

SUPREME COURT OF QUEENSLAND

CITATION: *Re: OCNR (Australia) Pty Ltd; Convergence Team Pty Ltd v OCNR (Australia) Pty Ltd* [2014] QSC 102

PARTIES: **CONVERGENCE TEAM PTY LTD ACN 140 286 586**
(applicant)
v
OCNR (AUSTRALIA) ACN 142 238 828
(respondent)

FILE NO: BS3617 of 2014

DIVISION: Trial Division

PROCEEDING: Application for winding up

DELIVERED ON: 22 May 2014

DELIVERED AT: Brisbane

HEARING DATE: 20 May 2014

JUDGE: Mullins J

ORDER:

- 1. Leave under s 459S(1) to the respondent to oppose the application on the basis of the debts claimed by the respondent against the applicant and the offsetting claims against the respondent's other creditors is refused.**
- 2. OCNR (Australia) Pty Ltd ACN 142 238 828 be wound up by the court in insolvency under the provisions of the *Corporations Act 2001* (Cth).**
- 3. That Nick Combis and Steven Staatz be appointed jointly and severally liquidators for the purpose of the winding up.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – APPLICATIONS FOR WINDING UP BY THE COURT – GENERALLY – where the company failed to comply with s 459G of the *Corporations Act 2001* (Cth) and the application to set aside the statutory demand was dismissed – where the company opposed the winding up on some grounds that could have been argued in the application to set aside the statutory demand – where leave under s 459S(1) refused – whether the company should be wound up

Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd [2007] NSWCA 57, considered *Chief Commissioner of Stamp Duties v Paliflex Pty Ltd*

[1999] NSWSC 15, considered

COUNSEL: D W Williams for the applicant
 R G Dwyer (director of the respondent) by leave for the respondent
 K Gothard for the supporting creditors G M Kemp and R J Bragg

SOLICITORS: Steindls for the applicant
 Steindls for the supporting creditors G M Kemp and R J Bragg

- [1] There are multiple court proceedings that have involved the applicant and the respondent. For consistency, I will refer to the parties in these reasons by the roles they play in this proceeding. The respondent's business is the supply of information technology consultants on a contract or permanent capacity to companies that implement and support software, such as the applicant. The respondent billed the applicant for the permanent placement of two employees with the applicant and invoiced in respect of the consulting services of another person for onward supply by the applicant to one of its clients. The applicant disputed that fees were payable under its agreement. Four statutory demands dated 16 August 2013 were served on the applicant by the respondent for a total sum of \$84,172.
- [2] In proceeding 8239 of 2013 in this Court commenced on 3 September 2013, the applicant applied to set aside those statutory demands. That application was opposed, but was successful before the Chief Justice on 19 September 2013. The Chief Justice was satisfied that a genuine substantial dispute existed between the parties as to the alleged debts. The respondent was ordered to pay the applicant's costs of that application on the indemnity basis, because of what the Chief Justice referred to as "an improper approach coming from Mr Dwyer" in the communications with the applicant in relation to demands for payment of the alleged debts. Mr Dwyer is a director of the respondent. The alleged debts the subject of those statutory demands are now the subject of a proceeding commenced by the respondent against the applicant in the Magistrates Court at Brisbane. The costs ordered by the Chief Justice in favour of the applicant were assessed by a costs assessor and are the subject of an order of this Court made by the Registrar on 20 January 2014 for the sum of \$31,952.72.
- [3] The Magistrates Court proceeding has reached the stage where the parties are in dispute about disclosure. The respondent has provided the security for costs of the applicant in that proceeding.
- [4] On 9 December 2013 the applicant filed in the Court of Appeal an application to extend the time for filing a notice of appeal against the orders made by the Chief Justice and an application for a stay of the orders setting aside the statutory demands and the costs order. The second application was decided by Gotterson JA on 28 February 2014, when the application was refused and the respondent was ordered to pay the applicant's costs of the application. The respondent was also ordered to give security for the costs of the applicant: *OCNR (Australia) Pty Ltd v Convergence Team Pty Ltd* [2014] QCA 28. The respondent has provided the security for costs. The application to extend the time for filing the notice of appeal has not yet been heard by the Court of Appeal. The respondent filed an application on 29 April 2014

in the Court of Appeal to seek leave to adduce further evidence which it is claimed became available after the hearing before the Chief Justice as a result of recovery of emails from the backup of the email account of a former director in order to dispute assertions made on the applicant's material relied on before the Chief Justice. That application has not been heard.

