HIGH COURT OF AUSTRALIA

GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION APPELLANT

AND

LANEPOINT ENTERPRISES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) RESPONDENT

Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) [2011] HCA 18
1 June 2011
P43/2010

ORDER

1. *Appeal allowed with costs.*

2. *Set aside:*

   (a) *paragraphs 1, 2, 3 and 4 of the order of the Full Court of the Federal Court dated 24 May 2010; and*

   (b) *the further order of the Full Court as to costs dated 9 September 2010, as varied by the order of Siopis J dated 1 October 2010;*

   and in place thereof order that the appeal by Lanepoint Enterprises Pty Ltd to the Full Court be dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with P D Crutchfield SC and O Bigos for the appellant (instructed by Australian Securities and Investments Commission)

G R Donaldson SC with A J Papamatheos for the respondent (instructed by Mony de Kerloy)

CATCHWORDS

Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed)

Corporations law – Winding up in insolvency – Application for winding up by Australian Securities and Investments Commission – Where respondent presumed insolvent under s 459C(2)(c) of *Corporations Act* 2001 (Cth) ("Act") – Where principle applying under former companies legislation that company will not be wound up where debt subject of bona fide dispute on substantial ground – Whether principle applicable to Act in light of presumption of insolvency – Whether respondent solvent – Where primary judge did not accept respondent's explanation for alterations to accounts and no further evidence relevant to solvency could be identified by respondent – Whether primary judge's exercise of discretion miscarried in refusing to dismiss or stay proceedings – Whether necessary to join other parties.

Words and phrases – "except so far as the contrary is proved".

Corporations Act 2001 (Cth), ss 459A, 459C, 459P, 467.

1 GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The respondent, Lanepoint Enterprises Pty Ltd ("Lanepoint"), is a company within the Westpoint Group of companies and in 2005 was a developer of property. Its operations were financed by loans from Suncorp-Metway Limited ("Suncorp") and from Westpoint Management Ltd ("Westpoint Management"), which was the responsible entity for a managed investment scheme, the Westpoint Income Fund ("the WIF"). The loans were secured by floating charges over the assets of Lanepoint.

2 On 25 October 2005 the Australian Securities and Investments Commission ("ASIC") issued the first of two interim stop orders, which prevented Westpoint Management from raising funds for the WIF. The final stop order was issued on 23 November 2005. On 9 February 2006 a provisional liquidator was appointed to Westpoint Management. On 3 March 2006 Suncorp appointed receivers and managers to Lanepoint. The provisional liquidator of Westpoint Management did likewise on 9 March 2006.

3 On 2 June 2006 ASIC applied, pursuant to s 459P of the *Corporations Act* 2001 (Cth) ("the Act"), to the Federal Court for orders that it have leave to apply for the winding up of Lanepoint in insolvency, for an order that Lanepoint be wound up and for the appointment of liquidators on the ground of Lanepoint's insolvency. In its application ASIC relied upon a statutory presumption of insolvency created by s 459C(2)(c) of the Act.

4 Section 459C appears in Pt 5.4 of the Act, which is entitled "Winding up in insolvency". Part 5.4 was introduced on 23 June 1993[1] and, together with Pts 5.4A and 5.4B, replaced the existing Pt 5.4 which dealt with orders for the winding up of companies. The provisions for winding up in insolvency which took effect in 1993 effected some significant changes. The statutory presumption of insolvency provided in s 459C was one. It is an important element of the scheme of Pt 5.4[2] and assumes importance on this appeal. The section has effect, inter alia, for the purposes of an application to wind up a company in insolvency

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1 Into the then Corporations Law, on the commencement of the *Corporate Law Reform Act* 1992 (Cth).

2 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 278 per Gummow J; [1995] HCA 43.

brought under s 459P and an application for leave under that section[3]. It provides in relevant part:

> "(2) The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:
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> …
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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;".

5 Sub-section (3) of s 459C provides that the presumption for which the section provides "operates except so far as the contrary is proved for the purposes of the application."

6 Lanepoint filed a notice of opposition to ASIC's application. The ground given for that opposition was that Lanepoint was solvent. If it was able to satisfy the Court of that fact, the statutory presumption would be rebutted.

