FEDERAL COURT OF AUSTRALIA

MNWA Pty Ltd v Deputy Commissioner of Taxation

[2016] FCAFC 154

Appeal from:	Application for leave to appeal: *MNWA Pty Ltd v Deputy Commissioner of Taxation (No 2)* [2015] FCA 1128; 109 ACSR 265
File numbers:	NSD 1286 of 2015 NSD 1287 of 2015
Judge:	**RARES, FARRELL AND DAVIES JJ**
Date of judgment:	16 November 2016
Catchwords:	**PRACTICE AND PROCEDURE** – appeal from orders dismissing applications to set aside statutory demands pursuant to s 459J(1)(b) of the *Corporations Act 2001* (Cth) – whether leave to appeal required **CORPORATIONS** – application to set aside statutory demand under s 459G of the *Corporations Act 2001* (Cth) – where statutory demand for payment of taxation liabilities under s 459E(5) – whether sufficient to show the issuing of the statutory demands was unconscientious, an abuse of process or contrary to statements and representations – whether amounts due and payable – whether sufficient to show that there was a genuine dispute about promise not to pursue recovery of the amounts – whether failure to deal with critical evidence as to reliability and credibility of witnesses
Legislation:	*A New Tax System (Goods and Services Tax) Act 1999* (Cth) *Corporations Act 2001* (Cth) ss 459C, 459E, 459G, 459H, 459J, 459P, 459S *Federal Court of Australia Act 1976* (Cth) s 24 *Income Tax Assessment Act 1936* (Cth) s 177 *Income Tax Assessment Act 1997* (Cth) *Supreme Court Act 1970* (NSW) *Supreme Court Act 1986* (Vic) s 17A *Taxation Administration Act 1953* (Cth) ss 14ZZM, 14ZZR, 225-105, 255-5 Sch 1
Cases cited:	*A-Pak Plastics Pty Ltd v Merhone Pty Ltd* (1995) 17 ACSR

Hopetoun Kembla Investments Pty Ltd v JPR Legal Pty Ltd (2011) 286 ALR 768

Hotncold Pty Ltd v Hawk Construction Services Pty Ltd [2006] WASCA 45

Hughes v Metropolitan Railway Co (1877) 2 App Cas 439

In the matter of Tuffrock Pty Ltd [2015] NSWSC 738

Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd (2012) 297 ALR 372

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [2014] NSWCA 262

Mansfield v Director of Public Prosecutions (WA) (2006) 226 CLR 486

Meehan v Glazier Holdings Pty Ltd (2005) 53 ACSR 229

Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] 2 VR 290

MNWA Pty Ltd v Deputy Commissioner of Taxation (No 1) [2015] FCA 1011

NT Resorts Pty Ltd v Deputy Commissioner of Taxation (1998) 153 ALR 359

O'Connor v Quinn (1911) 12 CLR 239

Owners of "Shin Kobe Maru" v Empire Shipping Inc (1994) 181 CLR 404

Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd (1996) 20 ACSR 746

Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd (No 3) (2014) 46 WAR 483

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Re Luck (2003) 203 ALR 1

Re Sarina; Ex parte Wollondilly Shire Council (1980) 32 ALR 596

Robinson Helicopter Company Incorporated v McDermott (2016) 90 ALJR 679

Saferack Pty Ltd v Marketing Heads Australia Pty Ltd (2007) 214 FLR 393

Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd (1997) 76 FCR 452

Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315

The Queen v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd (1979) 144 CLR 45

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Total Beverage Australia Pty Ltd v Corporate Link Australia Pty Ltd [2013] SASC 45

Date of hearing:	17 May 2016
Date of last submissions:	26 August 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	204
Counsel for the Appellants:	Mr M L Robertson QC with Mr C J Peadon
Solicitor for the Appellants:	Zafra Legal
Counsel for the Respondent:	Mr J Giles SC with Ms S Foda
Solicitor for the Respondent:	Review & Dispute Resolution, Australian Taxation Office

ORDERS

NSD 1286 of 2015

BETWEEN:	GUCCE HOLDINGS PTY LTD (ACN 099 191 714) Appellant
AND:	DEPUTY COMMISSIONER OF TAXATION Respondent
JUDGES:	RARES, FARRELL AND DAVIES JJ
DATE OF ORDER:	16 NOVEMBER 2016

THE COURT ORDERS THAT:

1. Leave to appeal be granted.
2. The appeal be dismissed.
3. The appellant pay the respondent's costs of and incidental to the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

NSD 1287 of 2015

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AND:	DEPUTY COMMISSIONER OF TAXATION Respondent

JUDGES:	RARES, FARRELL AND DAVIES JJ
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REASONS FOR JUDGMENT

RARES J:

1 When Allen **Caratti** left a meeting that he had had with two officers of the Australian Taxation Office (**ATO**), Ross **Burns**, Director Strategic Recovery, and his subordinate, Amon-Ra **Barton**, in Brisbane on 10 April 2014, the primary judge found that Mr Caratti personally believed that he had made a legally binding agreement with the (Deputy) **Commissioner** of Taxation: *MNWA Pty Ltd v Deputy Commissioner of Taxation (No 2)* (2015) 109 ACSR 265. Mr Caratti and, principally, Mr Burns had discussed the ongoing disputes between the ATO, Mr Caratti, his de facto spouse, Tina **Bazzo**, and entities that they separately controlled or spoke for Mr Caratti's company MNWA Pty Ltd (formerly known as **Mammoth** Nominees Pty Ltd) and Ms Bazzo's company, **Gucce** Holdings Pty Ltd (collectively **the appellants**).

2 Mr Caratti believed that he and Mr Burns, on behalf of the Commissioner, had agreed that if Mammoth and Gucce provided the Commissioner with agreed security for their disputed tax debts that were the subject of objection and review proceedings, the Commissioner would not continue with current, or threaten or commence, new enforcement proceedings or processes. Mr Caratti believed that this was a "**global settlement**" that, subject to the agreed security being provided, the Commissioner would cease taking current or future individual recovery proceedings pending the finalisation of the objection and appeal processes.

3 In one deed dated 16 May 2014 and two other deeds dated 31 July 2014, Gucce, Mammoth and other entities controlled by or related to Mr Caratti and Ms Bazzo, agreed that, in consideration of the provision of security specified in each deed, the Commissioner would forbear from taking any further recovery action in respect of separate taxation debts defined in that deed and would allow the relevant taxpayer to pursue its objection and appeal rights in respect of those debts. The security was provided on the execution of the deeds and Mr Caratti and Ms Bazzo believed that peace was at hand.

4 Then in early September 2014, the Commissioner served two statutory demands under s 459E of the *Corporations Act 2001* (Cth), the *first*, on Mammoth claiming $5,462,889.00 in respect of goods and services tax, pursuant to a notice of assessment dated 30 May 2014 and the *second*, on Gucce claiming $3,796,160.01 in respect of notices of assessment for the year

ended 30 June 2012, for Gucce's income tax liability, general interest charge (**GIC**) and shortfall interest charge.

5 On 26 September 2014, Gucce and Mammoth each applied to this Court under s 459G for an order setting aside the statutory demand addressed to it and Ms Bazzo and Mr Caratti each filed and served a detailed affidavit supporting the respective application pursuant to s 459G(3)(a). The applications relied on Mr Caratti's belief that the global settlement and the grant of securities under the three deeds precluded the Commissioner from serving the demands. Gucce and Mammoth contended that those circumstances provided "some other reason" why each demand should be set aside pursuant to s 459J(1)(b).

6 The primary judge decided that it was appropriate to take the unusual course of permitting the parties' witnesses to be cross-examined at the final hearing of the applications which he later dismissed with costs. Gucce and Mammoth filed notices of appeal from his Honour's orders dismissing their applications. The Commissioner raised in written submissions an argument that an order dismissing an application under s 459G is interlocutory and that the appellants required, but should not be granted, leave to appeal.

The issues

7 These two appeals raised three issues relating to each appellant's application under s 459G of the *Corporations Act* to set aside the statutory demands that the Commissioner served on it in early September 2014. The issues are whether:

(1) the appellants require, and if so, should be granted, leave to appeal (**the leave to appeal issue**);

(2) the primary judge applied the wrong test in determining that there was not "some other reason why the statutory demand(s) should be set aside" within the meaning of s 459J(1)(b), as asserted in ground 2 of the notices of appeal (**the correct test issue**);

(3) his Honour erred in finding that the parties had not made a global settlement that covered all present and future tax recovery actions open to the Commissioner to pursue against Gucce, Mammoth and others associated with Mr Caratti and Ms Bazzo, but rather they had made an agreement covering only the taxation liabilities for which the Commissioner already had issued assessments as at 10 April 2014, as asserted in ground 1 of the notices of appeal (**the global agreement issue**).

Background

8 At the time of the meeting of 10 April 2014, Mr Caratti and Ms Bazzo, their companies and their associates, including trusts for Mr Caratti's children (**the Caratti/Bazzo group**), were disputing or in default of payment of about $45 million that the Commissioner claimed was owing, including accruing interest (or **GIC**) and penalties. The Commissioner was litigating one of those disputes in proceedings he had brought in 2013 in the Supreme Court of Western Australia (**the Supreme Court proceedings**) to recover from Gucce about $10.5 million, including a primary taxation debt of about $7.5 million together with taxation penalties and GIC. Another dispute concerned income tax assessments for the years ended 30 June 2010, 2011, 2012 and 2013 against Mammoth for about $21.6 Million.

9 In the years before 2014, the ATO had conducted tax audits of various members of the Caratti/Bazzo group. The Commissioner progressively issued assessments or amended assessments for persons within the group and, in turn, the relevant taxpayer then began availing of objection and review processes. In addition, the Commissioner had commenced recovery proceedings against some group members for various assessed liabilities, including the Supreme Court proceedings, as well as taking other steps, such as issuing statutory demands against other group members, including in late 2012, one against **Goldtune** Investments Pty Ltd. On 25 September 2013, the ATO issued Goldtune with notices under s 225-105 of the *Taxation Administration Act 1953* (Cth) (***TAA 1953***) requiring Goldtune to provide security of $2 million in respect of its personal taxation liabilities and $3 million in respect of its liabilities as trustee of the **Byford** Trust.

10 Goldtune brought proceedings in this Court, seeking the withdrawal of those notices, that were listed for hearing before Barker J on 3 and 4 April 2014. Mr Caratti and Mr Burns had a discussion outside the Court during that hearing at which the idea emerged that the parties should discuss whether an overall arrangement could be made that would enable group members to pursue their objection and review rights while the ATO would have sufficient security to warrant it refraining from pursuing many recovery actions based on issued assessments for outstanding liabilities. They arranged to meet without lawyers at Mr Burns' office in Brisbane on 10 April 2014. Before the meeting Ms Bazzo gave Mr Caratti written authority to negotiate with the Commissioner on behalf of herself, Gucce and the other entities she controlled, however Mr Caratti did not have any such authorities from his children or their trustee(s), including the **Whitby Trust**.

The statutory scheme

11 The provisions of Pt 5.4 of the *Corporations Act* have remained substantially the same since they were first enacted in 1992 into the then *Corporations Law*. The scheme to which Pt 5.4 gives effect is thus well-known and does not require detailed repetition here. Accordingly, I can describe the relevant features briefly.

12 A person can serve a statutory demand on a company under s 459E that asserts that it owes one or more specific, quantified debts (greater than the minimum value) that is or are due and payable (s 459E(1)) and, relevantly, requires the company to pay the total claimed within 21 days after service (s 459E(2)(c)). Where, as here, the debt claimed is not a judgment debt, the demand must be accompanied by an affidavit that verifies that the debt or debts is or are due and payable. Importantly, in order to avoid doubt, but not so as to limit the generality of a reference in the Act to a debt (s 459E(6)), s 459E(5) allows a statutory demand to be made under various provisions of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***) and the *TAA 1953*.

13 Division 3 of Pt 5.4 of the Act deals with an application to set aside a statutory demand that has been made under s 459E. A company can apply under s 459G(1) to this Court or a Supreme Court of a State or Territory for an order setting aside a statutory demand, but only if the application and an affidavit supporting it is filed in the Court and served on the person who served the demand within 21 days of service of the demand on the company (s 459G(3)(a)). The grounds on which an application can be made under s 459G are set out in ss 459H and 459J.

14 There are three bases on which the Court has power to set aside a statutory demand under Div 3 of Pt 5.4 of the Act. The first basis is under s 459H. That applies where the Court is satisfied of either or both that there is a genuine dispute between the company and the respondent (**issuer** of the demand) about the existence or amount of the debt to which the claim relates or the company has an offsetting claim, being a genuine claim that it has against the issuer (s 459H(1)). In such situations, the Court must calculate (after valuing any genuinely disputed debt at nil) the substantiated amount of the demand (i.e. the total sum admitted to be due, less the total of all offsetting claims that are either admitted or about which the Court is satisfied there is a genuine dispute) (s 459H(2)). If after that calculation, the substantiated amount is less than the statutory minimum amount, the Court must order that the statutory demand be set aside (s 459H(3)).

15 In addition, the Court has a discretion to vary the quantum required to be paid to satisfy the demand, by using its power under s 459H(4) to make the sum required to satisfy the demand correspond to the substantiated amount, and it may order that the demand have effect as varied from the date of its service on the company. However, this discretion is subject to s 459J (as s 459H(6) specifies), which provides the other two bases for setting aside a demand, namely:

> 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. (emphasis added)

16 The Court must presume that the company is insolvent by force of s 459C(2), if, within three months before an application to wind up the company in insolvency is made under, relevantly s 459P, it failed to comply with a statutory demand. However, that presumption is rebuttable because the Court can grant the company leave to oppose the application based on its presumed insolvency, on a ground material to proving the company is in fact solvent, that it either raised, or could have raised, in an application under s 459G to set the demand aside (ss 459C(3), 459S).

The basis of the s 459G application

17 His Honour accepted that, although Mr Caratti and Ms Bazzo are de facto partners, each managed separately his and her business and taxation affairs. Each of them carried on property development activities through corporate vehicles.

18 In his affidavit of 26 September 2014, Mr Caratti set out the background leading to the 10 April 2014 meeting. He said that Mr Burns proposed that if he and Ms Bazzo provided security over assets in the sums that the ATO nominated, Mr Burns would give them all the time needed for them to pursue their objections and appeal rights and they could carry on their business. Mr Caratti said that the conversation proceeded:

Mr Burns then said words to the following effect:

> There are currently other income tax and GST issues under audit in relation to Mammoth but if those audits result in additional tax liabilities the Commissioner will not require you to give security over and above the security arrangement I have just outlined. That arrangement is intended to cover security that would otherwise be required for those additional amounts. I told you I would do you a good deal on these other debts. You will be a born-again taxpayer.

I said words in effect: "Mammoth does not really have any assets. It would have difficulty putting up assets as security in that amount."

Mr Burns responded with words to the effect that: "**I don't care where you get the security from. It does not have to come from Mammoth.** Another entity can pledge its assets as security for Mammoth. It does not matter to me. As far as I am concerned, the assets can be owned by your brother's uncle's sister and be a plot of land out in the middle of nowhere. Just find the assets. **If you want to do a global deal, this is what you have to do.**" (emphasis added)

19 Mr Caratti repeated that Mr Burns told him "You will be a born again taxpayer". They then negotiated on the basis of a spreadsheet, from which Mr Burns appeared to be working that Mr Caratti did not see but inferred, set out the ATO position on the various entities' liabilities.

20 At the end of the discussion, that included what security the ATO required in respect of the Whitby Trust, Mr Caratti said that he told Mr Burns "I think we can do a global deal on those terms" to which the latter replied: "Good. We will need to document the security arrangements for each of the taxpayers. I told you I would do you a good deal. **This should resolve all the current outstanding debt recovery disputes.** You will be a born again taxpayer" (emphasis added).

21 On 11 April 2014, Mr Burns provided an executive **brief** to an assistant Commissioner reporting on the detailed arrangements he had negotiated with Mr Caratti in respect of 16 taxpaying entities, eight of which owed small amounts of tax that Mr Caratti had promised would be paid by the end of the following week. The brief noted that two companies would be placed into voluntary administration, and that the Commissioner would receive $1 million under a deed of company arrangement for one of them, formerly known as Starbrake Holdings Pty Ltd, in respect of a taxation liability of about $2.25 million. The brief also recorded the securities that Mr Caratti said various entities would provide. Under the heading "Outcome of Meeting", Mr Burns wrote:

> I explained to Allen Caratti that my **overarching objective was to ensure that all tax liabilities, penalties and interest would ultimately be paid**, and I suggested

> that the mutually-acceptable arrangement that we had previously reached in respect of Goldtune should serve as a model for other indebted entities.
>
> ...
>
> Following some fairly torrid negotiations, **we reached the following agreements in respect of each indebted company in respect of which he had authority to negotiate**. (emphasis added)

22 The primary judge accepted Ms Bazzo's evidence. She said in her affidavit of 26 September 2014, under s 459G(3)(a), that after the meeting Mr Caratti phoned her on 10 April 2014 and said that he had done a global deal with the ATO that would bring to an end the garnishees, statutory demands and debt recovery actions. He told her that their companies and trusts would pay small amounts and could give security for the larger ones pending resolution of the objections and reviews. Ms Bazzo said that Mr Caratti told her that he had agreed to Gucce giving the ATO $11 million security because that was "necessary to get the deal done". Ms Bazzo remonstrated with him about that as the Supreme Court had only required Gucce to provide security for $3.5 million. However, Mr Caratti persuaded her that, at the meeting, Mr Burns had insisted that Gucce's total liability was close to $11 million and, by offering that sum as security for it, he was able to obtain more favourable terms for other entities that he and she controlled.

