SUPREME COURT OF QUEENSLAND

CITATION:	*Re: Asia Pacific Glass Pty Ltd* [2003] QSC 406
PARTIES:	**SINDEA TRADING CO PTY LTD** ACN 002 708 732 (applicant) **v** **ASIA PACIFIC GLASS PTY LTD** ACN 060 554 994 (respondent)
FILE NO/S:	S5920 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2003
JUDGE:	Mackenzie J
ORDERS:	**1. The application to wind up the respondent and the application for leave under s459S of the *Corporations Act* 2001 (Cth) are adjourned to a date to be fixed** **2. The application to dismiss the winding up application as an abuse of process is dismissed** **3. The respondent file and serve upon the applicant all additional material relating to solvency upon which it wishes to rely on or before 16 December 2003** **4. Either party may bring the matter on on 2 days notice to the other party** **5. The respondent pay the applicant's costs of and incidental to the proceedings on 15 September 2003 to be assessed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – WHAT CONSTITUTES INSOLVENCY OR DEEMED INSOLVENCY – where applicant earlier served creditors statutory demand – where respondent sought to have set aside – where order to set aside subject to condition that respondent commence proceedings by specified date – where respondent sought to comply – where erroneous refusal to accept statement of claim by registry – where accepted and served out of time – where applicant bought application to wind up respondent – where respondent claimed no available presumption of insolvency

and abuse of process of court – whether presumption of insolvency existed

CORPORATIONS – WINDING UP – WINDING UP BY COURT – WINDING UP APPLICATION – OTHER MATTERS – where dispute as to indebtedness – where offsetting claim – whether leave should be granted to oppose application for winding up on those grounds previously relied upon – whether those grounds material to proving company is solvent

Corporations Act 2001 (Cth), s 459G, s 459S

Braams Group Pty Ltd v Miric [2002] NSWCA 417; (2002) 171 FLR 449
Chief Commissioner of Stamp Duties (NSW) v Paliflex Pty Ltd (1999) 17 ACLC 467
Expile Pty Ltd v Jabb's Excavations Pty Limited [2003] NSWCA 163
Redglove Holdings Pty Ltd v GNE & Associates Pty Ltd (2001) 20 ACLC 304
State Bank of New South Wales v Tela Pty Ltd (No 2) [2002] NSWSC 20
Switz Pty Ltd v Glowbind Pty Ltd; Glowbind Pty Ltd v Switz Pty Ltd [2000] NSWCA 37; (2000) 48 NSWLR 661
Williams v Spautz (1992) 174 CLR 509

COUNSEL: C Coulsen for the applicant
P A Hastie for the respondent

SOLICITORS: Hunt & Hunt for the applicant
Lees Marshall Warnick for the respondent

[1] **MACKENZIE J**: This is an application for winding up the respondent. The basis of the application is that on 6 December 2002 the applicant served a creditor's statutory demand in respect of a sum of $242,095.49 asserted by the applicant to be owing to it by the respondent for goods purchased by the respondent. The respondent had applied to the New South Wales Supreme Court to set aside the notice of demand, raising both a dispute as to the amount owing and an offsetting claim.

[2] On 23 April 2003, Barrett J ordered that the statutory demand be set aside on condition that the respondent no later than 31 May 2003 commence in a court of competent jurisdiction proceedings described in an affidavit read in the proceedings. In the affidavit in support of the application to wind up filed in this court on 3 July 2003 the applicant's solicitor deposed that the respondent had failed to observe those conditions. On 24 July 2003 a notice of appearance to oppose the application was filed on behalf of the respondent on the grounds that there was no available presumption of insolvency and that the commencement and maintenance of the proceedings constituted an abuse of process of the court. In the alternative, if a presumption of insolvency existed, leave was sought under s 459S of the *Corporations Act* 2001 (Cth) to raise identical grounds to those

availed of before Barrett J in support of the application to set aside the statutory demand.

