SUPREME COURT OF QUEENSLAND

CITATION:	*KW & KM Quinn Investments Pty Ltd v Deputy Commissioner of Taxation* [2003] QSC 336
PARTIES:	**KW & KM QUINN INVESTMENTS PTY LTD (ACN 080 376 576)** (applicant) v **DEPUTY COMMISSIONER OF TAXATON** (respondent)
FILE NO/S:	SC No 7029 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2003
JUDGE:	McMurdo J
ORDER:	**Statutory demand served upon the applicant by the respondent be set aside.**
CATCHWORDS:	CORPORATIONS LAW – STATUTORY DEMAND – where application to set aside statutory demand for debts arising from two income tax assessment notices – where application made in reliance on s 459J(1) – whether application made within 21 days of service of demand – whether court has power to set aside statutory demand pursuant to s 459J – whether genuine dispute as to correctness of assessment – whether applicant taking appropriate steps to set aside assessment – whether in all the circumstances court should exercise its discretion to set aside statutory demand *Evidence Act* 1995 (Cth), s 163 *Income Tax Assessment Act* 1936 (Cth), s 99A *Uniform Civil Procedure Rules*, r 103 *Hoare Bros v The Commissioner of Taxation* (1996) 62 FCR 302, considered *Moutere Pty Ltd v DCT* (2000) 34 ACSR 533, considered *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336, considered *Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd* [2003] QSC 098, cited *Re: Softex Industries Pty Ltd* (2001) 48 ATR 239, considered

Willemse Family Company v DCT (2002) 51 ATR 92, considered

COUNSEL: P Bickford for the applicant
P Hack SC for the respondent

SOLICITORS: Abbott Tout for the applicant
Australian Government Solicitor for the respondent

[1] **McMURDO J:** This is an application to set aside the respondent's statutory demand dated 16 July 2003. The amount demanded is $646,266.54, made up of amounts claimed for income tax and interest for the 1998 and 1999 years.

[2] There is a threshold question concerning whether this application was made within 21 days of service of the demand. The application was filed on 8 August, and served on that date but not before 4 p.m. The respondent says that by the operation of the *UCPR* r 103 the application is taken to have been served on the next day, 9 August, relying upon *Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd* [2003] QSC 098 at [12]. If so, the applicant must show that the demand was served no earlier than 19 July. By s 163 of the *Evidence Act* 1995 (Cth), the demand is presumed to have been served on the fifth business day after the date of the demand, unless evidence sufficient to raise doubt about the presumption is adduced.[1] The respondent submits that a doubt is raised by the evidence of the applicant's accountant, Mr McSwain, whose office is the applicant's registered office. He recalls receiving by post the demand, although he does not recall the precise date upon which it was received, but he adds that "it was at least 2 or 3 days after 16 July 2003 which is the date upon the Creditor's Statutory Demand". This evidence is not sufficient to raise doubt about the presumption. Mr McSwain says no more than that whenever it was received it was not received before 18 or 19 July. The evidence is not to the effect that the document *was* received on the second or third day after 16 July. The operation of the presumption is not displaced merely because there is a possibility that the actual date of receipt differs from the presumed date. The evidence which is sufficient for s 163 need not prove the fact that the date of receipt was different from the presumed date, but it must be probative of that fact, which Mr McSwain's evidence is not. If the evidence is accepted it would not disprove the presumed fact. It follows that if the application is treated as filed and served only on 9 August, it is still within time.

[3] It was common ground that the statutory demand can not be set aside or varied pursuant to s 459H, because the debts arise from notices of assessment of income tax. Absent some genuine dispute about the validity of a notice of assessment which has been duly served, there could be no genuine dispute about the existence or amount of the debt specified in the notice: *Hoare Bros v The Commissioner of Taxation* (1996) 62 FCR 302 at 311.

[4] The application is made in reliance upon the discretionary power to set aside a statutory demand if the court is satisfied that "there is some other reason why the demand should be set aside": s 459J(1). In an appropriate case, a statutory demand for unpaid income tax can be set aside under s 459J. That was accepted by the Full Court of the Federal Court in *Hoare Bros*[2] and by numerous decisions of single

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1 Section 163 applies to all proceedings in an Australian Court: s 5

2 At 316-318

judges in this and other Supreme Courts: see e.g. *Moutere Pty Ltd v DCT* (2000) 34 ACSR 533; *Re: Softex Industries Pty Ltd* (2001) 48 ATR 239; *Willemse Family Company v DCT* (2002) 51 ATR 92. In *Hoare Bros* the Full Court apparently endorsed the view of the primary judge (Olney J) that had it been shown that the Commissioner's conduct was unconscionable, was an abuse of process, or had given rise to substantial injustice, the statutory demand would have been set aside.[3] In *Moutere*, Austin J said that in a case where the assessment was the subject of a due objection, then if the court forms the view that the Commissioner has acted oppressively or unfairly by issuing a statutory demand rather than awaiting the outcome of the objection or taking proceedings for the recovery of the debt, the appropriate course is for the court to set aside the demand.[4] In neither *Hoare Bros* nor *Moutere* was the demand set aside, and both the judgment at first instance and upon appeal in *Hoare Bros* make it clear that the court is not bound to set aside the demand simply because there is a genuine dispute as to the company's underlying liability to income tax which the company was appropriately pursuing by objections and appeals. In *Softex*, Mullins J set aside a statutory demand where part of the amount demanded was not only the subject of an objection, but was also the subject of a long reserved decision by the Administrative Appeals Tribunal of the company's application for review. In the circumstance that the parties had been awaiting the decision of the Tribunal for several months, her Honour not surprisingly found that it was oppressive for the respondent to serve a statutory demand incorporating the disputed sum. In *Willemse*, Holmes J expressed what might be considered to be a wider view of the discretion saying at [42]:

> "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."

