SUPREME COURT OF QUEENSLAND

CITATION:	*Neutral Bay P/L v DCT; MA Howard Racing P/L v DCT; Broadbeach Properties P/L v DCT* [2007] QCA 312
PARTIES:	**NEUTRAL BAY PTY LTD** ACN 086 100 432 (applicant/respondent) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent/appellant) **MA HOWARD RACING PTY LTD** ACN 092 182 048 (applicant/respondent) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent/appellant) **BROADBEACH PROPERTIES PTY LTD** ACN 100 178 943 (applicant/respondent) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent/appellant)
FILE NO/S:	Appeal No 449 of 2007 Appeal No 448 of 2007 Appeal No 430 of 2007 SC No 4143 of 2006 SC No 4144 of 2006 SC No 4715 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	5 and 6 September 2007
JUDGES:	Keane, Holmes and Muir JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeals dismissed** **2. Appellant to pay respondents' costs to be assessed on the standard basis**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION

TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – TESTS TO BE APPLIED – where appellant served respondents with statutory demand – where respondents pursuing Part IVC proceedings – whether statutory demand could be set aside under s 459H – whether discretion under s 459J correctly exercised

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 17-5, s 33-5, s 165-40, s 165-50
Corporations Act 2001 (Cth), s 459H, s 459J, s 459P
Income Tax Assessment Act 1936 (Cth), s 177, s 204
Taxation Administration Act 1953 (Cth), s 24

Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation (2005) 157 ACTR 22, considered
Batagol v Federal Commissioner of Taxation (1963) 109 CLR 243, cited
Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1995) 183 CLR 168, applied
Deputy Federal Commissioner of Taxation v Brown (1958) 100 CLR 32, cited
Hoare Bros Pty Ltd v Commissioner of Taxation (1996) 62 FCR 302, not followed
Kalis Nominees Pty Ltd v DCT (1995) 31 ATR 188, disapproved
KW & KM Quinn Investments P/L v DCT [2004] QCA 91; Appeal No 9491 of 2003, 31 March 2004, applied
McAndrew v Federal Commissioner of Taxation (1956) 98 CLR 263, applied
Platypus Leasing Inc v Federal Commissioner of Taxation (2005) 61 ATR 239, considered
Willemse Family Company Pty Ltd v Deputy Commissioner of Taxation [2003] 2 Qd R 334, applied

COUNSEL: M R Aldridge, with P A Looney, for the appellant
F L Harrison QC, with M L Robertson, for the respondents

SOLICITORS: Australian Taxation Office Legal Services Branch for the appellant
Deacon & Milani for the respondents

[1] **KEANE JA:** In March and May 2006, the appellant served a statutory demand under the *Corporations Act 2001* (Cth) ("the Act") on each of the respondents for payment of a tax debt. Each of the respondents applied for an order that the demands be set aside. The learned primary judge made orders pursuant to s 459H(1)(a) and s 459J(1)(b) of the Act setting aside the statutory demand in each case.

[2] The appellant challenges those orders, contending that the learned primary judge erred in holding, in respect of some of the amounts claimed by the appellant, that there was, in the circumstances, "a genuine dispute between the parties about the existence or amount of the debt" for the purposes of s 459H(1)(a) of the Act. The

appellant also contends that the learned primary judge erred in the exercise of the discretion conferred by s 459J(1)(b) of the Act in respect of the balance of these amounts.

[3] In my respectful opinion, the appellant's contentions should be rejected, both in relation to s 459H and s 459J of the Act. Before attempting to explain the reasons for my conclusions, I will set out the facts relating to the statutory demands and the relevant statutory provisions. I will then set out the reasons supporting the decision at first instance. I will then consider the arguments agitated in this Court in order to explain why the appeal should be dismissed.

The facts

[4] The statutory demand against the respondent, Neutral Bay Pty Ltd ("Neutral Bay"), was for a debt in the amount of $8,433,350.79. This debt was said to be a "Running Balance Account" ("RBA") deficit in respect of amounts due principally by way of goods and services tax ("GST") payable under *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act"). The *Taxation Administration Act 1953* (Cth) ("the TAA") makes provision for the collection of GST by use of an RBA. The learned primary judge explained the nature of an RBA deficit debt as follows:

> "Under the TAA, the Commissioner may establish one or more systems of accounts for primary tax debts of a taxpayer, each account to be known as Running Balance Account or RBA. A primary tax debt is defined to mean any amount due to the Commonwealth directly under a taxation law (TAA, s 8AAZA), and the TAA is itself a taxation law (TAA, s 2(1)). An RBA deficit debt is defined to mean, in relation to an RBA of an entity, a balance in favour of the Commissioner which is based on primary tax debts allocated to the RBA which are currently payable, payments made in respect of current or anticipated primary tax debts of the entity and credits to which the entity is entitled under a taxation law which have been allocated to the RBA (TAA, s 8AAZA). If there is an RBA deficit debt at the end of any day, then a general interest charge is payable on that RBA debt for that day and the balance of the RBA is altered accordingly (TAA, s 8AAZF (1), (2)). By TAA s 8AAZH(1), the tax debtor is liable to pay the amount of the debt which is due and payable at the end of that day."[1]

[5] The statutory demand against the respondent, MA Howard Racing Pty Ltd ("Howard Racing"), was for an RBA deficit debt in the amount of $6,389,785.75.

[6] The statutory demand on Broadbeach Properties Pty Ltd ("Broadbeach Properties") was for a debt in the sum of $1,679,920.24 being Broadbeach Properties' assessed income tax liability for the year ended 30 June 2004 together with interest.

[7] The components of the RBA deficit debts claimed by the appellant were helpfully summarised by the learned primary judge:

> "**Description** **Neutral Bay** **Howard Racing**
> Assessed/declared net

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[1] *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation; MA Howard Racing Pty Ltd v Deputy Commissioner of Taxation; Neutral Bay (Sales) Pty Ltd v Deputy Commissioner of Taxation; Broadbeach Properties Pty Ltd v Deputy Commissioner of Taxation* [2006] QSC 394 at [3].

amounts	$ 4,291,567.00	$ 3,187,743.00
'Failure to withhold' penalties	$ 75,177.90	$ 9,031.50
Tax shortfall penalties	$ 2,426,963.00	$ 1,773,546.00
Administrative overpayments	$ 150,255.00	$ 209,091.00
General interest charge	$ 1,610,847.89	$ 1,229,397.25
Other	-$ 121,460.00	-$ 19,023.00
Total	$ 8,433,350.79	$ 6,389,785.75"[2]

[8] Before the learned primary judge, it was common ground that Neutral Bay and Howard Racing had instituted and were pursuing proceedings under Pt IVC of the TAA to challenge the Commissioner's assessments and declarations and consequential claims for penalties, overpayments and interest. Thus, the respondents were disputing, in accordance with the provisions of the TAA, the existence of the debts payment of which was claimed by the statutory demands. It was common ground that, in each case, the respondent had an arguable case. The basis on which the debts the subject of the statutory demand are being contested by the respondents was sufficiently summarised by the learned primary judge:

> "These companies are involved in property development and specifically the construction of residential apartments. Some apartments were constructed by Neutral Bay Pty Ltd on land which it owned after which it sold the apartments to Neutral Bay (Sales) Pty Ltd which sold them to members of the public. Similarly, apartments were constructed by MA Howard Racing Pty Ltd on land which it owned after which the apartments were onsold to Broadbeach Properties Pty Ltd which sold them to members of the public.
>
> Sales of residential premises do not attract GST except where they are new residential premises, which means premises which have not previously been sold as residential premises (*A New Tax System (Goods and Services Tax) Act* 1999, s 40-75). Ordinarily a supply within a group registered as such for GST purposes does not attract GST. Neutral Bay Pty Ltd and Neutral Bay (Sales) Pty Ltd became registered as a group for GST purposes, the nominated group representative being Neutral Bay Pty Ltd. MA Howard Racing Pty Ltd and Broadbeach Properties Pty Ltd were registered as another group, the representative being MA Howard Racing Pty Ltd. A representative member is liable to pay GST on any taxable supply by a member of the group. The applicants say that the sales to Neutral Bay (Sales) Pty Ltd and Broadbeach Properties Pty Ltd were not taxable because they were within a group, and that the sales by those companies to the public were not the first sales, because the first sales were the sales to them. The respondent says that *A New Tax System (Goods and Services Tax) Act* 1999 (the GST Act) upon its proper interpretation, means that the first sale cannot be constituted by a sale within a group, so the sales to the public are subject to GST, and the representative members are liable. This is but one of the issues for determination in the Part IVC proceedings.
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> In the case of Neutral Bay Pty Ltd, the assessed/declared net amounts, totalling $4,291,567, are assessments of GST or alternatively amounts claimed by the respondent by way of a declaration under the anti-avoidance provisions of the GST Act. The

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2 [2006] QSC 394 at [4].

