SUPREME COURT OF QUEENSLAND

CITATION:	*CED WISE AB Services Pty Ltd v Hilltops Pastoral Group Pty Ltd* [2013] QSC 259
PARTIES:	**CED WISE AB SERVICES PTY LTD (applicant)** **v** **HILLTOPS PASTORAL GROUP PTY LTD (respondent)**
FILE NO:	BS2624 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	22 May 2013 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2013
JUDGE:	Margaret Wilson J
ORDER:	**1. Application to amend the originating application dismissed.** **2. Application for winding up order dismissed.** **3. Applicant to pay Respondent's costs of and incidental to the application, to be assessed on the standard basis.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – OTHER CASES – where the applicant company served a statutory demand on the respondent company in circumstances where it was aware that notice of the demand was unlikely to come to the respondent company's attention – when the statutory demand should be taken to have been served – whether the statutory demand was stale at the time the application for winding up was filed – whether the applicant could amend its application for winding up – whether an adjournment should be granted *Corporations Act* 2001 (Cth), s 109X, s 459C, s 459E, s 459F, s 459G, s 459J *Deputy Federal Commissioner of Taxation v Abberwood Pty Ltd* [1998] 8 ACLC 528, distinguished *Woodgate v Garard Pty Ltd* (2010) 239 FLR 339, distinguished

COUNSEL:	JD Johnson for the applicant VG Brennan for the respondent
SOLICITORS:	Johnsons Solicitors for the applicant Quadrio Lee Lawyers for the respondent

MARGARET WILSON J: This is an application to wind up the respondent company, Hilltops Pastoral Group Pty Ltd in insolvency. I shall deal presently with the application insofar as it is based upon non-compliance with a statutory demand.

By a statutory demand dated 17 October 2012, the applicant company CED WISE AB Services Pty Ltd, claimed the sum of $162,284.10. That statutory demand was served on the company on 7 November 2012 by its being attached to the door of its registered office. At the time service was effected, the company was not carrying on business from that registered office, and the applicant was aware that it was unlikely that notice of the statutory demand would come to the attention of the company as a result of its being attached to the door of the premises.

On 3 December 2012, the applicant caused an email to be sent by its solicitors to Mr Neville, a director of the company. Attached to that email was a letter which read,

> "Dear Mr Neville
> Re: Debt owed to CED WISE AB Services Pty Ltd
>
> We refer to the above matter and note we act on behalf of CED WISE AB Services Pty Ltd.
>
> On 7 November 2012, a Statutory Demand issued by our client was served upon the registered office of Hilltops Pastoral Group Pty Ltd (copy enclosed for ease of reference). The time for complying with that Statutory Demand expired on 28 November 2012.
>
> We are advising that we now hold instructions to make application to wind-up Hilltops Pastoral Group Pty Ltd, pursuant to section 459F(2) of the Corporations Act and will be filing and serving a winding up application upon the Company at its registered office. We are advising you as a matter of courtesy."

The winding-up application was filed on 20 March 2013. By that application, the applicant claimed that the respondent had been served with a creditor's statutory demand on 3 December 2012, and that it had failed to comply with that statutory demand, and thereby committed an act of insolvency. In material before the court this morning, it became apparent that Mr Neville acknowledged receipt of the email and attachments sent on 3 December 2012 in the course of a telephone conversation on 4 December 2012.

Today, the solicitor for the applicant submitted that 4 December 2012 was the effective date of service of the statutory demand. He submitted further that when 21 days were then allowed for compliance, the application for winding up filed on 20 March 2013 was within time.

I am unable to accept these submissions. It seems to me there has been a shifting of ground on the part of the applicant in an endeavour to bring itself within the three-month

period which is prescribed in section 459C of the *Corporations Act*. Mr Johnson drew my attention to a number of authorities. He relied in particular on *Deputy Federal Commissioner of Taxation v Abberwood Pty Ltd* [1998] ACLC 528, and *Woodgate v Garard Pty Ltd* (2010) 239 FLR 339.

I will deal first with *Woodgate*, which is a decision of Justice Palmer concerning failure to comply with a statutory demand. In that case, the demand was sent by registered post to an address which, only a month before, had ceased to be the company's registered office. The creditor was apparently unaware of the change. One of the company's directors collected the registered letter containing the demand from Australia Post, and acknowledged that he had received it. It had been sent to the former registered office on 31 July 2009. The letter was collected by the director on 13 August 2009, and the acknowledgement was made by him on 14 August 2009.

