

SUPREME COURT OF QUEENSLAND

CITATION: *Fresh Outdoor Carport and Pergola Pty Ltd v Style Group Construction Pty Ltd* [2024] QSC 43

PARTIES: **FRESH OUTDOOR CARPORT AND PERGOLA PTY LTD**
(applicant)
v
STYLE GROUP CONSTRUCTION PTY LTD
(respondent)

FILE NO: BS 13044 of 2023

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 March 2024

DELIVERED AT: Brisbane

HEARING DATE: 19 March 2024

JUDGE: Muir J

ORDER: **The originating application filed 16 October 2023 is dismissed.**

I will hear the parties as to costs.

CATCHWORDS: CORPORATIONS – WINDING UP – APPLICATION FOR WINDING UP BY COURT – EVIDENCE PERTAINING TO INSOLVENCY – DISPUTE ABOUT DEBT – where the applicant served a statutory demand on the respondent – where the respondent did not apply to set aside the statutory demand – where the applicant applied to wind up the respondent on the ground of insolvency – where the respondent is presumed to be insolvent – whether the respondent is insolvent – whether the respondent should be wound up

Corporations Act 2001 (Cth), s 95A, s 459
Uniform Civil Procedure Rules 1999 (Qld), r 681

Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd [1999] FCA 728
Camden v MacKenzie [2008] 1 Qd R 39
Commissioner of Taxation v De Simone Consulting Pty Ltd [2007] FCA 548
Commonwealth Bank of Australia v Begonia Pty Ltd (1993) 11 ACLC 1075

Consortium Holdings Pty Ltd v Maybell 1 Pty Ltd [2015] QSC 55
Elite Motor Campers Australia v Leisureport Pty Ltd (1996) 22 ACSR 235
Fox v Percy (2003) 214 CLR 118
Jones v Dunkel (1959) 101 CLR 298
Mulherin v Bank of Western Australia Ltd [2006] QCA 175
Re Pacific Mobile Phones Pty Ltd [2008] QSC 210
Rudd v Starbucks Coffee Company (Australia) Pty Ltd [2015] QDC 232
Sandell v Porter (1996) 115 CLR 666
Southern Cross Interiors Pty Ltd (in liquidation) v Deputy Commissioner of Taxation (2001) 53 NSWLR 213
(Williams) as liquidator of Scholz Motor Group P/L (in liq) v Scholz & Anor [2008] QCA 94

COUNSEL: B Long (*sol.*) for the applicant
H Fielder for the respondent

SOLICITORS: Celtic Legal for the applicant
Fusion Legal for the respondent

Introduction

- [1] This is an application to wind up the respondent in deemed insolvency pursuant to ss 459A and 459P of the *Corporations Act 2001* (Cth).
- [2] Deemed insolvency arises pursuant to section 459C of the *Corporations Act* as on 15 August 2023, the respondent was served with a Creditor's Statutory Demand to pay an alleged debt of \$34,999.99 to the applicant, but it failed to comply with that Statutory Demand, (or to file and serve an application to set it aside under s 459G) by 15 September 2023.
- [3] The applicant has complied with the procedural requirements necessary for obtaining a winding up order, but the respondent opposes the application on two grounds:¹
 - (a) First: That it is solvent; and
 - (b) Secondly: On the basis that there is a genuine dispute about the existence of the alleged debt.
- [4] Under section 459S of the Act, leave is required for the respondent to oppose the application on a ground that it could have relied on for the purpose of applying to set aside the Statutory Demand.² Leave is to not to be granted unless the Court is satisfied that the ground is material to proving that the company is solvent. It is

¹ Notice of objection filed 22 November 2023.

² Leave was sought in the respondent's interlocutory application filed on 30 November 2024.

unnecessary to consider the question of leave in this case because, and as these reasons reveal, I am satisfied that the respondent is solvent.

The Issue

- [5] The only issue for my determination is whether the respondent is a solvent company. The onus of proving solvency rests with the respondent.³
- [6] The respondent does not rely on an independent solvency report or audited accounts to prove solvency. Rather, it relies on the recent financial books and records of the company and other evidence adduced through its managing director, Mr Wenguang He, and also the respondent's company accountant (of some nine years), Mr Ziad Ajjwai. Apart from a few objections which I dealt with at the outset of the hearing, this evidence was unchallenged by the applicant. Although in written and oral submissions emphatic challenge was made about its reliability and the weight it ought to be afforded. I have therefore assessed all of the evidence objectively, having regard to the applicant's submissions about weight and upon a consideration of where the balance of probability lies.⁴

Relevant background

The respondent's business

- [7] The respondent is a small project-based construction company operated and run by its two directors – Mr He and Mr Simon Semaan. The company was established in 2012 and is in the business of developing residential and commercial building projects around Sydney.
- [8] The respondent's only full-time employee is its bookkeeper, Ms Jay Dhillon. The issued share capital in the respondent is \$485,000. Mr He owns 80.7% of the shares with the other 19.3% held by Mr Semaan – who also holds the relevant building license. The respondent has little in the way of fixed costs and earns its profits by charging a builder's margin of between 10 to 20 per cent. The business is an ongoing and viable one. The company has been trading for over 12 years, and currently has two residential building projects on its books.

The Statutory Demand

- [9] In April 2020, the respondent completed renovation works at a property in Bellevue Hill, New South Wales, for a homeowner, Zhaohua Ma. About two years later, Mr Ma discussed the idea of adding a pergola to his house with Mr He. He also mentioned that the applicant had been recommended to him to undertake such works. Mr He's unchallenged evidence, which I accept, was that he gave Mr Ma some tips about pergola works but that the respondent did not enter into a written contract with Mr Ma or the applicant to build the pergola, nor did it carry out any such works for either.

³ See ss 459C(2) and (3) and see *Elite Motor Campers Australia v Leisureport Pty Ltd* (1996) 22 ACSR 235 per Spender J.

⁴ *Fox v Percy* (2003) 214 CLR 118 at [31] and *Camden v MacKenzie* [2008] 1 Qd R 39 at 34; see also discussion by Bowskill QC DCJ (as her Honour then was) in *Rudd v Starbucks Coffee Company (Australia) Pty Ltd* [2015] QDC 232.

- [10] Subsequently, the applicant invoiced the respondent for the pergola work carried out at Mr Ma's house. In July and November 2022, the respondent made two payments totalling \$35,000 to the applicant on behalf of Mr Ma (apparently because Mr Ma had a poor command of English and needed assistance with adding new account details). The respondent's bank statements support this evidence as they show the respondent receiving money from Mr Ma which was transferred to the applicant.
- [11] On 13 January 2023, the respondent received an email request for payment of invoice 0932 in the amount of \$27,999.99 from the applicant. On 3 February 2023, the respondent sent an email to the applicant rejecting the invoice and requesting it be sent to the applicant's "client" [Mr Ma] directly.
- [12] On 17 February 2023, the respondent received another email from the applicant requesting payment of invoice 0973 in the sum of \$7,000. On the same day, the respondent sent an email back in reply rejecting that it was liable for payment of this invoice.
- [13] On 15 August 2023, the applicant served the respondent with the Statutory Demand. The details of the alleged debt claimed in the Statutory Demand are scant, but the debt is said to be for "services rendered by the Creditor to the Company pursuant to the Creditor's tax invoices" – with the director of the application swearing that there is no genuine dispute about the existence or amount of the debt. The amount due of \$34,999.99 is comprised of the total of invoices 0932 and 0973.
- [14] On 25 August 2023, Ms Dhillon sent an email to the respondent's solicitor referring to the Statutory Demand and reiterating her earlier advice that the respondent had never engaged the services of the applicant. Ms Dhillon did not receive a response from the applicant, nor did she obtain legal advice about the Statutory Demand. Between 27 August 2023 and 25 October 2023, Mr He was in hospital (due to his son's illness)⁵ and was not told of the Statutory Demand. It follows that the respondent did not apply to set aside the Statutory Demand.

Application for winding up

- [15] On 17 October 2023, the applicant served the current application (which had been filed the day before) on the respondent. This application was first returnable on 30 November 2023 but was subsequently adjourned with various directions as to the filing of further material, objections to evidence, and submissions.
- [16] Prior to the first return date, the respondent filed three affidavits. Two were from Mr He, swearing to solvency and challenging the existence of the alleged debt the subject of the Statutory Demand.⁶ The third was from Mr Ajjawi, swearing mainly (and generally) to the issue of the company's solvency.⁷ Relevantly, too, on 30 January 2023, the respondent's solicitor swore an affidavit confirming receipt of the sum of \$35,000 from the respondent into its trust account. This sum was to be held in its trust account (pending proceedings about the disputed debt being commenced)

⁵ Nothing turns on this but I found this evidence confusing. I assume Mr He meant that he was at the hospital or visiting the hospital, or it may have been he was required to stay at the hospital as his son is young.

⁶ Exhibits 1 and 2.

⁷ Exhibit 3.

or was to be paid into Court in this application as further evidence of the respondent's solvency.⁸

[17] On 31 January 2024, Mr He swore a further affidavit containing more extensive evidence as to the respondent's solvency.⁹

[18] The applicant does not rely on any evidence other than the procedural matters it has undertaken in support of its winding up application. None of the invoices or any contract between the applicant and the respondent or any other party relevant to the building of the pergola is in evidence.

Relevant legal principles

[19] Before analysing the evidence pertaining to solvency, it is necessary to set out the relevant legal principles.

[20] Section 95A(1) of the *Corporations Act* provides the meaning of solvent and insolvent as follows:

“95A Meaning of solvent and insolvent

(1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

(2) A person who is not solvent is insolvent.

...”

[21] Whether a company is able to pay its debts as and when they fall due and payable is a question of fact to be determined in all the circumstances, including the nature of the company's assets and business and the commercial realities, including the availability of any unsecured borrowing or voluntary extension of credit by another party.¹⁰ Relevantly, funds made available by a third party (such as a director) may be taken into account when assessing a company's solvency, even if there is no formal agreement or understanding with that third party, provided the prospect of receipt of those funds is in fact sufficient to allow the company to meet its debts.¹¹

[22] The definition of solvent under the Act adopts a cash flow test of insolvency, which is directed to income sources that are available to the company and expenditure obligations it must meet, rather than a balance sheet test which focusses on the value of the company's assets and liabilities reflected in the company's books. However, a balance sheet test can provide context for the application of the cash flow test.¹²

Fullest and best evidence

⁸ Exhibit 4.

⁹ Exhibit 5.

¹⁰ See *Sandell v Porter* (1996) 115 CLR 666 at [15].

¹¹ See *Mulherin v Bank of Western Australia Ltd* [2006] QCA 175 at [115]; (Williams) as liquidator of *Scholz Motor Group P/L (in liq) v Scholz & Anor* [2008] QCA 94 at [110]. See also the discussion by Jackson J in *Consortium Holdings Pty Ltd v Maybell 1 Pty Ltd* [2015] QSC 55 at [3].

¹² See *Southern Cross Interiors Pty Ltd (in liquidation) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213.

