



Equity Division Supreme Court New South Wales

Case Name: In the matter of Plutus Payroll Pty Limited & others

Medium Neutral Citation: [2017] NSWSC 1360

Hearing Date(s): 26 September 2017

Date of Orders: 9 October 2017

Date of Decision: 9 October 2017

Jurisdiction: Equity – Corporations List

Before: Brereton J

Decision: Order that the defendant companies be wound up.

Catchwords: CORPORATIONS – external administration – winding up – winding up in insolvency – creditor’s statutory demand – whether presumption of insolvency may be relied on where non-compliance with statutory demand occurs after institution of winding up proceedings – held, it can.

TAXES AND DUTIES – whether a winding up proceeding is a proceeding to recover an amount of a tax-related liability under (CTH) *Taxation Administration Act 1953*, Sch 1, s 255-45(1) – held, it is.

CORPORATIONS – external administration – winding up – winding up in insolvency – actual insolvency – where existence of unpaid taxation liabilities proven – where many defendants owe employee entitlement debts – where many unrelated statutory demands not complied with – apparent absence of cash of property to meet liabilities – held, relevant defendants wound up in insolvency.

Legislation Cited: (CTH) *A New Tax System (Goods and Services Tax) Act 1999*, s 33-3, s 33-5
(CTH) *Corporations Act 2001*, s 459C(2), s 459F, s 459P, s 459Q, s 459T, s 461(1)(k), s 466(2)
(CTH) *Fringe Benefits Tax Assessment Act 1986*, s 72

(CTH) *Income Tax Assessment Act 1936*, s 166A
(CTH) *Superannuation Guarantee (Administration) Act 1992*, s 36, s 37, s 46
(CTH) *Taxation Administration Act 1953*, Sch 1, s 12-35, s 155-5, s 250-10, s 255-1, s 255-5, s 255-45, s 268-20, s 268-40, s 284-75, s 298-15, 350-10(1)
(NSW) *Uniform Civil Procedure Rules 2005*, r 6.19, r 19.2(4)

Cases Cited:

Australian Beverage Distributors v The Redrock Co [2008] NSWSC 3
Bluehaven Transport Pty Ltd v DCT (2000) 157 FLR 26
Commissioner of Revenue (Vic) v Roy Morgan Research Centre Pty Ltd (1997) 24 ACSR 73
Deputy Commissioner of Taxation v Bayconnection Property Developments Pty Ltd [2012] FCA 363
Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473
Equititrust Limited v Willaire Pty Ltd [2012] QSC 206
FP Leonard Advertising Pty Ltd v KD Travel Service Pty Ltd (1993) 12 ACSR 136
Golden Plantation Pty Ltd v TQM Design and Construct Pty Ltd [2010] NSWSC 1453
James v Deputy Commissioner of Taxation (1957) 97 CLR 23
Just Juice Corporation Pty Ltd v Murrayland Fruit Juice Pty Ltd (1990) 2 ACSR 541
Lorang Contractors Pty Ltd, In the matter of [2015] NSWSC 1435
Missing Link Network Integration Pty Ltd v Keene Consulting International Pty Ltd [2007] NSWSC 1377
Perovich v ASIC [2005] QCA 456
Pinn v Barroleg Pty Ltd (1997) 138 FLR 417
Plutus Payroll Australia Pty Limited, In the matter of [2017] NSWSC 1041
Sim v Ravenswood Resort Pty Ltd [2003] WASC 121
Simpson v CT Partners Australia Pty Ltd [2015] FCA 1191
Southgate Investment Funds Ltd v DCT (2013) 211 FCR 274
Surdex Steel Pty Ltd v GB Manufacturing Pty Ltd [2012] VSC 90
Taylor Industrial Flooring Ltd v M&H Plant Hire (Manchester) Pty Ltd [1990] BCLC 216
The Gilbert Machinery Company (No 1), Re (1906) 26 NZLR 47
Transtar Linehaul Pty Ltd v DCT (2011) 196 FCR 271
W Carter Smith; Ex parte The Commissioners of Taxation, Re (1908) 8 SR (NSW) 246

Woodgate v Garard Pty Ltd (2010) 239 FLR 339;
(2010) 78 ACSR 468; [2010] NSWSC 508

Category: Principal judgment

Parties: Deputy Commissioner of Taxation (plaintiff)
Plutus Payroll Pty Ltd (first defendant)
PPA Contractors Australia Pty Ltd (second defendant)
PPA Services Australia Pty Ltd (third defendant)
PP AUS Holdings Pty Ltd (fourth defendant)
PP Australia NSW Pty Ltd (fifth defendant)
PP Services (WA) Pty Ltd (sixth defendant)
PPA (SA) Pty Ltd (seventh defendant)
PPA NT Pty Ltd (eighth defendant)
RAM Enterprises Australia Pty Limited (ninth defendant)
SAI Solutions Australia Pty Limited (tenth defendant)
BRW Services Pty Ltd (twelfth defendant)

Representation: Counsel:
J. White w T. Prince (plaintiff)

Solicitors:
Australian Government Solicitor (plaintiff)

File Number(s): 2017/169447

JUDGMENT

1 The plaintiff Deputy Commissioner of Taxation (“the Commissioner”) applied by originating process filed on 6 June 2017 for the winding up of eleven companies on the just and equitable ground referred to in (CTH) *Corporations Act 2001*, s 461(1)(k), on the footing that the companies were participants in a syndicate with the purpose of not paying, or understating, large taxation obligations to the Commonwealth. Provisional liquidators (Messrs Norman, Algeri and Senatore of Deloitte) were appointed to each of those companies, other than the eleventh defendant Synep Pty Ltd, on 9 June 2017.¹ The originating process was amended on 3 July 2017, to join BRW Services Pty Limited as twelfth defendant, and to add as a ground insolvency under *Corporations Act*, s 459P; in that respect, the Commissioner contended that each of the companies had incurred large taxation liabilities which apparently

¹ *In the matter of Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041.

cannot be satisfied by them. Prior to the appointment of provisional liquidators, the only appearance had been by the first defendant Plutus Payroll Pty Limited, which appeared by its voluntary administrator, and while the companies have since formally appeared, by their provisional liquidators, only Synep has filed notice of grounds of opposition. On 31 July 2017, the Court ordered that the proceedings against the first to tenth defendants and the twelfth defendant (“the relevant defendants”) be heard on 26 September 2017, and those against Synep on 12 December 2017.

