[2016] QCA 149

COURT OF APPEAL

FRASER JA
PHILIPPIDES JA
PHILIP McMURDO JA

Appeal No 2547 of 2016
SC No 479 of 2016

PALMER PETROLEUM PTY LTD	**Appellant**
v	
BGP GEOEXPLORER PTE LTD	**Respondent**

BRISBANE

WEDNESDAY, 8 JUNE 2016

JUDGMENT

PHILIP McMURDO JA: This is an appeal against an order dismissing an application made under s 459G of the *Corporations Act* 2001 to set aside a statutory demand. The amount demanded was a sum in excess of US$16 million and said to be owing under a contract between the parties. The appellant argued that the statutory demand should be set aside upon two bases. The first was that there was a genuine dispute as to the existence of the debt. The second was that the parties had agreed that any controversy arising from their contract should be determined by an arbitrator, so that there was some other reason in the terms of s 459J of the Act to set aside the demand.

The application was heard on 19 February 2016. By a judgment delivered on 4 March 2016, the application was dismissed. According to the notice of appeal, this court should order that the statutory demand be set aside.

A statutory demand is relevant only in a particular context, namely, on an application under s 459P of the *Corporations Act* for an order that a company be wound up in insolvency. The court hearing such an application is required by s 459C to presume that the company is insolvent if during or after the three months ending on the day when the application was made, the company had failed to comply with a statutory demand: s 459C(2)(a). That presumption may be rebutted by proof that the company is solvent: s 459C(3). A company fails to comply with a statutory demand if at the end of the period for compliance, the demand is still in effect and the company has not complied with it: s 459F(1).

The period for compliance with a statutory demand is fixed by s 459F(2) according to whether the company applies for an order to set aside the demand. Absent such an application, the period for compliance is 21 days from the service of the demand. If the company applies in accordance with s 459G for an order setting aside the demand, there are then two possible periods for compliance. One possibility results from an order by the court for the extension of the period for compliance. The other possibility is where the period is not extended by the court, in which case, the period for compliance ends seven days after the application to set aside the demand is finally determined or otherwise disposed of: s 459F(2)(a)(ii).

In the present case, there was no order for an extension of the period for compliance with the demand. Indeed, no such order was sought. Consequently, the period for compliance with the demand ended seven days after the application to set it aside was finally determined. The period thereby expired on 11 March 2016.

This appeal was filed on 10 March within the time for compliance with the demand; however, the existence of the appeal did not affect the duration of the period for compliance because notwithstanding the appeal the judgment of 4 March was a final determination of the application for the purposes of s 459F. The Victorian Court of Appeal so held in *Buckland Products*

Proprietary Limited v The Deputy Commissioner of Taxation [2003] VSCA 85, and in *Meehan v Glazier Holdings Proprietary Limited*, Chief Justice Young in Equity, citing *Buckland Products*, said that this had been consistent ruling of courts: [2005] NSWCA 24, [64]; (2005) 53 ASCR 229, 214. The appellant does not contend otherwise. There is no power to extend the period for compliance once that period has expired. The High Court so held in *Aussie Vic Plant Hire Proprietary Limited v Esanda Finance Corporation Limited*: (2008) 232 CLR 314; [2008] HCA 9. Clearly then, the period for compliance expired on 11 March, at which point, the demand was still in effect and the appellant had not complied with it, with the consequence that the appellant is taken to have failed to comply with the demand.

A court hearing an application under s 459P for the winding up of the company would be required to presume that the company is insolvent unless the contrary is proved to its satisfaction. The order which is sought on the face of this appeal, namely, the setting aside of the statutory demand, could have no legal consequence. The presumption of insolvency would result from events which have occurred and which cannot be undone in this appeal. In *Buckland Products* [2003] VSCA 85, [9], Justice Phillips, with whom Justices Chernov and Eames agreed, said that without an extension of time for compliance there could be no point in the continued prosecution of an appeal such as this:

> "...for, the period of compliance having ended before the appeal was heard and determined, the consequence prescribed by s 459F(1) attached, with all that followed under the statute."

Again, the appellant here does not argue to the contrary.

What then is the purpose to be served by this appeal? There is no order which can be made here which would reverse or vary the effect of the primary judgment. In particular, there would be no legal consequence from the order which is sought, which is the setting aside of the statutory demand. Were this court to express an opinion that the demand should have been set aside by the primary judge, that opinion would be irrelevant in the forum in which the non-compliance with the demand would require that court to presume insolvency.

However, the appellant argues that its appeal has utility in this way. It is said that when the appellant applies to a judge for an injunction to restrain the respondent filing an application for the appellant to be wound up, the opinion of this court as to the order which ought to have been made by the primary judge would be relevant and persuasive. Conversely, if the judgment of the primary judge is not overturned on appeal, in that context, it is said, it could be persuasive that the statutory demand provides a basis for the respondent to maintain in good faith that the application to wind up would be properly based. In its application to a judge in the trial division to enjoin the making of a winding up application, the appellant will argue that reliance upon the demand would be an abuse of process because the demand ought to have been set aside.

The appellant's argument somewhat misstates the possible relevance of the primary judgment. The outcome of the application to set aside the demand could be relevant in an application to enjoin a winding up proceeding because that outcome, together with non-compliance with the demand, would provide a prima facie case of insolvency in a winding up proceeding. It would at least preclude an argument that a winding up proceeding could have no prospect of success so that as an abuse of process on that account, it should be prevented by an injunction. But if the outcome before the primary judge could be relevant in that way, the relevance would not be affected by the opinion of this court. That is because an opinion of this court that the primary judgment was incorrect could not affect the presumption of insolvency.

This court is not asked to decide whether reliance upon non-compliance with the demand would be an abuse of process. As the appellant concedes, that is an argument which could be made to the court which is asked to enjoin a winding up proceeding without an opinion of this court as to the correctness of the primary judgment.

The essential flaw in the appellant's submission is that it seeks to have this court express an opinion in an advisory role, rather than in quelling a controversy. In the proceeding in the trial division, there was a controversy, namely, as to the effect or otherwise to be given to the statutory demand. That controversy no longer exists. The effect of the demand cannot be affected here. And, as already noted, in this appeal, there is no controversy as to whether an

application under s 459P, based upon the non-compliance of the demand, would be an abuse of process. In *Bass v The Permanent Trustee Company Limited* (1998) 198 CLR 334, 355 [45]; [1999] HCA 9 the plurality said that:

> "The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy."

In my conclusion, there is no proper purpose to be served by this Court considering whether the primary judge was correct in concluding as he did. Indeed, it would be inappropriate for this Court to do so. I will dismiss the appeal with costs.

FRASER JA: I agree.

PHILIPPIDES JA: I also agree.

FRASER JA: The order of the Court is that the appeal is dismissed with costs.