SUPREME COURT OF QUEENSLAND

CITATION:	*Devmin International Pty Ltd v Belconnen Developments Pty Ltd* [2022] QSC 186
PARTIES:	**DEVMIN INTERNATIONAL PTY LTD** ACN 146 701 377 (applicant) **v** **BELCONNEN DEVELOPMENTS PTY LTD** ACN 648 004 853 (respondent)
FILE NO/S:	BS No 7854 of 2022
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 October 2022
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2022; further written submissions filed on 5 October 2022 and 17 October 2022.
JUDGE:	Cooper J
ORDER:	**1. Originating application filed 5 July 2022 dismissed.** **2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis if not agreed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – OTHER CASES – where the respondent was one of a number of companies incorporated for the purpose of engaging in property development – where the respondent entered into a loan agreement for the purpose of obtaining funds to purchase and develop sites – where the respondent made no repayments of principal or interest under the loan agreement – where the debt under the loan agreement was assigned to the applicant who became a creditor of the respondent pursuant to ss 459P(1)(b) and 462(2)(b) of the *Corporations Act 2001* (Cth) – where the applicant demanded payment of an amount claimed to be owed under the loan agreement – where the demand was responded to in the form of a *Calderbank* offer – whether the respondent should be wound up pursuant to s 461(1)(c) of the *Corporations Act 2001* (Cth) because it suspended its business for a whole year – whether it is just and equitable that the respondent be wound up

pursuant to s 461(1)(k) of *Corporations Act 2001* (Cth) – whether the respondent is insolvent and should be wound up pursuant to ss 459A or 459B of *Corporations Act 2001* (Cth)

Corporations Act 2001 (Cth), s 95A, s 459A, s 459B, s 459E, s 459P, s 461, s 462, s 465A, s 467, s 1367A
Corporations Regulations 2001 (Cth), reg 5.4.01A, reg 5.6.75
Uniform Civil Procedure Rules 1999 (Qld), r 5.6 in sch 1A

Australian Securities and Investments Commission v ABC Fund Managers Ltd (2001) 39 ASCR 443; [2019] FCA 1514, considered
Australian Securities and Investments Commission v Kingsley Brown Properties Pty Ltd [2005] VSC 506, cited
Australian Securities and Investments Commission v Merlin Diamonds Ltd [2019] FCA 1546, cited
Australian Securities and Investments Commission v Midland Hwy Pty Ltd (2015) 110 ACSR 203; [2015] FCA 1360, considered
Australian Securities and Investments Commission v Plymin (No 1) (2003) 175 FLR 124; [2003] VSC 123, cited
Cornhill Insurance plc v Improvement Services Ltd [1986] 1 WLR 114, cited
Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd (2004) 9 VR 549; [2004] VSC 157, considered
Fisher v Southern Logistics Pty Ltd (No 2) (1985) 3 ACLC 534, considered
Macquarie Bank Ltd v TM Investments Pty Ltd (2005) 223 ALR 148; [2005] NSWSC 608, considered
Re 52 The Esplanade Pty Ltd [2021] QSC 318, cited
Re Catombal Investments Pty Ltd [2012] NSWSC 775, considered
Re Metropolitan Railway Warehousing Co Ltd (1867) 36 LJ Ch 827, considered
Re Middlesborough Assembly Rooms Co (1880) 14 Ch D 104, considered
Re MSB Capital Holdings Pty Ltd [2020] VSC 775, cited
Re Plutus Payroll Pty Ltd [2017] NSWSC 1360, cited
Re Tianda Iron Ore (Australia) Pty Ltd [2019] NSWSC 891, considered
Re Tivoli Freeholds Ltd [1972] VR 445, considered
Re Tomlin Patent Horse Shoe Co Ltd (1886) 55 LT 314, cited
Taylors Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd [1990] BCLC 216, cited

COUNSEL: M T de Waard for the applicant
A A Evans (solicitor) for the respondent

SOLICITORS: Kelly Legal for the applicant
O'Shea & Partners Lawyers for the respondent

[1] The applicant (**Devmin**) is a creditor of the respondent (**Belconnen**) for the purposes of s 462 of the *Corporations Act 2001* (Cth) (**the Act**). That position is the result of Devmin having taken an assignment of a debt owed by Belconnen under a loan agreement made on 3 March 2021 (**Loan Agreement**) pursuant to which it borrowed $250,000 from a company called Holistic Property Group Pty Ltd (**Holistic**).

[2] Devmin demanded that Belconnen repay the debt owed under the Loan Agreement and Belconnen failed to comply with that demand. Thereafter, on 5 July 2022, Devmin filed an originating application seeking to wind up Belconnen on just and equitable grounds.