7 It was common ground at the hearing of ASIC's application that Lanepoint's assets amounted to $5,729,837. Its liabilities, by way of tax and certain company loans, were of the order of $1.7 million. By the time of the hearing the debt due to Suncorp had been repaid but the liquidator of Westpoint Management had not recovered the debt to the WIF. The extent of that debt was the matter critical to the issue of Lanepoint's solvency. The receivers and managers of Lanepoint had expressed the opinion that the amount due by Lanepoint to the WIF, at 9 March 2006, was $6,607,978.41 and the liquidator of Westpoint Management agreed.

8 In concluding that Lanepoint owed that amount to the WIF, the receivers and managers did not accept as correct certain changes which had been made to the accounts of Lanepoint and the WIF and which had the effect of reducing Lanepoint's indebtedness to the WIF by some $5 million. One change made to the accounts was referred to in the proceedings as the "Kingdream transfer" and the other, which resulted from two "round robin" transactions, the "$2M run-around". Lanepoint sought to establish that the changes reflected the true

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3 *Corporations Act* 2001 (Cth), s 459C(1).

position, which is to say that the transactions in question were bona fide and effective, and that it was therefore solvent.

9 The hearing of evidence took place over three days in 2008 and Gilmour J made the orders sought by ASIC on 14 May 2009[4]. His Honour did not accept the explanation proffered by the witnesses called by Lanepoint, as to why the original records of monies advanced by the WIF to Lanepoint required correction. His Honour concluded that "Lanepoint has failed to establish its solvency and, thereby, rebut the statutory presumption. It is not able to pay its debts as they fall due and payable."[5]

10 A majority of a Full Court of the Federal Court (North and Siopis JJ, Buchanan J dissenting) allowed an appeal from his Honour's decision, set aside the orders made by his Honour and ordered a stay of ASIC's application "pending the determination of proceedings brought by the liquidator of Westpoint Management to determine the extent of the WIF liability."[6] Such proceedings had not in fact been brought. Their Honours must be taken to refer to proceedings yet to be initiated for that purpose by the liquidator, although there was no suggestion that the liquidator had the intention of doing so.

11 No error was identified by the majority in the findings made by Gilmour J as to the explanation for the changes to the accounts or as to his non-acceptance of Lanepoint's witnesses. The majority accepted two related contentions put by Lanepoint: that ASIC's winding up application was an inappropriate vehicle for the determination of questions as to Lanepoint's insolvency[7]; and that the discretion exercised by Gilmour J, as to whether to stay or dismiss the proceedings, had miscarried[8].

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4 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52.

5 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 65 [93].

6 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 499 [75].

7 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 493 [36] and 497 [61]-[62].

8 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 497 [61]-[62].

12 The starting point in the reasons of the majority was that it was well established prior to the changes effected in 1993 "that ordinarily a company would not be wound-up on the basis of a disputed debt."[9] Their Honours considered that that principle was maintained after the coming into force of the statutory amendments in 1993 and that the exercise of the court's discretion:

> "is also to be informed by the legislative policy manifest by the reforms introduced by the Corporate Law Reform Act to the effect that where a disputed debt is relied upon as being demonstrative of insolvency, that dispute should be resolved outside of the winding-up process."[10]

13 It may be observed at once that their Honours do not appear to distinguish between ASIC and a creditor applying for an order to wind up in insolvency. Their Honours treat the question about the extent of Lanepoint's liability to the WIF as analogous to a dispute about the amount of a debt owed by a company to a creditor who is applying to wind up the company. The "policy" to which their Honours refer must therefore relate to the procedures provided by the 1993 amendments for the resolution of disputes concerning statutory demands by creditors. As will be explained in these reasons, the approach taken by their Honours to the status of ASIC and as to principles affecting the determination of its application is not correct. However, that approach necessitates consideration of the position of creditors as applicants for winding up in insolvency in the current statutory scheme. For present purposes it may be further observed that their Honours considered that the current statutory scheme does not inhibit the application of principles which informed the exercise of the court's discretion in the past. Attention is therefore directed to those principles and the statutory context in which they were applied.

Disputed debts prior to the 1993 amendments

14 The relevant provisions of the Corporations Law, as it existed prior to the 1993 amendments, were in relevant respects the same as those of the previous Companies Code. The then Australian Securities Commission could bring

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9 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 493 [37].

