SUPREME COURT OF QUEENSLAND

CITATION:	*Consortium Holdings P/L v Maybell 1 P/L* [2015] QSC 55
PARTIES:	**CONSORTIUM HOLDINGS PTY LTD** **ACN 133 192 659** **ATF CONSORTIUM HOLDINGS TRUST** (applicant) v **MAYBELL 1 PTY LTD** **ACN 158 837 971** (respondent)
FILE NO/S:	BS10233/14
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	24 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURT – WINDING UP IN INSOLVENCY – WHAT CONSTITUTES INSOLVENCY – EVIDENCE OF INSOLVENCY – where the applicant served a statutory demand on the respondent – where the respondent did not apply to set aside the statutory demand – where the applicant applied to wind up the respondent on the ground of insolvency – where the respondent is presumed to be insolvent – whether the respondent proves solvency by evidence of a sole director's financial capacity and present intention to support the respondent *Corporations Act* 2001 (Cth), ss 95A, 459A, 459C, 459E, 459F, 459P, 459S *Uniform Civil Procedure Rules* 1999 (Qld), r 5 *Chan & Ors v First Strategic Development Corporation (in liq) & Anor* [2015] QCA 28, applied *Commonwealth Bank of Australia v Begonia Pty Ltd (rec &*

mgr apptd) (1993) 11 ACSR 609, considered
International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors (2013) 97 ACSR 200; [2013] QCA 372, applied
Lewis v Doran (2005) 219 ALR 555, referred to
Mulherin v Bank of Western Australia Ltd; McCann and Ors v Bank of Western Australia Ltd [2006] QCA 175, referred to
Williams (as liquidator of Scholz Motor Group P/L (in liq)) v Scholz & Anor [2008] QCA 94, applied

COUNSEL: S Coulson for the applicant
C Muir for the respondent

SOLICITORS: Morgan Conley for the applicant
Steadfast Solicitors for the respondent

[1] **Jackson J**: The respondent is a company which was served with a statutory demand to pay an alleged debt.[1] It failed to comply with the demand.[2] The applicant applies to wind it up in insolvency.[3] The court must presume that the respondent is insolvent.[4] The presumption of insolvency "operates except so far as the contrary is proved" under s 459C(3) of the *Corporations Act* 2001 (Cth) ("CA"). The sole disputed question for decision is whether the respondent has proved solvency.

[2] As will appear, on the assumptions that are required to be made, the respondent has a significant deficiency of current assets. The deficiency is due to the applicant's alleged debt. However, the respondent does not apply for leave to oppose the application on the ground that the applicant's alleged debt is not due or payable.[5] As defined, insolvency, is a person's inability to pay all the person's debts as and when they become due and payable.[6] A significant deficiency in current assets may be a strong indicator of insolvency. The point is sometimes made by treating a "current asset ratio" or "liquidity ratio", meaning the ratio of current assets to current liabilities, of less than 1:1 as an indicator or one of the indicia of insolvency. In particular, where the assets which may be utilised to meet liabilities, as and when the liabilities become due and payable, are not realisable within the time frame required for payment, and the debtor is unlikely to be able to borrow funds against those assets to meet the current liabilities, a finding of insolvency will often follow.

[3] The respondent seeks to meet that difficulty by evidence that its sole director has arranged to personally borrow enough money to pay the applicant's alleged debt and that she is willing to provide working capital to support the respondent, including payment of the applicant's alleged debt. As Muir JA said in *Mulherin v Bank of Western Australia*:

> "… where it can be shown that directors are likely to continue to support the company, whether by unsecured loans or otherwise, there is no reason in

1 *Corporations Act* 2001 (Cth), s 459E.
2 *Corporations Act* 2001 (Cth), s 459F.
3 *Corporations Act* 2001 (Cth), ss 459A, 459P.
4 *Corporations Act* 2001 (Cth), s 459C(2)(a).
5 See *Corporations Act* 2001 (Cth), s 459S.
6 *Corporations Act* 2001 (Cth), s 95A.

> principle why such support should be regarded as irrelevant. The likely existence of continued support of directors and/or shareholders may be a significant consideration in assessing the solvency of a development project vehicle such as [the company]."[7]

[4] On the facts of this case, proof of solvency by the respondent turns on two relatively narrow questions: first, whether the sole director's intention to provide financial support to enable the debts of the respondent to be paid as and when they become due and payable must be supported by further proof of her financial capacity to do so; secondly, whether that present intention is enough, given that she has not undertaken an obligation to do so.

