FEDERAL COURT OF AUSTRALIA

Zomojo Pty Ltd v Zeptonics Pty Ltd [2013] FCA 1131

Citation:	Zomojo Pty Ltd v Zeptonics Pty Ltd [2013] FCA 1131
Parties:	**ZOMOJO PTY LTD v ZEPTONICS PTY LTD, CROSSWISE PTY LTD, MD HAMMER PTY LTD, ZEPTO MARKETS PTY LTD, ZEPTO FABRICS PTY LTD, ZEPTOIP PTY LTD and TRADEMACH PTY LTD**
File number(s):	VID 663 of 2013
Judge(s):	DAVIES J
Date of judgment:	31 October 2013
Catchwords:	**CORPORATIONS** – Winding up in insolvency – Application by contingent creditor – Leave to bring application required – Where contingent debt arises from unquantified damages and costs orders – Whether proceedings constitute an abuse of process – Leave to apply granted – Application to wind up respondent companies granted.
Legislation:	*Corporations Act 2001* (Cth), ss 95A, 459A, 459P
Cases cited:	*Leveraged Capital Pty Ltd v Modena Imports Pty Ltd* [2009] NSWSC 509 *Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458 *Crema Pty Ltd v Land Mark Property Developments Pty Ltd* [2006] VSC 338 *Australian Beverage Distributors v The Redrock Co* [2008] NSWSC 3 *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 164 FLR 430 *Lewis v Doran* (2004) 208 ALR 385 *Re MIG Property Services Pty Ltd (in liq)* [2012] VSC 122 *Hurd v Zomojo Pty Ltd* [2013] FCA 581 *Melbase Corporation Pty Ltd v Segenhoe Ltd* (1995) 17 ASCR 187 *Williams v Spautz* (1992) 174 CLR 509 *Re Company (No 0089 of 1894)* [1894] 2 Ch. 349 *Roberts v Wayne Roberts Concrete Constructions Pty Ltd* (2004) 208 ALR 532 at 548 *Australian Beverage Distributors Pty Ltd v The Redrock Co Pty Ltd* (2007) 213 FLR 450

Date of hearing:	31 October 2013
Date of last submissions:	31 October 2013
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	27
Counsel for the Applicant:	B Carew
Solicitor for the Applicant:	Corrs Chambers Westgarth
Counsel for the Respondents:	T R Messer
Solicitor for the Respondents:	Page Seager Lawyers

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 663 of 2013**

BETWEEN: **ZOMOJO PTY LTD**
Applicant

AND: **ZEPTONICS PTY LTD**
First Respondent

CROSSWISE PTY LTD
Second Respondent

MD HAMMER PTY LTD
Third Respondent

ZEPTO MARKETS PTY LTD
Fourth Respondent

ZEPTO FABRICS PTY LTD
Fifth Respondent

ZEPTOIP PTY LTD
Sixth Respondent

TRADEMACH PTY LTD

Seventh Respondent

JUDGE: **DAVIES J**
DATE OF ORDER: **31 OCTOBER 2013**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The applicant has leave pursuant to s 459P(2) of the *Corporations Act 2001* (Cth) to apply to the Court to wind up each of the respondents in insolvency.
2. Zeptonics Pty Ltd ACN 141 647 716, Crosswise Pty Ltd ACN 140 717 317, MD Hammer Pty Ltd ACN 149 869 189, Zepto Markets Pty Ltd ACN 150 529 301, Zepto Fabrics Pty Ltd ACN 156 138 000, Zeptoip Pty Ltd ACN 156 133 087 and Trademach Pty Ltd ACN 155 683 864 are each wound up in insolvency pursuant to s 459A of the *Corporations Act 2001* (Cth).
3. Richard Gell Mansell and Bruno Anthony Secatore of Level 11, 330 Collins Street Melbourne Victoria 3000 are appointed liquidators of the companies ordered to be wound up in paragraph 2 above.
4. The applicant's costs, including reserved costs, be taxed and reimbursed in accordance with s 466(2) of the *Corporations Act 2001* (Cth).
5. This order is stayed for a period of 7 days from the date of the order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 663 of 2013**

BETWEEN:

ZOMOJO PTY LTD

AND:

ZEPTONICS PTY LTD

JUDGE: **DAVIES J**
DATE: **31 OCTOBER 2013**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The applicant (**"Zomojo"**) has applied for leave pursuant to s 459P(2) of the *Corporations Act 2001* (Cth) (**"the Act"**) to apply to wind up the respondents in insolvency and, if leave is granted, for orders under s 459A of the Act winding them up. Zomojo requires leave to make the application because it is a contingent creditor of the respondents in respect of:

- a judgment on liability, where damages and other pecuniary relief are still be assessed; and
- costs orders that have not yet been taxed: *Leveraged Capital Pty Ltd v Modena Imports Pty Ltd* [2009] NSWSC 509 at [19]-[22].

