IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P43 of 2010

Between:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Appellant

and

HIGH COURT OF AUSTRALIA
FILED
15 FEB 2011
THE REGISTRY PERTH

LANEPOINT ENTERPRISES PTY LTD (ACN 110 693 251)

(RECEIVERS AND MANAGERS APPOINTED)

Respondent

RESPONDENT'S SUBMISSIONS

Part I: SUITABILITY FOR PUBLICATION

1 This submission is in a form suitable for publication on the Internet.

Part II: STATEMENT OF ISSUE

2 The first issue in the appeal is to identify the stages at which a company sought to be wound up can dispute a debt in the course of an application that it be wound up in insolvency.

3 The second issue in the appeal is; in the event that at different stages of the winding up in insolvency process a company sought to be wound up disputes a debt, whether, if such debt is genuinely disputed (or if there is a substantial

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contest as to it), the court has power or a discretion to dismiss or stay the winding up application at such stages of the winding up process.

4 The third issue in the appeal is; in the event that a court has such discretion, and in this case such discretion has been exercised by the Full Court, whether this Court ought to interfere with the exercise of such discretion.

Part III: ***JUDICIARY ACT* s.78B**

5 No notice should be given in compliance with s.78B of the *Judiciary Act 1903.*

Part IV: **FACTS**

6 The Respondent accepts [1]-[9] of the Appellant's statement of facts.

10 7 As to [10], the hearing time before the trial judge dealt substantially with an application to wind up a further company, Bowesco Limited. Though taking up a deal of time at the hearing, this application to wind up was settled prior to judgment[1]. The Respondent would not accept the characterisation of the amount of evidence led as to Lanepoint's financial position as being "substantial", nor the cross examination of Mr. Nairn or Ms. Carey "detailed".

8 Facts in respect of the Kingdream transfer and the $2 million run around are stated in the submissions below at [41]-[45].

9 Other material witnesses, being directors and officers of Westpoint Group companies, were referred to in affidavits and in evidence of others at trial. Mr
20 Raymond Ellis was referred to (affidavit of SA Read dated 29 September 2006, 2 AB 343; GJ Nairn XXN 1 AB 120-121, 125) and provided an affidavit in the proceedings prior to his leaving the Westpoint Group (KS Carey XXN 1 AB 38-40). Mr Graeme Rundle (affidavit of O Zohar dated 26 March 2006, 1 AB 157,

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1 North and Siopis JJ judgment at [16] (4 AB 1454]).

166; affidavit of W Chan dated 12 October 2006, 2 AB 497; KS Carey XXN 1 AB 29; NP Carey XXN 1 AB 53-54, 81-82, 84-85, 87, 101-102, 106; GJ Nairn XN 1 AB 117-118; XXN 1 AB 119, 124, 128, 131). Both were referred to in the judgment at first instance (4 AB 1415 ([32]), 1418 ([41]) and 1419 ([46])). Neither Mr Ellis nor Mr Rundle was called to give evidence.

10 Evidence was accepted at trial to the effect that there was a tax liability of $1,208,797.31 (SR Fraser XXN 1 AB 109-113), there was later during the proceedings evidence that no such tax liability existed after certain correspondence with the Australian Tax Office and $1,282,867.20 was refunded
10 (affidavit of KS Carey dated 12 March 2009, 4 AB 1385-1386; affidavit of DP Melbin dated 18 March 2008, 3 AB 1208-1209). Nonetheless, Gilmour J made a find that the tax liability of $1,208,797.31 remained unpaid (4 AB 1426, [87]).

Part V: APPLICABLE LEGISLATION

11 Part 5.4 of the *Corporations Act 2001*.

Part VI: ARGUMENT

12 Central to the issues in this appeal is an appreciation of the mechanism of Part 5.4 of the *Corporations Act 2001* for the winding up in insolvency; in particular the operation of different processes provided for in Divisions 1 and 4 of Part 5.4. It is necessary to identify the stages within the winding up process at which
20 (*first*) disputes as to debts arise, and (*secondly*) the discretion which the court has when a dispute as to a debt arises.

