SUPREME COURT OF QUEENSLAND

CITATION:	*Chief Commissioner of State Revenue v Fun FM Pty Ltd* [2019] QSC 205
PARTIES:	**CHIEF COMMISSIONER OF STATE REVENUE** (applicant) v **FUN FM PTY LTD** ACN 079 268 367 (respondent)
FILE NO:	BS No 3366 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2019. Further submissions 26 and 30 April 2019
JUDGE:	Martin J
ORDER:	**The Originating Application filed on 28 March 2019 is dismissed.**
CATCHWORDS:	TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – RETURNS AND ASSESSMENTS – ASSESSMENTS – CONCLUSIVENESS OF ASSESSMENT – where the Chief Commissioner of State Revenue of New South Wales is alleged to have issued notices of assessment in respect of unpaid parking levies and interest imposed on the respondent – where s 119 of the *Taxation Administration Act* 1996 (NSW) provides that the production of notices of assessment is conclusive evidence of the making and correctness of the assessments – where s 70 of the *Evidence Act* 1977 provides that any document which by a law at any time in force in another State is admissible in evidence for any purpose in a court of that State without proof is admissible in evidence to the same extent and for the same purpose in all courts in Queensland without such proof – whether production of notices of assessment issued by the Chief Commissioner of State Revenue of New South Wales in proceedings before the Supreme Court of Queensland is conclusive evidence of the making and correctness of the

assessments

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – where the applicant issued a statutory demand to the respondent and the respondent applied to have it set aside – where that application was dismissed by consent and the first demand expired – where the applicant issued to the respondent a second statutory demand in similar terms – where the respondent applies to have that demand set aside by repeating and relying upon the matters set out in the affidavit supporting the first application – where the respondent further seeks to rely on new grounds not contained in the supporting affidavit filed in these proceedings – whether the affidavit supporting the application in these proceedings contains any grounds for setting aside the second demand – whether the respondent can rely on any other grounds

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SOME OTHER REASON – where the applicant issued a statutory demand to the respondent and the respondent applied to have it set aside – where that application was dismissed by consent and the first demand expired – where the applicant issued to the respondent a second statutory demand in similar terms – whether issuance of the second demand constitutes an abuse of process

Corporations Act 2001, s 459G, s 459H, s 459J, s 459L

Evidence Act 1977, s 70

Taxation Administration Act 1996 (NSW), s 119

Crawford Earthmovers Pty Limited v Fitzsimmons (1972) 4 SASR 116, applied

Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473, applied

GoConnect Ltd v Sino Strategic International Ltd (in liq) [2016] VSCA 315, cited

Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1996) 70 FCR 452, cited

Hoare Bros Pty Ltd v Commissioner of Taxation (1996) 62 FCR 302, cited

Infratel Networks Pty Ltd (ACN 116 417 884) v Gundry's Telco & Rigging Pty Ltd (ACN 140 711 182) (2012) 297 ALR 372, cited

In the matter of Modern Wholesale Jewellery Pty Ltd; In the matter of Global Austral Pty Ltd; In the matter of Modern Wholesale

Jewellery Pty Ltd [2017] NSWSC 236, cited

In the matter of Precise Training Pty Limited [2018] NSWSC 1383, followed

James Estate Wines Pty Ltd v Winelink (Australia) Pty Ltd (2003) 47 ACSR 72, cited

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [2014] NSWCA 262, cited

K Young Trading Pty Ltd v Tjoi [2009] NSWSC 260, cited

Meehan & Ors v Glazier Holdings Pty Ltd (2005) 53 ACSR 229, cited

Missay Pty Ltd v Seventh Cameo Nominees Pty Ltd (in liq) [2000] VSC 397, cited

QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & North Queensland Pipeline No 2 Pty Ltd; QNI Metals Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & North Queensland Pipeline No 2 Pty Ltd [2017] QCA 297, followed

Re the Corporations Law; Re Il Palazzo (Management) Pty Ltd [1999] QSC 356, cited

Tatlers.com.au Pty Ltd v Davis (2006) 203 FLR 473, cited

COUNSEL:	G Dietz for the applicant G Radcliff for the respondent
SOLICITORS:	Matthews Folbigg Lawyers for the applicant Tucker & Cowen as town agents for SCAS Law for the respondent

[1] Fun FM Pty Ltd is an occupant of a three level building on Jones Bay Road in Pyrmont in New South Wales. The ground floor of the building is taken up with car parking spaces. In New South Wales the *Parking Space Levy Act* 2009 (NSW)[1] provides that parking spaces in particular areas can be subject to a parking space levy. A body called Revenue NSW collects those levies and the Chief Commissioner of State Revenue may make demands for the payment of them.