> same applies to the component of $3,187,743 in the demand upon MA Howard Racing Pty Ltd.
>
> The 'tax shortfall penalties', totalling $2,426,963 for Neutral Bay Pty Ltd and $1,773,546 for MA Howard Racing Pty Ltd, are penalties imposed for the non-payment in each case of the company's GST debt.
>
> The so called administrative overpayments, $150,255 for Neutral Bay Pty Ltd and $209,091 for MA Howard Racing Pty Ltd, again relate to GST. They are amounts which the respondent says were overpayments in that the company concerned was given higher input tax credits than it should have been allowed.
>
> The 'failure to withhold' penalties, being $75,177.90 for Neutral Bay Pty Ltd [and] $9,031.50 for MA Howard Racing Pty Ltd … represent penalties assessed by the respondent for the alleged failure by the company to withhold amounts from contractors who had not quoted an ABN.
>
> The remaining component is for interest which is a function of the other components."[3]

[9] The statutory demand in relation to Broadbeach Properties does not relate to an RBA deficit in respect of GST. In this regard, the learned primary judge said:

> "The statutory demand addressed to Broadbeach Properties Pty Ltd is for the sum of $1,679,920.24. It differs from the others in that it is not a demand for a RBA deficit and it does not relate to GST. It demands income tax for the year ended 30 June 2004, according to a notice of assessment issued on 18 April 2006, together with interest on that sum."[4]

[10] Broadbeach Properties objected to the assessment on the basis that the Commissioner had wrongly failed to allow deductions for interest paid to related companies. At the time of the hearing at first instance, the Commissioner had not ruled upon this objection.[5] The appellant's concession that the challenge was arguable extended to the case of Broadbeach Properties.

[11] It is important to emphasise the significance of the appellant's concession. The concession means that this case cannot be understood as one in which a taxpayer's attempt to dispute its liability to tax is spurious.

The *Corporations Act*

[12] Section 459A of the Act empowers a court to wind up in insolvency an insolvent company on an application under s 459P. Section 459E(1) permits a person to serve a demand on a company for the payment of debts that are due and payable and are at least equal to the statutory minimum. Under s 459C(2)(a) of the Act, the court to which a winding up application is made must presume that the company is insolvent if, during or after the three months ending on the day when the application for the winding up is made to the court, the company failed to comply with a statutory demand. The company may apply to the court pursuant to s 459G of the Act for an order setting aside the statutory demand.

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3 [2006] QSC 394 at [5] – [11].
4 [2006] QSC 394 at [12].
5 [2006] QSC 394 at [52].

[13] Section 459H provides relevantly:

> "(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
>
> (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
>
> (b) that the company has an offsetting claim.
>
> …
>
> (3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.
>
> …
>
> (6) This section has effect subject to section 459J."

[14] Section 459J of the Act provides further bases on which the court may set aside a statutory demand. It provides:

> "(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
>
> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
>
> (b) there is some other reason why the demand should be set aside.
>
> (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

[15] Section 459K provides: "A statutory demand has no effect while there is in force under s 459H or s 459J an order setting aside the demand." On the hearing of the appeal, Mr Aldridge SC, who appeared with Mr Looney of Counsel on behalf of the appellant, accepted that, within the context of this Part of the Act, the "effect" of a statutory demand which is "in force" is to create a basis for winding up a company on the ground that it is insolvent. This acknowledgment conforms to the observation of Hayne J in *Mibor Investments Pty Ltd v Commonwealth Bank of Australia*:[6]

> "the only significance that the statutory demand has is that if there is failure to comply with it then the company is deemed to be insolvent. Thus the demand is no more than a precursor to an application for winding-up in insolvency."

[16] This observation draws attention to the statutory context in which s 459H and s 459J must be interpreted. While a statutory demand may be regarded as a perfectly legitimate means of attempting to collect debts which are due and payable,[7] s 459H and s 459J are not concerned with whether a debt should be paid, but with whether a company should be wound up.

The relevant provisions of the taxation legislation

[17] Section 33-5 of the GST Act provides for the payment of GST as follows:

> "(1) If the net amount for a tax period (other than a quarterly tax period) applying to you is greater than zero, you must pay

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6 [1994] 2 VR 290 at 295.

7 *Redglove Holdings Pty Ltd v GNE & Associates Pty Ltd* (2001) 165 FLR 72 at 77 – 78 [29] – [31].

the net amount to the Commissioner on or before the 21st day of the month following the end of that tax period.

(2) However, if the tax period ends during the first 7 days of a month, you must pay the net amount to the Commissioner on or before the 21st day of that month."

[18] Section 17-5 of the GST Act provides relevantly as follows:

"(1) The ***net amount*** for a tax period applying to you is worked out using the following formula:

GST – Input tax credits

where:

GST is the sum of all of the GST for which you are liable on the taxable supplies that are attributable to the tax period

input tax credits is the sum of all of the input tax credits to which you are entitled for the creditable acquisitions and creditable importations that are attributable to the tax period

…"

[19] A provision of particular relevance for the argument of the appellant in the case of the RBA deficit debts owed by Neutral Bay and Howard Racing is s 105-100 of Sch 1 of the TAA. It provides:

"The production of:

(a) a notice of assessment under this Part; or

(b) a declaration under:

(i) section 165-40 or subsection 165-45(3) of the *GST Act; or

(ii) section 75-40 or subsection 75-45(3) of the *Fuel Tax Act 2006*;

is conclusive evidence:

(c) that the assessment or declaration was properly made; and

(d) except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment or declaration – that the amounts and particulars in the assessment or declaration are correct."

[20] Section 105-100 of Sch 1 of the TAA is similar in effect to s 177(1) of the *Income Tax Assessment Act 1936* (Cth) ("the ITAA"). It is convenient to set out here the material terms of the latter section:

"The production of a notice of assessment … shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to assessment, that the amount and all the particulars of the assessment are correct."

[21] Section 165-40 of the GST Act is an anti-avoidance provision. It relevantly provides:

"For the purpose of negating a GST benefit the avoider mentioned in section 165-5 gets or got from the scheme, the Commissioner may make a declaration stating either or both of the following:

(a) the amount that is (and has been at all times) the avoider's net amount for a specified tax period that has ended;

…"

[22] Section 165-50 of the GST Act provides:

> "A statement in a declaration under this Subdivision has effect according to its terms, for the purposes of Division 33 (about payments of GST) and Division 35 (about refunds), despite the provisions of this Act outside those Divisions and this Division."

[23] The operation of the GST Act and the TAA was helpfully summarised by McClellan CJ at CL, with whom Handley and Tobias JJA agreed, in *Platypus Leasing Inc v Federal Commissioner of Taxation*[8] as follows:

> "Liability for GST is imposed by the GST Act which provides that GST is payable if a taxable supply has been made. Any liability in respect of taxable supplies is adjusted by the amount of any tax credits in respect of creditable acquisitions (s 7-5). Many difficult issues can arise before the net liability for tax is determined.
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> Section 24 of the TAA provides that any liability to pay GST is not dependent upon the Commissioner issuing an assessment. That liability arises from the operation of the GST Act under which taxpayers must file a return and at the same time make payment of any identified liability. This is different to income tax for which a taxpayer is liable only when assessed: s 204 of the *Income Tax Assessment Act 1936* (Cth) (the ITAA 1936).
>
> Provision is made in Pt VI of Div 2 of the TAA for the Commissioner to issue a notice of assessment of GST (s 22). In this event s 59 of the TAA will apply if the assessment is tendered in legal proceedings.
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> Section 59 is in the following terms:
>
> > The production of a notice of assessment under this Part or of a declaration under section 165-40 or subsection 165-45(3) of the GST Act is conclusive evidence:
> >
> > (a) that the assessment or declaration was properly made; and
> >
> > (b) except in proceedings under Part IVC on a review or appeal relating to the assessment or declaration-that the amounts and particulars in the assessment or declaration are correct.
>
> The GST Act contains its own anti-avoidance provisions. They are found in Div 165 of the Act which provides that in relevant circumstances a taxpayer (who for this purpose is defined as 'an avoider') may lose the benefit of any 'scheme'. In general terms the Division has the effect of establishing the liability of a person or corporation to GST at the appropriate amount, but for the scheme. The Commissioner is able to negate an avoider's benefit from a scheme by making a declaration pursuant to s 165-40 of the Act.
>
> Section 59 of the TAA gives to a declaration the same conclusive evidentiary effect as it gives to an assessment."

It should be noted that s 59 of the TAA to which McClellan CJ at CL referred is now s 105-100 of Sch 1 of the TAA.

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[8] (2005) 61 ATR 239 at 246 [37] – [42].

[24] A taxpayer dissatisfied with an assessment or a taxation decision may invoke the provisions of Pt IVC of the TAA to object to an assessment. If the taxpayer is dissatisfied with the Commissioner's objection decision, the taxpayer may apply for review of the decision to the Administrative Appeals Tribunal ("the Tribunal") pursuant to s 14ZZ of the TAA.