[5] For the respondent, Mr Hack SC submitted that the court had no power, under s 459J or otherwise, to set aside a statutory demand for unpaid income tax where the notice of assessment had been duly served, and that the contrary view in each of these cases was wrong. I should accept that submission only if I think that those decisions were clearly wrong, which I do not. The attack upon these decisions fails to appreciate the limits of the proper use of the statutory demand process. In an appropriate case, a court will protect a company against a misuse of the process by setting aside the demand. That process could be misused where the statutory demand is used to coerce payment and to unfairly defeat the company's genuine exercise of its statutory rights to challenge an assessment of income tax.

[6] Accordingly the court has a discretion to set aside the demand on s 459J where the circumstances include the existence of a genuine dispute as to the correctness of the assessment and the taking of appropriate steps by processes of objection or appeal

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3 At 317-318

4 At 543

to set it aside. Even given those circumstances, the company has no right to have the demand set aside, as under s 459J there is a broad discretion which must be exercised having regard to all relevant circumstances. Plainly, the conduct of the creditor is most relevant to the exercise of the discretion: *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336 at 339.

[7] With those considerations in mind, I turn to the circumstances of the present matter. The applicant is a trustee. It claims to have distributed almost all of its income for the 1998 and 1999 years to a company called No 2 Pitt Street Pty Ltd as trustee for the Northbourne Holdings Unit trust. The Commissioner took the view that these distributions should be disregarded and assessed the applicant upon the whole of its income pursuant to s 99A of the *Income Tax Assessment Act* 1936 (Cth). A number of other taxpayers, unrelated to the Quinns who control the applicant, made similar purported distributions to the Northbourne trust. Many of their cases have been the subject of unsuccessful objections and are now the subject of applications in the AAT. It appears that the Tribunal has been managing them as a group, and it has within the last few weeks heard some of those applications as test cases. The precise extent of the overlap between those cases and whatever is involved in the applicant's proposed challenges to these assessments is not clear, but it is likely that there is some substantial overlap. The applicant's present solicitors are acting for many of those other taxpayers. The evidence indicates that there is some prospect that a successful outcome for those taxpayers would be consistent with these assessments being incorrect.

[8] However, the applicant has done little to challenge the 1998 assessment, and thus far has done nothing to challenge the 1999 assessment. It objected to the 1998 assessment. But after that objection was disallowed in September 2002, it took no further step to challenge the assessment until it filed an application in the AAT on 8 August 2003. The application was to extend the time for lodging of its proposed application for review. Notably, it did this only after it was served with the statutory demand, and on or after the date on which it filed this application. The respondent neither opposes nor consents to the extension of time sought from the Tribunal, but the applicant is obliged to put some evidence before the Tribunal in support of the extension sought. The applicant has thus far failed to do so. On 8 September, the Tribunal conducted a telephone directions hearing, in the course of which the applicant's counsel told the Tribunal that the applicant's legal representatives had not yet obtained affidavits to support the application for an extension of time. In late September, the same member of the Tribunal was hearing some of the Northbourne matters when he raised with counsel then appearing for the applicants, who is this applicant's counsel, whether the application for extension of time could be heard on 26 September 2003. Counsel then replied to the effect that there was still no supporting material so that the matter could not then be heard. The position appears to be the applicant has done effectively nothing to prosecute its application for extension of time, although it is still on foot and there remains a significant prospect that it will succeed. Moreover, the applicant has done nothing to challenge the 1999 assessment, even by an objection.

[9] Prior to giving the statutory demand, the respondent wrote to the applicant in May requiring payment of these amounts. When there was no response to that letter, the respondent issued its statutory demand dated 16 July. Its conduct in issuing the statutory demand hardly appears to be oppressive or otherwise improper because

apart from the unsuccessful objection in 2000 to the 1998 assessment, the applicant had shown no interest in challenging these assessments.

[10] However, the applicant's solicitor swears that he now holds instructions from the applicant "to proceed with Applications before the AAT" in respect of all relevant assessments, including some which relate to Mr and Mrs Quinn personally, and to apply for all necessary extensions of time. Although it would be preferable to have evidence of the applicant's intentions from its directors, nevertheless this is substantial evidence indicating a genuine desire now to challenge these assessments. It is still difficult to understand why nothing has been done to progress the application for an extension of time. That inactivity might suggest that the applicant is not genuine in its attempt to overturn the assessments, but the evidence of its solicitor was not challenged by cross examination and ultimately I accept it. The case is therefore one where I accept that the applicant genuinely intends to challenge the assessments, although it has not taken reasonable steps to do so. The fact that the applicant had taken no such step (apart from its original objection some years earlier) prior to the issue of the statutory demand does not in itself prevent the setting aside of the demand under s 459J.

[11] An important consideration is the potential for these assessments to be revealed as incorrect by the outcome of other applications in relation to these Northbourne distributions by other taxpayers, which have recently been heard but not decided in the AAT. Whilst the respondent does not agree to the extension of time for this company's application to the Tribunal, that application still remains unopposed, presumably in recognition of the need for some consistency of approach between this company and other Northbourne taxpayers. In the present circumstances, the continued reliance upon the statutory demand would be unfair to the applicant if the applicant clearly intends to pursue its proposed challenge to these assessments. In such a case, for the Commissioner not to await the outcome of the applicant's challenge, when it is awaiting the decision of the AAT in the case of other taxpayers which is likely to show the correctness or otherwise of the subject assessments, would involve a misuse of the statutory demand process. I have concluded that the applicant does intend to pursue its challenge to the assessments, and that in all the circumstances, the statutory demand should be set aside.

[12] I therefore conclude that the statutory demand be set aside and I shall hear the parties as to costs.