The three deeds

23 Mr Caratti exhibited to his 26 September 2014 affidavit copies of the following three deeds of agreement between the Commissioner (representing the Commonwealth) and:

(a) Gucce, Ms Bazzo as bare trustee for Gucce, **Mortimer** Land Company Pty Ltd as trustee for the Mortimer Land Trust and Gucce as trustee for the Gucce Holdings Trust, executed on 16 May 2014 (**the Gucce deed**);

(b) Mammoth and **Byford** River Pty Ltd, executed on 31 July 2014 (**the Mammoth deed**);

(c) **Whitby** Land Company Pty Ltd in its own right and as trustee of Whitby Trust, Josephine Bazzo as bare trustee for the Gucce Holdings Trust and Byford, executed on 31 July 2014 (**the Whitby deed**).

24 The parties negotiated through lawyers the terms of each deed, including the precise taxation liabilities that it covered and the securities that the Commissioner would receive. Each deed contained the following covenants:

3.3 The taxpayer [being Gucce in the Gucce deed, Mammoth in the Mammoth deed and Whitby in the Whitby deed] agrees:

(a) to comply with its current and future tax obligations under the *ITAA 1936*, the *ITAA 1997*, the *TAA 1953* or otherwise during the term of this deed; (this was cl 3.2 in the Whitby and Mammoth deeds)

...

5.3 Unless an Event of Default occurs, the Commissioner will not take any further action to pursue or recover any part of the Taxation Debt. For the sake of clarity, however, the Commissioner **may, acting in good-faith, employ any and all recovery options and powers to pursue any tax-related liabilities of the Taxpayer which are not part of the Taxation Debt which is the subject of this Deed.** (this was cl 5.4 in the Whitby deed)

...

13.1 To the extent permitted by law, **this Deed constitutes the entire agreement and understanding between the Parties in relation to the subject matter, and supersedes any previous deeds, agreements, arrangements, and understandings between them.** (emphasis added)

25 Each deed defined the assessments with which it dealt and related its provisions concerning objections and reviews to those specific assessments and to the sum comprehended in the deed's definition of "Taxation Debt", being a particular amount of "tax related liabilities and applicable GIC" and any GIC that accrued after a specified date.

26 The security provided pursuant to the Gucce deed consisted of first or second mortgages of real property owned by Gucce, Ms Bazzo and Mortimer to secure no less than $9,050,000 (cl 6.1(j)). That real property security was in addition to the $2,000,000 that Gucce had paid into the Supreme Court of Western Australia as security in support of its application for the stay of the Commissioner's summary judgment application based on his claim for $5,794,576.74 (recitals D-F). The claim also included GIC and penalties. The Gucce deed defined the "Taxation Debt" as $10,795,673.13 as at 6 May 2014.

27 The security provided pursuant to the Mammoth deed consisted of second mortgages of three properties, with an available equity of $3,000,000, by Ms Bazzo's company, Byford, to secure the defined "Taxation Debt" of $30,736,752.69 as at 16 June 2014. The value of the security was to be no less than $12,900,000 (which was subject to a first mortgage of $4,700,000), $5,200,000 of which was also to secure the taxation liabilities covered by the Whitby deed.

28 The security provided pursuant to the Whitby deed consisted of three third mortgages by Byford and a first mortgage by Josephine Bazzo as bare trustee of the Gucce Holdings Trust

to secure the defined "Taxation Debt" of Whitby in its personal and trustee (of the Whitby Trust) capacities of $5,826,739.31 as at 7 July 2014. The value of the security was to be no less than $6,000,000.

29 On 30 May 2014, the Commissioner issued Mammoth with a notice of assessment that recorded a total amount due of $9,878,793 for that net amount for the tax quarters between those ending on 30 September 2009 and 30 June 2012. The notice stated that "Payment for this notice is due: Refer to RBA [Running Balance Account] statement". The statutory demand served on Mammoth claiming a total debt of $5,462,889 included some of the amounts in that notice, being for the five quarters between those ending on 31 December 2009 and 31 December 2010, less a number of payments or credits.

30 On 7 July 2014, the Commissioner issued Gucce with an amended notice of assessment for the year ended 30 June 2012 that required payment of $3,760,058.01 by 31 July 2014, being the principal sum claimed in the statutory demand served on Gucce. Gucce lodged a notice of objection to that assessment on 25 September 2014 that the Commissioner had not yet determined at the time of the hearing below.

31 Thus, by 31 July 2014, when the Mammoth and Whitby deeds were executed, both the Commissioner and the Caratti/Bazzo group were aware that the assessments had been served on Gucce and Mammoth that founded the principal debts claimed in the two statutory demands.

32 In the end, even though at several times during the negotiations to finalise the deeds, Mr Caratti complained to Ms Bazzo that the ATO was being very demanding and asking for more security, she caused Gucce and her entities to provide security for their, and some of his entities, tax liabilities in the three deeds. Ms Bazzo said that she would not have agreed to Gucce and other entities that she controlled providing the security to the ATO, or incurred the associated costs of doing so, to secure liabilities of Mammoth and Whitby had she known that the Commissioner would not abide by the global settlement.

33 Like Ms Bazzo, Mr Caratti said that he would not have agreed to cause Mammoth to give security to the ATO by entering into the Mammoth deed or asked Ms Bazzo to get her entities to provide security for the ATO, had he known that the ATO would not abide by the global settlement.

34 The affidavits of Ms Bazzo and Mr Caratti concluded that the statutory demands should be set aside on the grounds that issuing them was:

> "(a) unconscionable;
>
> (b) an abuse of process;
>
> (c) contrary to statements and representations made on behalf of the [Commissioner] relating to the issuing of the statutory demand which reasonably induced [Gucce, entities controlled by Ms Bazzo or Mammoth] to change its position, and resiling from which would cause [Gucce, entities controlled by Ms Bazzo or Mammoth] detriment."

The Commissioner's initial evidence

35 On 12 and 16 June 2015, Mr Burns made separate affidavits in the two applications that did not set out any of his version of the meeting of 10 April 2014. He explained that the Caratti/Bazzo group by then had outstanding taxation debts exceeding $175 million and that he had been involved in collection activities in respect of the group since July 2010. Mr Burns annexed some notes that Mr Barton had taken of the 10 April 2014 meeting and asserted that he did not agree with Mr Caratti's characterisation that they had reached a "global settlement" because in his understanding that "**would involve one payment or** security arrangement which then covered all relevant entities". (emphasis added)

36 Leaving aside the problematic admissibility of Mr Burns' ratiocinations, as evidence, his affidavits did not annex the 11 April 2014 brief or explain how what had been done by Mr Caratti, Ms Bazzo and their entities could not reasonably support their claim that they would not have provided the cross securitisation of other group entities' liabilities had the arrangements not met Mr Burns' objective of ensuring "that all tax liabilities, penalties and interest would ultimately be paid". At the hearing, his Honour rejected, as inadmissible, a large part of Mr Burns' evidence in his June 2015 affidavits.

37 Much earlier, on 5 May 2014, Yen-Li **Harako** swore an affidavit in the Supreme Court proceedings opposing Gucce's application for an extension of time. She was an executive level ATO employee and said in her affidavit:

> On 10 April 2014 a meeting occurred between ATO employees, Ross Burns and Amon Barton, and Allen Caratti, an authorised contact for the defendant and other entities, **to discuss all the debts of the defendant and other entities**. During that meeting an agreement was reached whereby the defendant in its own right and in its capacity as trustee for The Gucce Trust would: (i) provide to the plaintiff registered

> mortgages over real estate with clear unencumbered equity of $11 million pending the resolution of proceedings under Part IVC of the *Taxation Administration* 1953 [sic]; and (ii) pay $85,000.00 per month to cover accruing general interest charge ("**Global Settlement Agreement**"). Attached hereto and marked "**YLFH-2**" is a copy of an executive brief drafted by Mr Burns and dated 11 April 2014 **outlining the outcomes arising from the meeting on 10 April 2014**, subject to deletion of information relating to third parties due to secrecy and privacy reasons. (emphasis added)

The written submissions before the hearing below and the Commissioner's further evidence

38 Before the primary judge Gucce and Mammoth based their submissions to set aside the statutory demands solely on the ground under s 459J(1)(b), namely that there was "some other reason" why they should be set aside. In essence, as articulated in their initial written submissions filed on 15 April 2015, that "other reason" was because the Commissioner was bound not to pursue other recovery action by force of the global settlement. They made those submissions before the Commissioner had filed any evidence or submissions. Gucce and Mammoth argued that they and their associates had changed their positions by providing substantial security pursuant to the three deeds that they had entered into with the Commissioner on the faith of the "global" nature of the deal negotiated on 10 April 2014 between Mr Caratti and Mr Burns. They argued that if the Commissioner were free thereafter to take new recovery actions, such as service of the two statutory demands complained of, they and their associates would have altered their positions to their detriment by encumbering assets as security. They contended that the issue and service of the two statutory demands "was in breach of the global deal", an unconscionable departure from either its terms or the Commissioner's representations and was also an abuse of process because the Commissioner had the improper purpose of seeking to coerce Gucce and Mammoth and their associates, who had disputed liabilities, into providing more security.

39 On 17 June 2015, the Commissioner filed substantially identical written submissions in each application and relied on the affidavits of Mr Burns of 12 and 16 June 2015 and Mr Barton of 16 and 17 June 2015. The Commissioner argued that the "agreement between the parties is not the 10 April 2014 agreement but rather the Deed of Agreement" and that all of the appellants' complaints related to the 10 April 2014 "agreement" rather than the existing three deeds.

40 On 21 July 2015, Gucce and Mammoth filed their submissions in reply. They criticised the affidavit evidence of Mr Burns as doing little more than attaching Mr Barton's notes of the

10 April 2014 meeting, that Mr Burns asserted, reflected his recollection of the meeting, without his giving his own recollection of any conversation on that occasion, including any different version he recollected as against any part of the conversation set out at length, in Mr Caratti's affidavits of 26 September 2014. Mr Burns merely had asserted that he disagreed with Mr Caratti's "characterisation of a number of his interactions with me and his description of the 10 April 2014 negotiations and characterisation of a global deal as being reached then". Moreover, Mr Burns only denied that he had made one statement (allegedly made in mid-August 2014) as deposed to by Mr Caratti in paragraph 82 of his affidavit.

41 The reply submissions also noted that the Commissioner had led no evidence from Mr Barton about the 10 April 2014 meeting at all. Those submissions also argued that the terms of the three deeds between the parties were capable of being understood consistently with their having been provided as part of the global settlement alleged.

The decision to permit cross-examination

42 On 28 August 2015, the appellants filed an interlocutory application seeking an order that there be no cross-examination on the affidavits at the hearing set down for 10 and 11 September 2015. The primary judge decided that application on the papers and, after considering the parties' written submissions, his associate informed the parties on 4 September 2015 that he had granted leave for the deponents to be cross-examined, subject to the Court exercising its usual control and supervision of any cross-examination and would include his reasons for doing so in his Honour's final reasons for judgment.

43 In his final reasons, his Honour explained why he had granted leave to cross-examine. He referred to the well-established practice that, in general, cross-examination was not permitted on applications to set aside a statutory demand under s 459G, but noted that there were occasions when the Court could make an exception in cases where there was a genuine dispute concerning the claimed debt. He noted that the appellants' case was based not on s 459H, but on s 459J(1)(b) and that they had the onus of proving that there was "some other reason" why the two demands should be set aside. He concluded:

> It was evident from the affidavit evidence filed on behalf of all the parties in the proceedings that there was a significant dispute concerning the existence of any "global deal" and, **if it existed, what were its terms and conditions**. In particular, the Deputy Commissioner disputed Mr Caratti's description of the arrangements which were negotiated by the parties on 10 April 2014 as a "global settlement". Equally significantly, it was evident that the parties were in dispute as to the terms of various alleged representations made by Mr Burns to Mr Caratti. **It seemed unlikely**

that these disputes were capable of being resolved simply by reference to the terms of the Deeds which were subsequently executed. (emphasis added)

The hearing of the s 459G applications

44 When senior counsel opened the appellants' case to his Honour for about 2 hours on 10 September 2015, he began by handing up a written summary of case. That raised what his Honour regarded as four new matters, namely, *first*, what was the test under s 459J(1) and who carried the onus of proof, *secondly*, whether Mr Burns had made a unilateral mistake in his understanding of the agreement or agreements reached on 10 April 2014, *thirdly*, whether the parties had reached a "global security agreement" or, as was now alleged for the first time a series of "deals", and *fourthly*, whether particular provisions of the taxation legislation supported the appellants' new allegation in their submissions of 10 September 2015, that on 10 April 2014 Gucce's income tax and Mammoth's GST liabilities, the subject of the statutory demands, already existed. At the conclusion of that opening, his Honour granted the Commissioner an adjournment to the next day to meet the newly raised issues: *MNWA Pty Ltd v Deputy Commissioner of Taxation (No 1)* [2015] FCA 1011.

45 At the commencement of the hearing the next morning, the Commissioner provided the appellants and his Honour with two substantive affidavits made on 11 September 2015 by Mr Burns and Mr Barton. Each new affidavit dealt in detail, in more admissible form than Mr Burns' earlier affidavits, with what had been said in the 10 April 2014 meeting. His Honour then adjourned for 2 hours to enable senior counsel for the appellants to absorb the new material. On the resumption, Mr Caratti, Ms Bazzo (briefly) and Mr Burns gave evidence and their cross-examinations continued over the rest of the day. On 19 October 2015, Mr Barton gave evidence and then the parties made final oral submissions to his Honour.

46 His Honour found Mr Burns to be an impressive witness and to be more reliable and objective than Mr Caratti. He preferred Mr Burns' evidence to Mr Caratti's where they were in dispute. The primary judge found that Mr Burns' evidence was substantially supported by Mr Barton's and that both were truthful.

47 In the course of a long answer in cross-examination Mr Burns said that Mr Caratti's "main concern when I met him outside the Federal Court in Perth ... was the garnishee activity and the windup activity. **So his concern was to bring that to an end**". He went on to say that "I can't go pursuing the liabilities that are in yet to be completed audits". He also gave this

evidence that is very similar to the account of the conversation on 10 April 2014 given by Mr Caratti (see [18] above):

> So he was concerned to stop recovery action against income tax liabilities that hadn't been assessed? --- He may well have been. I imagine he would – he – I mean, we've had these sorts of discussions since 10 April as well. He – you know, including one this morning, in fact. **But he's certainly desirous of somehow or other bringing all of this to an end, and my response has always been, "We can do this if you provide security in respect of the various liabilities, then I'm happy to not pursue recovery action pending resolution of the disputes you've got"**, and I've said to him many times, "If you want to go all the way to the High Court, I will wait until we've got a final decision from the court to decide how much is actually owed and then you can pay." **My concern has been to make sure that, once it is finally determined, we're going to be able to recover it.** (emphasis added)

48 The primary judge accepted Mr Burns' evidence that, as he and Mr Caratti went through the topics that Mr Burns had listed in the ATO spreadsheet of liabilities (to which Mr Caratti did not have access) at the 10 April 2014 meeting:

- Mr Burns told Mr Caratti that they were dealing only with established debts and that they could deal with future liabilities as they became known and that Mr Caratti had responded: "OK. I agree";
- neither Mr Caratti nor he (Mr Burns) used the word "global" and that he (Mr Burns) "was 'absolutely certain' that the negotiations and heads of agreement reached at the meeting were only in respect of established debts which were reflected on the spreadsheet";
- at the end of the meeting, Mr Burns told Mr Caratti that to avoid confusion "there are no agreements until each respective deed is executed";
- Mr Burns accepted, as the 11 April 2014 brief noted, that Mr Caratti had a concern about liabilities that were yet to be assessed, but Mr Burns' focus was on the existing debts;
- Mr Burns did use the expression "born again taxpayer" once during the meeting. (The primary judge then accepted Mr Burns' assertion of his own understanding of what he meant by that expression, rather than making a finding of what a reasonable person in the position of the parties at the meeting, when the expression was used, would have understood it to have conveyed: cf *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 177-178 [35]-[36], 179-180 [40]-[41] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Ermogenous v Greek Orthodox*

Community (2002) 209 CLR 95 at 105-106 [24]-[25] per Gaudron, McHugh, Callinan and Hayne JJ).

49 His Honour accepted Mr Barton's evidence that, during the meeting:

- he had no recollection of hearing, in cross-examination, Mr Burns use the word "established" when speaking about taxation liabilities and that he and Mr Burns had not discussed that word in the context of the proceeding;
- the word "global" had not been used and that, had it been, he would have recalled its use;
- Mr Burns had said that there were no agreements until the deeds were executed.

