Re **MACRO CONSTRUCTIONS PTY LTD**

[Appn 606/1992]

Supreme Court, Brisbane (Derrington J.)

10 September; 6 October 1992

Corporations – Companies – Winding up – Winding up by Court – Grounds for winding up – Inability to pay debts – Neglect to pay after demand – What constitutes demand – Creditor misnamed – Failure to show company number – Corporations Law s. 1322(2). (A.Dig. 3rd [170]).

Corporations – Companies – Miscellaneous matters – Irregularities in proceedings – Particular cases – Necessity to show company name and number – Non-compliance – Winding-up notice – Corporations Law s. 1322(2). (A.Dig. 3rd [293]).

Section 1322(2) of the *Corporations Law* provides:

> "A proceeding under this Law is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid."

Held:

(1) That the giving of a notice of demand under s. 460(2) of the *Corporations Law* was part of a proceeding within the meaning of s. 1322(2).

Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd (1988) 14 A.C.L.R. 303 followed.

Australian Hydrocarbons N.L. v. Green (1985) 10 A.C.L.R. 72 considered.

Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd [1992] 2 Qd.R. 76 in part not followed.

(2) That if such a notice contained a slight error which did not in any substantial way frustrate the statutory provisions relating to the winding up of companies or deprive the relevant company of a right, it would not be held to be invalid.

Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd (1988) 14 A.C.L.R. 303 followed.

(3) That accordingly where such a notice identified the creditor only by reference to its registered business name which it had used during part of its trading with the debtor the notice was not invalid notwithstanding that it did not, in contravention of ss 219(2) and 219(3) of the *Corporations Law*, set out the creditor's company name and registration number.

Moreland Metal Company Ltd v. Cowlishaw (1919) 19 S.R. (N.S.W.) 231 applied.

Transfloors Pty Ltd v. S.W.F. Hoists & Industrial Equipment Pty Ltd (1984) 3 A.C.L.C. 66 considered.

(4) That in any event the notice was not such as could cause any substantial injustice within the meaning of s. 1322(2) and would not be declared thereunder to be invalid.

Re J. & P. Sussman Ltd [1958] 1 W.L.R. 519; *Re Waldcourt Investment Co. Pty Ltd* (1986) 4 A.C.L.C. 589; *Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd* (1988) 14 A.C.L.R. 303, 305 considered.

CASES CITED

The following cases are cited in the judgment:

Allen Properties (Queensland) Pty Ltd v. Encino Holding Pty Ltd (1985) 3 A.C.L.C. 817.
Australian Hydrocarbons N.L. v. Green (1985) 10 A.C.L.R. 72.
Clarke & Walker Pty Ltd v. Thew (1967) 116 C.L.R. 465.
Collins Bros. Stationers Pty Ltd v. Zebra Graphics Pty Ltd (1986) 4 A.C.L.C. 234.
Corazon Pty Ltd; Re (1987) 5 A.C.L.C. 1059.
Crust 'N' Crumb Bakers (Wholesale) Pty Ltd; Re [1992] 2 Qd.R. 76.
General Welding & Construction Co. (Qld) Pty Ltd v. International Rigging (Aust.) Pty Ltd [1983] 2 Qd.R. 568.
Hodges; Re (1873) 8 Ch.App. 204.
J. & P. Sussman Ltd; Re [1958] 1 W.L.R. 519.
Kieran Byrne & Associates Geotechnical Consultants Pty Ltd; Re (1987) 6 A.C.L.C. 76.
Mannum Haulage Pty Ltd; In re (1974) 8 S.A.S.R. 451.
Metropolitan Waste Disposal Authority v. Willoughby Waste Disposals Pty Ltd (1987) 5 A.C.L.C. 702.
Moreland Metal Company Ltd v. Cowlishaw (1919) 19 S.R. (N.S.W.) 231.

Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd (1988) 14 A.C.L.R. 303.
Transfloors Pty Ltd v. S.W.F. Hoists & Industrial Equipment Pty Ltd (1984) 3 A.C.L.C. 66.
Waldcourt Investment Co. Pty Ltd; Re (1986) 4 A.C.L.C. 589.
Willes Trading Pty Ltd; Re [1978] 1 N.S.W.L.R. 463.

APPLICATION

S. J. Given for the applicant.

P. A. J. Howard for the respondent.

C.A.V.

DERRINGTON J.: This is an application to wind up the abovenamed company ("the company") pursuant to its failure to comply with a s. 460(2) notice delivered by the applicant, Stramit Corporation Limited (ACN 005 010 195), which since 3 February 1992 has registered and used the business name "Stramit Industries".

The notice was given on 2 July 1992 and described the creditor as Stramit Industries. It was signed by solicitors purporting to be the duly authorised agent of Stramit Industries and it claimed a debt of $25,654.56.

Learned counsel for the company takes objection to the form of the notice and says that it is defective and of no effect on three grounds:

1. That there is no such legal person as Stramit Industries because that is not the name of the creditor company; and therefore as the identity of the creditor to whom the debt is owed is not properly stated, the notice cannot be a proper demand;
2. That there has been a failure to comply with the requirement of s. 219(3) of the *Corporations Law*, that the company number be shown on the document; and
3. That there is no proof that the solicitors who purported to sign the notice on behalf of the applicant were authorised to do so.

There is no denial that the debt is owed as claimed in the notice.

Learned counsel for the applicant denies that the notice was defective at all but in the alternative has invoked s. 1322(2) of the *Corporations Law* which provides that:

> "A proceeding under this Law is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid."

He submits that this applies to the first two objections of the company because if there are any irregularities they have not caused nor will they cause any or any substantial injustice. As to the third point of objection, he relied at first upon the statement in the affidavit of his instructing solicitor who says that his firm is the solicitors for the plaintiff and that he is the person entrusted with the conduct and carriage of this matter; alternatively he sought an adjournment to file a suitable affidavit, and since the hearing of argument this has been filed by leave.

The giving of a notice of this kind is part of "a proceeding" within the meaning of s. 1322(2): *Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd* (1988) 14 A.C.L.R. 303. The suggestion in *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* [1992] 2 Qd.R. 76 that *Clarke & Walker Pty Ltd v. Thew* (1967) 116 C.L.R. 465 is authority to the contrary is, with respect, not correct. The context in which the term was employed in that authority was quite different and this provides a clear

distinction. A closer analogy is *Australian Hydrocarbons N.L. v. Green* (1985) 10 A.C.L.R. 72 where an annual general meeting of a company was held to be a proceeding so that a misstatement in a notice of the closing date of nominations for director at the meeting was held to be a curable irregularity. In the present case the proceeding is the winding-up application and the giving of this notice is a part of it. However, before it is necessary to invoke this section, there must be an irregularity.

The first issue then is whether the use of a registered business name in such a notice amounts to an irregularity or defect. There was a legal person behind the name and it was lawful for it generally to use that name in its dealings with the company because of the provisions of the *Business Names Act* 1962. In fact since the registration of the name, the applicant used it when the debt was incurred by the company. The company has however advanced a supplementary point which depends upon the undisputed fact that part of the debt referred to in the notice was incurred in January 1992 shortly before the registration of the business name which is used in the notice. The argument is to the effect that because the whole of the debt claimed was not incurred in its entirety with the applicant under that name, the claim cannot be validly made for that amount under such name. If then, the argument proceeds, the amount claimed is excessive, then the demand will fail, notwithstanding that the balance exceeds the statutory amount: *General Welding and Construction Co. (Qld) Pty Ltd v. International Rigging (Aust.) Pty Ltd* [1983] 2 Qd.R. 568 at 570.

Although there is some difference of judicial opinion upon the validity of this latter proposition, that is irrelevant here. The whole of the debt was still incurred by the debtor to the actual creditor which is accurately identified in the notice. It is immaterial that the name used in the notice was not the name used at the time when part of the debt was incurred, for it was still the same party and the debtor has always known that, according to the evidence. The mere alteration of the name, where the alteration is known to the debtor, cannot have any influence upon the existence of the debt which was still owing to the creditor which was accurately identified in the notice, as at the date of the notice. There is nothing in this point.

