1 of 1 DOCUMENT: Butterworths Corporation Law Bulletin/2014/No 12 -- July 2014

In this Issue

[302] BCLB 12: Dr Marcel Fernandes

In this edition's article, Robin Bowley and Lloyd Wood analyse a recent NSW Supreme Court case (*Polon v Dorian* [2014] NSWSC 571) in which a solicitor was held liable for making representations to prospective investors an investment scheme, including as to the operation of the scheme and to legal safeguards in place, in circumstances where her client was the company proposing the scheme. The solicitor was also held liable for breach of an implied retainer between her and the prospective investors to whom she made those representations. She was not a mere conduit and had allowed the impression to be created that she was their legal adviser. She had not verified the accuracy of her client's representations about the scheme, which she had relayed to the investors and endorsed. Her duties to her actual client, the company, were in conflict with her duties to the investors under the implied retainer. Hall J also found the solicitor liable for false and misleading statements under the Fair Trading Act.

In *JPMorgan Chase Bank, National Association and Another v Fletcher (as liquidators of Octaviar Ltd) (receivers and managers appointed) (in liq) and Others; Grant Samuel Corporate Finance Pty Ltd v Fletcher (as liquidators of Octaviar Ltd) (receivers and managers appointed) (in liq) and Others* [2014] NSWCA 31; BC201401011, the Court of Appeal held by majority that an order made under the UCPR extending an extension of time already granted to liquidators under s 588FF(3) CA was valid. Ward J had made the impugned order by varying the extension order under UCPR r 36.16(2)(b). At first instance, Black J had dismissed the interlocutory challenge to Ward J's order. The majority, in dismissing the appeal, held that the order was valid for two reasons. First, as a matter of principle, while s 588FF(3) governs the time limit within which a liquidator's extension application must be made, it is the relevant rules of court picked up s 79 of the Judiciary Act 1903 (Cth) that determine how that application is to be treated once an application has been made within time. Secondly, as a matter of characterisation, although the impugned order extended the original extension, the extension it granted was still under the original application and as such within s 588FF(3). Use of the rules to amend an order so as to extend the time for the making of an application under s 588FF(3) would be invalid; this case, in contrast, was merely the renewal, under the rules of court, of an application that had originally satisfied s 588FF(3) by being made within the time limit. In dissent, Beazley P held that the application under the rules to vary the extension involved additional evidence and called for a fresh exercise of the discretion to extend time, despite the period under s 588FF(3) having expired, which was inconsistent with s 588FF(3)(b) and so the relevant rule was not picked up by the Judiciary Act.

Article

[303] Solicitor held liable for representations about investment scheme: Polon v Dorian [2014] NSWSC 571

By Robin Bowley -- Lecturer Faculty of Law, University of Technology Sydney; and Lloyd Wood -- LLB Candidate University of Technology Sydney

In the recent decision of *Polon v Dorian*,[1] a solicitor acting for the proponents of a bridging finance investment scheme was held liable for representations she had made to prospective investors about the operation of and alleged safeguards in place for the scheme. Through drafting legal documentation both for the scheme proponents and for the investors, the solicitor was held to have been acting for both parties, and to have breached the fiduciary duties she owed under her

implied retainer. Furthermore, through failing to verify the accuracy of representations made by the proponents of the scheme, the solicitor was held to have negligently breached her duty of care to the investors. For solicitors and other professionals the decision highlights the importance of exercising due care when making representations to third parties -- especially about potentially risky investment schemes -- through carefully checking all background facts and ensuring representations are provided with necessary qualifications.

[1] Background

In about 2001, the plaintiff, Ms Hazel Polon, became acquainted with a Mr David Dorian at an Amway of Australia Pty Ltd function, and maintained contact through her attendances at further Amway events and property seminars. Between 2003 and September 2005 Ms Polon attended three meetings of the "Follow Me Chat Club" -- a group founded and supervised by Mr Dorian for persons interested in property development, which he promoted as a "safe space". In due course Mr Dorian mentioned that he had become involved in a "Bridging Finance Investment Scheme", through which invested funds would be provided to third party borrowers, and which he said provided a set return of two per cent per month (the Scheme). During June 2005 the Chat Club newsletters discussed the potential for investment in the Scheme, and around late August or early September Mr Dorian told Ms Polon that the formal parts of the Scheme were being set up and monitored by a solicitor with expertise in the field.[2]