The primary judge's reasons

50 The primary judge commenced his reasons with an account of each witness' evidence and made findings about that witness' evidence as he progressed through what each had said in affidavits and in the witness box.

51 As noted above, his Honour found that Mr Caratti was a truthful and responsive witness who had a genuine subjective, but erroneous, belief that he and Mr Burns had entered into a binding legal agreement on 10 April 2014. However, the primary judge preferred the contrary evidence of Mr Burns and Mr Barton.

52 His Honour said that Mr Burns' 11 September 2015 affidavit was in response to the new case raised at the hearing on 10 September 2015. In my opinion, Mr Burns' affidavits of 12 and 16 June 2015 were largely in inadmissible form that gave no account contradictory of Mr Caratti's version of what was said at the meeting on 10 April 2014. All that they did was to convey Mr Burns' assertion of disagreement with the equally inadmissible statement at the conclusion of Mr Caratti's and Ms Bazzo's affidavits set out at [34] above that was in the form of a legal submission. Mr Burns' June affidavits were not in a form appropriate for a substantive hearing in which an order for cross-examination could have been useful. However, as his Honour had perceived, when deciding to allow cross-examination, those affidavits demonstrated that there was a substantive dispute between the parties.

53 While Mr Burns' affidavit of 11 September 2015 doubtless also addressed the new case, it provided a substantive new case itself in opposition to Mr Caratti's affidavit evidence that the Commissioner had left unanswered by evidence in admissible form for nearly a year.

54 His Honour also said that Mr Barton's 11 September 2015 affidavit related primarily to the new case. However, in it, Mr Barton had set out for the first time his evidence concerning the 10 April 2014 meeting and verified his file note of it, that had previously only been annexed to Mr Burns' June affidavits.

55 The primary judge construed s 459J(1) as requiring that there must be "sound or positive ground or good reason" to set aside a statutory demand, referring to what Santow JA, with whom Tobias JA and Young CJ in Eq agreed, had said in *Meehan v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229 at 234 [35]. His Honour accepted the Commissioner's submission that the correct test on which an order under s 459J(1) could be made was whether a respondent's action in issuing a statutory demand:

> subverted the statutory scheme provided for in s 459E in Pt 5.4 ... such that there is a positive ground for exercising the power to set aside the statutory demands that is consistent with the purposes of that scheme.

56 His Honour may have incorporated the concept of subverting the statutory scheme from what Barrett J had said in *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* (2007) 214 FLR 393 at 401 [33], namely that s 459J(1)(b) "applies whenever there is a need to counter some attempted subversion of the statutory scheme".

57 The primary judge found that Gucce and Mammoth had not proved that the parties had entered into a contract that was a legally enforceable global settlement. He said that in applying an objective test as to the parties' intention to enter into a contract, regard could be had to surrounding circumstances, including conversations and correspondence that occurred before and after the meeting of 10 April 2014. His Honour concluded that the relevant evidence, viewed objectively, pointed to the parties intending to postpone the creation of contractual relations until the execution of formal deeds. That was because, *first*, it was highly improbable that Mr Burns would have committed the ATO to a binding position in circumstances where it was not aware of the quantum of any potential additional taxation liabilities not included in the spreadsheet that he was using at the meeting, and so he was not in a position to know whether or not the security that Mr Caratti was offering would be sufficient to cover those then unknown potential liabilities. *Secondly*, the primary judge preferred Mr Burns' and Mr Barton's evidence of what was discussed in the 10 April 2014 meeting, particularly as Mr Barton corroborated Mr Burns' evidence that Mr Burns had told Mr Caratti that "there are no agreements until each respective deed is executed".

58 *Thirdly*, his Honour found it telling that both Mr Caratti's letter of 11 April 2014, and Gucce's solicitors' letter of 29 April 2014 concerning a draft of the Gucce deed, did not support Mr Caratti's belief in there being global settlement. His Honour noted that the solicitors' letter did not comment on the proposed entire agreement clause or another clause that contemplated that the Commissioner could exercise his power to pursue in good faith all recovery options and powers regarding Gucce's tax-related liabilities that did not fall within the draft deed's definition of "taxation debt".

59 *Fourthly*, his Honour considered that the references to an "agreement" in various documents produced by the ATO, including in the 11 April 2014 brief and Ms Harako's affidavit, were to an in principle, but non-binding, agreement that would be the basis for formal documents that would only become legally binding when finalised and executed. *Fifthly*, his Honour did not consider that Mr Burns' instruction to Mr Barton, not to pursue recovery action while the three deeds were being finalised, indicated a recognition that a binding agreement had been reached at the 10 April 2014 meeting. The primary judge added that if a binding agreement had been reached at the 10 April 2014 meeting, it related only to the then known taxation liabilities on the spreadsheet.

60 Next, his Honour rejected Gucce's and Mammoth's argument that the issue of the statutory demands was an unconscionable departure from the terms of the global deal that the Commissioner would not take further debt recovery action against them. He noted that each deed contained an express power for the Commissioner to act in good faith, using any and all recovery options, to recover any tax related liabilities of Gucce or Mammoth that were not the subject of the respective deed. The primary judge found that the taxation liabilities, the subject of each of the two statutory demands, were not provided for in any of the executed deeds.

61 His Honour also rejected the appellants' argument that the issue of the statutory demands was an abuse of process because the Commissioner had the improper purpose of coercing security to be pledged on behalf of other entities with disputed liabilities. His Honour found that, *first*, there was no evidence that Gucce had lodged any objection to its income tax assessment for the year ended 30 June 2012 issued on 7 July 2014 that had become due on 31 July 2014. That assessment was the foundation of the statutory demand served on Gucce. *Secondly*, he found that there was no evidence that Mammoth had lodged any objection to its assessment for GST liabilities for the tax periods between 1 October 2009 and 31 December 2010 that

issued on 30 May 2014. *Thirdly*, he found that in his affidavits verifying each demand, Mr Barton had said, and was not challenged in cross-examination, that he believed that there was no genuine dispute about the existence or amount of any of the debts that it claimed.

62 His Honour found that there was no probative evidence to suggest that the Commissioner had issued the two demands for any purpose (including to coerce other entities to pledge security in respect of their disputed liabilities) other than to set in train a winding up of each of Gucce and Mammoth in respect of the unpaid taxation debts claimed by each respective demand.

63 The primary judge rejected the appellants' argument that a company seeking to establish that there is some other reason to set aside a statutory demand under s 459J(1)(b) had only to show that there was a genuine dispute of the kind sufficient to satisfy the test under s 459H, as Finkelstein J had suggested in *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359 at 366-367 in observations that Sulan J followed in *Total Beverage Australia Pty Ltd v Corporate Link Australia Pty Ltd* [2013] SASC 45 at [30]. He was not satisfied that Gucce and Mammoth had established a plausible basis for s 459J(1)(b) to be applied. He distinguished what Finkelstein J and Sulan J had said on the basis that each decision was directed to a situation where the company contended that the demand should be set aside under s 459J(1)(b) because the debt was not due and payable.

64 The primary judge said that where the company alleged that the power to issue a statutory demand had been abused or used for some collateral purpose, it had to prove that allegation on the balance of probabilities in order to obtain relief under s 459J(1)(b), by analogy with what Finkelstein J had said in *NT Resorts* 153 ALR at 364 about a case where a company alleged that there was a defect in the demand under s 459J(1)(a). In such a case Finkelstein J had said that the company had to establish that there was, in fact, a defect, as opposed to an arguable case that there was.

65 Accordingly, his Honour dismissed both applications.

The leave to appeal issue – Gucce's and Mammoth's submissions

66 The Commissioner contended that both appeals were incompetent because his Honour's orders dismissing each s 459G application were interlocutory. He opposed the grant of leave to appeal.

67 Gucce and Mammoth argued that the decision of the primary judge was final and not interlocutory and that they did not require leave to appeal. They noted that there is a division

of appellate authorities on this issue. They contended that an order determining an application under s 459G finally disposed of the subject matter of that litigation, as had been held by appellate courts in New South Wales (*A-Pak Plastics Pty Ltd v Merhone Pty Ltd* (1995) 17 ACSR 176) and Western Australia (*Asian Century Holdings Inc v Fleuris Pty Ltd* [2000] WASCA 59). They submitted that the decision in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2007) 63 ACSR 300 could be distinguished because, there, the Victorian Court of Appeal had construed the expression "a judgment or order in an interlocutory application" in s 17A(4)(b) of the *Supreme Court Act 1986* (Vic) as meaning "an interlocutory judgment or order" (as Nettle JA had explained at 331-332 [109]), but that that expression was not the same as that in the text of s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). They submitted that their status would change if the presumption of insolvency under s 459C were to apply to them if they failed to comply with the statutory demands as a result of the dismissal of their applications to set them aside under s 459G.

The leave to appeal issue – consideration

68 In *Aussie Vic Plant* 63 ACSR 300, Maxwell P, Chenov, Nettle, Ashley and Neave JJA held that an order dismissing an application under s 459G was interlocutory and not final, and so the unsuccessful company needed leave to appeal from such an order (63 ACSR at 303 [5] per Maxwell P and Neave JA, 321 [81] per Chernov JA, 331 [108] per Nettle JA and 336 [125] per Ashley JA). They refused to follow *A-Pak Plastics* 17 ACSR at 180-181 per Sheller JA with whom Kirby P and Priestley JA agreed, and *Asian Century* [2000] WASCA 59 per Kennedy J at [7], with whom Ipp J agreed at [37], and per Heenan J at [55]-[57]. As Heenan J noted in *Asian Century* [2000] WASCA 59 at [55], the position in New South Wales changed soon after the decision in *A-Pak Plastics* 17 ACSR 176 because of a subsequent amendment to the *Supreme Court Act 1970* (NSW) that made it necessary to obtain leave to appeal from a decision in an application under s 459G. The issue of whether leave to appeal was necessary did not arise in the High Court appeal in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314: see at 321-322 [7] per Gleeson CJ, Hayne, Crennan and Kiefel JJ.

69 Subsequently, the Full Court of the Supreme Court of South Australia followed *Aussie Vic* 63 ACSR 300 in holding that leave to appeal from an order deciding application under s 459G is required: *Hardel Pty Ltd v Burrell & Family Pty Ltd* (2009) 103 SASR 408 at 422-423 [39]-[43] per Kourakis J with whom Nyland and David JJ agreed: see too *Pravenkav Group Pty*

Ltd v Diploma Construction (WA) Pty Ltd (No 3) (2014) 46 WAR 483 at 508 [100] where Newnes JA, Murphy JA and Edelman J referred to this issue, but did not decide it.

70 In my opinion, this Court should follow the appellate decisions in *Aussie Vic* 63 ACSR 300 and *Hardel* 103 SASR 408. I am not persuaded that they are plainly wrong: cf *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 152 [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

71 Of course, each appellate court is governed by its constituting statute in respect of its jurisdiction to hear an appeal by right or by leave to appeal from an interlocutory order, as is the case under s 24(1A) of the *Federal Court of Australia Act*. The determination of what is an interlocutory order in any particular context can provoke radical divergences of judicial opinion even though the test is well settled. In *Re Luck* (2003) 203 ALR 1 at 2 [4] McHugh ACJ, Gummow and Heydon JJ said:

> That question is answered by determining whether the *legal* effect of the judgment is final or not *(Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246 at 248, 256*)*. If the *legal effect* of the judgment is final, it is a final order; otherwise, it is an interlocutory order. (their Honours' emphasis)

72 I do not consider that the difference in wording of s 17A(4)(b) of the *Supreme Court Act 1986* (Vic) from s 24(1A) of the *Federal Court of Australia Act* justifies a different characterisation of the legal effect of an order that determines an application under s 459G from the appellate decisions in *Aussie Vic* 63 ACSR 300 or *Hardel* 103 SASR 408.

73 An interlocutory order is the product of a determination of an interlocutory application. In essence, an application under s 459G is interlocutory because it does not determine rights nor does it create a status. As Gleeson CJ, Hayne, Crennan and Kiefel JJ noted in *Aussie Vic* 232 CLR at 327 [26], a failure to comply with a statutory demand does:

> ... no more than create a presumption about the ultimate issue that arises in an application to wind up in insolvency: is the company insolvent? Denying the power of a Court to extend time for compliance with a statutory demand after the time has already expired **determines no right or liability of the company or of the party that has made the demand**. (emphasis added)

Their Honours had already noted that s 459C(3) permitted the presumption of insolvency, created by a failure to comply with a statutory demand by s 459C(2), to be rebutted on a later

application to wind up the company in insolvency under s 459P based on that failure. This supports the view that a decision under s 459G, that a demand should or should not be set aside, just as a failure to comply with such a demand, does not determine the rights of the parties because it does not determine whether or not the debt exists.

74 The way in which s 459H operates focuses attention on the issue of whether a genuine dispute exists between the company and the issuer about the existence or amount of the debt to which the demand relates. That section recognises that some part of a sum demanded may be the subject of a genuine dispute, while another part is not. Thus, in such a situation, s 459H requires the Court to calculate a substantiated amount for which the demand may remain valid by applying the formula in s 459H(2).

75 The definitions in s 459H(5) throw light on the significance in the statutory scheme that the establishment of the objective fact of a genuine dispute between the company and the insurer will have as to, *first*, the existence of the debt claimed in demand and, *secondly*, the amount of that debt as affected by any offsetting claim, as defined. If there is a genuine dispute as to the existence of the debt, then par (a) of the definition of "admitted amount" in s 459H(5) requires that the Court value the admitted amount at "nil" and, it follows, that the Court must then set the demand aside by force of s 459H(3). The Court's calculation of the admitted amount in this scenario under s 459H is not discretionary.

76 The issue that s 459H requires the Court to determine is whether the asserted dispute as to the existence of the debt is genuine. However, once the Court has found that a genuine dispute exists, s 459H(3) requires that it must set the demand aside. That is because of the consequence of the definition in par (a) of "admitted amount" in s 459H(5), that the amount of a debt in respect of which a genuine dispute exists is nil. Ordinarily, such a finding will occur in a summary, not substantive, proceeding. Crucially, the finding does not decide the actual state of accounts between the contending parties, rather the finding is only that there is a "genuine dispute" about that issue.

77 The scheme of the statutory demand procedure in Divs 2 and 3 of Pt 5.4 of the Act envisages that, similarly to an application for summary judgment, it is inapt to determine a substantive dispute. It should not be used by a person claiming to be a creditor where a genuine dispute exists as to the existence or enforceability of a debt as a substitute for judicial proceedings for the ascertainment and final determination of rights.

78 A valid statutory demand with which a company does not comply, is a rebuttable evidentiary foundation for the person who served the demand to initiate a curial proceeding to obtain a court order that the company be wound up in insolvency. If a statutory demand is based on a judgment debt that remains unpaid, s 459H recognises that the company can raise a genuine dispute about the existence or amount of that debt. When a court resolves that issue under s 459H, it is not deciding an issue about whether the original court order (or other foundation for the issue of the demand, such as that under s 459E(5)) created a valid and binding judgment debt.

79 Rather, in such a proceeding the Court is deciding whether, and to what extent, there is a genuine dispute that the company owes the issuer the amount claimed in the statutory demand. For example, the company may have obtained reasons for judgment, but no order, on an appeal against the judgment debt, in which the appellate court has said that it will allow the appeal and set aside the order establishing the judgment debt, but will require submissions as to the calculation of the amount owing, or will order that the issue be remitted for further findings, or will make other orders affecting the rights and liabilities of the company and the issuer of the demand.

80 Similarly, a dispute can exist as to whether, for example, a taxpayer can allege that it made an arrangement with the Commissioner to pay the taxation debt by instalments, or defer its payment until after the taxpayer has pursued objection proceedings. If the Court is satisfied that such an arrangement exists or, in a case like the present, that there is a genuine dispute that it does, I am of opinion that, consistently with the scheme of Pt 5.4 of the Act, there is "some other reason", for the purposes of s 459J(1)(b), to enliven the Court's discretion to set aside a statutory demand, including one based on a liability referred to in s 459E(5).

81 A court hearing a dispute as to the genuineness of any dispute about the existence or amount of the judgment debt to which a statutory demand relates cannot perform the, as yet incomplete, work of the appellate court before which the appeal is pending from the judgment on which the statutory demand is based, but the former court can still make an order about the enforceability of the statutory demand. That is because the justiciable issue in an application under s 459G is whether the demand should be set aside or varied in amount on the bases set out in ss 459H and 459J. That issue is distinct from whether a debt exists as a matter of fact and does not finally determine any rights. Moreover, the Court can grant leave to a company, under s 459S, to oppose an application for its winding up based on its

failure to comply with a statutory demand on a ground on which it had, or could have had, in an application by it to set the demand aside, only if the Court gives it leave to do so.

82 The only fact that a decision under Div 3 of Pt 5.4 of the Act establishes is that the issuer either has, or does not have, a statutory demand on which the issuer can bring a winding up application if the company fails to comply with it. In other words, the decision simply determines the issuer's entitlement to make an application under s 459Q to wind up the company based on a failure to comply with that statutory demand.

