SUPREME COURT OF QUEENSLAND

CITATION:	*Sustainable Organics (Wooshaway) Pty Ltd ACN 115 709 352 v Ranger Loaders Pty Ltd ACN 112 474 898* [2011] QSC 45
PARTIES:	**Sustainable Organics (Wooshaway) Pty Ltd** ACN 115 709 352 (Applicant) **v** **Ranger Loaders Pty Ltd** ACN 112 474 898 (Respondent)
FILE NO/S:	13859 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	17 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2011
JUDGE:	Philippides J
ORDER:	**The application is dismissed**
CATCHWORDS:	CORPORATIONS – WINDING UP IN INSOLVENCY – FAILURE TO COMPLY WITH STATUTORY DEMAND – Disputed debt – No application to have statutory demand set aside within time-limit – Ability of company to seek declaration that the statutory demand was not such a demand – Whether injunctive relief available to prevent reliance on statutory demand – Whether injunctive relief available pursuant to s 1324 and 1337B of the *Corporations Act*. PRACTICE AND PROCEDURE – ABUSE OF PROCESS – Whether creditor's reliance on disputed judgment debt in winding up proceedings constituted an abuse of process. *Re Ad-A-Cab Holdings Pty Ltd* [1997] 2 Qd R 115 *Re Beralt Pty Ltd* (2001) 1 QR 232 *Braams Group Pty Ltd v Meric* (2002) 171 FLR 449 *David Grant & Co v Westpac Banking Corporation* (1995) 184 CLR 265 *Global Cement (North Qld) P/L v Benchmark Debtor Finance P/L* [2007] QSC 143 *Naswari Group of Companies Pty Ltd v Byrne Earthmoving*

& Engineering Pty Ltd [2005] QSC 002
Peak Hill Manganese Pty Ltd v Hydraplant Equipment Pty Ltd [2003] WASC 120
Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd (1997) 147 ALR 444
Topfelt Pty Ltd v State Bank (NSW) (1993) 47 FCR 226

Corporations Act 2001 (Cth) s 459E(2); s 459G; s 459J; s 1324; s 1337B
Service and Execution of Process Act 1992 (Cth) s 16

COUNSEL: P Dunning and M Bowman for the applicant
G Sheahan for the respondent

SOLICITORS: Robinson and Robinson for the applicant
Gadens Lawyers for the respondent

The Application

[1] On 24 December 2010 the applicant filed an application seeking an order pursuant to s 459G of the *Corporations Act 2001* (Cth) (the "*Corporations Act*") to set aside a statutory demand served upon the applicant by the respondent on 8 December 2010.

[2] It also now seeks leave to amend its originating application to seek declaratory and injunctive relief pursuant to s 1324 and s 1337B of the *Corporations Act*. The applicant alerted the respondent to this course on 25 February 2011 when a draft of the proposed amended application was provided to the respondent's solicitors.

[3] The declaratory relief sought is a declaration "that the document purporting to be a statutory demand served by Ranger Loaders fails to comply with the requirements of s 459E of the *Corporations Act* and is not a statutory demand for the purposes of Part 5.4 of the *Corporations Act*." The injunctive relief, which is sought in the alternative, is an order "restraining Ranger Loaders in any way howsoever from relying upon, or assisting any other person in relying upon, the statutory demand in any way howsoever."

Background

[4] The statutory demand, which is dated 3 December 2010 and was served on the applicant in Queensland, did not provide an address for service in Queensland, rather it specified an address in Western Australia. The applicant served the application to set aside the statutory demand and supporting affidavit by email and post on 24 December 2010. The material was posted in Brisbane to a business address (not the registered address) of the respondent in Western Australia and the offices of the respondent's solicitors in Western Australia.

