JUDGMENT : MAXWELL P: Supreme Court of Victoria. Melbourne. Practice Court. 20th June 2007

1 The plaintiff ("Crown Joinery") served a statutory demand on the defendant ("Lyleho") under s 459E of the *Corporations Act* 2001. The demand claimed the sum of $139,869.20.

2 Lyleho operates the Hush Bar at Melbourne Central. Crown Joinery did the fit-out of the Bar before it opened in 2005. The debt was said to have been incurred for the provision of goods and services by Crown Joinery to the value of $481,600.00, less a deduction and certain part payments made by Lyleho which totalled $329,091.80.

3 On 18 May 2006, Lyleho applied under s 459G to set aside the demand. The Master was satisfied that Lyleho had an offsetting claim in the sum of $105,204.00, for the cost of rectifying alleged defects in the fit-out works, but found that there was no genuine dispute concerning the existence of the debt the subject of the demand. The *"substantiated amount of the demand"* within the meaning of s 459H(2) was therefore $34,665.20. On 26 June 2006, in exercise of the power conferred by s 459H(4), the Master varied the demand so that it claimed that reduced amount.

4 On 23 June 2006, shortly before the order was made varying its statutory demand, Crown Joinery filed an application under s 459P, seeking an order that Lyleho be wound up in insolvency. Significantly for present purposes, that application did not rely on a failure by Lyleho to comply with the statutory demand. (Had it done so, the requirements of s 459Q would have had to be complied with). Instead, the application relied on *"failure of the defendant to pay its debts as they fall due"*.

5 The affidavit in support of the winding up application relied on a series of affidavits which had been filed, on both sides, in the proceeding under s 459G. The affidavit said:

> *"5. The defendant is unable to pay its debts as and when they fall due and as a consequence is insolvent.*
> *6. The plaintiff does not have access to the defendant's most recent balance sheet and profit and loss statement as they are not publicly available. Nevertheless, the plaintiff relies upon the affidavits [from the 459G proceeding]".*

6 On 3 July 2006, Lyleho paid the sum of $34,665.20 the subject of the demand as varied by the Master. That payment was made under protest. Lyleho then asked the Master to determine as a preliminary question whether Crown Joinery had standing to bring the winding up application. The Master ruled that Crown Joinery had standing to bring the winding up application because, at the time the application was filed, the amount outstanding under the varied demand had not been paid and Crown Joinery was therefore a creditor of Lyleho.

7 Lyleho then filed its appearance to the winding up application. Its stated grounds of opposition were threefold, namely that –

- Lyleho was solvent;
- Lyleho had a counterclaim against Crown Joinery which exceeded the amount of Crown Joinery's alleged claim; and
- the winding up proceeding was an abuse of process.

Lyleho's damages proceeding

8 On 25 July 2006, Lyleho commenced proceedings in this Court against Crown Joinery seeking to recover the sum of $836,240.20. That sum comprises the following amounts:

(a) $335,020.00, being the cost of rectifying the alleged defects in the fit-out works;
(b) $80,000.00, being the benefit of an incentive payment from the landlord of the premises which (it is said) would have been received had the fit-out been completed by 1 July 2005;
(c) $386,555.00, being profits said to have been lost by Lyleho because of the delay in the commencement of trading resulting from the late (and defective) completion of the fit-out;
(d) $34,665.20, being the amount paid under protest pursuant to the statutory demand as varied.

9 Lyleho's argument that the winding up proceeding is an abuse of process includes the contention that the damages proceeding is the appropriate forum for the hearing and determination of the disputes between Crown Joinery and Lyleho. As will appear, I have not found it necessary to rule on this point.

Is Crown Joinery a creditor?

10 It is clear, in my opinion, that Crown Joinery is a creditor of Lyleho in the sum of $105,204.00. The Master concluded in the s 459G proceeding that there was no genuine dispute as to the existence of the debt which Crown Joinery claimed. Lyleho did not appeal that decision. It has paid part of the debt (under protest) but the balance is outstanding. It follows that Crown Joinery has standing to bring the winding up application: s462(2)(b).

11 The Court having already ruled – in a proceeding between these two parties – that there was no genuine dispute as to the existence of the debt claimed by Crown Joinery, the standing of Crown Joinery as creditor is not affected by the principles enunciated in ***Mann v Goldstein***,[1] and applied (for example) in ***CVC Investments Pty Ltd v P & T Aviation Pty Ltd***,[2] on which Lyleho relies.