83 The Court has a discretion under s 459J(1) to order that a statutory demand be set aside where it is satisfied that it should be set aside either because a defect in the demand would otherwise cause substantial injustice or, there is "some other reason why" it should be.

84 The issues under ss 459H and 459J are whether there is a genuine dispute about the existence of the debt or an offsetting claim or its amount, the presence of a defect in the demand that will cause substantial injustice if it is not set aside or whether there is "some other reason" to set the demand aside. In an application under s 459G, proof, or a failure to prove, that a genuine dispute exists about a subject-matter cannot, and does not resolve the underlying dispute, if any, the existence of which is in issue on the application.

85 Thus, the legal effect of an order under s 459G is that a document, the statutory demand, can or cannot be available as evidence creating a rebuttable presumption of insolvency available for use in a subsequent proceeding if the company does not comply with it. Moreover, if the Court orders that a demand be set aside in an application under s 459G, that does not have the legal effect of preventing the person who served the demand from serving another demand on the company, any more than an order dismissing an appeal from an order refusing to set aside a default judgment has the *legal* effect (as opposed to a practical effect) of preventing a subsequent application to set aside the default judgment: *Carr v Finance Corporation of Australia [No 1]* (1981) 147 CLR 246 at 248 per Gibbs CJ, 256 per Mason J, 258 per Murphy J; *Re Luck* 203 ALR at 2 [4].

86 Hayne J explained the role of a statutory demand in *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290 at 294-295 in a passage that French, Kiefel and Sundberg JJ applied in *Equuscorp Pty Ltd v Perpetual Trustees WA Ltd* (1997) 80 FCR 296 at 301G-302E:

> First, any application to set aside a statutory demand must be made very quickly: it must be made within 21 days. Secondly, the statute contemplates a summary procedure, **the only outcome of which will be an order affecting the statutory demand, not any order or judgment declaring a debt to be owing or not to be owing or ordering payment of any money sum. Thirdly, the only significance that the statutory demand has is that if there is failure to comply with it then the company is deemed to be insolvent**. Thus the demand is **no more than a precursor** to an application for winding-up in insolvency. Fourthly, an application to wind up in insolvency must be determined within six months (unless the court is satisfied that special circumstances justify an extension of that time) (s 459R). Fifthly, on the hearing of the application to wind up, the company may not oppose the application on grounds that it might have taken in any application to set aside the demand, unless those grounds are material to proving that the company is solvent.
>
> These matters, taken in combination, suggest that at least in most cases, **it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute**. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute. (emphasis added)

87 A rebuttable presumption that a company is insolvent, created by its failure to comply with a statutory demand, does not determine, as a fact, that it is or is not solvent. A solvent corporate debtor can choose not to comply with such a demand, as much as a solvent individual can choose not to comply with a bankruptcy notice: *Re Sarina; Ex parte Wollondilly Shire Council* (1980) 32 ALR 596 at 599-600 per Bowen CJ, Sweeney and Lockhart JJ.

88 For these reasons I am of opinion that his Honour's orders dismissing the s 459G applications were interlocutory and that Gucce and Mammoth require leave to appeal. Given the importance of the issues raised as to the scope of s 459J(1)(b) and the onus of proof that applies to it, that I discuss below, leave to appeal should be granted and they should have leave to rely on the notices of appeal already filed.

The correct test issue – the Commissioner's submissions

89 The Commissioner argued that Gucce and Mammoth had not put before the primary judge a case that the debts the subject of the statutory demands were not due and payable as they now contended on these appeals. Rather, he argued that the case they ran below was that the Commissioner had agreed or promised not to take recovery proceedings for, or to issue statutory demands, or to seek immediate recovery of the debts. He submitted that the appellants had not challenged Mr Barton's affidavit evidence that he believed that there was no dispute about the existence or amount of the debts claimed in the demands. The

Commissioner asserted that this meant that the appellants had not challenged below that those debts were due and payable. He contended that there was a difference between a debt being due and payable and the creditor electing not to exercise rights to recover it. He argued that the issue whether the debts were due and payable had not been raised in the s 459G applications or Mr Caratti's and Ms Bazzo's affidavits in support of them.

90 The Commissioner argued that, in any event, the primary judge's finding of fact, that there had been no agreement as alleged, negated the premises of the appellants' ground of appeal so that it could not arise. He contended that the primary judge had been correct to hold that the test to satisfy the existence of a genuine dispute for the purposes of s 459H was distinct from that to satisfy s 459J, which required proof of the defect or "some other reason" on the balance of probabilities. He submitted that Finkelstein J's reasons in *NT Resorts* 153 ALR 359 were either distinguishable or wrong in applying the genuine dispute criterion as the test for establishing "some other reason" under s 459J(1)(b). Finally, the Commissioner argued that the primary judge's decision to permit cross-examination was one within his discretion.

The correct test issue – consideration

91 The affidavit supporting an application under s 459G(1) to set aside a statutory demand, that s 459G(3)(a) requires, is an essential condition of a company's invocation of a right to apply to set aside the demand: *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 276-277 per Gummow J with whom Brennan CJ, Dawson, Gaudron and McHugh JJ agreed. As the High Court held in that case, it is also an essential condition of the jurisdiction to set aside a statutory demand that an application under s 459G and an affidavit in support of it be filed in the Court and served on the issuer within 21 days after service of the demand on the company. Gummow J set out some passages from the Explanatory Memorandum that the Minister published when proposing the 1992 Bill containing the amendments that introduced the (identical) analogue of Pt 5.4 into the then *Corporations Law*, including [688] which read:

> The provisions in relation to the setting aside of a statutory demand are intended to be a complete code for the resolution of disputes involving statutory demands, and **to do so on the basis of the commercial justice of the matter, rather than on the basis of technical deficiencies**. In particular it is intended to remove the present difficulties which are experienced where difficulties in estimating the extent of the debt may lead to an invalidating of the statutory demand on the basis of a minor overstatement of the amount due ... (emphasis added)

92 Gummow J said that the provisions of Pt 5.4 (184 CLR at 270):

> ... constitute **a legislative scheme for the quick resolution** of the issue of solvency and the determination of whether the company should be wound up **without the interposition of disputes about debts, unless they are raised properly**. (emphasis added)

93 In order to comply with s 459G(3)(a), an affidavit "supporting the application" to set aside the demand must be filed and served within 21 days of service of the statutory demand. Many cases have considered the meaning of the expression "an affidavit supporting the application" in s 459G(3)(a). Sundberg J gave an early formation saying that it "must, as a minimum, contain a statement of the material facts on which the applicant intends to rely to show a genuine dispute – it might read more like a pleading than a story": *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452 at 459G. In *Energy Equity Corporation Ltd v Sinedie Pty Ltd* (2001) 166 FLR 179 at 182-183 [17]-[18] and 185 [29], Wallwork J, with whom Steytler J and Olsson AUJ agreed, in the Full Court of the Supreme Court of Western Australia, applied the approach of Sundberg J and held that an affidavit could not raise a new ground on which to seek that a statutory demand be set aside, if it were filed outside the 21 day period specified in s 459G: *Sinedie* 166 FLR at 185 [29]: *Graywinter* 70 FCR at 460C-E.

94 However, although the initial affidavit must "support" the application, the company can supplement that material later. The initial affidavit does not have to deploy the, or all of the, evidence, or be in admissible form and the company can file supplementary evidence so that on the hearing it will be able to rely on admissible evidence, including evidence to quantify an offsetting claim: see too *Pravenkav* 46 WAR 483 at 494-495 [43], 497-500 [52]-[64] per Newnes JA, Murphy JA and Edelman J.

95 The precise nature of the application under s 459G will determine whether the initial affidavit(s) filed and served in accordance with s 459G(3)(a) "support" it: *Financial Solutions Australasia Pty Ltd v Predella Pty Ltd* (2002) 26 WAR 306 at 316-317 [34] per Parker J with whom Anderson and Scott JJ agreed; *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* (2012) 297 ALR 372 at 377 [29]-[32] per Young JA with whom Hoeben JA and Ward J agreed. They approved what Ward J said in *Hopetoun Kembla Investments Pty Ltd v JPR Legal Pty Ltd* (2011) 286 ALR 768 at 776 [36] namely:

> There need not be an explicit articulation in the supporting affidavit of the ground(s) on which the application to set aside is to be raised, **provided the ground is raised expressly or by necessary or a reasonably available inference**. (emphasis added)

96 In *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601 at 613 [54]-[55], Beazley P, AJ Meagher and Gleeson JJA concluded, after a careful examination of the authorities, that the procedure for challenging a statutory demand was intended to be an essentially summary one. They said that for the purposes of s 459H (at [55]):

> Thus, even though the courts may allow evidence to be supplemented beyond what is raised in the initial affidavit containing the grounds upon which the application is made, **care must be taken not to elevate the requirements of the evidence necessary to establish that there is a basis to set aside a statutory demand beyond what we have stated it to be**. For example, it would set too high a standard to require that the evidence "prove" the facts that raise the ground in the initial affidavit. **Whether in the initial affidavit, or by a combination of that evidence and other evidence filed or adduced at the hearing, a party seeking to set aside a statutory demand must establish that there was a plausible contention requiring investigation**: see the discussion at [30]–[31] above. (emphasis added)

97 They said that it was settled law that, in order to establish the existence of a genuine dispute for the purposes of s 459H, the Court had to be satisfied that there is a "serious question to be tried" or "an issue deserving of a hearing" or, which was much the same, "involved a plausible contention requiring investigation", (*Britten-Norman* 85 NSWLR at 608 [30]-[31], 609 [36]). They also observed that, whether proceedings under s 459G are characterised as final or interlocutory, "the issue in such proceedings is not whether a debt to which the statutory demand relates is owed" (85 NSWLR at 609 [38]) and, so, evidence that may be inadmissible as hearsay or opinion to establish a fact relevant to indebtedness would not necessarily be inadmissible to establish a fact relevant to the existence of a genuine dispute about indebtedness. They referred, without expressing any disagreement, to Barrett J having used the same reasoning in *Saferack* 214 FLR 393 at 399-400 [25], a case under s 459J(1)(b), as Sundberg J had used in *Graywinter* 70 FCR 452. Barrett J had held that the affidavit under s 459G(3)(a) must reveal a genuine dispute for the purposes of s 459J(1)(b) and that it had to contain a statement of the material facts on which the company intends to rely to show such a dispute (*Britten-Norman* 85 NSWLR at 611 [44]-[45]).

98 A "genuine dispute" must, *first*, be *bona fide* and truly exist in fact and, *secondly*, the grounds for asserting its existence must be real and not spurious, hypothetical, illusory or

misconceived: *Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd* (1997) 76 FCR 452 at 464F; applied in *Equuscorp* 80 FCR at 301F-G.

99 Moreover, s 459J(1)(a) and (2) operate together as a code for dealing with defects in a statutory demand. Those provisions authorise the Court to set a demand aside only if substantial injustice will be caused because of a defect in it: *Equuscorp* 80 FCR at 299G-300A per French, Kiefel and Sundberg JJ applying what Northrop, Merkel and Goldberg JJ had held in *Spencer* 76 FCR at 460G-461B.

100 Importantly, French, Kiefel and Sundberg JJ explained that the "some other reason" ground in s 459J(1)(b) was not qualified by s 459J(1)(a) or (2): *Equuscorp* 80 FCR at 299G-300A. Indeed, Northrop, Merkel and Goldberg JJ had held that s 459J(1)(a) and (b) were mutually exclusive (*Spencer* 76 FCR at 460D-E). French, Kiefel and Sundberg JJ said that the discretion to set aside the demand for "some other reason" could be enlivened by the absence of good faith or some abuse of process on the part of the creditor: *Equuscorp* 80 FCR at 300F) see too *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302 at 317G-318A per Black CJ, Einfeld and Sackville JJ who also suggested there that the power under s 459J(1)(b) might be enlivened if the issuer unreasonably refused the company's offer to meet the debt or, possibly, referring to the *Re Norper Investments Pty Ltd* (1977) 33 FLR 87, was seeking to use the demand oppressively: *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* (2005) 157 ACTR 22 at 26 [27] per Crispin P, Gray and Marshall JJ; *Infratel* 297 ALR at 381 [66].

101 An evident purpose of Pt 5.4 is the speedy resolution of applications to wind up companies in insolvency: *Aussie Vic* 232 CLR at 323 [14], 324-325 [18] per Gleeson CJ, Hayne, Crennan and Kiefel JJ; *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 485 [15] per Gummow A-CJ, Heydon, Crennan and Kiefel JJ. In *Meehan* 53 ACSR at 239-240 [52], Santow JA, with whom Tobias JA and Young CJ in Eq agreed, said that in considering the exercise of the discretion to set aside a statutory demand under s 459J(1)(b), the Court looks at the relative position of both parties against the objectives of Pt 5.4 and continued:

> That is why the more general formulation of Bryson J in *Portrait Express* [*(Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* (1996) 20 ACSR 746 at 757] is to be preferred as an approach; that is, **setting aside a statutory demand under s 459J(1)(b) where there is proper reason viewed in the circumstances of the parties taking into account the purposes of Pt 5.4**. (emphasis added)

102 Bryson J had explained his approach to s 459J(1)(b) in *Portait Express* 20 ACSR at 757, to which Santow JA referred, as follows:

> The court should not act under para (b), which is discretionary, unless the decision to do so **is supported by some sound or positive ground or good reason which is relevant to the purposes for which the power exists.**
>
> ... A judicial decision to set a demand aside must be obtained by a prescribed procedure **invoked in a limited time**, and this regime of itself indicates that **there must be grounds of appropriate seriousness**. (emphasis added)

103 In *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262 at [24]-[25], Barrett JA, with whom Beazley P and Gleeson JA agreed, held that s 459J(1)(b) was not confined to cases coming within established categories and that it applied "whenever there is a need to counter some attempted subversion of the intended operation of Part 5.4". He held it to be a remedial provision that enabled the Court to deal with cases not within ss 459H or 459J(1)(a) "in a way that is just, having regard to the purpose of the legislation". He accepted what Black CJ, Einfeld and Sackville JJ had said in *Hoare Bros* 62 FCR at 317F-G that it would be unwise to mark out the limits of the discretion conferred by s 459J(1)(b).

104 In *NT Resorts* 153 ALR at 365 Finkelstein J said that an application to set aside a statutory demand, "being a summary process with evidence on affidavit, is hardly an appropriate vehicle for a trial of substantive issues". In *obiter* comments, he said that he inclined to the view that, in a case where the issue was whether a debt was, at the time of the demand, due and payable, the standard of proof in an application under s 459J(1)(b) was the same as that under s 459H. He mused that, to justify an order under s 459J(1)(b), the Court would have to be "satisfied that there was a genuine dispute about whether the debt to which the demand relates was due and payable" (153 ALR at 367).

105 In *Hotncold Pty Ltd v Hawk Construction Services Pty Ltd* [2006] WASCA 45 at [24] and [33] McLure JA, with whom Steytler P and Murray AJA agreed, referred, without needing to decide its correctness, to Finkelstein J having applied the genuine dispute test by way of analogy to s 459J(1)(b), in a situation involving a dispute concerning whether the debt was due and payable. However, as McLure JA noted ([2006] WASCA 45 at [24]) differing judicial views existed as to whether an argument that a debt claimed in a statutory demand was not due and payable amounted to a "defect" within the meaning of s 459J(1)(a), or amounted to "some other reason" within the meaning of s 459J(1)(b). Bryson J had held in *Portrait Express* 20 ACSR at 756 that the issue whether a debt was due and payable did not

arise under s 459H, because s 459H(1)(a) did not relate to "the existence or amount of a debt to which the demand relates". He preferred the view that the issue of whether the debt was due and payable related to whether there was a defect in the demand that had to be decided under s 459J(1)(a) and (2) (20 ACSR at 757).

106 Finkelstein J disagreed with Bryson J's view: *NT Resorts* 153 ALR at 365-367. He observed that the parties before Bryson J had appeared to accept that, once it was established that the debt was not due for payment at the date of the demand, there was a defect in the demand (153 ALR at 366). Finkelstein J considered that it was not clear that s 459H(1)(a) could be construed to cover a case where the debt was alleged not to be due and payable and, so, inclined to the view that this issue should be considered under s 459J(1)(b) (153 ALR at 367).

107 In *In the matter of Tuffrock Pty Ltd* [2015] NSWSC 738 at [12]-[15], [18], Black J considered the judicial debate at first instance as to which provision in Div 3 of Pt 5.4 applied where the company disputed that a debt was due and payable at the time of service on it of a statutory demand. He made an order setting a demand aside under s 459J(1)(b) because the authorities indicated that "a genuine dispute as to whether the debt is due and payable can provide a sufficient basis to set aside a creditor's statutory demand under s 459J(1)(b)" (see at [15]).

