IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P 43 of 2010

ON APPEAL FROM THE FULL COURT OF
THE FEDERAL COURT OF AUSTRALIA

BETWEEN

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

LANEPOINT ENTERPRISES PTY LTD
(ACN 110 693 251)
(RECEIVERS AND MANAGERS APPOINTED)
Respondent

APPELLANT'S SUBMISSIONS

Date of Document: 31 January, 2011
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Part I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: ISSUE

2. The issue in this appeal is whether, and if so in what circumstances, the assertion by a company presumed to be insolvent under s 459C(2) of the *Corporations Act 2001* (Cth) that it disputes a debt ought result in the dismissal or stay of an application that the company be wound up in insolvency.

Part III: SECTION 78B OF THE JUDICIARY ACT

3. No notice need be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: CITATION

4. The decision of Gilmour J at first instance is: *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (receivers and managers appointed) (No 2)* [2009] FCA 493. The decision of the Full Court of the Federal Court is: *Lanepoint Enterprises Pty Ltd (receivers and managers appointed) v Australian Securities and Investments Commission* [2010] FCAFC 49; (2010) 78 ACSR 487. The decision of the Full Court of the Federal Court in relation to costs is: *Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) v Australian Securities and Investments Commission (No 2)* [2010] FCAFC 116.

Part V: FACTS

5. The Respondent (**Lanepoint**) is a company within the Westpoint Group of Companies. It was engaged in property development (AB 280-1; AB 1085; AB 842-848). Its operations were financed by loans from an external

financier, Suncorp Metway Limited (**Suncorp**) (AB 47, 73) and from another company within the Westpoint Group, Westpoint Management Pty Ltd (in its capacity as responsible entity of a managed investment scheme known as the Westpoint Income Fund) (**Westpoint Management**) (AB 78; AB 840; AB 876). The external loan was secured by a floating charge granted by Lanepoint to Suncorp (AB 205), and the internal loan was secured by a floating charge granted by Lanepoint to Westpoint Management (AB 233, 236).

6. Shortly before January 2006 the Westpoint Group's books of account showed that Lanepoint's debt to Westpoint Management was $6,607,978. This figure is the amount stated as due and payable by Mr Read, the liquidator of Westpoint Management (AB 340, 345; AB 1159). In late December 2005 and early January 2006 the books of Lanepoint and Westpoint Management were changed by the Westpoint Group's financial controller. The changes purported to reduce the recorded debt owed by Lanepoint to Westpoint Management to $2,266,557 (a reduction of $4,341,422).

7. The first change, described as the 'Kingdream transfer', was an alteration of the books to record around $2 million of the loan from Westpoint Management to Lanepoint as a loan made to Kingdream Pty Ltd instead (AB 317; AB 343, 394, 418-445; AB 661-664; AB 956-969; AB 971, 978, 982, 983; AB 988, 992, 994; AB 1004,1005).

8. The second change, described as the '$2 million run-around', consisted of two round-robin payments of $1 million each between companies in the Westpoint Group, which were accompanied by book entries to suggest a repayment by Lanepoint of $2 million of the outstanding Westpoint Management loan (AB 81; AB 153, 156; AB 168-9; AB 170-171; AB 321-322; AB 621-42; AB 342–4, 447–92; AB 970; AB 978, 983; AB 997, 1005; AB 1026, 1031; AB 1036, 1040, 1044).

9. Lanepoint defaulted on both the loan from Suncorp and the loan from Westpoint Management (AB 258; AB 266). On 3 March 2006 Suncorp appointed receivers and managers to Lanepoint, under its floating charge (AB 188; AB 255). On 9 March 2006 Westpoint Management (by then in

provisional liquidation) appointed receivers and managers to Lanepoint, under its floating charge (AB 224; AB 262; AB 340).

