SUPREME COURT OF QUEENSLAND

CITATION:	*Re Starport Futures Trading Corporation* [2009] QSC 94
PARTIES:	**ELTRAN PTY LTD** **(ACN 002 663 329)** First Applicant **ELTRAN PTY LTD as Trustee for the Eltran Superannuation Fund** **(ABN 33892112476)** Second Applicant **v** **STARPORT FUTURES TRADING CORPORATION** **(USCN 29174448100 981262652)** Respondent
FILE NO/S:	BS 1887 of 2009
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED EX TEMPORE ON:	6 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 and 6 April 2009
JUDGE:	Applegarth J
ORDER:	**1. Starport Futures Trading Corporation (USCN 29174448100 981262652) be wound up by the Court under the provisions of the *Corporations Act* 2001 (Cth).** **2. Mark William Pearce be appointed liquidator for the purpose of winding up.**
CATCHWORDS:	CORPORATIONS – WINDING UP – GENERALLY – JURISDICTION OF COURT – COMPANY NOT INCORPORATED IN JURISDICTION – where company's registered office was in Delaware, United States of America – where the respondent had regular dealings with investors in Australia – where the company had an Australian postal

address and telephone numbers – where sole director and employee of respondent resides in Australia – where the respondent had a wholly owned subsidiary in Australia – whether the respondent is a Part 5.7 Body – whether the respondent was carrying on a business in Australia by directly dealing with Australian investors or though its agent

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – where there were several demands made by the applicants and other Australian investors – where the court approved the methods of service of the demands on the respondent – where the debts are unpaid – whether the respondent is taken to be unable to pay these debts under s 585(a)

CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – MISCELLANEOUS GROUNDS – action or proceeding taken against a member for debts – where an action has commenced against the sole director of the respondent for a debt owed by the company – where service was effected by serving the documents on his solicitors – where service apt to bring proceedings to the attention of the sole director and the company – whether the respondent is taken to be unable to pay these debts under s 585(b)

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – unable to pay its debts – where the respondent owes substantial debts to Australian creditors – where no evidence that the respondent has any assets – where no statement about why the debts remain unpaid – whether there is an inference that the respondent is unable to pay its debts – whether in the absence of evidence that the respondent has any assets the court is satisfied that it is unable to pay its debts under s 585(d)

CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – where money has been lost without explanation by the respondent's investment business – where the sole director and employee has failed to comply with court orders – whether the investors should seek the winding up of the company in Delaware, United States of America – whether there is a lack of confidence in the ability of the respondent to manage its own affairs – where there is a risk that the respondent will seek further investment by Australian investors – whether it is just and equitable to wind up the company under s 583

Acts Interpretation Act 1901 (Cth) s 28A
Corporations Act 2001 (Cth) s 18, s 21, s 583, s 585

Australian Securities and Investments Commission v ABC Fund Managers Ltd (No 2) (2001) 39 ACSR 443,

distinguished
Australian Securities and Investments Commission v Austimber Pty Ltd (1999) 17 ACLC 893, cited
Australian Securities and Investments Commission v Edwards (2004) 22 ACLC 1469; [2004] QSC 344, applied
Australian Securities and Investments Commission v West (2008) 100 SASR 496, cited
Davison v Global Investments International Ltd (1996) 14 ACLC 208, cited
Hyde v Sullivan (1956) 56 SR (NSW) 113, applied
Luckins v Highway Motel (Carnarvon) Pty Ltd (1975) 133 CLR 164, cited
Re Producer's Real Estate and Finance Co Ltd [1936] VLR 235, applied

COUNSEL: Paul Lynch (*sol*) for the first and second applicant
P D Hay of Counsel for the respondent

SOLICITORS: Lynch Morgan Lawyers for the first and second applicant
Tucker and Cowen Solicitors for the respondent

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

No 1887 of 2009

ELTRAN PTY LTD	Applicant
and	
STARPORT FUTURES TRADING CORPORATION AND OTHERS	Company

BRISBANE

..DATE 06/04/2009

JUDGMENT

HIS HONOUR:

[1] An application is made for the winding up of Starport futures Trading Corporation ("Starport") on the grounds that:

(a) it is unable to pay its debts;

(b) it is just and equitable that it be wound up.

The application was heard on Friday, and some further submissions were made today.

[2] The uncontradicted evidence is that Starport owes the first applicant $9,821,264 and owes the second applicant $21,467,158. Other creditors who appeared in support of the application have demanded payment of sums invested totalling $12,854,722. Issues arise as to whether their demands were effective for the purpose of s 585(a). The affidavit material indicates that demands from these other investors have been made more than three months ago and it was conceded by Starport that most, if not all, of the amount of $12,854,722 is due.