In early September 2005, Mr Dorian introduced Ms Polon to the Scheme proponents, mortgage brokers Messrs Sam Hraiki and Darryl Tombleson, who operated Skyder Investments Pty Ltd[3] at their offices in Cronulla. At this meeting Mr Dorian introduced Ms Renae Fowler-Hay, a solicitor then employed by Tiernan & Associates Lawyers Pty Ltd[4] adjacent to the offices of Skyder. He explained that Ms Fowler was an expert on bridging finance contracts and that she would be setting up the loan investor contracts, managing the trust and taking care of all of legal aspects of the Bridging Finance Scheme for investors. At this meeting Mr Hraiki and Mr Tombleson outlined the workings of the Scheme on a whiteboard. They explained that there was strong demand for bridging finance in the mortgage market and that the Scheme was "...100% safe for investors". During this meeting Ms Fowler also elaborated on and clarified several legal aspects of the workings of the Scheme.[5]

After having several further telephone discussions with Mr Dorian regarding the Scheme, on 19 September 2005 Ms Polon attended a meeting of the Chat Club at the Seven Hills RSL Club. At this meeting, Mr Tombleson and Ms Fowler delivered a joint presentation to the 80-odd attendees to promote investment in the Scheme. Ms Fowler explained that members would be registered as second mortgagees over properties for which bridging finance would be provided, that their names would be placed on the Title Deeds for these properties and that she would retain the documents and oversee the protections in place for investors. Mr Tombleson explained that Ms Fowler would draw up the investor loan contracts, manage the funds in a trust and provide legal assistance to the Chat Club members. He also stated that the investors' funds would be secured against property with low Loan to Valuation Rations (LVRs) at a maximum of 65%, but generally at around 55%. Mr Dorian also stated that Mr Tombleson would be paying the cost of Ms Fowler's legal services provided to Chat Club members investing in the Scheme. Mr Tombleson and Ms Fowler both explained that the risk of investing in the Scheme would be minimised through securing the investors' funds against properties with substantial equity valued by registered property valuers, and through maintaining each investor's funds in separate trust accounts quarantined from the ordinary workings of Skyder Investments Pty Ltd, and through not pooling investors' funds.[6]

Over the next six months, Ms Polon made three investments in the Scheme totaling $1,190,000 -- investing $80,000 in October 2005, $310,000 in November 2005, and $800,000 in March 2006. While Ms Polon experienced some delays in receiving copies of her investment contracts and caveats over the properties for which bridging finance was provided, she received regular interest payments on her investments until December 2006.[7] Throughout this period Ms Polon remained in regular contact with Ms Fowler and with Ms Dorian. After making her third investment of $800,000, Ms Polon telephoned Ms Fowler to discuss her investments -- but was told that Ms Fowler could no longer talk to her as she was acting for Silkwater Group Pty Ltd, which had taken over the running of the Scheme from Skyder. While somewhat confused by this news (given that Mr Tombleson had explained at the Chat Club meeting that Ms Fowler

would be available to provide legal services to the Scheme investors), Ms Polon was not overly concerned as she had already completed the investment of all the funds she could afford into the Scheme, and still believed that Ms Fowler would continue to manage the affairs of the Scheme and protect the interests of the investors.[8]

However from the middle of 2006, Ms Polon experienced several delays in receiving the interest payments on her investments and raised her concerns with Mr Tombleson and Mr Dorian -- who assured her that her investments were still safe.[9] Despite these concerns, on 8 February 2007 Ms Polon rolled over her loans with Silkwater and extended the term of the loan contracts from 12 months to 24 months -- but did not receive any further interest payments from this new contract.[10] In late March 2007 Ms Polon was telephoned by a representative of Silkwater and advised that all of her money invested in the Scheme was lost, and that no securities in the Scheme remained.[11] Ms Polon then telephoned Ms Fowler to express her concerns about her lost investments -- but Ms Fowler stated that she no longer acted for Silkwater and terminated the telephone conversation, and repeated this when contacted by other Scheme investors.[12]

Ms Polon commenced proceedings in the Supreme Court of New South Wales against Mr Dorian (first defendant -- but who was subsequently declared bankrupt and played no part in the proceedings), and against Ms Fowler (second defendant) and Tiernan & Associates (fourth defendant).[13] Skyder and Silkwater were both in liquidation, and Messrs Hraiki and Tombleson became bankrupt and were therefore not named in Ms Polon's proceedings.[14]

Ms Polon pleaded four inter-related causes of action against Ms Fowler including negligence; breach of fiduciary duty and implied retainer; misleading or deceptive conduct contrary to the Fair Trading Act 1987 (NSW); and the provision of financial services advice without holding a financial services licence, contrary to s 911A and 911B of the Corporations Act 2001 (Cth).[15] In finding for Ms Polon, Hall J considered her evidence, which was corroborated by three other Scheme investors[16] to be more plausible than the evidence advanced on behalf of Ms Fowler.

