

Statutory demands – the ‘no genuine dispute’ statement obligation

26 August 2014

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Introduction

1. Part 5.4 (ss 459A - 459T) of the *Corporations Act 2001* (Cth) (“CA”).establishes a regime for the winding up of a company in insolvency. It includes provisions enabling a creditor to serve a statutory demand on a company where there is an undisputed debt owing, due and payable by the company to the creditor. Unless the debt is a judgment debt, the statutory demand must be accompanied by an affidavit that verifies that the debt is due and payable and that complies with rules of court which require that the affidavit include a ‘no genuine dispute’ statement. Serious consequences may follow for a company which fails to comply with a statutory demand served on it. There will be a presumption of insolvency upon which the creditor may rely in seeking an order for the company to be wound up in insolvency. However, a company served with a statutory demand may apply to the court for an order setting aside the demand on certain grounds. One such ground, provided by s 459J(1)(b) of the CA, is that there is “some other reason” which would warrant the setting aside of the demand, a reason not otherwise indicated by the CA as a ground for setting aside a statutory demand.
2. In the case of *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd*¹ (“**Kisimul Holdings**”), important questions were raised about the ‘no genuine dispute’ statement obligation. In that case, the statement had not been included in the affidavit accompanying the statutory demand and the New South Wales Court of Appeal had to decide whether the absence, of itself, constituted “some other reason” to set aside the statutory demand under s 459J(1)(b) of the CA or whether the absence could be offset or compensated for by particular factual matters, as the trial judge in that case had found.
3. The New South Wales Court of Appeal held, overturning the trial judge’s decision, that the absence of the ‘no genuine dispute’ statement was sufficient “other reason”, for the purposes of s 459J(1)(b), to warrant the setting aside of the demand because the quality of the debt as undisputed was fundamental to the proper working of Pt 5.4 of the CA and the statement provided a significant measure of assurance that the objectives of Pt 5.4 were being observed by the creditor. Therefore, the absence of the statement could not be offset or compensated for by particular factual matters.
4. The decision of the Court of Appeal is consistent with the approach taken by other authorities to the ‘no genuine dispute’ statement obligation.
5. This paper considers the relevant provisions, the decision at first instance in *Kisimul Holdings* and the decision on appeal in *Kisimul Holdings*.

¹ [2014] NSWCA 262

Relevant provisions

6. Under s 459E(1) of the CA, a person may serve a statutory demand on a company in relation to one or more debts that the company owes to the person and that is or are due and payable. If there is one debt only, then the amount of the debt must be at least the "statutory minimum".² If there are 2 or more debts, the amounts of the debts must total at least the statutory minimum. Section 459E(2) sets out the form and contents of the demand. Under s 459E(3), unless the debt, or each of the debts owed, is a judgment debt, the demand must be accompanied by an affidavit that:

*"(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
(b) complies with the rules."*

7. The "rules" with which the accompanying affidavit must comply are rules of the Federal Court or rules of the Supreme Court of a State or internal Territory, as the case requires.³ In the case of the Supreme Court of New South Wales, the "rules" are the *Supreme Court (Corporations) Rules 1999 (NSW)* ("**Rules**").
8. Under the Rules, the affidavit accompanying a statutory demand, for the purposes of s 459E(3) of the CA, must, amongst other things, be in accordance with Form 7 in Schedule 1 to the Rules and state the matters mentioned in Form 7, and be made by the creditor or by a person with the authority of the creditor or creditors.⁴ Form 7 in Schedule 1 of the Rules sets out a form of affidavit which contains 5 paragraphs, the last of which is as follows:

*"5 I believe that there is no genuine dispute about the existence or amount of the *debt/*any of the debts."*

9. Section 459F specifies the period within which a company must comply with a statutory demand and provides that, if, as at the end of the period for compliance, the demand is still in effect and the company has not complied with it, the company is taken to have failed to comply with the demand at the end of that period.
10. Where a company fails to comply with a statutory demand, a presumption of insolvency arises upon which a creditor may rely in seeking an order under s 459P of the CA for the company to be wound up in insolvency.⁵
11. A company upon which a statutory demand is served may apply to the Court for an order setting aside the demand under s 459G. On such an application, the company will need to show one or more of the grounds made available in ss 459H and 459J of the CA. Those grounds are:

² Defined in s 9 CA

³ See the definition of "rules" in s 9 CA

⁴ See rr 5.2 and 1.6 of the Rules

⁵ See s 459C(1)(a) and (2)(a) CA

- there is a “genuine dispute” about the existence or amount of the debt (s 459H(1)(a));
- the company has an “offsetting claim” (s 459H(1)(b));
- there is a “defect”⁶ in the demand which will cause “substantial injustice” unless the demand is set aside (s 459J(1)(a)); and/or
- there is “some other reason why the demand should be set aside” (s 459J(1)(b)).