108 There is a distinction between the question whether, under s 459H(1)(a), there is a genuine dispute about the existence and amount of a debt and the question whether the debt has the characteristics required by s 459E(1) and (3)(a), namely that it is due and payable. Importantly, s 459E(3)(a) requires the affidavit that must accompany a statutory demand, which is not based on a judgment debt, to verify that the debt is due and payable by the company. It is a commonplace that a debt can exist but not be due and payable. A debt can be "due" in the sense of "owing", but not payable until sometime in the future: *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 8 per Gibbs CJ, 15 per Mason J with whom Aickin and Wilson JJ agreed; *Australian Guarantee Corporation Ltd v Balding* (1930) 43 CLR 140 at 153 per Isaacs J, 157 per Starke J, 160 per Dixon J; *HJ Wigmore & Co Ltd v Rundle* (1930) 44 CLR 222 at 228 per Gavan Duffy, Rich, Starke and Dixon JJ; *O'Connor v Quinn* (1911) 12 CLR 239 at 252 per Griffith CJ with whom Barton and O'Connor JJ agreed. Indeed, a debtor and creditor can make an arrangement with each other that allows the debtor time to pay a debt that is due. Such arrangements are a commonplace.

109 If the issue of whether a debt claimed in a statutory demand is due and payable at the time of the demand is not justiciable under s 459H(1), then it must be justiciable under s 459J(1)(b).

There is no reason why the Court would apply a different onus of proof, when deciding if it was satisfied that a demand should be set aside "for some other reason" under s 459J(1)(b), being that the debt is not due and payable, to the onus that the Court would apply when deciding whether there is a genuine dispute under s 459H: *Saferack* 214 FLR at 399-400 [25]; *Tuffrock* [2015] NSWSC 738 at [15], [18].

110 Indeed, such an approach is consistent with the purposes of Pt 5.4. Those purposes include the quick resolution of the issue of solvency and the determination of whether the company should be wound up, without interposing disputes about debts, unless they are raised properly: *David Grant* 184 CLR at 270; *Aussie Vic* 232 CLR at 323 [14], 324-325 [16], [18]; *Broadbeach* 237 CLR at 485 [15]; *Meehan* 53 ACSR at 239-240 [52]; *Kisimul* [2014] NSWCA 262 [24]-[25]. The Parliament intended that a genuine dispute as to the existence and amount of a debt the subject of a contested statutory demand under s 459G should be decided in separate, substantive proceedings from those under Pt 5.4.

111 In some cases, the issue of whether a part of a debt claimed in a statutory demand was due and payable at the time of its service may be justiciable under s 459H. That is because, while the debt claimed in the demand may exist, the full amount may not have been due and payable at the date of service. In such a case the Court could calculate a lesser substantiated amount under s 459H(2). For example, a person may have given a company credit terms for a purchase of goods or services that required payment of two sums one each after, say, 30 and 60 days. If the person served a statutory demand for both sums, after the company failed to pay the first instalment, but before the 60th day (and assuming that the contract did not make the whole amount due in such an event), then the Court could determine that the substantiated amount was the first instalment and vary the demand to require payment of that lesser sum under s 459H(4).

112 Since s 459H(6) makes s 459H subject to s 459J, a genuine dispute about a demand for a debt, that raises the issue that it was not due and payable at the time of service, is capable of amounting to "some other reason" to set the demand aside under s 459J(1)(b). Thus, a genuine dispute that, for example, the debtor and creditor had made an arrangement for the payment of the debt claimed at a time later than the creditor asserted, could create "some other reason why the demand should be set aside" for the purposes of s 459J(1)(b). The construction of s 459J(1)(b) must be approached consistently with the principles of statutory

construction identified by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], namely:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute [See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ.]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" [*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617, per Lord Scarman, "in the context of the legislation read as a whole"]. In *Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that **"the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed"**. Thus, the process of construction must always begin by examining the context of the provision that is being construed [*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J.] (emphasis added)

113 The conditions for a valid statutory demand appear in s 459E(1) and (2). Critically, s 459E(1)(a) requires that the demand must relate to:

- a single debt that the company owes to the issuer (the person serving the demand);
- that is due and payable; and
- whose amount is at least the statutory minimum.

114 If the amount of the debt claimed in a demand were less than the statutory minimum, the demand would be invalid. Likewise, if, as a matter of fact, the debt or some part of it were not due and payable at the time of making the affidavit required under s 459E(3)(a) to verify the demand (which must precede service of the demand on the company), then the demand would also be invalid. It follows that if there were a genuine dispute as to whether the debt or part of it were due and payable at the time of making of the affidavit, Div 3 of Pt 5.4 must be construed to permit the company to apply to set the demand aside on that ground.

115 As explained above, each of ss 459H and 459J(1)(b) can apply to an issue about whether a debt to which a demand relates was due and payable at the time that it was served. The Explanatory Memorandum explained (at [688]) that the use of the expression "some other reason" in Pt 5.4, including s 459J(1)(b), was to ensure that the Court had power to set a demand aside "on the basis of the commercial justice of the matter, rather than on the basis of technical difficulties".

116 In my opinion, s 459G(1) gives a company a right to apply to the Court for an order to set a statutory demand aside on the basis of the facts and circumstances revealed expressly or by necessary implication in the affidavit supporting the application that must be filed and served under s 459G(3). If the affidavit reveals a ground that the Court is satisfied falls within ss 459H(1) and 459J, the Court has jurisdiction to determine the application.

117 Importantly, s 459G does not require the application or affidavit supporting it to identify a legal category, to plead a statutory provision or to nominate a cause of action: cf *Agar v Hyde* (2000) 201 CLR 552 at 577-578 [64] per Gaudron, McHugh, Gummow and Hayne JJ. The jurisdiction of the Court to make an order setting the demand aside is enlivened if, at the hearing, the material facts and circumstances originally revealed in the initial affidavit under s 459G(3)(a) fall within the provisions of ss 459H(1) or 459J(1). As I have noted above the evidence and circumstances at the hearing can supplement the material facts and circumstances expressed or necessarily implied in the initial affidavit, including putting evidence into admissible form, but cannot expand the field of issues.

118 Moreover, s 459H(6) provides that the governing provision is s 459J. Ordinarily, s 459H will allow an efficient summary process to identify whether a genuine dispute exists as to the existence or amount of a debt (including the impact of any offsetting claim) and s 459J(1)(a) and (2) will allow a similar process to identify whether there is a defect in a demand that will cause substantial injustice, unless the demand is set aside. The power to set a demand aside for "some other reason" under s 459J(1)(b) will be enlivened where it would be contrary to the purposes of Pt 5.4 to create a presumption of insolvency were the company to fail to comply with it.

119 A defect in a demand ordinarily will be evident on its face or simply because some requirement in s 459C, that is readily ascertainable, has not been satisfied. The Court will then be able to determine whether it is satisfied that the established defect will cause substantial injustice, again without a substantive trial.

120 If the question of whether a debt were both due and payable at the time of issue or service of a statutory demand had to be proved on the balance of probabilities, the otherwise summary procedure envisaged in Div 3 of Pt 5.4 for the determination of an application under s 459G would be turned into a substantive final hearing as to the legal status of that issue. The consequence of such a construction is highly likely to promote delay rather than speed in considering an application under s 459G that raises such an issue. The provisions of

s 459J(1)(a) and (2) are consistent with this conclusion and in any event they do not qualify the Court's power under s 459J(1)(b): *Equuscorp* 80 FCR at 299G-300A; *Owners of "Shin Kobe Maru" v Empire Shipping Inc* (1994) 181 CLR 404 at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

121 Nonetheless, the operation of provisions in taxation laws, such as the then s 177 of the *ITAA 1936*, creating debts and providing for their recovery by the Commissioner, cannot be sidestepped in an application by the taxpayer under s 459G of the *Corporations Act* to set aside a statutory demand that the Commissioner served: *Broadbeach* 237 CLR at 495-496 [57]; see too at 488 [26]ff; 493 [49].

122 Gummow A-CJ, Heydon, Crennan and Kiefel JJ held that the Commissioner was entitled to use the statutory demand procedure in aid of a winding up application in the course of recovery of a debt due to the Commonwealth (*Broadbeach* 237 CLR at 496 [58]). They said (at 497 [61]) that a material consideration that the Court had to take into account on an application under s 459G was the legislative policy of provisions, such as ss 14ZZM and 14ZZR of the *TAA 1953*, to allow actions for recovery of tax while the taxpayer's application to review or appeal against the Commissioner's decision to assess the tax as due and payable was pending. (Those sections provided that the pendency of a review, or an appeal against an assessment, in respectively the Administrative Appeals Tribunal and this Court, does not interfere with or affect the Commissioner's decision and the tax may be recovered as if no review or appeal were pending.) Moreover, their Honours had held that the pendency of a review of or an appeal against an assessment under ss 14ZZM or 14ZZR did not create a "genuine dispute" for the purposes of s 459H(1) (at 496 [60]) of the *Corporations Act* because the taxation legislation allowed the Commissioner to take recovery proceedings despite the taxpayer's pending administrative review or appeal to the Court in respect of the assessment.

123 The generality of the discretionary power conferred on the Court by s 459J(1)(b) to order that a statutory demand be set aside because "there is some other reason" should not be "hedged about by implied limitations": cf *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 361 [178] per Gummow, Hayne, Heydon and Kiefel JJ; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 492 [10] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ. In *Shin Kobe Maru* 181 CLR at 421, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ said:

> It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

124 Section 459J(1)(b) gives the Court a discretion, that must be exercised judicially, to set aside a statutory demand if it is satisfied that there is some other reason, than on the basis of ss 459H or 459J(1)(a), to do so. The discretion is unconfined except by reference to the subject matter, scope and purpose of Pt 5.4 in the more general context of the *Corporations Act*: *The Queen v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 50 per Stephen, Mason, Murphy, Aickin and Wilson JJ. And, as the Court in *Broadbeach* 237 CLR at 497 [61] held, a relevant consideration that must be considered, in a case where the Commissioner is seeking to recover a taxation debt, is that the debt is made due, payable and recoverable under the taxation laws and the demand is served in aid of a winding up application.

Consideration

125 Ordinarily, a substantive dispute about whether the debt, which a statutory demand claims, is due and payable (to the extent that this issue does not go to the quantification of the substantiated amount under s 459H or about the underlying relationship between the company and the issuer of the demand), is not a matter that is appropriate to be resolved in an application under s 459G. This is not to say that the Court must accept, uncritically, a mere assertion of a dispute. In particular, in an application under s 459G involving a statutory demand served by the Commissioner, the Court must have regard to the legislative policy that the Commissioner should be able to exercise his function to collect taxation liabilities: *Broadbeach* 237 CLR at 496 [58], 497 [61].

126 The nature of the reason why a company seeks an order setting aside a statutory demand under s 459J(1)(b) can affect how the Court must proceed to quell that controversy. For example, if the company has filed an appeal against a judgment on which a debt claimed in the statutory demand is based, the Court may have to evaluate the *bona fides* of the appeal and the reasonableness and arguability of the grounds that it advances to challenge the judgment debt or the negation of an offsetting claim, as Emmett J discussed in *Eumina Investments Pty Ltd v Westpac Banking Corporation* (1998) 84 FCR 454. In such a case, the Court will evaluate those questions to see whether there is a sufficient basis to set the demand aside, without assessing how the pending appeal must be decided: see e.g. 84 FCR at

461F-G. The nature of such a determination is similar to that of assessing whether a genuine dispute exists for the purpose of s 459H.

127 But the issues before the primary judge here were of a different character. Mammoth and Gucce contended that the Commissioner had entered into an enforceable agreement that, if proved, would have precluded him from serving the two statutory demands for payment of their taxation liabilities that had been assessed after the 10 April 2014 meeting. Ordinarily, the sums claimed in those assessments are due, payable and recoverable at the suit of the Commissioner under ss 14ZZM or 14ZZR of the *TAA 1953* and the pendency of a challenge to them by the taxpayer would not amount to "some other reason" to set aside a statutory demand based on such a debt: *Broadbeach* 237 CLR at 496 [57].

128 However, each of the affidavits of Ms Bazzo and Mr Caratti supporting the s 459G applications of Gucce and Mammoth asserted, that on 10 April 2014, Mr Burns had agreed with Mr Caratti, not to pursue recovery proceedings on any of their group's taxation liabilities if he, Ms Bazzo, their associated entities and family members provided security to the agreed amounts while they pursued their taxation objections and reviews. Gucce and Mammoth asserted that they had altered their positions on the basis of this "global settlement" and that they had given, and caused other entities associated with them to give, securities to the Commissioner under the three deeds on the basis of the agreement for, or representations about, that "global settlement".

129 In effect, the "some other reason" on which the appellants relied under s 459J(1)(b) consisted of arguments that:

(1) this was an enforceable contractual right or an arrangement to prevent the Commissioner from seeking to recover the taxation liabilities or debts the subject of the statutory demands; and

(2) the security that they or their associates had provided, on the basis of the asserted global agreement, or Mr Burns' representations to its effect, either created an equitable estoppel or amounted to conduct that was unconscionable or an abuse of process so as to preclude the Commissioner from serving or relying on the demands.

130 I am of opinion that that controversy should have been decided in substantive proceedings to enforce the alleged contract or to establish the estoppel or conduct. The substance of the reason that the appellants advanced for setting the demands aside was the actual existence of

a state of fact that they had to prove to be true. This would have to be determined based on evaluating, in the context of a full trial on clear issues, what Mr Caratti and Mr Burns had said in the 10 April 2014 meeting in the context of the relationship between the parties and the subsequent dealings and events.

131 In my opinion, the primary judge erred in finding that a company had to prove, on the balance of probabilities, the basis for the existence of "some other reason" to set aside a statutory demand under s 459J(1)(b) and that the existence of the genuine dispute as to whether the statutory demands should have been set aside was insufficient.

132 His Honour's decision to allow cross-examination appeared to have been based on that finding. That is because he said that, given the disputes on the affidavit evidence filed before the commencement of the trial as to the existence of the global settlement, its terms, conditions and the alleged representations made by Mr Burns to Mr Caratti, that it "seemed unlikely that these disputes were capable of being resolved simply by reference to the terms of the Deeds which were subsequently executed": see [43] above.

133 In other words, his Honour considered that he had to resolve the s 459G application by deciding the underlying facts in the genuine dispute about whether the debts claimed in the two statutory demands ought to be set aside that were evident from his reading the initial affidavit evidence of Mr Caratti and Ms Bazzo and the June 2015 affidavits of Mr Burns and Mr Barton. I consider that was an error. Beazley P, AJ Meagher and Gleeson JJA said in *Britten-Norman* 85 NSWLR at 615 [67]:

> One object of cross-examination is to undermine the evidence given in chief or establish that it is false, incorrect, unreliable or implausible. Whilst cross-examination is not (and ought not be) the norm in an application brought under s 459G, there are occasions where cross-examination may be permitted, **if directed to whether there is a genuine dispute as to the existence of a debt or whether there is a plausible basis for an offsetting claim, as distinct from the merits of any such dispute or claim**: *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* at 294. (emphasis added)

134 The same considerations apply in a case like the present where, as his Honour accepted there was a plausible basis for the applications to set the demands aside that could not be resolved on the then affidavits. Instead, his Honour allowed cross-examination as to the merits of the underlying dispute. The appellants bear considerable responsibility for what occurred. They presented their case to his Honour and on appeal, at times confusingly, including, by using

their new approach in their opening submissions on 10 September 2015 and seeking to raise a new issue on appeal as to whether the debts the subject of the demands were due and payable.

135 Nonetheless, the appellants argued at all times that they had only to establish that a genuine dispute existed about whether, *first*, the global settlement covered the taxation liabilities the subject of the demands and, *secondly*, the Commissioner's demands or enforcement actions, including service of the demands, after 10 April 2014 or the grant of securities under the three deeds were made for an improper purpose or were unconscionable. The primary judge structured his reasons to deal with the three grounds advanced in those submissions as if there had been a full trial on the merits.

136 Viewed in isolation, each deed appeared on its face to be a self-contained commercial agreement to deal with only the taxation liabilities specified in the particular deed. The deeds were prepared not only with the active participation of Mr Caratti and Ms Bazzo but also their lawyers. In this context, Mr Caratti and Ms Bazzo, as the controlling minds of Mammoth and Gucce must have appreciated, when executing the deed or deeds, that whatever may have been discussed in the 10 April 2014 meeting, each deed reflected a binding contract in relation to what it covered. However, there was a genuine dispute about whether the three deeds could be viewed in isolation, particularly given the broad similarities between the evidence of Mr Caratti and Mr Burns as to what they had said on 10 April 2014 set out at [18], [21] and [47] above.

137 It may be accepted that the deeds (cf [24] above) contained promises by the appellants that they would comply with their future obligations under the taxation legislation (cl 3.3(a)) and an entire agreement clause (cl 13.1). But the service of the statutory demands raised, as articulated in Ms Bazzo's and Mr Caratti's supporting affidavits, whether that was done "in good faith" (cl 5.3) in all the circumstances. I am satisfied that that question required a substantive, not summary, trial in other substantive proceedings where, if the Commissioner wished to pursue immediate recovery of those debts, he could have sought a judgment for the taxation liabilities and Gucce and Mammoth could have raised the issues the subject of their supporting affidavits in defence.

