HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CRENNAN AND KIEFEL JJ

AUSSIE VIC PLANT HIRE PTY LTD APPELLANT

AND

ESANDA FINANCE CORPORATION LIMITED RESPONDENT

Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited
[2008] HCA 9
26 March 2008
M123/2007

ORDER

1. Appeal dismissed.

2. Mr Bruno Strangio pay the respondent's costs of the appeal to this Court.

On appeal from the Supreme Court of Victoria

Representation

J M Selimi for the appellant (instructed by Starnet Legal Pty Ltd)

D G Collins SC with N A Frenkel for the respondent (instructed by Gadens Lawyers)

CATCHWORDS

Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited

Corporations law – Winding up in insolvency – Statutory demand – Extension of time – Application by appellant to set aside statutory demand under s 459G(2)(a) of the *Corporations Act* 2001 (Cth) dismissed by Master, but extension of time granted for compliance with the demand – After the expiration of the extension of time for compliance, the appellant applied for an order further extending the time for compliance with the demand – Presumption of insolvency where there was a failure to comply with a statutory demand – Whether Court had the power to extend the time for compliance after the period had expired – General interpretation provisions applied subject to contrary intention – Whether contrary intention sufficiently shown.

Words and phrases – "extend", "period of compliance", "the last such order".

Corporations Act 2001 (Cth), ss 9, 70, 459F(2), 459G(2)(a).

1 GLEESON CJ, HAYNE, CRENNAN AND KIEFEL JJ. On an application under s 459P of the *Corporations Act* 2001 (Cth) ("the Act"), a "Court"[1] may order that an insolvent company be wound up in insolvency. For the purposes of an application under s 459P the Court is required, by s 459C, to presume that the company is insolvent if, during or after the three months ending on the day when the application was made, the company failed to comply with a statutory demand[2]. That presumption "operates except so far as the contrary is proved for the purposes of the application"[3].

2 Section 459F of the Act identifies when a company is taken to fail to comply with a statutory demand. If, at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with that demand at the end of that period[4]. Section 459F(2) identifies the period for compliance with a statutory demand. If the company does not apply in accordance with s 459G for an order setting aside the demand, the period for compliance with the demand is 21 days after the demand is served[5]. If the company does apply in accordance with s 459G for an order setting aside the demand, s 459F(2)(a) makes alternative provisions fixing the period for compliance with the demand according to the outcome of the application for an order setting aside the demand. If such an application is made, the period for compliance with the demand is:

> "(i) if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes

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1 Defined in s 58AA of the *Corporations Act* 2001 (Cth) as any of:

> "(a) the Federal Court;
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> (b) the Supreme Court of a State or Territory;
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> (c) the Family Court of Australia;
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> (d) a court to which section 41 of the *Family Law Act 1975* applies because of a Proclamation made under subsection 41(2) of that Act".

2 s 459C(2)(a).

3 s 459C(3).

4 s 459F(1).

5 s 459F(2)(b).

an order that extends the period for compliance with the demand—the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or

(ii) otherwise—the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of".

3 The central question in this appeal is whether an order may be made extending the period for compliance with a statutory demand after the period for compliance has expired. That question should be answered "no".

The proceedings below

4 The respondent is a finance company. It served a statutory demand on the appellant. The affidavit accompanying the demand alleged that the appellant owed the respondent more than $400,000 under several hiring and chattel mortgage contracts between the parties. Pursuant to s 459G of the Act, the appellant applied to the Supreme Court of Victoria for an order setting the demand aside.

5 On 20 June 2006, Master Efthim of the Supreme Court dismissed the application to set aside the statutory demand but ordered that the time for compliance with the demand be extended until 4 July 2006. The appellant was entitled to appeal as of right to a single judge of the Trial Division of the Supreme Court against the orders of the Master[6] and that appeal would be by rehearing de novo[7]. The appellant, being dissatisfied with the orders of Master Efthim, gave notice of appeal.

6 After the time fixed by the Master as the time for compliance with the statutory demand had expired, but before the appeal to a single judge had come on for hearing, the appellant applied for an order further extending the time for compliance. The application for further extension and the appeal came on for hearing by Whelan J. Both the application for further extension and the appeal were dismissed[8]. His Honour held that[9]:

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6 Supreme Court (Corporations) Rules 2003 (Vic), r 16.5.

7 Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 77.05(7).

8 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2006] VSC 306.

9 [2006] VSC 306 at [9].