10. On 2 June 2006 the Appellant (**ASIC**) commenced an application for the winding up in insolvency of Lanepoint (AB 2). Lanepoint contended that it was solvent and that the amount which it owed under the Westpoint Management loan was $2.3 million, not $6.6 million. The hearing before Gilmour J occurred over a total of four days in March and April 2008 with several short hearings for submissions and evidence on subsequent issues between July 2008 and March 2009 (AB 1428). There was substantial evidence about Lanepoint's financial position. Three witnesses called by Lanepoint, including a financial controller, were cross-examined in detail: see affidavits of KS Carey dated 29 November 2007 at AB 1078; dated 19 March 2008 at AB 1229; dated 10 April 2008 at AB 1236; dated 20 May 2008 at AB 1245; dated 28 July 2008 at AB 1271; dated 12 March 2009 AB 1382; KS Carey XN and XXN 25 March 2008 at AB 19–44; affidavit of NP Carey dated 26 September 2007 at AB 1074; NP Carey XN, XXN and ReXN AB 25, 26 March 2008 at AB 45–107; affidavit of G Nairn dated 14 December 2006 at AB 667; G Nairn XN, XXN and ReXN 27 March 2008 at AB 114–132.

11. His Honour noted but rejected a submission by Lanepoint that the winding up application should be dismissed or stayed on the ground that there was a substantial dispute as to the extent of the indebtedness under the Westpoint Management loan (at [27], [28] AB 1414). His Honour said (at [28] AB 1414):

> A great deal of evidence was adduced in this respect including detailed cross-examination of, amongst others, Mr Carey, Ms Karen Carey and Mr Gregory Nairn, a former senior Lanepoint executive. No suggestion was made that there was other relevant evidence available going to the resolution of this question. If such an alleged dispute is raised and can be resolved during such an application then in my opinion it ought to be. It would only add to the costs of the parties as well as to the public to put it off.

12. His Honour noted that it was common ground that Lanepoint had assets of $5.7 million (at [18] AB 1412) and Gilmour J found that Lanepoint's liabilities, apart from the Westpoint Management loan, were an assessed taxation liability of $1.2 million and further inter-company loans of $495,000

(at [87],[88] AB 1426). His Honour found that Lanepoint had failed to establish its solvency and thereby to rebut the statutory presumption of insolvency (at [90], [93] AB 1427). In particular, he found that the two transactions by which that debt had purportedly been reduced to $2.3 million were 'improper transactions put into effect to conceal the true position that Lanepoint was indebted to [Westpoint Management] in approximately $6.6 million and to render it unlikely that [Westpoint Management] could recover those funds'[1] (at [70] AB 1423) and that Lanepoint remained indebted to Westpoint Management in the amount of $6.6 million (at [86] AB 1426).

13. On 14 May 2009 Gilmour J ordered that Lanepoint be wound up in insolvency (AB 1430).

14. Lanepoint appealed to the Full Court of the Federal Court (AB 1432). On 24 May 2010 the Full Court delivered its reasons for judgment, allowing the appeal and ordering that the application for winding up be stayed until further order (AB 1480). The majority (North and Siopis JJ) upheld Lanepoint's primary ground of appeal, that in light of the dispute about the Westpoint Management loan, the trial judge erred in the exercise of his discretion by not staying or dismissing the winding up application (at [61]-[62], [85] AB 1465, 1470). The minority judge (Buchanan J) agreed with the trial judge (at [105], [108], [113] AB 1476-8). On 9 September 2010 the Full Court relevantly ordered ASIC to pay Lanepoint's costs including all reserved costs of both the appeal and the original action (AB 1494).

Part VI: ARGUMENT

Part 5.4 of the Act

15. Part 5.4 of the *Corporations Act 2001* (Cth) (**Act**), entitled 'Winding up in insolvency', was introduced into the then *Corporations Law* (now the Act) on 23 June 1993, upon the commencement of the *Corporate Law Reform Act 1992* (Cth). It replaced Division 1 of the former Part 5.4, which had dealt with

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1 In other words, his Honour found that the two transactions were 'shams': *Raftland Pty Ltd v Commissioner of Taxation* (2008) 238 CLR 516 at [35], [173].

orders for winding up. Former Part 5.4 was deleted entirely, and replaced by new Parts 5.4, 5.4A and 5.4B.