[5] The respondent was incorporated on 6 June 2012. Emily Jane May was the sole director and shareholder. She remains the sole director. The respondent is trustee of a trust named the "Maybell 1 Trust".[8] It appears that the business of the trust is the respondent's sole business.

[6] In June 2012, Ms May was in an intimate relationship with Mr Alistair Bell. It began in April 2011 and continued until December 2013. During the second half of that period, they were living together. Mr Bell is the manager of, but not a director of, the applicant.

[7] As trustee of the trust, the respondent operates as a sole purpose company. The purpose was to develop four units on land at 18 Homebush Street, Dalby. In April 2013, the respondent purchased the land for $110,000. Some funds for the purchase were contributed by or on behalf of the respondent. They were sourced from Ms May and Mr Bell or the applicant including a deposit for the purchase. The initial and ongoing expenses were contributed to the respondent's bank account.

[8] In the financial statements of the trust, the contributions appear as beneficiary loans. It does not matter for that entry whether the contributor was the applicant, Mr Bell or Ms May. The balance of the purchase price of the land was borrowed from National Australia Bank, secured by first mortgage over the land. Ms May guaranteed repayment of the respondent's loan from the bank.

[9] As the project proceeded, the respondent prepared and lodged a development application. In November 2012, the respondent appealed from the local government's decision on the development application. In August 2013, the appeal was successful. The respondent continued and continues to incur expenses in connection with the project. At present, however, the development is on hold until such time as the property market picks up, when Ms May intends to seek advice as to whether to continue with the development or to sell the land.

[10] In or about June 2012, Mr Bell and Ms May made an oral arrangement for the project and Mr Bell's involvement. Ms May says it was agreed that Mr Bell would take a 33 percent project management fee calculated on the net profit of the project once it had been built and valued and that he would provide the sum of $150,000 by way of investment capital.

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7 *Mulherin v Bank of Western Australia Ltd; McCann and Ors v Bank of Western Australia Ltd* [2006] QCA 175, [115].

8 The copy of the trust deed in evidence was unsigned.

[11] Mr Bell seems to accept that the agreement was to provide a loan of up to $150,000, that the applicant would make the loan and that the applicant take a 33 percent profit share. However, other aspects of the arrangement are disputed. Mr Bell says that there was an agreement to pay interest. But he has no recollection of a specific conversation about interest. He also says that the respondent was to give a mortgage to secure the loan. But he says that was because he was not "allowed" to lend money without security (whatever that means). He did not say that Ms May had agreed that the respondent would give a mortgage. Ms May disputed and disputes these aspects.

[12] The arrangement between the respondent and Mr Bell or the applicant was not documented before the intimate relationship between Ms May and Mr Bell ended in December 2013. In-mid 2014, they discussed arrangements for the project to go forward. No agreement or further agreement was reached. Mr Bell then wanted return of the money contributed to the project through his involvement.

[13] In the result, the applicant served a statutory demand for the payment of $56,530.00. It was alleged in the demand to be owing pursuant to a loan made between 18 June 2012 and 15 May 2014 ("the applicant's alleged debt"). The demand was made by the applicant, not Mr Bell personally. Ms May appears to say that the contributor of funds was to be Mr Bell personally.

[14] The respondent did not apply to set aside the demand within the 21 day period allowed under s 459F of the CA. Under s 459C of the CA, the Court must presume that the respondent is insolvent. As previously stated, the presumption operates except so far as the contrary is proved.

[15] Some of the affidavit evidence read upon the hearing of the application and some of the cross-examination of the applicant's witnesses were directed to opposing the application to wind up the respondent on the ground that it was an abuse of process. However, the respondent abandoned that ground before final addresses. The remaining question is whether the respondent has proved solvency.

[16] A balance sheet for the respondent as trustee of the trust at 31 October 2014 was set out in an expert accounting report filed by the respondent as follows:

	Estimated Realisable Value as at 31 October 2014 $
Current Assets	
Cash at Bank	1,009
Total Current Assets	**$1,009**
Current Liabilities	
Rates & GST Liabilities	Nil
Loan – Consortium Holdings Pty Ltd	56,530
Total Current Liabilities	**$56,530**
Surplus/(Deficit) in Net Current Assets	**($55,521)**
Non-Current Assets	
Property – 17 Homebush Street, Dalby	200,000
Total Non-Current Assets	**$200,000**

Non-Current Liabilities	
Loan – Emily May	9,882
NAB Mortgage	85,684
Total Non-Current Liabilities	**$95,566**
Total Surplus/(Deficit)	**$48,913**
Adjustments	
Cash at Bank	**(745)**
Property – 17 Homebush Street Dalby	35,000
Total Surplus as per Balance Sheet as at 31 October 2014	**$83,168**

[17] A later report by the expert accepted and opined that the respondent's position had not materially altered by the time of the trial. The only current liability of the respondent which has not been met is the applicant's alleged debt. Because of s 459S(1) of the CA, the respondent cannot oppose this application on the ground that it is not owing.