[2] The Chief Commissioner has made such demands of Fun FM. Fun FM has denied liability for those levies. A statutory demand was issued by the Chief Commissioner for payment of those levies and Fun FM has applied to have it set aside. Before that application could be heard, the Chief Commissioner applied under s 459L of the *Corporations Act* 2001 for an order dismissing Fun FM's application.

[3] At the hearing of the Chief Commissioner's application the parties agreed that the fate of that application would determine Fun FM's application to set the demand aside.

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[1] And the predecessor legislation the *Parking Space Levy Act* 1992 (NSW).

History of the proceedings

[4] Between 25 September 2012 and 16 November 2018, the Chief Commissioner issued Assessment Notices to Fun FM in respect of parking space levies. Those Assessment Notices remain unpaid.

[5] On 21 September 2018 the respondent received a Creditor's Statutory Demand for Payment of Debt from the Chief Commissioner demanding payment of $134,467.24 (First Demand) on the basis of those unpaid parking space levies and interest. The period covered by the First Demand was 1 July 2012 to 13 September 2018.

[6] On 11 October 2018 the respondent filed an application to set aside the First Demand.

[7] The application was supported by an affidavit of Bill Caralis (First Caralis Affidavit). He is the sole director, secretary and sole shareholder of the respondent.

[8] On 13 February 2019 that application was dismissed by consent.

[9] On 21 December 2018 the First Demand "expired".[2]

[10] On 28 February 2019 the Chief Commissioner issued another Statutory Demand to the respondent demanding the payment of $170,850.34 (Second Demand). That amount was based on unpaid levies and interest the subject of seven statutory assessment notices issued by the applicant to the respondent between 25 September 2012 and 16 November 2018. The period covered by the Second Demand is 1 July 2012 to 28 February 2019.

[11] The Second Demand was supported by an affidavit of Catherine Brooks (First Brooks Affidavit).

[12] On 28 March 2019 the respondent filed an Originating Application in this court seeking an order that the Second Demand be set aside. It was listed for hearing on 27 May 2019.

[13] That application is supported by another affidavit of Bill George Caralis (Second Caralis Affidavit). The Second Caralis Affidavit repeats and relies upon the matters set out in the First Caralis Affidavit. The First Caralis Affidavit is exhibited to the Second.

[14] On 12 April 2019, the applicant filed an application seeking the dismissal of Fun FM's application. That application is supported by a further affidavit of Catherine Brooks (Second Brooks Affidavit).

Should Fun FM's application be dismissed?

[15] The Chief Commissioner's argument is in three broad parts:

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[2] See s 459C(2) of the *Corporations Act*.

(a) The Second Demand claims debts the subject of assessment notices, the production of which (by operation of s 119 of the *Taxation Administration Act* 1996 (NSW) (TAA)) is conclusive evidence of the making and correctness of the assessments. The respondent has made no objection to any of the relevant assessment notices.

(b) The Second Caralis Affidavit does not contain any grounds for setting aside the Second Demand, other than the inference that there is some abuse of process.

(c) In any event, there is no basis either in fact or law for any of the grounds raised in support of the relief sought in Fun FM's application.

[16] The Chief Commissioner relies upon s 459L of the *Corporations Act* 2001:

> "Unless the Court makes, on an application under section 459J, an order under section 459H or 459J, the Court is to dismiss the application."

[17] The parties elected to treat this as the final hearing with the result that, should the Chief Commissioner's application be dismissed, then it would follow that the Second Demand should be set aside.

[18] Fun FM says there are three reasons to set aside the Second Demand:

(a) The Second Demand is defective.

(b) There is a genuine dispute as to the existence or amount of the debt.

(c) The Second Demand constitutes an abuse of process.

[19] Fun FM relies upon the following parts of s 459H and s 459J of the *Corporations Act*.

[20] Section 459H provides as follows:

> "(1) This section applies where, on an application under section 459G, the Court is satisfied of … the following:
>
> (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;"

[21] Section 459J provides as follows:

> "(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
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> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or

(b) there is some other reason why the demand should be set aside.

(2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

What reasons does the respondent advance for setting aside the Second Demand?

[22] Section 459G of the *Corporations Act* provides for the manner in which a statutory demand arising under s 459E of the Act may be set aside:

"(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company."

[23] Section 459G(3) requires that the grounds of challenge to the statutory demand be sufficiently identified in the supporting affidavit – expressly or by reasonably available inference.[3] A mere assertion of a genuine dispute is insufficient to satisfy this requirement.[4]

[24] In *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & North Queensland Pipeline No 2 Pty Ltd; QNI Metals Pty Ltd v North Queensland Pipeline No 1 Pty Ltd & North Queensland Pipeline No 2 Pty Ltd*[5] Holmes CJ[6] held that:

> "[52] … The requirement in s 459G(3) that the application to set aside a statutory demand and the affidavit supporting the application must both be filed within 21 days of the demand itself goes to the jurisdiction of the court to deal with the application. The affidavit must provide support for the application in the sense that it discloses the ground of the application; in the case of an application made in reliance on s 459H, by identifying the dispute. It has been said that it will suffice if that dispute is identified 'expressly, by necessary inference, or by reasonably available inference'.