[3] By its written submissions Devmin sought to expand the grounds it relies on in support of the winding up application, as follows:

(a) that Belconnen had suspended its business for a whole year (s 461(1)(c) of the Act);

(b) that it is just and equitable that Belconnen be wound up (s 461(1)(k) of the Act); and

(c) that Belconnen is insolvent (s 459A or s 459B of the Act).

Publication of prescribed information

[4] By reason of s 465A(1)(c) of the Act, Devmin was required to cause a notice setting out prescribed information about the winding up application to be published in the prescribed manner.

[5] The prescribed information is set out in reg 5.4.01A of the *Corporations Regulations 2001* (Cth) (**the Regulations**). The prescribed manner of publication is addressed in s 1367A of the Act and reg 5.6.75 of the Regulations.

[6] Rule 5.6 in schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld) also sets down requirements for publication of notice of the application.

[7] The material relied upon by Devmin did not address the requirement for publication of the prescribed information.

[8] Further written submissions filed on behalf of Devmin acknowledged that, due to an oversight, it did not publish any notice pursuant to s 465A(1)(c) of the Act. Those further submissions set out reasons why, pursuant to s 467(3)(b) of the Act, the court should dispense with the requirement for publication in the circumstances of this case.

[9] Belconnen did not contend that Devmin's failure to comply with s 465A(1)(c) of the Act is fatal to the winding up application. However, it submitted that this was a matter which weighed against the making of such an order when considered in all of the circumstances.

[10] It is ultimately unnecessary to determine whether it is appropriate to dispense with the requirement for publication because, for the reasons set out below, I have

concluded that it is not appropriate to exercise the discretion to make a winding up order in the circumstances of this case.

Background

[11] Belconnen was registered on 17 February 2021. Its sole director and secretary since that date has been, and remains, Jamie Garden. The sole shareholder of Belconnen is Garden Bells Pty Ltd (**Garden Bells**). Mr Garden is also the sole director of, and owns 100% of the shares in, Garden Bells.

[12] The evidence establishes that Belconnen was one of a number of companies which Mr Garden caused to engage in various aspects of a property development business under the name Parity Group.

[13] Another company in the Parity Group was Parity Developments Pty Ltd (**Parity Developments**). On or about 13 May 2022, Parity Developments changed its name to Canlux Pty Ltd, but for simplicity's sake I will continue to refer to it as Parity Developments. That company was placed into voluntary administration on 30 May 2022 and then into liquidation on 27 June 2022. It will be necessary to return to aspects of Mr Garden's conduct with respect to Parity Developments when considering Devmin's arguments, particularly concerning the just and equitable ground.

[14] In early 2020, Mr Garden had identified a potential development site in Beresfield in New South Wales which he considered could be developed as a cold storage facility. He registered Parity Developments on 15 March 2020 to purchase the development site in Beresfield.

[15] Parity Developments needed funding to acquire and develop the Beresfield site. In that context, Mr Garden engaged in discussions with James O'Dwyer, the director of Holistic.

[16] Mr Garden's evidence is that during the course of that meeting, and in subsequent meetings, Mr O'Dwyer represented to Mr Garden that he had expertise in raising capital for property development and that Mr Garden should consider funding the Beresfield development by way of 50% capital raising and 50% borrowings. Mr Garden swore that Mr Dwyer made statements to the effect that:

(a) Mr O'Dwyer had access to unlimited funds;

(b) Mr O'Dwyer would have no difficulty raising the funds Mr Garden needed for the development;

(c) Mr O'Dwyer had a business partner (identified in Mr Garden's affidavit only as "Shane") who had previously worked at Babcock and Brown and who was a "guru" of the type of deal that Mr O'Dwyer was proposing;

(d) Mr Garden was very lucky to have Mr O'Dwyer and his business partner involved in the fund raising because, between the two of them, they had Mr Garden covered.

[17] Mr Garden asserts that there was then an agreement that Mr O'Dwyer would take up a half interest in the Beresfield development. That would be achieved by the incorporation of a further company called Parity Partners Pty Ltd (**Parity Partners**)

owned in equal shares by a company controlled by Mr Garden and a company controlled by Mr O'Dwyer. From that time, it was intended that Parity Partners would purchase the Beresfield site and Parity Developments would be appointed manager of the Beresfield development.

[18] On 30 November 2020, Parity Developments entered into an option deed to purchase a different site at Belconnen Crescent in Brendale for a purchase price in excess of $5 million.