> "The point is not whether an extension of time can or should be granted, the point is that the consequence provided for by s 459F(1) has already attached ... and no order which I make can or should purport to undo that."

7 The appellant sought to appeal to the Court of Appeal of the Supreme Court of Victoria against the orders made by Whelan J. One of the questions for the Court of Appeal was whether an appeal to that Court lay as of right or only by leave. That depended upon whether the subject of the proposed appeal was "a judgment or order in an interlocutory application"[10]. The Court of Appeal held[11] that an appeal lay only by leave but that the appellant should have leave. The Court of Appeal's holdings that an order refusing to extend time for compliance with a statutory demand is an order in an interlocutory application, and that to challenge the order in the Court of Appeal requires leave, are conclusions that are not in issue in the proceedings in this Court. What is in issue is whether the time for compliance with a statutory demand can be extended after it has expired.

8 On that issue the Court of Appeal divided in opinion. Because submissions were to be made to the Court of Appeal that it should depart from its earlier decision in *Buckland Products Pty Ltd v Deputy Commissioner of Taxation*[12], five members of the Court of Appeal heard the appeal in the present matter. Two members of the Court (Maxwell P and Neave JA) held[13] that time for compliance with a statutory demand can be extended after it had expired. Two members of the Court (Nettle and Ashley JJA) held[14] that while the preferable construction of the Act is that time for compliance can be extended after it has expired, earlier decisions to the opposite effect[15] could not be said to

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10 *Supreme Court Act* 1986 (Vic), s 17A(4)(b).

11 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2007) 63 ACSR 300 at 320 [77] per Maxwell P and Neave JA, 322 [82] per Chernov JA, 331 [108] per Nettle JA, 336 [125] per Ashley JA.

12 [2003] VSCA 85.

13 (2007) 63 ACSR 300 at 308-316 [28]-[58].

14 (2007) 63 ACSR 300 at 336 [124] per Nettle JA, 345 [187] per Ashley JA.

15 *Livestock Traders International Pty Ltd v Thi Lam Bui & Van Quang Bui* (1996) 22 ACSR 51; *Equuscorp Pty Ltd v Perpetual Trustees WA Ltd* (1997) 80 FCR 296; *Buckland Products Pty Ltd v Deputy Commissioner of Taxation* [2003] VSCA 85.

be wrong and productive of inconvenience and should therefore be applied[16]. The fifth member of the Court, Chernov JA, concluded[17] that the policy of Pt 5.4 of the Act (ss 459A-459T) and the mischief which s 459F(2)(a)(i) sought to abrogate required the conclusion that s 459F(2)(a)(i) does not empower the Court to extend the period for compliance after it has expired. The Court of Appeal dismissed the appellant's appeal. By special leave, the appellant now appeals to this Court.

A question of construction

9 The competing views about construction of the relevant provisions of the Act hinge about whether certain general interpretation provisions in Pt 1.2 of the Act (ss 6-109X) are engaged.

10 Section 6(1) of the Act provides that the provisions of Pt 1.2 "have effect for the purposes of this Act, except so far as the contrary intention appears in this Act". Two provisions of Pt 1.2 are relevant: s 70 and the definition of "extend" set out in the Dictionary to the Act contained in s 9.

11 Section 70 provides that:

> "Where this Act confers power to extend the period for doing an act, an application for the exercise of the power may be made, and the power may be exercised, even if the period, or the period as last extended, as the case requires, has ended."

Section 9 provides that:

> "Unless the contrary intention appears
>
> ...
>
> ***extend***, in relation to a period:
>
> (a) includes further extend; and
>
> (b) has a meaning affected by section 70."

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16 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; [1993] HCA 15.

17 (2007) 63 ACSR 300 at 323-326 [85]-[92].

12 As noted earlier, s 459F(2) fixes the period for compliance with a statutory demand. Paragraph (a) of that sub-section is predicated upon the company applying "in accordance with section 459G for an order setting aside the demand" and sub-par (i) of s 459F(2)(a) is further predicated upon the Court making "an order that *extends* the period for compliance with the demand" (emphasis added) either on hearing the application under s 459G or on an application by the company "under this paragraph" (that is, s 459F(2)(a)). It therefore follows from the reference to "an order that *extends* the period for compliance" that, unless the contrary intention appears in the Act, the power to extend the time for compliance thus given to a Court is to be understood in the manner described in the definition of "extend" in s 9, and as the meaning of that word is affected by s 70. That is, unless the contrary intention appears in the Act, the power to extend the period for compliance is to be understood as including power to extend it even if the period has ended. But there are several features of Pt 5.4 of the Act which lead to the conclusion that a contrary intention does appear.