2 This judgment is therefore concerned with the proceedings against the relevant defendants. As to the formal matters:

- (1) notice of the proceedings to the defendants (other than the twelfth defendant BRW Services, which had not yet been joined) was addressed on the application for appointment of provisional liquidators.² Since then, the provisional liquidators have filed an appearance for each of the relevant defendants other than BRW Services;
- (2) service of the amended originating process and supporting affidavit was effected on BRW Services at its registered office on 4 July 2017, as appears from the affidavit of Andrew Ng-Saad made 14 July 2017;
- (3) notice in Form 519 of the making of an application for the winding up of the first through tenth defendants was lodged with ASIC on 6 June 2017, as appears from the affidavit of Zhilia Jamali sworn 7 June 2017, and such notice in respect of the twelfth defendant was lodged on 4 July 2017, as appears from the affidavit of Zhilia Jamali made 4 July 2017;
- (4) notice of the hearing on 3 July 2017 in respect of the first through tenth defendants was published on 15 June 2017 on the ASIC insolvency

² *In the matter of Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041 at [3]-[4].

notices website, and of the hearing on 31 July 2017 in respect of the twelfth defendant on 10 July 2017, as appears from the affidavit of Emma Whan made 17 July 2017; and

- (5) consents have been filed of Timothy Norman, Salvatore Algeri and Ezio Senatore of Deloitte to act as liquidators of the first through tenth defendants dated 7 June 2017, and of the twelfth defendant dated 5 July 2017. They are already the provisional liquidators of the first through tenth defendants, for reasons given at that time;³ there is no apparent reason why, if winding up orders are made, they should not be appointed as liquidators.

3 Although the proceedings are undefended, and no officer of the companies has made any application to the Court, or contacted the Commissioner to foreshadow an appearance, they give rise to several issues which require consideration. Those issues are:

- (1) whether a statutory presumption of insolvency is available against the twelfth defendant;
- (2) whether evidentiary certificates given under the taxation legislation are available in winding up proceedings: that is to say, whether such a proceeding is "a proceeding to recover an amount of a tax-related liability", for the purposes of (CTH) *Taxation Administration Act 1953*, Sch 1, s 255-45(1); and
- (3) whether actual (as distinct from presumed) insolvency is established in respect of the first through tenth defendants.

4 Moreover, the proceedings have attracted some public interest. For all those reasons, this judgment is more elaborate than usual for an undefended winding-up application. The comprehensive and considered submissions

³ *In the matter of Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041 at [21]-[22].

provided by counsel for the Commissioner have greatly facilitated its preparation.

Statutory presumption of insolvency – the twelfth defendant

- 5 After the joinder of BRW Services on 3 July 2017, the Commissioner on 18 August 2017 served on it a creditor's statutory demand for payment of debt, for a sum of \$1,181,186.77, as appears from the affidavit of Michael Guest made 23 August 2017. No application was made to set aside or vary the demand, which expired unsatisfied on 8 September 2017, as appears from the affidavits of Aris Zafiriou made on 3 October and 5 October 2017. At the hearing, the plaintiff was granted leave to further amend the originating process, so as to rely on the presumption of insolvency provided for by *Corporations Act*, s 459C(2)(a), arising upon failure to comply with the demand. In this respect, an issue arises as to whether that presumption of insolvency can be invoked in winding up proceedings which have been instituted before the presumption arises.
- 6 Section 459C(2)(a) relevantly provides that (emphasis added): "[t]he Court must presume that the company is insolvent if, during *or after* the 3 months ending on the day when the application was made: the company failed (as defined by section 459F) to comply with a statutory demand". The relevant application was made on 3 July 2017, when BRW was joined as a defendant.⁴ The failure to comply with the demand occurred after that date, on 8 September 2017,⁵ and is therefore within the words of the second limb of s 459C(2)(a).
- 7 Prior to the decision of Palmer J in *Woodgate v Garard Pty Ltd*,⁶ plaintiffs had been permitted to rely on the presumption in cases where it arose after the

⁴ UCPR, r 19.2(4), provides that if a person is added as a party under that rule, the date of commencement of the proceedings in relation to that person is taken to be the date on which the amended document is filed.

⁵ A company is taken to fail to comply with a demand if, at the end of 21 days after the demand is served, the demand is still in effect and the company has not complied with it (s 459F). The failure to comply occurs at the end of that 21-day period.

⁶ (2010) 239 FLR 339; (2010) 78 ACSR 468; [2010] NSWSC 508.

institution of the winding up proceedings.⁷ However, in *Woodgate v Garard*, his Honour observed that, in the light of s 459Q, s 459C(2) should be construed as meaning that while the presumption of insolvency arising from any of the events referred to in paragraphs (b) through (f) might be relied upon if they occurred after the making of the winding up application, the presumption arising from a failure to comply with a statutory demand (paragraph (a)) could not.

8 *Woodgate v Garard* was ostensibly followed in that respect by Barrett J in *Golden Plantation Pty Ltd v TQM Design and Construct Pty Ltd*,⁸ but his Honour treated it as allowing that a presumption of insolvency arising under s 459C(2)(a) from failure to comply with a statutory demand after filing of the winding up application is available to a plaintiff where the winding up application, when filed, was based on other grounds.

9 In *Lorang Contractors Pty Ltd*,⁹ I expressed some reservations about, but followed, *Woodgate v Garard*:

[3] In order to address that problem, the plaintiffs served further statutory demands on the defendant on 2 April 2015, which were deemed to be served by post on or about 6 April 2015. The defendant has not complied with those second statutory demands. The plaintiff submits that that non-compliance founds a presumption of insolvency that is available at the date of hearing, though it was not available at the date when the originating process was filed.

[4] At first sight, some support for that contention is derived from two sources. The first is that ordinarily the question of insolvency is a matter to be determined on the evidence at the date of hearing, as distinct from as at the date on which the application was made. The second is that s 459C(2) provides that the Court must presume that the company is insolvent if "during or after the three months ending on the day when the application was made", any of the various grounds for the presumption referred to in subparagraphs (a) through (f) are established. The fact that reference is made to "after the three months ending on the day when the application was filed" seems to contemplate that the presumption may arise after the application is filed.

[5] However, s 459Q mandates that, in an application for a company to be wound up in insolvency that relies on a failure to comply with the statutory

⁷ *Pinn v Barroleg Pty Ltd* (1997) 138 FLR 417; *Sim v Ravenswood Resort Pty Ltd* [2003] WASC 121; *Missing Link Network Integration Pty Ltd v Keene Consulting International Pty Ltd* [2007] NSWSC 1377 (White J).

⁸ [2010] NSWSC 1453 at [31].

⁹ *In the matter of Lorang Contractors Pty Ltd* [2015] NSWSC 1435.

demand, the application must set out particulars of service of the demand and the failure to comply with it and attach to it a copy of the demand. That section bespeaks a requirement that the demand and failure have occurred before the application is made.