[25] Section 14ZZK of the TAA provides that, on an application for review of a reviewable objection decision, the applicant has the burden of proving that "if the taxation decision concerned is an assessment … the assessment is excessive."

[26] Section 14ZZL provides that the Commissioner must, after the decision of the Tribunal becomes final, "take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision."

[27] Section 14ZZM of the TAA provides:

> "The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending."

[28] Section 14ZZR of the TAA provides:

> "The fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax or additional tax or other amount may be recovered as if no appeal were pending."

[29] Section 24 of the TAA relevantly provides in relation to GST as an "indirect tax":

> "(1) Your liability to pay indirect tax, and the time by which a net amount or an amount of indirect tax must be paid, do not depend on, and are not in any way affected by, the making of an assessment under this Division."

[30] It is convenient to set out here the relevant provisions of s 204 of the ITAA:

> "(1) Subject to the provisions of this Part, the tax payable by a taxpayer other than a full self-assessment taxpayer for a year of income becomes due and payable:
>
> (a) if the taxpayer's return of income is lodged on or before the due date for lodgement – on the later of:
>
> (i) 21 days after the due date for lodgement of that return specified in the Gazette under section 161 for the year of income; or
>
> (ii) 21 days after a notice of assessment is given to the taxpayer; or
>
> (b) in any other case – 21 days after that due date for lodgement.
>
> …
>
> (1A) Subject to the provisions of this Part, the tax payable by a full self-assessment taxpayer for a year of income becomes due and payable as follows:
>
> (a) if the taxpayer's year of income ends on 30 June - on 1 December of the following year of income or on

such later date as the Commissioner allows by notice published in the Gazette;

(b) if the taxpayer's year of income ends on a day other than 30 June – on the first day of the sixth month of the following year of income, or on such later date as the Commissioner allows by notice published in the Gazette."

[31] It should be noted that subsection (1A) of s 204 was added to the legislation after the decision of the Full Federal Court in *Hoare Bros Pty Ltd v Commissioner of Taxation*[9] ("*Hoare Bros*"). This is a decision on which the appellant places special reliance and which the respondents urge should not be followed. The amendments to s 204 set out above are of some significance to this debate: they were not drawn to the attention of the learned primary judge.

The decision at first instance

Section 459H

[32] The learned primary judge held that, so far as the RBA deficit debts claimed from Neutral Bay and Howard Racing comprise a debt for GST and interest, and administrative overpayments, these debts did not arise by reason of the making of an assessment by an officer of the appellant under the tax legislation. His Honour was of the view that the Full Court of the Federal Court in *Hoare Bros* had held that a debt could not be said to be genuinely disputed for the purposes of s 459H of the Act if it arose by virtue of an assessment under the ITAA even though the tax liability underlying the assessment was subject to a genuine challenge in accordance with Pt IVC of the TAA. The learned primary judge regarded himself as bound by the reasoning in *Hoare Bros* to hold that the existence of a debt established by assessment subsists until the assessed amount of income tax is amended in accordance with the processes provided by Pt IVC of the TAA. Accordingly, so it was said, a genuine dispute about whether the assessment was correct could not be a genuine dispute about the debt established by the assessment.

[33] The learned primary judge considered that the position was different if the tax liability arose automatically by the objective application of the law to facts, as his Honour held was the case under the GST Act and s 24 of the TAA. In such a case, where the true outcome of the operation of the law to the facts was the subject of a genuine contest, the existence of the debt could be said to be genuinely disputed without falling into conflict with the reasoning in *Hoare Bros*. His Honour concluded that it was open to the respondents to dispute the existence of the components of the GST debts owed by Neutral Bay and Howard Racing which were not the creature of a declaration by the Commissioner. On the basis of the appellant's concession that the respondents' challenge was arguable, his Honour concluded that these debts were genuinely disputed for the purposes of s 459H(1) of the Act.

[34] The learned primary judge stated the principal argument advanced by the respondents (who were the applicants below) in the following terms:

> "Next, the applicants argue that s 105-100 simply does not allow the respondent to deny that there is a genuine dispute as to the existence

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9 (1996) 62 FCR 302.

> of the debt. As this argument was advanced, it effectively challenged the correctness of the decision in *Hoare Bros*. The argument emphasises that the issue in the present proceedings is not (apart from the *Hickman* argument) whether the assessments or declarations were properly made or the amounts and particulars of them are correct: it is whether there is a genuine dispute about the existence or amount of the debts, and the fact that the dispute can be resolved only within Pt IVC proceedings does not mean that there is no dispute.
>
> The Full Court's decision in *Hoare Bros*, in relation to the present point involving s 459H, has been consistently followed in judgments of Supreme Courts: see eg *Moutere Pty Ltd v DCT* [2000] NSWSC 379; (2000) 34 ACSR 533; *Re Softex Industries Pty Ltd* [2001] QSC 377; (2001) 187 ALR 448; *Willemse Family Co Pty Ltd v DCT* [2003] 2 Qd R 334; *Maddison Resort Pty Ltd v DCT* [2006] QSC 485; *KW & KM Quinn Investments Pty Ltd v DCT* [2003] QSC 336; (2003) 202 ALR 335; *Rocket Transport Services Pty Ltd v DCT* [2006] WASC 234. However, *Hoare Bros* was a case dealing with provisions relevant to income tax, and its relevance to other taxes and different statutory provisions must be considered.
>
> In *Hoare Bros*, the relevant provisions were s 204(1) and s 208(1) of the *Income Assessment Act* 1936 (Cth) and s 14ZZM and s 14ZZR of the TAA. Section 204(1) provides that any income tax assessed is due and payable on the dates specified in the notice of assessment (or absent such a date 30 days after service of the notice). Section 208(1) then provided that 'income tax when it becomes due and payable shall be a debt due to the Commonwealth, and payable to the Commissioner in the manner and at the time prescribed.' Notices of assessment had been issued and served and the period for payment had expired ((1996) 62 FCR 302, 311). Sections 14ZZM and 14ZZR provide that the fact that a review or appeal is pending in relation to a taxation decision does not in the meantime interfere with or affect the decision and that any tax, additional tax or other amount may be recovered as if no review or appeal were pending. In *Hoare Bros*, the Commissioner did not rely on the conclusive evidence provisions of s 177 of the *Income Tax Assessment Act*, which is relevantly equivalent to TAA s 105-100."[10]

[35] The learned primary judge, after examining the reasoning in *Hoare Bros* (to which I shall return), concluded:

> "The debt claimed in *Hoare Bros* was … one which was fixed and became payable by the issue and service of a notice of assessment. Unless and until that assessment was successfully challenged, the debt which arose by reason of the notice of assessment existed. Accordingly, at the time of the company's challenge to the statutory demand, there was then a debt the existence of which could not be disputed. That debt might be extinguished by the outcome of proceedings under Pt IVC, but that would result from amendment to the assessment in accordance with the decision of the AAT or the Federal Court (1996) 62 FCR 302, 307. So whilst the company was

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10 [2006] QSC 394 at [26 – [28] (citation footnoted in original).

able to challenge the assessment (by Pt IVC proceedings) it could not deny that until the assessment was amended, the debt was due.

In the cases of Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd, the assessed tax is GST, not income tax. As Gzell J noted in *Platypus Leasing*, ([2005] NSWSC 388 at [34]) the GST Act is 'self-executing' and does not depend on the issue of a notice of assessment. The existence of a debt due and payable for GST, is because of the occurrence of facts and circumstances as set out [in] the GST Act, and in particular the making of a taxable supply. A notice of assessment for GST has effect, for example, in the operation of Pt IVC, and it engages s 105-100. But it does not of itself create a debt due and owing. Section 24(1) of the TAA provides that a liability to pay indirect tax (which includes GST) and the time by which an amount of indirect tax must be paid, do not depend on and are not in any way affected by the making of an assessment of that tax.

Accordingly, if these companies succeed in challenging the assessments of GST, that will involve a determination by the AAT that the GST has not at any time been payable. The result will not be to set aside a debt which had been payable, but to resolve that the debt has not been owed. In this way, an assessment of GST is different from the assessment of income tax considered in *Hoare Bros*.

In the present cases then, there is a dispute as to whether there is presently a debt for GST. Especially because the respondent concedes that the applicants have arguable bases for challenging the assessments (within the Pt IVC proceedings) that is a genuine dispute. The fact of that genuine dispute is not affected by s 105-100. It is an evidentiary position which would be critical to the outcome of any proceeding, apart from a Pt IVC proceeding, in which an issue for determination was whether the company did owe the GST as assessed. That is why the taxpayer in *Platypus Leasing Inc* was unsuccessful in seeking a declaration that it did not owe the GST: once the Commissioner tendered copies of the relevant notices of assessment and the declaration, they were conclusive evidence of the correctness of the amounts in proceedings in which the Court was asked to declare them to be incorrect. But in the present proceedings, the merits of the assessments, and of the dispute, are not to be determined.