12 Nor is it of any relevance that Lyleho has paid the amount the subject of the statutory demand as varied. As noted earlier, Crown Joinery is not relying on the statutory demand as the basis of the winding up application. The debt remains unpaid to the extent of $105,204.00. As a result, Lyleho derives no assistance from decisions

[1] [1968] 2 All ER 769, 775 (Ungoed-Thomas J).
[2] (1989) 18 NSWLR 295, 299-300 (Cohen J).

such as ***De Montford v Southern Cross Exploration NL***,[3] which concern the payment of the debt the subject of a statutory demand, where the application to wind up is founded on non-compliance with the statutory demand.

The evidence on which Crown Joinery relies

13 Crown Joinery has filed affidavits sworn by representatives of third parties which have dealt with Lyleho. In each case the representative states that an amount owing by Lyleho is unpaid. The details are as follows:
(a) Italpro Enterprises (Aust) Pty Ltd: $4,102.70;
(b) Elect-trix Contractors Pty Ltd: $2,700.00;
(c) Stevens Glass (Croydon) Pty Ltd: $4,960.80;
(d) Tooheys Brewing Company Pty Ltd: $4,192.01.

14 In response, Mr Russel Hammad, a director of Lyleho, stated on affidavit that –
(a) the Italpro debt was paid on 24 July 2006 (bank receipt exhibited);
(b) there was no indebtedness to Elect-trix, which had never submitted an invoice to Lyleho. Mr Hammad stated that Elect-trix owed Lyleho $6,529.00;
(c) there was no debt owed by Lyleho to Steven's Glass, which had done work at different premises and not for Lyleho but for a related company. Any work done by Steven's Glass at the Melbourne Central premises was as subcontractor to Crown Joinery, such that any issue of non-payment was between Steven's Glass and Crown Joinery alone;
(d) the Toohey's debt was paid on 7 August 2006.

15 Mr Hammad also stated that he had been telephoned by representatives of three other businesses, each of whom stated that he/she had been contacted by the solicitor for Crown Joinery asking if they would swear an affidavit stating that Lyleho owed them money. Each had refused *"because there would be no basis for doing so"*.

16 Mr Hammad exhibited Lyleho's profit and loss statement for the nine months ending 26 September 2006, which showed that the business had traded with increasing profits for the months of May, June, July, August and September 2006, culminating in a net profit for the nine-month period of $76,104.00. Based on function bookings made by corporate customers and further bookings expected over the months of October to November 2006, Mr Hammad estimated that the net profits of the business for the last three months of 2006 would be approximately $150,000.00.

17 Mr Hammad stated his belief that (as at September 2006) the value of Lyleho's business was at least $1,200,000.00 and that, if the net profits of the business for the months October, November and December reached the estimate of $150,000.00, the value of the business would be approximately $1,500,000.00. He said that Lyleho had liabilities totalling approximately $115,000.00, comprising $103,000.00 in long-term loans and $12,000.00 in "*normal short-term trading debts*".

18 There are also affidavits by Bruce Henderson, managing director of Bruce Henderson Pty Ltd, who swears that the costs of remedying the defects in the fit-out works will be in the order of $320,000.00; Stephen Mitchell, senior estimator in the building industry and employee of Renascent (Victoria) Pty Ltd, who provided an estimate of $337,100.00 (exclusive of GST) as the cost of the necessary works to remedy the defects; Steven Peluso, managing director of State Property Insurance Services Pty Ltd, who provided an estimate of $335,020.00 (inclusive of GST) for the works necessary to remedy the defects; Necati Yoldas, director of Dream Works (Vic) Pty Ltd, who provided an estimate of $302,214.00 (inclusive of GST) for the remedial works.

19 The Master's conclusion was in these terms:

> *"32. There is no presumption of insolvency here. The onus is on the plaintiff to demonstrate the defendant is insolvent. There are affidavits stating that other debts are due however, these are all being disputed by the defendant. I note that no other creditor has served a statutory demand, nor have they decided to participate as supporting creditors. The financial records of the company relied on by the defendant have not been audited and they are of no assistance to the Court. The plaintiff does not have evidence of insolvency before the Court. On the material currently before me, the defendant will not be wound up."*

20 I respectfully agree. The inability of Crown Joinery to establish even a prima facie case of insolvency was confirmed by an expert's report which it filed. The report (dated 30 October 2006) was prepared by Mr Richard Cauchi of CJL Partners, *"a specialised insolvency and business advisory practice"*. Mr Cauchi is a registered liquidator.