[3] Reliance is placed by the applicants upon s 583(c)(i) and (ii) of the *Corporations Act* 2001 (Cth) ('the Act') on the basis that Starport is a Part 5.7 body to which the winding up provisions of the Act applies by virtue of s 583. The threshold issue is whether Starport is a Part 5.7 body and this turns on whether it carried on business in Australia. Starport submits that the evidence does not support this conclusion, and therefore this Court has no jurisdiction to grant the orders sought by the applicants.

[4] If, however, the Court has jurisdiction, then Starport opposes the application on the grounds that:

(a) the evidence does not prove that it is unable to pay its debts;

(b) it is not taken to be insolvent under s 585 of the Act;

(c) it would not be just and equitable to order its winding up.

Did Starport carry on business in Australia?

[5] Starport was incorporated in 1998 in Delaware in the United States. It is not registered as a company under the Act. The Court will have jurisdiction if it is a Part 5.7 body. The parties are agreed that it will only be a Part 5.7 body if it carried on business in Australia. Sections 18 to 21 of the Act clarify the circumstances in which a body corporate may be said to carry on business. Section 21 concerns the circumstances in which a body corporate may be said to carry on business in Australia. Under s 21(1) a body corporate that has a place of business in Australia, or in a state or territory, carries on business in Australia, or in that state or territory. Section 21(2) provides:

> "(2) A reference to a body corporate carrying on business in Australia, or in a State or Territory, includes a reference to the body:
> (a) establishing or using a share transfer office or share registration office in Australia, or in the State or Territory, as the case may be; or
>
> (b) administering, managing, or otherwise dealing with, property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise."

[6] Section 21(3) states that despite subsection (2) a body corporate does not carry on business in Australia, or in a state or territory, "merely because, in Australia, or in the state or territory, as the case may be, the body:

> "(a) is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute; or
>
> (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
>
> (c) maintains a bank account; or
>
> (d) effects a sale through an independent contractor; or
>
> (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia, or the State or Territory, as the case may be; or
>
> (f) creates evidence of a debt, or creates a charge on property; or
>
> (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts; or
>
> (h) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
>
> (j) invests any of its funds or holds any property."

[7] Section 21(1) directs inquiry as to whether Starport had "a place of business in Australia". If so, it is taken to carry on business in Australia. The term "carrying on a business" generally means to conduct some form of commercial enterprise, systemically and regularly, with a view to profit: *Hyde v Sullivan* (1956) 56 SR (NSW) 113 at 119.

[8] I adopt, with respect, the observations of McMurdo J in *ASIC v Edwards* (2004) 22 ACLC 1469 at 1479 [38] and 1483 [62]. The relevant inquiry is whether Starport's conduct in Australia, either directly or through its agents, involved "a succession of acts designed to advance some enterprise of the company pursued with a view to pecuniary gain" (at 1479 [38], quoting *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 at 178). The factual question is addressed not only by reference to the context of the particular statute but also with an understanding of the particular nature of the enterprise which constituted the company's business (at 1483 [62]).

[9] Roger Gareth Munro is the sole director of Starport and lives at Kingscliff in New South Wales. His affidavit states:

> "6. Starport conducts business by trading on various equity, commodity, futures and currency markets. The company receives loan funds from various individuals, companies and trusts. The company then invests those funds in futures, options, CFDs, currencies, and shares on various equity, commodity, futures and currency markets. Starport does not trade in any Australian markets.
>
> 7. The registered office of Starport is in Delaware, in the Unites States of America.
>
> 8. Starport does not, and has never had, any place of business in Australia, nor has Starport ever conducted business in Australia, or traded in any Australian markets."

[10] RG Munro Futures Pty Ltd ("RGMF") is a wholly owned subsidiary of Starport and was incorporated on 13 January 1999. Mr Munro says that RGMF was incorporated in Australia

with the intention that any Australian trading would be done exclusively by RGMF and that, whilst he remained a director of both companies, they operated independently of each other with RGMF (until the appointment of liquidators to it) conducting its business from Australia and Starport continuing to be based in Delaware in the United States of America.

[11] Certain documents and sworn evidence are inconsistent with Mr Munro's claim that Starport has not ever conducted business in Australia. This evidence has not been addressed by Mr Munro or any other deponent on behalf of Starport. It includes reports that Starport sent to investors by post. These reports are on letterhead which include both an address in Delaware, a post office box at Main Beach on the Gold Coast and, importantly, Australian telephone and fax numbers. No telephone or fax number is given for anywhere other than Australia. Mr Munro says that Starport was "based in Delaware" but does not elaborate on the respects in which it was based in Delaware. Apart from being registered in Delaware the only apparent presence of Starport in Delaware was its use of a contracted services company, a representative of which gave an affidavit concerning having no record of receiving certain correspondence and court documents. Neither that deponent nor, tellingly, Mr Munro describes any business activity that Starport undertakes in Delaware.

[12] Starport's website similarly directs persons to telephone and fax numbers in Australia, and not anywhere else.