10 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 497 [59].

proceedings for the winding up of a company, in certain circumstances[11]. A circumstance which permitted an order for the winding up of a company to be made was where the company was "unable to pay its debts"[12]. No further definition of insolvency was provided. The most common method used by creditors to establish the fact that a company was unable to pay its debts was the "statutory demand" procedure[13]. The procedure did not require a creditor to have a final judgment for the sum demanded. If the sum the subject of the demand was not paid within the prescribed period, or the company failed otherwise to secure or compound the sum to the reasonable satisfaction of the creditor, the company was "deemed to be unable to pay its debts"[14].

15 Non-compliance with the demand did not always result in the presumption applying. If the company proved that it had a genuine dispute, on a substantial ground, concerning the existence or amount of the debt, failure to comply with the notice or demand was not considered to give rise to a presumption that the company was unable to pay its debts. In the third edition (1987) of McPherson's *The Law of Company Liquidation* it is stated that the existence of such a dispute explained why the demand was not complied with "and so rebuts the presumption of insolvency which would otherwise arise."[15]

16 Where a creditor sought to prove a company's insolvency by relying upon a debt owed by it, but without resort to the procedure of statutory demand, the court, as a general principle, would not order winding up where a debt was bona fide disputed upon some substantial ground[16]. The principle informed the court's discretion whether to dismiss the application. McPherson says that, although the principle may have had some basis in the court's concerns as to the status of the applicant for winding up as a creditor where there was a genuine dispute about

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11 Corporations Law, s 462(2)(e); Companies Code, s 363(1)(e).

12 Corporations Law, s 460(1); Companies Code, s 364(1)(e).

13 Corporations Law, s 460(2)(a); Companies Code, s 364(2)(a).

14 Corporations Law, s 460(2)(a); Companies Code, s 364(2)(a).

15 McPherson, *The Law of Company Liquidation*, 3rd ed (1987) at 63-64; see also at 53 (referencing the Companies Code).

16 *Re KL Tractors Ltd* [1954] VLR 505 at 512; McPherson, *The Law of Company Liquidation*, 3rd ed (1987) at 63.

the debt, the principal reason for it was that the court would not permit an application for winding up to be used for the improper purpose of compelling a solvent company to pay a disputed debt[17]. It followed that it had no application in the case of an insolvent company.

17 The power given to the court to order a winding up of a company was expressed in permissive terms[18], as it is now. Subject to two express limitations, the court could dismiss the application[19]. And the court might refuse to make an order for winding up even if a creditor proved a debt, although the discretion to do so was regarded as one to be exercised according to defined principles[20]. More pertinent to the present case was the practice of the court to dismiss an application for winding up where a debt was the subject of a genuine dispute on substantial grounds[21]. The practice is explained by the principles discussed above. An order for dismissal would not be made in the case of an insolvent company.

18 The court also had the power to adjourn the hearing or to make such other order as it thought fit[22]. An "other order" might include a stay of the proceedings. The power to adjourn or to order a stay was sometimes exercised in order to allow a debt to be proved, or not, in other proceedings. The question which often arose for the court in winding up proceedings was the extent to which it should entertain questions about the bona fide nature of the dispute, and the debt the subject of it, within those proceedings. In *In re QBS Pty Ltd*[23] Gibbs J said that in some cases it may be easy to determine the question whether the dispute was bona fide; in others that question could not be determined without determining the merits of the dispute itself. His Honour said:

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17 McPherson, *The Law of Company Liquidation*, 3rd ed (1987) at 63.

18 Corporations Law, s 460(1); Companies Code, s 364(1).

19 Corporations Law, s 467(1); Companies Code, s 367(1).

20 McPherson, *The Law of Company Liquidation*, 3rd ed (1987) at 61-62.

21 McPherson, *The Law of Company Liquidation*, 3rd ed (1987) at 67.

22 Corporations Law, s 467(1); Companies Code, s 367(1).

23 [1967] Qd R 218 at 225.

> "In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard."

19 The question necessary to be determined in *In re QBS Pty Ltd* was whether payments made by the company were preferences. Gibbs J considered that that question could conveniently be decided in proceedings which had been brought by the petitioner for that purpose and which were pending. To that end his Honour made an order staying the proceedings on the petition until the determination of the other proceedings. By contrast, in *Brinds Ltd v Offshore Oil NL*[24] the Privy Council (which cited the observations of Gibbs J in *In re QBS Pty Ltd* with approval[25]) considered that, having regard to the nature of the dispute and the course the proceedings took, it was almost inevitable that the trial judge should determine the question which there arose, namely whether the debt was repayable on demand or only on 12 months notice. The intermediate appeal court in that case had observed that no evidence, in addition to that which had been tendered, could be identified by the company and it could not be said that the witnesses should have been cross-examined on other topics[26]. Similar observations were made by Gilmour J in this case[27].