- [5] The applicant served a statutory demand on the respondent based on the debt for the costs order made in the applicant's favour in proceeding 8239 of 2013 on 3 March 2014.
- [6] The respondent applied in this Court to set aside the statutory demand in proceeding 3544 of 2014. Although copies of the application and supporting affidavit were received by the Registry of the Court before the expiry of the period of 21 days set out in s 459G(2) of the *Corporations Act* 2001 (the Act) and copies of those unfiled documents were emailed to the applicant's solicitors on 21 March 2014, the original application and supporting affidavit were not filed until 8 April 2014. The application was therefore dismissed on 12 May 2014 on the basis that the court had no jurisdiction to determine the application due to non-compliance by the respondent with the Act.
- [7] The application for winding up the respondent in this proceeding pursuant to s 459A of the Act was listed for hearing on 12 May 2014 which was the same day as the respondent's application to set aside the statutory demand served on the respondent. The respondent was appearing by Mr Dwyer who was in New York at the time and, in fact, had recently arrived in New York from the United Kingdom. Because of the time difference between New York and Brisbane, he was finding it difficult to respond by telephone and, after the application to set aside the applicant's statutory demand was disposed of, the application for winding up was adjourned to 13 May 2014. It was adjourned further on that date to 20 May 2014, as the applicant was relying on affidavits sworn by supporting creditors Mr Kemp and Ms Bragg (who are former directors of the respondent) which Mr Dwyer had received only on the business day preceding the initial return date of 12 May 2014. The adjournment was granted to the respondent to allow Mr Dwyer to respond in a considered way to the application for winding up. I made orders directing that any notice of appearance on behalf of the respondent and any supporting affidavit be filed and served simultaneously by electronic communication to the Registrar of this Court and the applicant on or before 4pm on 15 May 2014. I did not on 13 May 2014 deal with any leave that may be required under s 459S of the Act.
- [8] Electronic copies of the notice of appearance and a supporting affidavit of Mr Dwyer were received by the Registry and the applicant on 14 May 2014. Mr Dwyer also notified the court of a list of affidavits filed on the files of the various proceedings on which he intended to rely to oppose the winding up application. One of those documents was an affidavit of Mr Dwyer sworn for the purpose of the proceeding 3544 of 2014 on 2 May 2014, but which was not filed until 15 May 2014. Since the decision was reserved on 20 May 2014, Mr Dwyer forwarded to my Associate and the applicant copies of further documents that were referred to in his submissions made on 20 May 2014.
- [9] The affidavit filed on 15 May 2014 does set out the matters relied on by the respondent (largely in an inadmissible way) to support Mr Dwyer's assertion in his

submissions that the Chief Justice was misled by the applicant and a former director of the respondent.