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[3] *Infratel Networks Pty Ltd (ACN 116 417 884) v Gundry's Telco & Rigging Pty Ltd (ACN 140 711 182)* (2012) 297 ALR 372 at [32] per Young AJA (Hoeben JA and Ward J agreeing).

[4] *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452 at 459 per Sundberg J.

[5] [2017] QCA 297.

[6] Fraser and McMurdo JJA agreeing.

> [53] Courts have been prepared to accept that a ground evidenced by a document annexed to the supporting affidavit can properly be said to be raised by the affidavit. Provided the supporting affidavit filed within the 21 day period reveals the genuine dispute, it may be supplemented by further affidavits filed outside that period. However, appellate courts have held that an affidavit filed outside the 21 day period which raises a new ground may not be used. ('Ground' in this context is used in the sense of a particular area of dispute, rather than in the broad sense of involving a genuine dispute, off-setting claim or substantial injustice.)"

[25] In *GoConnect Ltd v Sino Strategic International Ltd (in liq)*[7] the Victorian Court of Appeal[8] provided a comprehensive summary of the law in this area:

> "[40] In *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)*, this Court set out the principles relating to reliance on supplementary affidavits filed outside the 21-day period. In particular, the Court referred to the analysis of Sundberg J in *Graywinter* as to the minimum requirements that had to be satisfied by the supporting affidavit: (a) the affidavit must state material facts which show that there is a genuine dispute; (b) the affidavit may read like a pleading and need not detail, in admissible form, all the evidence that supports the contention of a genuine dispute; and (c) neither a mere assertion that there is a genuine dispute nor a bare claim that the debt is disputed is sufficient. Where the affidavit did not meet the minimum requirements, the Court lacked jurisdiction and the absence of jurisdiction could not be overcome by the filing of a supplementary affidavit after the expiration of the 21-day period. However, where the minimum requirements had been met, the material relied upon in that affidavit could be supplemented by affidavits filed after that period. Affidavits filed outside the 21-day period which raise a new ground to set aside a statutory demand (as opposed to an affidavit which expands on grounds in an earlier affidavit) cannot be relied upon to set aside a statutory demand. The supporting affidavit must 'fairly alert' the respondent to the nature of the case made in support of the application to set aside the statutory demand. It 'must fairly notify the respondent of the evidentiary basis for a submission that the statutory demand should be set aside on the particular ground upon which the applicant seeks to rely'. It will be sufficient if the material facts on which the applicant intends to rely to support the genuine dispute are 'discernible from the supporting affidavit and/or the annexures and exhibits to it'."

[26] Areas of dispute which are raised only by an affidavit filed outside the 21 day period cannot be relied on by a party in an application to set aside a statutory demand. There is, however, nothing to prevent a party establishing grounds by a document exhibited or annexed to a supporting affidavit which otherwise complies with the requirements of s 459G. Nor is a party

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[7] [2016] VSCA 315 at [40].

[8] Santamaria and Kyrou JJA, Elliott AJA.

prevented from relying on material in a later affidavit that expands on the grounds outlined in a compliant supporting affidavit.

[27] Considering the foregoing, the respondent is not prevented from relying on the First Caralis Affidavit as evidencing the grounds for setting aside the Second Demand. However, it can naturally only do so to the extent that matters related to the First Demand are deposed to as being matters which relate to the Second.

Do the assessment notices constitute conclusive evidence of the making and correctness of the assessments?

[28] There is no dispute that the levies have not been paid. A question arose during argument about the proof of the making of the assessments and their correctness.

[29] The Chief Commissioner relies upon s 119 of the TAA. It provides:

> "Evidence of assessment
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> Production of a notice of assessment, or of a document signed by the Chief Commissioner purporting to be a copy of a notice of assessment, is:
>
> (a) conclusive evidence of the due making of the assessment, and
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> (b) conclusive evidence that the amount and all particulars of the assessment are correct, except in objection or review proceedings when it is prima facie evidence only."

[30] In supplementary submissions the Chief Commissioner submits that s 70 of the *Evidence Act* 1977 effectively applies the provisions of s 119 of the TAA when a document which would have the conclusiveness given by that section in New South Wales is produced in proceedings in Queensland. Section 70 provides:

> "Proof of certain documents admissible elsewhere in Australia
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> Any document which by a law at any time in force in a State or Territory other than Queensland is admissible in evidence for any purpose in a court of that State or Territory without proof of—
>
> (a) the seal or stamp or signature authenticating the same; or
>
> (b) the judicial or official character of the person appearing to have signed the same, shall be admissible in evidence to the same extent and for the same purpose in all courts in Queensland without such proof."

