SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson Commercial Pty Ltd & Ors v Commissioner of State Revenue* [2015] QSC 375
PARTIES:	**THOMPSON COMMERCIAL PTY LTD** (applicant) **V** **COMMISSIONER OF STATE REVENUE** (respondent) **THOMPSON RESIDENTIAL PTY LTD** (applicant) **V** **COMMISSIONER OF STATE REVENUE** (respondent) **BLUE 11 PTY LTD** (applicant) **V** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	BS No 8890 of 2015 BS No 8888 of 2015 BS No 8887 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	2 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10, 11, and 12 September 2014
JUDGE:	Peter Lyons J
ORDER:	**Applications dismissed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SOME OTHER REASON – where the respondent served on each applicant a creditor's statutory demand – where the applicants were each members of the same corporate group – where each statutory demand claimed against each applicant the total of the payroll

tax assessments for each applicant where the applicants apply to have the statutory demands set aside – whether an assessment can be the subject of a genuine dispute when a certificate has been issued under s 132 of the *Taxation Administration Act* 2001 (Qld)

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SOME OTHER REASON – – where the applicants were jointly and severally liable for the debt claimed in the statutory demands – whether the respondent's use of the statutory demand process was oppressive or an abuse of process – whether the respondent used the process to obtain an advantage for which the process is not designed or to obtain a collateral advantage – whether a statutory demand may properly be issued to each debtor who is jointly and severally liable for the debt – whether a composite application to set aside a statutory demand might be brought by more than one applicant in relation to an alleged joint debt – whether payment of the total debt by one applicant amounts to compliance by the other two with the demand

Corporations Act 2001 (Cth), s 459E, s 459J
Taxation Administration Act 2001 (Qld), s 132

Circle Recruitment Pty Ltd, Re [2013] NSWSC 734, cited.
Cooloola Dairys Pty Ltd v National Foods Milk Ltd [2004] QSC 308; [2005] 1 Qd R 12, followed.
Createc Pty Ltd v Design Signs Pty Ltd (2009) 71 ACSR 602; [2009] WASCA 85, cited.
Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473; [2008] HCA 41, followed.
Femley Pty Ltd v Salken Engineering Pty Ltd [1999] NSWSC 334; (1999) 17 ACLC 828, cited.
John Farlow Pty Ltd, Re [2015] NSWSC 939, cited.

COUNSEL:

In BS No 8890 of 2015
S Hogg for the applicant.
FW Redmond for the respondent.

In BS No 8888 of 2015
S Hogg for the applicant.
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In BS No 8887 of 2015
S Hogg for the applicant.
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SOLICITORS:

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[1] HIS HONOUR: On 18 September 2015, the respondent in each of these applications caused to be served on each applicant a creditor's statutory demand for payment of debt, relying on s 459E of the *Corporations Act* 2001 (Cth). Each of the applicants has applied to have that notice set aside.

[2] It is convenient to refer to each applicant by a distinguishing feature of their name. A payroll tax assessment issued to Commercial in the sum of $234,809.09, a payroll tax assessment issued to Residential in a sum totalling $145,383.81, and a similar assessment issued to Blue 11 in a sum of $290,874.04. In each case, the assessment included interest. The three applicants were described as members of the Thompson Group and there is, it would appear, no issue as to whether they were, in fact, together members of that group. A consequence of that conclusion is that each was jointly and severally liable for payroll tax assessments and interest owed by the other members of the group to the respondent. It was on that basis that each of the statutory demands claimed, against each applicant, the total of the three assessments, being an amount of $671,066.94. Each demand was in the statutory form. Each applicant was required by the demand, within 21 days of service of it, to pay to the respondent the total amount of the debt or to secure or compound for the total amount of the debt to the respondent's reasonable satisfaction. Each application was made within the 21 day period.

[3] I should add that the amounts which were claimed were the results of assessments made in 2013. Objections were lodged by each applicant, but were overruled by the respondent on 29 April 2014 and no appeal against or application for review of those decisions has been filed. Reassessment notices, however, issued to Commercial and Blue 11 on 27 May 2014. Those notices were also not the subject of an appeal or application for a review. It appears to be common ground that the amounts in the demands are the amounts finally claimed as a result of the assessments and reassessments to which I have referred.

