SUPREME COURT OF QUEENSLAND

CITATION:	*KW & KM Quinn Investments P/L v DCT* [2004] QCA 91
PARTIES:	**KW & KM QUINN INVESTMENTS PTY LTD** ACN 080 376 576 (applicant/respondent) v **DEPUTY COMMISSIONER OF TAXATION** (respondent/appellant)
FILE NO/S:	Appeal No 9491 of 2003 SC No 7029 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	31 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2004
JUDGES:	Davies JA, Fryberg and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TAXES AND DUTIES - INCOME TAX AND RELATED LEGISLATION - OBJECTIONS AND APPEALS - APPEAL TO COURT - REVIEW OF MATTER OF JUDGMENT, DISCRETION OR OPINION - where the learned primary judge set aside a statutory demand made by the appellant pursuant to Division 2 Part 5.4 of the *Corporations Act* 2001 claiming income tax and interest - where the learned primary judge found there was "some other reason why the demand should be set aside" within the meaning of s 459J(1)(b) *Corporations Act* 2001 - where an application has been made by the respondent to the Administrative Appeals Tribunal seeking an extension of time within which to seek review - whether the learned primary judge erred in setting aside the statutory demand *Corporations Act* 2001 (Cth), s 459J(1)(b) *Hoare Bros v The Commissioner of Taxation* (1996) 62 FCR 302, cited

Willemse Family Company Pty Ltd v Deputy Commissioner of Taxation [2003] 2 QdR 334, applied

COUNSEL: P E Hack SC for the appellant
P G Bickford for the respondent

SOLICITORS: Australian Government Solicitor for the appellant
Abbott Tout Solicitors for the respondent

DAVIES JA: This is an appeal against an order made in the Supreme Court setting aside a statutory demand made pursuant to Division 2 of Part 5.4 of the *Corporations Act* (Cth) 2001 ("the Act") on the ground that the court was satisfied that there was some other reason why the demand should be set aside within the meaning of s 459J(1)(b) of the Act.

The relevant facts upon which the learned primary judge made the order which he did were as follows. The respondent was a trustee. In each of the 1998 and 1999 income years it claimed to have distributed almost the whole of its income, $313,000 in the first of those years and $300,000 in the second, to a company called No. 2 Pitt Street Pty Ltd, as trustee of the Northbourne Holdings Unit Trust.

In May and July 2000 the appellant made assessments of the respondent's taxable income for 1998 in the sum of $313,000 and for 1999 in the sum of $300,000 on the basis that the distributions had been ineffective and that the respondent, as trustee, was liable to tax on those amounts. The respondent objected to the 1998 assessment but did not object to the 1999 assessment and has not since done so. By letter dated 13 September 2002 the appellant disallowed that objection. In

that letter the appellant explained the rights which the respondent had to review or appeal against that assessment. It has not done so.

On 6 May 2003 the appellant sent a notice of demand in respect of the total tax debt. The respondent did not reply to that letter. Then on or about 16 July 2003 the appellant served on the respondent a statutory demand pursuant to Division 2, Part 5.4 of the Act for the sum of $646,266.54 comprising income tax and interest in respect of the assessments which I've mentioned. On 8 August 2003 the respondent filed the application to set aside the statutory demand.

Also on 8 August 2003 the respondent filed an application in the Administrative Appeals Tribunal for an extension of time within which to seek a review of the 1998 objection decision. No material was filed in support of that application. However the appellant, by letter to the Tribunal of 1 September 2003 advised that he neither opposed nor agreed to an extension of time and there is reason to think, as the learned primary judge did, that in view of the other proceedings to which I shall refer there is a reasonable prospect of that application being granted.

In support of the application to set aside the statutory demand the respondent's solicitor swore, amongst other things:

> "Abbott Tout are instructed that the applicant in these proceedings and Mr and Mrs Quinn wish to proceed with Applications before the AAT in respect of all assessments, including amended assessments, issued by the

> ATO in respect of all financial years, including the financial years 30 June 1998 and 30 June 199[sic]."