[18] The respondent does not have the current assets to repay that debt. However, Ms May has entered into a personal loan agreement with De Leon Pty Ltd ("De Leon") to borrow $57,000. A copy of the approval, but not her acceptance of it, is in evidence. Ms May has also obtained approval for a personal credit card facility from a major trading bank with a limit of $8,400.

[19] If she borrows the $57,000, the repayments will be $1201.07 per month for a term of 5 years. It appears that De Leon is a company associated with Ms May's present partner, but there is no other evidence suggesting that as between Ms May and De Leon the arrangement is anything other than a commercial loan agreement.

[20] Ms May proposes to lend to the respondent the money which may be required to pay its debts as and when they fall due. To date, it appears that at least during 2014 and this year she has been funding the debts of the respondent for loan repayments to the National Australia Bank and any other recurring expenses for the project.

[21] Despite the assumption I am required to make about the applicant's debt, I note that Ms May "vehemently" denies that any money is due and payable by the respondent to the applicant. There appear to be two grounds for her view about that. First, she says that the agreement she made was with Mr Bell, not the applicant. Mr Bell swears that it was the applicant which contributed funds to the project. There is some documentary evidence which appears to support that the applicant was the funder. Secondly, Ms May says that the arrangement was that Mr Bell's loan would not be repaid until after the project was completed. I offer no views about the likely strength or weakness of those defences to the applicant's claim. There may be a third question about the extent of the balance of the funds contributed through Mr Bell's involvement.

[22] Ms May says that she currently runs a number of businesses including a successful broking business and she has capacity to inject funds into the respondent if necessary. She says that as a mortgage broker she has a steady income from future and past mortgage deals. She says that she will continue to provide the respondent with working capital, should it be required, in the future, as she has done and continues to do. There are no details of what that income has been or might be.

Although she was cross-examined, the applicant did not expressly challenge her ability to provide the necessary working capital, should she wish to do so.

[23] If the respondent is required to pay the applicant's claim, and she must contribute the necessary funds to pay it, Ms May says that she will treat her loan to the applicant to fund the payment as a long term liability. In this way, the respondent submits that it can meet the only unmet current liability in a way that will convert that liability into a non-current liability, thereby continuing its ability to meet its debts as and when they fall due.

[24] Ms May's preferred plan for the future of the property is to continue the development. But there is no project cash flow showing either the amounts of or timing of proposed expenses or any receipts. As previously stated, at the present time, the project is on hold. That may be a consequence of both the lack of working capital and the state of the market.

[25] The respondent's only asset of substance is the land. A valuer expressed the opinion that at the end of 2014 the land was valued at approximately $200,000 assuming a six to nine month selling period. However, if there is a "fire sale", the valuer thought the land might be worth as little as $140,000. The significance of the difference is that if the land is worth $200,000, the net assets of the respondent are approximately $83,000. If the land is worth less, the excess of assets over liabilities is less.

First question: lack of evidence of Ms May's financial capacity

[26] As previously mentioned, the applicant submits that the proposed loan by Ms May to the respondent to fund its liability to the applicant does not prove solvency because there is no evidence of Ms May's capacity to fund the respondent's expenses. Even though she has had the ability to fund the past and present recurring expenses, there is no proof of her ability to fund the $1200 monthly repayments to De Leon. Putting it more precisely, perhaps, there is no evidence that she can afford to fund the respondent's expenses as well as her own commitments in respect of the proposed loan from De Leon.

[27] The applicant submits that the lack of evidence means that the respondent fails to prove that it is solvent.

[28] Some of the cases discuss the extent of the proof that may be required for the company to discharge the onus of proving solvency. The expression "fullest and best proof" is often deployed to indicate what is required. That expression is sourced from the reasons for judgment of Hayne J in *Commonwealth Bank of Australia v Begonia Pty Ltd (rec & mgr apptd)*[9], where it was said:

> "Ordinarily one would expect that on an application of this kind the company would provide the fullest and best possible material in support of its case. Thus one would ordinarily expect that the agreements between Texel and Redlock (for I would assume them to be written and not oral) would be produced in evidence."[10]

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9 (1993) 11 ACSR 609.

10 (1993) 11 ACSR 609, 617.

[29] The context where that expression was used in *Begonia* was that there was little evidence to support a finding that there was a contract which was alleged to be an answer to Texel's presumed insolvency by reason of its non-compliance with a statutory demand. The context where the expression has been deployed on many other occasions is not usually the problem raised in the present case. Usually, the problem lies in establishing what the assets and liabilities of the company are at the relevant date.

[30] There are three cases in the Court of Appeal which do assist in framing the first question for decision in the present case. In *Williams (as liquidator of Scholz Motor Group P/L (in liq)) v Scholz & Anor*,[11] Muir JA said this:

> "Unsecured borrowings are also relevant, provided that they do not give rise to obligations which the company is unable to meet. Where the Court has the benefit of assessing insolvency with the advantage of hindsight, as is the case here, it will tend to be in a better position to evaluate the true bearing of unsecured borrowings on the Company's ability to meet its financial obligations. There is some authority for the proposition that unsecured loans by directors cannot be taken into account. There should, however, be no objection in principle to regarding such financial support as relevant **where the evidence establishes that the directors are likely to continue it**. Loans by related corporations have been regarded as relevant to the determination of solvency. And there is no reason in principle why a loan from directors should be treated any differently to loans from companies controlled by directors. **The most important consideration is the degree of commitment to the continuation of financial support**."[12] (footnotes omitted) (emphasis added)

[31] And in *International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors*,[13] Morrison JA returned to the theme:

> "**The appellant sought to utilise the decision in *Scholz*, to contend that in a case such as this there must be evidence that the funders were able and willing to provide sufficient funds from their own resources, to enable ICM to discharge its debts. *Scholz* is not authority for that proposition.** In that case there was no financial arrangement in place. Absent such an arrangement the contention was that consideration should have been given "to the prospect of the Sholzes providing long term loans to the company (or share capital) in lieu of bank debt". There was no evidence at all that the Scholzs' were able or willing to provide sufficient funds and the only evidence given was of a hearsay nature, where one witness spoke only of the "possibility" that the Scholzs could have borrowed and on-lent. In those circumstances it is not surprising to find a conclusion that in the absence of such evidence solvency could not be established on that ground, but the decision extends no further on that point.

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11 [2008] QCA 94.

12 [2008] QCA 94, [110]. See also per Keane JA at [41]-[42].

13 (2013) 97 ACSR 200.

> The loans provided by the Nu-Log/Rodrick interests were secured by the charge, but were loans from, effectively, a director or related company. As *Scholz* shows, regard can be had to such financial support where the evidence establishes that the directors are likely to continue it…"[14] (footnotes omitted) (emphasis added)

[32] Thirdly, in *Chan & Ors v First Strategic Development Corporation (in liq) & Anor,*[15] Morrison JA referred to both *Scholz*, *International Cat* and the leading case of *Lewis v Doran,*[16] and continued:

> "I agree respectfully with those observations. They reflect the need, in cases where the financial support is from a source which cannot be compelled by legal arrangement, for there to be a degree of assuredness that the financial support will be forthcoming and at such a level that one could say the company was **able** to pay its debts as and when they fall due, rather than being **possibly able** to do so. Just as a conclusion that the relevant financial support does not have to be absolutely certain in order to be sufficient to meet the test in *Lewis v Doran*, *Scholz* and *International Cat*, equally the financial support does not have to be absolutely uncertain in order to be insufficient to qualify. Between the two extremes the factual circumstances of each case will provide a variety of points at which one might conclude that the financial support was of such a degree of commitment that it was likely to continue, and with the result that the company was able to pay its debts, and therefore that it has sufficient financial support to draw the conclusion of solvency."[17] (emphasis in original)"

[33] In the present case, the applicant's counsel cross-examined both Ms May and the expert accountant who gave evidence in support of the respondent's solvency. He asked Ms May about the financial structure of her mortgage broking business. It appears that she is the director of a company that carries on the business as trustee of a trust. The applicant's counsel asked whether the company had a bank account and whether it was meeting its tax compliance obligations. But he did not ask any questions about what its assets were or whether Ms May had any other assets or sources of income which might support her intention to provide working capital to the respondent as required, so as to challenge her evidence, which was not objected to, that she had the capacity.

[34] The applicant's counsel also asked the expert accountant about the sources of information provided to her about Ms May's position. She said that she had been provided with copies of some information not identified in her report by way of tax returns. The applicant's counsel did not ask what the information revealed as to Ms May's assets or sources of income.

[35] In taking this approach, the applicant's counsel relied on the forensic position that it is for the respondent to prove all these things if it wants to prove solvency, so that

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14 *International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors* (2013) 97 ACSR 200, 223-224, [104].

15 [2015] QCA 28.

16 (2005) 219 ALR 555, 579.

