SUPREME COURT OF VICTORIA

TEXEL PTY. LTD. v. COMMONWEALTH BANK OF AUSTRALIA

HAYNE J.

10, 14 September 1993

Companies – Winding up – Statutory demand – Setting aside – Application to extend time – Corporations Law, ss. 459G, 459S, 1322.

Section 459G of the Corporations Law provided that an application to set aside a statutory demand might only be made within 21 days after the demand was served. A company applied, pursuant to s. 1322 of the Corporations Law, for an extension of time within which to apply to set aside a statutory demand served on it.

Held, that s. 1322 did not give power to extend the time for making an application under s. 459G. To apply the general provisions of s. 1322 to extend the time so emphatically prescribed by s. 459G would be repugnant to the special scheme enacted by Pt 5.4 of the Corporations Law. The clear intention of Pt 5.4 was to provide a scheme regulating the winding up of companies in insolvency and the whole of the statutory demand procedure.

Application

The applicant applied pursuant to s. 1322(4)(d) of the Corporations Law for an extension of time for instituting proceedings under s. 459G of the Corporations Law to set aside a statutory demand which had been served on it by the respondent. The facts are stated in the judgment.

D. M. B. Derham for the applicant.

A. H. Goldberg Q.C. and *P. W. Collinson* for the respondent.

Cur. adv. vult.

Hayne J.: On 27 July 1993 the Commonwealth Bank of Australia served a statutory demand on Texel Pty. Ltd. demanding payment of more than $81 million under a guarantee given by the company in support of financial accommodation given by the bank to Redlock Pty. Ltd. and Lamina Pty. Ltd.

On the same day the bank served similar statutory demands on other companies including Mibor Investments Pty. Ltd., Mideb Nominees Pty. Ltd. and Elli Nominees Pty. Ltd. In separate reasons for judgment I have dealt with applications made by those companies to set aside the demands made on them. The case of Texel Pty. Ltd. presents separate issues.

Texel did not apply to set aside the demand before the expiration of 21 days after service of the demand upon it. It did not do so because of the oversight of its solicitor.

By operation of s. 459F the company was taken to fail to comply with the demand at the expiration of that 21 day period and on an application to wind up it is to be presumed insolvent s 459C(2)(a) It now applies by

notice of motion dated 23 August 1993 for an order under s. 1322(4)(d) of the law extending the period for instituting a proceeding under the law namely a proceeding under s. 459G and also applies in the same notice of motion for an order under s. 459G setting the demand aside.

It was contended in support of the application that the failure to apply in time was an oversight, that there can be no prejudice to the bank in extending time, that there are clear grounds for setting aside the notice and that in those circumstances an order should be made under s. 459G. The bank acknowledged that it could point to no factual prejudice if time were to be extended. However, whether time should be extended depends upon the logically prior question of what is the interrelation of s. 459G and s. 1322 of the law.

Section 459G provides that an application may only be made within 21 days after the demand is served and that an application is made in accordance with the section only if within those 21 days an affidavit in support of the application is filed and a copy of the application and affidavit is served on the person who served the demand. The language is emphatic.

The consequences of the emphatic terms of this language are to be understood in light of the legislative scheme that has been introduced into the Corporations Law as the new Pt 5.4 dealing with winding up in insolvency.

Division 2 provides for the service of a statutory demand, failure to comply with which means that, as the section says, "the Court must presume" that the company is insolvent if the failure to comply with the demand occurred within the preceding three months. That presumption operates "except so far as the contrary is provided for the purposes of the application": s. 459C(3).

The court is given power under Div. 3 to set aside a demand but also is given power (in effect) to vary a demand. The court is prohibited from setting aside a demand merely because of a defect which is defined as including an irregularity, misstatement of an amount or total, a misdescription of a debt or other matter and a misdescription of a person or entity: s. 9. Again the language is emphatic – a court *must not* set aside a statutory demand merely because of a defect.

Not only are the consequences of a failure to comply with a demand serious, so too are the consequences of failing to apply to set aside the demand. Section 459S provides that without leave of the court, a company may not oppose a winding-up application based on deemed insolvency following failure to comply with a statutory demand on a ground that the company could have relied on to set the demand aside but upon which it did not rely.

Further, by s. 459S(2):

> "The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

In my view the intent of Pt 5.4 is clear. It is to prescribe a scheme regulating the winding up of companies in insolvency and the whole of the statutory demand procedure: the making of such demands, their setting aside, their variation

In those circumstances I do not consider that the general provisions of s. 1322 may be applied to extend the time so emphatically prescribed in s. 459G(2) even if, as I assume, s. 1322 is ordinarily to be given a wide construction. The operation of the general provisions of s. 1322 would be repugnant to the special scheme enacted by Div. 2 of Pt 5.4 and in particular s. 459G(2). (See *Downey v. Trans Waste Pty. Ltd.* (1991) 172 C.L.R. 167, at pp. 171-2, 181; *Anthony Horden & Sons Ltd. v. Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 C.L.R. 1, at pp. 7, 20-21; *R v. Wallis* (1949) 78 C.L.R. 529, at p. 550; *Leon Fink Holdings Pty. Ltd. v. Australian Film Commission* (1979) 141 C.L.R. 672, at p. 678; *Refrigerated Express Lines (A/Asia) Pty. Ltd. v. Australian Meat and Live-stock Corporation (No. 2)* (1980) 44 F.L.R. 455, at pp. 468-9; 29 A.L.R. 333, at p. 347.

Counsel for the applicant referred to the decision of Beaumont J. in *Lyons v. Registrar of Trademarks* (1989) 50 A.L.R. 496 in aid of his characterisation of s. 1322 as a *force majeure* provision to which effect could and should be given in relation to applications under s. 459G. In written submissions he also referred to *AB Scaniainventor v. Commissioner of Patents* (1981) 36 A.L.R. 101, at p. 105, and *Australian Paper Manufacturers Ltd. v. C.I.L. Inc.* (1981) 148 C.L.R. 551. It is enough to say that in my view the decision in *Lyons Case* turned upon consideration of the legislative history of the *Trademarks Act* and in particular the fact that the provision for extension of time had been introduced into the act *after* enactment of the provision prescribing a time limit. In the present matter the special provisions of Pt 5.4 were enacted after the general provisions of s. 1322.

The provisions of the *Patents Act* considered in the other two cases that I have mentioned are markedly different from the provisions with which I am concerned, if only because they do not contain any language suggesting an intention to prescribe an exhaustive code. In my view these cases do not assist in the resolution of the present matter.

In my view the language of the provisions of the Corporations Law shows a clear legislative intention that the special provisions made by s. 459G(2) and (3) are not to be extended by resort to s. 1322. Otherwise the limitations imposed in such clear and emphatic language by s. 459G(2) and (3) would be rendered nugatory.

Where the legislature has wished to provide a power in the court to extend time in relation to winding up in insolvency it has done so expressly — see, for example, s. 459R. The absence of such an express power in s. 459G gives further emphasis to the limitation indicated by the repeated use of the word "only" in s. 459G.

No doubt one would be repelled by such a conclusion if it meant that in all circumstances the company would, by simply allowing the effluxion of 21 days, face certain corporate death with no opportunity of demonstrating that it should be permitted to survive.

Two things should be said of this point: first, it is to be noted that there is power under s. 459S to grant leave to rely on grounds that could be used to set aside a statutory demand. As the Act says, that leave is not to be granted unless the ground is material to proving that the company is solvent, but clearly there is, as counsel for the bank put it, a safety net provided by s. 459S in the sense that there *are* cases in which a dispute as to the existence of the debt may be litigated at the time of the application for winding up in insolvency, even if there has been no application under s 459G

Now in the case of an alleged debt as large as this one it would seem probable that the question whether the debt is due would likely bear upon the company's solvency but that is a matter for another day and I say no more about it.

The second point is that made in para. 688 of the explanatory memorandum published at the time of the introduction of the Corporate Law Reform Bill 1992 into the Parliament. There it was said: "The provisions in relation to the setting aside of a statutory demand are intended to be a complete code for the resolution of disputes involving statutory demands and to do so on the basis of the commercial justice of the matter rather than on the basis of technical deficiencies. In particular, it is intended to remove the present difficulties which are experienced where difficulties in estimating the extent of the debt may lead to an invalidating of the statutory demand on the basis of a minor overstatement of the amount due." If Parliament intends (as it clearly does) that Div. 3 of Pt 5.4 is to be a code, then so be it. I acknowledge that the scheme as I have construed it is one that may be said to be capable of harsh operation. One need point only to the facts of this case in which the company is in the position it is because of a slip by its legal adviser. Further, to take one other example, s. 459G(3) requires service of documents within 21 days on the party giving the demand, wherever that party is and whether that party can be shown to be avoiding service or not. Yet it is clear that Parliament intends that the 21 day period should be absolute and intends that the only "safety net" to be provided to a company against failure to comply with s. 459G should be s. 459S. Whether, as the explanatory memorandum suggests, that accords with "the commercial justice of the matter" is for Parliament not the court to say.

In my view s. 1322 does not give power to extend the time for applications under s. 459G.

It follows that the application is dismissed.

Application refused.

Solicitors for the applicant: *Arnold Bloch Leibler.*

Solicitors for the respondent: *Phillips Fox.*

E. J. HOLLINGWORTH
BARRISTER-AT-LAW