Debt disputes prior to standing

13 Disputes as to the existence of a debt of the company sought to be wound up often arise at different stages of the statutory demand process, which precedes the making of a winding up application. The *first* is provided for at s.459H(1)(a); the statutory formulation of a "genuine dispute about the existence

or amount of a debt" which invokes the power to set aside a statutory demand under s.459G.

14 The *second* stage in which a dispute as to a debt can arise is where the 21 day statutory demand period has expired, or an application to set aside a statutory demand failed; an issue can still then arise as to whether the issuer of the demand under s.459E is a creditor for the purpose of s.459P(1)(b)[2]. The applicant for winding up must still be a creditor for the purpose of s.459P(1)(b) and a dispute as to the existence of a debt can arise at this stage. As a matter of practicality, where the statutory demand period has expired or where an application to set aside the statutory demand has failed, the question of whether the person who served the demand under s.459E, is a creditor for the purpose of s.459P(1)(b) is resolved by s.459S. If the company asserts that the person who served the demand under s.459E is not a creditor, on the basis that there is a dispute as to the debt the subject of the statutory demand, s.459S invariably arises. The court has an obvious discretion under s.459S(1), qualified by s.459S(2). Clearly enough, the court can be called upon to consider a dispute as to a debt in exercising its power under s.459S.

Debt disputes at the stage of standing

15 Commonly disputes as to debts arise at different stages of the consideration of standing. *First* (and independently of the statutory demand process); as to whether applicant is a creditor for the purpose of s.459P(1)(b).

16 *Secondly,* in addition to the power to dismiss the application where the applicant can not prove that it is a creditor for the purpose of s.459P(1)(b), it is uncontroversial that there is a further power or "discretion"[3] to stay or dismiss a winding up application "in the circumstances discussed by McGarvie J in

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2 In this sense the heading of s.459E (in the reference to "creditor") is misleading.

3 *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([57]); [2007] NSWCA 57.

Fortuna Holdings[4] ... or upon the basis referred to by McLelland J in *Re Jeff Reid Pty Ltd*[5]". The existence of this power or discretion is confirmed in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([57]). The "circumstances discussed by McGarvie J in *Fortuna Holdings* ... or upon the basis referred to by McLelland J in *Re Jeff Reid Pty Ltd*" include disputes as to debts. This discretion is not limited to the context of an applicant failing to prove its status as a creditor for the purpose of s.459P(1)(b).

17 *Thirdly,* s.459P(2) imposes a leave requirement and thereby a discretion. In respect of s.459P(2)(a); even if it is found that an applicant is a creditor, or that a company can not, by reason of s.459S, assert that an applicant is not a creditor, and that the winding up application ought not be stayed or dismissed "in the circumstances discussed by McGarvie J in *Fortuna Holdings* ... or upon the basis referred to by McLelland J in *Re Jeff Reid Pty Ltd*" - the creditor must still apply under s.459P(2) for leave under s.459P(3). An application for leave under s.459P(3) can give rise to a dispute concerning a debt if the disputed debt is relevant to solvency. The section imposes a burden on the applicant for winding up to establish that there is a prima facie case that the company is insolvent before the exercise of discretion.

18 In this matter s.459P(2)(d) required that ASIC seek and be granted leave to apply for an order under s.459A. The proposition is advanced by the Appellant at the final sentence of [25] of its Submission that the presumption of insolvency created by s.459C "meets the condition for grant of leave under s.459P(3)". This submission repeats the reasoning and authority cited in support of it by the trial judge[6]. This conclusion is likely correct by reason of s.459C(1)(b), though the reference in each of s.459C(1)(a) and (b) to "section 459P" is apt to confuse.

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4 *Fortuna Holdings Pty Ltd v Depute Commissioner of Taxation* [1978] VR 83 at 93.

5 *Re Jeff Reid Pty Ltd* (1980) 5 ACLR 28 (presumably) at 32.