138 The primary judge found that Gucce had not adduced any evidence that it had lodged an objection to the 2012 assessment as part of his reasoning that there was no genuine dispute about the existence or amount of that taxation debt. However, his Honour overlooked the

Commissioner's evidence, in Mr Barton's affidavit of 17 June 2015, that Gucce had lodged an objection, and there was no evidence that this had been determined.

139 Each of the two statutory demands sought payment of a tax-related liability of Gucce and Mammoth respectively that was not the subject of any "Taxation Debt", as defined in the deeds. Nonetheless, a possible basis under the deeds, that the use of the statutory demands might be in breach of the deeds, would arise if the Commissioner was not "acting in good faith" in using them, despite the entire agreement clauses in the deeds. Indeed, the service of the statutory demands could only be in aid of winding up applications against Gucce and Mammoth: *Broadbeach* 237 CLR at 496 [58]. Mr Caratti's version of the arrangement that he claimed to have made with Mr Burns on 10 April 2014 involved Gucce and Mammoth providing sufficient security that the Commissioner considered satisfactory to cover not just the numerous then existing liabilities but also future assessments that could be raised as a result of the then current tax audits. The use of the statutory demands, if such an arrangement existed, was capable of amounting to "some other reason" within the meaning of s 459J(1)(b). That is because taxation recovery action, using a statutory demand, would be a breach of the Commissioner's obligations under the arrangement he had made with Gucce and Mammoth: cf *Broadbeach* 237 CLR at 497 [16].

140 The scope of equity's power to relieve against unconscientious conduct depends on an appreciation of all of the facts and circumstances, including, here, the legislative context, the nature of the taxation liabilities and the dealings (including the three deeds and any other contractual obligations) and other conduct occurring between the parties: cf *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 324-326 [20]-[26], 326-327 [30]-[31], 328 [37], 335-336 [58]-[62] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ. In Meagher, Gummow & Lehane's *Equity: Doctrines and Remedies* (JD Heydon, MJ Leeming & PG Turner, 5th ed, 2015) at [17-220], the learned authors discussed the principles of equitable estoppel citing *Tanwar* 217 CLR 315 as supporting the proposition that it would be fraudulent (in the sense used by equity – that is: unconscientious) to allow a person to depart from conduct or a representation that induced another to alter his, her or its position in particular circumstances, including those discussed by Lord Cairns LC in the following passage in his speech in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at 448:

> ... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent

> **enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.** (emphasis added)

141 The Commissioner has rights and duties in relation to the recovery of taxation liabilities of taxpayers, including those available under Pt 5.4 of the *Corporations Act*. But, that does not mean that he is free to resort to those despite having promised, or made representations to, or entered into an arrangement with, a taxpayer that he would proceed differently, as a result of which the taxpayer altered his, her or its position. The question of whether a contract or an arrangement was made and, if so, on what terms or whether the Commissioner, in fact, acted "in good faith" in accordance with cl 5.3 in the three deeds or for an improper purpose or unconscientiously, in my opinion, was one that, in the circumstances, could only be resolved in other substantive proceedings and not in the applications under s 459G.

142 Because of the view that he formed, that the appellants had to prove their case as if it were a trial of causes of action, in order to establish "some other reason" to set aside the demands under s 459J(1)(b), his Honour dealt with the evidence and made findings as if he had held such a trial.

143 One obvious difficulty with that approach is that there were no pleaded issues, the parties had not given discovery, the appellants put forward a new articulation of their case on 10 September 2015 and the Commissioner only put forward his evidence about the 10 April 2014 meeting immediately before the hearing resumed on 11 September 2015.

144 Suffice to say that I am satisfied that on the material before his Honour there was a genuine dispute about whether the Commissioner was entitled to serve Gucce and Mammoth with the statutory demands in the circumstances. It may be accepted that the appellants' argument that the parties had entered into a binding contract on 10 April 2014 might be difficult to establish at a trial. Nonetheless, Mr Burns' brief of 11 April 2014 referred to his "overarching objective … to ensure that **all** liabilities, penalties and interest would ultimately be paid" and Ms Harako's affidavit of 5 May 2014 referred to the 10 April 2014 meeting saying it was "to discuss **all** the debts of [Gucce] and other entities". The matters on which Gucce and Mammoth relied could be found to amount to an arrangement sufficient to provide "some other reason" to set aside the statutory demands under s 459J(1)(b).

145 Ms Bazzo and Mr Caratti caused their associates to enter the three deeds and give the very considerable securities under each deed. That conduct is reasonably capable of being seen as achieving Mr Burns' objective regardless of whether further taxation liabilities would be assessed or accrue later. Those statements were consistent with both Mr Caratti's and Mr Burns' version of the meeting set out at [18], [21] and [47] above.

146 After all, the Gucce deed provided about $9 million in security to cover its then assessed taxation liability of about $10.8 million. The Mammoth deed provided security of about $12.9 million to cover a then assessed taxation liability of over $30.7 million. Moreover, some of the security for the Mammoth taxation liabilities (valued at about $5.2 million) was cross security for the taxation liabilities of about $5.8 million secured under the Whitby deed (see [26]-[28] above). It may reasonably be inferred that the security lemon available to the Caratti/Gucce group had been squeezed as dry as the Commissioner could go, leaving a substantial overall secured shortfall, immediately after the three deeds were executed, of nearly $20 million of the "Taxation Debts" as defined in the deeds. Moreover, at the time when they entered each deed, both sides knew of the assessments made subsequent to 10 April 2014, under which Gucce and Mammoth were liable for a total of over $13.5 million more (see [29]-[30] above).

147 In my opinion, the Commissioner's use of the statutory demands, in the context of the earlier circumstances in which the deeds came to be made and the securities provided, was capable of raising the issues that were express or necessarily implied in the supporting affidavits of Mr Caratti and Ms Bazzo to warrant the demands being set aside under s 459J(1)(b): *Infratel* 297 ALR at 377 [30]; *Hopetoun* 286 ALR at 776 [36]. The obvious question that the Commissioner's decision to serve the demands raised is: what was the benefit in Gucce and Mammoth and their associates entering the three deeds and arranging extensive security so that they could pursue their challenges to existing assessments, if the next moment the Commissioner was free to initiate the summary process of seeking to wind them up on a new set of taxation liabilities? No obvious answer arises.

148 The idea of Gucce and Mammoth merely buying time makes no apparent commercial sense, as Mr Burns said in his evidence, Mr Caratti was "desirous ...of bringing this **all** to an end" (see [47] above). In that context, it is unlikely that the Caratti/Bazzo group would have provided security under the deeds that its members might soon need to meet the next wave of the Commissioner's enforcement actions.

149 And, if the Commissioner were prepared, as he was, to be unsecured for about $20 million under the deeds, it may be open to infer that he regarded the security that he had as sufficient, or all that he might be able to get, and that he might have those assets available eventually to cover the new assessed liabilities of over $13.5 million. Another possibility is that propounded by the appellants, namely that by serving the two demands, the Commissioner was seeking to obtain more security unconscientiously. Of course, the result contended for by the Commissioner was also reasonably open to be found.

150 The primary judge found that Mr Caratti had a genuine belief in what, he understood, he and Mr Burns had agreed. In my opinion, in the circumstances, the appellants proved that there was a genuine dispute about whether the Commissioner was entitled to use the demands so as later to be able to rely on a failure by Gucce or Mammoth to comply with them as giving rise to a presumption of insolvency. A winding up of Gucce and Mammoth, based on a failure to comply with the demands after the giving of the securities under the deeds, might well render futile their challenges to the taxation assessments which the deeds contemplated would occur. There was also a genuine dispute as to whether the Commissioner's use of his power to serve the statutory demands was unconscientious or not in good faith.

151 It follows that I am satisfied for the reasons I have given that his Honour erred and the statutory demands should be set aside pursuant to s 459J(1)(b).

The global agreement issue – Gucce and Mammoth's arguments

152 The appellants argued that his Honour made several errors in his assessment of the evidence in arriving at his overall finding that Mr Caratti and Mr Burns had not entered into a binding contract on 10 April 2014. They contended that his Honour failed to deal with the circumstance that Mr Burns and Mr Barton had discussed their evidence before making their affidavits, but rather found in the Commissioner's favour that their evidence corroborated each other's, especially where their accounts conflicted with Mr Caratti's.

The global agreement issue – consideration

153 In light of my findings that his Honour erred in not setting the demands aside, it is not necessary to decide this issue. However, I consider that there was some force in this ground of appeal and make the following observations. In *Fox v Percy* (2003) 214 CLR 118 at 125-129 [23]-[31] Gleeson CJ, Gummow and Kirby JJ discussed the principles on which an appellate court acts on a rehearing on an appeal.

154 The first time that Mr Burns and Mr Barton gave a substantive account of some of what was said at the meeting of 10 April 2014, was in their affidavits made on the second day of the hearing, 11 September 2015. Mr Barton said in cross-examination that he believed that one of the Commissioner's solicitors gave a copy of his new affidavit to Mr Burns on the morning of 11 September 2015. Mr Barton also gave evidence that both men had discussed their recollections of the meeting, at some unspecified time, before making their 11 September 2015 affidavits and he accepted that his account of the 10 April 2014 meeting agreed with Mr Burns'.

155 While Mr Burns did not use the word "global" in his evidence, set out at [47] above, or in his brief, set out at [21] above, that is the thrust of the discussion that he recounted. Mr Burns recognised that Mr Caratti wanted to bring **all** of the ATO's activity "to an end" and he told Mr Caratti that "[w]e can do this if you provide security in respect of the various liabilities". Both Mr Caratti and Mr Burns knew that they were discussing an overall resolution of a series of disputes arising out of the tax audit of the Caratti/Bazzo group involving multiple "garnishee activity and wind up activity" that would come to an end if the group provided security to cover the various liabilities.

156 The question is what would a reasonable person in the position of the parties have understood from the words used in the meeting of 10 April 2014 in the context in which they had spoken: *Toll* 219 CLR 177-178 [35]-[36], 179-180 [40]-[41]. In *Ermogenous* 209 CLR at 105-106 [25], Gaudron, McHugh, Callinan and Hayne JJ discussed the legal requirements for the formation of a contract. They said:

> Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties [*Masters v Cameron* (1954) 91 CLR 353 at 362, per Dixon CJ, McTiernan and Kitto JJ; *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548-549, per Gleeson CJ] (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. **It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened** [*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 348-353, per Mason J; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436; 186 ALR 289 [240 CLR 45]]. **It is not a search for the uncommunicated subjective motives or intentions of the parties.** (emphasis added)

157 In his reasons, his Honour worked his way through each witness' evidence but did not make any clear findings of what the whole conversation on 10 April 2014 was so as to be in a position to evaluate what a reasonable person in the position of Mr Caratti and Mr Burns would have understood in context from those words. Rather, the primary judge dealt with the various accounts piecemeal, which does not leave an appellate court in a position to make findings about what actually transpired.

158 By the end of the 10 April 2014 meeting the parties had reached a conditional resolution in principle that required not only documentation, but authority from others associated with Mr Caratti and Ms Bazzo to provide security. If the Caratti/Bazzo group paid the small taxation liabilities and provided the security for the larger ones to the value agreed in principle, Mr Burns, on behalf of the Commissioner, had made a clear representation, if not agreement, or was offering an arrangement, that "I'm happy to not pursue recovery action pending resolution of the disputes you've got". Although each deed was self-contained, by reason of the entire agreement clause, the subsequent issue of a statutory demand for new taxation liabilities of Gucce or Mammoth was the very kind of action that Mr Caratti had sought to forestall in his negotiations with the Commissioner, through Mr Burns on 10 April 2014 and Mr Burns knew that.

159 His Honour accepted Mr Burns' evidence that he had spoken to Mr Caratti of dealing only with "established debts" and that they could deal with future liabilities as they arose to which Mr Caratti said "OK. I agree". However, that evidence eschewed both the evidence to which I have referred above and the very reason the two men were discussing these matters, namely, that Mr Burns knew that Mr Caratti wanted to bring *all* the ATO's recovery actions to an end and was willing to do an overall deal, by providing security, to achieve that while the Caratti/Bazzo groups' review and appeal proceedings took their course.

160 In my opinion, it is necessary to weigh the primary judge's finding that Mr Barton had no recollection of Mr Burns using the word "established" when speaking of taxation liabilities with the harmonious evidence of Mr Caratti and Mr Burns (set out at [18], [21] and [47]) as to the commercial purpose of the agreement or arrangement in principle that they negotiated on 10 April 2014. His Honour did not deal expressly with the argument that the corroboration by Mr Barton of Mr Burns' evidence was not the product of entirely independent recollection, but had occurred in the context of both men working and discussing

together the circumstances and Mr Burns seeing a copy of Mr Barton's affidavit of 11 September 2015 before giving evidence.

161 As I have explained above, the presence of cl 5.3 in the Gucce and Mammoth deeds (or cl 5.4 in the Whitby deed) that contemplated that the Commissioner could employ any and all recovery options and powers in respect of taxation liabilities not the subject of the particular deed, was qualified by his having to act in good faith. His Honour regarded this provision as negating Mr Caratti's account. But in my opinion, the qualification of "good faith" can be seen as requiring the Commissioner to act consistently with the common understanding that Mr Caratti and Mr Burns reached on 10 April 2014 for which the deeds and securities were, or were to be, given.

162 For these reasons, the appellants' first ground of appeal raised a real question as to whether his Honour arrived at erroneous findings. However, as I have said, it is not necessary to decide that matter, and indeed such a decision would be problematic given the lack of any overall finding by the primary judge of what was said at the 10 April 2014 meeting. In any event, because the hearing below proceeded on an erroneous basis, and was not a final hearing, I do not consider it appropriate to make findings that could be taken as creating issue estoppels.

Conclusion

163 For these reasons, I would grant Gucce and Mammoth leave to appeal, allow the appeals with costs and set aside the statutory demands with costs.

I certify that the preceding one hundred and sixty-three (163) numbered paragraphs is a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 16 November 2016

REASONS FOR JUDGMENT

FARRELL AND DAVIES JJ:

164 We have had the benefit of reading the draft reasons for decision of Rares J. We agree with his Honour's reasons and conclusion that leave to appeal from an order deciding an application under s 459G of the *Corporations Act 2001* (Cth) (**"the Act"**) is required. However we respectfully disagree that the primary judge was wrong to conclude that the appellants had not established "some other reason" within the terms of s 459J(1)(b) of the Act for setting aside the creditor's statutory demands.

The statutory demands

165 The creditor's statutory demand served on MNWA Pty Ltd (**"MNWA"**) was for payment of the amount of $5,462,889 due and payable under assessments of goods and services tax (**"GST"**) for the tax periods 1 October 2009 to 31 December 2009, 1 January 2010 to 31 March 2010, 1 April 2010 to 30 June 2010, 1 July 2010 to 30 September 2010 and 1 October 2010 to 31 December 2010.

166 The creditor's statutory demand served on Gucce Holdings Pty Ltd (**"Gucce Holdings"**) was for the amount of $3,796,160.01 for income tax due and payable under an assessment for the year ended 30 June 2012, shortfall interest charge as assessed for the year ended 30 June 2012 plus the general interest charge on the unpaid income tax and shortfall interest charge.

The section 459G applications

167 MNWA and Gucce Holdings (collectively **"the companies"**) are not related companies but the link between them is that Mr Caratti, the owner and controller of MNWA, is the de facto partner of Ms Bazzo, the owner and controller of Gucce Holdings.

168 Each of the companies applied to have statutory demands served on them set aside. The grounds relied on were the same in each case, namely that the issuing of the statutory demand was unconscionable, an abuse of process and "contrary to statements and representations made on behalf of [the Commissioner] relating to the issue of the statutory demand which reasonably induced [the company] to change its position" and "resiling from which would cause [the company] detriment".

169 The relevant statements and representations were said to have been made by a taxation officer, Mr Burns, to Mr Caratti at a meeting in April 2014 at which the Commissioner was

said to have promised that, subject to appropriate security being provided, he would not pursue recovery of the companies' unpaid tax liabilities and other additional tax liabilities resulting from issues then under audit, whilst the companies pursued their objection and appeal rights under Part IVC of the *Taxation Administration Act 1953* (**"Taxation Administration Act"**).

170 The Commissioner entered into Deeds of Agreement with Gucce Holdings (on 16 May 2014) and MNWA (on 31 July 2014) under which the Commissioner agreed to forbear from recovering certain identified tax liabilities on terms which required each company, amongst other things, to provide particular security, which they did. It was common ground that the tax debts which were the subject of the Commissioner's statutory demands (collectively **"the tax debts"**) were not amongst the tax liabilities covered by the Deeds of Agreement. In the case of Gucce Holdings, the relevant assessments did not issue until after the Gucce Holding's deed had been executed.

171 The Commissioner's statutory demands were served in September 2014.

172 The applications to set aside the statutory demands relied on the ground in s 459J(1)(b) of the Act. Under s 459J(1)(b), the Court may set aside a statutory demand "if it is satisfied that ... there is some other reason why the demand should be set aside". Before the primary judge, it was argued that the statutory demands should be set aside "for some other reason" within the terms of s 459J(1)(b) on the basis that the serving of the demands was in breach of, and an unconscionable departure from, the terms of the "global deal" that was said to have been made at the 10 April 2014 meeting.

