Federal Court of Australia

Nextgen Financial Group Pty Ltd v WJ & V Drakoulis Super Pty Ltd [2023] FCA 789

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| File number(s): |  |
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| Judgment of: | **O’CALLAGHAN J** |
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| Date of judgment: | 12 July 2023 |
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| Catchwords: | **CORPORATIONS** – application to set aside statutory demand – where statutory demand issued in respect of a binding determination of the Australian Financial Complaints Authority – where sum of money the subject of the determination due and payable on date of statutory demand, and remains due and payable – where no dispute about indebtedness – application dismissed  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 912A, 1050, 1051, 1051AAustralian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021) rr A.1.2, A.1.3, A.1.4, A.15.3 |
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| Cases cited: | *Bartex Fabrics Pty Ltd v Phillips Fox*(1994) 13 ACSR 667*Eltin Open Pit Operations Pty Ltd v Warekim Pty Ltd* [2001] SASC 377*First Line Distribution v Whiley* (1995) 18 ACSR 185*ISG Financial Services Ltd v Australian Financial Complaints Authority Ltd* [2022] QSC 281*QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97*Re Elgar Heights Pty Ltd* [1985] VR 657*Rothwells Ltd v Nommack (No 100) Pty Ltd* [1990] 2 Qd R 85*Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 31 |
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| Date of hearing: | 12 July 2023  |
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| Solicitor for the Plaintiff: | Mr L Young of Assembly Law |
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| Counsel for the Defendant: | Mr J Doherty |
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| Solicitor for the Defendant: | Fortrade Lawyers |

ORDERS

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|  | VID 116 of 2023 |
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| BETWEEN: | NEXTGEN FINANCIAL GROUP PTY LTD (ACN 055 622 967)Plaintiff |
| AND: | WJ & V DRAKOULIS SUPER PTY LTD (ACN 614 244 852) AS TRUSTEE FOR THE WJ & V DRAKOULIS SUPER FUNDDefendant |

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| order made by: | O’CALLAGHAN J |
| DATE OF ORDER: | 12 JULY 2023 |

THE COURT ORDERS THAT:

1. The plaintiff’s originating application dated 27 February 2023 be dismissed.
2. The plaintiff pay the defendant’s costs of the application, including all reserved costs, on a full indemnity basis, except insofar as they are of unreasonable amount and have been unreasonably incurred.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Ex tempore)

O’CALLAGHAN J

1. By originating application filed on 27 February 2023, the plaintiff, Nextgen Financial Group Pty Ltd seeks to set aside a statutory demand issued by the defendant, WJ & V Drakoulis Super Pty Ltd (as trustee for the WJ & V Drakoulis Super Fund).
2. The statutory demand, dated 31 January 2023, stated that the defendant is owed by the plaintiff in relation to a determination made by the Australian Financial Complaints Authority (**AFCA**) in case number 851610 dated 18 November 2022, the sum of $270,523.67. The deponent, a director of the defendant, also deposed as to his belief that there is no genuine dispute about the existence or amount of the debt.
3. At the hearing this morning, counsel for the defendant tendered a copy of the determination and I marked it as Exhibit D1. It is not necessary to recite the detail of it, other than to observe that the defendant made a complaint in respect of financial advice from the plaintiff to invest an amount of cash into a certain fund which was later wound up, meaning that the defendant was unable to complete the purchase of an investment property and suffered loss and damage.
4. The determination also records that the plaintiff did not respond to the complaint.
5. The determination relevantly provided as follows:

1.3 Determination

This determination is in favour of the complainant[.]

The complainant has 30 days to accept the determination. If the complainant accepts the determination, the financial firm must pay $261,394.90 compensation to the complainant as trustee of the SMSF with interest as set out in Section 2.1 below within 28 days of that acceptance[.]

The complainant is to provide a transfer of its units in Fund I or an assignment of any dividend received from the liquidation of Fund I if requested by the financial firm.

1. The relevant statutory provisions relating to the role played by AFCA are contained in Part 7.6 of the *Corporations Act 2001* (Cth).
2. Section 912A(1)(g) provides that if a financial services licensee provides services to retail clients, the licensee must have a dispute resolution system which complies with s 912A(2). Section 912A(2) provides that the licensee must have an internal dispute resolution procedure and have “membership of the AFCA scheme”.
3. The “operational requirements” of the AFCA scheme are contained in s 1051(4), as follows:

*Operational requirements*

(4) The operational requirements are that:

(a) the complaints mechanism under the scheme is appropriately accessible to persons dissatisfied with members of the scheme; and

(b) complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent; and

(c) appropriate expertise is available to deal with complaints; and

(d) reasonable steps are taken to ensure compliance by members of the scheme with those determinations …

1. Section 1051A further provides, as follows:

**1051A General considerations**

The general considerations for an external dispute resolution scheme are the following:

(a) the accessibility of the scheme;

(b) the independence of the scheme;

(c) the fairness of the scheme;

(d) the accountability of the scheme;

(e) the efficiency of the scheme;

(f) the effectiveness of the scheme.