[4] The applications are made under section 459J(1) of the Corporations Act, specifically on the basis that there is some other reason than that stated in paragraph (a) of that subsection why each demand should be set aside. In support of that ground, it is submitted that the respondent is, in each case, using the statutory demand procedure as a debt collection tool when the respondent knows the applicant to be solvent. The debt is overstated and multiple demands have been served for the one debt. As the submissions developed, it became clear that the applicants contended that the use of the statutory demand process was oppressive or an abuse of process because compliance

would require payment three times of the amount owed to the Commissioner, and because even if the debt were paid, there would have to be more than one application for the setting aside of the statutory demands.

[5] The proposition that the respondent is using the statutory demand procedure as a debt collection tool knowing the applicant to be solvent was in part based on evidence of an accountant as to the solvency of each applicant. For reasons which will become apparent, it is unnecessary for me to consider further the solvency of each applicant.

[6] The proposition that it is inappropriate to use the statutory demand procedure in a case like the present case was supported by reference to the judgment of Martin CJ with whom the other members of the court agreed in *Createc Pty Ltd v Design Signs Pty Ltd*[1]. There his Honour said:

> *'...there will be an abuse of process if the purpose of the party issuing the statutory demand is not the purpose of pursuing the statutory demand to wind up the company on the ground of insolvency ...'*

[7] And I paraphrase what his Honour said:

> *To use the process as a means of obtaining an advantage for which the process is not designed or [obtaining] a collateral advantage ... such as [applying] pressure to compel payment of a disputed debt.*

[8] The present applications do not come within the propositions stated by his Honour. While there is evidence before me that the debt is disputed, I am faced with the effect of s 132 of the *Taxation Administration Act* 2001 (Qld). It provides that the production of a document signed by the respondent purporting to be a copy of an assessment notice is conclusive evidence of three things, namely: the proper making of the assessment, that the amount of the assessment is correct and that all particulars of the assessment are correct.

[9] Such documents have been produced in the present proceeding. The language of the section is clear enough. Reference to it was buttressed by reference to *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*[2]. In that case, it was held that even the existence of proceedings under the *Taxation Administration Act* 1953 (Cth) for the purpose of challenging an assessment did not give rise to a genuine dispute, in view of the effect of the provisions supporting assessments in that legislation, it follows, it seems to me, that evidence that the assessments are erroneous in terms of the amounts calculated is not evidence on which I can act, rather, s 132 requires me to act on the documents produced by the Commissioner with the result that, for present purposes, there is no dispute about the debt. If there is no dispute about the debt, then, the collateral purpose or advantage for which the process is not designed is not apparent in the present case. At least as those things were identified by Martin CJ in *Createc*.

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1 [2009] 71 ACSR 602, at [50].
2 (2008) 237 CLR 473.

[10] The mere attempt to recover a debt, it seems to me, is not itself outside the scope of the statutory demand procedures. That follows from the fact that the legislation specifically authorises a person to serve a demand on a company for a debt and attaches consequences to a failure to comply with the demand, in one of the ways specified in the legislation, within time limits fixed by it. See, in particular, s 459E of the *Corporations Act*. I, therefore, do not accept the submission that the procedures employed by the Commissioner amount to pure debt collection which would provide a basis for setting aside the statutory demand.

[11] I should add that the submission was supported by reference to the time over which there appear to have been some negotiations and a program of payments on behalf of the applicants to the Commissioner in reduction of the total amount owing and what was, at least by implication, said to be the precipitous action of the Commissioner in nevertheless issuing the statutory demands. That seems to me to be a matter of no consequence for the purpose of the present applications. It will also be apparent, from my reference to s 132 of the *Taxation Administration Act* (Qld) that the disputes about the amounts or the allegations that the debt is overstated, are matters which I can not take into account.

[12] It is true that each demand is for the same debt. The Act, however, authorises the issue of such a demand against a company for a debt which that company owes to the person issuing the demand. It is consistent with the legislation, therefore, that a demand issue against each company owing a debt even if that debt is owed jointly and/or severally with other persons or entities.

[13] In *Circle Recruitment Pty Ltd*[3], Black J accepted the concession that a statutory demand for the amount of a debt could properly be issued to each debtor who is jointly and severally liable for that debt. His Honour relied upon the decision of White J in *Hills Motorway Ltd v UBS AG*[4] as supporting the proposition. As I have said, that seems to be consistent with the legislative provisions which authorise the making of a statutory demand for the purposes of the Corporations Act.