[3] The chronology of events, according to affidavits filed on behalf of the respondents, was that on 30 May 2003, a Friday, a clerk from the Sydney solicitor's office tried to file the statement of claim contemplated by Barrett J's order in the Supreme Court of New South Wales but the document was refused by the registry on a ground conceded by the registrar in subsequent correspondence to be erroneous. Notwithstanding the fact that it was filed later than the date required by the order, the respondent's solicitor believed, according to correspondence that his "…client was not irredeemably prejudiced…" by the refusal to accept the document. The document was accepted by the registry on Monday 2 June 2003.

[4] On 3 June 2003 a copy of the statement of claim was forwarded to the applicant's solicitors' DX box but they declined to accept service. Eventually on Friday 20 June 2003, it was posted by ordinary post to the registered office of the applicant in Brisbane and received by the applicant on Wednesday 25 June 2003. The applicant filed an appearance in the New South Wales Supreme Court on 10 July 2003 and grounds of defence on 22 July 2003.

[5] I was informed that on the return date for the winding up application, it was adjourned to allow the respondent to apply to the Supreme Court of New South Wales for orders varying Barrett J's orders made on 23 April 2003 (misdescribed in the affidavit of Mr Roberts of 15 September 2003 as the order of 23 July 2003). On 12 September 2003 Barrett J refused the application.

[6] In his reasons, Barrett J recounted that he had accepted that there was "at least some basis in logic sufficient to be accepted" at that stage of proceedings that there may be an offsetting claim of described monetary value, but that the quantification was "of the broad-brush kind that might not in the fullness of time withstand detailed scrutiny". He also noted that the intention expressed some months prior to initiate proceedings and commence the action for breach of contract and unconscionable conduct had not been acted on by the time of the hearing in April.

[7] Barrett J proceeded to consider "…the extent to which the steps taken by the defendant constituted fulfilment of the condition to which the order was made subject". He accepted the present applicant's submission that non-compliance was not confined to failure to file the claim by 31 May 2003. None of the commencement of legal proceedings nor filing and service of the originating proceedings nor communication of the "particulars of claim and of damages" had occurred within the time allowed. With regard to the particulars Barrett J was of the view that they were never given in terms of the order.

[8] After referring to *Australian Vineyard Management Ltd v Madden; Brancourts Nominees Pty Ltd v Madden* [1998] NSWSC 84 and *Natcraft Pty Ltd v WIN Television Pty Ltd* (2003) 1 Qd R 196, he held that failure to comply with the conditions to which the order of 23 April 2003 was subject meant that the beneficial effect of the order in favour of the plaintiff had ceased, so that the statutory demand may no longer be regarded as "set aside". The notice therefore continued to stand. It was not open to the court to recast the conditions to suit

events that had happened because that would subvert the strict interpretation given to s 459G in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265. Even if there was discretion available under the rules of court, the purpose of s 459G(2) would cause the court in the exercise of its discretion to refuse the order.

[9] In the original proceedings to set aside the notice of statutory demand Barrett J analysed the elements of the applicant's case as comprising, in relation to the allegation of "genuine dispute", an allegation that about $70,000 was money not yet due and payable to the respondent because the applicant had not itself received payment from those to whom the goods had been supplied and about $26,000 being moneys allegedly to be credited to the respondent for goods returned to the applicant. With respect to the offsetting claim an amount in excess of $775,000 was claimed for alleged breach of the distribution agreement. Subsequent pleadings in the Supreme Court action show that there is a dispute whether the agreement was for exclusive distributorship and as to a number of other matters, depending on how that principal issue is resolved.

[10] I have gone into some detail in analysing Barrett J's reasons to show that he considered that the concern he had about the "broad brush" approach to quantification had not been allayed by the pleadings. It was not merely the failures to commence the action and filing and serving out of time that were the critical failures. It is therefore inevitable, and conceded by the respondent, that I should consider the matter on the basis that the presumption of insolvency arising from the failure to set aside the notice of demand in a timely way has arisen and that under s 459S leave is necessary to oppose the application on a ground previously relied on. It is also necessary, in view of the prohibition in s 459S(2), to consider whether the ground is material to proving that the company is solvent.