[19] Mr Garden's evidence is that, in a discussion about this further project, Mr O'Dwyer made similar representations to the effect that he could raise the funds required to purchase the Brendale site.

[20] In about February 2021, when it came time for Parity Developments to exercise the option to purchase the Brendale site, Mr Garden caused Parity Developments to nominate Belconnen as the purchaser under the contract. At that time a deposit of $251,370 became payable under the purchase contract.

[21] Mr Garden's evidence is that, at that time, Mr O'Dwyer had not raised the capital which was needed for the Beresfield development or for the purchase of the Brendale site. He says that Mr O'Dwyer proposed that Belconnen should borrow $250,000 from Holistic in order to exercise the option to purchase the Brendale site and continued to assure Mr Garden that he could raise the funds required to settle the purchase of the Brendale site.

[22] As already noted above, Belconnen entered into the Loan Agreement on 3 March 2021. Relevantly for the purpose of the winding up application, the Loan Agreement provided:

(a) by item 6 in the Schedule, the term of the loan was for a maximum period of six months;

(b) by clause 4.1, Belconnen was required to repay the whole of the principal sum by the end of the term of the loan;

(c) by clause 5.1, Belconnen was obliged to pay interest at a rate of 15% by way of monthly instalments in arrears on the first day of each month;

(d) by clause 6.2, Belconnen was required to make each payment due to the lender without any set-off or counterclaim.

[23] Parity Developments provided a guarantee in respect of Belconnen's obligations under the Loan Agreement (**Guarantee**).

[24] Belconnen made no interest payments and no repayments of principal under the Loan Agreement.

[25] Mr Garden's evidence is that his intention in purchasing the Brendale site was to obtain a development approval and then resell the site for a profit. He says that he did not speak to any other financiers about raising money to complete the purchase of the Brendale site because Mr O'Dwyer continued to assure him that he would raise the funds. According to Mr Garden, when it came time to settle the purchase of the Brendale site Mr O'Dwyer was not able to raise the required funds and Belconnen was not able to complete the purchase.

[26] Mr Garden has deposed to negotiations he engaged in, at about the time the purchase of the Brendale site by Belconnen was due to settle, to on-sell the property. He asserts that Belconnen would have made a profit on reselling the Brendale site if it had been able to complete the purchase. He says that, had it not been for Mr O'Dwyer's continued representations that he could raise the funds required for Belconnen to complete the purchase, he would have sought and obtained alternative funding which would have allowed Belconnen to purchase the Brendale site.

[27] On 19 August 2021, shortly prior to the expiry of the term of the Loan Agreement, Devmin's solicitors gave written notice to Belconnen that the debt under the Loan Agreement had been assigned from Holistic to Devmin. That assignment means that Devmin is a creditor of Belconnen pursuant to ss 459P(1)(b) and 462(2)(b) of the Act and, on that basis, has standing to bring the present winding up application.

[28] On 25 November 2021, Devmin's solicitors wrote to Parity Developments and demanded payment by it of $281,268.20 claimed to be owing as a consequence of Belconnen's default under the Loan Agreement. Todd Giraudo, a director of Devmin, explained in his evidence that he elected to pursue Parity Developments under the Guarantee rather than Belconnen because of a belief that Parity Developments was more likely to have sufficient assets to repay the outstanding debt.

[29] Parity Developments, by its then solicitors, responded to the demand on 26 November 2021 in the form of a *Calderbank* offer to settle the dispute on the basis that Parity Developments would pay the full amount demanded by Devmin.

[30] Devmin did not accept that offer. Mr Giraudo's affidavit seeks to explain this decision by reference to "a breakdown in good faith between [Devmin] and Parity Developments" by that time, said to be caused by Parity Developments failure to pay the monies owed. It is not clear how this breakdown in good faith is said to have manifested.

[31] In any event, on 14 January 2022, Devmin instituted proceedings against Parity Developments under the Guarantee. Parity Developments defended those proceedings on the basis, among other things, of the various misrepresentations alleged to have been made by Mr O'Dwyer. The trial was listed for hearing in the District Court commencing on 8 June 2022, but did not proceed after Parity Developments was placed into voluntary administration.

[32] Devmin then filed its originating application seeking to wind up Belconnen. At the same time, Devmin filed an interlocutory application seeking the appointment of a provisional liquidator to Belconnen. In response to that application, Belconnen's solicitor deposed, on information from Mr Garden, that Belconnen had not traded in any way for over a year, save for a small payment in June 2022 to ASIC.

[33] Having set out the background to the present application, I turn now to the different grounds upon which Devmin relies.