To establish the ground under s 459H, a company must establish only that it disputes the debt. In *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362, Hayne J (sitting in the Supreme Court of Victoria) said that at least in most cases, a court in these applications will not attempt to weigh the merits of the dispute and in most cases at least will not embark upon any extended inquiry in order to determine whether there is a genuine dispute ((1993) 11 ACSR 362, 366-367). Similarly, in *JJMMR Pty Ltd v LG International Corp* [2003] QCA 519, in relation to an offsetting claim, de Jersey CJ noted that the relevant inquiry was not of what amount was owing to the company, but whether there was a genuine offsetting claim as would warrant

> subsequent adjudication ([2003] QCA 519 at [4]). In *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250 at 253, Young J said that although something more than mere assertion by the company is required, because otherwise 'anyone could merely say it did not owe a debt', 'on the other hand, if proof of a claim was required then one would be doing the very thing that one is not to do, and that is to try this sort of dispute in the Companies Court.'
>
> It follows that as far as the assessments of GST are concerned, the existence of debts for the amounts claimed is genuinely disputed by Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd. What must now be considered is the impact of s 105-100 upon other components of the RBAs."[11]

[36] So far as the RBA deficit debts comprised tax shortfall penalties, they were said to have been imposed under s 284-B of Sch 1 of the TAA. These liabilities depended for their existence on the liability for GST.[12] No declaration or assessment had been made in relation to those penalties. Accordingly, his Honour held that there was a genuine dispute as to the existence of these components of the statutory demands so as to justify setting aside the statutory demands at least in relation to these components of the RBA deficit debts.[13] Similarly, the components of the statutory demands relating to "administrative overpayments" were held to be the subject of a genuine dispute.[14] Because there was a genuine dispute as to tax shortfall penalties and administrative overpayments, his Honour held that there was a genuine dispute as to the claim for interest.[15]

[37] The learned primary judge held, however, that, so far as the components of the respondents' RBA deficit debts were the subject of a declaration under s 165-40 of the GST Act, they were debts owing to the appellant which were not the subject of genuine dispute. In this regard, his Honour said:

> "The declaration in relation to Neutral Bay Pty Ltd declares that its net amounts for certain tax periods are amounts totalling $4,039,786. The tax periods are the calendar months commencing November 2003 and ending March 2005. The declaration is dated 22 December 2005. The declaration in the case of MA Howard Racing Pty Ltd has the same date and declares net amounts for the calendar months from August 2003 to May 2004, totalling $3,187,743.
>
> Once these declarations were made and for as long as they stand, they have a deeming effect which is to treat the declared net amounts as amounts of GST payable to the Commissioner. The applicants are entitled to challenge, as they do, those declarations within Pt IVC proceedings. But the position is different from that already discussed in relation to whether there was truly GST which was payable. In the case of the declarations, the relevant debt exists because of the declaration itself. Unless that declaration can be impugned (according to the *Hickman* principle) its effect is that at present there

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11 [2006] QSC 394 at [30] – [35] (citations footnoted in original).
12 [2006] QSC 394 at [45] – [46].
13 [2006] QSC 394 at [35].
14 [2006] QSC 394 at [48].
15 [2006] QSC 394 at [49].

> is indisputably a debt owing. In relevant respects, the position is the same as that of the income tax demanded in *Hoare Bros* …"[16]

[38] In relation to Broadbeach Properties, the learned primary judge said:

> "The applicant argues that there is a genuine dispute as to the debt under s 459H. It is said that *Hoare Bros* is distinguishable because in the present case the dispute is still at the stage of an objection and there is no provision which expressly authorises the Commissioner to commence recovery proceedings at this stage. It is said that s 14ZZM and s 14ZZR of the TAA formed the basis for the decision in *Hoare Bros* and that they apply only after Pt IVC proceedings are underway. And it is said that this limitation on the application of *Hoare Bros* was recently demonstrated in *Ozone Manufacturing*. As already mentioned, the demand in *Ozone Manufacturing* was set aside upon the basis of an offsetting claim, rather than a genuine dispute as to the debt. As the Full Court there held, *Hoare Bros* was of limited relevance to that ground (an offsetting claim). The judgments in *Ozone Manufacturing* did not explore the proposition now advanced, which is that an income tax debt can be genuinely disputed whilst the Commissioner is or should be considering an objection to it. But as already discussed, there is a debt which indisputably has a present existence from the fact of the assessment. And this assessment is not attacked upon a *Hickman* basis.
>
> It follows that Broadbeach Properties Pty Ltd has not made out the ground under s 459H."[17]

[39] The learned primary judge was invited by the respondents to decline to follow the decision of the Full Federal Court in *Hoare Bros*. In declining that invitation, his Honour said:

> "… The question then is whether I should decline to follow the reasoning in that decision.
>
> I should do that only if I think that the decision is clearly wrong. In my respectful opinion that is not so. It has been consistently followed. It is consistent with the terms of s 459H(1)(a), because that section refers to a dispute about the *existence* of a debt.
>
> In the absence of authority, and having regard to the general law background to s 459H (see *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362, 365-366) a wider view of s 459H(1)(a) might be open, by which a demand could be set aside where the debt is challenged either as to its present existence or as to its continuing existence. It might be thought that where the company was agitating for the debt to no longer exist, it was in one sense disputing its existence. However, there is the authority of *Hoare Bros* and the many cases which have followed it. And there is also a line of authority, in relation to the analogous position of a judgment debt which is challenged by an appeal, which holds that unless and until the judgment is set aside on the appeal, the present existence of the debt cannot be disputed. In that context, it has been held that the relevant ground for setting aside a demand is

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16 [2006] QSC 394 at [37] – [38].

17 [2006] QSC 394 at [53] – [54].

> not the that under s 459H but in an appropriate case could be that under s 459J(1)(b): see *Barclays Australia (Finance) Ltd v Mike Gaffikin Marine Pty Ltd* (1996) 21 ACSR 235; *Eumina Investments Pty Ltd v Westpac Banking Corporation* (1998) 84 FCR 454; *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24.
>
> I am not persuaded to depart from the reasoning in *Hoare Bros*. The result is that the debts which exist by reason of the declarations have a (present) existence which cannot be genuinely disputed, so that s 459H does not apply to them. However, the narrowness of that operation of s 459H is relevant in the consideration of the discretion under s 459J(1)(b), to which I will return."[18]

[40] Accordingly, as to the net amounts declared to be amounts of GST payable to the Commissioner of Taxation and as to the income tax liabilities of Broadbeach Properties, the learned primary judge declined to set aside the statutory demands under s 459H(1) of the Act.

[41] For the sake of completeness, I should mention that, before the learned primary judge, the respondents advanced other arguments by way of challenge to the conclusive effect of notices of assessment under s 105-100 of Sch 1 of the TAA and s 177 of the ITAA on the basis that the notices of assessment did not reflect a genuine and final belief on the part of the assessing officer that the assessments were correct. The learned primary judge concluded that these arguments were without substance.[19] The respondents sought to re-agitate these arguments on the hearing of the appeal. It is unnecessary to deal with them in detail because of the conclusions which I have reached on the principal issues argued by the parties. It is sufficient, I think, to say that I see no reason to doubt the correctness of the learned primary judge's rejection of these contentions.

Section 459J

[42] His Honour held in the exercise of his discretion under s 459J(1)(b) of the Act, that there was good reason to set aside the statutory demands because of the perceived unfairness involved in the likely impact of winding up upon the respondents' challenges to their liabilities.

[43] The appellant had relied upon the statement by the Court of Appeal of the Supreme Court of the Australian Capital Territory in *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation*:[20]

> "… what the [debtor] must put in evidence is conduct on the part of the [creditor], or circumstances, which enliven the court's discretionary power but which do not relate to a defect in the demand itself. That the conduct of the [creditor] is productive of substantial injustice may be a powerful ground for exercising the discretion … However, it is not a necessary element for granting relief under s 459J(1)(b).
>
> What is contemplated by s 459J(1)(b) is a discretion of broad compass which extends to conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice."

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18 [2006] QSC 394 at [38] – [41].

19 [2006] QSC 394 at [19] – [25].

20 (2005) 157 ACTR 22 at [26] - [27].

