



HIGH COURT OF AUSTRALIA

Public Information Officer

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AUSSIE VIC PLANT HIRE PTY LTD v ESANDA FINANCE CORPORATION LIMITED

A court could not extend the time for compliance with a statutory demand under the *Corporations Act* if the time fixed by the Act had already expired, the High Court of Australia held today.

Esanda served a statutory demand on Aussie Vic Plant Hire when Aussie Vic owed Esanda more than \$400,000 under several hiring and chattel mortgage contracts. A statutory demand is a demand served on a company under section 459E of the *Corporations Act* to pay a debt or debts within 21 days. Section 459F(2) provides that if the company applies pursuant to section 459G for an order to set aside the demand, a court may extend the period for compliance, and if no extension is ordered the period ends seven days after the application under section 459G is finally determined.

Aussie Vic applied to the Victorian Supreme Court for an order setting the demand aside. On 20 June 2006, Master John Efthim dismissed the application to set aside the demand but ordered that the time for compliance be extended to 4 July 2006. Aussie Vic was entitled to appeal to a single judge of the trial division of the Supreme Court. After the extension fixed by Master Efthim had expired but before the appeal to a single judge had come on for hearing, Aussie Vic applied for another extension of time for compliance. The application and the appeal were heard by Justice Simon Whelan who dismissed both. He held that he could make no order to extend time due to section 459F(1) of the Act, which provided that the company was taken to fail to comply with the demand if the period for compliance had ended. Aussie Vic then appealed to the Victorian Court of Appeal, which sat with five Justices. On the issue of whether the time for compliance with a statutory demand could be extended after it had expired, two members of the Court held that it could, two members held that the preferable construction of the Act was that it could but that earlier contrary decisions should still apply, and the fifth member held that it could not. The Court of Appeal dismissed the appeal and Aussie Vic appealed to the High Court.

The High Court, by a 4-1 majority, dismissed the appeal and held that an order could be not be made to extend the period of compliance with a statutory demand after that period had expired. Generally the Act allowed a period for compliance to be extended even if the period has ended, unless the contrary intention appeared. The Court held that such a contrary intention did appear in Part 5.4 of the Act, entitled "Winding up in insolvency", which included sections 459E, 459F and 459G. It held that the evident purposes of Part 5.4 included speedy resolution of applications to wind up insolvent companies. Section 459F(1) provides that if at the end of the period for compliance with a statutory demand the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand. The Court held that the demand was in force and the time had expired so the company had not complied with the demand. It said that Aussie Vic's argument that an order extending the time for compliance can be made after the period has expired was not supported by section 459(2). It pointed out that denying the power to extend the time to comply with a statutory demand after the time had already expired did not affect the determination of the rights or liabilities of the company or of the party making the demand. Non-compliance with a demand merely creates a rebuttable presumption of insolvency.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*