Suspension of Belconnen's business for a whole year

[34] Section 461(1)(c) of the Act provides that the court may order the winding up of a company if the company suspends its business for a whole year.

[35] Mr de Waard, who appeared as counsel for Devmin, frankly acknowledged in the course of argument that this ground is primarily designed to provide shareholders with a means of recovering their investment from a company which ceases to engage in its intended business.

[36] That acknowledgement is consistent with the observation of the authors of *McPherson's Law of Company Liquidation* who state:[1]

> "… At one time this ground was quite frequently invoked by contributories, but its utility and importance has diminished owing to changes in company law and practice, and to the fact that, even where the requisite matters are established, the application will generally be dismissed if the majority of shareholders are opposed to winding up and the company's inactivity can be satisfactorily explained."

[37] An example is *Re Middlesborough Assembly Rooms Co*,[2] where the company had been incorporated with the aim of erecting and letting out assembly rooms but, due to a trade depression, undertook no construction work for three years. A member of the company sought a winding up under the equivalent of s 461(1)(c) but the application was opposed by a large majority of shareholders. The court refused the application because it said it was not clear that the company had no intention of carrying on business.

[38] A similar result was reached in *Re Metropolitan Railway Warehousing Co Ltd*,[3] where the company had been incorporated for the purpose of constructing warehouses above a goods station. That could not be done until the station was built by an associated company. The court was satisfied that the construction of the station was about to proceed such that although the warehousing company had not been in a position to construct the warehouses it would be in such a position within a reasonable period of time. In circumstances where the majority of shareholders did not support the application, but wished for the warehousing company to continue its business as soon as it became possible, the court refused to wind up the company.

[39] It is worth noting that in each of the cases just referred to, the court expressly cited the fact that the winding up was not sought for the purpose of paying creditors as a factor telling against the making of a winding up order.

[40] More recently, in *Re Tianda Iron Ore (Australia) Pty Ltd*,[4] Black J ordered that a company be wound up under s 461(1)(c), as well as s 461(1)(k), on an application by one of the company's two shareholders. Although the other shareholder had filed a notice of appearance indicating that it would oppose the application it ultimately led no evidence, nor made any submissions, in opposition to the winding up. Black J was satisfied that the provision was engaged where the evidence

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1 See paragraph [4.365].
2 (1880) 14 Ch D 104.
3 (1867) 36 LJ Ch 827.
4 [2019] NSWSC 891.

established that the company, which was incorporated with the intent of investing in iron ore exploration and exploitation, had ceased to hold any relevant exploration licences and thereafter ceased trading.

[41] Devmin's written submissions accepted that, for an order to be made on the ground of suspension of business, not only must there be a cessation of the business but there must also be shown an apparent intention not to carry on, or an apparent inability to carry on, the business.[5]

[42] The fact that Belconnen had not traded for a period of more than a year was not in dispute at the hearing. Belconnen also did not challenge evidence in the form of searches exhibited to Mr Giraudo's affidavit which indicated that Belconnen holds no real property in Australia. On Mr Garden's evidence, Belconnen was unable to obtain funding to complete the purchase of the Brendale site. The second report to creditors provided by the administrators appointed to Parity Development, which was exhibited to Mr Giraudo's affidavit and was not the subject of any objection by Belconnen's counsel, also established that the development of the Beresfield site, that being the only other project in which the Parity Group of companies appeared to have engaged in, had also failed. On this basis, Devmin submitted that Belconnen had evinced an intention not to carry on its business, or was unable to do so.

[43] Against this, Mr Garden's affidavit says only:

> "35. I do not believe there is (sic) any grounds to wind up [Belconnen] and believe it should be (sic) because:
>
> (a) being its director it may have adverse implications for me;
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> (b) it is owed money by [Parity Developments], some of which may be recovered in the liquidation;
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> (c) it has a potential claim for damages against [Devmin]; and
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> (d) it could be used for development or other business purposes in the future."

[44] I am satisfied that the discretion to make an order under s 461(1)(c) arises on the facts of this case. Nevertheless, there remains the question whether it is appropriate to make such an order in the circumstances of this case where, I infer, Devmin's purpose in seeking the winding up of Belconnen is to advance its efforts to recover the debt it claims to be owed under the Loan Agreement.

[45] At the hearing of the winding up application, Belconnen submitted that the appropriate way for Devmin to pursue this end was to bring court proceedings to recover the debt or to issue a statutory demand under s 459E of the Act. Belconnen submitted Devmin had not pursued either of those courses because its solicitors were aware from the proceeding brought against Parity Developments that the obligation to pay the debt under the Loan Agreement was disputed by reason of the alleged conduct of Mr O'Dwyer described above.

