

JUDGMENT : EMMETT J. Federal Court of Australia. New South Wales District Registry. 29th June 2007

1 The plaintiff, Sandos Painting Pty Ltd (Sandos), seeks an order under s 459G of the *Corporations Act 2001* (Cth) (the Act) setting aside a statutory demand served on Sandos under s 459E of the Act on 20 March 2007. Sandos relies on a number of grounds. Before recounting the grounds, it is desirable to say something about the relevant provisions of the Act.

STATUTORY DEMANDS

2 Under s 459E(1), a person may serve on a company a **statutory demand** relating to a debt that the company **owes to the person**, being a debt that is due and payable and the amount of which is at least \$2000. The demand must:

- specify the debt and its amount; and
- require the company to pay the amount of the debt or to secure or compound for that amount within 21 days; and
- be in writing; and
- be in the prescribed form; and
- be signed by or on behalf of the creditor.

Unless the debt is a judgment debt, the demand must be accompanied by an affidavit that verifies that the debt is due and payable by the company and complies with the Rules of the Federal Court or a Supreme Court. Under s 459C(2) of the Act, in an application to the Court to wind up a company in insolvency under s 259P of the Act, the Court must presume that the company is insolvent if, during or after the period of three months ending on the day when the application was made, the company has failed to comply with a statutory demand.

3 However, under s 459G, a company may apply to the Court for an order setting aside a statutory demand. Such an application may only be made within 21 days after the demand is served. Within those 21 days, an affidavit supporting the application must be filed and a copy of the application and the supporting affidavit must be served on the person who served the demand on the company.

4 Section 459H applies on an application under s 459G where the Court is satisfied of either or both of the following:

- that there is a genuine dispute, between the company and the person who served the statutory demand, about the existence or amount of the debt to which the demand relates,
- that the company has an offsetting claim.

The Court is required under s 459H(2) to calculate the **substantiated amount** of the demand in accordance with a formula set out in that section. If the substantiated amount is at least \$2000, the Court may make an order varying the demand as specified in the order and declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

5 Further, under s 459J, the Court may, on an application under s 459G, set a statutory demand aside if it is satisfied that:

- because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
- there is some other reason why the demand should be set aside.

However, the Court must not set aside a statutory demand merely because of a defect, if substantial injustice will not be caused.

6 Under s 459F of the Act, 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. However, a statutory demand has no effect while an order setting the demand aside is in force. Unless the Court makes an order setting the demand aside, the Court must dismiss the application. An order under s 459H or s 459J may be made subject to conditions.

THE ALLEGED INDEBTEDNESS OF SANDOS

7 Sandos carried out painting services at Merimbula in New South Wales as subcontractor to Southern NSW Maintenance Pty Ltd (in Liquidation) (Southern). A dispute arose in relation to a claim by Sandos for variation works. On 13 November 2006 an adjudication certificate was issued under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Building Act). The certificate was for the sum of \$131,943.22. Judgment was subsequently entered for Sandos against Southern in the District Court of New South Wales at Wollongong, on the basis of that certificate.

8 On 10 November 2006, a garnishee order was issued by the District Court addressed to the Commonwealth Bank of Australia (the Bank). Following service of the garnishee order, the Bank paid to Sandos the sum of \$59,158.53 on 13 November 2006. That amount, together with an administrative charge of \$13, was debited to Southern's account with the Bank.

9 On 9 February 2007, the second and third defendants, Gideon Isaak Rathner and David John Coyne (the Liquidators), were appointed as administrators of Southern. At the second meeting of the creditors of Southern, held on 2 March 2007, the creditors resolved that Southern be wound up and that the Liquidators be appointed as joint and several liquidators.