6 4 AB 1409 at [2], *Australian Securities & Investments Commission v Forestview Nominees Pty Ltd (No 3)* [2006] FCA 1710 at [53] and *Australian Securities & Investments Commission v Eastlands Pty Ltd (No 3)* [2006] FCA 1702 at [64].

Even if, as contended, the presumption of insolvency created by s.459C "meets the condition for grant of leave under s.459P(3)" it does not exhaust or determine that the discretion to grant leave be exercised at this stage[7].

19 That there may be circumstances in which a court may refuse leave even if satisfied that the company is prima facie insolvent can be readily demonstrated. Assume; a receiver is appointed over the assets (or an asset) of a solvent company and the appointment endures for 3 months (thereby satisfying the requirement of s.459C(2)(c)) and thereby the company is presumed to be insolvent. The company could establish solvency at the stage of the seeking of
10 leave under s.459P(2). If it did so it is impossible to conceive of a circumstance in which the Court would under s.459P(2) grant leave to allow the winding up application to be made, even though the company is presumed to be insolvent and even if this presumption establishes for the purpose of s.459P(3) that there is a prima facie case that the company is insolvent.

20 A more prescient example involves the following to be assumed; a receiver is appointed and thereby by reason of s.459C(2)(c) the company is presumed insolvent. ASIC applies for leave under s.459P and at the stage of leave the company contends that its solvency is determined by a particular debt. Determination of whether the particular debt is due is the subject of proceedings
20 already commenced. In such a case, it can not be doubted that under s.459P(3) the court could exercise its discretion to refuse leave.

21 A still more prescient example; a receiver is appointed and thereby the company is by reason of s.459C(2)(c) presumed insolvent. ASIC applies for leave under s.459P and at the stage of leave the company contends that solvency is determined by a particular debt the determination of which gives rise to "a substantial contest"[8] of fact that would in the ordinary course be determined by proceedings inter partes. The central issue of this appeal is whether in that

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7 See *Melbase Corporation Pty Ltd v Segenhoe Ltd* (1995) 13 ACLC 823 at 834 (Lindgren J).

8 *L&D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180 at 183 (McLelland J).

circumstance a discretion exists for the court to refuse the grant of leave under s.459P(3).

Debt disputes at the stage of winding up

22 Section 459A is permissive in its terms, and the discretion given confirmed by s.467(1). There is no doubt that debt disputes can give rise to various orders under s.467(1)(a)-(c).

The discretion to stay

23 It is not challenged in this appeal that, in addition to various powers provided for in Part 5.4 of the *Corporations Act* to dismiss, adjourn or stay a winding up application, there is a further discretion to stay or dismiss on the basis of a debt dispute; see inter alia, *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([57]). An issue in this appeal is whether this discretion is limited to the context of an applicant seeking to prove its status as a creditor for the purpose of s.459P(1)(b).

24 In *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([56]-[57]), Beazley JA prescribes the circumstances of exercise of this power as the "circumstances discussed by McGarvie J in *Fortuna Holdings* ... or upon the basis referred to by McLelland J in *Re Jeff Reid Pty Ltd*"[9]. To similar effect is the formulation of McLelland J in *L & D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180 at 183, which includes that

> ... if issues will arise in the winding up proceedings of a kind inappropriate for determination in such proceedings e.g. a substantial contest as to the existence or enforceability of a debt relied on by the

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9 The relevant passage from the judgment of McGarvie J in *Fortuna Holdings* is extracted in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 386 ([53]) and the basis referred to by McLelland J in *Re Jeff Reid Pty Ltd* is referred to in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 386-387 ([54]).

applicant, which should properly be resolved in separate proceedings brought for that purpose.[10]

25 This is akin to the statutory formulation in s.459H(1)(a) of a "genuine dispute about the existence of amount of a debt" which invokes the power to set aside a statutory demand under s.459G, though of course the discretion referred to in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([56]-[57]) could be excited by factors other than just a genuine dispute about the existence of amount of a debt.