[11] Since the presumption of insolvency had arisen, the submission was made on behalf of the applicant that a line of authority including *Chief Commissioner of Stamp Duties (NSW) v Paliflex* (1999) 17 ACLC 467, *Switz Pty Ltd v Glowbind Pty Ltd; Glowbind Pty Ltd v Switz Pty Ltd* [2000] NSWCA 37; (2000) 43 (NSWLR) 661, *Braams Group Pty Ltd v Miric* [2002] NSWCA 417 and *Expile Pty Ltd v Jabb's Excavations Pty Limited* [2003] NSWCA 163 applied. Under this line of authority the respondent would be required to prove its solvency. The case is not one where the respondent seeks to prove solvency where the disputed debt is owing. In the affidavit of Mr Mace affirmed on 15 August 2003 it is asserted that to the best of his knowledge the company is solvent. Save for the disputed debt, the company is said to have no other creditors. In addition it has assets, leaving aside those associated with the legal proceedings between the applicant and the respondent, in the form of trade debtors in the sum of $40,000.

[12] Mr Watts, a partner in the accountancy firm that has acted for the respondent for 7 years, annexes to his affidavit a balance sheet for the year ending 30 June 2002 and MYOB records for the year ending 30 June 2003. He swears that the applicant's claim is not due and payable because there is a dispute with respect to $96,000 and because of the potential value of the counter-claim. He concludes that if the amount claimed by the applicant were included in the balance sheet he would be of opinion that the respondent would not be in a position to pay its debts as and when they fell due unless a significant injection of funds was made

by the directors or shareholders. If the amount claimed is excluded from the balance sheet he would be of opinion that the respondent was in a position to pay its admitted debts as and when they fell due.

[13] The applicant drew attention to the apparent non-capital purchases and the absence of sales in the April to June 2003 BAS and to the non-capital purchases in excess of $47,000 and sales of about $5,300 in the January to March 2003 BAS. It was submitted that these purchases were not reflected in the inventory in the records for the year ending 30 June 2003. It was submitted that this suggested that the company was incurring debts and passing stock on to another entity or entities without actively trading itself. It was further submitted that in any event the production of balance sheets was not decisive of the proper test of solvency, the ability to pay debts as and when they fell due.

[14] *Switz Pty Ltd v Glowbind Pty Ltd* discussed the concept of a ground being "material to proving that the company is solvent" in a case where the court acted on the basis that the defendant had taken the stance that it was solvent whether or not the disputed debt was due and owing. Spigelman CJ said at paragraph 43:

> "The words are not "material to solvency" or "material to finding solvency" but "material to proving" solvency. The use of the word "proving", a present participle in the active voice, indicates that the test to be applied to a process then under way, or in contemplation, before the Court. Subsection 459S(1) makes it clear that the process of "proving" is being conducted by the company."

[15] After referring to the statutory context of an application under s 459S he referred to competing public interests on the one hand in avoiding the consequences of an otherwise solvent company having to pay a disputed sum to avoid the winding up process until the entitlements of the parties were resolved and, on the other, of facilitating the winding up of companies that were undoubtedly insolvent. He said:

> "These are offsetting public interests. The legislature has adopted a particular scheme which causes the balance to be drawn in a specific way. The circumstance that commercial injustices may, on some occasions, be caused to the debtor company by the operation of that scheme, may be offset by the commercial injustices that the continued operation of an insolvent company may cause to existing and, if permitted, increase or future creditors of such a company."