[2] Negligence

Citing previous authorities holding that an ad hoc duty of care may arise even in cases where a solicitor already acts for another party in a transaction,[17] Ms Polon contended that several aspects of Ms Fowler's conduct gave rise to a duty of care to her. She argued that Ms Fowler's representations at the Chat Club meeting about the legal safeguards in place to protect investors' funds in the Scheme were directed at the members in attendance and were intended to be relied upon; that Ms Fowler was aware that she and the other investors had not obtained independent legal advice;[18] and that through her numerous conversations with Ms Fowler following the Chat Club meeting that it was reasonable to believe Ms Fowler was acting to protect her interests, as well as those of Skyder and subsequently for Silkwater.[19] Ms Polon further argued that Ms Fowler held herself out as a lawyer and that her status as such gave further weight to her statements than the weight which would be attached to the statements of an ordinary businessperson.[20] Ms Polon submitted that Ms Fowler's representations, upon which she relied in deciding to invest her monies in the Scheme, were false and misleading and that she suffered economic loss by reason of her reliance upon them.[21]

In addition to arguing that Ms Fowler breached her tortious duty of care, Ms Polon argued that in accordance with previous authority,[22] Ms Fowler's conduct gave rise to an implied retainer (discussed below under [3]) through which Ms Fowler tacitly agreed to act for her as well as for her actual clients Skyder and Silkwater; and that Ms Fowler had breached this implied retainer through failing to exercise due care and skill.[23]

In defence to Ms Polon's submission, Ms Fowler responded that Ms Fowler's assertion that her statements at the Chat Club meeting about the legal safeguards in place to protect the funds of investors in the Scheme were merely "neutral statements as to the current law", and that any statements she made regarding the Scheme were provided on her instructions from Skyder.[24] She also argued her duties to her client Skyder (and later Silkwater) would not allow her to have a duty a third party such as to Ms Polon.[25] However after weighing up the evidence presented by Ms Polon and the other investors, and by Ms Fowler, Hall J considered Ms Fowler's account of the limited, factual nature of her statements at the Chat Club meeting as "highly implausible".[26] His Honour determined that being aware that the purpose of the Chat Club meeting was to promote investment in the Scheme, Ms Fowler represented to investors that

she would be involved in the ongoing oversight of funds invested in the Scheme and that the investors were persuaded by her statements that the Scheme was a safe investment.[27]

Hall J addressed Ms Polon's argument that Ms Fowler owed her a duty of care by considering whether a reasonable solicitor addressing a public meeting of potential investors about the soundness of potential investments would realise that he or she is being or is likely to be trusted by the recipients of such information and advice.[28] In holding that such a duty of care arose in the case before him, and that Ms Fowler had breached this duty, his Honour noted four key factors regarding the nature of Ms Fowler's representations at the Chat Club meeting:

- she was represented to the investors as a solicitor familiar with the Scheme;
- she had not been in a position to verify the existence and operation of the Scheme's supposed safeguards for protecting investors' funds and had not prefaced her statements with any qualifications or disclaimers;
- the investors, as recipients of her information and advice, were in an unequal position through being unaware that her representations were based solely on the assertions of Messrs Tombleson and Hraiki; and
- her awareness that Ms Polon would be investing substantial amounts in the Scheme based on her representations.[29]

Hall J also rejected Ms Fowler's argument that through her statements at the Chat Club meeting she was merely acting as a conduit passing information from Skyder to the prospective investors in the Scheme, declaring that: "Statements made by a solicitor to members of the public at a public meeting as part of in an investment promotion without an appropriate disclaimer may supplement, reinforce, endorse or adopt statements made by the promoters of the financial product. That is what I find and conclude occurred in the meeting held on 19 September 2005".[30]