The respondents did not dispute that Zomojo has standing as a contingent creditor but they have opposed both applications, contending that they are solvent and that the applications are an abuse of process.

INSOLVENCY

2 Judgment was given in favour of Zomojo for claims of:

- knowingly assisting breaches of fiduciary and statutory duties owed to Zomojo by Matthew Hurd, a former director, employee and shareholder of Zomojo; and
- inducing breaches of contract by him.

Zomojo also obtained judgment against Matthew Hurd for breaches of fiduciary and statutory duties and breach of contract: *Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458. In short compass, the trial judge found that Matthew Hurd had improperly used the intellectual property and connections of Zomojo to start up a rival venture and had established the respondents as the corporate vehicles through which to conduct those activities and to take the benefit of his misconduct. The Court held that Zomojo is entitled to damages and made declarations that the respondents (save for the third respondent) hold the profits that they had derived by reason of their involvement in those activities as constructive trustee for the benefit of Zomojo and are liable to account to Zomojo for those profits. The Court further ordered each of the respondents (save for the third respondent), by their proper officer, to file and serve an affidavit deposing to all the profits derived by them by reason of, or arising out of, their relevant participation in the misconduct and to the precise manner of calculation of those profits. Those affidavits are required for the purpose of a separate hearing to determine the pecuniary relief to which Zomojo is entitled (**"the quantum hearing"**).

3 Several affidavits were filed on behalf of the respondents as required by Court order. The respondents' case is that there are no profits to disgorge because:

- the third, fifth, sixth and seventh respondents have never carried on any revenue earning business;
- the first, second and fourth respondents have only ever made losses from their business operations and none of those companies are still trading; and

- none of the respondents has any foreseeable prospect of receiving sales revenue.

4 Financial statements produced "in verification" that the first, second and fourth respondents made losses from their business activities also disclosed that the first respondent (**"Zeptonics"**) was the only company with any assets of value and, as of November 2012, that it had a substantial deficiency of assets.

5 In this proceeding, Zomojo relies on those same affidavits, and what they disclosed about the financial position of the respondents, as evidence of the insolvency of the respondents. The respondents contend that none of that material is admissible or probative of solvency because the affidavits were prepared in a different context and for a different purpose. They also contend that they are solvent and able to pay their debts as and when they fall due.

6 The test for insolvency in an application to wind up under s 459A of the Act is whether the company can pay all its debts as and when they become due and payable: s 95A of the Act. Insolvency is the inability to meet liabilities out of available resources, as they fall due. It is a cash flow test that looks at liquidity in considering a company's ability to meet expenses and liabilities when payable: *Crema Pty Ltd v Land Mark Property Developments Pty Ltd* [2006] VSC 338 at [141]. The nature of a company's assets and the company's ability to convert those assets into cash within a relatively short time to meet debts as and when they fall due must be considered in determining solvency and commercial realities will be relevant in considering what resources are available to a company to provide an income source out of which to meet its liabilities: *Australian Beverage Distributors v The Redrock Co* [2008] NSWSC 3 at [157]; *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 164 FLR 430 at 440.

7 Reconstructed balance sheets for the first, second and fourth respondents prepared by John Hurd, the sole director of the companies (and father of Matthew Hurd), for the purposes of this proceeding, show that the only company that has assets is Zeptonics. Those assets as at July 2013 comprised cash at bank, trade debtors and inventory, though Mr Hurd conceded that the trade debtors were unlikely to be collected and the inventory was not readily realisable.

8 The respondents' own evidence shows that none of them have an income stream, none of them have any foreseeable prospect of a future revenue stream and none of them have a source of credit available to them. Nonetheless, in this proceeding the respondents claim to be solvent. Mr Hurd gave evidence that only Zeptonics has any liabilities due for payment and that it has sufficient cash reserves to pay those liabilities. The submission was put that, as none of the defendants are trading, there is no question of them incurring liabilities they cannot meet and they are solvent.