16. Within Part 5.4 of the Act:

(a) Section 459P describes the persons who have standing to apply to the Court for a company to be wound up in insolvency.

(b) Section 459A provides that on an application under s 459P the Court may order that an insolvent company be wound up in insolvency.

(c) Section 459C relevantly provides that, in an application for winding up in insolvency, the Court must presume that the company is insolvent if certain circumstances existed during or after the 3 months ending on the day when the application was made. This is conveniently labelled 'the presumption of insolvency'. The presumption operates except so far as the contrary is proved for the purposes of the application.

17. 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: s 95A(1) of the Act. A person who is not solvent is insolvent: s 95A(2).

18. Section 95A is another provision that was introduced by the *Corporate Law Reform Act 1992*. Previously the Act did not contain a definition of insolvent. Under the *Companies Code* (which had applied until 1991) a company could be wound up by the court if it was 'unable to pay its debts': s 364(1)(e).[2] It was left to the courts to explain its meaning. A similar expression, 'unable to pay his debts as they become due from his own moneys', which appeared in bankruptcy legislation, was interpreted by the High Court in *Bank of Australasia v Hall* (1907) 4 CLR 1514, 1527–1528; *Sandell v Porter* (1966) 115 CLR 666, 670. In the latter case, Barwick CJ said that 'the conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity', and that 'it is the debtor's inability, utilizing such cash resources as he has or can command through the

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[2] The same expression was used in the *Corporations Law* (as originally enacted, which applied from 1991 to 1993): s 460(1).

use of his assets, to meet his debts as they fall due which indicates insolvency'. Section 95A contemplates a cash flow test of solvency, rather than a mechanical calculation of assets and liabilities.[3] This is consistent with the 'common law test' for solvency as expressed in *Sandell v Porter*.

Presumption of insolvency

19. The presumption of insolvency in s 459C has been identified by the High Court as an important element of the scheme of Pt 5.4.[4]

20. No statutory presumption of insolvency had existed before the enactment of the current Part 5.4.[5] However there was s 364(2) of the *Companies Code*[6], which deemed a company to be 'unable to pay its debts' in certain circumstances.[7] The General Insolvency Inquiry (ALRC report number 45, 1988) (**Harmer Report**), which formed the basis for many of the amendments introduced by the *Corporate Law Reform Act 1992*, supported a proposal to provide presumptions of insolvency which would facilitate proof of insolvency in a winding up application, to replace the deeming provision: [135]–[138]. It further recommended that there should be several circumstances in which a company would be presumed to be insolvent: [136]–[141].

21. Where a company is presumed to be insolvent under s 459C, it bears the onus of displacing the presumption. In the terms of s 95A, the company must prove that it is able to pay all its debts, as and when they become due and payable. How it chooses to do that is a forensic decision for the company. In order to

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3 *Melbase Corporation Pty Ltd v Segenhoe Ltd* (1995) 13 ACLC 823, 832; *Leslie v Howship Holdings Pty Ltd* (1997) 15 ACLC 459, 465.

4 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 278.

5 At common law, it was said that evidence of failure to pay debts constitutes evidence of inability to pay debts: *Re Globe New Patent Ion & Steel Co* (1875) 20 LR (Eq) 337; *Cornhill Ins PLC v Improvement Services Ltd* [1986] 1 WLR 114, 117. Therefore the non-payment of a debt after demand could, in appropriate circumstances, assist in proof of insolvency quite independently from the statutory provisions: *Southern Steel Suppliers Pty Ltd v Utility Brute Trailers Pty Ltd* (1984) 2 ACLC 686, 687. However this was not a presumption of law; rather it falls within the category of presumptions of fact, which are not true presumptions at all – merely frequently recurring examples of circumstantial evidence: *Cross on Evidence*, [7255].

6 which had applied until 1991.