Following previous authority,[31] Hall J held that Ms Fowler's duty of care to Ms Polon continued for the whole period throughout which she relied upon her representations about the legal safeguards for protecting investors' funds in the Scheme.[32] Having concluded that Ms Polon relied and acted upon Ms Fowler's representations about the legal safeguards in place to protect investors' funds when investing in the Scheme,[33] Hall J concluded that Ms Fowler had breached her duty of care to Ms Polon through failing to satisfy herself about the truth and accuracy of the assertions by Messrs Tombleson and Hraiki about the ongoing viability of the Scheme.[34]

[3] Breach of implied retainer and breach of fiduciary duty

Ms Polon secondly argued that through the assumed relationship of solicitor and client, Ms Fowler was subject to a fiduciary duty to act in her best interests, and to avoid conflicts with this duty through advancing the interests of Skyder and Silkwater. She submitted that Ms Fowler breached this fiduciary duty by advising her to invest in the Scheme without any proper regard to her interests in order to advance the interests of Skyder and Silkwater.[35] Ms Polon also submitted, and Hall J accepted, that she was an inexperienced investor who placed reliance in Ms Fowler for advice and reassurance.[36] In response, Ms Fowler submitted that she never received any payment made from Ms Polon nor any of the other investors and that she had twice written to Ms Polon recommending she obtain independent legal advice.[37]

Hall J reviewed the law of implied retainers,[38] noting that retainers may be inferred from the conduct of parties and may even arise in situations where a solicitor already acts for another party in a transaction.[39] His Honour concluded that Ms Fowler's conduct supported the inference of an implied retainer existing between her and Ms Polon through her actions in:

- undertaking the preparation and provision of the contract(s) which would contain the relevant provisions, including those in the interests of the individual investors;
- being available to deal with Ms Polon's telephone inquiries regarding the Scheme;
- undertaking administrative tasks including corresponding with Ms Polon and monitoring the funds invested in the Scheme; and

- preparing mortgages and caveats arising in respect of bridging finance loans.[40]

Having concluded the existence of an implied retainer between Ms Polon and Ms Fowler, his Honour concluded that Ms Fowler was at all material times subject to a fiduciary duty to protect and advance Ms Polon's interests,[41] and that she failed to fulfil to fulfil this duty through not informing and warning Ms Polon about the actual lack of safeguards to protect the funds of investors in the Scheme.[42]

[4] Misleading or deceptive conduct under Fair Trading Act 1987 (NSW)

Ms Polon thirdly argued that Ms Fowler's conduct and representations about the legal safeguards in place to protect investors' funds in the Scheme (including her awareness that the investor contracts did not contain provisions for the monies invested to be held in trust and that caveats to protect the investors' interests had not been lodged as she had represented) constituted misleading or deceptive conduct in contravention of s 42(1) of the Fair Trading Act 1987 (NSW). Ms Polon submitted that these misleading representations had induced her to invest in the Scheme.[43]

Hall J dismissed Ms Fowler's argument that she was merely acting as a conduit for passing information supplied by Messrs Tombleson and Hraiki to investors.[44] His Honour stated that where her statements did not identify the source of her information (and were therefore unqualified and made without disclaimer), Ms Fowler was obliged to obtain independent and objective verification about the existence and operation of the Scheme's alleged safeguards, which she failed to do before making her representations[45] -- and indeed under cross-examination conceded she had never seen a unit trust deed nor sighted any trust ledgers or bank accounts for the Scheme.[46] Hall J therefore held that Ms Fowler's representations concerning the safety of investing in the Scheme were matters about which she had no direct knowledge, and held that the principles of causation applied equally to a Ms Polon's claim under section 42(1) of the Fair Trading Act 1987 (NSW).[47]

[5] Contravention of s 911A and s 911B of the Corporations Act 2001

Ms Polon's fourth pleaded cause of action was that Ms Fowler had provided financial services advice without holding an financial services licence in breach of ss 911A and 911B of the Corporations Act 2001 (Cth). She argued that investors in the Scheme were making a "financial investment" within the meaning of s 763B of the Corporations Act 2001 (Cth) and that Ms Fowler's recommendations and statements of opinion constituted the giving of "financial product advice" within the meaning of s 766B of the Corporations Act 2001 (Cth); and emphasised that neither Ms Fowler, nor any of the Scheme proponents, held a financial services licence.[48] Ms Polon sought damages under s 1324 of the Corporations Act 2001 (Cth) to compensate her for her losses in consequence of these contraventions.[49]