[5] In relation to the original application to set aside the statutory demand brought under s 459G of the *Corporations Act*, much time was devoted to the question of

whether the application was efficaciously served on the respondent within 21 days as required by s 459G(3). Since the applicant served the respondent in Western Australia, by posting the material from an address in Brisbane, compliance was required with s 16 of the *Service and Execution of Process Act* (Cth) (*SEPA*) by attaching a SEPA Form 1 to the document. That did not occur. The respondent relied on a line of authority to the effect that that failure to comply with SEPA rendered the service of the material ineffective, so that the application to set aside the statutory demand was incompetent.[1]

[6] However, it emerged during argument that the 21 day period for service of the application to set aside the statutory demand expired on 30 December 2010, and that the application had not in any event been served by that date. Accordingly, irrespective of the s 16 *SEPA* point, there was a failure to comply with the provisions as to service of the application. In those circumstances, counsel for the applicant abandoned the application under s 459G of the *Corporations Act*.

[7] The applicant still pressed the application for declaratory relief. That is, it sought a declaration that the statutory demand, that it had originally sought to set aside, was not a statutory demand for the purpose of the *Corporations Act*, in that it failed to comply with the requirements of s 459E of the *Corporations Act.* Alternatively, in the event that there was an efficacious statutory demand, the applicant sought injunctive relief as stated.

[8] The respondent contended that the Court has no power to grant leave to amend the application, there being no valid application before the Court to amend. It was said that in those cases where the Court has allowed an amendment to an application brought pursuant to s 459G of the *Corporations Act*, the application has been brought in time.[2] The relief sought by the applicant is entirely distinct from that originally sought and is in effect a separate matter. I do not consider that there is an impediment to hearing the separate claims for relief now sought to be pursued with leave and grant leave to do so. Nevertheless, for the reasons explained below, I do not consider that the relief sought should be granted.

Consideration of the issues

[9] As already stated, the address for service provided by the respondent on the statutory demand was an address in Western Australia. Section 459E(2)(e) provides that a statutory demand "must be in the prescribed form (if any)". Form 509H of the *Corporations Regulations 1990* (Cth) is prescribed for the purposes of s 459E(2)(e) and requires that the address of the creditor for service of copies of any application and affidavit be in the State or Territory in which the demand is served on the company. It is acknowledged that the specification of an interstate address for

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1 *Energy Conservation Systems v Downer EDI Engineering Electrical Pty Ltd* [2008] NSWC 1139; *Fresh Express Australia Pty Ltd v Mary Peter (NT) Pty Ltd* [2009] NSWCS 277; *Everkind Pty Ltd v Hazenforn Pty Ltd* [2010] NSWSC 1031; *Global Cement (North Queensland) Pty Ltd v Benchmark Debtor Finance Pty Ltd* [2007] QSC 143 per A Lyons J; *Elan Copra Trading Pty Ltd v JK International Pty Ltd* (2005) 226 ALR 349; *Australian Ophthalmic Supplies Pty Ltd v Klas Pty Ltd* [2005] VSC 106; *Dominion Capital Pty Ltd v Pico Holdings Inc* [2001] VSC 458.

2 Such as *A & M Short Pty Ltd v Prestige Residential Marketing Pty Ltd* 54 ASCR 760 per Young CJ in Eq; *Re Jackaroo Agencies Pty Ltd* [2006] 1 Qd R 332 per White J at [12].

service in the demand and the failure to nominate an address for service in Queensland was a defect in the statutory demand.[3]

[10] The applicant sought to argue that in those circumstances the failure to specify an address for service within the jurisdiction had the consequence that the court ought to find that the document was incapable of purporting to be a statutory demand and was in effect a nullity. The respondent, on the other hand, submitted that the deficiency in the form of the statutory demand did not of itself justify either a declaration that the document was not a statutory demand, nor an injunction to restrain reliance upon it on a winding up application.[4] The respondent argued that the error in the statutory demand should be seen as a "defect" in relation to a statutory demand, which by s 9 is defined to include an irregularity.

