SUPREME COURT OF QUEENSLAND

CITATION:	*Re: A AAAAAAAAAAAAAAAAAAA AACHEN Aussie Emergency Glass Pty Ltd* [2003] QSC 090
PARTIES:	**SANKEY SECURITY & GLASS SERVICES PTY LTD ACN 005 751 155** (applicant) **v** **A AAAAAAAAAAAAAAAAAAA AACHEN AUSSIE EMERGENCY GLASS PTY LTD A.C.N. 082 203 861 T/as A AAACHEN AUSSIE EMERGENCY GLASS AREA 1** (respondent)
FILE NO/S:	SC No 763 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2003
JUDGE:	Mackenzie J
ORDER:	**That A AAAAAAAAAAAAAAAAAAA AACHEN Aussie Emergency Glass Pty Ltd A.C.N. 082 203 861 T/As A AAACHEN Aussie Emergency Glass Area 1 be wound up in insolvency**
CATCHWORDS:	CORPORATIONS LAW – WINDING UP – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – WHAT CONSITUTES DEMAND – GENERALLY – where statutory demand described relevant law as "Corporations Law" not "Corporations Act" – whether such was a defect rendering the demand fundamentally flawed – whether statutory demand ineffective – whether order for winding up could be made *Corporations Act* 2001 (Cth), s 9, s 459E, s 1370, s 1371, s 1407 *Quitstar Pty Limited v Cooline Pacific Pty Ltd* [2002] NSWSC 402, unreported, NSW Supreme Court, 10 May 2002, Barrett J, approved *Re: AJ Air Pty Limited* [2002] QSC 140, unreported, Queensland Supreme Court, 13 May 2002, Wilson J, not

followed

COUNSEL: M J Solomon for the applicant
No appearance for the respondent

SOLICITORS: Solomon Lawyers for the applicant
No appearance for the respondent

[1] **MACKENZIE J:** When this matter was before me on 28 March 2003 I ordered that the company be wound up. The application to wind up came before a Deputy Registrar earlier the same day. The Registrar referred the matter to the court because there were conflicting authorities concerning the efficacy of the creditors' statutory demand. The only issue is whether the statutory demand is ineffective because, instead of describing the relevant statute as the *Corporations Act*, it described it as the *Corporations Law*.

[2] In *Archerfield Airport Corporation Pty Ltd v A J Air Pty Limited* [2002] QSC 140, unreported, Queensland Supreme Court, 13 May 2002, Wilson J., in an *ex tempore* judgment, held that an identical defect rendered the demand fundamentally flawed. It was held that it was not and did not purport to be a demand under s. 459E of the *Corporations Act* 2001 (Cth).

[3] On the other hand, Barrett J. dismissing an appeal from a Master in *Quitstar Pty Ltd v Cooline Pacific Pty Ltd* (2002) 168 F.L.R. 213, held, on 10 May 2002, that notwithstanding references to the superseded legislation, the document was a "statutory demand" within the definition of that term in s. 9 of the *Corporations Act*. Wilson J. was not referred to that decision for reasons that are fairly obvious.

[4] In *A J Air*, Wilson J. referred to the definition of "statutory demand" in s. 9 of the *Corporations Act* where it is defined as meaning a document that is or purports to be a demand served under s. 459E of the Act. She identified one question as being whether there was a fundamental flaw or a mere defect. "Defect" by definition includes an irregularity through a misstatement of an amount or total, mis-description of the debt or other matter and misdescription of a person or entity. Wilson J. referred to the consequence of non-compliance with a statutory demand that there was a presumption of insolvency and concluded that because it referred to the repealed legislation as the source of the document, and its consequences, there was a fundamental flaw. She referred to *Topfelt Pty Ltd v State Bank of New South Wales Ltd* (1993) 47 F.C.R. 226, 238 as authority for this approach.

[5] In *Quitstar*, Barrett J. identified the appellant's argument as being that a reference to s. 459E of the *Corporations Act* 2001 was an essential element of the content of the document, without which the document was not a statutory demand. Additionally, reference to s. 459E of the *Corporations Law* was, since the *Corporations Law* was no longer in force, a reference which would confuse the recipient. Barrett J. rejected these arguments. It is not apparent that the arguments which found favour with him to which I will refer shortly were addressed to Wilson J.

[6] Particular reference was made in *Quitstar* to s 1370(1) of the *Corporations Act* which describes the object of Part 10.1 as being:

> "(1) …to provide for a smooth transition from the regime provided for in the old corporations legislation of the States and Territories … to the regime provided for in the new corporations legislation, so that

> individuals, bodies corporate and other bodies are, to the greatest extent possible, put in the same position immediately after the commencement as they would have been if:
>
> (a) that old corporations legislation had…been valid Commonwealth legislation …; and
> (b) the new corporations legislation (to the extent it contains provisions that correspond to provisions of the old corporations legislation as in force immediately before the commencement) were a continuation of that old corporations legislation as so applying."

Section 1370(2) provides:

> (2) "In resolving any ambiguity as to the meaning of any of the other provisions of this Part, an interpretation that is consistent with the object of this Part is to be preferred to an interpretation that is not consistent with that object."

Section 1371 defines an instrument as meaning any instrument of a legislative character or of an administrative character or any other document.

[7] Reliance was also placed on s. 1407 which relevantly provides that a reference in an instrument to an Act that is part of the old Corporations legislation is taken after the commencement of the new Corporations legislation to include a reference to the corresponding part of it. Barrett J. interpreted this as manifesting an intention that whenever a reference to a provision of the *Corporations Law* is found in an instrument to which s. 1407(1) applies, including an instrument created after the commencement of the *Corporations Act* 2001, the reference is to be regarded as including a reference to the corresponding provision of the *Corporations Act*. He concluded that it was not limited to instruments created prior to the commencement of the Act.

[8] Whether or not the scope of s. 1407 is as wide as that, in my view the demand is a document which purports to be a demand served under s. 459E of the legislation in force at the time the demand was made, the *Corporations Act*. The form of the demand is precisely the same as would be appropriate for a demand under the *Corporations Act*, save for the references to the *Corporations Law*. The procedure to be followed by a company that wishes to apply to have the demand set aside is precisely the same under both the Law and the Act. A person who made the most elementary inquiries, if confused, would discover that at the time the demand was made, the Law had ceased to have effect and the Act was in operation in identical terms in relevant respects. The risk of genuine confusion is minimal.

[9] In my view the history of the legislation gives ample indication, of which s. 1370 is a particular manifestation, that the intention was to ensure that there should be a seamless transition from the Law to the Act. All provisions relevant to this procedure are identical in the Law and the Act. It is difficult to see why an inadvertent reference to the Law rather than the Act in a document in a form which is appropriate to each legislation should not be treated as an irregularity of the character of a misdescription rather than a fatal flaw. While erroneous references to the Law in a document issued a considerable time after the Act came into force may be open to legitimate criticism on the grounds of lack of care or efficiency, no

substantial injustice would be caused if the erroneous reference were to be treated as an irregularity.

[10] In the present case no attempt was made to set aside the demand. There is no suggestion that the company was misled in any way in failing to do so. The conclusion therefore is that the demand was not ineffective to bring into operation the presumption of insolvency once there was no application to set aside the demand within 21 days. For these reasons an order winding up the company could be made and in the event was made on 28 March 2003.