1. Rule A.1.3 of the AFCA *Complaint Resolution Scheme Rules* (dated 13 January 2021) (**AFCA Rules**) provides that the AFCA complaint resolution scheme is free of charge for complainants and that “[c]omplainants do not generally need legal or other paid representation to submit or pursue a complaint through AFCA”.
2. Section 1051(4)(e) provides that determinations made by AFCA are binding on members of the scheme, but not binding on complainants to AFCA. The AFCA Rules provide at r A.1.4 that a person is not obliged to use the AFCA complaint resolution process to pursue a complaint against a financial licensee but instead may institute court proceedings or any other available dispute resolution forum.
3. Rule A.15.3 provides that after AFCA has made a determination it is binding upon the parties to the dispute “if accepted by the complainant within 30 days of the complainant’s receipt of the determination”.
4. Rule A.15.4 further provides that if a complainant does not accept a determination, the complainant is not bound by the determination and may bring action in the courts or take any other action available to it.
5. Rule A.1.2 makes clear that the AFCA Rules constitute part of a tripartite agreement between AFCA, financial firms and complainants (here, the plaintiff and defendant, respectively).
6. As Dalton J said in *ISG Financial Services Ltd v Australian Financial Complaints Authority Ltd (No 2)* [2022] QSC 281 at [8], “the federal government has entrusted the administration of the AFCA scheme to a company limited by guarantee … That company has power to make determinations affecting financial services licensees and investors because they agree to it doing so. The relevant cause of action, by and against AFCA, is in contract, ie., private law, not public law”.
7. In this case, the determination was accepted by the defendant on 24 November 2022. Upon that acceptance, and in accordance with r A.15.3, the determination was binding upon the plaintiff and the defendant.
8. At no time since then has the plaintiff sought any form of judicial relief by way of stay, appeal or otherwise in relation to the determination.
9. In an affidavit sworn in support of the plaintiff’s application to set aside the statutory demand, Mr Turco, who is a director and secretary of the plaintiff, deposed, among other things, to his belief that the debt the subject of the determination is not due and payable by the plaintiff, as follows:

14. The Statutory Demand alleges that Nextgen owes a debt to the Defendant in the sum of $270,523.67.

15. The debt is stated to have arisen out of a Determination issued by the Australian Financial Complaints Authority (**AFCA**) on 18 November 2023 (sic). This is a typographical error as the relevant Determination was issued on 18 November 2022.

16. A Determination by AFCA does not have the effect of creating a debt enforceable by way of statutory demand.

17. I refer to the decision of this Honourable Court in *QSuper Board v Australian Financial Complaints Authority Limited* [2020] FCAFC 55 (***QSuper Decision***).

18. I note that this Honourable Court, in the QSuper Decision, states the following: *It follows that AFCA’s decision was not enforceable of itself and, in order for it to be efficacious, an additional independent exercise of judicial power was required.*

19. It is Nextgen’s view that the rights created by the AFCA Determination must be enforced by way of separate application to this Honourable Court and not by way of statutory demand.

1. The plaintiff submitted, in written submissions filed on its behalf, that it was not “at issue” that the determination “was made and that the plaintiff was held liable” by virtue of it. Instead, it was contended, consistently with what Mr Turco had sworn, that the plaintiff “takes issue with the defendant’s approach to seek enforcement of the … Determination by way of the Statutory Demand”.
2. In support of that submission, the plaintiff referred to certain passages in the decision of the Full Court (Moshinsky, Bromwich and Derrington JJ) in *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97.
3. That was a case that concerned a complaint made by a doctor to AFCA alleging that he was entitled to a refund from the appellant, which administered the relevant superannuation fund as its trustee. The legislative provisions regarding such a complaint are contained in Part 7.10A of the Corporations Act and are relevantly analogous to the provisions governing complaints in relation to financial services of the type relevant here. So much was accepted by the parties.
4. The case, however, has nothing to do with the issue at hand because it, or the relevant parts of it, dealt with a different question, namely whether a determination made by AFCA involves an exercise of judicial power.
5. The Full Court held that it did not, including for the following reasons:

144 However, that submission cannot be accepted. Even if the commencement of proceedings based on AFCA’s determination has the effect of enforcing the rights of the parties as created by it, the process necessarily relies upon the independent exercise of judicial power by a separate body. The determination itself is not enforceable as an exercise of power by AFCA and, as such, it lacks that essential characteristic of judicial power. As submitted by AFCA at [32] of its written submissions, the manner in which AFCA’s decisions might be enforced is “…apt to describe any arbitral award which could be sued on…”. Rather than being a judicial determination, any decision is used as a foundation for an action in the courts. In [*Attorney-General (Cth) v Breckler* (1999) 197 CLR 83] at 111 [45] the High Court held that the only method of enforcement of the SCT decision was by “an independent exercise of judicial power” initiated by the commencement of separate proceedings and that negated the conclusion that judicial power was being exercised. The same conclusion arises under the AFCA scheme.

145 Further, in any enforcement proceedings the Court will have to be satisfied of the existence of the determination and that it has not been complied with: *Breckler* at 133 [100]. As Mr del Villar QC accurately submitted, any determination by AFCA of a superannuation complaint is but a “factum by reference to which” enforceable rights and liabilities are conferred in the sense referred to in *Breckler* at 111 [45]. In *Breckler*, the fact that a decision did not give rise to immediately enforceable rights as opposed to the existence of a factum by which rights would be enforced, was a significant matter in the plurality’s conclusion.

146 It follows that AFCA’s decision was not enforceable of itself and, in order for it to be efficacious, an additional independent exercise of judicial power was required. In the enforcement, AFCA’s decision was merely a fact on which an enforceable right would arise. This strongly indicates that its power was not judicial.

1. It was submitted by the plaintiff, in reliance on those paragraphs, that the determination in this case “is not an enforceable right of itself” and is “also one … that is not enforceable by way of statutory demand”. That proposition is untenable. It also addresses the wrong question.
2. The relevant question in this case is whether the statutory demand was made in respect of an ascertained sum of money that was then immediately payable and recoverable by action. See, by way of example only, *Re Elgar Heights Pty Ltd* [1985] VR 657 at 669 (Ormiston J, as he then was).
3. Countless other decisions are to similar effect. See, by way of example only, *Rothwells Ltd v Nommack (No 100) Pty Ltd* [1990] 2 Qd R 85 (McPherson J); *Bartex Fabrics Pty Ltd v Phillips Fox*(1994) 13 ACSR 667 (Young J); *First Line Distribution v Whiley* (1995) 18 ACSR 185 (Cohen J); and *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 (Palmer J).
4. Here, the amount claimed in the statutory demand is the amount of the determination plus interest. It is clearly a liquidated sum in money presently due, owing and payable. It has been owing and payable since the expiration of 28 days from the defendant’s acceptance of the determination – that is 28 days after 24 November 2022.
5. The notion implicit in the plaintiff’s submission that an amount cannot be relevantly presently due, owing and payable, absent some sort of judicial imprimatur, is untenable. As the Full Court in *QSuper* held at 131-32 [144], the manner in which AFCA’s decisions might be enforced is apt to describe any arbitral award that could be sued on. And as Lander J said in *Eltin Open Pit Operations Pty Ltd v Warekim Pty Ltd* [2001] SASC 377 at [30]:

I see no reason to treat an arbitral award any differently to a judgment of an inferior court. The ordinary rule should apply which is that a successful party is entitled to the benefit of the judgment obtained by him as soon as the judgment is entered: *Hackney Tavern Nominees Pty Ltd v McLeod* (1983) 33 SASR 590.

1. In this case, the simple and incontrovertible fact is that the sum of $270,523.67 was due and payable by the plaintiff as at the date of the statutory demand, and it remains due and payable today, together with additional interest that has accrued since the date of the statutory demand.
2. The plaintiff has never sought to dispute the debt. Indeed, as I have already said, it did not even respond to the complaint made to AFCA. When pressed today as to any basis upon which it might be said the debt was disputed, counsel for the plaintiff could only say that he had no instructions about whether the plaintiff intended to challenge the existence of the debt. (Given the effluxion of time, and the fact that the plaintiff did not participate at AFCA, it is difficult to imagine what challenge could now be mounted to the determination, but I leave that to one side).
3. For those reasons, the application to set aside the statutory demand is refused. The plaintiff should pay the defendant’s costs of the application, including all reserved costs, on a full indemnity basis, except insofar as they are of unreasonable amount and have been unreasonably incurred, because the application was untenable and should not have been brought.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan. |

Associate:

Dated: 12 July 2023