SUPREME COURT OF QUEENSLAND

CITATION:	*Junction Grosvenor Pty Ltd v The Deputy Commissioner of Taxation* [2003] QSC 227
PARTIES:	**JUNCTION GROSVENOR PTY LTD ACN 085 990 003** (applicant) v **THE DEPUTY COMMISSIONER OF TAXATION** (respondent)
FILE NO/S:	SC No 4877 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	24 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2003
JUDGE:	McMurdo J
ORDER:	**1. The statutory demand be set aside.**
CATCHWORDS:	CORPORATIONS LAW – STATUTORY DEMAND - where application to set aside statutory demand – where demand said to be owing by the applicant as a partner in the Grosvenor Unit Trust and Junction Grosvenor Pty Ltd – where applicant claims not to be a partner in the partnership – whether there is a genuine dispute – whether s 459H enlivened – whether statutory demand should be set aside *Corporations Act* 2001 (Cth) 459H, 459J, *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, applied *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362, applied
COUNSEL:	R J Anderson for the applicant M K Stunden for the respondent
SOLICITORS:	Morgan Conley Solicitors for the applicant Australian Taxation Office Legal Practice for the respondent

[1] **McMURDO J:** This is an application to set aside a statutory demand served on the applicant by the respondent and dated 13 May 2003. The demand was for an amount of $186,650.70, said to be owing by the applicant "as partner in the partnership of the Grosvenor Unit Trust and Junction Grosvenor Pty Ltd ABN 47

322 733 423". The particulars of the debt, as set out in the demand, were as follows:

> "Running Balance Account deficit debt as at 13 May 2003 in respect of amounts due under the BAS provisions as defined in subsection 995-1(1) of the *Income Tax Assessment Act* 1997 ("the ITAA 1997") [BAS provisions include, generally: the goods and services tax provisions, the PAYG withholding provisions, the PAYG instalment provisions, the fringe benefits tax instalment provisions, the fringe benefits tax instalment provisions and the deferred company instalment provisions] and the general interest charge payable under section 8AAZF of the *Taxation Administration Act* 1953 ("the TAA 1953"), being a debt due and payable by the company pursuant to section 8AAZH of the TAA 1953"

[2] The applicant is a company of which the only shareholder and director is Mr Daryl Fennell. He has sworn affidavits in support of this application in which he says that the applicant was not a partner in such a partnership and, accordingly, it is not indebted to the respondent. The application is therefore made in reliance upon s 459H, although, as I shall mention below, there are alternative grounds in reliance upon s 459J.

[3] The matter concerns a business conducted from licensed premises in Brisbane which traded under the name "The Grosvenor on George". According to an affidavit from Mr Fennell, in about July 2001 the applicant was invited by a Mr Peter Austin to provide "capital funding" for the trustee of a unit trust which conducted that business. The trustee was the holder of the required liquor licence, and Mr Austin was its nominee for that purpose. The trustee is a company now called Austin Consulting Pty Ltd. Mr Fennell swears that the applicant's involvement was as a lender only, and that it was not otherwise involved in the conduct of the business from these premises. He does concede that it was the applicant's original intention to participate in the business as a joint venturer, but that was not pursued because of a change in the policy of the Queensland Government in relation to gaming licenses for such premises. Mr Fennell swears that in September 2001 he learnt of the Treasurer's announcement of 8 May 2001, which had the effect for the subject business of making it desirable to rely upon an existing application for a gaming machine licence which had been lodged by Mr Austin's company prior to the Treasurer's announcement. To have made the applicant a joint venturer would have made it difficult to obtain a gaming machine licence. Mr Fennell swears that as a result, he and Mr Austin decided that the joint venture would not proceed, and that the business would be operated only by Mr Austin's company with the applicant's involvement being "reduced to that of a lender". Upon Mr Fennell's evidence, Mr Austin retained all of the relevant records relating to the business. The business was sold to an unrelated party in September 2002.