26 The central issue in this appeal is whether this discretion can only be exercised at particular stages of the winding up process.

The Appellants attack on the reasoning of North and Siopis JJ

27 The essential reasoning of North and Siopis JJ is at [37]-[51] of the judgment (4 AB 1458-1463). The Appellant's principal submission in this respect is at [27(c)(ii) and (iii)] of the Submission.

28 *The proposition at [27(c)(i)] of the Appellant's Submission* may be accepted. Indeed, this was the "policy" effected by the Harmer reforms; where a dispute as to a debt arises in respect of a debt the subject of a statutory demand, the *Corporations Act* provides a mechanism for determination of this dispute; being Part 5.4 Division 3, having regard to s.459S. Some authorities refer to these provisions as being a "code" for disputes concerning debts the subject of a statutory demand; see *Perpetual Nominees Pty Ltd v Masri Apartments Pty Ltd*

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[10] Quoted with approval by (inter alia) Perram J in *Grant Thornton Services (NSW) Pty Limited v St. George Wholesale Distributors Pty Ltd (No 2)* [2009] FCA 557 at [12]. Both judgments of McLelland J are referred to in the joint judgment of North and Siopis JJ below at [42]-[43] (4 AB 1460-1461).

(2004) 49 ACSR 719; [2004] NSWSC 551 at [11]-[12], but even in this respect, Austin J in *Masri Apartments* determined[11] that:

> "... there is a broad general principle that a winding up order will not, as a matter of discretion, been made on a debt which is bona fide disputed, provided that the dispute is based on some substantial ground: A Keay, *McPherson's Law of Company Liquidation* (4th edition, 1999), citing *Mann v Goldstein* [1968] 1 WLR 1091."[12]

29 As explained by Spigelman CJ (Handley and Giles JJA concurring) in *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 at 676 ([64]-[65]); [2000]
10 NSWCA 37, the relevant "policy" of the Harmer reforms encapsulated in Part 5.4 of the *Corporations Act* comprises Division 3 of the Part 5.4; to have disputes as to debts that were the subject of a statutory demand (which account for the vast bulk of winding up applications) determined at a preliminary stage (or an "early time"[13]) and not at the final hearing of the winding up application[14].

30 *The proposition at [27(c)(ii)] of the Appellant's Submission* is not the subject of citation, but accepts, as formulated, the proposition that where an applicant for winding up who has standing[15] relies upon a presumption of insolvency[16] the

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11 *Perpetual Nominees Pty Ltd v Masri Apartments Pty Ltd* (2004) 49 ACSR 719; [2004] NSWSC 551 at [56].

12 In this respect it is also notable that Beazley JA (Hodgson and Santow JJA concurring) in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([55]-[57]), when accepting that the discretion to stay a winding up application persisted, agreed with the statement of the principle of Brownie J in *Pacific Communications Rentals Pty Ltd v Walker* (1993) 12 ACSR 287 which was a statement of principle expressed in the context of a stay where a statutory demand had expired.

13 *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 at 676 ([65]).

14 See also *State Bank of New South Wales v Tela Pty Ltd (No. 2)* (2002) 188 ALR 702 at 711 ([11]); [2002] NSWSC 20; *Radiancy (Sales) Pty Limited v Bimat Pty Limited* (2007) 25 ACLC 1216; [2007] NSWSC 962 at [70]-[77].

15 As ASIC does here by reason of s.459P(1)(f).

16 As ASIC does here; s.459C(2)(c).

court has a discretion to decide or not to decide a disputed debt. There is no reason to suppose that this discretion is not of the genus referred to in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([56]-[57]). Further, there is no reason to suppose that this discretion could not be exercised at the stage of the applicant seeking leave under s.459P(2) and (3). Further, there is no reason to suppose that this discretion could not be exercised at the stage of an order being sought under s.459A and s.467(1), in exercise of any of the powers under s.467(1)(a)-(c).