[31] For Fun FM it was argued that s 119 of the TAA cannot apply in Queensland as the parliament of New South Wales cannot make laws which bind other States. So much can be accepted. In any event, the Chief Commissioner does not argue that it can.

[32] It is also argued that the assessments which are exhibited to two affidavits (Brooks and Tavui) can only be hearsay evidence as neither of the deponents properly establish their appointment

or "any original admissible evidence about the facts leading to the assessments". Fun FM then submits that s 70 does not have the effect ascribed to it by the Chief Commissioner. It says that, if s 70 does make the documents admissible, it leaves open the issue of the weight to be given to them.

[33] Section 70 does not appear to have been the subject of any reported consideration. The provision, though, has a long history. It effectively reproduces s 7 of the *Evidence Act* 1898 (Qld) which was considered by the Queensland Law Reform Commission in that body's report on "The Law Relating to Evidence".[9] In the Commission's comments on cl 59 of the draft bill,[10] which formed part of the report, the following is said:

> "Clause 59 would make admissible without further proof in Queensland courts a document that is admissible in some other State or Territory of Australia without proof of the seal or stamp or signature authenticating the document or of the judicial or official character of the person appearing to have signed the document. … If a document comes within the ambit of cl. 59, it will be admissible in evidence though it only purports to be signed or sealed by the proper person."[11]

[34] A similar provision was considered by the Full Court of the Supreme Court of South Australia in *Crawford Earthmovers Pty Limited v Fitzsimmons.*[12] In that case the court was concerned with an appeal from a conviction for driving a non-compliant vehicle on a road. One of the elements to be proved was the ownership of the vehicle and that was sought to be done through reliance upon a certificate issued in the Northern Territory. The legislation relevant to this issue was s 8 of the *State and Territorial Laws and Records Recognition Act* 1901-1964 (Cth) and s 118 of the *Motor Vehicles Ordinance* 1949-1967 (NT).

[35] Section 8 of the *State and Territorial Laws and Records Recognition Act* provided:

> "Whenever by any State Act at any time in force in any State, or by any law of a Territory at any time in force in any Territory:
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> (a) any public document; or
>
> (b) any record required by law to be kept of any public document or proceeding; or
>
> (c) any certified copy of any public document or by-law or of any entry in any public register or book;
>
> is admissible in evidence for any purpose in that State or Territory, it shall be **admitted in evidence to the same extent and for the same purposes**, in all Courts if it purports to be sealed or impressed with a stamp, or sealed and signed, or signed alone, or impressed with a stamp and signed, as directed by such State Act

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[9] *Queensland Law Reform Commission*, "The Law Relating to Evidence" (1975) No 19.

[10] Which became s 70 of the *Evidence Act* 1977.

[11] At 45.

[12] (1972) 4 SASR 116.

> or law of a Territory, without any proof of such seal stamp or signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original document could have been received in evidence." (emphasis added)

[36] Section 118 of the *Motor Vehicles Ordinance* provided:

> "(1) Particulars of the registration of motor vehicles and of the grant of certificates and licences shall be recorded at the office of the Registrar.
>
> (2) An extract from, or copy of, any entry contained in the record, certified by the Registrar, shall, in all courts and upon all occasions, be **received as evidence and deemed sufficient proof of all particulars contained in that entry** without requiring the production of the books, licence, requisition, notice or other document upon which the entry was founded." (emphasis added)

[37] Bray CJ, after considering whether the particular document was an extract, said:

> "Section 118(2) of the Ordinance makes an extract from an entry (or from the record, if that is the true construction) sufficient proof in the Northern Territory of all particulars contained in that entry, and s 8 gives it the same effect here."[13]

[38] Walters J agreed with Bray CJ that the extract was covered by s 8(c) and said that:

> " … by the combined operation of s 8 of the *State and Territorial Laws and Records Recognition Act* and of ss 118 and 119 of the *Motor Vehicles Ordinance*, recognition must be given to a certified extract from an entry of the particulars of registration of motor vehicles, and that the certificate (Exhibit D.1) issued by the Deputy Registrar was admissible in evidence before the learned Special Magistrate, in the same way and for the same purposes as it would be receivable in the Courts in the Northern Territory."[14]

[39] Both Bray CJ and Walters J held that the combination of the two pieces of legislation led to the extract being admissible *and* having the same effect in the South Australian court as it would have had in a Northern Territory court. In other words, it was not just able to be admitted into evidence it was also *sufficient proof* of the particulars in the extract.

[40] Hogarth J disagreed with Bray CJ and Walters J and held that the extract was not a certified copy of a public document and so did not come within s 8(c) of the *State and Territorial Laws and Records Recognition Act.*

[41] The language in s 8 of the *State and Territorial Laws and Records Recognition Act* is, for these purposes, relevantly the same as that in s 70 of the *Evidence Act*. Thus, where s 70 provides

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[13] At 130.

