



Supreme Court New South Wales

Medium Neutral Citation:	In the matter of Glenevan Pty Ltd [2015] NSWSC 201
Hearing dates:	23 February 2015
Date of orders:	23 February 2015
Decision date:	23 February 2015
Jurisdiction:	Equity Division - Corporations List
Before:	Brereton J
Decision:	Defendant be wound up in insolvency.
Catchwords:	CORPORATIONS – winding up – winding up in insolvency where no application to set aside creditor’s statutory demand – where statutory demand fails to specify correct address for service of creditor – whether failure invalidates statutory demand – where other options for service available – held, not invalid – where defence founded on purported “affidavit/commercial lien” – held, spurious legal nonsense
Legislation Cited:	(Cth) Corporations Act 2001, s 459E, s 459G
Cases Cited:	Everkind Pty Ltd v Hazenform Pty Ltd [2010] NSWSC 1031 Re International Materials & Technologies Pty Ltd [2013] NSWSC 787; (2013) 282 FLR 362
Category:	Principal judgment
Parties:	Deputy Commission of Taxation (plaintiff) Glenevan Pty Ltd (defendant)
Representation:	Counsel: D Hume (plaintiff) T Evans (in person) (defendant) Solicitors: Australian Government Solicitor (plaintiff)
File Number(s):	2014/342414

JUDGMENT (EX TEMPORE)

- 1 HIS HONOUR: By an originating process filed on 20 November 2014, the Deputy
Commissioner of Taxation as plaintiff seeks an order that the defendant company
Glenevan Pty Limited be wound up in insolvency and a liquidator appointed.
- 2 The application relies on the defendant's failure to comply with a creditor's statutory
demand dated 20 October 2014 which the affidavit of Belinda Taylor sworn 20 October
2014 proves was that day served by post on the defendant by posting it to its registered
office at 19 Stanley Street, Wodonga, in the State of Victoria by ordinary prepaid post.
The creditor's statutory demand demands payment of a debt of \$100,951.14, being the
total of the amount of debts described in the schedule to the demand, which comprise
taxation debts on running balance account and superannuation guarantee charge.
- 3 Paragraph 1 of the creditor's statutory demand says:
- The company owes the Deputy Commissioner of Taxation of 14 Mason Street,
Dandenong ("the creditor") the amount of \$100,951.14...
- 4 Paragraph 6, however, states:
- the address of the creditor for service of copies of any application and affidavit is ATO
Review and Dispute Resolution, level 15, 52 Goulburn Street, Sydney NSW 2000.
- 5 As the registered office of the company was in Victoria and as the demand was to be
served on the company in Victoria, the prescribed form 509H for a creditor's statutory
demand required that paragraph 6 specify an address for service of the creditor in the
State in Victoria, that being the state in which the demand was to be served on the
company. It did not do so.
- 6 The question is whether that invalidates the demand, as I have held that in some
circumstances at least it does: see *Re International Materials & Technologies Pty Ltd*
[2013] NSWSC 787; (2013) 282 FLR 362, [16]-[21]. In *Re International Materials &*
Technologies, the demand was served on the company in New South Wales. The
address for service ought to have been an address in New South Wales. Not only was
an address for service specified in Victoria but, importantly, the address so specified
was not the registered office of the creditor, but the address of solicitors acting for it. In
those circumstances, service at the nominated address for service would not have
been effective service under the (Cth) *Service and Execution of Process Act 1992*.
- 7 It was because of the combined effect of the requirement to resort to the *Service and*
Execution of Process Act where both the nominated address for service and the
registered office of the creditor were not in the State where the demand was served on
the debtor company, and the specification of an address for service that was not the
registered office so that inter-State service at that address would have been ineffective,
that I concluded that the demand was so misleading that it should be treated as a
nullity. However, I noted at [23] of that judgment that, in *Everkind Pty Ltd v Hazenform*
Pty Ltd [2010] NSWSC 1031, Barrett J (as his Honour then was) had taken the view
that the inclusion of a Victorian address in paragraph 6 of a statutory demand, although
non-compliant with the prescribed form, did not cause the statutory demand in that
case to be a nullity, nor provide a basis on which it would have been set aside. That

was a case in which other possibilities for service were open, including service at the registered office of the defendant which was in New South Wales, the same State as that in which the demand was served on the debtor company.

8 That distinction also applies in the present case, for the reason that paragraph 1 of the demand identifies the address of the Commissioner in Victoria at which an application to set aside the statutory demand under s 459G could have been effectively served had such an application been made, without having to resort at all to the *Service and Execution of Process Act*.