173 The companies (the plaintiffs below) in their written "summary of case" handed up at the commencement of the hearing below claimed that:

> (a) the [Commissioner] promised on 10 April 2014 (**"the global security agreement"** or **"the deals negotiated on 10 April 2014"**) not to make those demands until Part IVC proceedings challenging the tax liabilities to which the demands related had ended (which they have not) if the [companies] complied with their obligations under that agreement (which they did) and/or
>
> (b) the [Commissioner's] conduct, in repeatedly threatening to issue statutory demands to coerce implementation of the global security agreement (in the terms he believed applied) and to obtain other benefits, culminating in the making of the demands, was not for the proper statutory purpose and was unconscionable.

174 In the companies' written supplementary submissions, two grounds were put forward as constituting "some other reason" within the terms of s 459J(1)(b), namely that:

> (a) issuing the statutory demands is contrary to the [Commissioner's] promise not to take recovery action in respect of those and other debts in return for the [companies'] promises to provide specific amounts of security, which they did **and is thus unconscionable** (**"Ground (a)"**);
>
> (b) the statutory demands were **otherwise issued for an improper purpose**, being part of Mr Burn's *modus operandi* on behalf of [the Commissioner] and not for the proper statutory purpose (**"Ground (b)"**).
>
> (emphasis added)

175 The companies argued below that it was sufficient to come within the terms of s 459J(1)(b) that their claim that the Commissioner had agreed to defer recovery action of the tax debts was "reasonable and arguable" or "plausible" and the Court did not have to decide whether there was such agreement. In support of the submission that the Court need only be satisfied that there was a genuine dispute as to whether the Commissioner had promised not to seek immediate recovery of the tax debts, the companies relied on *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359 (***"NT Resorts"***) and a line of cases that followed that decision.

176 In *NT Resorts* the taxpayer applied to set aside a statutory demand for unremitted group tax and unpaid superannuation guarantee charges on the ground that there was a genuine dispute about whether the time for the payment of the charges had been extended by agreement with the Commissioner until sometime after the service of the demand. Finkelstein J held that where an application could fall within either s 459H(1)(a) or s 459J(1)(b) the standard of proof would in either case be the same. His Honour reasoned:

> On what ground then should the applicant base its application? There are only two possibilities. The first is s 459H(1)(a) that permits an application to be made when there "is a genuine dispute ... about the existence .... of a debt to which the demand relates". Here there is no dispute about the existence of the debts due to the Crown. What is said is that those debts were not due and payable. Does such an allegation fit within the language of the ground? It would if the "debt" that is referred to in s 459H(1)(a) is only a debt of the class that can be included in a statutory demand; that is a debt that is due and payable. In that event the application could be made under s 459H(1)(a). But it is by no means clear that this construction is available. The second possibility is that the application should be based on s 459J(1)(b). There is no doubt that this ground is available if s 459H(1)(a) is not.
>
> In reality it is not necessary to reach a concluded view on the matter (although I should say that I incline in favour of the view that s 459J(1)(b) is the only available ground) for the reason that the standard of proof would in either case be the same. That is to say if the application must be made under s 459J(1)(b) the Court would not exercise its discretion to set aside the demand unless it was satisfied that there was a

genuine dispute about whether the debt to which the demand relates was due and payable.

177 In *Total Beverage Australia Pty Ltd v Corporate Link Australia Pty Ltd* [2013] SASC 45 Sulan J, after referring to the passage from *NT Resorts*, stated:

> Two things are clear from this passage. Firstly, a claim that a debt is not due and payable can be argued as a ground for setting a statutory demand aside under s 459J(1)(b) of the Act. Secondly, that a court will not exercise its discretion to set aside the demand unless it is satisfied that there is a genuine dispute about whether the debt to which the demand relates was due and payable. In other words, the onus on an applicant in relation to setting aside a statutory demand under s 459J(1)(b) is that same as that under s 459H(1)(a) of the Act. (footnotes omitted)

178 *NT Resorts* was also followed in *In the matter of Tuffrock Pty Ltd* [2015] NSWSC 738. In that case Black J set aside a statutory demand served by a shareholder on the company claiming an amount due and payable under a verbal loan agreement between the company and the shareholder. Black J held that an application to set aside a statutory demand on the ground that a debt was not due and payable was a matter falling within the scope of s 459J(1)(b) of the Act and that a genuine dispute as to whether the debt is due and payable can provide a sufficient basis to set aside a creditor's statutory demand under s 459J(1)(b).

The decision below

179 The primary judge rejected the companies' submission based upon *NT Resorts* that the demands should be set aside under s 459J(1)(b) of the Act if the Court was satisfied that there was a genuine dispute about whether the global security deal covered the tax debts to which the statutory demands related. The primary judge reasoned as follows at [158]–[160]:

> Finally, it is appropriate to say something further about the plaintiffs' submission that the onus is the same for a plaintiff who seeks to set aside a statutory demand under s 459H(1)(a), i.e. genuine dispute about the existence of a debt, as applies if a plaintiff relies on "other reason" under s 459J(1)(b). It is not strictly necessary to determine this matter because, for the reasons given above, I am not satisfied that the plaintiffs have even established a plausible basis for s 459J(1)(b) to apply. In any event, however, I would reject the submission. *NT Resorts* dealt with an application to set aside a statutory demand where the plaintiff alleged that the debt was not presently due and payable. Justice Finkelstein considered and rejected that this amounted to a "defect" as defined in s 9 of the *Corporations Law*. His Honour found that such an application could, however, fall within either s 459H(1)(a) or s 459J(1)(b). At 366-367, Finkelstein J made the following obiter observations:
>
> > On what ground then should the applicant base its application? There are only two possibilities. The first is s 459H(1)(a) that permits an application to be made when there "is a genuine dispute ... about the existence ... of a debt to which the demand relates". Here there is no dispute about the existence of the debts due to the Crown. What is said is that those debts were not due and payable. Does such an allegation fit within the language of the ground? It

> would if the "debt" that is referred to in s 459H(1)(a) is only a debt of the class that can be included in a statutory demand; that is a debt that is due and payable. In that event the application could be made under s 459H(1)(a). But it is by no means clear that this construction is available. The second possibility is that the application should be based on s 459J(1)(b). There is no doubt that this ground is available if s 459H(1)(a) is not.
>
> In reality it is not necessary to reach a concluded view on the matter (although I should say that I incline in favour of the view that s 459J(1)(b)) is the only available ground) for the reason that the standard of proof would in either case be the same. That is to say if the application must be made under s 459J(1)(b) the court would not exercise its discretion to set aside the demand unless it was satisfied that there was a genuine dispute about whether the debt to which the demand relates was due and payable.

> It is important to understand that those obiter observations (which were approved by Sulan J in *Total Beverage* at [30]), were directed to a situation where a claim that a debt was not due and payable arose for consideration under s 459J(1)(b). As his Honour effectively observed, it makes good sense that the same onus should apply in that circumstance as would be the case if the issue arose in the context of whether there was "a genuine dispute" in relation to the debt.
>
> I do not consider that these obiter observations as to onus apply where the claim of "other reason" concerns not whether a debt is due and payable, but rather whether the power to issue a statutory demand has been abused or used for some collateral purpose. In my opinion, in such a case the onus is higher than merely establishing an arguable case. Indeed, the onus in such a case is to establish on the balance of probabilities the alleged abuse or collateral purpose and is akin to the onus which arises under s 459J(1)(a) where it is alleged that there is a defect in the statutory demand.

180 The primary judge held that the evidence did not establish on the balance of probabilities that the parties had made a "global deal" that covered the tax debts which were the subject of the statutory demands and rejected the claim that the Commissioner had engaged in unconscionable conduct by serving the demands. The primary judge also rejected the claim that the statutory demands had been served for an improper purpose, finding that there was no probative evidence "to sustain an allegation that either statutory demand was issued for any purpose other than to set in train winding-up processes in respect of both plaintiff companies on the basis of their individual unpaid taxation debts for the relevant periods" or "to support the plaintiffs' contention that the statutory demands were issued with the improper purpose of coercing other entities to pledge security in respect of their disputed liabilities".

The appeal grounds

181 The Notices of Appeal of both companies were in identical terms. Each raised the following grounds:

Ground 1 – Erroneous findings of fact

1. The learned trial judge erred in finding that there was no binding oral agreement made on 10 April 2014 between the appellant (by its representative Mr Caratti) and the respondent (by its representative Mr Burns) (**"the global deal"**).

2. In particular, the trial judge erred in his findings about the words used on 10 April 2014, erred, at Judgment [131] – [140], in his analysis of the relevant surrounding circumstances, and erred in his drawing of inferences.

3. The learned trial judge should have found that the global deal came into existence on 10 April 2014 and included a term that the respondent would not from that time take recovery action in respect of tax liabilities for prior tax periods then under audit that would be disputed in proceedings under Part IVC of the *Taxation Administration Act* 1953 (Cth).

4. The learned trial judge should have found that the respondent's demand made under s 459E *Corporations Act* 2001 (Cth) was contrary to the global deal.

5. The learned trial judge should have set aside the demand under s 459J(1(b) *Corporations Act* 2001 as an unconscionable departure from the terms of the global deal.

Ground 2 – Proper application of the correct test under s 459J(1)(b) Corporations Act 2001

6. The Court erred in not identifying the correct test for determining, in the context of the dispute about the existence of the global deal, whether there was "some other reason" for setting aside the statutory demand under s 459J(1)(b) *Corporations Act*.

7. The Court should have decided that the correct test was set in *Tuffrock Pty Ltd v Roger Smith & Associates Pty ltd* [2015] NSWSC 738 and *NT Resorts Pty Ltd v DC of T* (1998) 153 ALR 359, being to determine if the dispute about whether the debt was immediately payable was genuine.

8. The Court, having found it "evident from the affidavit evidence filed on behalf of all the parties that there was a significant dispute concerning the existence of any 'global deal'" (Judgment [83]) and having found Mr Caratti to be truthful and his version to have support in objective evidence, should have found that the dispute was genuine.

9. The Court should have set aside the demand in the proper exercise of its jurisdiction.

182 There are two substantive issues raised by the appeal grounds for determination:

(1) Did the "global deal" have to be established on the balance of probabilities (as the primary judge found) or was it sufficient to show that there was a genuine dispute about the existence of the "global deal" for the Court to exercise its power to set aside the statutory demand under s 459J(1)(b) (as the companies contended)?

(2) Did the primary judge make erroneous findings of fact in determining that the companies had not established that there was a "global deal" as claimed?

The standard of proof issue: grounds 6–9 of the Notices of Appeal

183 It is convenient to start with this issue, which was argued first by the companies.

184 First, it was submitted that the primary judge mischaracterised an important aspect of the companies' case. The companies' case was said to be that the tax debts claimed in the statutory demands "were not immediately payable" at the time that the demands were served "due to the existence of an oral agreement made on 10 April 2014". It was said that this aspect of the companies' case was advanced in oral opening by their Senior Counsel and in the companies' written supplementary submissions in a section under the heading "*the Court's jurisdiction in considering whether the tax debts were immediately due and payable*". It was submitted that the primary judge's failure to deal with this aspect of the companies' case was an appellable error of law. The alleged appellable error is not in the grounds of appeal but the Commissioner nevertheless submitted that there was no such appellable error as, contrary to the companies' submission, it was not argued below that the debts were not "immediately payable" at the time the statutory demands were served. The Commissioner's submission should be accepted.

185 The case advanced in the oral opening by Senior Counsel for the companies was that the companies were "disputing that the Commissioner can recover [the tax debts] because of a contract that the Commissioner entered into with [the companies]".

186 The case advanced in ground (a) of the companies' written supplementary submissions was that the issue of statutory demands was unconscionable because issuing the statutory demands was "contrary to [the Commissioner's] promise not to take recovery action in respect of those and other debts in return for the [companies'] promise to provide specific amounts of security, which they did". There followed the following submission:

> **Ground (a)** – the [Commissioner's] promise not to take recovery action
>
> The Court's jurisdiction in considering whether the tax debts were immediately due *and payable*
>
> > It is submitted that the Court need only be satisfied that there is a genuine dispute as to whether the [Commissioner] promised not to seek *immediate* recovery of the debts....
>
> (emphasis in original)

187 The submissions under Ground (a) concluded:

> In this case, the [companies] invoke the Court's remedial jurisdiction conferred by s 459J(1)(b) to meet the demand of justice on the grounds of *unconscionable conduct and abuse of process.*
>
> (emphasis in original)

188 That argument was dealt with by the primary judge at [158]–[160] where his Honour rejected the submission, reasoning that the obiter observations of Finkelstein J in *NT Resorts* applied to a claim that a debt was not due and payable at the time the demand was served, and did not apply to a claim that the conduct of the creditor in issuing the statutory demand was unconscionable or an abuse of process. The primary judge dealt with the argument articulated and advanced on behalf of the companies and there is no substance in the claim that his Honour either mischaracterised or failed to deal with the argument which was advanced by the companies.

189 Moreover, had such an argument been put, it would have failed. The scheme of the taxation legislation would have precluded the companies from disputing that the tax debts in question were "immediately payable". The tax debts were assessed amounts of GST and income tax and due and payable at the time of service of the demands by force of legislation under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the Taxation Administration Act. Under the statutory scheme for the collection and recovery of tax debts, absent showing that the Commissioner had exercised his statutory power to extend the time for payment of the tax debts (and it was not contended by the companies at trial that he had), there was no scope to set aside the demands either under s 459H(1) on the basis of a "genuine dispute" about the existence or amount of those debts or under s 459J(1)(b) on the basis of a "genuine dispute" about whether the debts were due and payable when the demands were served: see *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 (***"DCT v Broadbeach"***). In *DCT v Broadbeach*, the High Court held that a claim that a genuine dispute exists as to the existence or amount of a tax debt is precluded by operation of the provisions within the statutory scheme that make the production of a notice of assessment conclusive evidence of the existence and amount of the tax debt, except in Part IVC proceedings. At [57] the High Court stated:

> Section 459G applications by taxpayers are not Pt IVC proceedings and production by the Commissioner of the notices of assessment and of the GST declarations conclusively demonstrates that the amounts and particulars in the assessments and declarations are correct. That being so, the operation of the provisions in the taxation laws creating the debts and providing for their recovery by the Commissioner cannot

> be sidestepped in an application by a taxpayer under s 459G of the *Corporations Act* to set aside a statutory demand by the Commissioner. (footnotes omitted)

The High Court also held that having regard to the legislative policy and scheme of the relevant taxation legislation, there was no basis for setting aside the demand "for some other reason" under s 459J(1)(b) of the Act notwithstanding that a taxpayer may contest substantive liability under the assessment in Part IVC proceedings. At [61], the High Court stated:

> Pt 5.4 [of the Corporations Act] contemplates that the "debts" in respect of which statutory demands may issue will include "tax debts" in the sense given to that expression in these reasons. The "material considerations" which are to be taken into account, on an application to set aside a statutory demand, when determining the existence of the necessary satisfaction for para (b) of s 459J(1) must include the legislative policy, manifested in s 14ZZM and s 14ZZR of the Administration Act, respecting the recovery of tax debts notwithstanding the pendency of Pt IVC proceedings.

NT Resorts was decided before the High Court decision in *DCT v Broadbeach* and cannot now be relied upon as authority that a creditor's statutory demand for the payment of an assessed tax liability can be set aside for "some other reason" under s 459J(1)(b) on the basis of some genuine dispute concerning whether the tax liability was "due and payable".

190 Next it was argued that, having found there was a "significant dispute" about the existence of that agreement, the primary judge erred, in embarking upon a trial of that dispute. It was submitted that the primary judge should have held that his jurisdiction was not to resolve that dispute and that as the dispute was genuine the companies had discharged the burden required of them to have the demands set aside.

191 Contrary to the submission made, the primary judge did not make a finding that there was a "significant dispute" about the existence of that agreement. The submission that he did misstates paragraph [83] of the reasons. At [83], his Honour explained why he had granted leave to cross examine. His Honour said:

> It was evident from the affidavit evidence filed on behalf of all the parties in the proceedings that there was a significant dispute concerning the existence of any "global deal" and, if it existed, what were its terms and conditions ... It seemed unlikely that these disputes were capable of being resolved simply by reference to the terms of the Deeds which were subsequently executed.

Senior Counsel for the companies elevated that statement to a finding by the primary judge that the dispute was genuine but it is clear from the context that his Honour was merely stating the position that the Commissioner disputed that a "global deal" was negotiated and agreed upon by the parties. His Honour did not make a finding that there was a genuine

dispute and, as the reasons later record, his Honour ultimately concluded that there was not even a plausible basis for the claim that a concluded contract had been negotiated.