Disputed debts and the current Pt 5.4

20 Included amongst the amendments effected in 1993 was a definition of insolvency. Pursuant to s 95A, a person is solvent if, and only if, the person is able to pay all the person's debts as and when they become due and payable[28]. A person who is not solvent is insolvent[29]. The words of s 95A are similar to those in s 95 of the *Bankruptcy Act* 1924 (Cth) ("unable to pay his debts as they

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24 (1985) 60 ALJR 185 at 188; 63 ALR 94 at 100.

25 (1985) 60 ALJR 185 at 188; 63 ALR 94 at 99.

26 *Brinds Ltd v Offshore Oil NL* (1985) 60 ALJR 185 at 188; 63 ALR 94 at 99.

27 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 56 [28].

28 *Corporations Act* 2001, s 95A(1).

29 *Corporations Act* 2001, s 95A(2).

become due from his own money") which were discussed by Barwick CJ in *Sandell v Porter*[30].

21 The presumption of insolvency provided by s 459C has previously been mentioned. It applies in proceedings brought under s 459P and operates unless the contrary is proved for the purpose of the application, placing the onus upon the company to establish that it is solvent within the meaning of the Act.

22 Section 459P(1) of the Act lists those persons and entities who may apply for an order that a company be wound up in insolvency. The list includes ASIC, but it is required to obtain the leave of the court to do so[31], which is to be granted only if the court is satisfied that there is a prima facie case that the company is insolvent[32]. However, as previously mentioned the statutory presumption, which arises in the circumstances provided in s 459C, applies on an application for leave.

23 An application for a company to be wound up in insolvency is required to be determined within six months after it is made, subject to the court extending that time in special circumstances[33]. Orders of this kind were made in the present case.

24 Section 459A provides that, upon the hearing of an application brought under s 459P, the court "may order that an insolvent company be wound up in insolvency." The extent of the discretion to refuse such an order is put beyond doubt by the terms of s 467(1), which appears in Pt 5.4B and provides that:

> "(1) Subject to subsection (2) and section 467A, on hearing a winding up application the Court may:

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30 (1966) 115 CLR 666 at 670; [1966] HCA 28.

31 *Corporations Act* 2001, s 459P(2)(d). (The order for leave to bring the application was made at the same time as the order for winding up in this case. No argument was made on the appeal as to the correctness of this approach.)

32 *Corporations Act* 2001, s 459P(3).

33 *Corporations Act* 2001, s 459R.

(a) dismiss the application with or without costs, even if a ground has been proved on which the Court may order the company to be wound up on the application; or

(b) adjourn the hearing conditionally or unconditionally; or

(c) make any interim or other order that it thinks fit."

As was the case with respect to the earlier legislation, "other order" is apt to include an order staying the proceedings.

25 Statutory demands by creditors are dealt with in Divs 2 and 3 of Pt 5.4. A creditor may serve a demand for monies to be paid by a company[34] and then base its application to wind up the company, under s 459P, upon a failure to comply with that demand. The statutory presumption of insolvency applies in the event of failure to comply[35]. Section 459F states what constitutes a failure to comply. It requires that the demand be in effect at the end of the period of compliance and that the company has not complied with it[36]. It is therefore essential to a conclusion of a failure to comply that the demand remains effective.

26 A statutory demand has no effect while there is in force an order made under ss 459H or 459J setting aside the demand[37]. Those orders may be made on an application for that purpose. The application may only be brought within 21 days after the demand is served[38]. Section 459H is expressed to apply where the court is satisfied that there is a "genuine dispute" about the existence or amount of a debt to which the demand relates[39]. Unless the court makes an order

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34 *Corporations Act* 2001, s 459E.

35 *Corporations Act* 2001, s 459C(2)(a).

36 *Corporations Act* 2001, s 459F.

37 *Corporations Act* 2001, s 459K.

38 *Corporations Act* 2001, s 459G(2).

39 *Corporations Act* 2001, s 459H(1)(a). See *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473; [2008] HCA 41.

under s 459H, or s 459J which provides for other grounds, the application to set a demand aside is to be dismissed[40].