9 Accordingly, in my view, the statutory demand in this case, though defective by reason of non-compliance with the requirements of paragraph 6 of the prescribed form, is not a nullity and, no application having been made to set it aside within time or at all, it is not deprived of effect.

10 The affidavit of Bali Suvarna of 20 November 2014 establishes that the company did not comply with the statutory demand. No application to set aside the statutory demand under s 459G was made within the 21 day period limited by that section or at all. Accordingly, the presumption of insolvency provided for by *Corporations Act*, s 459E, arises and the company is presumed to be insolvent. As a result, it bears the onus of adducing clear probative evidence to establish its solvency if it wishes to rebut that presumption.

11 The affidavit of Tania Payne of 19 December 2014 proves service of the originating process and supporting affidavits on the defendant by post addressed to its registered office in Victoria on 27 November 2014.

12 The affidavit of debt of Anna Nitis of 20 February 2015 establishes that the company remains indebted to the plaintiff for the amount of the demand and that the amount remains still wholly due and unsatisfied.

13 The affidavit of Zoe Joy-Daniels of 15 January 2015 establishes publication of the requisite notice on ASIC's insolvency notices website.

14 Christopher Chamberlain, an official liquidator, has consented to act as liquidator.

15 The matter comes before me because, on 16 January 2015, the defendant filed a notice of appearance and grounds of opposition, asserting by way of grounds of opposition, "the claims the Deputy Commissioner of Taxation are making are unlawful". The grounds of opposition do not assert that the defendant is solvent, and the defendant has adduced no evidence of solvency nor endeavoured to rebut the presumption of insolvency.

16 In support of its grounds of opposition, the defendant has filed a document entitled "Affidavit/Commercial Lien" sworn by its director, Anthony William Evans, on 15 January 2015. This document of some 15 pages comprises largely spurious legal nonsense. It is not necessary to deal with it in detail, but it is worth exposing some of the fallacies that it contains.

First, in paragraph 8, it refers to a ruling in the Chancery Division of the High Court in London on Friday 25 June 2004 as having stated, "letters patent issued under the great seal of Australia by the Queen appointing the Governor-General in Australia have been issued incorrectly". It then goes on to assert that as a result of that ruling, the Governor-General of Australia holds no executive powers whatsoever and that as a result of that ruling all current Australian laws assented to on behalf of a British monarch by the Governor-General cannot hold any valid or executive authority as the Governor-General's appointments have not been lawfully issued.

18 In the short time available I have not been able to locate a full copy of the decision of Senior Master Bowman, but it has been possible to locate a report of it which explains the following:

Master Bowman agreed that the Letters Patent appointing the Governor-General, which for Major-General Michael Jeffery and several of his predecessors were clearly stamped with the Great Seal of Australia, should perhaps have been stamped with the Great Seal of Britain instead. But the success of Mr Fitzgibbon ended at this particular concession.

"Essentially it is a matter of procedure and not necessarily of substance - that the wrong seal was used," Master Bowman found in the judgement.

"The claim should be struck out on the basis of hopelessness ... and, where appropriate, embarrassment."

19 Accordingly, the judgment of Master Bowman provides no support whatsoever for the contentions for which it is cited in the so-called affidavit/commercial lien.

20 Secondly, the repeated proposition that the affidavit, being unrefuted, "stood as law and fact" is equally nonsense. Unrebutted affidavits do not necessarily conclusively establish the facts deposed to in them. They are evidence of facts. They do not establish them conclusively. Even less do they establish law.

21 Thirdly, the idea that somehow by serving the so-called commercial lien on the Deputy Commissioner or anyone else those parties become bound by it is equally nonsense. Mere receipt or notice of a document does not mean that the recipient acknowledges, accepts or becomes bound by it. In the course of legal proceedings, parties are served with statements of claim and affidavits on a regular basis. The receipt of those documents does not of itself mean that the party is bound by or party to it, any more than receipt of a letter by an addressee means the party accepts its truth or becomes bound by it.

22 The "affidavit/commercial lien" demonstrates no defence whatsoever to the winding-up proceedings.

23 The court orders that:

- (1) The defendant Glenevan Pty Limited be wound up in insolvency; and
- (2) Christopher Chamberlain of Chamberlains SBR, Suite 103, Level 1, Wollundry Chambers, Johnston Street, Wagga Wagga in the State of New South Wales be appointed Liquidator.
- (3)

The plaintiff's costs payable out of the assets of the corporation be fixed in the sum of \$5,500 inclusive of GST.

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Decision last updated: 11 March 2015