21 The information provided to Mr Cauchi included all of the affidavits relied on by Crown Joinery in support of the winding up application, including those in respect of alleged third party debts. Mr Cauchi also reviewed Lyleho's profit and loss statement for the nine months to September 2006. His conclusion was expressed in these terms: *"... [T]he overall information which has been provided (in the material before me) does not provide me with sufficient evidence with which to form an opinion as to the relevant solvency of Lyleho."*

He then listed 10 classes of information which he would require *"[i]n order ... to be in a position to carry out a proper assessment of Lyleho's solvency."*

[3] (1987) 17 NSWLR 468; see also ***Deputy Commissioner of Taxation v Guy Holdings Pty Ltd*** (1994) 116 FLR 314; ***Braams Group Pty Ltd v Miric*** (2002) 171 FLR 449.

The notice to produce

22 Shortly before Mr Cauchi finalised his report, Crown Joinery served a notice to produce, requiring Lyleho to produce for inspection the following documents and classes of documents said to have been referred to in the affidavits of Mr Hammad and Mr Henderson.

> *"1. Lease agreement between Lyleho and Melbourne Central Custodian Pty Ltd (ACN 006 470 560) in relating to Shop 307, Level 3, 211 Lonsdale Street, Melbourne Central.*
>
> *2. Any and all invoices and other statements of outgoings in relation to the subject premises let by Lyleho, and documents evidencing of payment of these for the period 1 January 2005 to date.*
>
> *3. Any documents recording rental payments in relation to the subject premises let by Lyleho.*
>
> *4. Wage records of Lyleho for the period 1 January 2005 to date.*
>
> *5. Tax returns of Lyleho for the period 1 January 2005 to date.*
>
> *6. Bank statements of Lyleho for the period 1 January 2005 to date.*
>
> *7. Documents relating to any charges or other encumbrances over the assets or undertaking of Lyleho and any loans to which they relate for the period 1 January 2005 to date.*
>
> *8. Documents relating to any borrowings of Lyleho including any repayment schedules for the period 1 January 2005 to date.*
>
> *9. Documents relating to any borrowings of Lyleho including any repayment schedules for the period 1 January 2005 to date.*
>
> *10. Financial books, journals, records of Lyleho for the period 1 January 2005 to date and any computer records to which this information relates together with any relevant password required to access this information.*
>
> *11. Any and all emails, letters, default notices, correspondence and file notes relating to debts or arrears for the period 1 January 2005 to date claimed by Lyleho's creditors.*
>
> *12. Letters of instruction from Nunan and Bloom Solicitors to Bruce Henderson Architects relating to expert report dated 6 July 2006 and affidavit of Bruce Henderson sworn 28 August 2006 together with copies of any documents provided to Bruce Henderson for the purpose of producing the expert report."*

23 As the basis of the notice to produce, Crown Joinery relies on r 29.10(2) of the *Supreme Court (General Civil Procedure) Rules* 2005, which provides as follows:

> *"(2) Where, ... in any ... affidavit, ... filed by a party, reference is made to a document, any other party may, by notice to produce served on that party, require that party to produce the document for inspection."*

24 In the alternative, Crown Joinery relies on s 58C of the *Evidence Act* 1958, which provides:

> *"Where a person carrying on any business is a party to any legal proceeding the other party or parties thereto shall be at liberty to inspect and make copies of or extracts from the original entries and the accounts of which such entries form a part and the documents in respect of which such entries were made."*

25 Crown Joinery does not concede that the evidence of the third party creditors will be insufficient to establish insolvency at trial but, in the light of its own expert's report, the refusal to concede must be regarded as purely formal. On the hearing of the appeal no submission was advanced on behalf of Crown Joinery that the material currently before the Court showed Lyleho to be insolvent. Instead, Crown Joinery submitted that it –

> *"seeks to add to its evidence by inspecting [Lyleho's] financial accounts, books and records and has issued a Notice to Produce on that basis. It claims to be entitled to do so by the provisions of s 58C of the Evidence Act and by the Rules of Court concerning discovery generally and particularly in respect of documents referred to in pleadings. It says until that evidence is made available and assessed it is simply inappropriate for any court to pre-empt the outcome of the winding up application, the disposition of which is a matter of judicial discretion.*
>
> *Accordingly [Crown Joinery] contends that the reasoning of the Master was flawed in as much as it was circular and 'boot-strapped' the conclusion: the Court anticipated the final result on the basis of a lack of evidence and then denied access to evidence because it had anticipated the final result."*