[4] However, the respondent was made to believe otherwise. On 28 August 2001, the respondent received an application for registration for the New Tax System from "The Grosvenor on George Joint Venture" signed by Mr Austin who described himself as a "director of joint venturer". The venturers were shown as Mr Austin's company and the applicant. On 10 October 2001, the respondent received a fax from a registered tax agent, the firm of BDO Kendalls, in which that firm said that

the application had been wrongly made for registration as a joint venture and it requested that the application be amended "to indicate partnership as the type of entity to be registered and also allocated a tax file number". As a result the so called partnership was registered and given an Australian Business Number and tax file number in November 2001. Thereafter, business activity statements were lodged purportedly on behalf of the partnership. However, amounts have not been fully paid in accordance with those statements and it is the unpaid balance which is the subject of the respondent's statutory demand. After amounts became overdue BDO Kendalls had correspondence with the respondent in which some extensions of time were requested purportedly on behalf of the partnership. As recently as last month Mr Boyland, from BDO Kendalls, has maintained that there was a partnership and the applicant was a partner. According to Mr Boyland, he had instructions from both of the alleged partners to make some offer of settlement to the respondent.

[5] In the case of the monies the subject of this statutory demand, the respondent does not have the benefit of provisions such as s 204 and s 208 of the *Income Tax Assessment Act* 1936 (Cth). For the respondent it is conceded that if there is a genuine dispute as to whether the applicant was ever a partner and as to whether the business activity statements were lodged on its behalf, then the debt would be genuinely disputed for the purposes of the operation of s 459H. It is then a matter of assessing whether there is a genuine dispute as to those matters. All which the court needs to decide is whether there is a genuine dispute: it is not required to consider the merits of the ultimate outcome.[1]

[6] Mr Fennell has sworn affidavits which unambiguously deny the existence of any partnership. His evidence contains an explanation for why no partnership or even an association in the nature of a joint venture was formed. There seems to be nothing inherently implausible in that evidence. It is not as detailed as one would expect on a trial of a proceeding to recover the debt, but that is not to deny that it demonstrates a genuine dispute for the purposes of this application. Against Mr Fennell's evidence, there is no admission by him such as a document signed by him acknowledging the alleged partnership. The respondent has sought a copy of a partnership agreement from BDO Kendalls but none has been produced. On 12 February this year director penalty notices were issued to Mr Austin and Mr Fennell. Mr Fennell paid the amount the subject of his notice, which was $61,690.55, but under protest. Mr Boyland of BDO Kendalls has an unequivocal view that the applicant was indeed a partner in the conduct of this business, but his statements are not admissions by the applicant. Mr Fennell and Mr Austin appear to have owned the company Grosvenor Investments George & Ann Pty Ltd, which owned the freehold of the site from which the business was conducted, and which was sold to the purchaser of the business in September 2002. However, that is not inconsistent with Mr Fennell's evidence.

[7] In my view the applicant's contention is a plausible one requiring investigation, to adopt what McLelland CJ in Eq said in *Eyota v Hanave* (1994) 12 ACSR 785. I am satisfied that there is a genuine dispute as to the debt the subject of this demand for the purposes of the operation of s 459H. Accordingly the demand must be set aside.

---

1 *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362 (Hayne J)

[8] It is unnecessary then to consider the alternative grounds on reliance upon s 459J. One of those grounds was that the demand was defective, in its failure to sufficiently distinguish between the various types of tax and the respective amounts for them. However, there is no evidence of any substantial injustice caused to the applicant from that alleged defect. There was also reliance upon s 459J(1)(b), and a series of cases which have considered that provision in the context of a statutory demand issued by the Commissioner of Taxation: see *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302; *Re Softex Industries* [2001] QSC 377; 187 ALR 448 and *Willemse Family Co Pty Ltd v Deputy Commissioner of Taxation* [2002] QSC 292. In those cases the applicant company had to rely upon s 459J, because of the impact of legislative provisions which precluded it from disputing a debt the subject of a notice of assessment of income tax. As I have mentioned above, however, the present case is not of that kind.

[9] The statutory demand will be ordered to be set aside and I shall hear the parties as to costs.