[14] At 155.

that a document "shall be admissible in evidence to the same extent and for the same purpose in all courts in Queensland" it follows that the document will have the same evidentiary force as it would have in the State or Territory from which it came. The purpose of s 119 of the TAA is manifest – it is to bestow finality upon an assessment so it may not be challenged except in identified circumstances. Pursuant to s 70 it has the same effect in Queensland courts.

Can there be a genuine dispute?

[42] Fun FM contends that it is not liable to pay any of the levies. Putting to one side the issue of whether that was properly raised, I will consider the effect of the conclusiveness of the assessments.

[43] A similar situation was considered in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd.*[15] The Commissioner of Taxation had issued statutory demands based upon assessments of unpaid income tax, GST, interest and penalties. Each of the respondents brought review proceedings under Part IVC of the *Taxation Administration Act* 1953 (Cth) (the Administration Act) in the Administrative Appeals Tribunal and each applied under s 459G of the *Corporations Act* for orders setting aside the statutory demands.

[44] Section 177(1) of the Administration Act provided that with respect to income tax, the production of a notice of assessment shall be conclusive evidence of the due making of the assessment and, except in Pt IVC proceedings, shall be conclusive evidence "that the amount and all the particulars of the assessment are correct". There have been, since 1999, a number of amendments made to that legislation and they are set out in the decision of the High Court.[16] The effect was that, with respect to the respondent's tax debts there were "conclusive evidence" provisions which were relevantly indistinguishable from s 119 of the TAA.

[45] After considering all the conclusive evidence provisions the judges who gave the joint decision held that:

> "[57] Nothing turns upon the attribution to a s 459G application of the character of a proceeding in which, as Keane JA said, a tax debt may be disputed by the applicant taxpayer. Section 459G applications by taxpayers are not Pt IVC proceedings and production by the Commissioner of the notices of assessment and of the GST declarations conclusively demonstrates that the amounts and particulars in the assessments and declarations are correct. That being so, **the operation of the provisions in the taxation laws creating the debts and providing for their recovery by the Commissioner cannot be sidestepped in an application by a taxpayer under s 459G of the *Corporations Act* to set aside a statutory demand by the Commissioner**." (emphasis added)

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[15] (2008) 237 CLR 473.

[16] At [25] – [33].

[46] *Broadbeach* was applied by Black J in *In the matter of Precise Training Pty Limited*[17] where an application had been made to set aside a creditor's statutory demand which was based on an assessment made under the TAA. His Honour said:

> "[39] … it seems to me that no genuine dispute can be established given the effect of the Taxation Administration Act. Mr Krochmalik submits, and I accept, that there is no room for a genuine dispute as to the amounts that are the subject of the Demand where it is issued in respect of payroll tax, as set out in the several notices of assessment, and s 119 of the *Taxation Administration Act* provides that the production of a notice of assessment is conclusive evidence of the due making of the assessment and that the amount and all particulars of the assessment are correct … ."

[47] Section 119 of the TAA has the effect of nullifying an argument regarding the existence of a "genuine dispute" under s 459H, but it does not prevent a taxpayer from advancing arguments in respect of s 459J which do not concern the existence of a genuine dispute.

The Caralis Affidavits

[48] The reasons advanced by Fun FM as to why the Second Demand ought to be set aside are not addressed in any detail in the Second Caralis Affidavit. Instead, Fun FM simply refers to the matters set out in the First Caralis Affidavit as forming the basis for setting aside the Second Demand. The Second Caralis Affidavit does not exhibit either the First or Second Demand.

[49] The grounds to set aside the First Demand are set out in paragraphs [6] to [21] of the First Caralis Affidavit under the three headings "Abuse of Process", "Defect in the Statutory Demand" and "Genuine Dispute".

[50] Under the "Abuse of Process" heading, Mr Caralis stated that he did not "specifically recall the [respondent] receiving the assessments referred to in the Demand" and that "none of the assessments claimed under the Demand are attached to either the Demand or the supporting affidavit of Catherine Brooks." The respondent then sets out that the demand has been disputed "for at least five years" and that he believes that the applicant is using the statutory demand process "as a means of avoiding, or attempting to avoid, a proper determination of the dispute."

[51] The "Defect" section identifies several alleged defects in the First Demand and affidavit accompanying that demand. This ground is concerned with matters affecting the form and substance of the First Demand and accompanying affidavit. In Fun FM's outline of submissions and on the day of the hearing in these proceedings, it advanced two new arguments in relation to alleged defects in the Second Demand. First, the Second Demand appears to be based (in part) on debts which are now statute barred. Secondly, there are different versions of the amount payable. Nowhere in the Second Caralis Affidavit does Mr Caralis say that he has any difficulty being able to tell or understand the calculation of the amounts that are owing. Nor does he say anything about the debt being statute barred in part.