[44] This passage, the appellant argued below and in this Court, demonstrated the confines within which the s 459J(1)(b) discretion was to be exercised. In this regard, the learned primary judge said:

> "… Contrary to the respondent's submission, the Full Federal Court did not hold that the demand could be set aside only where the conduct could be so described, although in *Arcade Badge Embroidery*, the demand was set aside where the conduct did bear that description.
>
> The respondent argues that judgments such as *Willemse* and *KW & KM Quinn Investments* have wrongly shifted the proper focus from the conduct of the Commissioner to the effect on the taxpayer. But those two matters are obviously related. The Commissioner's conduct in a particular case could be criticised only by reference to its effect on the taxpayer. The submission does not provide a persuasive basis for limiting the power under s 459J to instances of unconscionability or abuse of process. And the Full Court in *Hoare Bros* instanced another circumstance as being that of 'substantial injustice', which undoubtedly focuses upon the effect on the taxpayer.
>
> Another of the respondent's submissions proceeded in this way: the respective powers under s 459H and s 459J cannot be exercised for the same circumstances; where a debt is disputed, the only available power is under s 459H; s 459J cannot be invoked on the basis of a disputed debt; therefore, a dispute as to the underlying tax debt cannot found an order under s 459J. The effect of this argument is that although the present existence of the debt cannot be disputed under s 459H, nevertheless because in a broader sense, there is a dispute as to the debt, s 459J has no operation. The logical difficulty in that argument and the likely unfairness from its application make it particularly unpersuasive."[21]

[45] One might add to the points made by the learned primary judge in the last paragraph of the passage just cited, the circumstance that s 459H(6) makes it clear that s 459H(1) is subject to the operation of s 459J(1)(b). One might also add that the appellant's submission was contrary to the view of the Full Court of the Federal Court in *Hoare Bros* on this point.[22]

[46] His Honour went on to conclude that the respondents were exposed to prejudice by the appellant's use of the winding up procedure because they were unprepared for the demands which they could not meet immediately. There was no reason to think that the appellant's inability to pursue the winding up of the respondents would enure to the prejudice of the appellant. Accordingly, his Honour exercised the discretion conferred by s 459J(1)(b) in favour of the respondents and set aside the appellant's statutory demands.[23]

The arguments on appeal

[47] As to s 459H of the Act, the appellant argues that a liability to a debt for income tax or GST each arises by reason of the Commissioner's assessment or declaration.

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21 [2006] QSC 394 at [62] – [64].

22 (1996) 62 FCR 302 at 310.

23 [2006] QSC 394 at [72].

Accordingly, so it is said, the point of distinction fixed upon by the learned primary judge to distinguish *Hoare Bros* is without substance. On this basis, the appellant argues that the basis on which the learned primary judge distinguished the decision of the Full Federal Court in *Hoare Bros* cannot be sustained.

[48] The appellant also argues that s 105-100 of Sch 1 of the TAA and s 177 of the ITAA make a notice of assessment issued by the Commissioner conclusive evidence of the correctness of the assessment. Section 105-100 of Sch 1 of the TAA and s 177 of the ITAA are materially indistinguishable insofar as both sections render an assessment to income tax made and served conclusive evidence of the debt for the liability, save pursuant to Pt IVC of the TAA. Accordingly, so it is argued, the learned primary judge erred in concluding that the existence of any component of the RBA deficit debts was susceptible to "genuine dispute" for the purposes of s 459H(1)(a) of the Act.

[49] The respondents resist the appellant's argument on this point, and counter with the further argument that the decision of the Full Federal Court in *Hoare Bros* was wrong and should not be followed, either in relation to the income tax debts, or in relation to the RBA deficit and associated liabilities.

[50] As to s 459J(1)(b) of the Act, the appellant argues that s 459H and s 459J codify the circumstances in which a statutory demand may be set aside, and that the discretion conferred by s 459J(1)(b) is narrower than the learned primary judge appreciated, being limited to cases of unconscionability or abuse of process. The appellant relies on observations concerning the scope of s 459J(1)(b) by Olney J in *Kalis Nominees Pty Ltd v DCT*;[24] to argue that decisions in which the broader view has been taken of the discretion to set aside a statutory demand on bases such as "unfairness" do not accord with the true effect of s 459J(1)(b). In this category are *KW & KM Quinn Investments P/L v DCT*,[25] *Willemse Family Company Pty Ltd v Deputy Commission of Taxation*,[26] *Softex Industries Pty Ltd, Re*[27] and *Moutere Pty Ltd v Deputy Commissioner of Taxation*.[28]

[51] The appellant also argues that the bases for setting aside a demand under s 459J and s 459H are mutually exclusive, so that it was not open to the respondents to rely on the existence of a genuine dispute as to the underlying tax liability to establish some other reason for setting aside the demand under s 459J(1)(b).

Discussion

Section 459H of the Act

[52] Discussion of the competing contentions of the parties must commence with a consideration of the decision in *Hoare Bros*. In that case, the Full Court of the Federal Court held that there could not be a genuine dispute "about the existence of a debt to which the demand relates" for the purposes of the statutory predecessor of s 459H(1) of the Act by reason of the pendency of genuinely arguable issues in proceedings brought by the company under Pt IVC of the TAA. It is necessary to set out the principal steps by which this conclusion was reached in order to discuss

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24 (1995) 31 ATR 188 at 193.
25 [2004] QCA 091.
26 [2003] 2 Qd R 334.
27 [2001] QSC 377.
28 (2000) 34 ACSR 533.

both the appellant's argument that the learned primary judge erred in distinguishing aspects of the present case from the decision of the Full Court of the Federal Court and the respondents' contention that this Court should decline to follow the decision of the Full Court of the Federal Court. The Full Court of the Federal Court said:

> "In assessing the Company's argument, it is useful to commence with the terms of s 459H of the Law and of the relevant provisions of the ITAA. The 'genuine dispute', to which s 459H(1) refers, is a dispute 'about the existence or amount of a debt to which the demand relates'. The demand served by the Commissioner in the present case specified amounts due and payable by the Company pursuant to notices of assessment made under the ITAA, together with interest on these amounts. As Olney J observed, the Commissioner did not rely on the conclusive evidence provisions of s 177 of the ITAA, since the notices of assessment were not produced. But his Honour found that the notices had been issued and served and that the 30-day period referred to in s 209 had expired. No attack was made by the Company on the validity of the notices served.
>
> **The effect of s 204 of the ITAA is that income tax assessed is due and payable by the person liable to pay the tax on the date specified in the notice or, if no date is specified, 30 days after service. Section 208 specifically provides that income tax, when it becomes due and payable, is a debt due to the Commonwealth and payable to the Commissioner. The Commissioner may sue for and recover unpaid tax in any court of competent jurisdiction (s 209) and the Commissioner is entitled to sue for the recovery of any tax immediately after the expiry of the time when it became due and payable: s 207. Section 175 provides that the validity of any assessment is not affected by reason that any of the provisions of the Act have not been complied with.**
>
> **The structure of the ITAA strongly suggests a legislative intent that the issue and service of a notice of assessment (after expiry of the appropriate period) creates a debt that is immediately due and payable, and that the assessment can be challenged only in the manner provided for by the TAA, Pt IVC. Thus, unless there is some genuine dispute about the validity of a notice which has been duly served, there can be no genuine dispute about the existence or amount of the debt specified in the notice (assuming the requisite period has elapsed since service of the notice). A company, or other taxpayer, served with a notice of assessment, is entitled to challenge the assessment through the procedures laid down in the TAA, Pt IVC. In the meantime, however, the tax must be paid. This, indeed, has been the approach taken by the High Court to the construction of the taxation legislation**." (emphasis added)

[53] I pause here to note the significance attributed by the Full Court of the Federal Court to s 204 of the ITAA as it was framed at that time. As has been seen, the terms of s 204(1) and (1A) now have a quite different operation in relation to self-assessment to income tax.

[54] Their Honours went on to discuss decisions of the High Court which bore upon the strictly limited scope available to a taxpayer to challenge an assessed liability to tax

once the taxpayer has been served with the assessment before s 204 was amended. Their Honours then concluded:

> "It follows from what has been said by the High Court in *Richard Walter*, that a genuine dispute may arise as to the existence or amount of a debt created by the service of a notice of assessment in circumstances somewhat broader than those contemplated by Olney J. If no reliance is placed on s 177 of the ITAA by the Commissioner, it may be open to the taxpayer to challenge the assessment on the grounds that the notice does not in truth constitute an assessment; that it was not issued as a bona fide attempt to exercise powers conferred by the Act or, possibly, that it does not relate to the subject matter of the Act. Where reliance is placed on s 177, other issues may arise. For example, it is not open to a taxpayer to contend that an assessment is in truth a tentative or provisional assessment if the notice, on its face, appears to be a final notice of assessment: *Bloemen* at 377; *Richard Walter* at 218, per Dawson J. However, there is no need to consider these matters further for the purposes of the present case. This is because there was no suggestion before Olney J that the notices of assessment served on the Company were other than final assessments made in good faith for the purposes of the ITAA.
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> **In our view, it is clear from the scheme of the ITAA that the Company in the present case became indebted to the Commissioner in the amounts specified in the notices of assessment once they were served and the time referred to in s 204 had expired. There were a number of grounds that, if the supporting facts were available, might have been relied upon by the Company to challenge the validity of the notices. None of these grounds was invoked. Had they been, depending upon the circumstances, there may have been a genuine dispute between the Company and the Commissioner as to the existence or amount of the debt to which the demand related. But the mere fact that the Company had objected to the assessments, or sought review of the Commissioner's decision before the AAT, did not establish that there was a genuine dispute as to the existence or amount of the relevant debt. That debt was not the subject of a genuine dispute**.
>
> The position is not altered by the fact (if it be such) that the Company's objections to the notices of assessment, or its application to the AAT, raise genuinely arguable issues. Any such issues, or disputes, do not affect the character of the debt to which the statutory demand relates. Of course, if the Company's objections or application for review succeed, the Commissioner will be required to issue an amended assessment and to refund any tax overpaid, or else apply the overpayment against any other tax liability: ITAA, s 172(1); TAA, s 14ZZL(1). But that does not alter the conclusion that there is no genuine dispute as to the existence or amount of the debt created by the issue and service of the notices of assessment. Whether it establishes an 'offsetting claim', for the purposes of s 459H, was not raised by the Company, and is a matter on which we

