Supreme Court
New South Wales

Medium Neutral Citation:	**In the matter of Universal Property Group Pty Limited [2019] NSWSC 796**
Hearing dates:	24 June 2019
Decision date:	28 June 2019
Jurisdiction:	Equity - Corporations List
Before:	Rees J
Decision:	1. Pursuant to section 459H of the Corporations Act 2001 (Cth), the statutory demand dated 7 March 2019 served by the defendants upon the plaintiff be set aside. 2. The defendants to pay the plaintiff's costs of the proceedings.
Catchwords:	CORPORATIONS — Winding up — Statutory demand — Application to set aside on the basis of a genuine dispute — Demand based on fees payable under deed granting option to purchase land — Where interpretation of deed disputed — When appropriate to determine proper construction of contract on application to set aside statutory demand — Low threshold for genuine dispute — Demand set aside.
Legislation Cited:	Conveyancing Act 1919 (NSW), s 66ZF Corporations Act 2001 (Cth), ss 459H, 459J
Cases Cited:	BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd (2013) 85 NSWLR 601; [2013] NSWCA 344 Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32 Creata (Aust) Pty Limited v Faull (2017) 125 ACSR 212; [2017] NSWCA 300 Createc Pty Ltd v Design Signs Pty Ltd (2009) 71 ACSR 602; [2009] WASCA 85 Drillsearch Energy Limited v Carling Capital Partners Pty Ltd [2009] NSWSC 1192 Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 Grandview Australia Pty Ltd v Budget Demolitions Pty Ltd

	[2019] NSWCA 60 In the matter of Litigation Insurance Pty Limited [2017] NSWSC 334 Nguyen v Taylor (1992) 27 NSWLR 48
Category:	Principal judgment
Parties:	Universal Property Group Pty Limited (Plaintiff) Anthony Sammut (First Defendant) Emily Sammut (Second Defendant)
Representation:	Counsel: Mr G Babe (Plaintiff) Mr M Bennett (Defendants) Solicitors: Kamiya Legal (Plaintiff) LAS Lawyers (Defendants)
File Number(s):	2019/95958

JUDGMENT

1 **HER HONOUR:** This is an application to set aside a statutory demand. The demand was issued by Anthony and Emily Sammut, vendors of a property at Oakville (*the vendors*). The demand was issued to Universal Property Group Pty Limited (*the developer*) in respect of a contract giving it the option to buy the property. The issue is whether differing contentions as to the meaning of the contract amount to a "genuine dispute" under section 459H(1)(a) of the *Corporations Act 2001* (Cth).

Facts

2 On 19 February 2018, the developer entered into a contract entitled "Put and Call Option" with the vendors under which an option was granted to purchase the property for some $9.5 million. The contract provided that, on payment of a Due Diligence Fee of $30,000, the developer had until the Due Diligence Expiry Date of 17 May 2018 to undertake inquiries in relation to the property: clause 2.1. Clause 2 continued:

> 2.2 If the Purchaser elects to proceed with the purchase, then on, or prior to the Due Diligence Expiry Date the Purchaser must pay to the Vendor the Call Option Fee Instalment set out in Item 3 of The Schedule.
>
> 2.3 If the Purchaser elects not to proceed with the purchase, then, an Email will be sent to the Vendor's Legal Representative prior to the Due Diligence Expiry Date. Notwithstanding this, the non-payment of the Call Option Fee set out in Item 3 of The Schedule shall signify that the Purchaser is not proceeding with the purchase.
>
> 2.4 The Vendor and Purchaser agree that in the event the Purchaser elects not to proceed with the purchase, the Purchaser shall assign to the Vendor all beneficial and legal ownership of any consultant reports, plans, documents or instruments. The Purchaser shall provide the material referred to in this clause within five (5) Business Days of the Due Diligence Expiry Date.