31 Though opaque at [27(c)(ii)], [28] and [33] of the Appellant's Submission, there is no reason to conclude that, if a debt dispute arises in a winding up application where insolvency is presumed, the court has no discretion to stay (or adjourn) the winding up and must proceed to require the company to prove at that point that the debt does not exist. The Appellant, in the words in parenthesis at [27(c)(ii)] of its Submission, accepts that there may be circumstances in which the winding up application would be stayed in this circumstance. The example given above at [19] illustrates. With respect it is difficult to accept that the cases demonstrate (as submitted in parenthesis in the Appellant's Submission at [27(c)(ii)]) that the "usual course" is that a court would exercise its discretion to determine a disputed debt. Though un-stated in the Appellant's Submission at [27(c)(ii)] there is no reason to doubt that, even where insolvency is presumed, the discretion to stay by reason of a disputed debt could be exercised where the debt is relevant to solvency and the effect of the exercise of discretion to not determine the disputed debt is that no winding up order is made, even though (in one sense) the presumption of insolvency has not been rebutted.

32 If *the proposition advanced at [27(iii)] of the Appellant's Submission* is that although there is a discretion to stay or dismiss a winding up order on the basis of a disputed debt, such a discretion only exists if the disputed debt goes to the question of whether the applicant is a creditor (for the purpose of standing), such a proposition is wrong. Certain of the cases cited in [27(iii)] of the Appellant's Submission dealt with a disputed debt in this context, but none limit the discretion in these terms or to this circumstance. With respect, the observation

of White J in *Radiancy (Sales) Pty Limited v Bimat Pty Limited* [2007] NSWSC 962 at [75] is correct; that the only modification to the principles as to a discretion to order a stay effected by the Harmer reforms was in respect to the statutory demand procedures. In this respect, as explained in *Switz Pty Ltd v Glowbind Pty Ltd*[17], this modification reflected a "policy" of encouraging disputes as to debts the subject of a statutory demand being determined before the final hearing of the winding up application, in accordance with Division 3 of Part 5.4. Nowhere in the reasoning of Perram J in *Grant Thornton Services (NSW) Pty Limited v St. George Wholesale Distributors Pty Ltd (No 2)* [2009] FCA 557 or of Beazley JA in *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 is there any suggestion that the discretion there being exercised or considered was limited to a debt dispute relevant to the applicants standing or status.

33 On this understanding, this appeal concerns simply the exercise by the trial judge of an undoubted discretion, in the exercise of which the Full Court determined that the trial judge erred and which the majority of the Full Court re-exercised. The Respondent does not contend that the trial judge did not have a discretion to exercise.

34 On this understanding, the Appellant's Submissions at [28]-[40] are simply contentions as to matters going to an undoubted discretion.

35 There is no challenge in this appeal to the test in *House v The King* (1936) 55 CLR 499 at 505.

THE FIRST GROUND OF APPEAL[18]

36 It is erroneous to contend that the reasons of North and Siopis JJ proceed from a proposition that "Part 5.4 of the *Corporations Act* manifests a legislative policy

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17 *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 at 676 ([64]-[65]).

18 Paragraph 2 of the Notice of Appeal (4 AB 1500).

that a disputed debt should be resolved outside the winding up process". Although [59] of their Honours' judgment[19] might be thought to be somewhat jejune, the paragraph is to be understood having regard to the consideration of principle at [37]-[58][20] and the consideration by their Honours of the relevant discretionary factors commencing at [60][21]. It is likely that the proposition at [59] was intended by their Honours to be no more than a re-statement of the accepted proposition, stated in cases such as *Perpetual Nominees Pty Ltd v Masri Apartments Pty Ltd* (2004) 49 ACSR 719 at 731 ([56]) cited above[22]. No doubt, the proposition at [59], in its qualification to debt disputes "as being demonstrative of insolvency", sought to exclude from the stated proposition the observation in cases such *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 at 676 ([64]-[65]), to the effect that the Harmer reforms sought to have disputes as to debts the subject of a statutory demand determined within the winding up process. This understanding of [59] of the joint judgment is more likely than that expressed in the Appellant's Submission at [32].