However after taking account of the accepted line of authority[50] that a plaintiff seeking damages under s 1324 of the Corporations Act 2001 (Cth) must seek an injunction to enliven the damages jurisdiction under s 1324(10), Hall J held that since Ms Polon had not actually sought an injunction, her claim for damages under the Corporations Act could not succeed, and therefore considered it unnecessary to consider whether the defendants contravened s 911A or s 911B.[51]

[6] Proportionality and contributory negligence

In determining Ms Fowler's proportionate liability for Ms Polon's losses, Hall J took account of Ms Fowler's failure to warn Ms Polon about the risks associated with investing in the Scheme; her failure to advise her to seek independent legal advice; that her unqualified representations constituted an endorsement of the safety and security of investing in the Scheme (which in fact induced Ms Polon to invest in the Scheme); that the investors as recipients of her representations were in an unequal position regarding knowledge of the Scheme in comparison to the Scheme proponents; her conduct extending beyond the ordinary scope of a retainer for the benefit of Skyder; and the extent of Ms Fowler's departure from the required standard of care of a solicitor.[52]

In her defence, Ms Fowler submitted that Ms Polon declined to take independent legal advice; invested large sums of money based on documentation she didn't understand; and "closed her eyes" to risks about which she should have

inquired.[53] Ms Fowler argued that any damages awarded to Ms Polon should be reduced by 50 per cent on account of Ms Polon's contributory negligence.[54]

In rejecting this argument, Hall J distinguished between an omission or failure by a solicitor to do something on the one hand, and the making false or misleading representations upon which recipients might act as in the case before him.[55] His Honour distinguished the case before him from *Astley v Austrust Ltd*[56] (which had concerned insufficient advice and determining the scope of a retainer), noting that Ms Fowler has made express and unqualified statements which had influenced Ms Polon and other investors to invest in the Scheme.[57] Accordingly, Hall J concluded there was no basis for finding contributory negligence on the part of Ms Polon.

His Honour assessed the combined proportionate liability of Messrs Tombleson and Hraiki as directors of Skyder (and subsequently Silkwater) at 60%, which he further apportioned as to 50% to Mr Tombleson and 10% to Mr Hraiki -- with this percentage of Ms Polon's total loss amounting of $714,000; and the proportionate liability of Mr Dorian at 10% ($119,000). His Honour assessed the proportionate liability of Ms Fowler and Tiernan & Associates at 30%, and therefore entered judgment in favour Ms Polon against Ms Fowler and Tiernan & Associates in the amount of $357,000.[58]

1 [2014] NSWSC 571.

2 [2014] NSWSC 571 [81]-[93].

3 [2014] NSWSC 571 [160]. In November 2005 the operation Scheme was transferred to Silkwater Group Pty Ltd -- which later entered liquidation, and Messrs Sam Hraiki and Mr Darryl Tombleson later became bankrupt and therefore took no part in Ms Polon's proceedings: [2014] NSWSC 571 [2]-[3].

4 Ms Fowler left Tiernan & Associates in December 2007 and set up her own practice in April 2009: [2014] NSWSC 571 [435].

5 [2014] NSWSC 571 [103]-[120].

6 [2014] NSWSC 571 [121]-[135].

7 [2014] NSWSC 571 [135]-[187], [193]-[194].

8 [2014] NSWSC 571 [189]-[191].

9 [2014] NSWSC 571 [194]-[198].

10 [2014] NSWSC 571 [199]-[201].

11 [2014] NSWSC 571 [202].

12 [2014] NSWSC 571 [203]-[204], [259].

13 Ms Polon's proceedings were originally brought against Mr Tiernan as the named third defendant. However, when it was established that the practice was an incorporated practice, they were discontinued against him: Ibid, [6].

14 [2014] NSWSC 571 [2].

15 [2014] NSWSC 571 [57].

16 [2014] NSWSC 571 [228].

17 *Watkins t/as Watkins Tapsell v De Varda* [2003] NSWCA 242 at [140] and *Pritchard v DJZ Constructions Pty Ltd* (2012) 16 BPR 31,141; [2012] NSWCA 196 at [67] to [70]. Cited in Polon, [437].