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[17] [2018] NSWSC 1383.

[52] Mr Caralis deposes to the Second Demand relating to the same facts and circumstances which gave rise to the First Demand. Those facts and circumstances necessarily encompass the alleged dispute between the parties regarding whether parking levies could be imposed on the respondent. Accordingly, to the extent that the First Caralis Affidavit deposes to the existence of a dispute, so much can be relied on by the respondent in relation to the Second Demand and expanded on by subsequent affidavits, where applicable.

[53] The Second Caralis Affidavit does not depose to what extent the First Demand and accompanying affidavit resemble in form and substance the Second Demand and accompanying affidavit. It does not elucidate whether the alleged defects or abuses of process said to have affected the First Demand have been carried over to the Second. These grounds therefore cannot be considered as being reasons to set aside the Second Demand.

[54] Similarly, the Second Caralis Affidavit does not identify limitation of actions or different amounts of the debt as being defects in the Second Demand. These grounds cannot be considered as being reasons to set aside the Second Demand, with the exception of one issue that is considered below.

[55] That leaves the inference in the Second Caralis Affidavit that the issuing of the Second Demand constitutes an abuse of process because it is similar to a previous demand. This ground may be advanced since it is discernible from the supporting affidavit.

[56] In his Second Affidavit, Mr Caralis deposes:

> "[5] The First Demand was set aside by agreement between the parties and a consent order of the Supreme Court of Queensland in matter number BS 11103/18.
>
> …
>
> [7] The Second Demand appears to relate to the same facts and circumstances which gave rise to the First Demand as the nature of the debt on the First Demand appears to relate to "parking space levies" imposed pursuant to section 9 of the Parking Space Levy Act 1992. The only difference to the First Demand is that the amount claimed has increased.
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> …
>
> [9] I repeat and rely on the matters set out in the First Affidavit [of] this Application to set aside the Second Demand in relation to the claim for $170,850.34.
>
> [10] I dispute that the Applicant is indebted to the Respondent in the amount stated on the Second Demand or any sum at all.
>
> …
>
> [12] I believe that for the reasons set out above the Applicant has a genuine dispute as to the existence of the debt claimed in the Second Demand."

[57] For the reasons set out above it is unnecessary to consider the paragraphs purporting to deal with whether there is a genuine dispute.

[58] The Chief Commissioner submits that the basis of the matters put by Mr Caralis in respect of the First Demand are not deposed to as being matters which relate to the Second Demand as the First Caralis Affidavit concerns a different demand to the one being considered in these proceedings.

[59] The Chief Commissioner's primary submission is that, beyond a bald assertion that Fun FM is not indebted to the Chief Commissioner in paragraph 10, there is no ground articulated in the Second Caralis Affidavit other than the implication that there is some abuse of process by issuing a second demand in respect of what Mr Caralis asserts is the same debt.

[60] The Chief Commissioner says that the demands are not the same because:

(a) the amounts are different,

(b) the First Demand was in respect of debts said to have been created under the *Parking Space Levy Act* 1992 and the Second Demand is in respect of subsequent legislation, the *Parking Space Levy Act* 2009, and

(c) the time periods covered by the two demands are different.

Abuse of process

[61] The service on a company of a statutory demand which is found by the Court to be an abuse of process constitutes "some other reason why the demand should be set aside" pursuant to s 459J(1)(b) of the *Corporations Act*.[18] The court's power under that section exists to maintain the integrity of the process provided under Pt 5.4 of the Act and is to be used to counter an attempted subversion of the statutory scheme, but is not exercised by reference to subjective notions of fairness.[19]

[62] Fun FM contends that issuing the Second Demand constituted an abuse of process. The basis of that submission appears to be the assertion at paragraph 5 of the Second Caralis Affidavit that the First Demand was set aside by agreement between the parties and a consent order of this court. This, as the applicant rightly observes, is incorrect. The respondent's originating application to set aside that statutory demand was dismissed by consent. The First Demand expired on 21 December 2018.

[63] The differences between the demands are slight. Fun FM contends that "bringing a second demand in respect of identical debts and issues may constitute an abuse of process" and cites three authorities for this proposition. Leaving aside the fact that the Demands are not, in fact,

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[18] *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302 at 317–18.

[19] *In the matter of Precise Training Pty Limited* [2018] NSWSC 1383 at [41] per Black J.

in respect of identical debts and issues, the authorities cited by the respondent are readily distinguishable from the present proceedings.