[6] Were the matter to come before me untrammelled by authority, I might have inclined to the view that the requirements of s 459Q were directory or procedural rather than mandatory and substantive. But, in *Woodgate v Garard Pty Limited* [2010] NSWSC 508; (2010) 239 FLR 339, Palmer J reviewed the sections and carefully and thoroughly considered earlier authorities, concluding (at [85]) that s 459C(2) must be construed consistently with s 459Q, so that the presumption of insolvency afforded by s 459C(2)(a), which is the relevant one here, arises only where failure to comply with the statutory demand has occurred during the three months before the winding up application is filed – although the presumptions afforded by s 459C(2)(b) through (f) can arise where the insolvency event occurs either during the three months before the winding up application is filed, or after the filing date and before the hearing date.

[7] His Honour said (at [86]) that had he found that the statutory demand was served at a time such that time for compliance would not have expired by the time of the filing of the winding up application but afterwards, the application would have been dismissed on the basis that it had not been proved that the company had failed to comply with the statutory demand within the three months ending on the day when the application was made, so that the presumption of insolvency was unavailable and there was no other evidence of insolvency.

[8] It seems to me that, consistent with his Honour's decision, which is reported, which is reasoned by reference to earlier authorities, which has stood for five years and which is not obviously wrong, I should not – particularly on an undefended application in the absence of a contradictor – depart from it.

10 However, in *Equititrust Limited v Willaire Pty Ltd*,¹⁰ P McMurdo J did not follow *Woodgate v Garard*, holding that the presumption was available where it arose after the institution of the winding up proceedings. His Honour said:¹¹

[83] Within paragraphs (a) through (f), several events are described as giving rise to the presumption. Those paragraphs are preceded within the subsection by the words which require the court to presume the insolvency of the company if the relevant event occurred “during or after the 3 months ending on the day when the application was made”. On the face of this provision, that same qualification as to timing of the event applies to each of the events specified within paragraphs (a) through (f). The event must occur during the three months ending on the day when the application is made or after that period. The words “or after” would seem to unambiguously permit an applicant to rely upon an event although it occurs after the application is made. In at least four decisions, it has been said that an applicant may rely

¹⁰ [2012] QSC 206.

¹¹ [2012] QSC 206 at [83]-[87] and [90] (footnotes omitted).

upon a failure to comply with a statutory demand which postdated the commencement of the winding up proceedings. They are *Pinn v Barroleg Pty Ltd*; *Sim v Ravenswood Resort Pty Ltd (recs and mgrs apptd)*; *Missing Link Network Integration Pty Ltd v Keene Consulting International Pty Ltd* and *Golden Plantation Pty Ltd v TQM Design and Construct Pty Ltd*, although in that last decision, a qualification was added by Barrett J to which I will return.

[84] The first three of those cases were not followed by Palmer J in his judgment in *Woodgate v Garard Pty Ltd*. The fourth case, *Golden Plantation v TQM Design and Construct*, was decided after his judgment. In obiter dicta, Palmer J interpreted s 459C(2) as meaning that although any of the events in paragraphs (b) through (f) might be relied upon if they occurred after the making of the application to wind up, but the event within (a), that is to say a failure to comply with a statutory demand, would not be relevant if it occurred after the winding up application was filed. He reached that conclusion effectively because of the requirements of s 459Q. It provides that if an application for a company to be wound up in insolvency relies upon a failure to comply with the statutory demand, the application must set out particulars of service of the demand and of the failure to comply with it, and have attached to it a copy of the demand, any order varying the demand and an affidavit which verifies the relevant debt. As he observed, it would be impossible to comply with s 459Q if the application when filed relied upon a failure to comply with the statutory demand, which was then an anticipated but not yet an actual failure. He observed that in those three cases, the relevance of s 459Q seemed to have been overlooked.

[85] In *Golden Plantation v TQM Design*, Barrett J agreed with that analysis by Palmer J but added this:

As Palmer J also observed, a presumption of insolvency arising under s 459C(2)(a) from failure to comply with the statutory demand after filing of the winding up application is, however, available to the plaintiff in cases where the winding up application, when filed, is based otherwise than on such a failure.

With respect, I am unable to identify that observation in the judgment of Palmer J. Still, *Golden Plantation v TQM Design* is an authority supporting this application by Equititrust, because when filed this application relied upon other events as giving rise to the presumption of insolvency.

[86] In a recent decision in the Supreme Court of Victoria, *Surdex Steel Pty Ltd v GB Manufacturing Pty Ltd*, Gardiner AsJ preferred the analysis of Palmer J in *Woodgate* (which was said to be supported by *Golden Plantation Pty Ltd v TQM Design*) to that in *Pinn v Barrowleg* and *Missing Link Network Integration Pty Ltd*. But that judgment did not deal with the circumstance here, where there were other events which were relied upon within the application as filed.

[87] In my opinion, the failure to comply with this statutory demand is within s 459C(2)(a) and requires a presumption of Willaire's insolvency. The first reason is that there is no authority for the proposition that in a case such as this, where the application is filed originally upon other events giving rise to the presumption, a subsequent failure to comply with the statutory demand must be disregarded. I agree with Barrett J that the effect of s 459Q is to make it "impermissible to file an originating process on (the basis of non-

compliance with a statutory demand) until the failure has occurred and particulars of it can be stated”, but that s 459Q does not preclude a reliance upon a failure to comply with a demand which occurs after an application is duly commenced.

...

[90] In a case such as the present, the result is thereby one which accords with the evident object of Part 5.4, which is that insolvent companies ought to be wound up. A failure to comply with a statutory demand should be more telling for being more recent at the time of the hearing. To exclude such an event would be anomalous.

- 11 In *Surdex Steel Pty Ltd v GB Manufacturing Pty Ltd*,¹² referred to by McMurdo J, the originating process recited the failure to comply with a demand, in circumstances where an application pursuant to s 459G to set it aside had been dismissed by consent, and was filed before expiry of the 7-day period referred to in s 459F(2)(a)(ii). Thus while Gardiner AsJ expressed agreement with the approach of Palmer J in *Woodgate v Garard*, the decision does not depend on it. On the other hand, in *Simpson v CT Partners Australia Pty Ltd*,¹³ Gilmour J expressed agreement with the passage set out above from *Equititrust v Willaire*.
- 12 What Palmer J said in this respect in *Woodgate v Garard* was *obiter dicta*. Those cases which have followed it have done so with qualification¹⁴ or reservation,¹⁵ or in circumstances where it was unnecessary to the decision.¹⁶ It has not been followed by two courts of co-ordinate jurisdiction.¹⁷ It does not accord with the plain words of the introductory part of s 459C(2). It results in an inconsistency between the application of the presumption when it arises from s 459C(2)(a), and when it arises from any of s 459C(2)(b) through (f). The requirement of s 459Q, even if mandatory, can be satisfied in the context of a failure to comply with a demand occurring after institution of proceedings, by amendment of the originating process after the presumption arises. Conscious of the undesirability of different interpretations by courts of co-

¹² [2012] VSC 90.

¹³ [2015] FCA 1191 at [36].

¹⁴ *Golden Plantation Pty Ltd v TQM Design and Construct Pty Ltd* [2010] NSWSC 1453 at [31].