26 The Master was prepared to treat the notice to produce as a request for discovery. He said:

> *"36. I accept that discovery can be ordered in a winding up proceedings however, it should only be exercised in special circumstances and in my view exercised sparingly. The plaintiff relies on evidence from other creditors that debts have not been paid. These debts are disputed. There is nothing in the evidence provided by the plaintiff to conclude that there are special circumstances before the Court. The plaintiff is in effect fishing for some evidence that will help it. The plaintiff does not have a presumption of the insolvency as the defendant has complied with the statutory demand nor has any other statutory demand been served. If the other creditors wish to serve statutory demands, they can do so.*
>
> *37. The notice to produce should therefore be dismissed as it is used for the purpose of fishing as in my view, it does not support the plaintiff's case but seeks to discover whether the plaintiff has a case at all (see **Bailey v Beagle Management Pty Ltd** (2001) 182 ALR 264). The plaintiff will therefore not be required to produce any documents under the notice to produce."*

27 I respectfully agree with the Master's conclusion. As this is a hearing *de novo*, I should state my own reasons. First, the notice to produce was not authorised by the rule on which Crown Joinery purported to rely. Put shortly, none of the documents (let alone the broad classes of documents) listed in the notice was referred to in any of the three Lyleho affidavits specified in the notice.

28 Crown Joinery seeks to defend the notice to produce by asserting that Mr Hammad's affidavit of 25 July 2006 and the exhibits to it – *"refer to the financial accounts of [Lyleho] and provide an accountant's opinion as to solvency."*

This is simply not an accurate description of the content of that affidavit or of the exhibits. The only relevant document referred to in the 25 July affidavit is a report from Lyleho's accountants, which expresses the opinion that Lyleho suffered a loss of profit of approximately $300,000.00 in the period 8 September 2005 – 31 March 2006 because of the delay in opening. The report itself (which includes a number of financial summaries) was exhibited to the affidavit. The report does not refer to the books of account of Lyleho. Nor does the report, as Crown Joinery contended, express an opinion about solvency. The accountants merely state that: *"The business has always paid its debts as and when due and following a substantial capital outlay, significant profits are expected for such a business venture."*

29 The Crown Joinery submission did not seek to justify the notice to produce by reference either to Mr Hammad's second affidavit or to the affidavit of Mr Henderson. This is scarcely surprising, since none of the documents listed in the notice to produce is referred to in either of those affidavits.

30 This was, in short, a wholly inappropriate use of the notice to produce procedure. It was quite wrong for the notice to assert that the documents of which production was sought were referred to in the affidavits when they were not.

31 Secondly, it was common ground that the obligations which a notice to produce imposes are similar to those imposed by a subpoena and that the considerations which apply to the setting-aside of a subpoena are equally applicable to a notice to produce.[4] Just as a "fishing" subpoena will be set aside, so will a "fishing" notice to produce.[5]

32 The applicable principle is that laid down by Jordan CJ in ***Commissioner for Railways v Small***,[6] as follows: *"In the absence of special circumstances, ... a party is no more entitled to use a subpoena duces tecum than he is a summons for interrogatories, for the purpose of 'fishing', i.e., endeavouring, not to obtain evidence to support his case, but to discover whether he has a case at all."*

This statement echoed what Cotton LJ had said 50 years earlier, in relation to an application for discovery in a winding up proceeding: *"I do not encourage the idea that a petitioner for a winding up order has a right to have discovery to support his case to fish out, in fact, something that may help him."*[7]

33 In my opinion, this notice to produce is shown, by its content and by the purpose for which Crown Joinery says it was issued, to be a paradigm example of fishing. On the evidence as it stands, Crown Joinery cannot establish any case of insolvency. Crown Joinery therefore *"seeks to add to its evidence by inspecting [Lyleho's] financial accounts, books and records"*. True to that purpose, the notice to produce seeks production of Lyleho's entire financial documentation for a 22-month period between 1 January 2005 and 24 October 2006. Not content with an all-embracing requirement to produce all "*financial books, journals [and] records"* for the period, the notice separately seeks: documentation relating to every outgoing incurred by Lyleho in that period; rental records; wage records; tax returns; bank statements; documents relating to borrowings and charges; and every document (emails, letters, default notices, correspondence and file notes) relating to every debt incurred by Lyleho in that period.

34 Quite apart from the fact that the notice is self-evidently fishing in nature, the breadth of the notice would warrant its setting aside on the grounds that it is too wide and oppressive. In its appeal from the Master, Crown Joinery seeks an order that Lyleho produce the documents specified in the notice. For its part, Lyleho seeks an order setting aside the notice to produce. For the reasons I have given, I have no hesitation in setting aside the notice to produce, on the several grounds that the notice is not authorised by the rule on which it purports to be founded; it is fishing; and it is too wide and oppressive.