> express no view: compare *Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation (Cth)* [1978] VR 83 at 102-103.
>
> In this connection, it is perhaps appropriate to note that we do not read Olney J's judgment as incorporating an affirmative finding that the Company's objections and applications to the AAT raised a genuine dispute as to the Company's liability to income tax. Rather, **his Honour was saying that, on the assumption that there was a genuine dispute as to the subject matter of the objection and review application, there was no genuine dispute as to the existence or amount of the relevant debt. We agree**." (emphasis added)

[55] It is apparent from this passage that the effect of s 177 of the ITAA upon a notice of assessment was not of crucial relevance to the decision of the Full Court. Rather, it was the effect of the service of the assessment, as fixing the liability to income tax, which was decisive in the reasoning of the Full Court that a debt was brought into existence which remained in existence, and beyond dispute, until the assessment was set aside.

[56] What is not so clear from this passage is why a genuine dispute about whether an assessment has correctly established a taxpayer's liability to tax is not a dispute as to the existence or amount of that debt. The decisions of the High Court which culminated in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[29] established that, even though the substantive liability of a taxpayer to pay income tax is imposed by the operation of the ITAA on facts which exist independently of the Commissioner's opinion, the making of an assessment by the Commissioner was the step which actually levied income tax by fixing the amount of, and enabling the enforcement of, the liability to pay income tax. Thus, in *Deputy Federal Commissioner of Taxation v Brown*,[30] Dixon CJ, speaking of the "general machinery for assessment" to tax under the ITAA, noted:

> "(1) that tax is not due and payable until assessed; (2) that it then becomes a debt to the Crown payable on the date specified in the notice of assessment or, if there be none, on the thirtieth day after service of the notice; (3) that the assessment of liability is conclusive except upon the processes of review and appeal."

[57] In that regard, the terms of s 204(1) of the ITAA as it was prior to the amendments which reflect the self-assessment regime were of critical importance. In *Batagol v Federal Commissioner of Taxation*,[31] Kitto J explained that, under the ITAA, the service of a notice of assessment:

> "is the levying of the tax … if the Commissioner, having gone through the process of calculation, serves on the taxpayer a notice that he has assessed the taxable income and the tax at specified amounts, the tax becomes by force of the Act due and payable on the date specified in the notice or (if no date is specified) on the thirtieth day after the service of the notice: s 204. Thus, and thus only, there is brought about an 'ascertainment' of the taxable income and of the tax …"

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29 (1995) 183 CLR 168.

30 (1958) 100 CLR 32 at 40.

31 (1963) 109 CLR 243.

[58] In *DCT v Richard Walter Pty Ltd*, Brennan J discussed the principal features of the liability to income tax under the ITAA and the place of the notice of assessment in that scheme. Brennan J said:

> "The first feature is the legislative intention to protect the validity of the notice of assessment as a central and critical link in the chain of imposing liability for income tax on and the recovery of tax from the taxpayer. The second feature is the full opportunity afforded to the taxpayer to object to the assessment and, in the event that the objection is dismissed, to challenge the assessment. The challenge may be made before either an administrative or a judicial tribunal (at the taxpayer's election) on any ground which affects the taxpayer's liability to tax or the quantum thereof including the Commissioner's power to make the assessment to which the taxpayer has objected.
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> …
>
> The notice of assessment, reflecting the antecedent calculation of the taxpayer's taxable income, fixes the amount of the taxpayer's tax liability, and it either fixes the date or its service determines the date on which the tax is due and payable. Absent the service of a valid notice of assessment, a taxpayer's liability to pay the tax imposed by the relevant Taxing Act is not fixed nor is there a due date for payment. But, on service of a valid notice of assessment on a taxpayer, s 204 imposes on the taxpayer a liability to pay tax in the amount and on the date specified in the notice or, if no date is specified, on the 30th day after service.
>
> ...
>
> The service of a notice of assessment would fail in its purpose if the assessment were open to challenge for non-compliance with the general and often complex provisions of the Act governing the calculation of taxable income and the liability to pay tax. The application of the general provisions to the particular facts of a taxpayer's case is and must be expected to be a matter of frequent controversy between the taxpayer and the Commissioner. Although the Commissioner's exercise of power to assess a taxpayer to tax is governed by provisions of the Act which prescribe the components of a taxpayer's taxable income and the manner in which those components and the taxable income are to be ascertained, it is inevitable that on occasions the process of assessment will fail to comply with those provisions. However, if s 175 confers validity on assessments made in a bona fide attempt to exercise the power to make them, it authorises the Commissioner to determine in good faith, rightly or wrongly, the application of the general provisions of the

> Act to the facts of the particular case subject to correction by the objection, review and appeal procedures."[32]

[59] It is apparent that, although in a general sense, a liability to income tax arises by reason of the operation of the ITAA upon events which have occurred, the making of an assessment by the Commissioner was regarded as essential to the creation of a fixed and enforceable liability to income tax. To this extent, there was, in my respectful opinion, real force in the learned primary judge's view that, to the extent that the respondents' debts for GST did not arise from an assessment or declaration by the Commissioner, that situation was materially different from the situation which obtained under the ITAA. There were good reasons for his Honour to make this distinction: an action can be brought for the recovery of a liability to GST without an assessment having issued and been served whereas the issue and service of an assessment under the ITAA was necessary before the amendments to s 204 of the ITAA.

[60] The attention of the learned primary judge had not, however, been drawn to the circumstance that s 204 of the ITAA had been amended since the decision in *Hoare Bros Pty Ltd v FCT* to include subsection (1A) and to amend subsection (1) to recognise the process of self-assessment to income tax. It was common ground that each of the respondents, and, in particular, Broadbeach Properties, is a "full self-assessment taxpayer". The basis for the distinction which the learned primary judge, deferring to and applying the reasoning in *Hoare Bros*, drew between assessment to income tax and liability to GST has disappeared.

[61] The appellant submitted that, once an assessment has issued, either in respect of income tax or GST or a declaration made under s 165-40 of the GST Act, there is brought into existence a debt, separate and distinct from the taxpayer's true liability to income tax or GST and having an existence by virtue of the fact of the making and service of the assessment. Further, s 177 of the ITAA and s 105-100 of Sch 1 of the TAA serve to render that debt indisputable save by means of the processes contemplated by Pt IVC of the TAA.

[62] The respondents submitted that, to speak of a tax debt, either for income tax or GST, created by the making and service of the assessment or declaration, which stands free of and distinct from the underlying liability to tax, is to allow form to triumph over substance. In the respondents' submission, the processes of objection and appeal under Pt IVC of the TAA are designed to establish the taxpayer's true liability to tax which is given formal effect by amendment to the assessment which has been shown to be erroneous. On this view, it is not correct to say, as the learned primary judge did, that, because the debt arising from an assessment under the ITAA or a declaration under s 165-40 of the GST Act exists indisputably until amended consequent upon the outcome of proceedings under Pt IVC of the TAA, the debt is not disputed while those processes are in train. Even a declaration under s 165-40 of the GST Act is not given effect by s 165-50 of that Act to create a liability if there is not a supply of goods or services upon which the GST Act operates.

[63] The reasoning in *Hoare Bros* in relation to s 459H of the Act was clearly not based on the conclusive effect of s 177 of the ITAA. Rather, it seems that the Full Court

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32 *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 195 – 196.

of the Federal Court reasoned that the subject matter of the dispute pursuant to Pt IVC of the TAA was the Commissioner's assessment rather than the debt constituted by the taxpayer's liability to tax. In other words, the Full Court of the Federal Court held that, because the subject matter of the dispute was the assessment, the debt was not the subject of the dispute. To say this is to erect a dichotomy between a challenge to a liability to tax and a challenge to an assessment to tax. That dichotomy is not established by the ITAA or the GST Act. There is no support in authority for the view that a dispute under Pt IVC in which it is contended that an assessment is excessive cannot accurately also be described as a dispute about the amount or (depending on the extent to which the assessment was excessive) the existence of the debt. A dichotomy of the kind in question is also inconsistent with s 14ZZK which contemplates an objection to an assessment on the ground that it is excessive in its statement of the amount (or existence) of the tax liability.

