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Case Note: *Jetaway Logistics Pty Ltd & Ors v Deputy Commissioner of Taxation*

Overview

In *Jetaway Logistics Pty Ltd & Ors v Deputy Commissioner of Taxation* [2009] VSCA 319, the Victorian Court of Appeal considered an appeal of a decision that permitted the Commissioner of Taxation (**Commissioner**) to raise an off-setting claim under s553C of the *Corporations Act 2001* (**Act**) as a defence to a claim by a liquidator for recovery of preference payments.

The appeal raised the issue of whether the Commissioner had 'notice of the fact that the company was insolvent' at the time of receiving the relevant credits.

The appeal was successful. The Commissioner was ordered to pay the total of the credits.

Facts

Jetaway carried on a trucking business which incurred liabilities to the Commissioner for GST, PAYG, withholding tax and fringe benefits tax. At the same time, Jetaway was entitled to receive payments under the Diesel and

Alternative Fuels Grant Scheme of the Commonwealth (**Scheme**), which was administered by the Commissioner.

Relevantly, Jetaway had made but failed to meet three unconditional promises of payment and admitted it did not have any funds to pay the tax debt, let alone to meet the debts which would fall due as the company continued to trade. The Commissioner also knew substantial amounts of PAYG deductions from salaries were not being remitted.

Jetaway authorised the Commissioner to withhold the payments due to it under the Scheme and to apply them in the reduction of its liabilities to the Commissioner for PAYG instalments and GST.

Subsequently, Jetaway was wound up at a meeting of creditors.

The liquidator brought proceedings claiming that each of the six credits received by the Commissioner were unfair preferences. The Commissioner claimed he was entitled to set off the Scheme payments against the company's tax liabilities pursuant to s553C of the Act.



The Supreme Court of Victoria at first instance held that the Commissioner was entitled to use the diesel fuel grants to set off its tax liabilities under s 553C of the Act. The court concluded that the Commissioner had not obtained any unfair preference as the Commissioner would have been entitled in a winding up to use the diesel fuel rebates to set off the tax under s 553C of the Act.

Although the court considered that the facts known to the Commissioner may have given him reasonable grounds for suspecting Jetaway was insolvent at the time of the transactions, the court was not satisfied the Commissioner had notice of the fact Jetaway was insolvent as required under s553C of the Act. (See *Jetaway Logistics Pty Ltd (receivers and managers appointed) (in liquidation) & Ors v COMMISSIONER* [2008] VSC 397, Supreme Court of Victoria, Robson J, 7 October 2008.)

The Court of Appeal had to determine whether the Commissioner had notice of Jetaway's insolvency.

The decision

The court held that 'notice' in section 553C(2) should be read as 'actual notice'. A person will have 'notice of the fact' a company is insolvent if the person has actual notice of facts which disclose the company lacks the ability to pay its debts when they fall due. It was considered unnecessary to show the person actually formed the view that the company lacked this ability.

It was not enough to have grounds for suspecting insolvency, nor to conclude insolvency as a possible inference from the known facts.

The court was satisfied that, at the time of the payment of the first credit, a reasonable person in the position of the Commissioner and knowing the facts that he knew, would have concluded Jetaway was

insolvent. The court said the trial judge was in error in reaching a conclusion to the contrary.

The liquidator also appealed on the ground that 'Division 2 – Voidable Transactions' in Part 5.7 B of the Act constituted a code delineating the court's powers with respect to unfair preferences. Accordingly, s553C had no application in relation to preference claims.

Regrettably, the liquidator did not press this particular appeal ground at the hearing. Hence until there is some further authoritative pronouncement, s553C may emerge more frequently in defence to preference claims where there are mutual dealings between an insolvent company and a creditor.

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