9 For the reasons that follow the respondents' claims of solvency are rejected.

10 The respondents' claim that they are solvent does not make any allowance for the contingent debts that arise from the judgment and costs orders. The respondents argued that they are not liabilities to be taken into account because nothing is yet due and payable, quantum is the subject of challenge, and they have not exhausted their appeal rights. That contention cannot be accepted.

11 The fact that the debts are contingent does not mean that they are excluded from consideration. Contingent debts may be taken into account in assessing solvency: 459D of the Act. Determining insolvency for the purposes of a winding up application involves an element of "looking forward" and it is material to consider not only the respondents' capacity to pay debts currently due, but also their capacity to pay debts that will become due: *Australian Beverage Distributors v The Redrock Co* at [157]; *Lewis v Doran* (2004) 208 ALR 385 at 408.

12 It is clear on the face of the evidence that the respondents do not have a present ability to pay any amount to Zomojo in discharge of their debts once quantum is assessed, nor is there any expectation that they will become able to pay any amount as there is no prospect of any improvement in their financial position. I take into consideration that Zeptonics presently has cash at bank, but it also has extant current and non-current liabilities which exceed that cash balance. As there is no suggestion in the material that the respondents' financial positions may, or could, change beneficially between now and the quantum hearing, the inability of the respondents to meet those liabilities once ascertained bears upon their solvency.

13 The respondents asserted through Mr Hurd that he "knows[s] there to be no such profits" and that the issue of damages is "complex" and "far from clear or certain", and that

there are costs orders that have been reserved that "are likely to be awarded to the respondents". But those statements are no more than bare assertion by a person unqualified to make them and are tendentious and argumentative. Zojomo has judgment against the respondents and its entitlement to be paid pecuniary relief and to recover costs has been established. This is an important and significant factor to take into account. Whilst I accept that there has been some attempt by the respondents to support their position that they made no profits, they have not shown an arguable case that there is a realistic prospect that nothing at all will be payable arising out of the judgment or costs orders.

14 Once it is determined that the respondents' contingent debts should be taken into account, as I consider they should be, the conclusion is reached that the respondents are insolvent because they have no capacity to pay those debts once quantified.

15 The fact that appeal rights have not yet been exercised may be a reason in an appropriate case for refusing to wind up a company, but I do not regard it as a reason in this case. An appeal against the judgment which founds the application to wind up would be a matter of significance if the appeal was based on genuine and arguable grounds: *Re MIG Property Services Pty Ltd (in liq)* [2012] VSC 122. The respondents have not attempted to satisfy the Court that any appeal would raise genuine and arguable grounds and, significantly, they failed to persuade the Court on an application for leave to appeal the judgment on liability that the judgment was attended with sufficient doubt to warrant its reconsideration by an appellate court: *Hurd v Zomojo Pty Ltd* [2013] FCA 581.

16 There is a further reason for concluding insolvency in relation to Zeptonics. I reject Mr Hurd's assertion that Zeptonics' liabilities do not include two loans from related entities that are recorded as long-term liabilities in the balance sheet as of July 2013 that he prepared for the purposes of this proceeding. The two liabilities relate to loans from:

- Strategic Principals FT (**"Strategic"**) for $3,152,979
- Jolene (Tas) Pty Ltd (**"Jolene"**) for $1,033,616

17 Mr Hurd is also the sole director of Strategic and one of the two directors of Jolene. He deposed that Strategic and Jolene advanced the monies "as an investment and were regarded by those companies as non-recourse loans only to be repaid in the event that Zeptonics had the capacity to do so". He then deposed that:

> As Zeptonics is now effectively non-operating the monies are not due and payable and as such should not be regarded as a liability of Zeptonics when assessing its capacity to pay its debts as and when they fall due. Both Strategic and Jolene regard their investment as lost and pursuant to the terms of the agreement made when advancing the subject moneys and acknowledge that they have no recourse against Zeptonics to recover the capital invested into Zeptonics.

18 His evidence was not supported by any documents, accounting records or other material. His evidence was no more than an unsubstantiated assertion and I do not consider that his status as a director of either of the lending companies elevates that evidence beyond mere assertion. He was not an impressive witness and I have very strong reservations about his creditworthiness and the reliability of the evidence that he gave.