[23] The applicant submitted that a *Jones v Dunkel*¹³ inference ought to be drawn against the respondent as the evidence from Mr He and Mr Ajjawi is not “the fullest and best evidence” that could have been adduced by the respondent – and that it ought to have obtained an independent solvency report and / or audited accounts.¹⁴

[24] I reject the applicant’s submission for the following three reasons:

- (a) First: It overlooks that each case turns on its facts. In some instances, it may be that a company’s audited accounts, together with verified proof of ownership and value of assets may be necessary but there are also instances where proof of that is not required;
- (b) Secondly: In making the assessment of what might be the fullest and best evidence, regard must be had to the circumstances of the case including the quantum of the alleged debt, other creditors, and the nature and size of the respondent’s business. On this point, the following observations of White J in *Re Pacific Mobile Phones Pty Ltd* [2008] QSC 210 are most apposite:¹⁵

“[i]t would be oppressive if a small, viable company, with no creditors, in the circumstances in which this application has been brought, were required to expend significant sums to employ an external accountant to analyse its books and records to rebut the presumption of insolvency.”
- (c) Thirdly: As a matter of common sense, the cost of the respondent obtaining an auditor to audit the accounts, or an independent solvency report would have been disproportionate to the amount of the alleged debt in this case.

Is the respondent a solvent company?

[25] The respondent’s financial statements for the year ended 30 June 2023 and the interim financial statements for the half-year ended 31 December 2024 – which were prepared by Mr Ajjawi, a chartered accountant employed by Freedom Financial – were in evidence. The most recent statements reveal that the respondent has:

- (a) a total trading income of \$ 1,828,644;
- (b) gross profit from trading of \$480,531;
- (c) current assets of \$1,297,337;
- (d) cash assets in the amount of \$933,302;
- (e) gross profit from trading in the amount of \$480,531; and
- (f) total equity of \$461,752 in the Balance Sheet.

¹³ That is, an adverse inference ought to be drawn against the respondent for adducing such evidence; see *Jones v Dunkel* (1959) 101 CLR 298.

¹⁴ Referencing the decision of *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728 and Haye J’s observations about such evidence in *Commonwealth Bank of Australia v Begonia* (1993) 11 ACLC 1075 at 1081.

¹⁵ *Re Pacific Mobile Phones Pty Ltd* [2008] QSC 210 at [29].

- [26] It follows that the company has a positive net asset position. Although, even if it had a negative net asset position, this would not necessarily mean it is insolvent.¹⁶
- [27] The respondent also adduced evidence of current bank statements from its trading account and its savings account. These cover the period 1 July 2022 to 31 January 2024. The statements show significant cash flow, and the bank balances rise and fall regularly. Over that period, a cash flow of debits and credits exceeding \$13 million is revealed.
- [28] The evidence shows that respondent has \$545,646.56 in its savings account and no significant future liabilities. The applicant submitted that this amount miraculously appeared in the savings account after this application was filed. But there is evidence of transfers between the two accounts and in the absence of any cross examination of Mr He, I accept on balance, that these are monies of the respondent and are to be taken into account in determining the financial position relevant to the issue of solvency.
- [29] Some general or common indicia of insolvency may include continuing losses, negative liquidity ratios, overdue taxes, poor relationships with lenders, inability to borrow funds, no access to alternative funding, cash on delivery requirements imposed by suppliers, post-dating of cheques and payments to creditors of rounded sums.¹⁷ The respondent does not have any of these indicia. To the contrary, the evidence which I accept is that the respondent:
- (a) has no current tax liabilities;
 - (b) has never issued post-dated cheques nor have its cheques ever been dishonoured;
 - (c) does not have any special arrangements with its creditors for payment;
 - (d) has current assets which it can convert into cash of \$112,312 relatively quickly and plant and equipment to the value of \$48,730;
 - (e) has never had a statutory demand issued to it (other than the Statutory Demand the subject of these proceedings);
 - (f) has never previously been the subject of a winding up application, nor has it had any issues with paying its debts. Other than these proceedings, the respondent has never had any dispute resulting in court proceedings with any of its creditors; and
 - (g) has never had any issues with borrowing money. Rather, the respondent is resourced by Mr He who has, over the past 11-12 years, injected funds as and when the company needs it, for the purpose of purchasing inventory and assisting the respondent to expand operations. Despite being recorded as 'directors loans' in the company's financial statements, I accept that these amounts were injected into the company without any formal loan arrangements, without any security to Mr He, without any interest obligations, and without any obligation for the company to repay. Mr He stands to benefit from such cash injections through his majority shareholding

¹⁶ See *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] EGA 728.