Contrary to the appellant's submissions, that is, in my opinion, prima facie evidence of an intention by the respondent, however belatedly, to challenge the assessments. There was no direct evidence to the contrary and the circumstantial evidence referred to by the appellant did not, in my opinion, permit a contrary inference.

The learned trial judge made the following finding based on the evidence before him which is not disputed in this appeal:

> "A number of other taxpayers, unrelated to the Quinns who control the applicant, made similar purported distributions to the Northbourne Trust. Many of their cases have been the subject of unsuccessful objections and are now the subject of applications in the AAT. It appears that the Tribunal has been managing them as a group, and it has within the last few weeks heard some of those applications as test cases. The precise extent of the overlap between those cases and whatever is involved in the applicant's proposed challenges to these assessments is not clear, but it is likely that there is some substantial overlap. The applicant's present solicitors are acting for many of those other taxpayers. The evidence indicates that there is some prospect that a successful outcome for those taxpayers would be consistent with these assessments being incorrect."

It was primarily that finding, together with the evidence of the respondent's intention to proceed to contest the 1998 and 1999 assessments that persuaded the learned primary judge that the continued reliance on the statutory demand would give rise to a substantial injustice. It was such injustice which it was said provided some other reason, within the meaning of

section 459J(1)(b), why the statutory demand should be set aside.

Although contesting its correctness before the learned primary judge, the appellant represented by Mr Hack SC in this Court, accepted the proposition that it may have been appropriate for the learned primary judge to exercise his discretion to set aside the statutory demand "had it been shown that the Commissioner's conduct was unconscionable, was an abuse of process or had given rise to substantial injustice"; *Hoare Bros v The Commissioner of Taxation* (1996) 62 FCR 302 at 317-318.

Mr Hack also accepted that the decision was not intended to delineate the boundaries of the s 459J(1)(b) discretion; rather that what the court there said suggested examples of conduct that might warrant a favourable exercise of the discretion. In conceding this, Mr Hack also conceded the correctness of the following propositions stated by Justice Holmes in *Willemse Family Company Pty Ltd v. Deputy Commissioner of Taxation* [2003] 2 QdR 334 at [42]:

> "The instances of unconscionability, abuse of process and production of substantial injustice referred to in *Hoare* are no more than examples of matters which may impel an exercise of discretion in favour of an applicant; but the discretion is by no means confined to those particular circumstances. But in the present case, where the applicant has on foot an appeal which is at least arguable and which would, if successful, have the consequence that the bulk of the amount in respect of which the statutory demand is made would not be payable, it does seem to me that there is an injustice in permitting the statutory demand procedure to go forward."

None of that is to say that the amounts of tax assessed against the respondent do not remain payable or that those amounts do not remain recoverable (see *Taxation Administration Act* 1953, s 14ZZM). The question here is rather whether his Honour was entitled to be satisfied that it was unjust to permit the procedure under Division 2 of Part 5.4 of the Act to be utilised to obtain payment of the amounts of the assessments.

In my opinion, for two reasons in combination, it was open to his Honour to be so satisfied. The first is that there was no suggestion that the respondent was unable to pay its debts as they fell due including these assessments, other than I should add in fairness to Mr Hack, than that these assessments were not paid. The winding up provisions of the *Corporations Act* were being used merely as a debt recovery procedure. And secondly there was the fact that there was some likelihood that the decision presently reserved by the Administrative Appeals Tribunal would resolve not only in the liability of the taxpayers in the matters before the Tribunal, but also the liability of the respondent under each of these assessments.

For those reasons in my opinion, it was open to his Honour to be satisfied that there was "some other reason why the demand should be set aside". I will therefore dismiss this appeal.

FRYBERG J: I agree.

PHILIPPIDES J: I agree.

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DAVIES JA: With costs.