Evidence Act s 58C

35 Section 58C of the Evidence Act 1958 states as follows: "*Where a person carrying on any business is a party to any legal proceeding the other party or parties thereto shall be at liberty to inspect and make copies of or extracts from the original entries and the accounts of which such entries form a part and the documents in respect of which such entries were made."*

36 The setting aside of the notice to produce leaves no room for the operation of s 58C, there being no separate application for inspection under that section. Had there been such an application, it would in any event have failed, for the following reasons.

37 Section 58C does not, as Crown Joinery appears to have assumed, create a free-standing and unlimited right in a party to inspect the opposing party's books of account. If it existed, such a right would represent a very significant expansion of a party's ordinary right to inspect the other party's discoverable documents (subject to claims of privilege).

4 LexisNexis Butterworths, *Civil Procedure Victoria*, Vol 1, [I 35.08.0].
5 ***Bailey v Beagle Management Pty Ltd*** (2001) 105 FCR 136.
6 (1938) 38 SR (NSW) 564, 575.
7 ***Re West Devon Great Consoles Mine*** (1884) 27 Ch D 106, 109; cited in ***Re Australian Mariners (Australasia) Pty Ltd*** [1975] VR 372, 375 (Adams J).

38 That the section creates no such right becomes clear when attention is paid to the precise wording of s 58C. The right conferred is a right to inspect (and copy) *"the original entries"*. But which original entries? In respect of what subject-matter(s)? The section provides no guidance. By itself the phrase *"the original entries"* has no meaningful content.

39 The phrase "*the original entries"* only makes sense when s 58C is read in conjunction with the preceding section, s 58B, which relevantly provides as follows:

"58B Entries in book of account to be evidence

Subject to the provisions of this Division in all legal proceedings –

(a) an entry in a book of account shall be prima facie evidence of the matters transactions and accounts therein recorded; and

(b) a copy of an entry in a book of account shall be prima facie evidence of the entry and of the matters transactions and accounts therein recorded; and ..."

40 Section 58B is a provision concerned with the evidentiary effect of an entry (or copy entry) in a book of account. The section operates if – and only if – a party seeks to put into evidence an entry or copy entry in a book of account. The entry will only be admissible if the *"matters transactions and accounts therein recorded"* are relevant to an issue in the proceeding. If admissible, the entry is *prima facie* evidence of the matters which it records.

41 In my opinion, the reference in s 58C to *"the original entries"* is a reference to the originals of any entries which become part of the evidence in that way, and to which s 58B gives evidentiary force. In other words, the right which s 58C confers is a right of inspection only of the originals of those entries which are made relevant and admissible by the issues in the proceeding.

42 Section 58C is thus an ancillary provision to s 58B. It does not give a party in the position of Crown Joinery an unfettered right to inspect the opposing party's financial records, less still a right to do so in order to "fish" for a cause of action.

Abuse of process

43 The Master summarised his conclusions in the following terms:

"41. In my view, the plaintiff is a creditor even though there is a genuine offsetting claim against it. It had standing to bring its application and would continue to have standing. On the evidence before the Court, the plaintiff, which has the onus of proving that the defendant is insolvent, does not make a prima facie case of insolvency and therefore requires discovery of the defendant's own documents. In the circumstances before the Court, it will be inappropriate to allow discovery. The application to wind up the defendant will therefore be dismissed."

44 Lyleho argued on the appeal that the proceeding must be dismissed as an abuse of process because it was bound to fail.[8] In my opinion, this submission must be upheld. Crown Joinery has filed all the evidence which it has been able to assemble in support of the application to wind-up on the ground of insolvency. For the reasons already given, the evidence does not establish even a *prima facie* case of insolvency. There is no utility in allowing this proceeding to go forward to trial as Crown Joinery will, inevitably, fail to establish the insolvency ground. Accordingly, the winding up application should be dismissed as an abuse of process.

45 I am reinforced in that conclusion by my view that the attempt to achieve exhaustive production of the financial records of Lyleho was itself an abuse of the Court's process. That is, it was an attempt to use a rule of Court for an extraneous or improper purpose. Rule 29.10(2) is directed at production of specific documents on which an opposing party has expressly placed reliance. The rule was not intended to be used, and cannot be used, to obtain blanket production of documents in the possession of the opposing party.

46 For these reasons, the appeal from the Master should be dismissed.

Mr S J Minahan for the claimant instructed by O'Donnell Salzano Lawyers
Mr D McWilliams for the defendant instructed by Nunan & Bloom

[8] ***R v Smith*** [1995] 1 VR 10, 15 (Brooking J).