¹⁷ *ASIC v Plymin (No 1)* (2003) 175 FLR 124 at [386].

so it is reasonable to assume, as I do, that he will continue this support as he contends.

- [30] Other than the costs and expenses associated with the respondent's construction projects, Mr He's evidence, which I accept, is that the respondent's main fixed costs are rent (\$59,000 per annum) and the bookkeeper's salary (\$100,000 per annum). Based on the last three financial years, the respondent's annual turnover is approximately \$4,957,365. The financial information disclosed by the respondent does not show any significant cash flow issues. Apart from the debt the subject of the Statutory Demand, as detailed above, there is no evidence of any other outstanding creditors.
- [31] The applicant referred to the following matters from the financial records of the respondent as evidence of its insolvency:
- (a) First: That the net profit for 2022 was \$5,392 and for 2023 it was \$33,951, with neither amount being enough to cover the amount owing pursuant to the Statutory Demand; and
 - (b) Secondly: That respondent is "propped up" with ever increasing loans from its director (totaling \$213,996), and that there is no evidence of any loan agreement or that the loans will not be called in by either director.
- [32] I reject the first proposition for the following two reasons:
- (a) First: Cash flow net profit is a far more reliable indicator of solvency. But regardless, the respondent is reporting profits (not losses); and
 - (b) Secondly: The contention that the profits do not cover the alleged debt overlooks that the respondent's cash at bank exceeds \$500,000, and that the amount of the alleged debt is currently being quarantined in the respondent's solicitor's trust account.
- [33] I also reject the applicant's second proposition for the following two reasons:
- (a) First: The unchallenged evidence of Mr He, which I accept as consistent with the approach that he has adopted over the last 11-12 years, is that he does not intend to seek repayment of the loans, rather, he intends to leave that money in the company to assist it to invest and expand; and
 - (b) Secondly: The unchallenged evidence of Mr He, which I also accept as consistent with his long term conduct, is that he remains committed to ensuring that the respondent has adequate cash flow to continue operating, to expand operations and to build the business further.
- [34] The applicant also submitted that that there is no evidence of the respondent's access to credit. But I reject this submission. The evidence, which I accept, is that the respondent has a company credit card with a credit limit of \$5,000. But the respondent has no need to use it, as Mr He is (and has been) injecting funds into the company for investment/expansion as and when the company requires it.
- [35] The evidence in relation to the respondent's financial position reveals that the respondent is a viable small business which is generating sufficient cash flow in the building and construction industry; an industry commonly known for its cash flow

issues. The respondent has ongoing projects on foot estimated to be completed by 23 December 2024 and 28 May 2025. These projects are expected to generate profits of around \$277,500.

- [36] The non-payment of the applicant's alleged debt is underpinned by a denial of liability to pay by the respondent, as opposed to an inability to pay this amount. The respondent has clearly shown that it is able to pay its debts as and when they become due and payable.
- [37] Even allowing for the fact that the respondent (through its own fault) failed to comply with the Statutory Demand time limit, this is an obvious case of the statutory demand and winding up process being used as a debt collection process. It is reasonable to infer, as I do, that the issue is really one of costs. This finding is supported by the fact that the respondent challenged the existence of the debt and adduced evidence of solvency shortly after being served with the winding up application; no other creditors gave notice of appearance in the winding up; and the amount of the alleged debt was paid by the respondent into its solicitor's trust account (with an offer to pay this sum into court) in early December last year.

Conclusion

- [38] I am satisfied on the balance of probabilities and find that the respondent is a solvent company.

Orders

- [39] The originating application for winding up filed on 16 October 2023 is dismissed.
- [40] I will hear the parties as to costs.