[16] He then explained the scope of s 459S, with focus on the facts of the case, in the following terms:

> "53 By the time an application under s459S is made, the company will be presumed to be insolvent and will have the burden of proving that it is not. In my opinion s459S(2) directs attention, in part, to what it is that the company intends to prove and how it intends to prove it. If the company is not prepared to contemplate the possibility that its assertion of solvency is subject to qualification, then the Court cannot be "satisfied" of the mandatory precondition in s459S(2). An objective element is introduced by

> the word "material" but that can only be determined after identifying the company's contentions.
>
> 54 If, as here, the company intends to prove that it is solvent whether or not a debt is payable, then with respect to a ground based on dispute about the debt, the test of materiality to it "proving" its solvency, cannot be satisfied.
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> 55 The process of proving solvency is not some kind of forensic game. Solvency is a matter peculiarly within the knowledge of the company. The primary source of information on the solvency of a company must be the company itself.
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> 56 It may well prove to be the case that whether or not a particular debt is owing is material, indeed crucial, to a company being able to establish its solvency. However, if the company itself is not prepared to mount a case which contemplates that as a possibility, then it is not open to the Court to be "satisfied" in the sense required by s459S(2) on the basis that the company should be protected from itself. As I have said, the fact that the company does intend to so contend would no determine the issue of whether the disputed debt is "material", let alone whether leave should be granted under s459S(1). On the submissions made to this Court, these issues do not arise."

[17] *Braams Group Pty Ltd v Miric* was a case where a money judgment had been obtained against the company and Mr Braams personally on a pleading which sought a money judgment against the natural person only. Relief against the company relating to the transfer of shares was abandoned at the hearing at first instance. It seemed to be accepted that there were good prospects of a successful appeal and the appeal was ultimately allowed against the primary judge's judgment. When the judgment had been originally given it was stayed for 7 days but no application was subsequently made to extend it. Notice of appeal had been filed promptly but no application for a stay was made.

[18] The notice of statutory demand based on the judgment was delivered but no application was made to set it aside. Winding up proceedings were then instituted. The respondent then filed a notice of motion seeking to stay or adjourn the application and sought leave to oppose the winding up on the ground of a genuine dispute (which was plainly a ground which could have been raised in contesting the notice of statutory demand). Because the company had not successfully applied to have the notice of statutory demand set aside, the presumption of insolvency applied. The judge at first instance found that on the evidence before him the company was insolvent in any event. The importance of this in relation to s 459S is that the provision does not lead to setting aside of a statutory demand and does not remove the presumption of insolvency. As Austin J said in *Paliflex* at 481:

> "Having granted leave, the Court's task is to deal with the proceedings for winding up, rather than cutting away the demand which is there substratum. The overall question of solvency is the critical issue. If it emerges that the debt upon which the applicant has relied is not owing, the Court may grant

> leave to a creditor to be substituted as applicant, and if that happens the new applicant may be able to take advantage of the presumption of insolvency which arose out of non-compliance with the initial demand."

[19] In *Braams*, Stein JA, in a judgment agreed with by Mason P and Ipp JA said in para 53 with respect to s 459S:

> "Under this provision the company would have needed to be granted leave to dispute the debt since it was matter which could and should have been raised in an application to set aside the statutory demand and made within 21 days of its service. In addition, s 459S(2) meant that the court could only grant leave if the ground was material to proving solvency. As Austin J said in *Paliflex*, the critical issue is the question of solvency."

[20] *Expile* was principally concerned with the nature and sufficiency of evidence to rebut the presumption of insolvency. The New South Wales Court of Appeal endorsed Weinberg J's catalogue of propositions in *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728 on the issue

[21] Turning to the facts of the present case, the grounds that the respondent is not indebted to the applicant and the existence of an offsetting claim arising from the relationship upon which the alleged debt is founded were not disputed as material to proving that the company is solvent. Since it was not suggested that the company is solvent if the debt is due and payable the first qualification, i.e. that in s 459S(2), is made out.

