

SUPREME COURT OF QUEENSLAND

CITATION: *Fraser Escape 4x4 Tours P/L v Deputy Commissioner of Taxation* [2005] QSC 352

PARTIES: **FRASER ESCAPE 4x4 TOURS PTY LTD ACN 077 533 414**
(applicant)
v
DEPUTY COMMISSIONER OF TAXATION
(respondent)

FILE NO: BS6795 of 2005

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 11 November 2005

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 7 November 2005

JUDGE: Wilson J

ORDER: **Dismiss the application.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – APPLICATION TO SET ASIDE DEMAND – where a statutory demand has been served on the applicant - where the directors of the applicant have used personal assets in an attempt to satisfy the applicant’s liabilities – where the applicant is unable to pay its debts and is incurring taxation liabilities – where there is no evidence of any proceedings to challenge relevant assessments or other decisions of the respondent – whether the statutory demand should be set aside pursuant to s459J(1)(b) of the *Corporations Act 2001*

Corporations Act 2001, s459J(1)(b)

General Welding and Constructions Co (Qld) Pty Ltd v International Rigging (Aust) Pty Ltd [1983] 2 QdR 568, cited
Hoare Bros Pty Ltd v Commissioner of Taxation (1996) 62 FCR 302, cited
KW & KM Quinn Investments Pty Ltd v DCT [2004] QCA 91, cited
Moutere Pty Ltd v DCT (2000) 34 ACSR 533, cited
Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd (1996) 20 ACSR 746, cited

COUNSEL: KS Howe for the applicant
A Penson for the respondent

SOLICITORS: Carswell & Company for the applicant
ATO Legal Services Branch for the respondent

- [1] **Wilson J:** This is an application to set aside a statutory demand pursuant to s459J(1)(b) of the *Corporations Act* 2001.
- [2] The demand, which was served on 27 July 2005, is for \$193,281-10 described in these terms –

<p>“a) Running Balance Account deficit debt as at 21 July 2005 in respect of amounts due under the BAS provisions as defined in subsection 995-1(1) of the <i>Income Tax Assessment Act 1997</i> (‘the ITAA 1997’) [BAS provisions include, generally: the goods and services tax provisions, the PAYG withholding provisions, the PAYG instalment provisions, the fringe benefits tax instalment provisions and the deferred company instalment provisions], administrative penalties due under Part 4-25 of Schedule 1 of the <i>Taxation Administration Act 1953</i> (‘the TAA 1953’) and the general interest charge payable under section 8AAZF of the TAA 1953, being a debt due and payable by the company pursuant to section 8AAZH of the TAA 1953.”</p>	<p>\$193,281.10</p>
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- [3] The debt is not disputed.
- [4] The directors of the applicant are an elderly couple, Mr and Mrs Jacob. The applicant operates a caravan park at Scarness. The land on which the business is conducted was owned by Mr and Mrs Jacob until April this year. They leased it to the applicant.
- [5] Some time ago Mr and Mrs Jacob retired and the business was then conducted by family members. There were defalcations by those family members who received income of the applicant company and applied it to their personal use without paying the company’s liabilities. When confronted about this, Mr and Mrs Jacobs’ daughter-in-law committed suicide.
- [6] Mr and Mrs Jacobs resumed the running of the caravan park business. They have used whatever personal assets they had to meet the company’s liabilities. This included selling their home in about November 2004 and paying a little under \$135,000-00 to the respondent in reduction of the applicant’s taxation liabilities. They sold the land on which the business is conducted in April 2005 for \$3 million.

At settlement \$1.3 million was received: this was used to discharge a mortgage and to pay outstanding rates. The balance, which is secured by a second mortgage over the land, is payable in 2 instalments of \$850,000-00 in April 2006 and April 2007. There is a Deed of Priority between the first mortgagee and Mr and Mrs Jacobs limiting the first mortgagee's priority to \$1.4 million.

- [7] Mr Jacobs says that he will be able to discharge the company's liability to the respondent fully in April 2006 when the next instalment of purchase moneys is paid. In the meantime he has been making payments to the respondent of \$4,000-00 per month.
- [8] The applicant concedes that it is presently unable to pay its debts as they fall due. Further, it is continuing to incur taxation liabilities.
- [9] According to Mr Jacobs, if the company were wound up the respondent would receive nothing as the company has no assets. Further, the winding up would be an event of default under the lease which might result in its termination. The company has tax losses of \$300,000-00, the benefit of which would be lost if it were wound up.
- [10] Section 459J provides -

“Setting aside demand on other grounds

- (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.
- [11] The Courts have been assiduous not to attempt to mark out the limits of the discretion s 459J(1)(b): see *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302 at 317. Under s 459J(1)(a) a demand may be set aside if, because of a defect in it, substantial injustice will result if it is not set aside. While it is not necessary to show substantial injustice to enliven the discretion, as Bryson J said in *Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* (1996) 20 ACSR 746 at 757 –
- “The court should not act under para (b), which is discretionary, unless the decision to do so is supported by some sound or positive ground or good reason which is relevant to the purposes for which the power exists.”
- [12] In *Moutere Pty Ltd v DCT* (2000) 34 ACSR 533 at para 54 Austin J said –
- “... The policy underlying s 459H is that the statutory demand should not be used to coerce a person to pay a disputed amount. A statutory demand is not an instrument of debt collection. By analogy, the commissioner should not use the statutory demand procedure to apply coercive pressure to a taxpayer who genuinely objects to the commissioner's decision. To do so would be to take unfair advantage of those provisions of the taxation legislation (such as ss 14ZZM and 14ZZR of the TAA) which say that an amount owing in consequence

of the commissioner's decision is recoverable, notwithstanding that an objection has been lodged against the decision. “

Examples of conduct which might warrant the exercise of the discretion are conduct that is unconscionable, an abuse of process or which gives rise to substantial injustice: *Hoare Bros Pty Ltd v Commissioner of Taxation* at 317-318; *KW & KM Quinn Investments Pty Ltd v DCT* [2004] QCA 91.

- [13] In the present case the taxation liability is not in dispute, and proceedings to challenge relevant assessments or other decisions of the respondent are not on foot or even contemplated. The respondent is entitled, indeed obliged, to act to collect outstanding revenue on behalf of the Crown. The conduct of Mr and Mrs Jacob in applying their personal assets to the satisfaction of the company's liabilities has been honourable and in the circumstances it may well be commercially unwise of the respondent to proceed to wind up the company before April next year. However, it cannot be said that the respondent has acted in any way improperly in serving this demand, or that he has in any way sought to take unfair advantage of the relevant provisions of the taxation legislation. This is a hard case on the facts. However, I am not persuaded that it is one warranting the exercise of the discretion to set aside the demand.
- [14] Non-compliance with the statutory demand gives rise to a presumption of insolvency upon which a winding up application may be based. The applicant seeks also an order restraining the respondent from taking any action consequent upon the expiry of the demand and a stay of any proceedings in respect of the debt until May 2006.
- [15] There is nothing from which I could conclude that winding up proceedings would in the circumstances be an abuse of process. The underlying debt is not disputed. The company is insolvent, and so without a trading reputation or commercial credit capable of protection by injunction. See generally *General Welding and Constructions Co (Qld) Pty Ltd v International Rigging (Aust) Pty Ltd* [1983] 2 QdR 568 at 570. There is no basis for an injunction.
- [16] There is no evidence of any proceedings on foot to enforce the debt, and so none which might be the subject of a stay.
- [17] The application is dismissed.