- 10 On 2 March 2007, Mr Coyne wrote to Sandos in his capacity as joint and several liquidator, relevantly saying as follows:
- "I am the Joint and Several Liquidator of [Southern] as a result of a resolution of creditors passed at a meeting held on 2 March 2007. I understand that within a period of six months prior to the commencement of the winding up you received monies as a result of attaching a debt or debts due to [Southern]. Pursuant to section 569 of the Corporations Act 2001 and as a result of the liquidation I now demand repayment of those monies net of the taxed costs of your proceedings."*
- 11 On 5 March 2007, Mr Coyne wrote again to Sandos, relevantly saying:
- "I understand that within a period of six months prior to the commencement of the winding up you received monies as a result of a Garnishee Order against the bank account of [Southern]. I attach a copy of the Garnishee Order and a copy of the bank statement of [Sandos] showing \$59,171.53 being removed under the Garnishee Order. Pursuant to s 569 of the Corporations Act 2001 and as a result of the liquidation I now demand repayment of those monies net of the taxed costs of your proceedings."*
- 12 On 8 March 2007, the Liquidators' solicitors wrote to Sandos' solicitors attaching a draft statutory demand requiring payment of a total sum of \$121,800.44. The letter contained a curious threat as follows:
- "If our client's views on your client company's and its directors' conduct are substantiated on examination of the evidence, our clients will be obliged to report any wrongful receipt and misapplication of such money to ASIC as a contravention of section 596 of the Corporations Act 2001. Your client company and its directors were put on prior notice by us on several occasions not to accept receipt of our client's money and not to dispose of such money. Further, our clients are willing to pursue the directors of [Sandos] personally if the funds owing are not immediately recovered from their company."*
- Section 596 of the Act is concerned with frauds by officers. In the light of the earlier correspondence, it is clear that the Liquidators' solicitors intended to refer to s 569 of the Act.
- 13 Section 569 relevantly provides that, where a creditor has instituted proceedings to attach a debt due to a company within six months immediately before the commencement of the winding up of the company and that company commences to be wound up, the creditor must pay **to the liquidator** an amount equal to the amount, if any, received by the creditor as a result of the attachment, less an amount in respect of the costs of the attachment, being an amount agreed between the creditor and the liquidator or, if no agreement is reached, an amount equal to the taxed cost of that attachment.
- 14 The draft statutory demand attached to the letter from the Liquidators' solicitors of 8 March 2007 purported to be in accordance with Form 509H. It referred to Sandos as "the Company" and began by asserting:
- "1. The Company owes Southern NSW Maintenance Pty Ltd (in Liquidation)... the amount of \$121,800.44 being the total of the amounts of the debts described in the Schedule.*
- 2. Attached is the affidavit of Gideon Isaak Rathner, dated... verifying that the amount is due and payable by the Company.*
- 3. The Creditor requires the Company, within 21 days after service on the Company of this demand:*
- (a) to pay to the Creditor the total of the amounts of the debts or*
- (b) to secure or compound for the total of the amounts of the debts, to the Creditor's reasonable satisfaction.*
- ..."*
- 15 While the term "Creditor" was not defined in the draft statutory demand, it is clear enough that Southern was intended to be referred to as "Creditor". The draft statutory demand provided for signature by Mr Rathner in his capacity as "joint and several liquidator".
- 16 Sandos' solicitors apparently understood that the Liquidators' solicitors intended to refer to s 569. By their response of 8 March 2007, Sandos' solicitors asserted that the draft statutory demand was flawed in several respects as follows:
- s 569 does not give rise to a debt but, at best, gives rise to a contingent or prospective liability, which can not be the subject of a statutory demand;
 - any such debt is, in any event, a liability owing to the Liquidators and not to Southern;
 - Sandos has a right of set off in respect of the costs of attachment and there can be no certainty as to the alleged liability until such time as the costs have been agreed or taxed.
- 17 On 2 April 2007, a statutory demand dated 20 March 2007, which was actually signed by Mr Rathner as joint and several liquidator, was served on Sandos. The statutory demand was generally in the form of the draft attached to the letter of 8 March 2007. However, it referred to an amount of \$49,171.53 as the amount of the debt that "the Creditor" required Sandos to pay. The schedule referred to the sum of \$49,171.53 as "being the sum garnisheed by the Company on or about 13 November 2006 less costs".
- 18 Attached to the demand was an affidavit by Mr Rathner relevantly saying as follows:
- "1. I am one of the liquidators of [Southern] in respect of a debt owed by [Sandos] to [Southern] relating to a sum of \$49,171.53 garnisheed by [Sandos] on or about 13 November 2006.*
- ...