7 This was replaced by s 460(2) of the *Corporations Law*, as originally enacted; it applied until 1993.

prove solvency the court should ordinarily be presented with the 'fullest and best' evidence of the financial position of the company.[8]

22. The majority of the Full Court stated that s 459C 'affords a creditor the status to commence a winding up application in circumstances where a company has not set aside a statutory demand' (at [44] AB 1461). That is incorrect. The section's purpose is to create a presumption of insolvency for the purposes of a winding up application. It makes no reference to standing or status to bring a winding up application.

Application of the presumption of insolvency in the present case

23. One circumstance which triggers the presumption of insolvency is the appointment of a receiver under a floating charge. Under s 459C(2)(c) of the Act the Court *must* presume that a company, which is the subject of a winding up application, is insolvent if, during or after the 3 months ending on the day when the application was made, relevantly a receiver of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property.

24. The appointment of receivers to Lanepoint on 3 March 2006 and again on 9 March 2006 twice triggered the statutory presumption of insolvency created by s 459C(2)(c). Having commenced its winding up application on 2 June 2006, ASIC had the benefit of that presumption.

25. ASIC is described as one of the persons that may apply to the Court for a company to be wound up in insolvency: s 459P(1)(f). An application by ASIC may only be made with the leave of the Court: s 459P(2)(d), after a Court is satisfied that there is a *prima facie* case that the company is insolvent: s 459P(3). The presumption created by s 459C that Lanepoint was insolvent operated to discharge ASIC's obligation to demonstrate a *prima facie* case that

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8 *Commonwealth Bank of Australia v Begonia* (1993) 11 ACLC 1075, 1081; *Ace Contractors and Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728, [44]; *Expile Pty Ltd v Jabb's Excavations Pty Ltd (No 2)* (2003) 45 ACSR 711, [16] (NSWCA).

Lanepoint was insolvent, and met the condition for the grant of leave under s 459P(3) of the Act.[9]

26. In order to resist the winding up application, the onus fell on Lanepoint to rebut the presumption and to prove that it was solvent.

Disputed debts in an application for winding up in insolvency

27. The current position under Part 5.4 of the Act may be summarised as follows:

(a) If one or more of the circumstances listed in s 459C(2) is satisfied, the company is presumed to be insolvent.

(b) The company may rebut the presumption by proving its solvency. In order to do this, it must present the fullest and best evidence of its financial position.

(c) If, in opposing the winding up application, the company disputes the existence or amount of a debt, for which it would otherwise appear to be liable, then:

(i) If the applicant for winding up relies on a presumption of insolvency triggered by the company's failure to comply with a statutory demand (s 459C(2)(a)), and the disputed debt is the subject of that demand, the company may not dispute the existence or amount of the debt in the winding up proceeding unless it obtains leave of the court (s 459S(1) of the Act). Leave must not be given unless the court is satisfied that the ground of dispute is material to proving that the company is solvent (s 459S(2) of the Act). This means that the company must show that the debt in respect of which it is seeking leave is pivotal to the question of solvency in the sense that that if the

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9 *ASIC v Forestview Nominees Pty Ltd (No 3)* [2006] FCA 1710, [53]; *ASIC v Eastlands Pty Ltd (No 3)* [2006] FCA 1702, [64].

debt exists then the company will be insolvent and if the debt does not exist, then the company will be solvent.[10]

(ii) If the applicant for winding up relies on a presumption of insolvency other than for a failure to comply with a statutory demand, or relies on a presumption of insolvency triggered by the company's failure to comply with a statutory demand but the disputed debt is not the subject of that demand, then, if the court, in the exercise of its discretion decides to determine the dispute (which it is submitted, would be the usual course), as part of discharging its onus of proving its solvency (rebutting the presumption), the company must prove to the court's satisfaction that the debt does not exist or is of a lower amount.

(iii) If the applicant for winding up does not rely on a presumption of insolvency at all, and seeks to prove the company's insolvency, the court may, in the exercise of its discretion, either determine the dispute as regards the debt in the winding up proceeding or split off the dispute: *Ocean City Ltd (receiver and manager appointed) v Southern Oceanic Hotels Pty Ltd* (1993) 10 ACSR 483, 486. There are cases which stand as authority for the proposition that if the disputed debt goes to the applicant's status as a creditor, and the applicant's standing, the court would ordinarily not make a winding up order without the dispute being determined first (either by that court or in another forum): *Re the Imperial Silver Quarries Company Ltd* [1868] 16 WR 1220, 1221;[11] *Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation* [1978] VR 83, 93–4;[12] *Re Jeff Reid*

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10 *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661, [56] (NSWCA); *Grant Thornton Services (NSW) Pty Ltd v St George Wholesale Distributors Pty Ltd* [2008] FCA 1777, [19]–[23].