[11] The respondent argued that the cases establish that only in rare cases or where there is an abuse of process would the Court grant equitable relief, and there was nothing in the material before the Court to establish that this was one of those rare cases or to support a finding of an abuse of process. In this regard, the respondent contended that the applicant did not depose to any substantial injustice or irreparable damage caused by the inclusion of an interstate address for service, in lieu of a Queensland address, so as to justify the grant of a declaration or injunction. Furthermore, it was contended that as there has been a failure to comply with the strictures of the *Corporations Act* (in the absence of any evidence of any substantial injustice or abuse of process) the proper forum to raise such arguments was at the hearing of the winding up application.[5]

[12] The starting point for a consideration of the issues raised by the parties is s 9 of the *Corporations Act*, which defines "statutory demand" as including a document that is or purports to be a demand served under s 459E. In *Global Cement (North Qld) Pty Ltd v Benchmark Debtor Finance Pty Ltd*[6] Ann Lyons J observed, citing *David Grant & Co v Westpac Banking Corporation* (1995) 184 CLR 265 at 270, that the courts have consistently taken the approach that "the provisions in relation to the setting aside of a statutory demand are intended to be a complete code for the resolution of disputes involving statutory demands, and to do so on the basis of the commercial justice of the matter, rather than on the basis of technical deficiencies." Her Honour explained at [14]-[15]:

> "Section 459J essentially provides that in an application under s 459G to set aside a demand the court should not set aside a statutory demand because of a defect in the demand unless substantial injustice will be caused or there is some other reason why the demand should be set aside. Accordingly even in an application brought within the strict time limits under s 459G a demand will not be set aside for a defect unless substantial injustice will be caused unless the defect is set aside, or there is some other good reason."

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3 *Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd* (1997) 147 ALR 444 at 448.

4 See *Nasrari Group of Companies Pty Ltd v Byrne Earthmoving & Engineering Pty Ltd* [2005] QSC 002; *Braams Group Pty Ltd v Miric* (2002) 171 FLR 449 at [28] – [47]; [79] – [86].

5 *Nasrawi Group of Companies Pty Ltd v Byrne Earthmoving & Engineering Pty Ltd* [2005] QSC 002 at [15] per Douglas J.

6 [2007] QSC 143.

[13] The applicant sought however to derive some benefit from the decision of Lockhart J in *Topfelt Pty Ltd v State Bank (NSW)*[7] where it was said at 238 that:

> "there may however be cases where deficiencies in the form of demands are so fundamental that the demands are incapable of assuming the description of statutory demands within the meaning of the *Corporation Law*."

[14] The respondent submitted that the present case did not fall within the category of case mentioned in *Topfelt Pty Ltd.* It should be noted that in *Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd*[8] the decision in *Topfelt Pty Ltd* was explained on the basis that the defect in issue there, in failing to specify the interest component, gave rise to "good reason" under the second limb of s 459J for setting aside the statutory demand (beyond the mere defect) since in the absence of the interest calculation the statutory demand could not be complied with.

[15] In *Re Beralt Pty Ltd*[9] on which the applicant also placed some reliance, the statutory demand did not contain wording to the effect that an application to set aside the demand had to be made within 21 days. The application to set aside the demand was served at an interstate address and was not effected within the time limit in accordance with the SEPA. Ambrose J found that, although the court lacked jurisdiction pursuant s 459G and s 459J of the *Corporations Act* to set aside the statutory demand, it could properly grant a declaration that non-compliance with the demand was insufficient to support a winding-up application and grant leave to apply for an injunction restraining the making of an application based on such non-compliance. Central to his Honour's conclusion was the view that, the omission of the words from the demand, informing the debtor of the consequences of failing to apply to set aside the demand within 21 days after service, could not be characterised as merely a defect within s 459J(2) (the result being that the saving provision of that section did not apply). Referring to the observations of Lockhart J in *Topfelt Pty Ltd*, Ambrose J held[10] that the deficiency in the statutory demand before him was so fundamental that it did not come within the description in s 9 of the *Corporations Act* of a statutory demand to which s 459E refers. Nor could it be treated as an effective demand for the purposes of s 459E, albeit that it came within the definition of "statutory demand" because it purports to be one.