27 The evident policy of Pt 5.4 is that there be a speedy resolution of applications to wind up in insolvency[41]. To that end, a challenge to a statutory demand is to be made promptly, before the application for the order for winding up in insolvency is determined and, where possible, disputes are to be resolved on the application to set aside the demand. Section 459S provides that where an application to wind up in insolvency relies upon a failure by the company to comply with a statutory demand, the company may not, without leave, oppose the making of an order on a ground which (a) it relied on in an application to set aside the demand or (b) it could have relied on but did not (whether or not it in fact made the application). That leave is not to be granted unless the court is satisfied that the ground is material to proving that the company is solvent[42]. Thus if leave is sought on the basis that the debt is disputed, the existence or amount of that debt must be relevant to a conclusion as to the company's solvency. This requirement of s 459S is consistent with the operation of the presumption of insolvency under s 459C, which applies even if leave is granted to raise a ground of opposition. It applies because there has been a failure to comply with a demand which remains in effect.

28 Under the present statutory scheme, where a demand has not been complied with, the statutory presumption of insolvency applies unless the demand is set aside in proceedings brought for that purpose prior to the hearing of the application for an order to wind up. Unless the demand is rendered ineffective, by an order setting it aside, the company is required to prove to the contrary of the presumption. This may be contrasted with the position which formerly pertained, where the presumption that a company was unable to pay its debts could not arise if the debt the subject of the demand was shown to be the subject of a genuine dispute of substance.

29 More relevant to the reasons of the majority in the Full Court is the principle applied by the court in winding up proceedings brought under the

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40 *Corporations Act* 2001, s 459L.

41 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314 at 324-325 [17]-[18]; [2008] HCA 9.

42 *Corporations Act* 2001, s 459S(2).

former legislation, where the statutory demand process was not invoked. It will be recalled that the principle was based upon the potential abuse, by creditors, of the winding up process to compel a solvent company to pay a genuinely disputed debt. On that basis alone it could have no application to ASIC, which did not claim the status of creditor and did not seek winding up on the basis of a debt owed. It brought its application under the statutory entitlement given by s 459P and in reliance upon the presumption of insolvency in s 459C(2)(c), which operates on the fact of the appointment of receivers and managers. More fundamentally, because the principle has no application in the case of an insolvent company, it cannot apply in the context of the current Pt 5.4, where the statutory presumption of insolvency operates.

30 The majority in the Full Court were therefore wrong to conclude that the general principle could apply to ASIC's application or that it continues to apply to creditors' proceedings, given the presumption provided by s 459C[43]. The current statutory scheme provides no basis for an assumption in favour of a dismissal or stay of proceedings where a company disputes the existence or amount of a debt.

31 The majority were also persuaded to a conclusion that a stay should have been ordered by the view they formed, that Pt 5.4 manifests a legislative policy that a dispute as to a debt should be resolved separately and apart from the winding up process. Part 5.4 therefore requires further examination.

32 There is a policy evident in the current statutory scheme that disputes concerning a statutory demand should, where possible, be determined prior to the determination of the winding up application and therefore separately from that application. The requirement of leave, to raise an objection at the hearing of that application which could have been taken in an application to set aside a demand, confirms this. But such a policy says nothing about what is to occur if there remains an issue about a debt at the time the application for an order for winding up in insolvency is heard. Sections 459A and 467(1)(c) make plain that the court retains a discretion to stay proceedings on an application to wind up a company in insolvency.

33 What was said by Gibbs J in *In re QBS Pty Ltd* about practical considerations, which may attend the resolution of a dispute about the existence

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43 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 496 [49].

or extent of a debt, remains relevant to applications for winding up, subject to some qualifications arising out of the present statutory scheme. The court may consider that although such a dispute may affect a conclusion as to solvency, the dispute may be more conveniently resolved in other proceedings which have been, or will be, brought for that purpose. Much may depend upon the nature of the dispute, and the extent to which it is removed from the central question of solvency. In this regard the court will bear in mind that the question of solvency, which it is required to determine upon an application for winding up in insolvency, is affected by the statutory presumption. The starting point, where the presumption operates, is that the onus is on the company to rebut the presumption, by proof of its solvency. And when considering whether to separate out a dispute from the winding up proceedings, the court will also bear in mind the statutory objective, that such applications are to be determined within six months, subject only to extensions granted in special circumstances.