[14] Solvency of itself is not a basis for setting aside the statutory demand, as appears to have been accepted in the submissions for the applicants. It was referred to in their submissions as relevant to the proposition that the application should be set aside because it was an exercise in pure debt collecting.

[15] Of the remaining issues, it is convenient to commence with that relating to the need for applications by at least two of the applicants to set aside the statutory demand should the debt be paid by the third or, alternatively, three applications even if at some point afterwards one of the three applicants paid the debt. This, it was submitted, was oppressive or an abuse of process and consistent with what was said by Chesterman J in *Cooloola Dairys Pty Ltd v National Foods Milk Ltd*[5], that oppression or an abuse of process may demonstrate some other ground on which a statutory demand might be set aside under s459J(1)(b) of the Corporations Act.

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3 [2013] NSWSC 734, at [6].
4 [2005] NSWSC 1086.
5 [2005] 1 Qd R 12 at [26].

[16] So far as the need for multiple applications is concerned, there is authority for the proposition that that is not correct[6]. In *Femley Pty Ltd v Salken Engineering Pty Ltd*[7], Santow J considered that a composite application might be brought by more than one company in relation to an alleged joint debt owed by them, notwithstanding that a separate statutory demand had issued against each of those companies.

[17] In *John Farlow Pty Ltd*[8] Brereton J went further. His Honour stated that, having regard to the rules in force in that State, he could not see why an application brought by one of the companies served with a statutory demand would not encompass an application by each individually to set aside the demand and thus come within s 459G of the Corporations Act. His Honour's proposition related to a debt said to be owed jointly and severally by each of the companies making the application. It would therefore cover the present case.

[18] The remaining question includes whether, if one pays, the other two might need to make an application. The process for issuing a statutory demand established by the Act has consequences identified in s 459F. Thus, if, at the end of the period for compliance with the demand, it is still in effect and the company on whom the demand has been served has not complied with it, the company is taken to fail to comply with the demand and there are consequences in terms of its deemed insolvency.

[19] The question is whether payment by one amounts to compliance by the other two with the demand notwithstanding that each demand specified a total amount owed as a joint and several debt. In other words, the submission made on behalf of the applicants is that if one were to pay, the others would not have complied with the statutory demand and either they face the consequence that each of those two would be deemed to be insolvent or each would have to make an application to set aside the statutory demand. These consequences were said to make the use of the procedure oppressive or provide some other ground for setting aside the three statutory demands.

[20] The first difficulty with the proposition is that it reflects the situation faced by White J in the *Hills Motorway* case referred to earlier. In that case a debt was alleged to be owed jointly by two companies. Half of the total amount was claimed by statutory demand. His Honour construed each demand to refer to the same half of the total debt. His Honour was not, however, prepared to set aside the statutory demands. His Honour concluded at [42] that each company would not fail to comply with the statutory demand if within the time prescribed each or either of them, or some person on behalf of them, paid the amount of the demand to the person issuing it. His Honour's conclusion is consistent with the views of Glanville Williams in *Joint Obligations*[9]. The author there stated that:

> *'One type of discharge common to joint and joint and several obligations is discharge by performance.'*

And that:

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6 See *Cooloola Dairys Pty Ltd* at [26].

7 [1999] NSWSC 334 at [20].

8 [2015] NSWSC 939 at [8]

9 Glanville Williams, *Joint Obligations*: *A treaties on joint and joint and several liability in contract, quasi-contract, and trusts*, Butterworth & co (Australia), at pp 92-93.

> *'An obligation, whether joint or joint and several, has only to be performed once.'*
> (citations omitted)

[21] It seems to me that it rules too fine a line to say that discharge of a joint debt or a joint and several debt by payment of the total amount of the debt by one of a number of debtors does not amount to compliance with the demand made on the other debtors. Accordingly, if one were to pay the total amount of the debt, that would be compliance by all and there would be no need to apply to set aside the statutory demands against the others.

[22] No other basis of any substance was identified in support of the applications. Accordingly, I propose to dismiss them. This does not seem to me to be an appropriate case for an order for indemnity costs. Not all of the points were of substance but some were not straightforward and, accordingly, it seems to me that even though there has been a lack of success by the applicants, there were some matters that did need careful consideration. For that reason it seems to me it was not a case where indemnity costs should be ordered.

[23] In each case I dismiss the application. I order that the applicants pay the costs of the respondent to be assessed on the standard basis.