[13] Mr King's evidence is that he received reports from Starport in the ordinary post and received new Acknowledgements of Debt from Starport through the post or sometimes by email from it. When he received the Acknowledgements of Debt he would sign them and on most occasions would deliver them to Mr Munro at his residence at 50 Cavill Avenue, Surfers Paradise or at an office he maintained at Sonray at Chevron. Mr King says that on these occasions he would often discuss with Mr Munro Starport's trading of the applicants' monies.

[14] Forms of Acknowledgements of Debt entered into between each applicant and Starport are exhibited to Mr King's affidavit. Similar forms of Acknowledgement of Debt were entered into between Starport and other Australian investors. The Acknowledgement of Debt entered into on 1 July 2008 between the second applicant and Starport was for an amount described as $20,295,000 or 1,353 units. The Acknowledgement of Debt entered into between the first applicant and Starport on the same date was for $9,285,000 described as 619 units. Each agreement contemplates use of the sum so advanced to enable Starport to enter into transactions. Clause 5.3 provides for interest and contains an acknowledgement that the principal sum "may be subject to losses from time to time dependent on the transactions undertaken by the borrower". The quarterly reports exhibited to Mr King's affidavit which was sworn and filed on 20 March 2009 exhibits reports of Starport's trading activities in various periods. Notably,

the summary refers to the number of units and reports a certain capital return.

[15] The nature of the transactions between Starport and the applicants is illuminated by an email sent by Mr Munro from Starport to Mr King on 4 October 2007. The subject of the email is Starport Futures Trading Corporation – Third Quarter 2007 Reports. Attached to the email were quarterly reports. These reports are on Starport stationery. The letterhead contains an address in Delaware. Importantly, Starport's postal address is C/- Box 187, Main Beach, Gold Coast, Queensland. The only telephone and fax numbers on the letterhead are Australian numbers. The body of the email contains a summary of the figures contained in the reports and refers to the number of trading units and a price per unit with the resultant "capital return". It states "this sum when rolled over into the Fourth Quarter 2007 would convert into an additional number of units". It concludes with an invitation for Mr King to advise whether he wished to amend these figures further in order to adjust the number of units in either the Eltran Pty Ltd account or the Eltran Pty Ltd Super Fund account. It states:

> "On my return to Australia I will also issue two new Starport Futures Trading Corporation agreements for the Fourth Quarter 2007 to adjust the funding details to reflect the new totals above."

[16] This email serves to prove that Starport dealt directly with investors like Mr King and that their relationship was one in which the sums invested were treated as being reflected in units which, dependent upon Starport's trading performance,

generated a capital return each quarter. The trading performance would be the subject of quarterly reports sent to investors. If there was a capital return then there would be an additional number of units allocated to the investment. Investors such as the applicants might choose to "roll over" or to redeem the whole or part of their investment. The Acknowledgement of Debt made provision for the return of investment by the investor/borrower making a demand. Under this document Starport agreed to repay the principal sum within three calendar months of a written demand being made.

[17] The contention that the trading activities by Starport in futures, options, CFD'S, currencies and shares did not involve trading in any Australian markets does not alter the fact that the business of Starport involve the receipt, retention and redemption of sums invested by investors. The procurement, receipt, retention and redemption of investment monies was an integral part of its business. In short, Starport was carrying on an investment business and, in doing so, reported to investors, at least, quarterly on the results of its trading activities.

[18] Its dealings with at least its Australian investors occurred in Australia. This occurred by:

(a) procuring investments;

(b) entering into loan agreements which, although governed by the laws of Delaware and subject to a non-exclusive jurisdiction clause, were entered into in Australia.

The evidence is that Mr Munro was Starport's sole director and employee. He was ordinarily resident in Australia. This leads me to conclude that Acknowledgements of Debt of the kind entered into between the applicants and Starport, and between other Australian investors and Starport were entered into in Australia. An integral part of Starport's business involved reporting to Australian investors by sending reports to them in the post or by e-mail. It also involved correspondence and other communications with investors about the results of trading activities, including advice about the number of units which the investors had. The evidence of Mr Munro's usual location, the location of the Australian investors and Starport's use of an Australian postal address and Australian telephone and fax facilities leads me to conclude that these activities occurred in Australia.

[19] Starport held itself out by its correspondence and by its website as being contactable by Australian phone and facsimile numbers. Mr Munro lived in Australia and made use of offices in Surfers Paradise in 2007 and 2008. There is no adequate evidence of how, where, and the respects in which Starport carried on business elsewhere. Mr Munro says that while he

was director of both Starport and RG Munro Futures (RGMF) the companies operated independently of each other with RGMF until the appointment of liquidators to the company conducting its business from Australia, and Starport continuing to be based in Delaware in the United States of America. I do not accept this evidence. The assertions in paragraphs 8, 11 and 17 of his affidavit that Starport did not ever conduct business in Australia is contradicted by Mr King's sworn evidence and by documents. The assertions that Starport continued to be based in Delaware is not supported by any evidence concerning its business operations there. Starport's correspondence has an address in Delaware and an affidavit from Mr Grier indicates that he is a registered agent of Starport. There is no suggestion that Mr Grier conducts any trading or other activities. At its highest, the evidence shows that Starport uses Mr Grier's company as a registered agent in Delaware. There is no evidence that Starport has or operates a business office in Delaware. The highest counsel for Starport could put it is that it has a registered office in the USA.