The creditor conceded that the demand had not been served at the registered office, or in any other manner authorised by section 109X for service of documents upon a company.

He submitted, nevertheless, that it was served upon the director within the meaning and purpose of section 459E(1) and 459F(2)(b), because it was actually and effectively received by the company. Justice Palmer undertook a review of authorities with respect to effective informal service. Of particular relevance is what his Honour said in paragraph 44 (iii) at page 349-350 of the report. He said —

"(iii) where a creditor serves a Statutory Demand in a prescribed mode and,

- knows at the time of service, or before the section 459G(3) expires, that the demand has not actually come to the attention of a company;

- knows that the company would dispute the demand if made aware of it;

- refrains from bringing the demand to the actual notice of a responsible officer of the company, within the section 459G(3) period; and

- relies on good service of the demand, and the presumption of insolvency arising under section 459C(2)(a),

the court may, in its discretion and in the interests of justice, set aside the statutory demand under section 459J(1)(b) not for want of good service, but for want of fair notice."

His Honour went on to give a number of citations in support of that statement.

That is not the present case. To begin with, this is not an application to set aside a statutory demand for want of fair notice, or on any other basis. Secondly, this is not a case where, on the material, the creditor knew at the time the document was affixed to the door of the registered office, that the company would dispute the demand if made aware of it. Knowledge of the dispute seems to have arisen subsequently.

The other case, that of *Abberwood*, is again a different situation. That was concerned with service of a statement of claim under the door of the company's registered office. It was returned to the plaintiff by the then-present occupier of the premises, with a notification that the company was no longer at the address. The plaintiff later signed judgment against

the company in default of appearance. The company sought an order setting aside the judgment. Chief Justice Waddell set aside the judgment as having been irregularly obtained and said that it was an abuse of process for the plaintiff to sign judgment in default of appearance when it knew that the statement of claim had not and could not have come to the attention of the defendant. As I say, that is a different situation from the present one.

I am satisfied that the statutory demand was served on the company on 7 November 2012. I am further satisfied that even if re-service were permissible, it was not served on 3 December 2012, which is the basis relied upon in the application for winding up. In the circumstances, I conclude that at the time the application for winding up was filed, the statutory demand was stale.

….

HER HONOUR: The solicitor for the applicant has now sought to file and read an amended application for winding up. Notice of the proposed amended application was given shortly before 4 pm yesterday. Counsel for the company has opposed my giving leave to amend on three bases: first, the shortness of the notice, second, that the application for winding up has no prospects of success, and third, that if the Court were minded to allow the amendment, his client would need an adjournment to bring on evidence on the solvency/insolvency issue.

In the course of submissions by the applicant's solicitor, it became clear that the applicant was relying, principally at least, on two matters to prove insolvency.

The first was what is described as an affidavit by Timothy Peter Dalton Neville. This is a document which apparently contains the signature of Mr Neville, but has not on its face been sworn or affirmed in a manner which would render it an affidavit. According to an affidavit by Ms Marshall of the applicant's solicitors' firm, it was provided to the applicant's solicitors prior to a mention of this matter on 22 April 2013, by the solicitors who were then acting for the company. Be that as it may, I would not allow that to be relied upon as sworn evidence of insolvency on a winding up application.

The other material relied upon consists of correspondence from Davidson & Sullivan, solicitors, dated yesterday, 21 May 2013, to which are attached creditors' statutory demands totalling in excess of $377,500. The time for compliance with those demands has not expired and so there could in no circumstances yet be a presumption of insolvency from non-compliance. The mere fact that those solicitors say that the debts remain unsatisfied is not admissible evidence of insolvency.

On the material which is presently before the Court, I do not think that the proposed amended application has even fair prospects of success. Accordingly, I am going to dismiss the application for amendment and dismiss the application for winding up.

So that the Court record is complete, I will have the copy of the draft amended application, which was provided to me by the solicitor for the applicant, marked as exhibit 1 in the proceeding. I shall give that to my associate to staple and mark now.

EXHIBIT #1 ADMITTED AND MARKED

HER HONOUR: Counsel for the company has submitted that costs should follow the event. The solicitor for the applicant has submitted that because the company and its directors failed to comply with their statutory obligation to notify ASIC of change of registered office and change of address of directors, this is a case where there ought to be no order as to costs. While conscious of the company's failure to meet its obligation to ASIC and hence to the community at large, I nevertheless am of the view that there is no adequate reason shown why costs ought not follow the event. Accordingly, I order the applicant to pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.

_____