11 Where it was stated that it is against the principles of the court to wind up a company upon a disputed debt.

12 Where it was stated that it is an abuse of process for a petitioner to petition for the winding up of a company on the basis of a disputed debt as the petitioner would not be able to establish its status as creditor in respect of a debt which was in dispute.

Pty Ltd and the Companies Act (1980) 5 ACLR 28, 32;[13] *L&D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180, 183;[14] *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374, [56]–[57];[15] *Radiancy (Sales) Pty Ltd v Bimat Pty Ltd* (2007) 25 ACLC 1216, [21]; and *Grant Thornton Services (NSW) Pty Ltd v St George Wholesale Distributors Pty Ltd (No 2)* [2009] FCA 557.[16]

Proceeding to determine the dispute as regards the debt in the present case

28. Both the trial judge and the Full Court referred to *Ocean City Ltd (receiver and manager appointed) v Southern Oceanic Hotels Pty Ltd* (1993) 10 ACSR 483 in considering Lanepoint's submission that the winding up application should be dismissed or stayed on the ground that there was a substantial dispute as to the extent of its indebtedness to Westpoint Management. In *Ocean City*, 486 French J (as he then was) said that in an appropriate case, the court may, in the exercise of its discretion, proceed to determine the merits of a disputed debt in a winding up proceeding.[17] His Honour said that this was consistent with modern notions of seeking the most economic and efficient use of judicial time rather than a more rigid approach which would mandate in every case of a disputed debt the splitting off of the dispute, however easily determined. It is important to remember that French J dealt with the law as it preceded the commencement of the *Corporate Law Reform Act 1992*. Accordingly, his Honour did not address the statutory presumption of insolvency in s 459C.

29. The present case falls within category ii) identified at paragraph 27(c) above, as ASIC relied on a presumption of insolvency other than a failure to comply

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13 Where it was concluded that a winding up petition should be stayed where the petitioner relied upon a disputed debt.

14 Where it was stated that it will ordinarily be held to be an abuse of process if the existence or enforceability of a debt relied on by the applicant should be resolved in separate proceedings.

15 Where it was stated that the principles stated in the earlier authorities still apply under Part 5.4 of the Act.

16 Where the court declined an invitation to decide a dispute in relation to a debt on which the winding up application was founded.

17 French J endorsed the views of Gibbs J *Re QBS Pty Ltd* [1967] Qd R 218, 225 and Needham J in *Offshore Oil NL v Acron Pacific Ltd* (1984) 2 ACLC 8, 8–9.

with a statutory demand. It was open to the trial judge, in the exercise of discretion, to proceed to determine the dispute about the Westpoint Management loan in the winding up application. His Honour did not err in this respect, and there was no warrant for the majority of the Full Court to interfere with his Honour's conclusion.

30. The majority's starting point 'that ordinarily a company would not be wound-up on the basis of a disputed debt' (at [37] AB 1458) was drawn from cases within category (iii) identified at paragraph 27(c) above. In those cases, the disputed debt was owed by the company to the applicant for winding up, so that the debt was essential to the applicant's standing as a creditor. In the present case, the applicant for winding up, ASIC, was not a creditor of Lanepoint. The dispute as to the debt arose only in the course of Lanepoint's attempt to rebut the statutory presumption of its insolvency, and was thus irrelevant to ASIC's application for winding-up.

Policy in Part 5.4 of the Act

31. The majority of the Full Court stated that the *Corporate Law Reform Act 1992* manifested a legislative policy 'to the effect that where a disputed debt is relied upon as being demonstrative of insolvency, that dispute should be resolved outside of the winding up process' (at [59] AB 1465).