13 Part 5.4 of the Act (ss 459A-459T) is entitled "Winding up in insolvency". Division 1 of Pt 5.4 (ss 459A-459D) is concerned with when a company is to be wound up in insolvency; Div 2 (ss 459E-459F) provides for statutory demands; Div 3 (ss 459G-459N) provides for applications to set aside statutory demands; Div 4 (ss 459P-459T) deals with applications for an order to wind up a company in insolvency.

14 The evident purposes of Pt 5.4 of the Act include speedy resolution of applications to wind up companies in insolvency. One particular feature of the way in which that purpose is carried into effect is to focus principal attention at the hearing of the winding up application upon whether a company is insolvent rather than upon defects in the procedures that precede the institution of the application for winding up.

15 The provisions that now appear in Pt 5.4 of the Act were first enacted as amendments to the *Corporations Act* 1989 (Cth) by s 57 of the *Corporate Law Reform Act* 1992 (Cth). The provisions found their origins in the Report of the General Insolvency Inquiry conducted by the Law Reform Commission[18] generally referred to as the "Harmer report". As that report recorded[19], the Law

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18 Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988).

19 Report No 45, (1988), vol 1 at 68 [138].

Reform Commission recommended repeal of what was then s 364(2) of the relevant companies legislation[20]. That section had "deemed" a company to be insolvent if a creditor to whom the company was indebted for more than $1,000 made demand for payment of the sum due and the company had, for three weeks after the service of the demand, failed to comply with the demand.

16 The Law Reform Commission recommended[21] repeal of this provision and replacement by "a provision which specifies the circumstances from which it may be presumed that a company is unable to pay its debts". It was intended[22] that this approach, coupled with provisions designed to overcome defects in notices of demand, would "more clearly permit the court to exercise a discretion in relation to defective notices of demand and may avoid winding up proceedings against a company being dismissed for technical or minor defects when the company is clearly insolvent".

17 That speed in the resolution of applications to wind up in insolvency is an important underlying policy of Pt 5.4 of the Act is evident from a number of provisions. First, there is the requirement of s 459R that an application for a company to be wound up in insolvency is to be determined within six months after it is made. Although that period may be extended by a Court, an extension may be granted only if the Court is satisfied that special circumstances justify the extension and if the order is made within the six months or within the period as last extended[23]. Secondly, there is the absolute limitation in s 459G of the time within which a company may apply for an order setting aside a statutory demand to 21 days after the demand is served. This Court held in *David Grant & Co Pty Ltd v Westpac Banking Corporation*[24] that the period of 21 days within which an application to set aside a statutory demand may be commenced cannot be extended. Thirdly, there is the fixing by s 459E(2)(c) of the time for compliance with a statutory demand (21 days) coupled with the fixing of times under s 459F(2) for compliance with a demand according to whether or not an application is made to set it aside.

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20 Found at that time in what was called the "co-operative scheme" to which effect was given, so far as now relevant, by the *Companies Act* 1981 (Cth) and the several State Companies Codes.

21 Report No 45, (1988), vol 1 at 68 [138] (footnote omitted).

22 Report No 45, (1988), vol 1 at 68 [137].

23 s 459R(2).

24 (1995) 184 CLR 265; [1995] HCA 43.

18 The emphasis which these provisions give to the speedy resolution of an application to wind up in insolvency is coupled with provisions which seek to focus attention at the hearing of an application to wind up in insolvency upon whether the company is insolvent rather than upon the formal adequacy of steps which have preceded the institution of the application to wind up. Chief among the provisions intended to focus attention upon solvency is s 459S. That section limits the grounds on which a company may oppose a winding up application which is founded on failure to comply with a statutory demand. Section 459S provides:

> "(1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
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> (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
>
> (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
>
> (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

The reference in s 459S to grounds that a company relied on or could have relied on in an application to set aside a statutory demand takes its content from s 459J. That section identifies when a Court may set aside a statutory demand. In particular, the Court "must not set aside a statutory demand merely because of a defect"; the defect must be such that "substantial injustice will be caused unless the demand is set aside"[25].