Where the name is used in such a notice, it has the purpose, and no more, of precisely identifying the creditor which claims that the debt referred to in the notice is due to it, and if the name used correctly identifies that party, particularly if it is the name which it used in conducting the relevant business, then it is impossible to say that there is any difficulty in identification of it for the purposes of the notice. Nor is there any danger of injustice to the company simply because the creditor's company name is not used.

There is no doubt that the company knew that "Stramit Industries" referred to the applicant creditor, and on 4 June 1992 its solicitor wrote to the creditor in that name referring only to the resolution of his "client's current cash flow difficulty" and requesting restraint for a period from taking any action adverse to his client's interest. There was no suggestion that the debt and the creditor were not both fully and accurately identified, and the present complaints go only to formal defects which do not affect that quality.

However, s. 219(2) of the *Corporations Law* requires that: "A company shall set out its name, in legible characters, on … every public document of the company that is signed, issued or published …". The s. 460(2) notice in this case is a "public document": s. 9.

It might be also noted here for convenience that s. 219(3) similarly requires that: "On … every public document of a company that is signed, issued or published … the company must, unless its registration number is part of its name, set out in legible characters, after the company's name where it first appears, the expression 'Australian Company Number' and the company's registration number."

It follows that whilst the name used on the notice was a correct name which accurately identified the creditor it failed to comply with each of these provisions in this document; and it is immaterial that the document was signed by an agent because the duty was still that of the company. Indeed, by s. 219(5), the prohibition of contravention of subs. (2) or (3) applies to any person "whether or not an officer of the company" who signs or publishes a public document of the company. The result is that these features of the document are in breach of the applicant's duty but they were not such as could cause any substantial injustice within the meaning of s. 1322(2).

There is abundant authority that apart from this provision the courts will require strict compliance by an alleged creditor with the technical formal requirements of a notice of this kind: *Re Hodges* (1873) 8 Ch.App. 204, 205; *Re Mannum Haulage Pty Ltd* (1974) 8 S.A.S.R. 451; *Collins Bros. Stationers Pty Ltd v. Zebra Graphics Pty Ltd* (1986) 4 A.C.L.C. 234 at 235; *Re Kieran Byrne & Associates Geotechnical Consultants Pty Ltd* (1987) 6 A.C.L.C. 76; *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* [1992] 2 Qd.R. 76. The reason is the draconian consequences to the company because default of compliance with the notice will render it vulnerable to a winding-up.

However the quality of strictness of compliance has been the subject of discussion in various authorities: *Re Willes Trading Pty Ltd* [1978] 1 N.S.W.L.R. 463; *Allen Properties (Queensland) Pty Ltd v. Encino Holding Pty Ltd* (1985) 3 A.C.L.C. 817; *Transfloors Pty Ltd v. S.W.F. Hoists & Industrial Equipment Pty Ltd* (1984) 3 A.C.L.C. 66; *Re Waldcourt Investment Co. Pty Ltd* (1986) 4 A.C.L.C. 589; *Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd*. Not every error will attract invalidity and, for example, the court will look to see whether, on a fair construction of the notice, the creditor company is or is not named: *Allen Properties (Queensland) Pty Ltd v. Encino Holding Pty Ltd*. Consistently with the need for giving business operation to the provisions of the *Corporations Law*, if the error is slight and does not in any substantial way frustrate the statutory provisions relating to this procedure or deprive the company of a right, the notice will not be held to be invalid: *Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd*.

Any breaches of ss 219(2) and (3) attract a penalty, but they are not such as to attract illegality to any document where they appear. In commercial legislation of such a fundamental character as this, it would be very surprising if it were intended that every public document of a corporation in which there had been a failure to comply with these sections, no matter how slight, should be invalid for illegality. Yet s. 103 must be noted. It provides against invalidity of documents where there is contravention of certain sections in the Act, but it does not refer to s. 219. There is a possible implication that the contrary may apply to those sections not mentioned, but it is necessary to look further.

On the issue of illegality some authorities were provided by the

applicant but they were not in point as the incorrect use of the company's name was made by the other party to the litigation and no relevant duty was cast on that party at law. The only point was whether there was a legal person behind the incorrect name which was used so that it could be treated as a misnomer. However, there is authority directly in point, and as it might be expected, the transaction is not avoided for illegality, despite the possible commission of an offence by the person responsible for the omission: *Moreland Metal Company Ltd v. Cowlishaw* (1919) 19 S.R. (N.S.W.) 231. The minor features of the *Corporations Law* which might be taken into account in this exercise, such as the terms of s. 103, are not such as would affect this result. However, the absence of illegality does not necessarily save this notice because any invalidity of this type of document is not necessarily dependent upon illegality. It is necessary to return to the general requirement of accuracy in such a notice.

Because there has been accurate identification of the creditor company and because the defects consist only of non-compliance with other provisions of the *Corporations Law* which do not go to any of the essential features of the notice itself, it is questionable whether the absence of the company name and number amounted to a defect in any relevant sense at all. For example, if the applicant had described itself in the notice as the company which traded with the respondent under the name of Stramit Industries, then the identification would have been complete for the purpose of compliance with the provisions relating to the notice though there would have been non-compliance with s. 219.

Even if this be incorrect, then because of those same considerations, the defect is of such a nature that it should not be regarded as invalidating the notice. In this respect, there are some comparable features with *Transfloors Pty Ltd v. S.W.F. Hoists & Industrial Equipment Pty Ltd* (1984) 3 A.C.L.C. 66.

Further, if it were necessary, the provisions of s. 1322(2) must be considered. Its predecessor, s. 539 of the *Companies Code*, was considered for use in *Re Waldcourt Investment Co. Pty Ltd* (1986) 4 A.C.L.C. 589. By analogy it is difficult to see why it should not have application here. However, the justice of the case might still demand that because of the severe consequences of such a notice, its accuracy in detail is demanded as a matter of justice, for that was the basis of the principle of strictness in the first instance. It seems, however that the terms of this section require that a more liberal approach should be given to the forgiveness of technical errors which have no substantive effect in themselves, so that where no-one has been misled by the mistake, the notice will not be bad: *Re J. & P. Sussman Ltd* [1958] 1 W.L.R. 519; *Pro-Image Productions (Vic.) Pty Ltd v. Catalyst Television Productions Pty Ltd* at 305. After all, if the notice is accurate in substance in showing that the debt is owing and if it remains unpaid there is little justice in withholding a winding-up order from the applicant. For these reasons, the notice was not invalid for either of the first two reasons relied upon by the company prefaced above.

Conformably with its third objection the absence of proof of agency in the signatory to the notice would have been fatal to the application unless an affidavit had been filed properly evidencing his authority. It would have been enough to show that the signatory had been given authority to commence winding-up proceedings, which will be taken to include an authority to sign such a notice: *Metropolitan Waste Disposal Authority v.*

Willoughby Waste Disposals Pty Ltd (1987) 5 A.C.L.C. 702; *Re Corazon Pty Ltd* (1987) 5 A.C.L.C. 1059.

However the proof originally advanced had not reached that status and the application would have been dismissed if that evidence alone had been relied on. It has since been cured by a sufficient affidavit, filed by leave, and the point no longer remains; but these matters must be reflected in the order for costs.

It is ordered that the company be wound up in accordance with the provisions of the *Corporations Law* and that Wilson Joseph Wilde and Ernest George Harris be appointed liquidators for that purpose.

The costs to which the applicant is entitled are to be limited so as not to include any costs incurred by it after the hearing of the application on 10 September 1992.

Orders accordingly.

Solicitors: *Halletts* (applicant); *Creedon Hetherington* (respondent).

L. J. A. T. HAMPSON
Barrister