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5 *Re Tomlin Patent Horse Shoe Co Ltd* (1886) 55 LT 314.

[46] Devmin refuted that submission and argued that the dispute raised by Belconnen was not genuine.

[47] It seems to me that the argument over the genuineness of Belconnen's dispute should more properly have been heard in the context of a summary judgment application in court proceedings to recover the debt or, perhaps more likely, in any application that Belconnen might have brought to set aside a statutory demand for the debt if one had been served. If, on such a hearing, the basis upon which Belconnen disputes the debt was found not to be genuine then Belconnen would still have an opportunity to pay the debt, whether in compliance with a statutory demand or a court judgment, before Devmin could take steps to wind it up. The consequence of the course Devmin has taken by bringing the present application, whether intended or not, is that Belconnen would be deprived of that opportunity.

[48] That is, it seems to me, a reason why no order should be made under s 461(1)(c) even though the ground has been proved.[6] This reflects an issue as to the appropriateness of the various different grounds for winding up in different circumstances and where those grounds are asserted by different categories of applicants. This was identified by the authors of *McPherson's Law of Company Liquidation*:[7]

> "The *Corporations Act 2001* makes very little distinction between the various types of applications mentioned above: prima facie they all appear to be subject to the same rules and, with few exceptions, any of the statutory grounds is in theory available to any qualified applicant. In practice, however, certain of these grounds are appropriate only to particular types of applications, and the manner in which the court's discretion is exercised is naturally affected by the nature of the applicant's interest in having the company wound up."

[49] Having regard to the historical basis for the provision and in circumstances where none of the authorities relied upon by Devmin involved an application by a creditor, rather than a shareholder, I am not persuaded that it is appropriate to exercise the discretion and make a winding up order under s 461(1)(c) on this application.

The just and equitable ground

[50] The categories of conduct which might justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case.[8]

[51] In *Re Catombal Investments Pty Ltd*,[9] Brereton J identified six "conventional" categories where a winding up order could be made, namely:[10] (1) failure of the substratum of the company; (2) deadlock or disagreement in the management of the company's affairs; (3) fraud in the formation of the company; (4) misconduct by the

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6 See s 467(1)(a) of the Act.
7 See at paragraph [2.700].
8 *Australian Securities and Investments Commission v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 at [96].
9 [2012] NSWSC 775.
10 [2012] NSWSC 775 at [19].

company's directors; (5) constitutional and administrative vacuum in the company's management; and (6) on the ground of lack of confidence, fairness and public interest and commercial morality. His Honour also rightly noted that the words "just and equitable" are general words and the just and equitable ground for winding up is "a broad one incapable of exhaustive definition". The case law establishes that ground is not confined to particular factual categories and the generality of the words "just and equitable" are not to be limited in any way.

[52] Devmin submits that the facts of this case bring it within the first category and the sixth category referred to above.

[53] There is a significant degree of overlap between the first category, being a failure of the substratum of the company, and the ground of suspension of business provided for under s 461(1)(c). As discussed above in relation to the suspension of business ground, the rationale for a finding that it is just and equitable to order that a company be wound up where there has been a failure of the substratum of the company is that a shareholder who has invested in a company on the basis that it will undertake a certain activity should be entitled to recover the funds invested if the activity becomes impossible. In *Re Tivoli Freeholds Ltd*,[11] Menhennitt J expressed the matter as follows:[12]

> "The question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders."

[54] Devmin submitted that the courts also consider that it is not in the public interest to allow shell companies to lay dormant. It relied on two authorities for that submission.

[55] First, Devmin referred to the decision of Beach J in *Australian Securities and Investments Commission v Midland Hwy Pty Ltd*.[13] In that case approximately 700 retail investors entered into option deeds with the company to participate and invest in a land banking scheme. The company was placed into voluntary administration and a resolution was passed at the second meeting of creditors that the company execute a deed of company arrangement. ASIC then sought orders pursuant to s 447A of the Act setting aside that resolution and orders that the company be wound up.

[56] In granting the orders sought by ASIC, Beach J stated:[14]

> "… the implementation of the proposed DOCA will not restore Midland to a position where it is able to trade. It will still remain in substance a shell corporation. It is not in the public interest to allow such a corporation to continue in existence to the detriment of future creditors and other persons dealing with Midland."

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11 [1972] VR 445.
12 [1972] VR 445 at 470.
13 (2015) 110 ACSR 203.
14 (2015) 110 ACSR 203 at [77].