The exercise of the discretion to stay the proceedings in this case

34 There can be no doubt that the court's power to adjourn or stay proceedings can, and should, be exercised where the interests of justice require. But no application for an adjournment of the proceedings was current when the hearing before Gilmour J commenced. A prior application for adjournment had been dismissed because Lanepoint did not pursue it when the matter was set down for hearing. Further, as Gilmour J observed, no suggestion was made at the hearing that there was other relevant evidence such as might necessitate an adjournment. It was upon this basis that his Honour determined that questions about the transactions should be resolved. In his Honour's view to do otherwise would only add to the costs of the parties and the public.

35 The submission by Lanepoint to Gilmour J, that the proceedings on ASIC's application were inappropriate to determine the issues arising with respect to the transactions, appears to have been first taken at the conclusion of evidence on the hearing. It was accompanied by the suggestion that the transactions were complex and could warrant further attention over many more days. However, as his Honour observed in his reasons, no further evidence was pointed to by Lanepoint as necessary for the purpose of a determination about them and his Honour did not identify any gaps in the evidence. Moreover, that submission was put in the alternative to one by which Lanepoint asserted that it had "done enough" to demonstrate that its accounts required correction and that it had rebutted the presumption of insolvency.

36 The majority in the Full Court identified three considerations as relevant to the exercise of his Honour's discretion, which pointed to the need for it to be

exercised in favour of a stay of the proceedings. The first was that not all parties necessary to a resolution of the issues raised by ASIC had been joined to the proceedings. In the view of the majority, conclusions about the transactions which were the reason for the corrections to Lanepoint's accounts had the potential to affect other companies in the Westpoint Group and they concerned the conduct of officers or directors of Lanepoint and other Westpoint Group companies. These possible effects were highlighted, in their Honours' view, by findings made by Gilmour J that the transactions were "improper", "ineffective" and liable to be set aside under s 588FF of the Act[44].

37 The second matter to which the majority referred also concerned s 588FF. Their Honours pointed out that a claim under that section can only be made by the liquidator of Westpoint Management. This called into question the finding of Gilmour J, that the impugned transactions could not be relied upon by Lanepoint to reduce its liability to Westpoint Management and the WIF, and therefore the utility of the proceedings[45]. It will be recalled that the order for a stay, which their Honours considered to be necessary on the re-exercise of the discretion, was made until the determination of proceedings to be brought by the liquidator. It may be that their Honours had in mind an application under s 588FF.

38 The third matter, which the majority held Gilmour J ought to have taken into account, was the fact that Lanepoint was no longer trading and was therefore less likely to cause prejudice to third parties[46]. By itself this fact would not seem to provide a reason for staying the proceedings. In any event it was a matter of which his Honour was aware, as his reasons disclose[47]. The other grounds, however, require reference to the transactions which were in contention and the findings of Gilmour J upon them.

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44 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 498 [65]-[66].

45 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 498-499 [69]-[71].

46 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 499 [73].

47 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 65 [90].

39 Before turning to these transactions, it is necessary to restate the issue which arose for Gilmour J's determination on ASIC's application and what was necessary to that determination. The issue before his Honour was whether Lanepoint was solvent. That issue arose because the statutory presumption applied and because Lanepoint sought to rebut it. It is to be emphasised that the issue did not arise because of an allegation by ASIC that Lanepoint owed the WIF $6.6 million. In order to rebut the statutory presumption of insolvency it was necessary for Lanepoint to prove that it did not owe that sum to the WIF.

40 In this case the evidence concerning transactions between the WIF and companies in the Westpoint Group consisted of entries in their accounts. Loans had been recorded as advanced to Lanepoint by the WIF for the sums in question and there were other documents which supported the fact of the loans. It was therefore necessary for Lanepoint to explain that these sums were not in fact advanced and that the alterations to the amounts reflected the true position. If these matters were established it would follow that the amount of Lanepoint's debt to the WIF was not as much as $6.6 million and Lanepoint might rebut the presumption of insolvency. His Honour was not persuaded by the evidence of the Lanepoint witnesses.

41 The "Kingdream transfer" concerned three of four draw downs made by Lanepoint on its loan facility with the WIF in October 2005. The last of those draw downs was effected on the day that ASIC issued its first interim stop order. Mr Norman Carey, a director of Lanepoint, Westpoint Corporation Pty Ltd, Westpoint Management and the managing director of the Westpoint Group at the relevant time, denied that these events were influenced by ASIC's inquiries about the WIF at this time.