[16] In *Peak Hill Manganese Pty Ltd v Hydraplant Equipment Pty Ltd*[11], Hasluck J after reviewing a number of cases including *Re Beralt*, concluded as follows:

> "The decided cases, and especially *Re Beralt* (*supra*), suggest that in certain circumstances an applicant might be able to obtain injunctive relief, notwithstanding a failure to comply with the statutory procedure to set aside. This might be so where the nature of the flaws complained of have misled the debtor as to the time limits, or as to the need to make an application to set aside or, alternatively, if the flaws are such that the statutory demand in question does not purport to be a statutory demand or are so fundamental that the demand cannot reasonably be characterised as a statutory demand."

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7 (1993) 47 FCR 226.
8 (1997) 147 ALR 444.
9 (2001) 1 Qd R 232.
10 (2001) 1 Qd R 232 at [60], [61].
11 [2003] WASC 120 at [72].

[17] In arguing that the failure to nominate an address for service in Queensland did not prevent the statutory demand from purporting to be a statutory demand under the statutory definition, the respondent noted that in *Spencer Constructions Pty Ltd*[12] a similar failure to specify an address for service within the jurisdiction was merely characterised as no more than a defect in the demand, which under the regime of the *Corporations Act*, only gave rise to an entitlement under s 459J(1)(a) to set aside the statutory demand if substantial injustice was established.[13] The court emphatically rejected the notion that it was able to approach the matter by treating the gravity of the defect as "some other reason" for the purpose of s 459J(2) in the absence of substantial injustice. The Court thus confirmed that s 459J precluded the setting aside of a demand solely on the ground that it contained defects.

[18] A similar approach was taken in *Re Ad-A-Cab Holdings Pty Ltd,*[14] by McKenzie J in respect of a statutory demand that did not include a Queensland address as the address for service. The defect was held to be insufficient to set aside the statutory demand in the absence of substantial injustice which had not been shown.

[19] I accept the respondent's submission that, while the failure to specify in the statutory demand an address for service within the State was an error which rendered the statutory demand defective, it did not have the result that the document, which in its form purported to be a statutory demand, was incapable of satisfying the description of a statutory demand for the purposes of s 459E of the *Corporations Act*. In this regard, the deficiency cannot be seen to be in the same category as the omission to give the requisite notice concerning the 21 day time period in *Re Beralt Pty Ltd.*

[20] In respect of the declaratory relief sought by the applicant, the respondent argued that, since the *Corporations Act* prescribes the remedy for a defect in the demand as being conditioned upon an applicant establishing substantial injustice, by analogy, that approach should inform the issue of whether or not to grant equitable relief. This was especially so where the applicant was effectively required to contend that the statutory demand was so fundamentally flawed that it did not come within the definition of a statutory demand for the purposes of the *Corporations Act*. Thus, the respondent argued that it was well established by the authorities that it was only in rare cases, or where the applicant can establish an abuse of process, that there could there be any resort to equitable relief, in respect of the application of Part 5.4 of the *Corporations Act*.[15]

[21] In terms of the declaration sought, the respondent argued that this case was on all fours with *Naswari Group of Companies Pty Ltd v Byrne Earthmoving & Engineering Pty Ltd*.[16] In that case, an application to set aside a statutory demand was not filed and served within the time prescribed by s 459G(3) of the *Corporations Act*. The applicant applied for a declaration that the statutory demand,

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12 (1997) 147 ALR 444.

13 *Spencer Constructions Pty Ltd* (1997) 147 ALR 444 at 452.

14 [1997] 2 Qd R 115 at 118.