[57] It should be noted, however, that this statement followed, and needs to be understood in the context of, a finding made by Beach J that the company in that case was insolvent.[15]

[58] Secondly, Devmin relied on the decision in *Fisher v Southern Logistics Pty Ltd (No 2)*.[16] That was a winding up application which was not opposed. In a brief judgment Young J, after describing the evidence as "most unsatisfactory", stated:[17]

> "However, it is abundantly clear that in the interest of everybody this company should be put out of its misery because its continued existence is of no value to anybody. It would appear from reading the material that there is little hope of the corporators getting together sufficiently to be able to put it out of its misery under a voluntary winding-up and it is not in the public interest that such shells should continue on unadministered."

[59] The basis upon which Young J reached that conclusion is not apparent from the judgment.

[60] Devmin submits that Belconnen's substratum has failed because it was unable to complete the purchase of the Brendale site and the Beresfield development project has also failed. This submission faces the difficulty that the general intention and common understanding of the members of a company are to be found in its constitution.[18] That document was not in evidence.

[61] I do not consider it necessary to decide whether it is permissible to go beyond the constitution of the company to establish such matters and, if so, whether Belconnen's name and the evidence of Mr Garden that he caused Parity Developments to nominate Belconnen as purchaser of the Brendale site is sufficient to do so. Plainly, sworn statements by Mr Giraudo concerning the reason Belconnen was incorporated and its present inability to meet its objectives are irrelevant and inadmissible on that question.[19]

[62] Even if Devmin established that Belconnen was no longer able to meet the objectives for which it was incorporated, and notwithstanding the concerns expressed in the statements in the authorities referred to above, I am not persuaded that it is just and equitable to order that Belconnen be wound up based upon a failure of the substratum of the company. This aspect of the application under the just and equitable ground raises similar issues to those I discussed in relation to the suspension of the company's business concerning the historical basis for the relief and the appropriateness of making a winding up order on the application of a creditor in circumstances where Belconnen maintains that the debt is disputed.

[63] Devmin then argues that it is just and equitable to make a winding up order due to a lack of confidence in the conduct and management of Belconnen's affairs.

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15 (2015) 110 ACSR 203 at [9](a) and [76].
16 (1985) 3 ACLC 534.
17 (1985) 3 ACLC 534 at 535.
18 *Re Tivoli Freeholds Ltd* [1972] VR 445 at 471-472.
19 See for example paragraphs [120] to [131] of the affidavit of T S Giraudo sworn 5 July 2022 (CFI No 12).

[64] There is no doubt that such a lack of confidence may provide a basis for winding up a company on just and equitable grounds. Devmin cited three authorities as examples: *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd*;[20] *Macquarie Bank Ltd v TM Investments Pty Ltd*;[21] and *Australian Securities and Investments Commission v ABC Fund Managers Ltd*.[22]

[65] It is worth noting the type of conduct which was found to have resulted in the lack of confidence findings in those cases.

[66] In *Casualife*, the Deputy Commissioner sought to wind up two companies involved in the operation of a family run furniture business. The family had conducted that business for 30 years through a succession of corporate entities without complying with the obligation to pay tax. When faced with winding up proceedings, the relevant company transferred employees and assets to another family controlled company which continued to carry on the same business. The previous company was wound up with an unpaid tax debt, in some cases in excess of $1 million.[23]

[67] Hansen J noted that, for a winding up order to be made in such circumstances, there had to be a sufficient nexus between the facts and conduct that make it just and equitable that the defendant companies be wound up, and the management and administration of the defendant companies' affairs.[24] That requirement was satisfied in circumstances where Hansen J found that the controllers of the defendant companies would continue to conduct the affairs of those companies in the same way in the future as they had with previous companies.[25]

[68] In *Macquarie Bank*, the bank sought to wind up companies which acted as investment advisers and, in that capacity, forwarded loan applications to the bank ostensibly on behalf of clients. This was done pursuant to arrangements which entitled the defendant companies to commissions from the bank. The bank advanced loan funds and paid commissions on the faith of what it understood to be genuine applications. In fact, as found by Barrett J, some of the transactions were sham transactions in that the borrowers did not sign the applications or receive the loan proceeds. The individuals who controlled the defendant companies had, by the time of the winding up application, already been banned by ASIC for life from acting as financial advisers.

[69] In *ABC Fund Managers*, companies within a scheme were wound up in circumstances where the court found that investors had been misled and there were serious and ongoing breaches of the Act with respect to record and account keeping. The court was satisfied that the there was a risk to the public interest which warranted protection by means of the winding up orders.

[70] On this application, Devmin relies upon certain conduct of Mr Garden concerning Parity Developments or Parity Partners as giving rise to a lack of confidence in the conduct and management of Belconnen's affairs.