37 In any event, it is evident from the reasoning of North and Siopis JJ commencing at [60][23], when considering the relevant discretionary factors, that their Honours did not reason from a presumption that "Part 5.4 of the *Corporations Act* manifests a legislative policy that a disputed debt should be resolved outside the winding up process".

38 Further to this, there is no foundation for the proposition expressed in the Ground that their Honours proceeded on a basis that the principle stated in

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19 4 AB 1465.

20 4 AB 1458-1465.

21 4 AB 1465.

22 "... there is a broad general principle that a winding up order will not, as a matter of discretion, been made on a debt which is bona fide disputed, provided that the dispute is based on some substantial ground: A Keay, *McPherson's Law of Company Liquidation* (4th edition, 1999), citing *Mann v Goldstein* [1968] 1 WLR 1091."

23 4 AB 1465.

Ocean City Ltd v Southern Oceanic Hotels Pty Ltd (1993) 10 ACSR 483 at 486-487 had been "modified" in any respect. It emerges from [51]-[54] of their Honours judgment[24] that their Honours' in fact applied *Ocean City Ltd v Southern Oceanic Hotels Pty Ltd* with the (correct) observation that the principle was stated in the circumstance of *Ocean City Ltd v Southern Oceanic Hotels Pty Ltd* where both parties to the disputed debt were parties to the winding up application.

THE SECOND GROUND OF APPEAL[25]

39 The contended relevant considerations ignored by North and Siopis JJ are not stated in the Ground or separately addressed in the Appellant's Submission.

40 In any event, as regards the exercise of discretion by North and Siopis JJ, their Honour's consideration of relevant factual matters was (with respect) entirely correct. Further, if error has been shown, the matter ought to be remitted to the Full Court for the discretion to be re-exercised according to law.

41 The debt dispute involved a dispute as to the "Kingdream transfer" and the "$2 million run-around"[26]. As regards the "Kingdream transfer", evidence was given by Mr. Nairn to the effect summarised by the trial judge at [40] of the judgment[27], with the finding at [51][28]. Mr. Nairn, who was responsible for the reversal of the relevant entries in the books of account of the relevant entities, gave clear evidence to the effect that, prior to correction by him, the accounts of entities within the Westpoint group recorded a liability of Lanepoint of $2 million which was properly a liability of another company in the Westpoint

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24 4 AB 1463-1464.

25 Paragraph 3 of the Notice of Appeal (4 AB 1501).

26 Nomenclature used by the trial judge seemingly without regard to the pre-supposing connotation.

27 4 AB 1417-1418.

28 4 AB 1420.

group, Kingdream Pty Ltd. Mr. Nairn's evidence in this respect is (relevantly) at 1 AB 116, 117, 124 (lines 1-5), 125 (lines 1-26), 130 (lines 10-40), 131 (line 15) - 132 (line 35). No challenge was made to the credit of Mr. Nairn. It was never put to Mr. Nairn or contended that had a personal interest in the transaction or that he was directed by anyone else to make the corrections. It was never put to him that his evidence was false, or incorrect in any respect. It was never put to him that he was party to a fraud. In particular, it was never out to him that the "Kingdream transfer" was "improper" or "ineffective" as the trial judge found[29]. It was never put to him that he did not undertake an investigation into what he described as, and found to be, incorrectly recorded draw downs. His description of the competence of Messrs. Francis and Fairman was not challenged. He stated (and it was not challenged) that he was a chartered accountant[30]; that he had been an audit partner of Pricewaterhouse for 15 years and had worked for them for a total of 31 years[31]. He was never challenged as to his capacity to undertake a review of accounts to correct incorrectly recorded liabilities. He was a director at material times of Westpoint Management Pty Ltd, which was the manager of the creditor WIF[32]. It was never put to him that in correcting the recorded draw downs he breached fiduciary duties that he owed to Westpoint Management Pty Ltd. He stated (and it was not challenged) that there were relevant documents, which corroborated his evidence, that were no longer in his possession but were held by ASIC[33]. It would appear that these documents were not produced by ASIC.