19 The evidence revealed that Zeptonics paid $375,000 to Strategic as recently as August 2013. Mr Hurd denied that the monies were paid in part payment of Strategic's loan but I was left greatly disquieted by the explanation that he gave. The explanation that he gave was that Zeptonics had received a direct credit from the Australian Taxation Office in August 2013 that was surplus to "requirements" at the time and that he deposited the $375,000 in Strategic's account to earn some interest on it because "it was the most convenient way for [him] to handle it" and he "didn't want the money sitting there just being useless". Mr Hurd said that he transferred back some of the funds the day before the hearing because he had received advice that he should have put the money into a savings account in the name of Zeptonics "to make sure that [he] had done things correctly".

20 The payment to Strategic and the repayment of part of the monies only came to be revealed as the result of Mr Hurd's evidence-in-chief about the current bank balance for Zeptonics. It emerged through cross-examination that Zeptonics' bank balance had been increased by a deposit the day before the court hearing. I found Mr Hurd's explanation as to why he put the money into Strategic's account in the first place implausible and his explanation as to why he took the money out the day before the hearing equally implausible.

21 I reject Mr Hurd's assertion that the loans from Strategic and Jolene were "non-recourse" and are now not repayable as a matter of legal obligation. I find that they are liabilities to be taken into account when assessing the solvency of Zeptonics and, although not recorded as current, there is no cogent evidence before the Court that the loans would not ultimately have to be repaid. It is clear on the financial information before the Court that Zeptonics cannot repay those loans, now or in the future.

22 I am satisfied on the material before the Court that the respondents are insolvent and that Zomojo should be granted leave under s 459P(3) of the Act to make the application for orders winding up the respondents in insolvency under s 459A of the Act. I reject the respondents' submission that Zomojo has not adduced admissible or probative evidence of their insolvency. The fact that the evidence on which Zomojo principally relied to prove insolvency was the respondents' affidavits in another proceeding, prepared in another context and for another purpose, does not gainsay their admissibility and probative value as evidence of insolvency in this proceeding. The respondents were required by Court order to file those affidavits, and for those respondents that had business operations, financial statements were produced "in verification" of the claims made that those companies only ever traded at a loss. By those affidavits, the respondents have represented to the Court on oath that none of them are trading, none of them have an income stream, and apart from Zeptonics, that none of them have any assets. That evidence was not refuted in this proceeding and was sufficient to make out a "prima facie" case of insolvency for the purposes of s 459P(3) of the Act: *Melbase Corporation Pty Ltd v Segenhoe Ltd* (1995) 17 ASCR 187.

ABUSE OF PROCESS

23 The respondents contended that the winding up applications are an abuse of process because their object is to stop the respondents from exercising their rights in the other proceeding. That submission cannot be accepted.

24 The claim that the winding up application is an abuse of process relies on the principle that it is an abuse of process to use the legal process for the predominant purpose of obtaining a collateral advantage other than for the purpose for which the proceedings are designed: *Williams v Spautz* (1992) 174 CLR 509 at 529. In the context of an application to wind up a company in insolvency, it may be an abuse of process if the application is made for the collateral purpose of coercing a company into paying a disputed debt: *Re Company (No 0089 of 1894)* [1894] 2 Ch. 349; *Roberts v Wayne Roberts Concrete Constructions Pty Ltd* (2004) 208 ALR 532 at 548. However, it is not an abuse of process to bring proceedings for the purpose of obtaining an order to wind up "whatever entitlement or benefit the law provides if the proceedings terminate in the plaintiff's favour": *Australian Beverage Distributors Pty Ltd v The Redrock Co Pty Ltd* (2007) 213 FLR 450 at 460.

25 The respondents argued that the Court should infer that Zomojo has the collateral purpose in making this application to prevent the respondents from contesting the assessment of pecuniary relief and prosecuting any appeal rights because there is no sum presently due and payable by the respondents to Zomojo, no other creditor is seeking payment and, if the respondents were wound up, it is unlikely that a liquidator would contest the damages assessment or pursue appeal rights.

26 Those matters do not support a conclusion of abuse of process. The respondents have been found by the Court liable to pay pecuniary relief to Zomojo and the hearing on quantum will assess the extent of the pecuniary relief that Zomojo is entitled to recover from them. A practical consequence of the winding up order may be that the liquidator will not further defend the proceedings but the tactical advantage that a winding up order might or could give Zomojo does not make this application an abuse of process: *Australian Beverage Distributors Pty Ltd v The Redrock Co Pty Ltd* (2007) 213 FLR 450 at 461.

CONCLUSION

27 There will be an order granting leave to Zomojo to apply to wind up the respondents in insolvency and an order winding up the respondents in insolvency.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: