point"

20 I turn now to the second basis on which the plaintiff attacks the statutory demand. This was described in the course of the hearing as the "mutuality point", although the concepts of mutuality which are relevant to set-off at common law and in equity or under bankruptcy legislation play no part here. The present controversy turns entirely upon the construction of s.459H.

21 This part of the plaintiff's argument involves the question whether there is, in the words of the section's definition of ***"offsetting claim",*** a "*genuine claim that the company has against the respondent ...*". The ***"genuine"*** qualification has been described as one of not frivolous or vexatious: ***Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd*** (1994) 13 ACSR 37. Another formulation was adopted by Wallwork J in ***Royal Premier Pty Ltd v Taleski*** [2001] WASCA 48: *"In my opinion the criteria by which to judge whether the appellant has satisfied the court that it has an offsetting claim should be the same as would be used to determine whether there was a genuine dispute between the parties pursuant to s.459H(1)(a), namely, the court is required to undertake an investigation 'that raises much the same sort of considerations as the "serious question to be tried" criterion which arises in an application for an interlocutory injunction or for the extension or removal of a caveat' – per Owen J in* ***Turner Corp*** *[****Turner Corp WA Pty Ltd v Blackburne & Dixon Pty Ltd*** *[1999] WASCA 294]."*

22 I have already referred to the test preferred by Palmer J in ***Macleay Nominees*** based on the question whether the claim is arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful.

23 In advancing the "***mutuality point***", Mr Stoljar relies on the fact that the claimants under the statutory demand are Mr Black, Mr Chapman and Mr Carter, whereas the second defendants in the District Court proceedings are Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon. This lack of correspondence focuses attention upon the definition of "respondent" in s.459H, that is, "the person who served the demand on the company". The singular here obviously includes the plural and the "respondent" is, clearly enough, Mr Black, Mr Chapman and Mr Carter. It follows that there will be an "offsetting claim", as defined by the section, only if there is a "genuine claim" by Toorallie against Mr Black, Mr Chapman and Mr Carter. A claim against Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon does not satisfy that description.

24 Mr Lynch sought to overcome this apparent problem by pointing to the underlying constituents of the subject matter of the District Court litigation. He did so by reference to a number of connected propositions. The person who provided the advice in question was Mr Carter. According to the amended statement of claim, he was at that time an employee of Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon who conducted a practice together as partners. According to the submission, Mr Carter himself owed a duty of care in negligence to the relevant client of the firm in the same way as an employee driving a vehicle in the course of his or her employment owes a duty of care to other road users. If Mr Carter breached that duty of care, he exposed himself to liability in negligence at the suit of the client and, because he was an employee, the four persons who were then the partners became vicariously liable for his negligence. Their liability, it was said, was joint and several. Each of Mr Black and Mr Chapman was therefore vicariously liable for the negligence for which Mr Carter was directly and principally liable, with the result that although the claim in respect of the advice in question was pleaded in the District Court as a claim against Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon, it may just as validly be viewed as a present and crystallised claim against Mr Black, Mr Chapman and Mr Carter, among others.

25 Vicarious liability and the relationship among partners have a common basis in notions of agency: see, as to the former, ***Rajski v Powell*** (1987) 11 NSWLR 522 per Kirby P and, as to the latter, ***National Commercial Banking Corporation Ltd v Batty*** (1986) 160 CLR 251. The submission therefore has sufficient merit to prevent its being discarded. The **Employees Liability Act** 1991 would no doubt operate to allocate the effects of liability away from Mr Carter and towards Mr Black and Mr Chapman (together with Mr Armstrong and Mr McKeon) as employers, but that does not change the nature of the negligence claim, from the perspective of the Toorallie, as a claim against Mr Black, Mr Chapman and Mr Carter, they being the "respondent" for the purposes of s.459H.