42 There was no basis whatsoever for the trial judge to reject Mr. Nairn's clear evidence in respect of the "Kingdream transfer", let alone to conclude that this evidence did not comprise a sufficient basis as to why the dispute as to the debt

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29 [70] of the judgment; 4 AB 1423.

30 1 AB 116 (line 2).

31 1 AB 116 (line 3).

32 1 AB 116 (line 16).

33 1 AB 117 (lines 15-20).

emerging from the "Kingdream transfer" ought not appropriately be dealt with in proceedings inter partes. In this respect, and further to the reasoning of North and Siopis JJ commencing at [63] of their Honours' judgment[34], the observation at [40] of the trial judge's judgment[35] referring to the fact that neither Mr. Francis nor Mr. Fairman were called disclosed obvious error. It is unclear whether this observation was akin to a *Jones v Dunkel* inference and its vagary illustrates the inaptness of the winding up process to deal with complex factual disputes such as that in respect to the "Kingdream transfer". In respect of observation at [40] of the trial judge's judgment[36] it can rhetorically be asked; why were Messrs. Francis and Mr. Fairman not called by ASIC in light of the allegations that were made by ASIC?

43 The use by the trial judge of imprecise terms such "improper" and "ineffective" in describing the "Kingdream transfer"[37] ought not obscure that his Honour was making findings of participation in an obvious fraud by, inter alia, Mr. Nairn. In this respect, if all other considerations are put to one side, North and Siopis JJ were (with respect) entirely correct to conclude that the hearing before Gilmour J lacked basic elements of procedural fairness[38] in allowing serious misconduct or fraud to be alleged without notice and without being "distinctly alleged and as distinctly proved"[39].

44 As regards the "$2 million run-around", when the alleged change in the financial records was put to Mr. Carey, he was definite in his response of having no knowledge or little recollection of those entries[40] having only had an explanation

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34 4 AB 1465.

35 4 AB 1417-1418.

36 4 AB 1417-1418.

37 [70] of the judgment; 4 AB 1423.

38 4 AB 1466-1467 ([68]).

39 *Armitage v Nurse* [1998] Ch 241 at 256-257 per Millet LJ.

40 4 AB 98 (lines 31-38, 40-41), 4 AB 99 (lines 30-34, 36-41, 45-48), 4 AB 100-101.

from Mr. Nairn.[41] What was put to Mr Nairn in cross-examination about the Goldtag loan was not an allegation of wrongdoing.[42] Mr. Nairn gave evidence that he could not recall telling Mr. Carey about the loan entries, but certainly told Mr. Rundle[43] (who was not called to give evidence). Mr. Nairn also gave evidence that an accounting document had a handwritten notation[44] of "$2 million run-around" by Mr. Ellis (who was not called to give evidence). It was not put to Mr. Nairn that he had participated in a sham transaction to deny Westpoint Management the ability to recover the funds. Again, Gilmour J made an express finding, of a seemingly final nature, that the $2 million run-around was an "improper transaction" and "ineffective".[45] Again, these were findings of participation in an obvious fraud by Mr. Nairn and Mr. Carey, in which Mr. Ellis and Mr. Rundle were involved.

45 Against this, an explanation for the transaction was advanced by Mr. Carey gave evidence that the Goldtag project (the Cinema City property) was not as advanced as the Respondent's Rivervale project.[46] With the approval of the liquidator for Westpoint Management, these loans were made to allow the Respondent to complete its project. Mr. Carey gave evidence that the liquidator for Westpoint Management was content to allow the transfer of the loan to Goldtag.[47] The propriety of these transactions was not challenged in cross-examination of Mr. Carey. The liquidator of Westpoint Management was not

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41 4 AB 100 (line 29).