[64] The Full Court's approach fails to appreciate that the end of the process of assessment and disputation under Pt IVC is to establish the taxpayer's true liability to tax, that is the existence and amount of the taxpayer's debt to the Commissioner. It has long been recognised that the true purpose of the processes provided by Pt IVC is to enable the taxpayer's contention that the assessment is excessive to be determined and the taxpayer's true liability to tax to be established. As Kitto J said in *McAndrew v Federal Commissioner of Taxation*:[33]

> "an objection … based upon a contention that the commissioner has fallen into some error in the course of making it … is an objection that it has resulted in an assessment fixing the taxpayer with a higher liability than that which attaches to him upon a correct application of the Act as a whole."

[65] In the same case, Taylor J said:[34]

> "… there is no reason for thinking that an assessment, made in purported but not justifiable exercise of a statutory power, may not properly be described as excessive; it purports to impose a specified liability and, upon appeal, the claim of the appellant is that he is not liable to pay any part of it. Whether the particular ground upon which he seeks to escape or reduce the liability merely touches the accuracy of the assessment or assails its validity as an assessment, he is, in the words of s 185, 'dissatisfied with' the assessment because it purports to impose upon him a liability in excess of that to which he may lawfully be subjected and I can see no reason why, in either case, his complaint may not be accurately described as a complaint that his assessment is excessive."

[66] I turn now to consider the effect of s 105-100 of Sch 1 of the TAA. Both s 177 of the ITAA and s 105-100 of Sch 1 of the TAA make the production of a notice of assessment conclusive evidence that the assessment was properly made and that the amounts are correct – save in proceedings on review or appeal in accordance with Pt V of the ITAA or Pt IVC of the TAA respectively. This exception to the conclusive effect of the notice of assessment or of a declaration made under s 165-40 of Sch 1 of the TAA is important – without it, the ITAA and the TAA

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33 (1956) 98 CLR 263 at 274.

34 (1956) 98 CLR 263 at 282 – 283.

would be constitutionally invalid as an attempt to oust the jurisdiction of the courts and create an incontestable tax.[35]

[67] The question then is whether, in proceedings under s 459H of the Act, either s 177 of the ITAA, or s 105-100 of Sch 1 of the TAA, oblige the court to ignore the circumstance that this exception has, in fact, been engaged. In this regard, it may be noted immediately that neither s 177 of the ITAA nor s 105-100 of Sch 1 of the TAA provides that production of a notice of assessment is conclusive (or even prima facie) evidence that the liability to tax is not disputed. Further, there is no other indication in the ITAA or the TAA that a statutorily permitted challenge to the debt which has been made in conformity with this exception must be ignored for all purposes in all proceedings which arise under all other laws.

[68] It is clearly a strong thing to say that when a court is made aware that the lawful processes whereby a tax debt may be disputed have been engaged, and it is accepted that there is an arguable basis for that challenge, nevertheless, for the purposes of s 459H of the Act, the court cannot regard the debt as being subject to a genuine dispute, and is obliged to conclude, contrary to the evident truth of the matter, that there is not a genuine dispute as to the existence of the debt. If an intention to bring about such a fictional state of affairs is to be attributed to the legislature, that intention would need to be expressed clearly. There are good reasons to conclude that the legislature has not sought to make the court a slave to such a fiction.

[69] In this regard, the appellant's counsel drew attention in their written submissions to the terms of the Explanatory Memorandum to the *Taxation Boards of Review (Transfer of Jurisdiction) Bill 1986* which amended s 67 of the *Sales Tax Assessment Act (No 1) 1930* from which s 105-100 of Sch 1 of the TAA is ultimately derived. According to the Explanatory Memorandum, the intention of s 105-100 of Sch 1 of the TAA is that the production of an assessment should be "conclusive evidence of the correctness of the assessment in an action for the recovery of the tax"; that is to say that the statutory conclusiveness of the assessment is established to facilitate the enforcement of the taxpayer's liability to pay the tax.

[70] It may be accepted for the sake of argument that a statutory demand is a mode of seeking to recover the tax, but proceedings under s 459P of the Act are not, as a matter of ordinary parlance, "an action for the recovery of the tax". Such proceedings are for the winding up of a company. To say this does not require one to accept that it is an abuse of process to bring proceedings under s 459P for the purpose of compelling payment of a tax debt by a debtor company: it is simply to make the obvious point that the objective of this part of the Act is the facilitation of the winding up of insolvent companies, not the recovery of debts (including tax debts).[36] The Explanatory Memorandum makes it clear that the operation of s 105-100 of Sch 1 of the TAA is not "in any proceeding", but is confined to proceedings for the recovery of the debt. This view of the effect of a certificate under s 177 of the ITAA accords with the policy of the ITAA explained by Dixon CJ, McTiernan and Webb JJ in *McAndrew v Federal Commissioner of Taxation*[37] where their Honours said:

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35 Cf *MacCormick v Commissioner of Taxation* (1984) 158 CLR 622 at 640.

36 Cf *Moutere Pty Ltd v Deputy Commissioner of Taxation* (2000) 34 ACSR 533 at 543 [54].

37 (1956) 98 CLR 263 at 270. See also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1994) 183 CLR 168 at 196 – 197.

> "The ground over which s 177(1) gives conclusiveness to the assessment is described as the due-making of the assessment and the correctness of the amount and all the particulars of the assessment. But that appears to us to comprise the whole ground. It is the manifest policy, one may now almost say the historical policy, of the legislation on the one hand to give to the taxpayer full opportunity on objecting to his assessment of contesting his liability in every respect before a court or before a board of review but on the other hand to require that in proceedings for the recovery of the tax the taxpayer will be concluded by the assessment and will not be entitled to go behind it for any purpose."

[71] The issue posed by s 459H(1) of the Act is not whether an application for summary judgment by the appellant against the respondents might be resisted by them because they have an arguable defence. Nor is it an issue of the kind which arose in *Platypus Leasing Inc v Federal Commissioner of Taxation (No 3)*.[38] In that case, the taxpayers sought declarations from the court that its liabilities to GST did not accord with notices of GST assessment under the TAA or as declared pursuant to s 165-40 of the GST Act: the taxpayer's applications were refused because they invited the court to make declarations which would have been inconsistent with the Commissioner's assessments and declaration which could not be disputed in the proceedings before the court.

[72] In summary, the appellant's submission requires the Court to ignore the reality that the existence of the debt is being disputed, on a genuine basis, in a forum which is competent to set the assessment, and hence the debt, aside. This requirement is not apparent in the language of the tax legislation or the Act. It seems to rest, at least in part, upon an assumption, not expressly articulated in the reasons of the Full Court of the Federal Court in *Hoare Bros*, that, unless the dispute as to the tax liability asserted by the appellant is justiciable in the proceedings under s 459P or s 459G, the court before which those matters are pending may not notice a genuine dispute pending elsewhere. But there is nothing in s 459H(1)(a) which requires that the dispute as to the debt be justiciable in the court which is asked to set aside the statutory demand; it should not be given a narrower operation than its language requires. Nor is there anything in the language or statutory history of s 105-100 of Sch 1 of the TAA which would warrant the expansive operation of its conclusive fictional effect for which the appellant contends.[39] The issue which arises on an application under s 459G of the Act is not whether the tax liability assessed against the company is recoverable, but whether the recovery of the tax is being genuinely disputed. If that matter is being disputed, with arguable prospects of success, in a tribunal able to set the assessment aside, then it accords with common sense to say that there is a genuine dispute about the existence of the debt insofar as it is sought to be made a basis for winding the company up in insolvency under s 459A of the Act.

[73] In accordance with the ruling of the High Court in *Australian Securities Commission v Marlborough Gold Mines Limited*,[40] within the Australian Federation, an intermediate court of appeal should not depart from another such

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38 [2005] NSWSC 388.

39 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696; *FCT v Comber* (1986) 10 FCR 88 at 96.

40 (1993) 177 CLR 485 at 492.

court's earlier construction of legislation having operation throughout Australia unless the court is of the opinion that the earlier decision is clearly wrong. This consideration gains added strength where the earlier decision has been followed by other courts, as is the case here.[41] On the other hand, *Hoare Bros* has not been followed by any other intermediate appellate court, and, importantly, the legislative basis for the principal strand of reasoning supporting it has been removed by amendments to the taxation legislation.

[74] This Court must follow the ruling of the High Court in *Australian Securities Commission v Marlborough Gold Mines Limited* and give due deference to the decision in *Hoare Bros*, but, of course, in the end, this Court's obligation is to give effect to the intention of the legislature. To the extent that the reasoning in *Hoare Bros* depends upon treating a dispute about whether an assessment has correctly fixed the taxpayer's liability to tax as preventing a court recognising the existence of a dispute about the existence or the amount of the debt for the purposes of s 459H(1), it cannot be justified, either by the language of the taxation legislation, or the language of s 459H(1) of the Act.

[75] In my respectful opinion, the reasoning in *Hoare Bros* should not be followed insofar as it adds a gloss to the language of s 459H(1) of the Act which is not sustainable having regard to the terms of that provision and the terms of the taxation legislation to which I have referred.