¹⁵ *Lorang Contractors Pty Ltd* [2015] NSWSC 1435 at [4]-[8].

¹⁶ *Surdex Steel Pty Ltd v GB Manufacturing Pty Ltd* [2012] VSC 90.

¹⁷ *Equititrust Limited v Willaire Pty Ltd* [2012] QSC 206 and *Simpson v CT Partners Australia Pty Ltd* [2015] FCA 1191.

ordinate jurisdiction of a national statute, in my view this court should now embrace the view of McMurdo J, and no longer follow *Woodgate v Garard*.

- 13 It follows that where proceedings are commenced invoking grounds other than a presumption of insolvency arising from failure to comply with a statutory demand, but there is subsequent such failure to comply before the hearing, the presumption becomes available. In this case, the proceeding (as against BRW Services) having been commenced invoking other grounds – namely 'actual' insolvency and the just and equitable ground, which continue to be advanced – leave was sought and granted at the hearing to amend the originating process to rely on the presumption, it having arisen subsequently, but before the hearing. In the absence of any argument let alone evidence to rebut it, the Court must presume that BRW is insolvent.

Debts owed by the defendants to the Commonwealth

- 14 As the failure of the defendants to pay tax debts said to be due to the Commonwealth is at the foundation of the plaintiff's submission that their actual insolvency should be inferred, the existence of those debts must be established. The debts relied upon are founded on notices of assessment (or amended assessment) of a net amount of GST,¹⁸ of estimate of PAYGW,¹⁹ of penalty for failing to provide a document where the Commissioner determined the defendant's tax-related liability without the document,²⁰ and/or of

¹⁸ (CTH) *Taxation Administration Act 1953* (TAA), Sch 1, s 155-5(1) and (2)(a) allows the Commissioner to make an assessment of the net amount of GST payable under the (CTH) *A New Tax System (Goods and Services) Act 1999* (GST Act) for a tax period. Where the tax period is a quarter, the assessed amount is a debt due and payable by the 28th day of the month following the end of the quarter (except for the December quarter, when the amount is due and payable by the following 28 February): TAA, Sch 1, s 250-10(2), item 5 and ss 255-1(1) and 255-5(1); GST Act, s 33-3. Where the tax period is other than a quarterly period, the assessed amount is a debt due and payable by the 21st day of the month following the end of the tax period: TAA, Sch 1, s 250-10(2), item 5 and ss 255-1(1) and 255-5(1); GST Act, s 33-5.

¹⁹ TAA, Sch 1, s 268-10(1), provides that the Commissioner may make an estimate of unpaid and overdue amounts of a liability to pay PAYGW. The amount of the estimate is a debt that becomes due and payable when the Commissioner provides the relevant entity with a notice of the estimate: TAA, Sch 1, s 250-10(2), item 138 and ss 255-1(1), 255-5(1) and 268-20(1). Unless and until an estimate of PAYGW is reduced or revoked in accordance with the provisions of Div 268, the liability to pay an estimate of PAYGW is separate and distinct from the underlying liability to pay PAYGW: TAA, Sch 1, s 268-20(2).

²⁰ TAA, Sch 1, s 284-75(3), provides for the imposition of an administrative penalty on an entity that fails to provide the Commissioner with a return, notice or document by the day it was required to be provided, where the document was necessary for the Commissioner to determine a tax-related liability

assessment (or amended assessment) for superannuation guarantee charge,²¹ issued by the Commissioner to the relevant defendants (other than the third defendant PPA Services Australia Pty Ltd) between 8 August 2016 and 1 June 2017.

- 15 To establish the existence of the relevant debts, the plaintiff invokes two evidentiary provisions of the (CTH) *Taxation Administration Act 1953* (TAA). TAA, Sch 1, s 350-10(1), item 2, provides that a notice of assessment is conclusive evidence that the assessment to which the notice relates was properly made, and that the amounts and particulars of the assessments are correct. TAA, Sch 1, s 255-45(1), provides a certificate stating one or more of the matters covered by s 255-45(2) and signed by the Commissioner, a Second Commissioner or Deputy Commissioner is *prima facie* evidence of the matter or matters "in a proceeding to recover an amount of a tax-related liability". The matters so covered relevantly include that notice of an assessment, or any other notice required to be served on a person in respect of an amount of a tax-related liability, was, or is taken to have been, served on the person under a taxation law,²² and that a sum specified in the certificate is, as at the date specified in the certificate, a debt due and payable by a person to the Commonwealth.²³
- 16 The Commissioner has tendered the relevant notices of assessment and estimate, and provided certificates signed on behalf of a Deputy Commissioner (a) that those notices have been served on the relevant defendant, and (b) that a specified sum is as at 7 September 2017 a debt due and payable by that defendant to the Commonwealth. There is however a question as to whether, as the plaintiff submits, such a certificate is available

and the Commissioner determines the liability without the assistance of that document. TAA, Sch 1, s 298-30(1), provides that the Commissioner must make an assessment of the amount of an administrative penalty under Div 284. The amount in the notice of assessment is a debt that becomes due and payable on the date specified in the notice, which must be at least 14 days after the notice is given: TAA, Sch 1, s 250-10(2), item 140 and ss 255-1(1), 255-5(1), 298-15.

²¹ (CTH) *Superannuation Guarantee (Administration) Act 1992*, ss 36 and 37, provides that the Commissioner may make a default assessment or amended assessment of superannuation guarantee charge. The amount is a debt that becomes due and payable at the time worked out in accordance with s 46: TAA, Sch 1, s 250-10(2), item 60 and ss 255-1(1) and 255-5(1).

²² s 255-45(2)(c).

²³ s 255-45(2)(e).

in winding up proceedings: that is to say, whether such a proceeding is "a proceeding to recover an amount of a tax-related liability", for the purposes of TAA, Sch 1, s 255-45(1).

- 17 In *Re W Carter Smith; Ex parte The Commissioners of Taxation*,²⁴ Street J held that s 51 of the (NSW) *Land and Income Tax Assessment Act 1895*, which provided that any tax "may be sued for and recovered by action in any Court of competent jurisdiction by the Commissioners", sufficed to authorize a bankruptcy petition. His Honour said (at 249-250):

Unless then it is clear that the Act has limited the powers of the Commissioners in this respect, I see no reason why in a proper case they should not present a bankruptcy petition. Mr Armstrong contended that their powers are so limited, and that on its true construction sec. 51 shows, that their remedies for the recovery of the tax are restricted to the right of bringing that form of proceeding which is popularly known as an action at law. I am unable to agree with this view of the meaning of the section. ... Whatever the popular signification of the word "action" may be it is clear ... that in its proper legal sense it is a generic term or *nomen generale*, and includes every sort of legal proceeding. When used by the legislature it must, in my opinion, be construed according to its true legal meaning unless it is apparent on the face of the Act, in which it is used, that it is intended to bear a more restricted meaning. As used in s 51, it was, in my opinion, intended by the legislature to bear and must be construed as bearing, its proper legal meaning, and as referring to all legal proceedings which may be available for the recovery of unpaid taxes. It stands alone in the section, no other words descriptive of legal proceedings being associated with it, and looking at the Act as a whole, it is clear to me that the intention of the legislature was not to limit the available remedies for the recovery of the tax, but to clothe the Commissioners with powers to resort to any tribunal competent to assist them in recovering amounts which might be owing.