[22] The question whether leave should be granted otherwise then remains. *Braams* is an example of a case where the company was held to have visited the consequences on itself by its unjustifiable inaction. In the present case the respondent was held to have failed to comply with the terms of a condition upon setting aside the statutory demand. One aspect of the failure involved an erroneous refusal by the registry of the New South Wales Supreme Court to accept documents for filing on the last working day available for doing so. However, it was held that there were other deficiencies so that rejection of the documents was not of itself critical. If it be relevant to classify the defaults in *Braams* and in this case the respondent's default in the present case was, in my view, less unjustifiable than that in *Braams*.

[23] In any event the major issue in the present case is whether there is evidence of solvency, the onus lying on the respondent to prove that fact. The difficulty is that only desultory and somewhat unsatisfactory attempts to deal with the issue have been made. While there is evidence from the accountant, Mr Watts, and from Mr Mace in which they both assert solvency if the indebtedness in the sum demanded is disregarded, they do not necessarily relate to the same date; nor are they clearly reconcilable in methodology.

[24] I also note that the application was filed on 3 July 2003, served on 7 July 2003 and was returnable on 18 August 2003. The notice of appearance was filed on 24 July 2003, with the grounds of opposition being that there was no available presumption of insolvency; the commencement and maintenance of the proceedings were an abuse of process; and that if there was a presumption of

insolvency, leave should be granted under s 459S to raise the identical grounds raised in the New South Wales proceedings which were relevant to proof of solvency.

[25] When the matter came on on 18 August 2003, two of the affidavits filed by leave were those of Mr Mace, sworn on 15 August 2003 and Mr Prowse, a solicitor, sworn on 13 August 2003 the latter of which annexes material relating to the basis of the respondent's defence to the applicant's claims and to the proceedings in the New South Wales Supreme Court. It is apparent that it was accepted that the company was to blame for the proceedings being adjourned on 18 August 2003 since it was ordered to pay costs thrown away. The only additional substantive documents filed by the time the matter was heard by me on 15 September 2003 were two affidavits of Mr Watts sworn on 11 September and 15 September 2003, filed and read by leave on the day of the hearing. They are not particularly satisfactory because while Mr Watts is a partner in the firm which acts as the company's accountant, he is not the partner who usually deals with the company's affairs. That person was "not available to make (the) affidavit". The documents annexed are snapshots of the company's position at past times rather than analysis of the company's solvency at the time of hearing although they tend to indicate what the state of the company was if the disputed debt is disregarded.

[26] Because of the unsatisfactory pattern of last minute steps being taken by the applicant, I have seriously considered refusing its application for leave and granting the application to wind it up. However, because of the particular circumstances of the case, I propose to give the respondent one final chance to provide cogent evidence of solvency in proper form. However, that opportunity will only be granted on the basis that it must pay the costs of the proceedings of 15 September 2003 in any event. The time allowed will be short. The issue of solvency should by now have been fully addressed and it should only be a matter of putting the evidence in a form that addresses all relevant issues.

[27] The respondent's case, insofar as it relies on the allegation that the application to wind it up is an abuse of process fails. The facts that there remain a dispute over the debt or that there is an assertion of solvency do not of themselves cause commencement of proceedings to be characterised in that way. The reasoning in cases such as *Redglove Holdings Pty Ltd v GNE & Associates Pty Ltd* (2001) 20 ACLC 304, *State Bank of New South Wales v Tela Pty Ltd (No 2)* [2002] NSWSC 20, and *Braams* is applicable. There is no evidence before me of the kind which fits the definition of abuse of process in *Williams v Spautz* (1992) 174 CLR 509, 526.

Orders:

1. The application to wind up the respondent and the application for leave under s459S of the *Corporations Act* 2001 (Cth) are adjourned to a date to be fixed;
2. The application to dismiss the winding up application as an abuse of process is dismissed;
3. The respondent file and serve upon the applicant all additional material relating to solvency upon which it wishes to rely on or before 16 December 2003;
4. Either party may bring the matter on on 2 days notice to the other party;

5. The respondent pay the applicant's costs of and incidental to the proceedings on 15 September 2003 to be assessed.