[64] *In the matter of Modern Wholesale Jewellery Pty Ltd* was a case concerned with duplicate demands, neither of which was withdrawn, and parallel proceedings for the same debt.[20] *Re Il Palazzo (Management) Pty Ltd* concerned an argument that the creditor's right to issue a statutory demand was suspended whilst there remained on foot an unresolved application to set aside an earlier statutory demand made in respect of the same debt. While the earlier demand was subsequently withdrawn, Jones J was concerned only with the period during which demands in respect of the same debt were on foot at the same time.[21]

[65] In *James Estate Wines Pty Ltd v Winelink (Australia) Pty Ltd*[22] the plaintiff sought relief on the basis that it would be an abuse of process for the defendant to rely on a statutory demand, because it was substantially identical with a statutory demand previously served. The previous demand had not been withdrawn. Austin J said that:[23]

> "… So far as public policy is concerned, it seems to me that the contention is answered by the observations on this subject made by Gummow J in *David Grant*, particularly at 279, and by the observation that if there is scope for challenging a statutory demand on the principle of 'double proceedings' abuse of process, then the principle will assume, prima facie, that the service of two statutory demands is oppressive unless a proper explanation can be given."

[66] In that case, Austin J held the defendant had provided an explanation for the concurrent existence of two proceedings.

[67] In *K Young Trading Pty Ltd v Tjoi*[24] Barrett J was faced with a set of facts which have many parallels to this case. His Honour's observations apply with equal force in these circumstances:

> "16 I accept that, generally speaking, it is, in the litigation context, an abuse of process to have two claims before the court for the same relief. So too, it might be an abuse of process for a creditor to allow two statutory demands to remain on foot covering the same alleged debt. But that is not the position here.
>
> 17 Two demands were, on 19 December 2008, outstanding in respect of the same debt, being the judgment debt. The plaintiff understandably and properly complained. The defendant promptly responded by withdrawing the first demand, leaving the second alone outstanding. That was the position at all times after 22 December 2008; a position which the defendant validated when it

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[20] *In the matter of Modern Wholesale Jewellery Pty Ltd; In the matter of Global Austral Pty Ltd; In the matter of Modern Wholesale Jewellery Pty Ltd* [2017] NSWSC 236 at [29].

[21] *Re the Corporations Law; Re Il Palazzo (Management) Pty Ltd* [1999] QSC 356 at [9].

[22] (2003) 47 ACSR 72.

[23] At [32].

[24] [2009] NSWSC 260.

> consented last week to an order setting aside the first demand. That action of the defendant was consistent with the withdrawal of the first demand on 22 December 2008 and there is nothing to suggest that the defendant has, at any time since 22 December 2008, sought to rely on or assert the viability of the demand that it withdrew on that day.
>
> 18 The s 459J(1)(b) jurisdiction is typically exercised where it would be unjust, in the light of the purposes for which Part 5.4 exists, to allow to stand a statutory demand not otherwise liable to be set aside. No such injustice appears in this case.
>
> 19 For the period of more than three months since 22 December 2008 the plaintiff has known that it has to contend only with the second demand now before the court. The debt is undisputed. It is, in no sense, unconscionable for the defendant to rely on that second demand. The factor that might originally have made such a stand unconscionable has been absent for the last three months.
>
> 20 If we go back to the litigation analogy, it is as if one action was commenced while another raising the same issues was still on foot, but the earlier action was then discontinued. It could not be said, in those circumstances, that continuation of the second after the first had been discontinued was an abuse of process."

[68] The Second Demand was not issued until the First was discontinued: there was no concurrency of proceedings. The Second Demand updated the amount claimed in respect of the accrual of interest since the First Demand. There was no abuse of process.

Some other reason

[69] Fun FM submits that the Second Demand ought to be set aside under s 459J(1)(b) of the *Corporations Act* because there are different versions of the amount payable based on the Chief Commissioner's own evidence. The differences are as follows:

(a) the Second Demand is said to be supported by the First Brooks Affidavit wherein the deponent affirms that the amount of the debt is $170,850.34, and

(b) in the Second Brooks Affidavit, the deponent now affirms that the amount of the debt is $120,760 plus interest.

[70] This argument, and the related contention that differences in the amount payable constitute a defect in the Second Demand, were not made during the period in which the respondent must, under the *Corporations Act*, advance arguments to set aside a demand. The respondent could have identified in the Second Caralis Affidavit the other four examples of what are said to be variations in the amount payable, but it failed to do so.

[71] Nevertheless, the Second Brooks Affidavit was filed and served after the 21 day period during which the respondent had the opportunity to canvass reasons for setting aside the Second Demand. Accordingly, it could not have addressed issues said to arise from the Second Brooks Affidavit.