18 Although Ms Polon signed a disclaimer form as she entered the Chat Club meeting, the reference on the form about obtaining

independent legal advice was in small print at the bottom of the document, and was provided in circumstances that would not have alerted participants attending the meeting to seek advice: [2014] NSWSC 571 [456] [459].

19 [2014] NSWSC 571 [439]-[440], [448]-[449].

20 [2014] NSWSC 571 [442].

21 [2014] NSWSC 571 [454].

22 Ms Polon pointed out that in *Pegrum v Fatharly* [1996] WAR 92 at 103, Anderson J said: when both parties to a transaction consult the same solicitor and together give him the information needed to prepare the documents in which their respective rights and obligations are to be set out, and the solicitor accepts the responsibility to prepare the documents without any indication that he cannot fully discharge his professional duties to them both, there is a strong bias towards finding the solicitor tacitly agrees to act for both parties and to undertake the usual professional responsibilities to them both: [2014] NSWSC 571 [455].

23 [2014] NSWSC 571 [455].

24 [2014] NSWSC 571 [498].

25 [2014] NSWSC 571 [499].

26 [2014] NSWSC 571 [609], [631].

27 [2014] NSWSC 571 [610]-[622].

28 [2014] NSWSC 571 [642].

29 [2014] NSWSC 571 [643], [651].

30 [2014] NSWSC 571 [650]. See also Ibid, [638].

31 *McCullagh v Lane Fox & Partners Ltd* [1995] EWCA Civ 8 per Hobhouse LJ and *Brownlie v Campbell* (1800) 5 AC 925 at 950 per Blackburn LJ.

32 [2014] NSWSC 571 [671]-[676].

33 [2014] NSWSC 571 [746], [622].

34 [2014] NSWSC 571 [444], [749], [758].

35 [2014] NSWSC 571 [461]-[463].

36 [2014] NSWSC 571 [18], [735], [894]

37 [2014] NSWSC 571 [489], [524].

38 As summarised in Professor GE Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010, Lawbook Co) at [3.50]:[2014] NSWSC 571 [681]-[684].

39 [2014] NSWSC 571 [686].

40 [2014] NSWSC 571 [716]-[721].

41 [2014] NSWSC 571 [722].

42 [2014] NSWSC 571 [732].

43 [2014] NSWSC 571 [466]-[471].

44 [2014] NSWSC 571 [755].

45 [2014] NSWSC 571 [757].

46 [2014] NSWSC 571 [366].

47 [2014] NSWSC 571 [768]-[771].

48 [2014] NSWSC 571 [472]-[478].

49 [2014] NSWSC 571 [77].

50 Hall J noted *Dungowan Manly Pty Ltd v McLaughlin* [2012] NSWCA 180 at [5], where Bathurst CJ noted that the predominant view (see *Permanent Trustee Australia Ltd v Perpetual Trustee Co Ltd* (1994) 15 ACSR 722) has been that damages can only be awarded in proceedings where an injunction is actually sought: [2014] NSWSC 571 [498], [798]-[801].

51 [2014] NSWSC 571 [800]-[801].

52 [2014] NSWSC 571 [863].

53 [2014] NSWSC 571 [554], [867]-[869].

54 [2014] NSWSC 571 [555], [871].

55 [2014] NSWSC 571 [883].

56 (1999) 197 CLR 1.

57 *Polon v Dorian* [2014] NSWSC 571, [898].

58 [2014] NSWSC 571 [904]-[905].

Recent Cases

[304] Should allegedly insolvent company be granted an extension of time by way of adjournment to pursue refinancing opportunities?

Ben Langford, Senior Associate, Ashurst

Deputy Commissioner of Taxation v Pacific Islands Express Pty Ltd, in the matter of Pacific Islands Express Pty Ltd [2014] FCA 211; BC201401510 (Foster J, 10 March 2014)

[CA ss 459A, 459C, 459G, 459R, 465A]

Court not satisfied that insolvent company's refinancing prospects justify an adjournment of winding up application.

Facts

The Commissioner sought an order winding up the defendant company in insolvency as a consequence of it failing to displace the presumption of insolvency created by its inability to comply with or set aside a statutory demand. The defendant company's assets were mostly non-current, illiquid property holdings and it submitted that it had a surplus of assets over liabilities. It had previously sought and obtained a number of adjournments to the Commissioner's application, which it had sought to enable it to pursue a financing proposal that it submitted would make it solvent.