17 *Chan & Ors v First Strategic Development Corporation (in liq) & Anor* [2015] QCA 28, [43].

he was not required to ask any questions to demonstrate that Ms May does not have the capacity to support the respondent to the required degree to service the loan she has arranged in order to meet its working capital needs.

[36] In another factual context, that might be a determinative position to take. But with some hesitation, I do not accept that it answers the question for the decision in the present case. Of course, if Ms May contributes the money borrowed from De Leon to the respondent, the respondent is not automatically responsible for her obligation to De Leon for interest. However, the possibility that she may not have enough money to fund her own affairs is at least indirectly relevant to the respondent's position. As well, the amounts in question in the present case are relatively small. It is an unhappy circumstance that there is litigation in this Court with the parties incurring costs on the scale applicable in this Court over those amounts.

[37] In the end, the underlying factual question resolves to whether Ms May will be able to fund an additional $1200 per month from her various sources of funds. There is no evidence that she will not be able to do it. In my view, the detail required to satisfy the "fullest and best" evidence requirement is informed by the circumstance that where the amounts are small, the costs of adducing further layers of proof may not be warranted, at least where no direct challenge is mounted to the existing proof. In my view, that approach is also informed by the duty of litigants to proceed in an expeditious way and the overriding philosophy of the rules of court "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[18]

[38] Accordingly, I am satisfied that the respondent has proved that Ms May has made arrangements by which it is more probable than not she will be able to provide the working capital required for the respondent to pay its debts as and when they fall due.

Second question: Ms May's present commitment may change

[39] The second question raised is the effect of the fact that Ms May is not bound to contribute her money to support the respondent. The respondent submits that Ms May has stated that she will support the respondent and intends to do so. That may be accepted as a jumping-off point for discussion.

[40] The loan which Ms May has agreed to obtain from De Leon is a personal loan. There was no evidence that the respondent unsuccessfully attempted to borrow the same sum from De Leon or any other lender with Ms May as guarantor.

[41] Notwithstanding her present attitude, it would be foolish for Ms May not to keep the financial position of the respondent under consideration. If, as I must assume for the determination of this case, the respondent is indebted to the applicant in the sum of $56,000, still Ms May does not accept that. She denies it vehemently. So, if the present application is dismissed, she does not say that she proposes to pay that or any other sum to the applicant. It is appropriate to infer on the balance of probabilities that she will cause the respondent to defend the applicant's claim. I must assume that at the end of this process, the amount payable to the applicant will

[18] *Uniform Civil Procedure Rules* 1999 (Qld), r 5.

be the claimed sum together with interest and costs. The respondent will also have incurred the costs of an unsuccessful defence.

[42] For simplicity, I assume that Ms May is the only person with an interest in the trust administered by the respondent who might benefit from a distribution of its assets and put to one side any other questions such as the incidence of taxation. Ms May's interest is worth no more that the excess of the assets over the liabilities of the trust. Unless the land is then worth more than $200,000, the amount of that excess will be less than the amount of $83,000 which was the amount of the net assets of the trust as at 31 October 2014. There must be a rational possibility that Ms May might hesitate before exposing herself personally to the extent of more than an additional $56,000 in order to preserve the respondent against liquidation.

[43] I do not find that Ms May will not make the proposed loan to the respondent to pay the applicant's debt. However, the questions that remain are whether I must be satisfied that it is more likely than not that she will do so for the respondent to prove that it is solvent and, if so, whether I am so satisfied.

[44] On the first of those questions, the cases show that the extent of the commitment of a third party who proposes to support an otherwise insolvent company is a highly relevant factor. In my view, in a case like the present, the company should show that the commitment is such that it is more likely than not that it will be manifested by providing support by way of working capital to enable the company to pay its debts as and when they fall due and payable. Consistently with that view, the respondent has proved that Ms May presently has the required commitment.

[45] Yet it is arguable that Ms May's present commitment is informed by her vehement denial and corresponding belief that the respondent does not owe any sum to the applicant and that could change if that belief proves false, as I must assume it will.

[46] The applicant did not challenge Ms May on this ground. Thus, despite my concern as expressed, she has had no opportunity to answer the question. As well, the fact is that she has arranged the personal loan from De Leon to show the respondent's ability, with her assistance, to meet the applicant's claim. Ms May was not asked whether she would bind herself to provide the support or whether the respondent had sought to borrow the funds supported by her guarantee. The applicant did not submit that in the absence of such a binding undertaking the respondent should not be found to have proved that it is solvent.

[47] In the result, I conclude that I should find that, on the balance of probabilities, the respondent has proved that it is able to pay its debts as and when they fall due and is solvent.