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20 (2004) 9 VR 549 (**Casualife**).
21 (2005) 223 ALR 148 (**Macquarie Bank**).
22 (2001) 39 ASCR 443 (**ABC Fund Managers**).
23 (2004) 9 VR 549 at [5], [56]-[57] and [495].
24 (2004) 9 VR 549 at [487].
25 (2004) 9 VR 549 at [496].

[71] As to Parity Developments, Devmin relies first upon the second report to creditors of the administrators which identifies adjustments made to debts owed by Parity Developments to related companies (including Belconnen) and adjustments made to debts owed to Parity Developments by related companies. Those adjustments were made immediately prior to the appointment of the administrators on 30 May 2022. I note that Mr Garden ceased to act as a director of Parity Developments on 11 April 2022. There is no evidence as to who directed or caused the adjustments identified in the second report to creditors to be made.

[72] Devmin then relies upon the transfer of two vehicles from Parity Developments to Ziggurat Property Pty Ltd (**Ziggurat**), another company controlled by Mr Garden in December 2021. The consideration for those transfers was an increase in the intercompany loan account owed by Ziggurat to Parity Developments in an amount of approximately $45,000. Devmin also relies on the fact that this transfer occurred only a short time after Parity Developments had been ordered to pay the contractor on the Beresfield project more than $1.3 million on an adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

[73] Finally, Devin relies upon the fact that the second report to creditors of the administrators identified a potential claim against Mr Garden of approximately $90,000 for insolvent trading.

[74] As to Parity Partners, Devmin relies first upon a transfer of $196,882.12 from Parity Partners to Parity Developments on 3 November 2021. This was done in circumstances where Parity Partners had been served with an application for a freezing order on 2 November 2021. Belconnen had previously responded to this issue, albeit on the basis of evidence given by its solicitor on information and belief, by asserting that the payment by Parity Partners was made in the ordinary course of business with respect to costs incurred by Parity Developments for work done on the Beresfield development.[26]

[75] Devmin then relies upon comments made by Judge Barlow KC in deciding a further application for freezing orders against Parity Partners. In the course of that judgment, his Honour expressed the view that the conduct of Parity Partners demonstrated a blasé attitude towards undertakings it had given in November 2021 on the earlier application for freezing orders and that its word could not be trusted. In response to this aspect of the argument Belconnen submitted that Judge Barlow KC made those comments in circumstances where Devmin (which was represented by different counsel on the application for freezing orders) had failed to draw relevant matters to the court's attention on an *ex parte* application. It is not necessary for me to consider that issue further for the purposes of this winding up application.

[76] Even if the evidence of what Devmin relies upon as misconduct on the part of Mr Garden is taken at its highest, I am not satisfied that conduct gives rise to a lack of confidence in the conduct and management of Belconnen's affairs that would make it just and equitable to wind that company up. The conduct Devmin relies upon concerns other companies within the Parity Group, to which Belconnen is related and which, like Belconnen, were controlled by Mr Garden. Nevertheless, I am not

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[26] See affidavit of A A H Evans affirmed 20 July 2022 (CFI No 14) at [36] and submissions filed 22 July 2022 (CFI No 13) at [21].

persuaded that the conduct is so pervasive as to demonstrate a sufficient nexus between the facts and conduct said to make it just and equitable that Belconnen be wound up, and the management and administration of Belconnen's affairs.

[77] Having regard to all of the circumstances of this case, I am not satisfied that it is just and equitable that Belconnen be wound up.

Insolvency

[78] Under this ground the onus lies on Devmin to demonstrate that Belconnen is insolvent: that is, that it is unable to pay its debts as and when they fall due.[27]

[79] A number of factors might be relevant on a winding up application as indicators of insolvency, including:[28]

(a) continuing losses;

(b) liquidity ratios below one;

(c) overdue taxes;

(d) poor relationship with bankers, including the inability to borrow further funds;

(e) no access to alternative finance;

(f) inability to raise further equity capital;

(g) suppliers placing the company on "cash on delivery", or otherwise demanding special payments before resuming supply;

(h) creditors unpaid outside trading terms;

(i) issuing of post-dated cheques;

(j) dishonoured cheques;

(k) special arrangements with selected creditors;

(l) solicitors' letters, summonses, judgments or warrants issued against the company;

(m) payments to creditors of rounded sums which are not reconcilable to specific invoices; and

(n) inability to produce timely and accurate financial information to display the company's trading performance and financial position, and make reliable forecasts.