[20] In the absence of evidence from Mr Munro or someone else concerning the business activities undertaken by Starport in Delaware I do not accept that Starport is or was based in Delaware. Incidentally, a recent company search records Starport's status as void.

[21] Even if it be the case that Starport had a business presence in Delaware, this does not negative the proposition that it carried on business in Australia. I find that it had regular dealings with the applicants and other Australian-based investors in connection with their investments. I find that Starport routinely and systematically entered into transactions with Australian investors in the form of loan arrangements. These transactions occurred in Australia. It reported to investors at least quarterly within Australia. It communicated by telephone, mail and e-mail within Australia. It deposited the sums so invested into a bank account in Australia.

[22] The report of the liquidator of RGMF, particularly, annexure 13 thereto explains the nature of RGMF's business and its relationship with Starport. The sworn evidence of Mr Michael in that annexure is that money would be paid by investors in both RGMF and Starport into a bank of RGMF with the Commonwealth Bank of Australia at Port Douglas. Funds paid in by investors, whether paid pursuant to an agreement with RGMF or Starport, would be pooled together and then paid out of the RGMF bank account to various recipients. Those recipients included Mr Munro.

[23] As at 3 March 2009 Mr Michael was able to say that at least $21,380,429 was paid to Mr Munro personally and at least

$15,939,258 was paid to Starport investors. In short, Starport procured investment from investors in Australia and pooled moneys with RGMF. Sums from the pool were paid to persons including Mr Munro and Starport.

[24] Starport submits that "there is no evidence of any activity at all in Australia by the respondent." I reject that submission. There is evidence from Mr King and Mr Michael and documents emanating from Starport which show that it engaged in activity in Australia including, as I have indicated, procuring investments from Australian investors, reporting to them at least quarterly and communicating with them about the retention or redemption of their investments.

[25] I accept, as McMurdo J stated in *ASIC v Edwards* (2004) 22 ACLC 1469 at 1484 [61] that:

> "Ordinarily, there is a distinction between the raising of capital by a company, by offering and issuing its shares, and the application of that capital in the conduct of its business."

[26] The evidence in this matter is not concerned with a capital raising by offering and issuing shares: cf *Davidson v. Global Investments International Limited* (1996) 14 ACLC 208. Starport was conducting an investment business, an integral part of which involved reporting on its trading activities, the capital return on investment, the number of units held by

Australian investors and the value of their investment which was available for redemption. The matter is to an extent analogous with the position of the company Coppertone in *ASIC v. Edwards* (2004) 22 ACLC 1469 in which the conclusion was reached that the procurement of funds was a step in the conduct of its business, rather than simply the raising of capital for the purpose of then carrying on the business. In that case the conduct occurred within Australia and as a result Coppertone carried on business here and was a part 5.7 body. I reach the same conclusion in this case. Starport's dealings with Australian investors who invested money directly with it were activities undertaken as a commercial enterprise which were designed to advance the enterprise. They were routine and systematic. They involved the carrying on of business in Australia.

[27] Starport probably had a place of business in Australia, being the place or places at which Mr Munro dealt with investors from time to time. However, I rest my conclusion concerning the fact that Starport carried on business in Australia on the basis of the proven activities that I have described. It is unnecessary to rely upon the deeming effect of s 21(1).

[28] I reach my conclusion concerning the fact that Starport carried on business in Australia by reference to the documents

indicating direct dealings between it and Australian investors including the entry by it into transactions with Australian investors, its reporting to Australian investors and its communication with Australian investors in person and through the post.

[29] My conclusion that Starport carried on business in Australia rests on documentary evidence and the sworn evidence of Mr King and Mr Michael about what it did, not what RGMF did on its behalf. However, to the extent that RGMF acted as agent for Starport, Starport carried on business in Australian through its agent. RGMF acted as Starport's agent by, for example, having business premises at Surfers Paradise and owning a post office box which Starport used as its post box in Australia. Thus RGMF's role in acting as agent for Starport supports the conclusion that Starport carried on business in Australia through its agent RGMF and, in particularly, Mr Munro who was the sole director of RGMF.

[30] I find that Starport carried on business in Australia and this Court has jurisdiction.