26 A similar, but statutorily based, argument is available in relation to the **Fair Trading Act** claim. In that context, Mr Carter is seen as the person who engaged in the conduct said to be proscribed by s.42, he being the person who actually gave the advice in question. Section 70 deals with a case where conduct is engaged in "on behalf of a person other than a body corporate" by "a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent'. In such a case, the conduct is to be regarded as having been engaged in also by the first-mentioned person. By this means, the submission runs, each of Mr Black, Mr Chapman, Mr Armstrong and Mr McKeon is deemed to have engaged in the conduct in fact engaged in by Mr Black, with the result again that the claim can be seen to be one against Mr Black, Mr Chapman and Mr Carter, as well as the other two.

27 This kind of analysis breaks down, however, when it comes to the claim in contract for breach of retainer. That contract cannot be regarded as one to which Mr Carter, as an employee only, was a party.

28 My task is to apply the "serious question to be tried" or "not frivolous or vexatious" or "not fanciful" test to these propositions as to avenues through which such liability, if any, as may be found to exist in relation to the subject matter of the District Court proceedings may be laid at the feet of each of Mr Black, Mr Chapman and Mr Carter. In my judgment, the propositions based on vicarious liability and statutory responsibility of employers pass that test in a theoretical sense, particularly when one remembers that s.459H abandons traditional concepts of mutuality and directs attention only to the question whether the person or persons who served the statutory demand are persons against whom the company has a genuine claim. I see no reason why, in a case of a multiplicity of persons, that is not so where the debt the subject of the statutory demand has accrued due to them as partners so as to become partnership property and the claim asserted against them is one which lies against other persons as well, with different bases of liability applicable to different persons in the wider group. The section's phrase "even if it does not arise out of the same transaction or circumstances as a debt to which the

demand relates" seems to me to support and emphasise this, as does the overall basis of the jurisdiction under the section which is to prevent the statutory presumption of insolvency arising in cases where circumstances other than the existence of the debt the subject of the demand appear, on cogent grounds, to affect the true state of the overall ledger between the parties to that debt.

Summation and assessment

29 Two issues are central to the genuineness of Toorallie's asserted offsetting claim and its quantification of at least $70,152.35. One is the identity of the trustee of the trusts, the other the concrete articulation of the theoretical case against Mr Carter as well as Mr Black and Mr Chapman, as two of the four existing defendants. On the first, I am very conscious that the documentary evidence favours the defendants' case, subject only to an admission the reliability of which may be questionable and which, if incorrectly made, could confidently be expected to be the subject of a successful application to amend. On the second, the reality of the extension of the claim – in the sense of translating it from the theoretical to the practical – will be shown by an appropriate further amendment of the District Court statement of claim and joinder of Mr Carter as a party.

30 I am mindful that s.459M allows an order under s.459H to be made subject to conditions. Such conditions may require the plaintiff to give undertakings to the court: see **Macleay Nominees Pty Ltd v Belle Property East Pty Ltd** (above). One possibility in the present case might be to make an order subject to conditions but, on the whole, I think the fairer approach to both sides is to adjourn Toorallie's application for a short time and to indicate that, if Toorallie takes steps to deal satisfactorily with the two issues in a way I am about to mention, its claim for the order it seeks may be regarded as established.

31 To this end, I grant leave to Toorallie to file (by delivery to my Associate) and serve, not later than 12 noon on the court day before that on which the matter is next to be before me, an affidavit of Toorallie's solicitor which

(a) identifies the evidence which would be adduced in the District Court proceedings if and when Toorallie was put to proof in those proceedings that it was, at all material times, the trustee of the two relevant trusts; and

(b) has annexed to it the form of the further amended statement of claim by which Toorallie intends to press against Mr Carter the claims it considers itself to have against him, in common with Mr Black and Mr Chapman, so as to show that it is presenting a claim against Mr Black, Mr Chapman and Mr Carter.

32 The matter will be stood over to a date I shall now fix.

Mr T.M. Lynch – Plaintiff instructed by Sachs Gerace Lawyers
Mr J. Stoljar – Defendant instructed by Speed & Stracey