- 18 In *James v Deputy Commissioner of Taxation*,²⁵ the High Court endorsed that approach:

We agree, however, in the general view of provisions like ss 208 and 209 which Street J took in *Re W Carter Smith: Ex parte Commissioner of Taxation* at 248-250. We think that the Commissioner or Deputy Commissioner is empowered to take the proceedings in bankruptcy for the recovery of the tax as a Crown Debt.

- 19 In *Re The Gilbert Machinery Company (No 1)*,²⁶ the issue was whether a power of attorney granted by the petitioning creditor "for us and in our name to

²⁴ (1908) 8 SR (NSW) 246.

²⁵ (1957) 97 CLR 23 at 35.

demand, sue for, and recover all and every sum of money that are or is due and owing to us ..." authorised the attorney to sign a winding up petition. Rejecting a submission that a winding up petition was not for relevant purposes "a demand or a suit", Stout CJ held that a petition to wind up a company was a mode of obtaining in a legal manner the payment of a debt (at 50):

The word "recover" has been held to mean something more than suing. ... Now, the proceeding by petition is a mode of recovering a debt, for it is often successful without the proceeding to wind up being continued, and the petition may be withdrawn.

- 20 The cases were reviewed by Williams J in *Bluehaven Transport Pty Ltd v DCT*.²⁷ Holding that ITAA, s 209, by providing that the Commissioner may sue for and recover unpaid tax, empowered him to issue a statutory demand and proceed to have the taxpayer company wound up in order to recover the unpaid tax, his Honour said:

[20] In my view the term "recover" in s 209 should be given the wide meaning ascribed to it in the authorities to which I have referred. It is not limited, as contended for by counsel for the applicant, to some recovery process consequent upon a judgment having been obtained. In other words, the Commissioner does not have to sue the taxpayer to judgment before he can "recover" the unpaid tax. The power to "recover" unpaid tax entitles the Commissioner to obtain satisfaction of the debt through any available legal proceedings. Payment consequent upon winding up proceedings is obtaining satisfaction in a permissible legal manner.

- 21 His Honour's analysis was endorsed by the High Court in *DCT v Broadbeach Properties Pty Ltd*:²⁸

[58] The matter was explained, with respect correctly, by Williams J in *Bluehaven Transport Pty Ltd v Commissioner of Taxation*. The use by the commissioner of the statutory demand procedure in aid of a winding-up application is in the course of recovery of the relevant indebtedness to the Commonwealth by a permissible legal avenue. The phrase "may be recovered" in ss 14ZZM and 14ZZR of the Administration Act applies to the statutory demand procedure.

²⁶ (1906) 26 NZLR 47.

²⁷ (2000) 157 FLR 26 at 32.

²⁸ (2008) 237 CLR 473 at [58].

- 22 While in terms what the High Court said was in the context of the issuance of a statutory demand – which being a demand for payment of a debt is more clearly a means of recovering a debt than winding up proceedings, which traditionally are not characterised as debt recovery proceedings, the reasoning which the High Court approved plainly encompassed winding up proceedings. Moreover, in form and substance, winding up proceedings brought by a creditor are a step towards recovery of the debt, in that they culminate in the proof of debts in the liquidation, and their payment out of the assets of the company. In my judgment, therefore, a winding up proceeding founded on a tax liability is "a proceeding to recover an amount of a tax-related liability", for the purposes of TAA, Sch 1, s 255-45(1), and certificates given under that section are available in such a proceeding.
- 23 The notices of assessment and estimate tendered by the Commissioner are summarised in the following table:

Company	Description	Amount \$	Date
Plutus Payroll Australia Pty Ltd	Notice of amended assessment for GST for 1 July 2015 to 31 December 2016	24,865,869	26 Apr 17
	Notice of PAYGW estimate for 1 July 2015 to 30 June 2016 and 1 January 2017 to 31 March 2017	21,858,812	26 Apr 17
PPA Contractors Australia Pty Limited	Notice of PAYGW estimate for 1 July 2015 to 30 September 2016	50,235,542	1 Jun 17
PP Aust Holdings Pty Ltd	Notice of assessment for GST for 1 August 2016 to 31 August 2016	15,785	23 Jan 17
	Notice of assessment for GST for 1 September 2016 to 31 December 2016	1,340,665	24 Jan 17
	Notice of assessment of penalty	4,930,130	24 Jan 17
	Notice of PAYGW estimate for 1 September 2016 to 31 December 2016	4,124,103	24 Jan 17
PP Australia NSW Pty Ltd	Notice of assessment for GST for 1 September 2016 to 31 December 2016	1,917,539	24 Jan 17
	Notice of assessment of penalty	7,037,544	24 Jan 17

	Notice of PAYGW estimate for 1 September 2016 to 31 December 2016	5,944,773	24 Jan 17
PP Services (WA) Pty Ltd	Notice of assessment for GST for 1 October 2016 to 31 December 2016	508,223	24 Jan 17
	Notice of assessment of penalty	1,884,756	24 Jan 17
	Notice of PAYGW estimate for 1 October 2016 to 31 December 2016	1,588,977	24 Jan 17
PPA (SA) Pty Ltd	Notice of assessment for GST for 1 September 2016 to 31 December 2016	1,091,466	24 Jan 17
	Notice of assessment of penalty	4,023,727	24 Jan 17
	Notice of PAYGW estimate for 1 September 2016 to 31 December 2016	3,409,289	24 Jan 17
PPA NT Pty Ltd	Notice of assessment for GST for 1 September 2016 to 30 November 2016	1,399,543	24 Jan 17
	Notice of assessment for GST for 1 December 2016 to 31 December 2016	623,604	24 Jan 17
	Notice of assessment of penalty	6,532,754	24 Jan 17
	Notice of PAYGW estimate for 1 October 2016 to 31 December 2016	5,262,538	24 Jan 17
RAM Enterprises Australia Pty Ltd	Notice of PAYGW estimate for 1 July 2015 to 28 June 2016	2,131,090	8 Dec 16
	Notice of PAYGW estimate for 29 June 2016 to 30 December 2016	1,435,100	1 Jun 17
SAI Solutions Australia Pty Ltd	Notice of amended assessment for SGC for quarter ending 30 September 2015	113,397.18	8 Aug 16
	Notice of amended assessment for SGC for quarter ending 31 December 2015	181,570.89	8 Aug 16
	Notice of amended assessment for SGC for quarter ending 31 March 2016	308,237.28	12 Jan 17
	Notice of assessment for SGC for quarter ending 30 June 2016	308,024.84	6 Jan 17
	Notice of PAYGW estimate for 1 July 2015 to 30 June 2016	2,667,507	8 Dec 16
BRW Services Pty Ltd	Notice of PAYGW estimate for 1 February 2017 to 31 March 2017	1,420,012	17 May 17

24 The evidence also establishes that, in addition to those assessments, for the year ended 30 June 2016, the first defendant Plutus Payroll Australia had a liability of \$546,504.43 for income tax and \$34,220.25 for FBT as a result of its lodgment of tax returns in April 2017;²⁹ and as at 27 April 2017, the third defendant PPA Services Australia had reported its tax liability for GST and PAYGW at \$5,459,854 and had made payments of \$2,650,020.56, leaving an outstanding balance of \$2,809,833.54. Further, some of the defendants have made payments in reduction of their liabilities, and the general interest charge³⁰ has accrued on outstanding liabilities. Absent any evidence to the contrary, the evidentiary certificates establish that, as at 7 September 2017, the total outstanding debt due and payable by each of the relevant defendants to the Commonwealth was as follows:

Defendant	Amount \$
Plutus Payroll Australia Pty Ltd	45,508,762.10
PPA Contractors Australia Pty Limited	54,750,706.72
PPA Services Australia Pty Ltd	3,258,032.96
PP Aus Holdings Pty Ltd	7,163,314.82
PP Australia NSW Pty Ltd	8,149,424.40
PP Services (WA) Pty Ltd	2,762,453.13
PPA (SA) Pty Ltd	5,657,355.97
PPA NT Pty Ltd	5,261,122.84
RAM Enterprises Australia Pty Ltd	1,602,792.77
SAI Solutions Australia Pty Ltd	3,706,937.23
BRW Services Pty Ltd	1,183,448.77

25 Notwithstanding the conclusive effect of a notice of assessment, in some cases where there is a serious question about the existence of a tax-related liability it may be appropriate for the Court to adjourn a winding up proceeding until Part IVC proceedings concerning the tax liability are resolved; however,

²⁹ *Income Tax Assessment Act 1936* (Cth), s 166A, and *Fringe Benefits Tax Assessment Act 1986* (Cth), s 72 deem the lodged tax returns to be an assessment by the Commissioner.

³⁰ Under TAA, Part IIA.

this discretion is exercised sparingly, and the company bears the onus of showing that it should be exercised.³¹

- 26 Only the first defendant Plutus Payroll Australia has lodged an objection or otherwise sought to challenge its relevant tax liabilities. On 1 May 2017 it lodged an objection to the amended assessment for GST dated 26 April 2017, and purported to lodge an objection to the PAYGW estimate. Although an estimate of PAYGW is not amenable to an objection, where a person who is given a PAYGW estimate gives the Commissioner a statutory declaration within the prescribed time period, then the "estimate is revoked if the statutory declaration is to the effect ... that the underlying liability [to pay PAYGW] never existed".³² For that purpose, the question is whether, as a matter of substance, the statutory declaration discloses facts upon which the underlying liability to pay PAYGW never existed.³³
- 27 On 3 May 2017, Mr Brendan Thomassen on behalf of Plutus Payroll provided a statutory declaration to the Commissioner for the purposes of Div 268, which relevantly stated that he believed, based on the objection filed by Plutus on 1 May 2017, that the amount referred to in the notice, being \$21,858,812, was not a liability of Plutus.
- 28 That objection asserts that after about January 2017, the first defendant entered into an arrangement with some of the other defendants, whereby the first defendant paid directly to employees, superannuation accounts and a solicitors' trust account, amounts said to be owing by it to the other defendants. This amounts to the first defendant paying wages and superannuation on behalf of some of the other defendants. The first defendant contends that it was not liable to pay PAYGW in relation to those payments, because it was providing the payments as a service to the other defendants.

³¹ *Deputy Commissioner of Taxation v Bayconnection Property Developments Pty Ltd* [2012] FCA 363 at [25]-[28]; *Southgate Investment Funds Ltd v DCT* (2013) 211 FCR 274 at [77].

³² TAA, Sch 1, s 268-40.

³³ *Transtar Linehaul Pty Ltd v DCT* (2011) 196 FCR 271 at [85]-[86].

29 However, TAA, Sch 1, s 12-35, provides that an entity must withhold an amount from salary, wages, etc it pays to an individual as an employee *whether of that or another entity*; thus, the obligation to withhold falls upon the entity making the payment to the employee, regardless of whether or not it is the employer. Accordingly, Mr Thomassen's statutory declaration does not disclose facts upon which the underlying liability to pay PAYGW never existed; and as a matter of substance, is not "to the effect" that Plutus Payroll's PAYGW liability never existed. In those circumstances, and *a fortiori* where no application is made for an adjournment and no evidence is adduced to cast doubt on the certified debts, there is no reason to doubt that those debts are due and payable, and that there is no real dispute about them.

Actual insolvency – first to tenth defendants

30 A corporation is not solvent unless it is able to pay all its debts, as and when they become due and payable.³⁴ A conclusion of insolvency is usually an inference drawn from multiple *indicia*.

General matters

31 Notwithstanding that the inquiry into insolvency ultimately depends on the company's position on an overall basis,³⁵ failure to pay a particular debt which is not the subject of genuine dispute may of itself provide evidence of insolvency.³⁶ In this case, the debts claimed by the Commissioner are substantial, and in the cases of the first and second defendants enormous. They are not open to serious challenge by any defendant, and except in the case of the first defendant (whose statutory declaration does not suffice to displace the Commissioner's estimate), there was no challenge or dispute, either when the assessments were issued, or when garnishment notices were served on the defendants' bank accounts. Even in the case of the first

³⁴ *Corporations Act*, s 95A.

³⁵ *Australian Beverage Distributors v The Redrock Co* [2008] NSWSC 3 at [146], [157] (Austin J).

³⁶ *FP Leonard Advertising Pty Ltd v KD Travel Service Pty Ltd* (1993) 12 ACSR 136 at 140; *Taylor Industrial Flooring Ltd v M&H Plant Hire (Manchester) Pty Ltd* [1990] BCLC 216; *Just Juice Corporation Pty Ltd v Murrayland Fruit Juice Pty Ltd* (1990) 2 ACSR 541 at 546 (Young J); *Commissioner of Revenue (Vic) v Roy Morgan Research Centre Pty Ltd* (1997) 24 ACSR 73 (Mandie J).

defendant, there has been no attempt to challenge the existence of its debt in this proceeding. In those circumstances, where the debts have been outstanding, in most cases, since January 2017, and in any event since 1 June 2017, the failure to pay large debts, while not disputing them, provides a firm foundation for an inference that the defendants cannot pay their debts from any source available to them.

- 32 Other significant *indicia* of insolvency include that the first through eighth defendants appear to have outstanding unpaid obligation to employees for wages and superannuation, and the ninth and tenth defendants appear to have substantial unpaid payroll tax liabilities to the Commissioner of State Revenue.

The provisional liquidators' opinions

- 33 The provisional liquidators have been able to reconstruct the balance sheet of the first defendant as at the date of their appointment (9 June 2017). From that they have formed the view that there is a deficiency of at least \$30 million, which (with other matters) founds their opinion that the first defendant is insolvent. While they have not been able to reconstruct the balance sheets of the second to tenth defendants, they have formed the opinion that they are likely to be insolvent, in the light of their having ceased to trade in late April or early May upon the execution of search warrants by the AFP, the cessation of funding from the first defendant, the issue of the Commissioner's garnishee notices, the apparent absence of cash and property, and the lack of accounting records.

First Defendant - Plutus Payroll Australia Pty Ltd

- 34 While the reconstructed balance sheet as at 9 June 2017 indicates total equity exceeding \$12.7 million, that does not take into account outstanding unpaid taxation liabilities exceeding \$45.5 million, including more than \$44.9 million reflected in a deficit in the company's running balance account in respect of BAS amounts. Although company had cash at bank as at 13 June 2017 totaling approximately \$697,000, its CBA and St George bank accounts were

garnisheed on 26 April 2017, to the extent of \$46,632,355. There is an outstanding unpaid debt to the Chief Commissioner of State Revenue, who has lodged a proof of debt for \$35,215.16, in respect of outstanding payroll tax. The provisional liquidators have received fourteen claims from employees, totaling \$97,484.09, in respect of outstanding wages and superannuation guarantee amounts as well as redundancy claims. When those matters are taken into account, the provisional liquidators consider that "a conservative net position" is that the company has a net asset deficiency of approximately \$30 million.

- 35 As already noted, the provisional liquidators are of the opinion that Plutus Payroll is insolvent. Moreover, voluntary administrators were appointed to the first defendant Plutus Payroll Australia Pty Ltd on 6 June 2017 by resolution of its sole director Mr Thomassen, who resolved that the company was insolvent or likely to become insolvent. That of itself is an admission of insolvency.
- 36 Having regard to the outstanding unpaid taxation liabilities and their magnitude, the other outstanding debts (including that they include employee entitlements and payroll tax), the admission inherent in the appointment of voluntary administrators, and the opinion of the provisional liquidators, I am very comfortably satisfied that Plutus Payroll is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Second Defendant - PPA Contractors Australia

- 37 As already noted, the provisional liquidators are of opinion that the second defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$54,711,671.62, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 5 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The provisional liquidators have received three claims from employees, totaling \$7,555.75, in respect of outstanding superannuation guarantee and wages entitlements. The company has net

cash at bank of approximately \$435; its CBA bank account was garnisheed on 8 December 2016, to the extent of \$3,388,048.91.

- 38 Having regard to the outstanding unpaid taxation liabilities and their magnitude, the outstanding debts in respect of employee entitlements, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PPA Contractors is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Third Defendant - PPA Services Australia Pty Limited

- 39 As already noted, the provisional liquidators are of opinion that the third defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$3,255,682.96, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 5 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The provisional liquidators have received four claims from employees, totaling \$23,025.96, in respect of outstanding superannuation guarantee and wages entitlements. The company does not appear to have a bank account.

- 40 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debts in respect of employee entitlements, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PPA Services Australia is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Fourth Defendant - PP AUS Holdings Pty Limited

- 41 As already noted, the provisional liquidators are of opinion that the fourth defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$7,025,648.29, being a running balance account deficit debt in

respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 12 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The provisional liquidators have received 42 claims from employees, totaling \$94,937.85, primarily in respect of outstanding superannuation guarantee, wages and salary sacrifice entitlements. The company has cash at bank of approximately \$4,020; its CBA bank account was garnisheed on 24 January 2017, to the extent of \$7,065,778.90.

- 42 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debts in respect of employee entitlements and their number and magnitude, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PP AUS Holdings is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Fifth Defendant - PP Australia NSW Pty Ltd

- 43 As already noted, the provisional liquidators are of opinion that the fifth defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$7,992,806.56, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 12 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The provisional liquidators have received 29 claims from employees, totaling \$67,226.71, primarily in respect of outstanding superannuation guarantee, wages and salary sacrifice entitlements. The company has cash at bank of approximately \$3,289.15; its CBA bank account was garnisheed on 24 January 2017, to the extent of \$7,891,612.38.

- 44 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debts in

respect of employee entitlements and their number and magnitude, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PP Australia NSW is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Sixth Defendant - PP Services (WA) Pty Ltd

45 As already noted, the provisional liquidators are of opinion that the sixth defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$2,709,363.58, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 12 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The provisional liquidators have received 36 claims from employees, totaling \$124,084.59, primarily in respect of outstanding superannuation guarantee, wages and salary sacrifice entitlements. The company has cash at bank of approximately \$5,098.79; its CBA bank account was garnisheed on 24 January 2017, to the extent of \$1,849,125.63.

46 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debts in respect of employee entitlements and their number and magnitude, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PP Services (WA) is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Seventh Defendant - PPA (SA) Pty Ltd

47 As already noted, the provisional liquidators are of opinion that the seventh defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$5,548,631.82, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 12 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated

creditor's statutory demand. The provisional liquidators have received 35 claims from employees, totaling \$122,588.94, primarily in respect of outstanding superannuation guarantee, wages and salary sacrifice entitlements. The company has cash at bank of approximately \$1,489.53; its CBA bank account was garnisheed on 24 January 2017, to the extent of \$4,529,490.68.

48 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debts in respect of employee entitlements and their number and magnitude, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PPA (SA) is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Eighth Defendant - PPA NT Pty Ltd

49 As already noted, the provisional liquidators are of opinion that the eighth defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$5,160,013.17, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 12 May 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The provisional liquidators have received 43 claims from employees, totaling \$150,006, primarily in respect of outstanding superannuation guarantee, wages, salary sacrifice entitlements, and motor vehicle lease payments. The company has no cash at bank; its CBA bank account was garnisheed on 24 January 2017, to the extent of \$5,041,630.47.

50 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debts in respect of employee entitlements and their number and magnitude, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that PPA NT is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Ninth defendant - RAM Enterprises Australia Pty Limited

51 As already noted, the provisional liquidators are of opinion that the eighth defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$1,601,636.69, being a running balance account deficit debt in respect of BAS amounts. When these proceedings were commenced, there was already pending another application, filed on 13 April 2017, to wind up the company in insolvency, relying upon its failure to comply with an unrelated creditor's statutory demand. The Chief Commissioner of State Revenue has lodged a proof of debt for \$144,389.71, in respect outstanding payroll tax. The provisional liquidators have received 43 claims from employees, totaling \$150,006, primarily in respect of outstanding superannuation guarantee, wages, salary sacrifice entitlements, and motor vehicle lease payments. The company has no cash at bank; its ANZ bank account was garnisheed by the ATO in December 2016 in the amount of \$561,884.54, before its closure on 10 June 2017, and its NAB account was garnisheed for a similar sum in January 2017. While the company's reconstructed balance sheet as at 9 June 2017 indicates assets of approximately \$7,897,000 and liabilities of approximately \$5,420,000, all significant assets are referable to "receivables", and the stated liabilities have been reduced by approximately \$2.286 million referable to loans, about which there is no information apparently available.

52 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debt for payroll tax, the prior failure of the company to comply with a statutory demand, and the opinion of the provisional liquidators, I am satisfied that RAM Enterprises Australia is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Tenth Defendant - SAI Solutions Australia Pty Limited

53 As already noted, the provisional liquidators are of opinion that the eighth defendant is likely to be insolvent. The Commissioner has lodged a proof of debt for \$3,709,769.13, being (as to \$2,494,772.26) a running balance account deficit debt in respect of BAS amounts; and (as to \$1,214,996.87)

outstanding superannuation guarantee charge. The Chief Commissioner of State Revenue has lodged a proof of debt for \$723,783.95, in respect of outstanding payroll tax. The company has no cash at bank. While the company's reconstructed balance sheet as at 9 June 2017 indicates total assets of approximately \$5,998,000, and liabilities of approximately \$5,390,000, the assets are very largely (to the extent of \$5,483,878) represented by "accounts receivable", about which no information is apparently available; the \$500,000 asset represented by the proceeds of bank accounts is apparently illusory; and the stated liabilities have been reduced by approximately \$723,000 referable to loans, about which there is no information apparently available.

- 54 Having regard to the outstanding unpaid taxation liabilities and the apparent absence of cash or property with which to meet them, the outstanding debt for payroll tax, and the opinion of the provisional liquidators, I am satisfied that SAI Solutions Australia is unable to pay its debts as and when they fall due, and accordingly is insolvent.

Conclusion

- 55 For the foregoing reasons, my conclusions are:
- 56 The statutory presumption of insolvency arising from failure to comply with a creditor's statutory demand is available against the twelfth defendant, notwithstanding that it arose after the institution of the proceedings. The twelfth defendant is presumed to be insolvent and ought to be wound up.
- 57 Evidentiary certificates given under the taxation legislation are available in winding up proceedings, since such a proceeding falls within the scope of the term "a proceeding to recover an amount of a tax-related liability", for the purposes of TAA, Sch 1, s 255-45(1).
- 58 On the evidence, the proper inference is that each of the first through tenth defendants is unable to pay its debts as and when they fall due and is therefore insolvent, and ought to be wound up.

59 In *Perovich v ASIC*,³⁷ McPherson JA said, in the context of an application for leave to appeal from an order for the winding up of two companies, that such an order was “quite irregular”, and that separate applications and orders should be made:

[2] On examining the order, I find that it purports to be a single order for the winding up of two companies and the appointment of Mr Richards as liquidator. In *Re Shields Marine Association* (1867) 16 WR 69; 17 LT 308, Lord Romilly MR said that such an order was “quite irregular” (17 LT 308), and that two separate orders must be made; but that an order might afterwards be obtained directing the adoption under each of the new orders of the proceedings under the old order. This was, in due course, presumably done because there is a reference in the Law Reports to the effect that another order was later obtained: *Re Shields Marine Insurance Association (Lee & Moor’s case)* (1868) LR 5 Eq 368 at 369. The *Corporations Act 2001* (Cth) confirms rather than alters that requirement except in the limited respect that two or more companies may be wound up in insolvency on one application “if they are joint debtors”. There is nothing here to show that this is so in the case of these two companies. They are not sought to be wound up as debtors, joint or otherwise, of ASIC.

[3] One can see the good sense of Lord Romilly’s requirement. In addition to other possible problems, it might, for example, be difficult on appeal to set aside the order for winding up of one of the companies without discharging the other as well. But, as it stands now, the order of 25 November 2005 is an order of a superior court of record and as such it would not in modern times be regarded as vitiated by the irregularity, at least in the absence of an appeal on that ground, of which there has so far been none: see *Cameron v Cole* (1944) 68 CLR 571 at 585, 590, 598, 607. ASIC may need hereafter to apply for the order for winding up of the two companies and the appointment of the liquidator to be embodied in separate orders to that effect; but there is no question of treating the order made here as in any sense a nullity.

60 It is true that *Corporations Act*, s 459T, provides that two or more companies may be wound up in insolvency on one application “if they are joint debtors”. However, I do not see why a single application cannot be made in respect of multiple defendant companies where the requirements of UCPR 6.19 for joinder of defendants are satisfied.³⁸ Given the original basis of this application, on the just and equitable ground, that all the defendant companies were engaged in a scheme, such requirements were plainly met

³⁷ [2005] QCA 456.

³⁸ UCPR r 6.19 provides that two or more persons may be joined as plaintiffs or defendants in any originating process if (a) separate proceedings by or against each of them would give rise to a common question of law or fact, and (b) all rights of relief claimed in the originating process are in respect of, or arise out of, the same transaction or series of transactions, or if the court gives leave for them to be joined, which leave may be granted before or after the originating process is filed.

when the originating process was filed. Even if that changed when insolvency was added, in that the transactions upon which relief depended were no longer identical, it was plainly a case for the grant of leave. In that context, no such difficulty as McPherson JA contemplated in connection with an appeal arises from a single order, at least so long as it is expressed in severable terms.

61 The Court therefore orders that:

- (1) each of the companies listed below be wound up and Timothy Norman, Salvatore Algeri and Ezio Senatore of Deloitte be appointed its liquidators:
 - (a) the first defendant Plutus Payroll Australia Pty Ltd;
 - (b) the second defendant PPA Contractors Australia Pty Ltd;
 - (c) the third defendant PPA Services Australia Pty Limited;
 - (d) the fourth defendant PP AUS Holdings Pty Limited;
 - (e) the fifth defendant PP Australia NSW Pty Ltd;
 - (f) the sixth defendant PP Services (WA) Pty Ltd;
 - (g) the seventh defendant PPA (SA) Pty Ltd;
 - (h) the eighth defendant PPA NT Pty Ltd;
 - (i) the ninth defendant RAM Enterprises Australia Pty Limited;
 - (j) the tenth defendant SAI Solutions Australia Pty Limited; and
 - (k) the twelfth defendant BRW Services Pty Ltd.

62 The costs of the proceedings are provided for by *Corporations Act* s 466(2), without the requirement for any further order.