42 4 AB 126-128.

43 4 AB 131 (lines 10-30).

44 4 AB 133 (lines 20-30).

45 4 AB 1423 ([69]).

46 4 AB 101 (lines 19-45).

47 4 AB 101 (lines 19-45).

called to give evidence by ASIC. This evidence was not addressed by Gilmour J in his judgment.[48]

46 Having made determinations about the "Kingdream transfer" and "$2 million run-around", Gilmour J proceeded to analyse the transactions in another manner under the *Corporations Act 2001* (Cth).[49] In respect of this reasoning, there were a number of what North and Siopis JJ called "...statutory, procedural or evidentiary obstacles which would preclude the court from being able to determine the dispute in question."[50] First, s.588FF requires an application of the company's liquidators. North and Siopis JJ were (with respect) correct to that
10 s.588FF could not be invoked.[51] Second, s.588FF requires that affected third parties be entitled to be heard when the court determines the validity of transactions.[52] As has been indicated, above, there would be a number of proper parties to determination of these disputed debts or transactions. Third, the insolvency of the company can be challenged under s.588FF. Other entities or officers or directors of the Respondent or those other entities may deny the insolvency of the Respondent and desire to be heard on that question, to which they are entitled.[53]

THE FOURTH GROUND OF APPEAL[54]

47 The Appellant's submission in this respect at [35]-[37] of the Submission
20 proceeds on a misunderstanding of the reasoning of North and Siopis JJ at [52]

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48 Cf: 4 AB 1421-1423.

49 4 AB 1423-1426.

50 4 AB 1464 ([55]).

51 4 AB 1467 ([70]).

52 *Dean-Willcocks v Commissioner of Taxation (No 2)* (2004) 49 ACSR 325; [2004] NSWSC 286 at [30]-[32] per Austin J.

53 *Sims v Deputy Commissioner of Taxation* (2007) 69 ATR 186; [2007] NSWSC 998 at [117] per Hammerschlag J.

54 Paragraph 5 of the Notice of Appeal (4 AB 1501).

and [65][55]. Their Honour's proposition there expressed relates to the effect of the winding up order upon other parties interests. This is a broader notion than a res judicata. It is undisputable that a winding up of the Respondent would affect the interests of (say) Westpoint Management. To illustrate, at the time that ASIC brought the winding up application Westpoint Management was in liquidation[56]. The liquidator of Westpoint Management had not made demand for the amount contended by ASIC to be owing to it by the Respondent and no explanation was given as to why. It could be that the liquidator of Westpoint Management would have preferred that, rather than be put into liquidation, the Respondent be permitted to trade and that Westpoint Management's claim for the total asserted debt remain until a time that the Respondent had the financial capacity to meet the entirety of the asserted debt. In this sense, winding up of the Respondent affected the interests of Westpoint Management. It is likely also that this aspect of the reasoning of North and Siopis JJ reflected the obvious query as to why the entities alleged to have been owed the disputed debts by the Respondent did not seek to recover them.

[38]-[40] of the Appellant's Submission

48 These submissions relate to [76] of the judgment of North and Siopis JJ[57]. Their Honour's reasoning in this respect is faultless in drawing a simple analogy between the test provided for in s.459H(1)(a) of the *Corporations Act* of a "genuine dispute about the existence or amount of a debt", which invokes the power to set aside a statutory demand under s.459G, and the substantive formulation of the stay discretion in authorities such as *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 at 387 ([56]-[57]) to the "circumstances discussed by McGarvie J in *Fortuna Holdings* ... or upon the basis referred to by McLelland J in *Re Jeff*

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55 Respectively 4 AB 1463 and 1466.

56 See 4 AB 1420 [50].

57 4 AB 1468.

Reid Pty Ltd" and the formulation of McLelland J in *L & D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180 at 183; "...a substantial contest as to the existence or enforceability of a debt".

Part VII: SUBMISSIONS ON CONTENTION

49 There are none.

DATED: the 15th day of February 2011

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