Insolvency

[31] Sections 583 and 585 of the Act provide:

"Winding up Part 5.7 bodies

583 Subject to this Part, a Part 5.7 body may be wound up under this Chapter and this Chapter applies accordingly to a Part 5.7 body with such adaptations as are necessary, including the following adaptations:

(a) the principal place of business of a Part 5.7 body in this jurisdiction is taken, for all the purposes of the winding up, to be the registered office of the Part 5.7 body;

(b) a Part 5.7 body is not to be wound up voluntarily under this Chapter;

(c) the circumstances in which a Part 5.7 body may be wound up are as follows:

(i) if the Part 5.7 body is unable to pay its debts, has been dissolved or deregistered, has ceased to carry on business in this jurisdiction or has a place of business in this jurisdiction only for the purpose of winding up its affairs;

(ii) if the Court if of opinion that it is just and equitable that the Part 5.7 body should be wound up;

(iii) if ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:

(A) the Part 5.7 body cannot pay its debts and should be wound up; or

(B) it is in the interests of the public, of the members, or of the creditors, that the Part 5.7 body should be wound up;

(d) if the Part 5.7 body is a registrable Australian body - the winding up must deal only with the affairs of the body outside its place of origin.

Insolvency of Part 5.7 body

585 For the purposes of this Part, a Part 5.7 body is taken to be unable to pay its debts if:

(a) a creditor, by assignment or otherwise, to whom the Part 5.7 body is indebted in a sum exceeding the statutory minimum then due has served on the Part 5.7 body, by leaving at its principal place of business in this jurisdiction or by delivering to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving in such manner as

the Court approves or directs, a demand, signed by or on behalf of the creditor, requiring the body to pay the sum so due and the body has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the satisfaction of the creditor; or

(b) an action or other proceeding has been instituted against any member for any debt or demand due or claimed to be due from the Part 5.7 body or from the member as such and, notice in writing of the institution of the action or proceeding having been served on the body by leaving it at its principal place of business in this jurisdiction or by delivering it to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving it in such manner as the Court approves or directs, the Part 5.7 body has not, within 10 days after service of the notice, paid, secured or compounded for the debt or demand or procured the action or proceeding to be stayed or indemnified the defendant to his, her or its reasonable satisfaction against the action or proceeding and against all costs, damages and expenses to be incurred by him, her or it by reason of the action or proceeding; or

(c) execution or other process issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor against the Part 5.7 body or a member of the Part 5.7 body as such, or a person authorised to be sued as nominal defendant on behalf of the Part 5.7 body, is returned unsatisfied; or

(d) it is otherwise proved to the satisfaction of the Court that the Part 5.7 body is unable to pay its debts."

Section 585(a)

[32] There is evidence of numerous demands having been made by the applicants and other Australian investors in sums totalling in excess of $44 million. Starport responds to the applicants' reliance upon s 585(a) by submitting that the relevant debt must be "then due" at the time the demand is made under s 585(a). To the extent that the applicants rely

upon the Acknowledgment of Debt documents it is submitted that there could be no debt due until three months had passed from the date of a written demand for payment pursuant to clause 3.1. The respondent submits that in order to rely upon the Acknowledgment of Debt to establish a presumed inability on the part of Starport to pay its debt, persons were required to first serve a demand in accordance with clause 3.1 and, after three months, if the debt remained unsatisfied, then serve a fresh demand. They submit there is no evidence of any such demand.

[33] The applicants reply by pointing to evidence concerning a separate debt for $3 million which was the subject of a separate agreement. Annexure TRK-2 to the first affidavit of Mr King states:

> "The $3 million promised to us from the Eltran Pty Ltd investment with you has not been received by the 7 October 2008 as agreed."

[34] This was in a letter directed to Mr Munro at Starport. Mr Munro on behalf of Starport responded to this letter and did not dispute the existence of the agreement and the default, with the result that a debt was due by it to Eltran in the amount of $3,000,000 after 7 October 2008.

[35] The fact that Eltran entered into an Acknowledgment of Debt dated 1 July 2008 does not detract from the existence of such an agreement. The Acknowledgment of Debt might have constituted the sole agreement between the parties and superseded all previous arrangements. However, at any time

after 1 July 2008 it was open to the parties to agree that $3 million would be paid by Starport by 7 October 2008. The evidence supports the existence of such an agreement and a debt arising from the failure of Starport to pay this sum by 7 October 2008. Eltran's letter of 2 November 2008 demanded payment of this sum. It demanded payment immediately. The demand was sent to Starport on 2 November 2008 and was received by it prior to Mr Munro's response at 9.24 a.m. on 3 November 2008. This constitutes service since in the absence of a registered office the transmission of the letter by email to Mr Munro was apt to bring the demand to Starport's attention and in fact do so. I have earlier approved this form of service nunc pro tunc.

[36] Starport failed to pay the sum of $3 million so demanded or to secure or compound it to the satisfaction of its creditor in that amount. Accordingly, I find that Starport was indebted to Eltran Pty Ltd in the sum of $3 million after 7 October 2008, that a demand was served on it on 2 November 2008 and that Starport failed to pay the sum or to secure or compound it. As a result, Starport is taken to be unable to pay its debts pursuant to s 585(a).