42 Lanepoint did not have a bank account. Funds advanced from the WIF were recorded as inter-company loans in the books of account. Mr Gregory Nairn, whose positions within the Westpoint Group included that of Group Financial Controller, "corrected" the accounting entries for three of the draw downs by reducing Lanepoint's borrowings and increasing those of Kingdream Pty Ltd ("Kingdream"), another Westpoint company, by the same amount, namely $2 million.

43 Lanepoint tendered the evidence of Mr Carey and Mr Nairn and others to explain the borrowings and to justify the changes made to the accounts. Other witnesses to whom Mr Nairn assigned accounting errors were not called by

Lanepoint and their absence was not explained. This drew adverse comment from Gilmour J[48].

44 There were other aspects of Lanepoint's evidence which his Honour did not consider satisfactorily explained the alterations to Lanepoint's accounts. Central to Mr Nairn's evidence about the "correction" to Lanepoint's draw downs and their allocation to Kingdream was that Lanepoint's Facility Limit with the WIF had been exceeded at the time. However, it appeared that the Facility Limit which both Mr Nairn and Mr Carey had in mind was some $2 million less than that which had been approved. And his Honour did not accept that the draw downs, which had been checked and were signed by Mr Nairn and Mr Carey, were the result of errors within the Westpoint Group.

45 His Honour found that Mr Carey approved the transactions by Lanepoint in order to ensure that funds were available, in the knowledge that the stop order of 25 October 2005 was looming[49]. The effect, and inferentially a purpose, of the Kingdream transfer was to reduce the ability of the WIF to recover monies and thereby to meet its obligations to investors[50]. So far as concerned the substitution of Kingdream for Lanepoint as a debtor of the WIF, his Honour found that the loan to Kingdream was largely irrecoverable.

46 The "$2M run-around" transaction involved the WIF and two other companies in the Westpoint Group, Bowesco Pty Ltd and Goldtag Pty Ltd ("Goldtag"). The $2 million debt owed by Lanepoint to the WIF, was replaced in the companies' books of account as a debt owed by Goldtag. Two "round robin" transactions were also recorded in the accounts and were said to support the substitution of Goldtag as debtor. As the description of the transactions suggest, they were neutral in their effect upon the other entities. The only effect, Gilmour J held, was to substitute Goldtag for Lanepoint[51]. The monies were not capable

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48 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 59 [40].

49 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 61 [52].

50 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 61 [56].

51 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 62 [62]-[63].

of being recovered from Goldtag. His Honour also observed that Mr Carey's family benefited from a reduction in Lanepoint's borrowings[52].

47 In his findings his Honour described the transactions as being improper and accepted ASIC's submission that they were ineffective[53]. His Honour's views in this regard were relevant to his rejection of the evidence which sought to explain and justify the changes to the accounts. His Honour's reference to the transactions being "ineffective" should be understood in this context and not as suggesting some legal consequence which was not relevant to the questions before his Honour.

48 His Honour said that the transactions were liable to be set aside under s 588FF[54]. His Honour clearly appreciated that he was volunteering an opinion, and was not making a ruling under the section, for he stated on more than one occasion that they were liable to be set aside at the instance of the liquidator of Westpoint Management[55]. No such application was before his Honour. His Honour appears to have offered his opinion about s 588FF in response to a submission to that effect by ASIC. But it was not necessary for the determination of the issues before his Honour to do so. His non-acceptance of the explanations about the alterations to the accounts was sufficient for that purpose.

49 It is not apparent why the majority in the Full Court considered that other parties were necessary to be joined in the proceedings. Their Honours did not elaborate upon the matter. Generally speaking, consideration is necessary to be given to the joinder of other parties where orders might be made directly

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52 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 62 [63].

53 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 63 [70].

54 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 63 [71], 64 [79].

55 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (rec and mgr apptd) (No 2)* (2009) 72 ACSR 52 at 63 [72], 64 [79].

affecting the rights and liabilities of a non-party[56]. An order that Lanepoint be wound up in insolvency may have financial, and even legal, implications for other entities within the Westpoint Group, but it does not itself affect their rights and liabilities.

50 The majority might have in mind the possibility that an issue estoppel might later be said to have arisen from Gilmour J's determination about the monies owed by Lanepoint and the findings along the path to that conclusion[57] and that this had the potential to affect the other companies involved. There may be some difficulties in raising an issue estoppel[58], but they do not need to be expanded upon for present purposes. If such a question did arise, the position of those companies vis-à-vis the winding up proceedings might assume some relevance. But this could provide no warrant for their joinder to those proceedings.