3

Call Option Fee Instalment was not defined but Call Option Fee was defined in the Schedule as follows:

Item 3	Call Option Fee	Non-refundable and payable to the Vendor as follows:
	Call Option Fee 1	$170,000.00 Payable on or prior to the Due Diligence Expiry Date
	Call Option Fee 2	$300,000.00 Payable twelve (12) months after the date of this deed.
	Call Option Fee 3	$1,500,000.00 Payable 30 days after the Purchaser obtains Development Consent in relation to the Property

4 Clause 2.5 then provided:

> **Grant of the Call Option**
>
> In consideration of the payment of the Call Option Fee set out in Item 3 of the Schedule by the Purchaser to the Vendor, the Vendor grants to the Purchaser the Call Option on the terms and conditions of this deed for the Purchaser to purchase the Property for the purchase price and on the terms and condition as set out in the Contract.

Call Option was defined as the option granted in clause 2.4, but the cross-reference does not make sense and was presumably intended to refer to clause 2.5.

5 Clause 2.7(a) provided that the Call Option was exercisable at any time during the Call Option Period set out in Item 4 of the Schedule, which states (as amended by the variation referred to in [9]):

Item 4	Call Option Period and Call Option Expiry Date	From the Due Diligence Expiry Date to 5:00pm on the day which is the earlier of: 1. 30 Days after Construction Certificate issue date; or 2. 24 Months from the Due Diligence Expiry Date.

6 Clause 2.8(c) provided that the Fees payable under the contract would be dealt with as follows:

> … liability for the payment of all the instalments of the Call Option Fee arises upon commencement of the Call Option Period. In the event of default, rescission or termination of this deed all the instalments of the Call Option Fee as set out in Item 3 shall become payable and a debt due to the Vendor.

Fees meant the Due Diligence Fee, the Option Fee and any other Fee paid under the deed: clause 1.1. Option Fee was not defined and presumably was a reference to the Call Option Fee, but the Call Option Fee was in any event captured by "any other Fee paid under this deed". Call Option Fee meant the Call Option Fee Instalments as set out in Item 3.

7 Clause 6 entitled the developer to nominate another to ultimately purchase the property.

> **6.1 Nomination of Nominee**
>
> The Purchaser may only nominate a Related Party Entity to exercise the Call Option hereby granted. If the Purchaser appoints a Nominee to exercise the Call Option the Purchaser will serve on the Vendor the Nomination Notice at Annexure E and all moneys paid by the Purchaser under this deed will be treated as though they were paid by that Nominee. The Nomination Notice may be executed by the Purchaser or their legal representative.
>
> 6.2 Except as provided for in Clause 6.1 the Purchaser's interest in this deed and the Contract is not assignable.
>
> **6.3 Nominee's Rights**
>
> The Nominee:
>
> > (a) may exercise the Call Option in accordance with the terms and conditions of this deed;
> >
> > …
> >
> > (c) will be deemed to be the Purchaser under this deed and be subject to and have the benefits conferred by the terms, conditions, rights and obligations of this deed from the date of service on the [Defendants] of the Nomination Notice.

8 On 19 February 2018, the developer also signed a certificate under section 66ZF of the *Conveyancing Act 1919* (NSW) waiving the cooling off period in relation to the Call Option. The developer also paid the Due Diligence Fee.

9 On 15 June 2018, the parties agreed to vary the contract in various respects, including to extend the Due Diligence Expiry Date from 17 May 2018 to 17 June 2018. On 17 June 2018, the developer paid Call Option Fee 1 of $170,000. Call Option Fee 2 of $300,000 was due on 19 February 2019.

10 On 12 February 2019, the developer incorporated a nominee company, 1 UPG Pty Limited (*the nominee*), to complete the purchase the property. The nominee has issued share capital of $100. On 14 February 2019, a Nomination Notice in the form of Annexure E to the contract was served on the vendors' solicitors.