[37] In addition the affidavit of Baron James Thompson filed 18 March 2009 supports insolvency under s 585(a).
Mr Thompson and his wife are the trustees of the Wildgate Superannuation Fund. Paragraph 7 of Mr Thompson's affidavit, which is not disputed, refers to previous correspondence in which a demand was made for payment of $1,005,000. This

demand was written pursuant to clause 3.1 of an Acknowledgment of Debt and expired on 1 February 2009. As a result, a debt of $1,005,000 was then due to the trustees of Wildgate Superannuation Fund. On 17 February 2009 it sent a letter of demand to Starport. Mr Thompson says that the demand was posted to Starport's address in Queensland, namely PO Box 187, Main Beach. This is the post office box that Starport had on its business correspondence. It was understandable and reasonable for Mr Thompson to send the demand to it at this post office box.

[38] Mr Munro says that upon the provisional liquidators of RGMF taking control of the post office box in 2008 he did not have access to it. However, he does not suggest that he told Mr Thompson or any other Australian investors that they should direct documents to Starport care of a different postal address. Under s 28A of the *Acts Interpretation Act* 1901 (Cth), unless a contrary intention appears, a document may be served on a body corporate by leaving it at, or sending it by pre-paid post to the head office, a registered office or a principal office of the body corporate. Starport was not registered in Australia and hence had no registered office here. Mr Munro's evidence is that it did not have an office and, if that is correct, it was entirely reasonable for Mr Thompson to direct his demand to Starport by pre-paid post to its given postal address. In the circumstances I have earlier approved this manner of service nunc pro tunc.

[39] The debt demanded remains unpaid and Starport has failed to secure or compound it to the satisfaction of its creditor, the Wildgate Superannuation Fund. As a result, I conclude that Starport is taken to be unable to pay its debts by reason of the unpaid debt which was due and demanded by the Wildgate Superannuation Fund.

Section 585(b)

[40] The applicants rely upon s 585(b) in respect of proceedings that have been instituted against Mr Munro. The evidence indicates that Mr Munro was the sole shareholder of Starport in 1998. There is no evidence of a change in the shareholding and, in the absence of any evidence of a change in the shareholding, I am prepared to act upon the presumption or inference that that shareholding remains unchanged.

[41] An action has been commenced against Mr Munro for the debt or demand due or claimed. It is unnecessary under s 585(b) for that action to have been instituted against him in his capacity as a member as such. It is sufficient if it has been instituted against him and if it be the fact, as I have found, that he is a member. Section 585(b) requires notice in writing of the institution of the action to be served on the body by leaving it at its principal place of business in this jurisdiction or by delivering it to the secretary or a director or senior manager of the body or by otherwise serving it in such a manner as the Court approves or directs.

[42] There has been no prior approval of the manner of service of those proceedings upon Mr Munro. There has not been personal service of those proceedings on him. The evidence indicates that the relevant proceedings were served by arrangement upon his solicitors. This form of service would be apt, however, to bring the fact of the proceedings to the attention of both Mr Munro and the company. On Friday I indicated that I was prepared to approve this manner of service.

[43] The apparent purpose of s 585(b) is to bring to the attention of a company the fact that a member has been sued for a debt which is claimed to be due and owing by the company. The service of the proceedings upon Mr Munro's solicitors would have that effect. Since service of the documents upon Mr Munro's solicitors there has not been any payment of the amount in question. Accordingly I am satisfied that the elements of s 585(b) are established.

Section 585(d)

[44] Section 585(d) provides that a Part 5.7 body is taken to be unable to pay its debts if "it is otherwise proved to the satisfaction of the Court that the Part 5.7 body is unable to pay its debts". There is no dispute that Starport owes the applicants in total $31,228,422. There is no dispute that the supporting creditors have demanded payment of a sum totalling $12,854,722, and have not been paid.

[45] In proceedings that have been commenced against Starport, RGMF alleges that RGMF is liable to investors who invested with it in the amount of some $23 million and that RGMF is entitled to be paid that amount by Starport on the basis that it appears funds paid by investors to RGMF were transferred to Starport and pooled with other investor funds to make investments. Starport makes no response in these proceedings to that allegation. I shall assume for present purposes that the claimed indebtedness of Starport to RGMF is disputed or may be disputed. I shall proceed on the basis that Starport has undisputed debts due to Australian investors well in excess of $31 million, and possibly as high a $44 million, $31 million approximately of which is owed to the applicants.

[46] The existence of outstanding debts by a company does not necessarily prove an inability to pay. There may be reasons why a debt or debts are not paid on time such as a temporary lack of liquidity. It is for the applicants to satisfy me of Starport's inability to pay debts, not for Starport to prove that it has sufficient funds to meet those debts. The issue under s 585(d) is whether I am satisfied that Starport is unable to pay its debts.