19 It would be sharply at odds with the purposes revealed by the provisions of Pt 5.4 to read the power to extend time for compliance with a statutory demand as capable of exercise after the time has expired. That may well be reason enough to consider that the Act intends that the general provisions of s 70 and the definition of "extend" in s 9 should not apply to the power to extend time for compliance with a statutory demand. But the point is put beyond doubt when regard is had to the consequence that the Act attaches to a failure to comply with

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25 s 459J(1)(a) and (2).

a statutory demand. As noted at the outset of these reasons, if a company fails to comply with a statutory demand, and that failure occurs during or after the three months ending on the day when that winding up application is made, the Court *must* presume that the company is insolvent. It is s 459C that requires the Court to make that presumption.

20 Section 459C(2) identifies several circumstances in which, for the purposes of an application to wind a company up in insolvency, a "Court must presume that the company is insolvent". Those circumstances are:

> "if, during or after the 3 months ending on the day when the application was made:
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> (a) the company failed (as defined by section 459F) to comply with a statutory demand; or
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> (b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or
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> (c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or
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> (d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or
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> (e) a person entered into possession, or assumed control, of such property for such a purpose; or
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> (f) a person was appointed so to enter into possession or assume control (whether as agent for the chargee or for the company)."

21 The temporal focus of s 459C is upon a period which commences three months before the date of the application for winding up, but the period does not terminate upon the date on which the winding up application commences. The question for a Court is whether any of the identified events has occurred at any time after the commencement of the relevant period. The Act does not require any further consideration of whether the event persists at the date of the application for winding up.

22 If one of the specified events has occurred at any time during the identified period, the Court *must* presume that the company is insolvent. But the presumption may be rebutted. Section 459C(3) provides that:

> "A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the application."

23 On its face, s 459F(1) is engaged if the time for compliance with a statutory demand expires and the company has not then complied with it. The demand was in force; the time expired; the company did not comply with the demand.

24 An order made after the time for compliance had expired, but which sought to extend the period for compliance, would not, in its terms, alter the fact that a failure to comply with the demand had then occurred. But that conclusion depends upon identifying that there was a failure to comply. Whether there has been a failure depends upon identifying the end of the period of compliance and the period of compliance is to be fixed in accordance with s 459F(2). The appellant's argument that an order extending the time for compliance with a statutory demand can be made after the period has expired can find no textual footing in s 459F(2). Although s 459F(2)(a)(i) refers to "the last such order" extending the time for compliance with a statutory demand, that cannot include an order made after the period has expired.

25 To read "the last such order" as including an order made after the period for compliance has expired would focus attention upon the state of affairs at either the date of commencement of the winding up application or the date of the hearing of that application. But s 459C neither requires nor permits that focus. It directs attention to what has happened at any time *during* a period, not upon a state of affairs at either of the particular times just nominated (commencement or hearing of the winding up application).

26 Further, it is of fundamental importance to recognise that the provisions which are now in question do 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. And contrary to much of the argument advanced in this case on the appellant's behalf, denying the power to extend time after its expiry does not cut down the utility, or impede the exercise, of rights of appeal. The principles

governing orders preserving the utility of the exercise of rights of appeal are well established[26]. If there is a right of appeal and those principles are engaged, orders will be made to preserve the subject matter of the appeal. Thus if, as in the present case, the appellant had an appeal as of right from the orders of the Master who heard the matter at first instance it was open to the appellant to seek orders preserving the utility of that right.

Conclusion and Orders

27 For these reasons it follows that, if the period for compliance with a statutory demand has expired, the Act does not permit the making of an order extending the period for compliance. It also follows that the appeal must be dismissed. Consistent with the undertakings given to the Court by Mr Bruno Strangio, he should pay the respondent's costs of the appeal to this Court.

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26 See, for example, *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd* (1988) 81 ALR 501; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 2]* (1998) 72 ALJR 869; [1998] HCA 32; cf *Wilson v Church (No 2)* (1879) 12 Ch D 454; *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261.

28 KIRBY J. This appeal, from the orders made by the Court of Appeal of the Supreme Court of Victoria[27], raises a contentious question about the meaning of s 459F(2)(a)(i) of the *Corporations Act* 2001 (Cth) ("the Act"). The appeal concerns the jurisdiction and power of the Supreme Court of Victoria to extend time for compliance with a statutory demand by a company subject to being wound up in insolvency upon that demand, notwithstanding that the stated period for such compliance has expired.

29 The relevant circumstances are explained in the reasons of Gleeson CJ, Hayne, Crennan and Kiefel JJ ("the joint reasons"). The applicable provisions of the Act and references to antecedent legislation and to a relevant law reform report may be found there. I need not repeat any of this material.