32. By that statement, their Honours may have intended to state the effect of s 459S (although they did not say so). That is, in short, where an application for winding up in insolvency is based on the failure to comply with a statutory demand, the company cannot dispute the debt (which was the subject of the demand) in the winding up proceeding, unless it obtains leave to do so. Section 459S is based on a policy that requires the company, in the absence of leave, to dispute the debt prior to the winding up proceeding by applying to set aside the statutory demand under ss 459G and 459H of the Act. Section 459S is irrelevant in the present case, as the winding up application by ASIC was not based on a presumption of insolvency triggered by a failure to comply with a statutory demand.

33. If the statement of the majority of the Full Court is taken at face value (that is, more broadly than stating the effect of s 459S), it is incorrect. No such broad legislative policy appears in Part 5.4 of the Act. The court is given a very broad discretion in a winding up application: s 467 of the Act. Where the applicant does not rely on a presumption of insolvency, the court may in the exercise of its discretion determine disputes about debts which go to the issue of insolvency. However where the applicant relies on a presumption of insolvency, the company must prove to the court's satisfaction that the debt does not exist or is of a lower amount.

34. If the majority of the Full Court were correct, it would substantially undermine the significance of the presumption of insolvency in s 459C of the Act. The decision would effectively allow a company presumed to be insolvent to stultify a winding up application by pointing to a disputed debt. If there is a legislative policy manifested in Part 5.4 of the Act as expressed by the majority of the Full Court, that would have a significant adverse effect on the conduct of the many winding up applications around the country.

Other parties interested in the dispute about the debt

35. The majority of the Full Court said that it was a relevant consideration, in determining whether to entertain the dispute about the debt in the winding up application, that 'all the parties whose interests would be affected ... are also parties to the winding up application', and that the trial judge did not appear to give consideration to this question (at [52] AB 1463; [65] AB 1466). This, the majority said, was another point of distinction with *Ocean City* (at [54] AB 1464).

36. Contrary to the majority's reasons, the other persons involved in the two transactions that purported to reduce the quantum of the Westpoint Management loan were not necessary parties to the winding up application. Their rights and obligations were not, and could not be, affected by a winding up order so as to necessitate their joinder.[18] A winding up order could affect the rights – more particularly, the status – only of Lanepoint. The conclusion

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18 cf *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 266 ALR 462, 492 – 493 .

of the trial judge that the transactions were shams was not binding on Westpoint Management or any officers of Westpoint Management or related companies who may have been involved in the transactions.[19] In requiring their joinder, the majority erred.

37. If the majority of the Full Court were correct, so that it is necessary to bring before the Court every person who is in some way interested in a dispute in relation to a debt that is relevant to solvency, many winding up applications, which require a quick resolution, will become cumbersome, slow and practically unworkable. It is contrary to the aims of Part 5.4, which are to ensure that the winding up in insolvency of a company proceeds in an orderly and efficient manner: Harmer Report, [122]. The need for efficiency is the reason behind the imposition of a time limit on winding up applications: an application must be determined within 6 months after it is made: s 459R. Section 459S also assists in achieving that aim, in eliminating disputes about debts (which are the subject of statutory demands) in a winding up proceeding.

Irrelevant hypothesis about statutory demand

38. The majority of the Full Court said that had Westpoint Management issued a statutory demand for $6.6 million in respect of the loan, 'Lanepoint would undoubtedly have succeeded' in setting it aside under s 459G of the Act (at [76] AB 1468-9). However, this consideration was irrelevant and merely hypothetical; such a demand was not issued. ASIC did not rely on a statutory demand to bring its application, and had the benefit of a presumption of insolvency unrelated to any statutory demand.

39. In any event, the hypothetical conclusion drawn by the majority does not follow. In order to set aside a statutory demand, Lanepoint would have had to satisfy the court, relevantly, that there was a 'genuine dispute' between it and Westpoint Management about the existence or amount of the debt. The court would have to investigate the factual basis of the claim that the debt was disputed before it could be satisfied that the dispute was genuine.[20] In an application to set aside a statutory demand, the court need not accept

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19 cf *Re Whitemark Pty Ltd v Cann Australia Ltd* [1993] FCA 141, [7].