[47] The existence of the debts themselves provide some evidence of an inability to pay. A further feature is the lack of any response by way of explanation when the debts became due and remained unpaid as to why they remained unpaid. For instance, there apparently was no response to the applicants stating that the inability to pay was due to a

temporary shortage of liquidity, let alone that Starport had sufficient assets to pay the debts demanded and other debts due by it.

[48] The response to the demand signed by Mr King was a letter dated 3 November 2008 in which Mr Munro gave his "solemn promise" to return the applicants' funds, requested Mr King not to complicate matters by carrying through on a threat to have a police or ASIC investigation, and asked for "a short time" so that he could get his "legal plan implemented". Mr Munro did not identify what a "short time" was, but the letter that requested that "short time" was sent more than five months ago.

[49] This is not a matter in which there was simply a lack of substantive response to one investor. In circumstances in which numerous investors demanded payment one would ordinarily expect a response to those demands. In the case of defaults in meeting demanded repayments, some explanation for the non-payment, and an assurance, for what it was worth, that the applicant was able to pay its debts would ordinarily be expected.

[50] The non-payment of debts well in excess of $30 million to Australian investors provides some evidence of an inability to pay. The inference that Starport is unable to pay its debts is supported by the absence of any explanation for the non-payment. There is no evidence that Starport has any assets. Mr Munro's affidavit is eloquently silent. The position then

is that there is undisputed evidence of indebtedness well in excess of $30 million to Australian investors, demands for payment totalling $44 million and no evidence of assets.

[51] Starport through Mr Munro made a forensic choice to put the applicants to proof on the issue of inability to pay debts. It exhibited no balance sheet or other financial records. It does not suggest that it has any prospect of obtaining payment from its wholly-owned subsidiary RGMF which is in liquidation and, as I have noted, the liquidator of that company, through Mr Michael, has sworn an affidavit which is exhibited to the Report to Creditors that it is entitled to be paid $23 million by Starport.

[52] Whether or not a Court is satisfied that a company is unable to pay its debts depends upon the circumstances. The present circumstances can be contrasted from an Australian registered company which is required to submit statutory returns or a company which provides information to the stock exchange, shareholders or investors about its financial affairs. In such a case, and in the face of putting an applicant to proof, a Court might require an applicant in such a case to address such publicly available information concerning the company's professed assets and liabilities. In this matter Starport has chosen to place no evidence before the Court concerning its assets, let alone evidence to the effect that its assets can be realised in order to pay the undisputed debts owned to the applicants. In addition,

Mr Munro has not been forthcoming with information to the liquidators of RGMF.

[53] Paragraphs 15 and 16 of annexure 13 to the creditors' report being Mr Michael's affidavit sworn 3 March 2009 state:

> "...although Munro has said in email correspondence that Starport has substantial assets, the collapse in world equity markets and Mr Munro's apparent depression over his losses makes me concerned as to Starport's capacity to meet any judgment. Only Munro can provide information about this matter and other matters arising in the proceedings.
>
> Notwithstanding requests, Munro has refused to provide information in relation to Starport's activities or its assets."

[54] It was submitted at the hearing that the applicants and other creditors could have asked Mr Munro about Starport's assets. The first thing to be said about this submission is that one would not readily conclude that Mr Munro would tell them anything about Starport's assets in circumstances in which he has chosen to say nothing about them in correspondence in response to their demands or in an affidavit in proceedings in which the applicants contend that Starport is unable to pay its debts. More fundamentally it can be said that the creditors in substance have already asked Starport about whether it has the assets to meet its debts by making the demands they have. Starport's lack of any substantive response, either at the time the demands were made or since, is telling.

[55] The passage of time since debts became due is a relevant factor. As noted, the applicants claim that $3 million became

due and owing on 7 October 2008, and I find that to be the case. They demanded payment of the whole of their investment totalling $31,288,422 on 2 November 2008. They allowed until early February 2009 for payment of this amount. It has not been paid. There has been no response by Starport which suggests that it presently has the capacity to pay these or any other debts. Accordingly, this is not a case in which only the existence of debts has been proven. The existence of those debts in itself supports the inference that Starport is unable to pay them. It is not suggested that they have not been paid because of some personal whim on the part of Mr Munro or because Starport experienced some temporary lack of liquidity. One cannot ignore the fact that, as the liquidator of RGMF points out, there has been a collapse in world equity markets.

[56] In the circumstances there is a strong inference that Starport is unable to pay its debts. Starport has offered no evidence at all to displace this inference or to support a competing inference. There is no evidence that it has any assets, let alone liquid assets or assets that could be realised to pay the undisputed debts. It was acknowledged by Starport during the submissions that there is no evidence to suggest that Starport had enough money to buy Mr Munro a meat pie. There is certainly no evidence that it has assets that enable it to pay the debts that it owes to the applicants or to the other Australian investors.

[57] In the circumstances I am satisfied that Starport is unable to pay its debts. As a result, pursuant to s 585(d), Starport is taken to be unable to pay its debts.

