

SUPREME COURT OF QUEENSLAND

[2002] QSC 140

CIVIL JURISDICTION

WILSON J

No 3432 of 2002

IN THE MATTER OF A J AIR PTY LIMITED
(ACN 088 086 891)

ARCHERFIELD AIRPORT CORPORATION PTY LTD
(ACN 081 619 123)

Applicant

and

A J AIR PTY LIMITED (ACN 088 086 891)

Respondent

BRISBANE

..DATE 13/05/2002

JUDGMENT

HER HONOUR: This is an application for winding up on the ground of insolvency. The applicant relies on noncompliance with a statutory demand in the sum of \$2,156.62. The demand was dated 14 February 2002 and served that day. The demand was headed "Form 509H Corporations Law Section 459E(2)(e) Creditor's Statutory Demand for Payment of Judgment Debt".

Paragraph 4 recited that the applicant creditor might rely on a failure to comply with the demand within the period for compliance set out in section 459F(2) as grounds for an application to a Court having jurisdiction under the Corporations Law for the winding up of the company.

In paragraph 5 the respondent was invited to make an application under section 459G of the Corporations Law to a Court having jurisdiction under the Corporations Law for an order setting the demand aside.

The Corporations Law ceased to have effect upon the commencement of the Corporations Act 2001. The new Act contains provisions in terms similar to those in the Corporations Law. It was the Corporations Act which was in force at the time the notice was issued.

By section 9 of the Corporations Act a "statutory demand" is defined as meaning (so far as relevant) a document that is or purports to be a demand served under section 459E.

What then is the effect of a notice referring to the repealed

legislation? Is there a fundamental flaw such that the notice is not one within the definition in section 9 or is there a mere defect?

If it is a defect, the winding-up application must not be dismissed unless the Court is satisfied that substantial injustice has been caused that cannot otherwise be remedied. See section 467A.

"Defect" is defined in section 9 as including an irregularity, a misstatement of an amount or total, a misdescription of a debt or other matter, and a misdescription of a person or entity. There are few cases on what can be another matter for this purpose. One of them is *Re Terra Nova Pty Ltd* (1990) 8 ACLC 825 where an incorrect reference to the affixing of a creditor's company seal was held to be another matter.

This is a very technical area of the law. Noncompliance with a statutory demand gives rise to a presumption of insolvency which can found the winding up of the company.

In this case the document which was served was entitled under repealed legislation. It recited its effect as being a ground for winding up under repealed legislation. It invited an application to set it aside under repealed legislation. In my view it was so fundamentally flawed that it was not and did not purport to be a demand under section 459E of the current legislation. As to this approach see *Topfelt Pty Ltd v. State Bank of NSW Ltd* (1993) 47 FCR 226 at 238.

Accordingly, I find that it was not a statutory demand and noncompliance with it is not a foundation for winding up in insolvency.

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HER HONOUR: I decline to make an order for winding up at this stage. I adjourn the application for winding up to a date to be fixed and I make no order as to costs.