The reasoning in the Court of Appeal

30 *Reasons of the minority*: Because I agree substantially with the reasons expressed in the Court of Appeal by Maxwell P and Neave JA, in dissent[28], it is unnecessary for me to recount the entirety of their Honours' analysis. It can be found in the reports of the decision below.

31 Maxwell P and Neave JA describe the statutory scheme of the Act[29]. They explain the three basic reasons why they come to a conclusion opposite to that now favoured in the joint reasons in this Court. I agree with their Honours:

(1) That the view of the statute now adopted effectively requires the reader of s 459F(2)(a)(i) of the Act to insert into that sub-paragraph words of limitation upon the jurisdiction and power there afforded to the court in ample terms. Such words of limitation do not appear in the language used by the Parliament. They should not be introduced in the guise of construing the words enacted[30];

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27 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2007) 63 ACSR 300. The Court of Appeal divided. For differing reasons, Chernov, Nettle and Ashley JJA favoured rejecting the appeal; Maxwell P and Neave JA reached the opposite conclusion and would have afforded relief.

28 (2007) 63 ACSR 300 at 302-320 [1]-[77].

29 (2007) 63 ACSR 300 at 305 [14]-[17].

30 (2007) 63 ACSR 300 at 308 [31], 309-310 [32]-[36].

(2) That the view now adopted also ignores the clear facultative language of s 70 of the Act which ostensibly applies to the case and which, when read with s 459F(2)(a)(i) of the Act, reinforces the contrary result[31]; and

(3) That the decision wrongly extends the application of the earlier reasoning of this Court in *David Grant & Co Pty Ltd v Westpac Banking Corporation*[32], which was concerned with the very different statutory language of s 459G(2) of the Act ("may only"), held to be relevantly unambiguous[33]. The presently applicable provision, in s 459F(2)(a)(i), not only clearly contemplates the possibility of extension of time for compliance but makes it plain that the jurisdiction and power to grant such extension is ambulatory ("or in the last such order, as the case requires"). Hence, it is clear that the Parliament envisaged a large power of extension in the particular case, a postulate which is compatible only with a facility for retrospective extension as stated in s 70 of the Act[34].

32 *Substantive support of a majority*: It is important to appreciate that, upon the substantive question now before this Court, the majority opinion in the Court of Appeal favoured the analysis of the Act preferred by Maxwell P and Neave JA. Thus, Nettle JA concluded[35]:

> "The natural and ordinary meaning of s 459F(2)(a)(i) of the [Act], as reinforced by s 70, is that an application to extend time for compliance with a statutory demand may be made under the section after the time for compliance has expired."

33 To similar effect Ashley JA, in his reasons, agreed with Maxwell P and Neave JA, and with Nettle JA, that[36]:

> "[N]otwithstanding the weighty considerations adverted to [in the reasons of Chernov JA], the proper construction of Pt 5.4 of the Act should yield the result that a court has power under s 459F(2)(a)(i), in conjunction with

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31 (2007) 63 ACSR 300 at 308 [31], 310-312 [37]-[45].

32 (1995) 184 CLR 265; [1995] HCA 43.

33 (2007) 63 ACSR 300 at 305 [17] referring to *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277.

34 (2007) 63 ACSR 300 at 308 [31], 312 [43].

35 (2007) 63 ACSR 300 at 334 [118]. See also at 336 [124].

36 (2007) 63 ACSR 300 at 344 [184].

> s 70, to extend time for compliance, despite the last date for compliance having passed, in order that a right of appeal not be rendered nugatory. That seems to me to be the ordinary meaning of the pertinent provisions."

34 The only basis upon which Nettle JA[37] and Ashley JA[38] respectively accepted the orders giving effect to the contrary view, as proposed by Chernov JA[39], was the existence of previous authority and practice to the contrary effect, relevantly deriving from decisions of single judges. As Nettle JA put it succinctly[40]:

> "It follows, as I see it, that if the interpretation of the section is to be revisited, it is a matter for the High Court or parliament."

35 The construction of the Act that I favour, therefore, enjoyed strong majority support in the Court of Appeal. To deny a relevant ambiguity[41] is, with respect, to fail to respond adequately to the careful analysis of the Act set out in the reasons of the judges of that Court. That analysis obliges this Court to reconsider the language and purpose of the Act, as well as any matters of legal principle or policy that may properly be taken into account in resolving the question of controversy.