Section 459J(1)(b) of the Act

[76] Where the demand for repayment of a debt is relied upon as a basis for winding up a company which genuinely disputes the existence of the debt, it may be said that there is a degree of unfairness involved which, while not properly described as an abuse of process, should not be promoted or facilitated by the invocation of provisions whose function is to wind up insolvent companies where there is no real dispute as to debts which establish that insolvency. In some cases where the dispute as to the debt is ultimately resolved in the company's favour, the winding up may have caused irreparable harm to the credit of the company or its contributories or creditors. In some cases, the winding up may have the practical effect of preventing a genuine issue from being resolved by a full and fair hearing of the merits of the case. These are good reasons, reflected in the decisions the correctness of which the appellant challenged, to reject the straight-jacketed interpretation which the appellant's submission would place upon s 459J(1)(b) of the Act.

[77] One aspect of the difficulty involved in the appellant's submissions on this point can be illustrated by reference to the appellant's argument that:

> "there are only four bases for setting aside a demand (Sections 459H and 459J of the Act) which together are a code (*Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605 …
>
> (a) the existence of a genuine dispute about the amount or existence of the debt the subject of the demand;
>
> (b) the existence of an offsetting claim equal to or greater than the debt;
>
> (c) the existence of a defect in the demand which would cause substantial injustice if the demand was not set aside; and

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41 Cf *Wobelea Pty Ltd v Deputy Commissioner of Taxation* (1996) 32 ATR 584 at 587 – 588; *Deputy Commissioner of Taxation v Ho* (1996) 32 ATR 269; *Maddison Resort Pty Ltd v Deputy Commissioner of Taxation* [2003] QSC 485 at [18].

(d) some other reason."

[78] The relevant statutory basis for setting aside a demand is "some other reason". It is difficult to argue that one is dealing here with a code, much less to say that the scope of what may be comprehended by "some other reason" is impliedly narrowed by the terms of the three other bases. The broad comprehensive scope of the expression "some other reason" cannot be narrowed by reading it as referring only to "other reasons" which are *eiusdem generis* with the reasons expressly prescribed, if for no other reason than the impossibility of identifying a "genus" common to s 459H(1) and (2) and s 459J(1)(a). And, as has been seen, s 459H is expressed to be subject to s 459J.

[79] The discretion conferred by s 459J(1)(b) is a "discretion of broad compass". It was described in these terms by the Full Court of the Federal Court in *Arcade Badge Embroidery Co Pty Ltd v DCT*.[42] That the Full Court in that case went on to say that the discretion "extends to conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice" does not suggest that the Court was seeking to give an exhaustive statement of the cases comprehended by the discretion which would exclude "unfairness" of the kind identified by the learned primary judge in this case.

[80] As I have said, there is authority against the appellant's submission. In *Willemse Family Company Pty Ltd v Deputy Commissioner of Taxation*,[43] Holmes J (as her Honour then was) said:

> "The instances of unconscionability, abuse of process and production of substantial injustice referred to in *Hoare* are no more than examples of matters which may impel an exercise of discretion in favour of an applicant; but the discretion is by no means confined to those particular circumstances. But in the present case, where the applicant has on foot an appeal which is at least arguable and which would, if successful, have the consequence that the bulk of the amount in respect of which the statutory demand is made would not be payable, it does seem to me that there is an injustice in permitting the statutory demand procedure to go forward."

[81] These observations were referred to with evident approval by Davies JA (with whom Fryberg and Philippides JJ agreed) in *KW & KM Quinn Investments P/L v DCT*.[44] Davies JA then went on to say:

> "None of that is to say that the amounts of tax assessed against the respondent do not remain payable or that those amounts do not remain recoverable (see *Taxation Administration Act* 1953, s 14ZZM). The question here is rather whether his Honour was entitled to be satisfied that it was unjust to permit the procedure under Division 2 of Part 5.4 of the Act to be utilised to obtain payment of the amounts of the assessments.
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> In my opinion, for two reasons in combination, it was open to his Honour to be so satisfied. The first is that there was no suggestion that the respondent was unable to pay its debts as they fell due including these assessments, other than I should add in fairness to

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42 (2005) 157 ACTR 22 at [27].

43 [2003] 2 Qd R 334 at [42].

44 [2004] QCA 91 at 6.

> Mr Hack, than that these assessments were not paid. The winding up provisions of the *Corporations Act* were being used merely as a debt recovery procedure. And secondly there was the fact that there was some likelihood that the decision presently reserved by the Administrative Appeals Tribunal would resolve not only in the liability of the taxpayers in the matters before the Tribunal, but also the liability of the respondent under each of these assessments.
>
> For those reasons in my opinion, it was open to his Honour to be satisfied that there was 'some other reason why the demand should be set aside'."

[82] The appellant also relies upon a passage from the reasons of Olney J in *Kalis Nominees Pty Ltd v DCT*,[45] Olney J said:

> "The legislative policy of the tax law is clear enough. Once tax is due and payable it may be recovered from the taxpayer notwithstanding that the taxpayer has sought to exercise his rights of review or appeal under Pt VIC of the *Taxation Administration Act*. The policy of the law would be defeated if a demand were set aside under s 459J(1)(b) simply because a review of an objection decision is pending. A taxpayer must, in the context of a case of this nature, demonstrate more than the fact that he disputes his liability for the tax as assessed and that he is actively pursuing his remedies. It is both unnecessary and undesirable to endeavour to list the circumstances which would justify the exercise of the discretion under s 459J(1)(b) except to say that in a case in which the Commissioner is not shown to have acted oppressively or to have treated the applicant in a manner different from other taxpayers in a similar position, it is not appropriate that the discretion to set aside the demand should be exercised. Section 459J(1)(b) does not provide an occasion for the Court to express its view on the reasonableness or otherwise of the taxation legislation."

[83] In my respectful opinion, the strictures expressed by Olney J in this passage tend to narrow the scope of the discretion conferred by s 459J(1)(b) in a way which is not warranted by the language, subject matter or purposes of the Act. In my respectful opinion, the approach of Holmes J and of Davies JA in this Court is to be preferred to an approach which tends to narrow the discretion conferred by s 459J(1)(b) by reading into it words which are not there. There are four reasons why I prefer the approach of Holmes J and Davies JA to the approach suggested by Olney J in the passage cited above. First, to the extent that the passage cited assumes that the policy of the tax law identified by Olney J would be defeated if a demand were set aside because a review is pending and there is an arguable case that the review will be successful, the accuracy of his Honour's assumption as to the policy of the tax law is not self-evident: it is certainly not expressly stated in the language of the tax law. Secondly, the scope of the discretion conferred by s 459J(1)(b) should be determined by reference to the subject matter and purposes of the Act not the tax law. Thirdly, to recognise that there is no indication in the taxation legislation that companies engaged in genuine disputes about their tax liabilities should be wound up before the dispute is resolved is hardly to treat the discretion conferred by s 459J(1)(b) as an occasion to express disapproval of the taxation legislation: in

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45 (1995) 31 ATR 188 at 193.

truth, it is simply to acknowledge the legislative purpose which explains the existence of s 459J. Fourthly, even if one were to accept the strict distinction drawn by the Full Court of the Federal Court in *Hoare Bros* between the "process of assessment" and the taxpayer's underlying liability to pay an amount of tax, observations of the Court in that case suggest that the existence of a genuine dispute as to the underlying tax liability could be taken into account as one factor in exercising the discretionary power to set aside the demand under s 459J(1)(b).[46] And if one were to add to that factor consideration of the disruption to the taxpayer and its creditors and contributors involved in a winding up and the absence of any suggestion that the creditor would suffer actual prejudice if left to remedies other than a winding up, it would, in my view, be open to a court to conclude that there was a reason to set aside the statutory demand without pausing to consider whether the circumstances involved unconscionable conduct or unfairness on the part of the Commissioner.

[84] It may, indeed, be preferable, as Mr Aldridge SC urged on behalf of the appellant, to avoid attempts to categorise a "reason" for setting aside a statutory demand under s 459J(1)(b) of the Act in terms of "unconscionability" or "abuse of process" because reference to these legal categories tends to distract attention from the real question which is whether there is good reason to deny effect to a statutory demand as creating a ground for the winding up of the debtor company. Similarly, broad notions such as "substantial injustice" or "unfairness" may describe a judge's reaction to circumstances which may constitute a reason to set aside a demand without affording an explanation of the analysis which has led to that conclusion.

[85] In my respectful opinion, the learned primary judge was correct in concluding that s 459J(1)(b) of the Act supported setting aside the statutory demands.

Conclusion and orders

[86] For these reasons, I have concluded that the appellant's challenges to the decision of the learned primary judge should be rejected, and that decision should be upheld.

[87] The appeals should be dismissed. The appellant should be ordered to pay the respondents' costs to be assessed on the standard basis.

[88] **HOLMES JA:** I agree with the reasons of Keane JA and the orders he proposes.

[89] **MUIR JA:** I agree with the reasons of Keane JA and the orders he proposes.

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46 (1996) 62 FCR 302 at 310.