- [10] Mr Dwyer appeared again by telephone on the hearing of the application on 20 May 2014.
- [11] Although there was no written application by the respondent for leave pursuant to s 459S of the Act to oppose the application for winding up on a ground that the respondent either relied on or could have relied on for the purposes of its application for the statutory demand to be set aside, the issue of leave was argued in connection with the hearing of the winding up application.
- [12] The applicant relies on the presumption of insolvency under s 459C(2)(a) due to the respondent's failure to comply with the statutory demand. The applicant opposes any leave being given to the respondent pursuant to s 459S, particularly as there has been a failure of the respondent to prove its solvency.
- [13] The applicant relies on the affidavits filed by Mr Kemp and Ms Bragg both of whom resigned as directors of the respondent on 12 June 2013. Their employment appears to have ceased at the same time. Each claims against the respondent for unpaid salary and entitlements in a combined total of around \$13,000. Of much greater significance are the letters dated 19 February 2014 exhibited to their affidavits from the New South Wales Office of State Revenue (the OSR) claiming from each of them as directors of the respondent the amount owed by the respondent for unpaid payroll tax liabilities for the financial years ended 30 June 2012 and 2013 in the sum of \$96,385.85. (The existence of this claim by the OSR against the respondent was acknowledged by Mr Dwyer in his oral and written submissions.) The affidavits of Mr Kemp and Ms Bragg also disclose that the Australian Taxation Office is pursuing the respondent for outstanding superannuation guarantee payments in respect of the salaries paid to Mr Kemp and Ms Bragg.
- [14] The grounds of opposition notified by Mr Dwyer on behalf of the respondent to oppose the application for winding up are:
- (a) the winding up application is an abuse of process;
 - (b) the successful winding up of the respondent would be a substantial injustice;
 - (c) the alleged creditors misled the court in obtaining a costs order;
 - (d) the winding up application is being used for improper purposes; and
 - (e) there are offsetting claims against all the creditors listed for the hearing.
- [15] The grounds (a), (b) and (d) can be pursued without leave under s 459S to the extent they relate to the prosecution of the winding up application itself, rather than the state of indebtedness between the parties as a result of their dealings. Ground (c) was vigorously argued by Mr Dwyer, but on the basis of his inferences and conclusions on selected and very little factual material, some of which Mr Dwyer claims not to have discovered until after the order made by the Chief Justice. It relates to the affidavit of Mr MacDonald and the statements of Mr Kemp exhibited to that affidavit concerning the terms of the agreement between the respondent and the applicant about the placement of three persons to work with the applicant, namely Morrison, McDonald and Varma that were relied by the applicant to

establish that there was a genuine substantial dispute between the parties before the Chief Justice. Despite the serious allegations made against Mr MacDonald by this argument pursued by Mr Dwyer, in substance it is an attack by the respondent on the outcome of the proceeding before the Chief Justice and the making of the costs order against the respondent and relates to whether there is a genuine and substantial dispute between the parties over the invoices that were the subject of the statutory demands totalling \$84,172 made by the respondent against the applicant. The respondent has continued to invoice the applicant for the services of Mr Varma and the claim of \$84,172 has escalated to around \$350,000. On the basis that the contractual dispute between the parties was a matter that could have been raised on an application by the respondent to set aside the applicant's statutory demand the respondent requires leave under s 459S to pursue this claim on this application. The same applies to ground (e).

- [16] The key to obtaining leave under s 459S is proof by the respondent under s 459S(2) that the dispute about the debt is material to proving the respondent is solvent: *Chief Commissioner of Stamp Duties v Paliflex Pty Ltd* [1999] NSWSC 15 at [49]. This has to be done in the context of the financial position of the respondent. Although Mr Dwyer offered explanations as to why he could not provide the financial accounts of the company, including that they were lost in floods that affected his home in England in February 2014 or they may have been taken by the former directors or he held by the receiver of the landlord of the respondent's former premises in Australia, he made no attempt to explain why he could not recover copies of the respondent's financial accounts from other sources, such as another director or the respondent's accountants or reconstruct them from his knowledge of the company's business or identify assets and liabilities from the information he did have. As was submitted by the applicant, the respondent's financial affairs "remain a mystery." What did emerge on the hearing was the existence of the OSR debt.
- [17] The respondent has failed to place relevant material before the court on the question of its solvency and has failed to discharge the onus under s 459S(2). Leave under s 459S (1) must therefore be refused.
- [18] In relation to the abuse of process and improper purpose grounds, an appeal by the respondent against the orders of the Chief Justice that resulted in the statutory demand which then resulted in this application and the existing Magistrates Court proceeding between the parties do not prevent the respondent pursuing the winding up application on the basis of presumed insolvency: *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* [2007] NSWCA 57 at [40]. The substantial injustice that the respondent argued would result for OSR from the winding up was misconceived, as was the respondent's view that a winding up would bring an end to any claims that the respondent may have against its former directors or, if it can be proved, against the applicant for the alleged misconduct in the proceedings before the Chief Justice.
- [19] Ultimately, the respondent submitted that the Court should not hear the winding up application while its appeal against the Chief Justice's orders was pending and the application should be adjourned or for the Court to refuse to exercise its discretion under s459A and s 467 of the Act. In the circumstances where the ground for winding up is presumed insolvency and the respondent's other grounds for opposing the winding up are without substance, I am not satisfied that this is an appropriate

case to exercise the discretion in favour of the respondent in the light of the clear policy of Part 5.4 of the Act.

[20] The respondent should be wound up.