20 *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362, 365.

uncritically every statement asserting a dispute 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself'.[21]

40. Lanepoint did not succeed in satisfying the trial judge that there was a genuine dispute about the amount of the debt to Westpoint Management. It was open to the trial judge to find that the two transactions were improper, to reject Lanepoint's alleged dispute, and to conclude that the amount of the debt owed to Westpoint Management was $6.6 million.

Part VII: APPLICABLE LEGISLATION

41. Part 5.4 of the *Corporations Act 2001* (Cth), as it existed at the relevant time (2 June 2006), is ***attached*** to these submissions. Those provisions are still in force, in that form, at the date of making these submissions.

Part VIII: ORDERS SOUGHT

42. The appellant seeks the following orders:

(1) Appeal allowed.

(2) Set aside the orders 1 to 4 made by the Full Court of the Federal Court on 24 May 2010, and in their place order that the appeal to that Court be dismissed.

(3) Set aside orders 1 and 3 made by the Full Court of the Federal Court on 9 September 2010 and in their place order that the Appellant's costs of the appeal to the Full Court of the Federal Court be taxed and be reimbursed out of the property of the Respondent in accordance with s 466(2) of the Act.

(4) The Appellant's costs of the appeal to this Court, including the costs of the application for special leave, be taxed and be reimbursed out of the property of the Respondent in accordance with s 466(2) of the Act.

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[21] *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787, approved in *Gajic v Poyser* [2007] VSCA 175, [18].

Dated: 31 January 2011

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Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 10 April 2006
taking into account amendments up to Act No. 17 of 2006

Volume 2 includes: Table of Contents
Chapters 2L–5B (ss. 283AA – 601DJ)

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Part 5.4—Winding up in insolvency

Division 1—When company to be wound up in insolvency

459A Order that insolvent company be wound up in insolvency

On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency.

459B Order made on application under section 234, 462 or 464

Where, on an application under section 234, 462 or 464, the Court is satisfied that the company is insolvent, the Court may order that the company be wound up in insolvency.

459C Presumptions to be made in certain proceedings

(1) This section has effect for the purposes of:

(a) an application under section 234, 459P, 462 or 464; or

(b) an application for leave to make an application under section 459P.

(2) The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:

(a) the company failed (as defined by section 459F) to comply with a statutory demand; or

(b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or

(c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or

(d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or

(e) a person entered into possession, or assumed control, of such property for such a purpose; or

(f) a person was appointed so to enter into possession or assume control (whether as agent for the chargee or for the company).

(3) A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the application.

459D Contingent or prospective liability relevant to whether company solvent

(1) In determining, for the purposes of an application of a kind referred to in subsection 459C(1), whether or not the company is solvent, the Court may take into account a contingent or prospective liability of the company.

(2) Subsection (1) does not limit the matters that may be taken into account in determining, for a particular purpose, whether or not a company is solvent.

Division 2—Statutory demand

459E Creditor may serve statutory demand on company

(1) A person may serve on a company a demand relating to:

(a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or

(b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.

(2) The demand:

(a) if it relates to a single debt—must specify the debt and its amount; and

(b) if it relates to 2 or more debts—must specify the total of the amounts of the debts; and

(c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company; and

(d) must be in writing; and

(e) must be in the prescribed form (if any); and

(f) must be signed by or on behalf of the creditor.

(3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:

(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and

(b) complies with the rules.

(4) A person may make a demand under this section relating to a debt even if the debt is owed to the person as assignee.

(5) A demand under this section may relate to a liability under any of the following provisions of the *Income Tax Assessment Act 1936*:

(aa) section 220AAE, 220AAM or 220AAR;

(a) section 221F (except subsection 221F(12)), section 221G (except subsection 221G(4A)) or section 221P;

(b) subsection 221YHDC(2);
(c) subsection 221YHZD(1) or (1A);
(d) subsection 221YN(1);
(e) section 222AHA;

and any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*, even if the liability arose before 1 January 1991.