Winding up on just and equitable grounds

[58] I accept Starport's submission that the discretion to wind up a company on the grounds that the Court is of the opinion that it is just and equitable to do so does not arise simply because the company is insolvent. I adopt, with respect, the observations of Warren J, as her Honour then was, in *ASIC v. ABC Fund Managers Limited (No 2)* (2001) 39 ACSR 443 at 470 [124]:

> "Of course, whilst insolvency is not a pre-condition to the making of an order for the winding up of a company, to make such an order with respect to a prosperous or at least solvent company is an extreme step requiring a strong case."

[59] There is no evidence here that Starport is a prosperous or even a solvent company. The authorities collected in *McPherson's Law of Company Liquidation* paragraph 5.280 show that a factor relevant to the Court's opinion as to whether the just and equitable ground has been established is whether there is a justifiable lack of confidence in the conduct and management of a company's affairs. The authorities indicate that the just and equitable ground may be established in circumstances such as the present.

[60] In short, large amounts of money have been procured from Australian investors by a company that should have been registered and regulated here. These large amounts have been

lost without explanation. Mr Munro does not state or suggest that Starport has ceased to trade. On the contrary, paragraph 6 of his affidavit is apt to suggest that it still conducts business.

[61] I find his sworn evidence that Starport has not ever conducted business in Australia to be false. It is contradicted by the documentary and sworn evidence to which I have earlier referred. His evidence that Starport and RGMF have always operated independently of each other is contradicted by the evidence of the liquidators of RGMF that the funds paid by investors were pooled together. Mr Munro has failed to comply with orders made by Martin J for the provision of information to liquidators. The liquidators' investigations indicate that at least $21 million was paid out of the pool funds to Mr Munro personally.

[62] The liquidators' investigations raise concerns concerning Mr Munro's compliance with his director's duties and the maintenance of proper books and records. I have a lack of confidence in the conduct and management of Starport's affairs by Mr Munro. Evidence indicates that he is the sole director, sole employee and sole shareholder of Starport.
He procured and lost large amounts of money from Australian investors. There is no assurance that if Starport is not wound up he will not continue its business and seek further funds from Australian investors.

[63] In *ASIC v. Edwards* (2004) 22 ACLC 1469 the company Coppertown was wound up in circumstances in which large amounts of money were procured unlawfully from investors in Australia and who, at the time of the hearing, had lost their funds. There has been a long-standing resort to the just and equitable ground in circumstances in which there has been mismanagement or misconduct in the conduct of the affairs of a corporation.

[64] In *Re Producers Real Estate and Finance Co Limited* [1936] VLR 235 at 246 Mann CJ said that it was appropriate to wind up a company on the just and equitable ground where a company's business “cannot be carried on consistently with candid and straightforward dealings with the public from which capital may be obtained if the company's existence is to be prolonged”. See also *Australian Securities and Investments Commission v. Austimber Pty Ltd* (1999) 17 ACLC 893 at 894 [5], *Australian Securities and Investments Commission* v West (2008) 100 SASR 496 at 541 [160].

[65] It would not be just to require the Australian investors to seek the winding up of Starport in some other jurisdiction. There is a question raised concerning its current status in Delaware. A company search suggests its status is void. Even if it is still registered in Delaware, substantial cost, expense and delay would be incurred in applying to wind up the company in that jurisdiction and any liquidator appointed there would be required to deal with Mr Munro who is a resident of Australia.

[66] Importantly the inter-company transactions involving Starport and its wholly-owned subsidiary RGMF make it important that any liquidation of Starport be undertaken in this jurisdiction so as to facilitate the early resolution of issues concerning the ownership of funds and the efficacy of transactions involving Starport and Starport investors.

[67] I am of the opinion that it is just and equitable that Starport should be wound up. Principally this is because I have no confidence in the conduct and management of the company's affairs by Mr Munro and I consider that he may continue to procure money from Australian investors in order to trade the company out of its losses. It is in the public interest that Starport be prevented from continuing to procure money from Australian investors.

Discretion

[68] I have to consider whether I should exercise my discretion. I have concluded that my discretion should be exercised. I am satisfied that Starport is insolvent. It is appropriate and in the public interest that the winding up of Starport take place as soon as possible and that the liquidator appointed by the Court work in close cooperation with the liquidators of RGMF to investigate transactions involving Starport, RGMF and Mr Munro, ascertain information concerning their affairs and recover any sums due to those companies for the benefit of their creditors.

Conclusion

[69] I am satisfied that Starport is unable to pay its debts. I also find that it is taken to be unable to pay its debts by virtue of s 585. I am also of the opinion that it is just and equitable that Starport be wound up.

[70] I order:

1. Starport Futures Trading Corporation, USCN 29174448100 981262652 be wound up by the Court under the provisions of the *Corporations Act* 2001 (Cth).
2. Mark William Pearce be appointed liquidator for the purpose of winding up.