Kisimul Holdings

Background and decision at first instance

12. Clear Position Pty Ltd (“**Creditor**”) served two statutory demands on Kisimul Holdings Pty Ltd (“**Company**”). Each statutory demand was accompanied by an affidavit of a director of the Creditor. Neither affidavit contained a ‘no genuine dispute’ statement in terms of para 5 of Form 7 of the Rules or anything intimating a belief of the director that there was no genuine dispute about the existence or amount of the relevant debt.
13. The Company commenced separate proceedings in respect of each demand for orders setting aside the demand under s 459G of the CA. In each case, the Company alleged that there was a genuine dispute about the existence or amount of the debt or that the Company had an offsetting claim under s 459H. Alternatively, the Company claimed that there was a defect in the demand under s 459J(1)(a) or there was “some other reason” within s 459J(1)(b) which warranted an order setting aside the demand. The “some other reason” relied upon was the absence from the s 459E(3) affidavits of the ‘no genuine dispute’ statement.
14. Both proceedings were heard together by Stevenson J at first instance. His Honour concluded that none of the grounds relied upon for setting aside the statutory demands was made out.
15. On the issue of whether the absence of the ‘no genuine dispute’ statement constituted “some other reason” why the demand should be set aside, his Honour referred to *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd*⁷ where it had been stated that s 459J(1)(b) applied “whenever there is a need to counter some attempted subversion of the statutory scheme”.⁸
16. His Honour also referred to many authorities which had held that the absence of the statement was a basis upon which a demand should be set aside under s 459J(1)(b).⁹ His Honour did not refer to any case in which the absence of the statement did *not* result in the demand being set aside under s 459J(1)(b).

⁶ Defined in s 9 CA

⁷ [2007] NSWSC 1143; 214 FLR 393; 25 ACLC 1392 at [33] per Barrett J

⁸ *In the matter of Kisimul Holdings Pty Ltd* [2014] NSWSC 338 at [99]

⁹ Above, n 8, at [100]-[103]

17. His Honour nevertheless found that, in the particular circumstances of the case, the absence of the 'no genuine dispute' statement in the s 459E(3) affidavits did not provide "some other reason" to set aside either of the demands. His Honour essentially gave the following two reasons for this finding:

- the Company's claim that there was a genuine dispute and offsetting claim was made in an "unsatisfactory and unpersuasive" way:
 - there was no basis upon which the Company could properly assert that there was a genuine dispute; and
 - the offsetting claim had been abandoned in the course of final submissions after misleading (if not false) evidence had been given; and
- the absence of the 'no genuine dispute' statement could not possibly have made any difference to the Company's response to the demands and had not caused "any confusion, let alone injustice" to the Company.¹⁰

18. Accordingly, his Honour concluded that, in the particular circumstances of the case, the absence of the 'no genuine dispute' statement had not caused any subversion of the statutory scheme, or provided any "other reason" why the demands should be set aside.¹¹

Appeal to the Court of Appeal

19. The Company sought leave to appeal to the Court of Appeal. The Court of Appeal (Beazley P; Barrett and Gleeson JJA) heard concurrent argument on the applications for leave to appeal and the appeals themselves. The Court of Appeal granted leave to appeal and allowed the appeal and set aside the statutory demands. The leading judgment was given by Barrett JA, with whose reasons Beazley P and Gleeson JA agreed.

Court of Appeal's reasoning

20. The principal issue before the Court of Appeal was whether the absence of the 'no genuine dispute' statement from the s 459E(3) affidavits, of itself, constituted "some other reason" why the demands should be set aside under s 459J(1)(b).¹²

21. Barrett JA noted¹³ that some appellate courts had said that s 459J(1)(b) conferred on the court a discretion of broad compass which extended to conduct that was 'unconscionable' or an 'abuse of process', or was conduct which gave rise to

¹⁰ Above, n 8, at [104]-[108], [79]-[86]

¹¹ Above, n 8, at [109]

¹² Above, n 1, at [1], [7]

¹³ Above, n 1, at [18]-[20]

'substantial injustice'¹⁴ but that the Queensland Court of Appeal had observed, in *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation*,¹⁵ that it might be preferable to avoid such terms and focus on whether the setting aside of the statutory demand was consistent with the objectives of Pt 5.4 of the CA. His Honour also noted¹⁶ that the New South Wales Court of Appeal in *Meehan v Glazier Holdings Pty Ltd*¹⁷ had emphasized that s 459J(1)(b) should be applied where it was necessary to preserve the 'undistorted operation' of Pt 5.4 and promote its objectives.