Favouring the facility of extension of time

36 *The court enjoys the power*: Without restating in its entirety the analysis of the judges in the Court of Appeal, let me express briefly, in my own words, the main considerations that lead me to the conclusion that the court enjoys the power to grant an extension for compliance with a statutory demand even though the initial period for compliance with the demand has expired.

37 *Multiple exercises of the power*: As all of the judges except Chernov JA concluded in the Court of Appeal, this is what the literal terms of s 459F(2)(a)(i) state, even without the support of s 70 of the Act.

38 Statutory interpretation is always, ultimately, a text-based activity. This Court has spent the last decade reminding Australian courts of their duty to

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37 (2007) 63 ACSR 300 at 336 [124].

38 (2007) 63 ACSR 300 at 345 [187].

39 (2007) 63 ACSR 300 at 331 [107].

40 (2007) 63 ACSR 300 at 336 [124].

41 Joint reasons at [19].

discharge the function of applying the law, when expressed in legislation, by starting with a close analysis of the text. We must be consistent in that approach. We should apply it in our own endeavours.

39 The language of s 459F(2)(a)(i) clearly contemplates the availability of extensions of the period for compliance with the demand and, moreover, that the circumstances of the particular case may require successive orders, inferentially over time, responding to demonstrated needs that arise ("or in the last such order, as the case requires"). The view that now prevails effectively obliges the insertion of words that the Parliament refrained from expressing such as "provided that any such application shall be made before the period for compliance has expired"[42]. The Parliament did not use such words. They are contrary to the generality of the language of the sub-paragraph. This Court has no authority to, and should not, insert words into a statute that cut down the generality of the words chosen by the Parliament.

40 *Express provision where period ended*: Section 70 of the Act renders even clearer the case for reading s 459(2)(a)(i) in this manner. That section, expressed in general terms, provides that "[w]here this Act confers power to extend the time for doing an act, an application for the exercise of the power may be made, and the power may be exercised, even if the period, or the period as last extended, as the case requires, has ended". The effect of s 6(1) of the Act is that s 70 is applicable in respect of s 459(2)(a)(i) unless "the contrary intention appears"[43]. The joint reasons suggest that such an intention can be taken to be manifested in the degree to which Pt 5.4 emphasises speed in the resolution of proceedings arising under that Part[44]. However, the general rule set out in s 70 is facultative, protective and beneficial. It has clear and particular procedural consequences in respect of a provision such as s 459(2)(a)(i). The rule should not be cut down by reference to general concerns said to be evident in other, related, sections of the Act. This is especially so because it is part of the scheme of the Act that a number of interpretative provisions (of which s 70 is one) are stated to be applicable in the absence of indication of an opposite intention. Given that the Act has been drafted on this basis, it would be reasonable to expect any purpose to displace the general rule to be expressed with a considerable degree of precision. In the face of the explicit grant of power, derogations are not to be left to judicial inference.

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42 cf joint reasons at [2].

43 Joint reasons at [12].

44 Joint reasons at [17]-[18].

41 *Interpreting judicial powers broadly*: Most importantly, the provisions for extension of time are reposed in a superior court. They constitute a grant of jurisdiction and power to such a court to deploy as the circumstances of the particular case necessitate. It is a basic rule of statutory construction, frequently repeated by this Court, that such a grant is not to be narrowly construed nor cut back without very clear reasons for doing so[45].

42 Why is this so? It is because such courts can be trusted to deploy the power so granted in a wise, prudent and just way. Courts know that they must do so judicially and consistently with the judicial process. It is the experience of such courts, and of ordinary life, that circumstances can and do arise involving a myriad of factual indications, such that orders may need to be made to suit the requirements of justice in the particular case. We must be consistent in the application of this principle. Courts below watch not only what we *say* in this Court, when expounding the governing rules of statutory construction, but what we *do* when ourselves purporting to apply those rules.