51 The majority expressed concern that officers and employees of Lanepoint and other Westpoint companies were exposed to findings concerning their conduct without the benefit of pleadings in that regard. Their Honours no doubt had in mind that a plea akin to fraud requires detailed particulars and that such pleadings would not usually be provided in proceedings for winding up. The concern rather overlooks the fact that any questions concerning the propriety of the conduct of these persons, in relation to the financial affairs of the WIF and Lanepoint, did not arise from allegations made by ASIC. The persons in question were called by Lanepoint to prove that the alterations to the accounts were for a legitimate purpose.

52 There was no evident reason to postpone the determination of ASIC's application to wind up and Lanepoint's notice of opposition to it. ASIC had the benefit of the presumption of insolvency and Lanepoint was required to prove to the contrary. Lanepoint could point to no further evidence necessary for this purpose the tender of which would warrant a postponement – a postponement

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56 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [131]; [2010] HCA 19; *Victoria v Sutton* (1998) 195 CLR 291 at 316-318 [76]-[81]; [1998] HCA 56.

57 See *Blair v Curran* (1939) 62 CLR 464 at 531-533; [1939] HCA 23.

58 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 590 [156], 591 [160]; [1999] HCA 27; *Kuligowski v Metrobus* (2004) 220 CLR 363 at 386 [62]; [2004] HCA 34.

which would have added to the considerable delays which had already taken place since ASIC's application had been filed.

53 The order for a stay made by the Full Court was premised upon the liquidator of Westpoint Management bringing proceedings concerning the loans made by the WIF to Lanepoint. The majority said that the liability of Lanepoint could only be finally determined by an order of the court upon an application made by the liquidator[59]. However, the statement fails to recognise that the extent of Lanepoint's liability was a matter properly to be determined by the court in connection with Lanepoint's solvency, which was the issue before it. And it fails again to appreciate that Lanepoint was obliged to prove that the monies were not owed by it to the WIF, in order to rebut the statutory presumption of insolvency which operated in ASIC's favour.

54 It remains to add that it is nowhere apparent that the liquidator of Westpoint Management, who gave evidence on ASIC's application, had any intention of bringing the proceedings to which the majority referred. The majority in the Full Court did not proceed upon the basis that he did so intend and that this was the more convenient course. No suggestion to this effect appears to have been raised with Gilmour J. The utility of the order is therefore called into question.

Conclusion and orders

55 The discretion of the primary judge, in considering whether to dismiss or stay the proceedings, did not miscarry. There was no impediment to his Honour proceeding to determine whether Lanepoint could rebut the presumption of insolvency. Lanepoint failed to do so.

56 Lanepoint submitted, in the event that this Court allowed the appeal, that the matter ought to be remitted to the Federal Court to determine the grounds of appeal which had not been dealt with by the majority in the Full Court. This Court has said on more than a few occasions that it is important for intermediate courts of appeal to deal with all grounds of appeal, not just that which is

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59 *Lanepoint Enterprises Pty Ltd (recs and mgrs apptd) v Australian Securities and Investments Commission* (2010) 78 ACSR 487 at 499 [70].

identified as the decisive ground[60], to overcome the need for remittal where a decision on that ground is the subject of a successful appeal. Fortunately in this case the difficulties presented by other grounds being outstanding may readily be resolved. No remitter will be necessary.

57 The only grounds which were pursued by Lanepoint on the appeal to the Full Court concerned the question of the compromise of the debt due by Lanepoint to the WIF. It was conceded by Lanepoint that a compromise of the debts was not finalised with the liquidator of Westpoint Management, which removes one ground from further consideration. The remaining ground has no merit. It was that the liquidator's willingness to compromise, evident at some point in the negotiations, was somehow relevant to whether the debt was in fact owed.

58 The appeal should be allowed with costs. The paragraphs numbered 1-4 inclusive of the order of the Full Court of the Federal Court made on 24 May 2010 and the further order as to costs made on 9 September 2010, as varied by the order of Siopis J made on 1 October 2010, should be set aside. In lieu of those orders it should be ordered that the appeal to that Court be dismissed and that Lanepoint pay the costs of ASIC of the appeal to that Court.

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60 *Kuru v New South Wales* (2008) 236 CLR 1 at 6 [12]; [2008] HCA 26; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274 at 312 [105]; [2004] HCA 58.