11 On 16 February 2019, Bhart Bhushan, the sole officeholder of the developer and also the sole officeholder and shareholder of the nominee, decided not to proceed with the purchase and also received legal advice that the contract was defective. On 18 February 2019, the developer's solicitors wrote to the vendors' solicitors noting that the Call Option Fee No 2 of $300,000 was payable the next day but sought a refund of the Call Option Fee paid to date on the following basis:

> I note that the purchaser believes that the information provided to them regarding the timing of services was inaccurate and based on the realistic timeline for services it would not be viable to continue with this purchase.
>
> As a result in accordance with clause 2.3 of the Deed, our client is proposing not to proceed with this purchase and will not be making the call option fee payment.

> **Grant of Call Option**
>
> We also believe that a strong argument can be made that no call option has been granted ….
>
> You would be aware that Clause 2.5 of the Deed provides that a Call Option is granted as consideration for the Call Option Fee set out in Item 3 of The Schedule. The Purchaser has not paid the Call Option Fee as pursuant to Clause 1.1 of the Deed the Call Option Fee is defined to mean the call option instalments and to date the Purchaser has only paid one instalment.

12 Call Option Fee 2 was not paid. On 25 February 2019, the vendors' solicitor replied, although that letter is not in evidence before me. On 26 February 2019, the developer's solicitors sent a further letter setting out arguments as to why the contract was not valid.

13 On 7 March 2019, the vendors issued a statutory demand to the developer for $1,800,000, being unpaid instalments of the Call Option Fee under the contract. On 27 March 2019, the developer filed an application to set aside the statutory demand.

Genuine dispute and interpretation of contracts

14 In *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601; [2013] NSWCA 344 at [31], the Court of Appeal approved McLelland CJ in Eq's consideration of a "genuine dispute" in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787 as involving a plausible contention requiring investigation, raising much the same sort of considerations as the "serious question to be tried" criterion that applies in the case of an interlocutory injunction. As McLelland CJ in Eq stated in *Eyota v Hanave* at 787:

> This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth", or "a patently feeble legal argument or an assertion of facts unsupported by evidence".

15 Thus, on an application to set aside a statutory demand where the asserted "genuine dispute" is as to the meaning of a contract, determination of the meaning of a contract may be appropriate if a "patently feeble legal argument" is put forward. However, as Barrett AJA cautioned in *Creata (Aust) Pty Limited v Faull* (2017) 125 ACSR 212; [2017] NSWCA 300 at [26]:

> But where the question of construction has any element of rational controversy to it, the Court must exercise particular restraint.

16 His Honour, with whom Gleeson and White JJA agreed, adopted the statement of principle by Gleeson JA in *In the matter of Litigation Insurance Pty Limited* [2017] NSWSC 334 at [31]:

> The important points to be derived from the authorities are as follows. First, the court dealing with a s 459G application is not compelled to determine questions of construction of documents. Second, s 459G proceedings are not ordinarily the occasion for the court to construe a contract where there are competing views about its meaning. Third, cases in which it will be appropriate for the court to entertain a construction argument on a s 459G application are likely to be few in number. Fourth, the court's

> state of mind concerning the existence of a genuine dispute may range from a clear conviction that the debt does not exist to an opinion that the genuine dispute hurdle has only just been cleared.

17 Thus, where there are clearly arguable alternatives as to the meaning of a term and related questions of construction, this of itself gives rise to a genuine dispute within section 459H(1)(a) and no attempt should be made to determine the question in an application to set aside a statutory demand: *Drillsearch Energy Limited v Carling Capital Partners Pty Ltd* [2009] NSWSC 1192 at [47] per Barrett J. More recently in *Grandview Australia Pty Ltd v Budget Demolitions Pty Ltd* [2019] NSWCA 60, White JA held at [90] (emphasis added):

> It is usually inappropriate on an application to set aside a statutory demand that the court attempt to decide competing contentions as to contractual interpretation, partly because to do so might embarrass a judge before whom that issue arises and *fundamentally because if the disputed question of contractual interpretation is arguable there will be a genuine dispute as to the existence of the debt*, albeit one that does not depend upon a disputed matter of fact. But where the legal argument propounded in support of a particular argument is "patently feeble" (*Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787 (McLelland CJ in Eq), or where it is "as plain as a pikestaff" that it has no basis (*Spacorp Australia Pty Ltd v Myer Stores Ltd* [2001] VSCA 89; 19 ACLC 1270 at [41]) then there will be no genuine dispute (*Creata (Aust) Pty Ltd v Faull* [2017] NSWCA 300; 125 ACSR 212 at [26]-[29].

