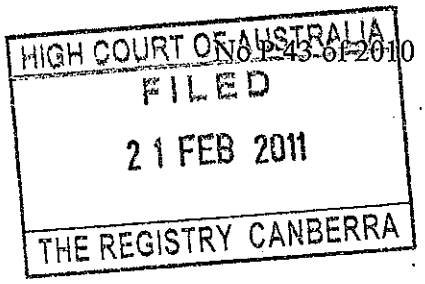
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

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

BETWEEN




No P43 of 2010

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Appellant

and

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

Respondent

## APPELLANT'S REPLY SUBMISSIONS

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

2. Paragraphs 17 to 21 of Lanepoint's submissions refer to the requirement for the grant of leave under s 459P(2) of the *Corporations Act* for some applications for winding up. The Court may grant leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise: s 459P(3). The presumption of insolvency satisfies the requirement of a prima facie case. Lanepoint acknowledges in paragraph 19 that 'the company could establish solvency at the stage of seeking of leave under s 459P(2)', that is, that the onus is on the company to rebut the presumption of insolvency. To 'contend that its solvency is determined by a particular debt' which is disputed or which is subject to 'a substantial contest of fact' (paragraphs 20 and 21 of Lanepoint's submissions) is insufficient; in this case, Lanepoint was required to prove, by admissible evidence, its solvency. On the evidence, it failed to do so. The trial judge did not

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err in granting leave under s 459P(2) and in ordering that Lanepoint be wound up.

3. The discussion of the cases at paragraphs 24 and 32 of Lanepoint's submissions relates to category (iii) of the scenarios referred to in paragraph 27 of ASIC's submissions, where no presumption of insolvency operates. These cases do not inform the position in relation to categories (i) or (ii), which are premised on the presumption. *Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 says nothing about the effect of the presumption of insolvency on the exercise of the Court's discretion to grant leave, which is central to this appeal. While it might be sufficient for a company to demonstrate a genuine dispute in situations where the presumption does not apply, the position is otherwise where the company is presumed to be insolvent.

4. Lanepoint submits at paragraph 30 that 'there is no reason to suppose that this discretion could not be exercised' where an applicant seeks leave to apply for a winding up order. The point that this submission misses is that in order to persuade the court to exercise the discretion in favour of the debtor company, that company must establish its solvency by proving that the debt does not exist or is of an amount that results in proof of solvency. A mere assertion that there is a dispute regarding the existence of a debt is not sufficient to establish solvency. If the court exercised its discretion to stay a winding up application as a result of an assertion by a company regarding the existence of a disputed debt, the presumption of insolvency would be rendered nugatory. Such an assertion, without proving that either the debt does not exist or is of such lower amount that the company is essentially solvent, does not assist in relation to the 'calculus' of insolvency.

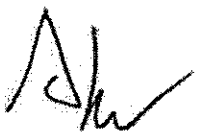
5. The trial judge had the discretion described available to him, and that discretion was exercised properly. His Honour was not satisfied that the evidence demonstrated that the 'disputed' debts were not owing or of a lesser amount. Accordingly, Lanepoint had not rebutted the presumption of insolvency. It was the Full Court that erroneously interfered with the exercise of the trial judge's discretion.

6. It is not open to Lanepoint at this stage in proceedings to attempt to challenge findings of fact. If such issues are to be raised, the correct procedure for doing so is via a notice of contention. Such notice has not been filed. Further, the claims by Lanepoint in relation to the evidence and treatment thereof by the trial judge (paragraphs 41, 42 and 45 of Lanepoint's submissions) ignore the fundamental principle underpinning this appeal: it was not for ASIC to prove that the debt exists, but for Lanepoint to prove that it did *not* exist. The onus was firmly upon Lanepoint and it failed to discharge this onus. Lanepoint was given every opportunity of proving its case at the appropriate time - there was no lack of procedural fairness as is suggested in paragraph 43 of Lanepoint's submissions.

7. It is incorrect to suggest, as does Lanepoint at paragraph 47 of its submissions, that every person whose interests are affected by a winding up order ought to be before the court. A winding up order operates *in rem*. Its whole purpose is to change the status of the company, and in doing so, to 'affect the interests' of others, including directors, employees, creditors, shareholders, customers and competitors.

8. Finally, paragraph 10 of Lanepoint's submissions, relating to the tax liability, is factually incorrect. The moneys refunded by the Australian Taxation Office did not belong to Lanepoint and were not available for payment of its debts – they were caught by the charge and belonged to the secured creditor Westpoint Management.

Dated: 21 February 2011

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