[80] Devmin did not put on evidence of any of these indicators of insolvency. There is no evidence in this case about Belconnen's financial position.

[81] Instead, Devmin relies upon a number of matters as supporting a finding that Belconnen is insolvent.

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27 Section 95A of the Act.

28 *Australian Securities and Investments Commission v Plymin (No 1)* (2003) 175 FLR 124 at [386].

[82] The first is Belconnen's failure to pay the amount owed under the Loan Agreement.

[83] Secondly, Devmin seeks to characterise the *Calderbank* offer made by Parity Developments as an admission or concession that the money was owing under the Loan Agreement.

[84] That offer was made in the following terms:

> "As you are aware, we act on behalf of [Parity Developments].
>
> We refer to your letter to [Parity Developments] dated 25 November 2021 (**Letter**).
>
> We are instructed to make the following offer to resolve the dispute:
>
> 1. our client will pay to your client the total amount owed under the March 2021 Loan Agreement (as defined in the Letter), including the Principal Amount, Interest, Legal Fees and Disbursements (**Settlement Sum**) in order to fully extinguish any liability owed in respect of the March 2021 Loan Agreement.
> 2. the Settlement Sum will be paid on or before Tuesday, 21 December 2021 into your client's nominated account;
> 3. in exchange for the Settlement Sum, within 2 business days of the Settlement Sum being paid, your client will provide any and all releases, including any PPS registrations held by them and/or [Holicstic];
> 4. each party will otherwise bear their own costs,
>
> (**Offer**).
>
> Put simply, the Offer is not a compromise. The Offer contemplates payment of all liabilities owing pursuant to the March 2021 Loan Agreement at the earliest opportunity.
>
> …
>
> The Offer is made pursuant to the principles of *Calderbank v Calderbank*, and our client will rely on this correspondence on the question of costs, should it be necessary to do so, which it will seek from your client on an indemnity basis.
>
> We otherwise reserve our clients' rights in all respects."

[85] Notwithstanding the content of the paragraph appearing immediately after the numbered terms of the Offer, it is not clear to me that this letter could properly be construed as an admission or concession that the amount claimed under Loan Agreement was owing. Even if that is assumed in Devmin's favour, the offer was plainly made on the basis that it was without prejudice save as to costs and was therefore subject to without prejudice privilege. Devmin would not have been able to rely upon that letter to establish the debt owed by Parity Developments in the guarantor proceedings. Nor can it rely upon the letter to establish the debt owed by Belconnen in this proceeding. Further, and in any event, any concession or admission in the letter was made by Parity Developments and is not binding upon

Belconnen. The fact that Mr Garden was the sole director of both companies does not transform a statement made on behalf of Parity Developments into a statement made on behalf of Belconnen. For those reasons, I do not consider the letter provides any evidence in support of a finding that Belconnen is insolvent.

[86] Thirdly, Devmin seeks to rely upon evidence that there are multiple court proceedings seeking the recovery of money from companies in the Parity Group. None of the proceedings identified by Devmin involve Belconnen. The proceedings against other companies in the Parity Group are irrelevant to the question whether Belconnen is insolvent.

[87] Finally, Devmin seeks to rely on Belconnen's failure to adduce any evidence in the nature of financial records or books of account, or any evidence from its accountant or its director as to its financial position, in order to demonstrate its solvency. In making that submission, Devmin relied on two authorities which concerned an application to appoint a provisional liquidator.[29] I do not understand anything said in those decisions to mean that Belconnen's failure to put on such evidence can be used by Devlin to establish insolvency if the evidence Devmin relies upon to positively prove insolvency is not sufficient to establish that fact.

[88] A company's failure to pay an undisputed debt may be sufficient evidence of insolvency.[30] However, this will not always be the case.[31]

[89] In circumstances where, as already discussed, Belconnen maintains that the obligation to pay the debt under the Loan Agreement is disputed I am not satisfied that the evidence before me is sufficient for me to infer than Belconnen is insolvent.

Conclusion

[90] For the reasons set out above, I dismiss Devmin's application to wind up Belconnen.

[91] The applicant is to pay the respondent's costs of and incidental to the application to be assessed on the standard basis if not agreed.

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29 *Australian Securities and Investments Commission v Merlin Diamonds Ltd* [2019] FCA 1546 and *Re 52 The Esplanade Pty Ltd* [2021] QSC 318.

30 *Re Plutus Payroll Pty Ltd* [2017] NSWSC 1360 at [31]; *Taylors Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216 at 219-220, citing *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114.

31 *Re MSB Capital Holdings Pty Ltd* [2020] VSC 775 at [77]-[89].