192 The submission also ignores the statutory scheme that applies to the collection and recovery of tax liabilities. Under that statutory scheme, a tax liability that is due and payable is a debt due to the Commonwealth and recoverable by the Commissioner if the liability remains unpaid after it has become due and payable: s 255–5 of Schedule 1 to the Taxation Administration Act. Thus, a tax debt that is due and payable is recoverable by the Commissioner by operation of law. The "significance of the taxation legislation" in this context is that the Commissioner is entitled by force of law to recover unpaid tax and "the use by the Commissioner of the statutory demand procedure in aid of a winding up application is in the course of recovery of the relevant indebtedness to the Commonwealth by a permissible legal avenue": *DCT v Broadbeach* at [40]–[50], [58]. *DCT v Broadbeach* establishes that in considering whether there is "some other reason" within the terms of s 459J(1)(b) of the Act the "material considerations" which are to be taken into account will include the statutory scheme that applies to the collection and recovery of tax liabilities. Given the statutory scheme for collection and recovery of tax, an arguable basis for disputing the Commissioner's right to take recovery action is insufficient to constitute "some other reason" within the terms of s 459J(1)(b) and does not support an exercise of power to set aside the statutory demands under that section.

193 The primary judge was correct to reject the companies' submission on the onus under s 459J(1)(b) of the Act.

The challenge to the findings of fact: grounds 1–5 of the Notices of Appeal

194 It was submitted that there was appellable error in the primary judge's findings of fact in holding that the companies had not established that the parties had entered into any legally binding agreement, other than the Gucce Deed and the MNWA Deed, by reason that the primary judge:

(a) erred in his consideration of the reliability and creditworthiness of the Commissioner's witnesses by failing to deal with critical evidence; and

(b) overlooked evidence said to be compelling contrary evidence in holding that there was no reason to believe that the Commissioner's witnesses were not both telling the truth.

195 The critical evidence which the primary judge was said to have overlooked in his consideration of the reliability and creditworthiness of the Commissioner's witnesses was "the inappropriate process by which [the Commissioner's witnesses] prepared their affidavit evidence and prepared to give evidence at the hearing". It was submitted that the cross examination of Mr Barton, one of the Commissioner's witnesses, disclosed that he and Mr Burns, the other of the Commissioner's witnesses, had collaborated extensively on their evidence and that each witness had refreshed his memory by reading the other's affidavit. The following parts of the transcript were relied on:

- Mr Barton stated that: "When it comes to debt collection, I very largely take heed [of] what Ross [Mr Burns] wants me to do. He's very experienced".
- Prior to or after affirming his affidavits in June 2015, Mr Barton read Mr Burns' affidavit of 12 June 2015 in the MNWA proceeding.
- The Transcript records the following:

> "And when you read [Mr Burns' MNWA affidavit of 12 June 2015], did you tell Mr Burns that you had a real difficulty with Mr Caratti's version of the meeting of 10 April 2015?-
>
> *--We have a conversation where I agreed that our version of events were different.*
>
> ...
>
> You've now had a .. new affidavit sworn, where you agree that there is – *you agree with everything Mr Burns says about his recollection of the meeting? --- That – that may be the case, yes.*
>
> And you agree because Mr Burns told you to agree?---No.
>
> ..[S]o you have no difference whatsoever in his recollection and your recollection of the meeting?--- .. I haven't had a conversion with Mr Burns going through the entirety of the meeting, but *there are certain key elements where I am in agreement with Mr Burns on his recollection of the meeting.*
>
> Is there any elements that you can say you're in disagreement with Mr Burns?--- No.
>
> ...
>
> *Did you discuss your evidence that you were going to give with Mr Burns. I'm talking about your fresh affidavit that you swore on the morning of the second day of the hearing?--- Yes, I believe .. one of our solicitors or the ATO solicitors provided Mr Burns with a copy of that ...*
>
> Copy of what?---*Of my affidavit on that morning*. But I – I don't recall specific conversation about evidence that I was admitting in this particular matter. After that – sorry, after the first day of the hearing.

> .. *[D]id you discuss with Mr Burns what words were used at the meeting of 10 April 2014?---Yes.*
>
> Just to be clear, this is on –after there had been a – was an adjournment in the hearing last month? --- Sorry, no – no, I misunderstood. *"We discussed at length prior to the first hearing date [11 September 2015]* that we agreed vehemently [that] the words such as "global" [were used at the 10 April 2014 meeting], *so we had many discussions prior to [that date]."*

(emphasis added in the submission)

196 It was submitted that this evidence, elicited in cross examination, was critical evidence of two witnesses conferring often and at length in the course of preparing affidavits and giving evidence, agreeing a version of events in respect of key elements of disputed matters and exchanging and reading each other's affidavits up to the point in time when Mr Burns was cross examined (Mr Burns was cross examined first). It was also submitted that the fact that the witnesses had refreshed their memories by reference to each other's affidavit ought to have been disclosed prior to cross examination of Mr Burns so that his credibility could have been properly tested. It was further submitted that the impression that the witnesses had not refreshed their recollection by reference to each other's affidavit was reinforced by Mr Barton complying with the request not to be present in court when Mr Burns was cross examined.

197 The primary judge was said to have recorded the companies' submission that it was unsafe to rely on the Commissioner's witnesses in light of those matters but, it was submitted:

> Without otherwise referring to or dealing with that submission, and despite finding Mr Caratti generally to be a truthful and responsive witness, the Primary Judge:
>
> 26.1 described Mr Burns (at [61]) as "an impressive witness. He gave his evidence truthfully, frankly, responsively and confidently. ... It is also significant that Mr Burns' evidence was substantially supported by that of Mr Barton. There is no reason to believe that they were not both telling the truth."
>
> 26.2 described Mr Barton (at [74]) "to be an honest, responsive and dispassionate witness. The only minor qualification relates to inconsistent answers which he gave concerning whether or not Mr Burns used the phrase "established tax liabilities" or the word "established" during the course of the 10 April meeting. ... I do not regard his change of evidence on this matter as significant or to cast doubt on his overall credibility."
>
> 26.3 stated that ([at [135]) one of the reasons for accepting and preferring the evidence of Mr Burns and Mr Barton to that of Mr Caratti in respect of the words used at the 10 April 2015 meeting is that "Mr Burns' evidence .. was corroborated by that of Mr Barton". See also [140].

198 The task of the Court on an appeal by way of rehearing on the evidence that was before the primary judge is the correction of error: *Fox v Percy* (2003) 214 CLR 118 at [20]–[31]. The Court should not interfere with primary judge's findings of fact unless persuaded that the finding was plainly and obviously wrong, or where it is concluded that the findings made are glaringly improbable or contrary to compelling inferences in the case: *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679 at [43].

199 The primary judge's factual finding that a deal covering all tax debts, including the tax debts in question, was not made at the 10 April 2014 meeting did not rest solely upon the credit of the witnesses. The primary judge did prefer the evidence of the Commissioner's witnesses to Mr Caratti's evidence about the meeting in April 2014 at which the deal was said to have been reached, but it is clear from the primary judge's reasoning that the factual finding made was also based substantially upon the objective evidence which was not supportive of Mr Caratti's version of events but rather was supportive of the version of events given by the Commissioner's witnesses. At [35], the primary judge stated:

> I do not doubt that Mr Caratti holds a genuine subjective belief that he and Mr Burns entered into a binding legal agreement on 10 April 2014 which went beyond the terms of the Deeds which were subsequently executed. I found Mr Caratti generally to be a truthful and responsive witness. However, for reasons which will be developed below, I consider that his subjective belief is not supported by either relevant objective documentary evidence or by the evidence of Mr Burns and Mr Barton regarding the 10 April 2014 meeting, which I prefer. There is no doubt that there is much at stake for Mr Caratti (and also for Ms Bazzo). This may have subconsciously affected Mr Caratti's perception of what occurred on 10 April 2014 and created a personal belief on his part that the negotiations covered a wider ground than they objectively did. I am not persuaded, however, that the broader binding agreement or agreements which Mr Caratti alleges were entered into on 10 April 2014 have been made out having regard to all the relevant evidence.

200 The primary judge set out his reasons in detail at [132]–[140] as follows:

> I accept the defendant's submission that no binding oral agreement was reached at that meeting and that the relevant evidence, viewed objectively, points to the parties intending to postpone the creation of contractual relations until formal Deeds were drawn up and executed. That finding is supported by the following matters.
>
> First, it is highly improbable that Mr Burns would have committed the ATO to entering into a binding legal agreement on 10 April 2014 when the ATO was not then aware of the quantum of potential additional taxation liabilities of the relevant entities which were not included in the spreadsheet used by him at that meeting but might subsequently emerge as a result of the audits which were on foot at that time. In other words, Mr Burns was simply not in a position at that time to know whether or not the security which Mr Caratti offered in respect of the known taxation liabilities would be sufficient to cover then unknown potential future liabilities.

As noted above, the plaintiffs submitted that it is evident from the final wording of the definitions of "Taxation Debt" in both the Deeds that the ATO was prepared to accept the possibility of some adjustment in the spreadsheet figures which might result from the Pt IVC processes. However, it is one thing to say that the ATO was prepared to accept the security arrangements notwithstanding the possibility of that type of adjustment in relation to a known taxation liability amount which had been arrived at after assessment by the ATO. It is quite another to say that a much wider inference should therefore be drawn to the effect that the ATO was willing to accept an amount of security in respect of an entirely unknown future amount or amounts which were unrelated to any known existing taxation liability. That submission cannot be accepted.

Secondly, I accept and prefer the evidence of Mr Burns and Mr Barton to that of Mr Caratti as to what was discussed at the 10 April 2014 meeting. In particular, I accept Mr Burns' evidence, which was corroborated by that of Mr Barton, that he told Mr Caratti that, so that there was no confusion, "there are no agreements until each respective Deed is executed". Mr Robertson QC submitted in closing address that Mr Barton was asked specifically about those words and he claimed that Mr Barton could not recollect that they were used. That is incorrect. When asked in cross-examination whether Mr Burns used those words, Mr Barton responded: "I can recall words to that effect, yes". Thus Mr Barton corroborates Mr Burns' evidence, which is contrary to Mr Caratti's.

Thirdly, as noted above, notwithstanding Mr Caratti's sincere personal belief that he had negotiated a binding agreement which was broader in terms than those in the subsequently executed Deeds, it is telling that that belief is not supported either by the terms of his letter dated 11 April 2014 (written very soon after the meeting), nor the letter which was written on behalf of Gucce on 29 April 2014 in response to the then draft Gucce Deed. In circumstances where Mr Caratti was authorised by Ms Bazzo to negotiate on behalf of Gucce, one would have expected Gucce's solicitors to have included in the letter among the numerous concerns they had with the draft Gucce Deed that it should not encroach upon the broader oral agreement which Mr Caratti claims was made at the 10 April 2014 meeting. It is significant that the solicitors' letter makes several references to that meeting yet, no comment is made on the potential effect of the entire agreement clause in cl 13.1 of the draft Deed on the alleged broader agreement. Nor was any comment made by the solicitors concerning the implications of proposed cl 5.3 and the Commissioner's power to pursue in good faith all recovery options and powers regarding Gucce's tax-related liabilities which did not fall within the definition of "Taxation Debt" in the draft Deed. That power entitled the Commissioner to pursue taxation liabilities such as those which the plaintiffs contend were protected by the broader agreement. Yet no objection was taken by Gucce's solicitors. In my view that is because, objectively assessed, there was no broader agreement.

None of the other correspondence relied upon by the plaintiffs which post-dates the 10 April 2014 meeting provides a sufficient evidentiary basis for concluding that a binding oral agreement was arrived at at that meeting in the broad terms now alleged by them.

Fourthly, it is true that there are references to an "agreement" having been reached at the 10 April 2014 meeting in various materials emanating from the ATO. For example, there is such a reference in Mr Burns' Executive Brief, which also seems to have informed Ms Harako's use of the same term in an affidavit she swore in the proceedings in the Supreme Court of Western Australia in May 2014. Ms Harako also elected to describe the agreement reached on 10 April 2014 as the "Global Settlement Agreement". I do not consider that any particular significance attaches to

> this terminology. It may be accepted that broad heads of agreement were reached at that meeting on particular matters, as is reflected in Mr Barton's handwritten notes and, in particular, the insertion of the word "deal" alongside various issues which were discussed. That does not conclude, however, that legally binding agreements were reached at that time. For the reasons provided above, the evidence does not support any such characterisation of the negotiations which took place on that day. The evidence strongly suggests that the parties did not intend to enter into binding contractual relationships at that time and that this would only occur following the provision of additional relevant information, further negotiations (including the drafting of the respective Deeds) and those Deeds being executed. The "agreements" or "deeds" which were negotiated at the meeting were only "in principle" and did not give rise to binding contractual relations.
>
> Fifthly, the fact that Mr Burns told Mr Barton after the meeting not to pursue further recovery action while the security deeds were being sorted out does not indicate that a binding agreement was reached at that meeting to that effect. The timing of any such recovery action was at the defendant's discretion. In any event, even if it did provide some such indication, the subject matter was limited to the amounts discussed at that meeting in relation to existing taxation liabilities (as later adjusted by mutual agreement prior to the Deeds being finalised) and not any other unknown and unrelated taxation liabilities of the relevant entities.
>
> Furthermore, if contrary to the above, a binding oral agreement was reached at the 10 April 2014 meeting, I consider that it was confined to the then known amounts of taxation liability by the relevant entitles as disclosed on the spreadsheet which was used by Mr Burns throughout that meeting and which provided the basis for the parties' negotiations at that time. Mr Barton's detailed notes of the meeting provide strong corroborating evidence to support the evidence of both Mr Burns and himself that the discussions at that meeting were limited to the known taxation liabilities for each relevant entity as disclosed in the spreadsheet and as explained to Mr Caratti. I accept Mr Barton's evidence that the word "global" was not used at the meeting and, perhaps even more significantly, that Mr Burns never used words such as that "the deal covered all entities" or that the arrangements which were then agreed covered all issues which were then under audit, including any future taxation liabilities which might emerge as a result of those ongoing audits. Mr Burns' evidence is to similar effect.

201 No appellable error is discernible – the primary judge correctly had regard to objective evidence and the balance of the evidence was supportive of the conclusion that the primary judge reached. The finding that a global deal which included the tax debts in question was not made at the 10 April 2014 meeting was neither glaringly improbable nor contrary to compelling inferences in the case, particularly in view of the subsequently executed MNWA and Gucce Deeds which covered other tax debts but did not include the tax debts in question.

202 Moreover, no appellable error is discernible in his Honour's conclusion that the evidence of the Commissioner's witnesses was to be preferred to the evidence of Mr Caratti. The primary judge recorded the submission that was advanced at trial at [110] as follows:

> Finally, the plaintiffs submitted that the Court should find the evidence of both Mr Burns and Mr Barton to be unreliable. He submitted that Mr Barton's credibility

> was affected by such matters as his acknowledgment that he had read Mr Burns' affidavit at some time, they had discussed their evidence at length before the trial, there were inconsistencies in his recollection of particular words or phrases being used at the 10 April 2014 meeting, and he was unable to explain why he had not referred to the Executive Brief in his affidavit even though, so it was submitted, it confirmed Mr Caratti's case that the purpose of the 10 April 2014 meeting was to settle all taxation debts.

203 It does appear that the primary judge did not give specific consideration to the reliability and credibility of the evidence of the Commissioner's witnesses in light of the submission put that the evidence in cross examination disclosed that they had seen each other's affidavits and discussed their evidence prior to trial. Nonetheless, it does not follow that appellable error is shown. The Commissioner argued that the companies' submissions misstated Mr Barton's evidence on cross examination and there is some force in that submission. This was not a case where the evidence revealed that the witnesses had discussed the evidence they would give: see *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 at [1924]–[1926]. They discussed their recollections but critically, it did not emerge that they agreed on a version of events that they would give in evidence. Mr Barton's evidence in cross examination was that he and Mr Burns had a conversation where he (Mr Barton) agreed that their version of events was different. When put to Mr Barton that he agreed with everything that Mr Burns had said about his (Mr Barton's) recollection and that he agreed because Mr Burns told him to agree, Mr Barton denied this. He was not challenged on his answer. The evidence elicited in cross examination fell far short of giving rise to an inference, or establishing, that the witnesses had collaborated. The case is distinguishable from *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 on which the companies relied. In *Day v Perisher Blue Pty Ltd* the "critical evidence" that the trial judge failed to deal with was that it came out in cross examination that the solicitors had advised the witnesses to have regard to the recollections of other witnesses, and moreover, the witnesses had met to discuss the evidence that they would give with the object of all speaking with one voice. This was not that case. Furthermore, and critically, the present case did not depend entirely on the recollections of Mr Burns and Mr Barton. At [140] the primary judge noted that Mr Barton's detailed notes of the meeting provided strong corroborating evidence to support the evidence of both Mr Burns and himself that the discussions at that meeting were limited to the known tax liabilities for each relevant entity. Earlier at [52], the primary judge noted that an internal written report of the 10 April 2014 meeting prepared by Mr Burns (the "Executive Brief") likewise substantially supported Mr Burn's version of events. In both circumstances, there was documentary evidence

corroborating the evidence given by the witnesses. It was open for the trial judge to accept the evidence of Mr Burns and Mr Barton as reliable and credible. Accordingly, this ground of the appeal is rejected.

CONCLUSION

204 The companies brought their appeal as of right but require leave to appeal. Leave to appeal should be granted, and the appeal dismissed.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Farrell and Davies.

Associate: 

Dated: 16 November 2016