(6) Subsection (5) is to avoid doubt and is not intended to limit the generality of a reference in this Act to a debt.

459F When company taken to fail to comply with statutory demand

(1) If, as at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period.

(2) The period for compliance with a statutory demand is:
(a) if the company applies in accordance with section 459G for an order setting aside the demand:
(i) if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand—the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or
(ii) otherwise—the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of; or
(b) otherwise—21 days after the demand is served.

Division 3—Application to set aside statutory demand

459G Company may apply

(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

459H Determination of application where there is a dispute or offsetting claim

(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:

(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;

(b) that the company has an offsetting claim.

(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

Admitted total – Offsetting total

where:

admitted total means:

(a) the admitted amount of the debt; or

(b) the total of the respective admitted amounts of the debts;

as the case requires, to which the demand relates.

offsetting total means:

(a) if the Court is satisfied that the company has only one offsetting claim—the amount of that claim; or

(b) if the Court is satisfied that the company has 2 or more offsetting claims—the total of the amounts of those claims; or

(c) otherwise—a nil amount.

(3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.

(4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(5) In this section:

admitted amount, in relation to a debt, means:

(a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt—a nil amount; or

(b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt—so much of that amount as the Court is satisfied is not the subject of such a dispute; or

(c) otherwise—the amount of the debt.

offsetting claim means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

respondent means the person who served the demand on the company.

(6) This section has effect subject to section 459J.

459J 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.

459K Effect of order setting aside demand

A statutory demand has no effect while there is in force under section 459H or 459J an order setting aside the demand.

459L Dismissal of application

Unless the Court makes, on an application under section 459J, an order under section 459H or 459J, the Court is to dismiss the application.

459M Order subject to conditions

An order under section 459H or 459J may be made subject to conditions.

459N Costs where company successful

Where, on an application under section 459G, the Court sets aside the demand, it may order the person who served the demand to pay the company's costs in relation to the application.

Division 4—Application for order to wind up company in insolvency

459P Who may apply for order under section 459A

(1) Any one or more of the following may apply to the Court for a company to be wound up in insolvency:

(a) the company;

(b) a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor);

(c) a contributory;

(d) a director;

(e) a liquidator or provisional liquidator of the company;

(f) ASIC;

(g) a prescribed agency.

(2) An application by any of the following, or by persons including any of the following, may only be made with the leave of the Court:

(a) a person who is a creditor only because of a contingent or prospective debt;

(b) a contributory;

(c) a director;

(d) ASIC.

(3) The Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise.

(4) The Court may give leave subject to conditions.

(5) Except as permitted by this section, a person cannot apply for a company to be wound up in insolvency.

459Q Application relying on failure to comply with statutory demand

If an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the application:

(a) must set out particulars of service of the demand on the company and of the failure to comply with the demand; and

(b) must have attached to it:

(i) a copy of the demand; and

(ii) if the demand has been varied by an order under subsection 459H(4)—a copy of the order; and

(c) unless the debt, or each of the debts, to which the demand relates is a judgment debt—must be accompanied by an affidavit that:

(i) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and

(ii) complies with the rules.

459R Period within which application must be determined

(1) An application for a company to be wound up in insolvency is to be determined within 6 months after it is made.

(2) The Court may by order extend the period within which an application must be determined, but only if:

(a) the Court is satisfied that special circumstances justify the extension; and

(b) the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires.

(3) An application is, because of this subsection, dismissed if it is not determined as required by this section.

(4) An order under subsection (2) may be made subject to conditions.

459S Company may not oppose application on certain grounds

(1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:

(a) that the company relied on for the purposes of an application by it for the demand to be set aside; or

(b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).

(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.

459T Application to wind up joint debtors in insolvency

(1) A single application may be made for 2 or more companies to be wound up in insolvency if they are joint debtors, whether partners or not.

(2) On such an application, the Court may order that one or more of the companies be wound up in insolvency, even if it dismisses the application in so far as it relates to another or others.