43 *Discretions to cure innocent error*: Experience specifically teaches that, on questions such as the present, judges, including in this Court, may exhibit different general inclinations. Thus, some judges incline to a narrower application of legislation so as to maximise the role of strict rules and to minimise the space for discretion that may adapt to the special demands of justice in the particular case. There are several instances where this tension has revealed

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45 See eg *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205; [1992] HCA 28; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 5; *The Commonwealth v SCI Operations* (1998) 192 CLR 285 at 301 [26]; [1998] HCA 20; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [21], 112-113 [111]; [1998] HCA 11; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 57 [112]; [1998] HCA 30; *Fejo v Northern Territory* (1998) 195 CLR 96 at 140 [79]; [1998] HCA 58; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 201 [41.3]; [1998] HCA 44; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 383 [71.2]; [1998] HCA 73; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 586-587 [221]; [1999] HCA 14; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423 [110]; [1999] HCA 18; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 461 [79]; [1999] HCA 19; *R v Gee* (2003) 212 CLR 230 at 274 [131]; [2003] HCA 12; *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 529-530 [32], 553 [114]; [2003] HCA 11; *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486 at 492 [10]; [2003] HCA 38; *John Fairfax Publications Pty Ltd v Gacic* (2007) 81 ALJR 1218 at 1239 [103]; 235 ALR 402 at 428; [2007] HCA 28.

itself[46]. Nevertheless, the general trend in this Court in recent years has, I believe, been to uphold the broad grant of jurisdiction and power to a court where this is afforded by legislation in terms that permit the court to soften the edges of overly rigid applications of procedural and other rules, and where otherwise an unyielding application of the law might defeat the attainment of justice in the particular case[47].

44 Differences of the foregoing kind might perhaps be traced to considerations embedded in individual judicial conceptions of the ameliorating role of courts of justice; a recognition of (and allowance for) human frailties; or the scars of particular professional experiences[48]. However that may be, when a choice exists in the construction of legislation, the trend of this and other courts has been to accept the need to uphold provisions that permit courts to cure particular defaults for reasons of justice. That is the approach that this Court should apply in circumstances such as the present. Above all where, with an explicit provision, the Parliament has afforded jurisdiction and power to a superior court, "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do"[49].

45 *Consistency with insolvency administration*: This Court has also repeatedly emphasised that "the modern approach to statutory interpretation … insists that the context [is to] be considered in the first instance … to include such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy"[50].

46 So can it be said, as the joint reasons conclude, that the reading of s 459F(2)(a)(i) of the Act urged by the appellant would cut across, and potentially defeat, the overall practical purpose of the Parliament? I think not:

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46 See eg *Jackamarra v Krakouer* (1998) 195 CLR 516 (Brennan CJ, McHugh and Kirby JJ; Gummow and Hayne JJ dissenting); [1998] HCA 27.

47 See eg *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 167-172; [1997] HCA 1.

48 cf Kirby, "Ten Parables for Freshly-minted Lawyers", (2006) 33 *University of Western Australia Law Review* 23 at 24-25.

49 *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey, cited (2007) 63 ACSR 300 at 309 [32].

50 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2. See (2007) 63 ACSR 300 at 323 [85].

(1) Such a view seriously underestimates the capacity of courts to organise their lists and to uphold applications for the extension of time only in cases where the proved circumstances clearly warrant that course. The capacity of judicial officers to decide such matters promptly (if necessary reserving reasons to be delivered at a later date, and then in short terms) is constantly demonstrated in busy practice lists throughout this country. There is no need to read down the ample language of the Act to avoid the dangers of misuse of such a facility. Courts, and particularly State Supreme Courts, are well capable of dealing quickly and resolutely with the substance of such applications. They will remember that the purpose of any extension of time is decidedly not to afford the company concerned further time to satisfy, or still worse, to delay creditors;

(2) Human nature being what it is, the proved default of an individual officer, employee or lawyer may fully explain the relevant delay. In such a case, it should be open to a court to provide relief as the Act contemplates and to do so even after the period for compliance with a statutory demand has elapsed, if adequate reasons are shown. The contrary postulate involves an assumption that an appeal might proceed, and even succeed in later demonstrating grounds on the merits, but be rendered nugatory because the relief is unavailable under the Act. Whilst other, later, remedies remain available to the company concerned, the issue remains whether the company has lost the particular opportunity afforded by the Act to invoke relief at the earlier stage. There may well be good commercial, financial and practical reasons, and reasons on the merits, why a company might wish to do so – asserting, in effect, that the proceedings against it are misconceived. In such a case, the Act affords remedies that are not futile, provided that the grounds for relief are satisfactorily proved and promptly invoked. Courts are well-equipped to differentiate cases deserving of relief from those that involve no more than delaying tactics[51]; and

(3) In the report that preceded the enactment of the relevant provisions of the Act, the Australian Law Reform Commission acknowledged that a company should be able to apply to set aside a statutory demand before the time for compliance expired and that, once the application was filed, the time for compliance should be extended for a fixed period or until such later time as a court determined[52]. As Maxwell P and Neave JA

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51 In his reasons in the Court of Appeal, Ashley JA dealt briefly, but convincingly, in the facts of this case, with circumstances which, if accepted, might well have resulted in the refusal of relief on the merits: see (2007) 63 ACSR 300 at 338-345 [137]-[182].