Contractual arguments raised

18 The developer puts forward three arguments which it says give rise to a genuine dispute as to the meaning and application of the contract. The first is that, by nominating 1 UGP Pty Ltd, the obligation to pay Call Option Fee 2 of $300,000 and Call Option Fee 3 of $1.5 million fell on the nominee, not the developer, and thus the statutory demand is issued to the wrong company. The vendors say such a construction is untenable and amounts to a device by the developer to avoid liability for the Call Option Fee.

19 The developer submitted that clause 6.1 does not require the nomination to be made when the Call Option Fee was paid. The second sentence – which deems all monies previously paid by the developer under the Deed to have been paid by the nominee – is consistent with the developer being entitled to make a nomination at any time. The developer was therefore entitled to nominated 1 UPG Pty Ltd on 13 February 2019.

20 As to whether a nomination releases the developer from its obligations, the developer submits that it is plain from clauses 6.2 and 6.3 that the intention of the clauses was to allow the developer to substitute a different company as the purchaser, not merely impose its obligations as purchaser on another entity in addition to itself. The developer submitted that the use in that sub-clause of the word "deemed"; the definitive article to describe "the Purchaser", combined with the use of the singular "Purchaser"; and the imperative that the Nominee will be "subject to … the terms, conditions, rights, and obligations of this deed …", reflect a clear intention by the parties that the nominee would take over all payment obligations from the developer upon its nomination, and that the developer would have no further contractual role to play.

21

The vendors submit that when the developer caused the Call Option Period to commence by paying $170,000 on 17 June 2018, a debt of $1,800,000 crystallised under clause 2.8(c), which states that the liability for the payment of all the instalments of the Call Option Fee (Call Option Fee 2 and Call Option Fee 3) arises upon the commencement of the Call Option Period. In the event of default, rescission or termination of this deed all the instalments of the Call Option Fee become payable and a debt due to the vendors. Clause 2.5 of the Deed supports that provision. Were it otherwise:

(a) there would have been nothing to nominate on 13 February 2019 if the Call Option Period was not running;

(b) there was no Email in accordance with clause 2.3 that would evidence the developer not proceeding with the Call Option; and

(c) there was no provision of consultant reports, plans, documents or instruments from the developer to the vendors within five Business Days or at all, in accordance with clause 2.4.

Further, the vendors submitted, the mere act of nomination does not change the crystallised rights: *Nguyen v Taylor* (1992) 27 NSWLR 48 at 60–61. Whilst that may be the position at common law, it would presumably be open to the parties to contract otherwise.

22 The vendors submitted that the developer's arguments that the nomination had the effect that any further monies payable were to be paid by the nominee is wrong because:

(1) It is inconsistent with liability for the whole of the Call Option Fee arising under clause 2.8(c) of the Deed on commencement of the Call Option period, that is, 17 June 2018.

(2) Clause 6.1 states, "The Purchaser may only nominate a Related Party Entity *to exercise the Call Option hereby granted"* and this allows for the ultimate purchaser to be the nominee but does not shift the liability that crystallised on 17 June 2018 to the Nominee.

(3) Clause 6.1 also states, "all moneys paid by the Purchaser under this Deed will be treated as though they were paid by that Nominee" but does not say, and could easily have said, that the Nominee is to pay those amounts. It expressly leaves the obligation to pay with the Purchaser, but gives credit to the Nominee for the payments.

(4) This is contrary to commercial sense and would breach an implied term necessary to be read into the contract for business efficacy: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 (Privy Council); *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; [2014] HCA 32 at [21].