3. *With respect to the debt mentioned in paragraph 1 of this affidavit, I have inspected the business records of [Southern] in relation to [Sandos's] account with [Southern].*
 4. *The debt mentioned in paragraph 1 of this affidavit is due and payable by [Sandos].*
 5. *I believe that there is no genuine dispute about the existence or amount of the debt."*
- 19 On 3 April 2007, Sandos' solicitors wrote to the Liquidators' solicitors setting out the respects in which they contended that the statutory demand was flawed. They referred to the same matters that were referred to in their letter of 8 March 2007.

GROUND FOR SETTING ASIDE

- 20 On the hearing of the application to set aside the statutory demand, Sandos relies upon four grounds as follows:
- (1) Any liability to the liquidators is prospective or contingent.
 - (2) The amount of the costs of the garnishee have not been determined.
 - (3) There is a defect in the demand as a result of which substantial injustice will be caused.
 - (4) If there is a debt owing, it is a debt owing to the liquidators and not to Southern.

Prospective or Contingent Liability

- 21 Section 569 performs a function similar to that performed by provisions such as s 500 of the Act. Under s 500, any attachment put in force against the property of a company after the passing of a resolution for voluntary winding up is void. The winding up of Southern is taken to have commenced on 9 February 2007, when the creditors resolved that Southern be wound up. That is relevant for the operation of s 569.
- 22 Section 569 also performs a function related to that performed by Division 2 of Part 5.7B. Division 2 deals with voidable transactions. Division 2 consists of ss 588FA to 588FJ. Under s 588FA, a transaction is an unfair preference given by a company to a creditor of the company if, relevantly, the transaction results in a creditor receiving from the company, in respect of an unsecured debt, more than the creditor would receive from the company in respect of the debt if the transaction was set aside and the creditor were to prove for the debt in a winding up of the company. Under s 588FC, a transaction of a company is an insolvent transaction if it is an unfair preference given by the company and the transaction is entered into at a time when the company is insolvent or the company becomes insolvent because of matters including entering into the transaction.
- 23 Under s 588FE, a transaction is voidable if it is an insolvent transaction of a company and it was entered into during the six months ending on the relation-back day or after that day on or before the day when the winding up of the company began. Under s 588FF, where, on the application of a company's liquidator, the Court is satisfied that a transaction is voidable under s 588FE, the Court may make an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction. A relation-back day is the day on which the winding up is taken to have begun.
- 24 Section 569 is also cognate with s 468. Under s 468, any disposition of property of a company being wound up by the Court, other than an exempt disposition, made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void. The exempt dispositions are:
- a disposition made by the liquidator;
 - a disposition made in good faith by or with the consent of an administrator;
 - a disposition under a deed of company arrangement.
- Under s 468(3) the Court may validate the making of a disposition of property after a winding up application has been filed but before an order has been made.
- 25 Sandos contended that, because the Court has a power to ameliorate the effect of s 569, on the ground that but for Southern's trickery or abuse of process, the garnishee proceeding would have been completed more than six months before the commencement of the winding up, any liability under s 569 is no more than prospective or contingent. Sandos says that because there is a residual discretion vested in the Court to relieve a creditor from the consequences of s 569 and there is a possibility that the Court would do so in the present circumstances, there is a genuine dispute between Sandos and Southern about the existence of any claimed debt. Alternatively, there is a reason why the demand should be set aside, to enable the question of the possible exercise of discretion to be ventilated.
- 26 Section 468 of the Act provides that any disposition of property of a company, other than an exempt disposition, made after the commencement of the winding up of the company by the Court is void, unless the Court otherwise orders. In an application under s 468 or its equivalent, the Court has a discretion to order that a disposition of property is not void. It may be that, where a creditor has been prevented by force or by fraud or trickery from issuing execution or attachment prior to the commencement of a winding up, the Court would order that the execution or attachment is not void (see *Armorduct Manufacturing Company Ltd v General Incandescent Company Ltd* [1911] 2 KB 143 at 147).
- 27 However, there is no power given to the Court under s 569 to order that s 569 not apply. In any event, there is simply no evidence before the Court to suggest that there was any fraud or trickery that resulted in any delay in obtaining the garnishee order that resulted in the payment from the Bank to Sandos. Accordingly, there is no basis for suggesting that this ground for setting aside the statutory demand has any substance.