52 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 72-73 [148]-[149].

> remarked in the Court of Appeal, interpreting s 459F(2)(a)(i) of the Act so as to allow the time to be extended *after* the period for compliance with the statutory demand has expired would not add significantly to any uncertainty. Ashley JA too was surely right in pointing out that it could not be said that "even on the construction contended for by [the respondent, s 459F(2)(a)(i)] will always produce a day certain in the near future at which the time for compliance will expire"[53]. His Honour noted that the position arising is unlike the situations which result from the operation respectively of s 459F(2)(b) or of s 459F(2)(a)(ii)[54]. He also contrasted s 459R(2)(b), inserted in the Act at the same time as was s 459F(2)(a)(i). As Ashley JA pointed out, in the case of the former provision, "the legislature appears to have settled upon a form of words that would have the effect for which [the respondent] contended in respect of s 459F(2)(a)(i)"[55]. These are powerful and entirely orthodox reasons for preferring the construction of the provisions in question here that the majority of the Court of Appeal favoured. Two judges of that majority did not feel able to give any effect to their preference for reasons immaterial for us. The outcome in that Court would otherwise have been different. This Court is under no equivalent inhibitions.

Conclusion: the preferable interpretation favours the power

47 This Court should therefore give s 459F(2)(a)(i) its natural and textual meaning. It is a meaning that preserves the jurisdiction and power of the Supreme Court, where the interests of justice warrant that course, to extend the period for compliance with a statutory demand, including after the initial period for compliance has expired.

48 This conclusion is still further strengthened by the comparatively clear indication of the Parliament's overall purpose in s 70 of the Act. It respects and trusts the judges of the relevant courts, who are afforded the jurisdiction and power to enable them to respond judicially to the necessities of the particular case. It conforms to the important instruction of this Court on the approach to be taken to questions of statutory construction. It recognises the fact that occasional defaults can arise because of human failings and innocent error, particularly, one might say, in a case where the postulate is that the company concerned has failed to comply with a statutory demand within the time fixed for compliance.

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53 (2007) 63 ACSR 300 at 344 [185].

54 (2007) 63 ACSR 300 at 344-345 [185] referring to *Buckland Products Pty Ltd v Deputy Commissioner of Taxation* [2003] VSCA 85.

55 (2007) 63 ACSR 300 at 345 [186].

49 The foregoing outcome is only "sharply at odds with the purposes revealed by the provisions of Pt 5.4" of the Act[56] if those who perceive those purposes derive them only from the language of nominated sections without giving due effect to the terms of s 459F(2)(a)(i) and s 70. Reading all the statutory language in its entire context is another principle of construction upon which this Court has insisted in recent times. It is an approach to the ascertainment of the meaning of ideas conveyed by words that finds its ultimate source in ordinary human experience[57].

50 As Ashley JA correctly remarked in the Court of Appeal, courts in Australia are "equipped and … able" to deal quickly and resolutely with such applications[58]. They should not be denied the jurisdiction and power to afford relief where a proper case is established. It is for the applicant to provide, in the usual way, both an excuse for non-compliance with the statutory demand within time and a reason, on the merits, why the period for compliance should be extended and why that course would not be futile, or inconsistent with the terms and purposes of the Act, which are generally directed to the prompt and efficient administration of insolvency law in its application to companies. Often, perhaps usually, it would be impossible for the company to establish its entitlement to an extension of time for compliance. The application would then fail. But the Parliament has provided for the exceptional case. This Court should not erase such a provision.

Orders

51 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of Victoria should be set aside. In place of those orders, this Court should order that leave to appeal be granted and the appeal allowed with costs. The order made in the Trial Division of the Supreme Court of Victoria should be set aside. In its place it should be ordered that the time for compliance with the statutory demand be extended for 21 days. The proceedings should be remitted to the Supreme Court of Victoria for hearing and for further orders within that time.

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56 Joint reasons at [19].

57 *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 397; [1996] HCA 36 citing *R v Brown* [1996] 1 AC 543 at 561 per Lord Hoffmann.

58 (2007) 63 ACSR 300 at 338 [136].