(5) Clause 6.3 does not override the clear terms of clause 6.1 and, even if it did, the obligation to pay arose on 17 June 2018 before the Nomination.

23 Having reviewed both sides of this argument, it seems to me that the developer's interpretation of the contract is arguable and does not fall within the description of "patently feeble". This is sufficient for the developer to clear the low hurdle on applications such as these. Without seeking to bind in any way a judge who may ultimately construe this contract definitively, it is reasonably arguable that, on making a

nomination under clause 6.1, the nominee was credited with the Call Option Fee instalments paid by the developer and "deemed" to be the developer and to be subject to the obligations imposed by the contract including the liability to pay any remaining portion of the Call Option Fee payable as at 13 February 2019. That argument may not ultimately succeed but it is not devoid of merit nor plainly unarguable.

24 The vendors' submissions, in part, placed emphasis on construing the contract having regard to commercial sense, implied terms of business efficacy, the sophistication of the developer, post-contractual conduct of the parties consistent with the vendors' construction of the contract, and the legislative intent underlying statutory provisions (in this case, section 66ZG of the *Conveyancing Act*). If, in opposing an application to set aside a statutory demand on the basis of an unarguable construction of a contract, one has to rely on such matters to support one's interpretation, then this should be taken as an indication that the low threshold has likely been reached by the plaintiff. This does not detract from the prospect that a court which is ultimately called upon to construe the contract may find such considerations weighty or even determinative. It is simply to say that a court will almost certainly not have regard to such matters which examining a contract in the limited exercise it is being asked to undertake under section 459G of the *Corporations Act*.

25 It is not necessary, therefore, to consider the other two arguments put forward by the developer. Nor is it appropriate for me to do so or comment further on the second or third arguments, heeding White JA's warning that to do so might embarrass a judge before whom the second and third arguments are ultimately resolved.

Other grounds

26 The developer submits that its solicitors put the vendors' solicitors on notice of these points of genuine dispute as to the existence of the debt; the vendors have never raised the question of the developer's solvency; and it was an abuse of process for the vendors to use the statutory demand process in an attempt to enforce the debt. In *Createc Pty Ltd v Design Signs Pty Ltd* (2009) 71 ACSR 602; [2009] WASCA 85 Martin CJ (with whom Owen and Miller JJA agreed) said, at [2]:

> The issue of the statutory demand, and the appeal from the decision of the master setting it aside, reflect a fundamental misconception as to the purpose of the statutory demand process created by Pt 5.4. of the *Corporations Act.* That purpose is to provide a means whereby the insolvency of a company may be established for the purposes of an application to wind up that company. Its purpose is not to provide a means whereby those claiming a genuinely disputed debt can avoid the obligation of establishing their entitlement to that debt in a court of appropriate jurisdiction by placing commercial pressure on the party resisting payment. There is a clear inference from the evidence that Createc's purpose in issuing the statutory demand was the improper purpose of using the statutory demand process to enforce payment of a debt which it knew to be genuinely disputed. That is an abuse of process.

27 The vendors submitted that there is no abuse of process in issuing a demand to a company that has failed to comply with "clear debts", payment of which had been requested on multiple occasions. Rather, an experienced property developer has

sought to avoid its obligations by nominating to a company of straw in a blatant attempt to avoid its obligations. There is no basis on which to apply section 459J of the *Corporations Act*. Having already found the existence of a genuine dispute, that these were “clear debts” is not a submission that I can agree with. I do not accept, however, that the mere issue of a demand where debts are contested, without more, amounts to an abuse such that the demand ought to be set aside for “some other reason” under section 459J. The developer has not pointed to anything out of the ordinary to found an order under that section.

ORDERS

28 For these reasons, I make the following orders:

(1) Pursuant to section 459H of the *Corporations Act 2001* (Cth), the statutory demand dated 7 March 2019 served by the defendants upon the plaintiff be set aside.

(2) The defendants to pay the plaintiff’s costs of the proceedings.

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Decision last updated: 28 June 2019