

# SUPREME COURT OF QUEENSLAND

CITATION: *Natcraft P/L v Win Television P/L* [2001] QCA 245

PARTIES: **NATCRAFT PTY LTD** ACN 010 592 775  
(plaintiff/appellant)  
**v**  
**WIN TELEVISION PTY LTD** ACN 009 697 198  
(defendant/respondent)

FILE NOS: Appeal No 7764 of 2000  
S119 of 2000

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Mackay

DELIVERED ON: 26 June 2001

DELIVERED AT: Brisbane

HEARING DATE: 7 June 2001

JUDGES: Williams JA, Muir and Atkinson JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made.

ORDER: **Appeal dismissed. Order that the appellant pay the respondent's costs of and incidental to the appeal to be assessed.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – GENERALLY – genuine dispute – substantiated amount less than statutory minimum – where statutory demand set aside on condition that the appellant pay into court the amount of the alleged debt – whether order setting aside demand can be made subject to conditions.

*Corporations Law*, s 459F, s 459H, s 459J, s 459M,

*Anchez Pty Ltd v Dragon Corporation Pty Ltd*, unreported Qld Court of Appeal, Appeal No 9706 of 1996, 22 May 1997; 15 August 1997, referred to.

*Re Roomcastle Pty Ltd*, unreported, Supreme Court of Qld, APN 404 of 1994, 4 July 1994, referred to.

*Taylor v Public Service Board (NSW)*(1976) 137 CLR 208, referred to.

*Wickman Machine Tool Sales Ltd v Schuler* [1972] 2 All ER

1173, considered.

COUNSEL: A J Moon, for the appellant  
C D Coulsen, for the respondent

SOLICITORS: Lawrence W Hewitt Solicitor for the appellant  
Jones King Lawyers for the respondent

- [1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Muir J wherein the issues raised by this appeal are defined.
- [2] One regularly finds in rules of court a provision that a step taken in a proceeding, or even a judgment or order, may be set aside on conditions. There is certainly nothing unusual, or contrary to principle, in a statute providing that a notice having potential legal consequences may be set aside on such conditions as the court thinks fit. There is, in my view, no inconsistency between s 459H(3) and s 459M of the Corporations Law. In circumstances calling into play s 459H(3) the court must set aside the demand, but that setting aside can be on conditions imposed pursuant to s 459M. Such orders have been regularly made at first instance, and the practice has the approval of this Court in the unreported decision of *Anchez Pty Ltd v Dragon Corporation Pty Ltd*, CA 9706 of 1996, 15 August 1997.
- [3] I agree that the appeal should be dismissed with costs to be assessed.
- [4] **MUIR J:** The appellant company was served with a statutory demand by the respondent pursuant to section 459F of the *Corporations Law* on 7 July 2000. On the appellant's application, a judge of the trial division of this Court ordered that the statutory demand be set aside on condition that the appellant pay into court the amount of the alleged debt.
- [5] The sole point raised on the appeal is whether the learned primary judge, having proceeded on the basis that there was a genuine dispute as to the whole of the amount claimed in the statutory demand, had power to make an order in such terms.
- [6] Mr Moon, who appears on behalf of the appellant, argues that it follows from the finding of a genuine dispute in respect of the whole of the sum demanded that the "substantiated amount" for the purposes of section 459H was less than the statutory minimum necessary to support a statutory demand. That being the case, it is said, section 459H(3) requires that the demand be set aside. That subsection provides –  

**"[When court must set aside demand]** If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand."
- [7] Section 459M provides –  

**"Order subject to conditions**  
**459M** An order under section 459H or 459J may be made subject to conditions."

- [8] The term “substantiated amount” used in section 459H(3) means, in broad terms, where the company served with the statutory demand does not rely on an “offsetting claim”, the amount (if any) of the alleged debt about which there is no genuine dispute.
- [9] Mr Moon submits that once the “substantiated amount” has been determined as being less than the statutory minimum, the Court must set aside the statutory demand and that it cannot impose a condition the non-fulfilment of which may result in the demand not being set aside. Such an order, he contends, would infringe the mandatory terms of section 459H(3).
- [10] One may accept that section 459H(3) requires a statutory demand to be set aside in the circumstances in which it applies. That subsection, however, is silent as to conditions, if any, which may be imposed by the order. Section 459M, which applies expressly to orders under sections 459H and 458J, permits the imposition of conditions in respect of such orders.
- [11] Mr Moon submits that section 459M it is a general provision and must therefore be read subject to section 459H(3), the more specific provision. The reality is that both provisions deal concisely with a specific subject matter. Section 459M is hardly more general or less specific than section 459H(3). Both deal with orders setting aside statutory demands. Section 459H(3) stipulates that in prescribed circumstances a statutory demand must be set aside by order. Section 459M addresses the content of such an order.
- [12] Acceptance of the appellant’s argument would mean that the words “subject to conditions” in section 459M must be read subject to a restriction or qualification not expressed in the wording of the section. Nor can I see any scope for the implication of any such qualification.
- [13] In my view the appellant’s preferred construction does not accord with the natural meaning of the words in section 459M. In *Wickman Machine Tool Sales Ltd v Schuler* Lord Denning MR observed –<sup>1</sup>

“There are three meanings of “condition” open to us. The first is the proper meaning, which is given pride of place in the Oxford English dictionary: “Something demanded or required as a prerequisite to the granting or performance of something else”; and which is carried over into the law in this way: “In a legal instrument, e.g. a...contract, a provision on which its legal force or effect is made to depend”...

In everyday language the words “an order subject to conditions” connote the imposition of a condition or conditions which, in the event of non-fulfilment, may prevent or restrict the operation the order would otherwise have had. In other words, to say that an order may be made subject to conditions means that a conditional order may be made.

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<sup>1</sup> [1972] 2 All ER 1173.

- [14] Perhaps the greatest difficulty with the appellant's approach is that it focuses to an impermissible degree on sub-section (3) of section 459H, ignoring the necessity for it to be read with and accommodated to the rest of Division 2 of Part 5.4.<sup>2</sup>
- [15] Mr Moon was able to point to no authority in support of his contentions. On the other hand courts, admittedly without considering the arguments advanced on behalf of the appellant, have imposed conditions of the type imposed by the primary judge.<sup>3</sup>
- [16] I would dismiss the appeal and order that the appellant pay the respondent's costs of and incidental to the appeal to be assessed.
- [17] **ATKINSON J:** I agree with the order proposed by and the reasons of Muir J.

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<sup>2</sup> cf *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ.

<sup>3</sup> *Re Roomcastle Pty Ltd*, Supreme Court of Qld, APN 404 of 1994, 4 July 1994, unreported; *Anchez Pty Ltd v Dragon Corporation Pty Ltd*, Qld Court of Appeal, Appeal No 9706 of 1996, 22 May 1997; 15 August 1997, unreported.