Offsetting Claim

- 28 Sandos contends that it is, at most, liable to pay the amount received following the garnishee order, less an amount in respect of the costs of the garnishee order. It says that, since that amount has not been determined, it is not possible to determine the amount payable.
- 29 The amount of the payment pursuant to the garnishee order was \$59,158.53. However, the statutory demand claims a debt of \$49,171.53. The difference is explained by evidence given on behalf of the Liquidators. Mr Coyne says that an allowance was made for up to \$10,000 for the costs of the garnishee order. There is no evidence from Sandos that the costs of the garnishee order are likely to exceed \$10,000. There is no substance in this ground.

Formal Defect

- 30 Sandos also complains that the statutory demand makes no reference to the basis upon which the debt is alleged to be owing. Rather, the affidavit attached to the statutory demand refers to business records in relation to Sandos' account with Southern and asserts that there is a debt due and payable by Sandos. Sandos says that the absence of a clear statement that a claim was being made under s 569 is a formal defect or, alternatively, another reason why the demand should be set aside. However, the correspondence that preceded the statutory demand made it abundantly clear that the Liquidators were asserting an entitlement under s 569, even if the statutory demand itself did not make that explicit.
- 31 I do not consider that any substantial injustice has been caused. There is no evidence from Sandos to indicate that it did not know the basis of the claim made by the statutory demand. It is quite apparent from the arguments that have been advanced and the correspondence that preceded the statutory demand that Sandos was well aware that the Liquidators claim was based on s 569. There is no substance in this ground.

Debt Not Due To Southern

- 32 Sandos also contends that the statutory demand is ineffective because it purports to be given in the name of Southern: it points out that the effect of s 569 is to impose an obligation on a creditor to pay an amount to the liquidator of a company, not to the company. Sandos says that there is no debt due to Southern; there is only a sum payable to the Liquidators.
- 33 Sandos points out that, in a proceeding under Division 2 of Part 5.7B of the Act, in respect of an insolvent transaction, the liquidator is a necessary party to a proceeding for recovery. Moneys paid in circumstances that create a preference, and which are recoverable under Division 2, are moneys recoverable for the benefit of the creditors of the company generally. Such moneys are not property of the company in liquidation; nor are they moneys owed by the recipient as a debt to the company. Accordingly, a liquidator must sue in his or her own name, in the interest of the creditors, to recover a payment that is void as against the liquidator (see *Bibra Lake Holdings Pty Ltd v Firmadoor Australia Pty Ltd* 7 (1992) ACSR 380 at 386).
- 34 An insolvent transaction that is an unfair preference is voidable. There are defences to a claim for payment under Division 2. However, there is no apparent defence to a claim under s 569. It is clear that what is to be paid to a liquidator under that section is the amount recovered by way of attachment, in this case the garnishee order to the Bank. I consider that money received by a liquidator pursuant to s 569 is received by the liquidator as agent for his or her company.
- 35 Sandos does not contend that the liability that arises by operation of s 569 is not a debt within the meaning of s 459E. Rather, it contends that that debt is owed to the Liquidators and not to Southern. The statutory demand in this case was signed on behalf of Southern by one of the Liquidators in his capacity as one of Southern's joint and several liquidators. Accordingly, it was a demand by Southern and not a demand by the Liquidators.
- 36 Any moneys received by the Liquidators or received by Sandos will be available as part of the fund available on the winding up of Sandos. While Sandos, notwithstanding that it is being wound up, continues as a separate corporate entity, whose mind is that of its liquidators, there is but one fund available for application in the winding up of Sandos. It is clear enough that the demand related to the sum garnisheered by Sandos from the Bank. Clearly, the demand was being made under s 569 of the Act. I do not consider that the fact the demand purports to be by Southern rather than by the Liquidators is anything more than a formal defect, if it is indeed a defect. I have already concluded that no substantial injustice has been caused by the form of the demand.
- 37 There is no basis for concluding that there is a genuine dispute between Sandos and either Southern or the Liquidators as to whether s 569 operates. I do not consider that there is a basis for setting aside the demand on this final ground.

CONCLUSION

- 38 The application should be dismissed with costs.

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