15 *Nasrawi Group of Companies Pty Ltd v Byrne Earthmoving & Engineering Pty Ltd* [2005] QSC 002 per Douglas J; see also *Dromore Fresh Produce Pty Ltd v W Paton (Fertilizers) Pty Ltd* (1997) 137 FLR; *2020 Constructions Systems Pty Ltd v Dryka and Associates Pty Ltd* [2010] WASC 22; *Bluechip Development Corporation (CAIRNS) Pty Ltd v Pnp Realty Pty Ltd* [2009] ACTSC 33; *Peak Hill Manganese Pty Ltd v Hydraplant Equipment Pty Ltd* [2003] WASC 120; *Global Cement (North Qld) Pty Ltd v Benchmark Debtor Finance Pty Ltd* [2007] QSC 143.

16 [2005] QSC 002.

which it had initially sought to set aside, was not a statutory demand within the meaning of the *Corporations Act*. Douglas J noted at [2] that the immediate problem faced by the applicant was that s 9 of the *Corporations Act* defined a statutory demand to mean, *inter alia*, "a document that is, or purports to be, a demand served under s 459E". His Honour proceeded to observe at [6]:

> "When one bears in mind that 'statutory demand' is defined to mean a document that purports to be a demand and considers the form of the document relied upon in this case, which clearly purports to be a demand on its face, it is my view that it would be wrong for me to exercise the jurisdiction of the court to grant the declaration sought unless there has been an abuse of process in issuing the demand"

[22] In making that observation, Douglas J explained that the reasons of the Court of Appeal of New South Wales in *Braams Group Pty Ltd v Meric*[17] made it clear why the introduction of Part 5.4 of the *Corporations Act* had narrowed the scope for the grant of equitable relief where no application has been made to set aside the statutory demand. In concluding that it was inappropriate to grant the declaration sought in the case before him, Douglas J stated at [15]:

> "The grant of a declaration in a situation like this would undermine the regime established by the Act for applying to set aside a statutory demand by creating a fresh opportunity to dispute the existence of a debt when the statutory scheme is designed to ensure that such disputes should be raised within the period prescribed by the Act. There is also another appropriate occasion where the applicant may seek leave, pursuant to s 459S of the Act, to advance its arguments about the character of the debt claimed and, more importantly, to assert its solvency, namely at the hearing of any winding up application."

[23] The approach taken in *Nasrawi Group of Companies Pty Ltd*[18] accords with the view expressed by Palmer J in *Red Glove Holdings Pty Ltd*[19]:

> "Where the debtor company has failed to set aside a statutory demand, it would have to establish by very cogent evidence that, despite the existence of a debt which can no longer be disputed, the creditor's purpose in seeking the winding up is not to collect payment of its debt or, in default to have the company wound up, but is, rather to achieve some entirely collateral end. Such a case is conceivable but would be extremely rare in reality."

[24] I do not consider that the material relied on by the applicant brings this case within the category of cases referred to by Douglas J in *Nasrawi Group of Companies Pty Ltd*.[20] The applicant has not shown that the statutory demand was made in circumstances where there has been an abuse of process; there is no suggestion of collateral or ulterior purpose. Nor does the affidavit material depose to some substantial injustice which has resulted from the defect in the statutory demand.

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17 (2002) 171 FLR 449 at [28] – [47], [47] – [86].
18 [2005] QSC 002.
19 (2002) 165 FLR 72 at [29].
20 [2005] QSC 002.

[25] In respect of the issue of injunctive relief generally, I note the following approach of Douglas J in *Naswari Group of Companies Pty Ltd* at [14]:

> "An injunction is not sought and there is little evidence on which to base a view that there would be irreparable injury to the applicant if a winding up application were to be made against it. It claims to be solvent and has lead evidence to that effect and could only ask me to infer that potential purchasers from the applicant may be deterred from entering into contracts with it if a winding up application were made."

[26] Those comments are apposite here. There was no suggestion in the material that the applicant was anything other than solvent. In respect of the injunctive relief sought pursuant to s 1324 of the *Corporations Act*, that provision sets out precise grounds on which a statutory injunction may be granted. I do not consider that the grounds in s 1324 which concern a contravention of the *Corporations Act* are applicable in the circumstances of this case or that they have been made out.

Orders

[27] I order that the application be dismissed. I shall hear submissions as to costs.