22. Having regard to these and other authorities, Barrett JA then made the following general points about s 459J(1)(b):

- The "substantial injustice" criterion to which express reference is made in s 459J(1)(a) is not, by some process of osmosis, imported into s 459J(1)(b).
- The provision is not confined to cases coming within established categories but applies whenever there is a need to counter some attempted subversion of the intended operation of Pt 5.4.
- The provision is thus a remedial provision under which the court may deal with cases not within s 459H or s 459J(1)(a) in a way that is just, having regard to the purpose of the legislation.
- It is unwise to attempt to mark out the limits of the s 459J(1)(b) power.¹⁸

23. His Honour then said¹⁹ that two decisions of the Full Court of the Supreme Court of Western Australia,²⁰ had regarded the absence of the 'no genuine dispute' statement as a significant omission and that these cases, as well as several first instance decisions referred to by Stevenson J,²¹ had recognised that the statement was concerned not only to ensure that the company was informed about the creditor's belief as to the relevant matter but also to ensure that the creditor gave proper consideration to the requirement that only an undisputed debt was to be made the subject of a statutory demand.

¹⁴ See *Hoare Bros Pty Ltd v Deputy Commissioner of Taxation* (1996) 62 FCR 302 at 317-318; *KW & KM Quinn Investments Pty Ltd v DCT* [2004] QCA 91; *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* [2005] ACTCA 3; 157 ACTR 22 at [27]

¹⁵ [2007] QCA 312; 25 ACLC 1341 at [84] (appeal allowed: *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; 237 CLR 473 at [61] but Barrett JA considered that the High Court had not disapproved of this aspect of the Court of Appeal's reasoning)

¹⁶ Above, n 1, at [21]-[22]

¹⁷ [2005] NSWCA 24; 53 ACSR 229 at [35] per Santow JA, [58]-[61] per Young CJ in Eq

¹⁸ Above, n 1, at [23]-[25]

¹⁹ Above, n 1, at [26]-[30]

²⁰ See *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd* [2001] WASCA 299; 20 ACLC 352 at [32]-[35]; *Wildtown Holdings Pty Ltd v Rural Traders Company Ltd* [2002] WASCA 196; 172 FLR 35 at [27]-[28], [68]-[71]

²¹ See, for example, *Technitrade Pty Ltd v Compucon Computers (SA) Pty Ltd* [2002] SASC 309 at [14]-[17]; *IFA Homeware Imports Pty Ltd v Shanghai Jerrys Candle Company Ltd* [2003] FCA 533 at [22]-[26]; *Saferack v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143 at [42]

24. His Honour noted²² that researches conducted on the Company's behalf had not revealed any case (prior to Stevenson J's decision) in which the absence of the statement had not been seen as a sufficient basis for setting aside the statutory demand and that, in *Ceduna Marina Development Co Pty Ltd v Bria*,²³ the Supreme Court of South Australia had observed that the absence could be a sufficient reason to set aside a demand even if the company relied on that absence alone and did not file material disputing the debt.
25. His Honour then said that the quality of the debt as undisputed was fundamental to the proper working of Pt 5.4 of the CA because a presumption of insolvency was only to arise if there was non-compliance with a demand for payment of an undisputed debt that was owing, due and payable. Otherwise, it could not be safely presumed that the reason for the non-payment was because of an inability to pay.²⁴
26. His Honour went on to say:

"A creditor seeking the benefit of a statutory presumption of insolvency through service of a statutory demand has a responsibility to ensure that, so far as it is aware, the debt relied on is owing, due, payable and undisputed - or, more accurately, a responsibility not to rely on the debt unless it genuinely believes it to be of that kind. And the company served with the demand has a right, secured to it by s 459E(3)(b) and the provision of the rules requiring adherence to Form 7, to be assured that the demanding creditor recognises that responsibility and has conscientiously formed a belief that the responsibility has been discharged.

...The statement by the deponent of the s 459E(3) affidavit of belief of absence of genuine dispute therefore provides a significant measure of assurance that the objectives of Part 5.4 are being observed by the creditor. Absence of the statement means that that measure of assurance is lacking and puts the recipient company into a position of uncertainty from which the legislation intends that it should be protected."²⁵

27. His Honour, accordingly, concluded that Stevenson J had erred when he regarded the absence of the statement as being able to be offset or compensated for by particular factual matters because those factual matters had nothing to do with preserving the operation of Pt 5.4.²⁶

Conclusion

28. The decision of the New South Wales Court of Appeal makes it clear, consistent with the approach taken by other authorities, that creditors who wish to have the benefit of the presumption of insolvency must comply with the obligation to include the 'no

²² Above, n 1, at [31]

²³ [2012] SASC 115; 281 LSJS 274 (at [15])

²⁴ Above, n 1, at [32]

²⁵ Above, n 1, at [33]-[34]

²⁶ Above, n 1, at [35]

genuine dispute' statement in the s 459E(3) affidavit. A creditor who fails to do this takes the risk that the debtor company may have the statutory demand set aside under s 459J(1)(b) by reason of this failure alone, the failure being inconsistent with the objectives of the statutory regime established by Pt 5.4 of the CA that the statutory demand procedure should only be used where there is no genuine dispute about the debt.

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26 August 2014

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