[72] The time for determining whether "some other reason" exists is the time when the court considers the application. It is not required to exist when the demand is served. As Barrett J held in *Tatlers.com.au Pty Ltd v Davis:*[25]

> "The particular sequence of events raises a question of timing relevant to s 459J(1)(b), that is, whether the 'other reason why the demand should be set aside' upon which a s 459G applicant relies must be seen to have existed when the statutory demand was served or whether regard is to be had to the position that exists when the court comes to consider the s 459G application. The defendant says that the first approach is the correct one. I do not accept that proposition. Section 459J(1)(b) is a provision that underwrites the statutory purposes reflected in Pt 5.4 as a whole. It was recognised as such by the Court of Appeal in *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24 where there was express approval of the observation to that effect by Bryson J in *Portrait Express (Sales) Pty Ltd v Kodak (A/asia) Pty Ltd* (1996) 132 FLR 300.
>
> When s 459J(1)(b) is invoked, the court is called upon to decide what will best serve the statutory purpose at the time it considers the question. The court should therefore approach the matter in the light of circumstances prevailing at that time rather than by merely paying attention to some historical snapshot.
>
> …
>
> The Court of Appeal emphasised in the *Meehan's* case that this is not some kind of intuitive exercise based on vague notions of fairness. In a case such as the present, the task is to be undertaken on the footing that a statutory demand should be allowed to create a presumption of insolvency if circumstances can be seen to be such that non-payment of the particular single debt within the prescribed period was unjustified. If there was some sound basis for failure to pay, distinct from genuine dispute as to the amount or existence of the debt or the existence of an offsetting claim, then the situation is one in which the policy of the legislation will be subverted if the presumption of insolvency is allowed to arise.
>
> … In *Meehan's* case, Young CJ in Eq, in his short concurring judgment, gave as a hypothetical example of circumstances within s 459J(1)(b) those where 'the alleged creditor has made a statement or representations relating to the statutory demand which have reasonably induced a change of the alleged debtor's position'. This, obviously enough, refers to matters arising after service of the demand."

[73] It follows that the alleged issue created by the Second Brooks Affidavit may be considered by the court. It existed when the respondent's s 459G application was heard but not during the period in which that application could be made.

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[25] (2006) 203 FLR 473 at [11] - [14].

[74] Whether a matter constitutes "some other reason" is to be determined by reference to the legislative intent of Part 5.4 of the *Corporations Act*.[26] In *Meehan & Ors v Glazier Holdings Pty Ltd*,[27] Santow JA said:

> "[35] There being no defect in the demand, reliance was placed upon whether there be 'some other reason' as would satisfy s 459J(1)(b). The claimants contend that such reason cannot be based simply on some need to bring to the relationship between the parties some broad form of perceived fairness or reasonableness. Rather there must be 'sound or positive ground or good reason' to set aside the statutory demand for 'some other reason', which was consistent with the legislative intent of Pt 5.4 of the Act : *Portrait Express (Sales) Pty Ltd v Kodak (A'asia) Pty Ltd* (above) a t 757 per Bryson J; *Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd* (1998) 29 ACSR 11 at 18 per Austin J."

[75] In *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd*,[28] Barrett JA similarly observed:

> "[24] The operation of s 459J(1)(b) is not confined to cases coming within established categories. The section applies whenever there is a need to counter some attempted subversion of the intended operation of Pt 5.4. Its purpose was recently described somewhat more broadly. In *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, the provision was said (at [83]) to be one
>
> > 'which will rarely be employed, but when employed, it will be for the purpose of meeting the demands of justice: *Eumina Investments Pty Ltd v Westpac Banking Corp* [1998] FCA 824 ; 84 FCR 454, 458-459'.
>
> [25] It is thus a remedial provision under which the court may deal with cases not within s 459H or s 459J(1)(a) in a way that is just, having regard to the purpose of the legislation. Furthermore and as the Full Federal Court said in *Hoare Bros Pty Ltd v Deputy Commissioner of Taxation* (above) at 137, it is unwise to attempt to mark out the limits of the s 459J(1)(b) power."

[76] The amount claimed in the Second Demand is $170,850.34. This is the same amount deposed to in the First Brooks Affidavit accompanying the Second demand. Further, the levy, interest and service fee amounts itemised in the Schedule to the Second Demand add up to the amount claimed. So far as the Second Demand is concerned, there are no discrepancies in the amount said to be due and payable to the applicant.

[77] Relief under s 459J(1)(b) is not supported here by a sound or positive ground or good reason which is relevant to the purposes for which the power exists. The Second Brooks Affidavit does not reveal any attempted subversion of the *Corporations Act*. It is clear that the Second Demand can be satisfied if the amount owing in it is paid. A typographical error in a later

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[26] *Meehan & Ors v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229 at [35].

[27] (2005) 53 ACSR 229.

[28] [2014] NSWCA 262.

affidavit, which itself was not filed for the purpose of supporting the Demand, is not a ground for setting aside that Demand in circumstances where the debt amount is otherwise unambiguous.

Conclusion

[78] The Originating Application filed on 28 March 2019 is dismissed. I will hear the parties on costs.