
Statutory Demands – What Went Wrong

Dale Cliff*

Introduction

... The new regime which Act No. 210 of 1992 has brought into being will, I think, give rise to a fair number of questions of interpretation in future cases.¹

On 23 June 1993, the *Corporations Law* 1990 ('the Law') was substantially amended in respect of insolvency issues. In particular, three substantive changes were made:

1. the concepts of administration and the deed of company arrangement were introduced;
2. the property recoverable by a liquidator, including the concept of voidable preferences, was materially altered; and
3. the procedures for issuing and contesting statutory demands ('the statutory demand provisions') were materially altered.

These changes generally reflected the recommendations of the Harmer Report,² although they have failed to achieve the desired results in some respects.

The statutory demand provisions were intended to simplify previous procedures by concentrating on resolving disputes as to debts prior to an application to wind up. The primary reason was so as to avoid contracted winding-up application which did nothing to resolve the underlying dispute. They were also intended to deflect attention from technical defects in a statutory demand to a consideration of the substantive dispute.

* LLB (Hons), BBus (Accty) LLM – Partner, McCullough Robertson, Solicitors, Brisbane. McCullough Robertson sponsor a Professorial Chair in Corporate Law at QUT.

1 *Topfelt Pty Ltd v State Bank of New South Wales Ltd* (1993) 12 ACSR 381 at 394 Lockhart J.

2 Australian Law Reform Commission *General Insolvency Inquiry* AGPS Canberra 1988 ('Harmer Report').

By virtue of a combination of imprecise legislative drafting and strict interpretation by the courts, the statutory demand provisions have created an environment for extensive and protracted litigation in relation to procedural issues.

This paper will focus on the changes to the statutory demand procedure, notably ss459G and 459J of the Act. It will discuss the changes, the interpretation of the changes in the courts and why, in practice, they have failed to achieve the reforms contemplated in the Harmer Report.

Statutory Demands Prior To 23 June 1993

The statutory demand procedure under s364(2)(a) of the Companies Code and later s460 of the Law was often criticised for its technical pedantry.

The courts were extremely critical of statutory demands issued inappropriately. In *L&D Audio Acoustics Pty Ltd v Pioneer Electronics Australia Pty Ltd*³ the court said the following applications would constitute an abuse of process:

- (1) applications brought when the winding up proceedings are bound to fail. For example, if it was clear that the applicant was unable to prove that he was a creditor within the meaning of s363(1)(d) of the legislation, or was unable to prove that the company was unable to pay its debts within the meaning of the legislation;
- (2) applications made for some improper purpose. For example, if the applicant was seeking to use the winding up proceedings to coerce a company into paying an alleged debt without affording the company a reasonable opportunity to ascertain whether or not the debt was properly payable; or
- (3) applications that give rise to issues in the winding up proceedings, of a kind inappropriate for determination in those proceedings. For example, a substantial contest as to the existence or enforceability of a debt relied on by the applicant, which should properly have been resolved in separate proceedings.

Procedural problems arose under the old statutory demand regime when demands:

- (1) were not signed by the **creditor**. (Disputes arose as to whether a particular individual signing for and on behalf of, or with the authority of the creditor complied with that requirement);
- (2) failed to accurately specify the name of the debtor;
- (3) failed to specify the exact amount due. (This was often the point of debate and statutory demands were regularly invalidated as a result).

Explanatory Memorandum

The Explanatory Memorandum to the 1992 Act provided:

3 (1982) 1 ACLC 536.

The ('Harmer Report') also noted that the existing legislative scheme for the winding up of a company in insolvency is well understood and works satisfactorily, but that some areas would benefit from reform or clarification including:

- ...
- excessive technicality in the use of statutory demands;
 - the requirements for a statutory demand;
 - grounds and procedure for setting aside a demand;
 - time limits relating to statutory demands and the setting aside of statutory demands.

Matters arising after service of a statutory demand:

- defects or irregularities in proceedings;

- ...

Proposed part 5.4 deals with ... the effect of non-compliance with the statutory demand, how a statutory demand can be set aside, the effect of minor defects or irregularities in a statement of demand ... The principal reforms, based on recommendations of the Harmer Report, relate to the effect of a statutory demand and the way in which it may be set aside.

Provisions in this part allow disputes in relation to the existence or amount of the debt to be dealt with quickly and in a way that will not impede the resolution of an application for the winding up of a company in insolvency.

Importantly, Harmer also recommended that s.460 of the Law, which **deems** a company to be insolvent in certain circumstances, be repealed and replaced by a provision stipulating the circumstances in which it may be **presumed** that a company may be unable to pay its debts. It was considered that a presumption of insolvency, rather than a deemed insolvency, would more closely reflect the appropriate policy, and overcome the inflexibility imposed by the present law.

The Explanatory Memorandum identified the rationale for the proposed amendments. Harmer suggested in his report that, given almost every application by a creditor relies upon a statutory demand, the then current procedure was inappropriate because a dispute could not be raised until the application to wind up was made. Harmer noted that the requirement to bring injunctive proceedings to prevent the winding up of a company would be unnecessary if the procedure was amended. Harmer therefore recommended that a specific procedure be established whereby debts could be disputed prior to the application to wind up.

Harmer considered that the court should have the power to set aside a demand if:

- (1) there is a substantial dispute as to whether the debt is owing.
- (2) the company appears to have a counter-claim which may exceed the amount of the debt; or
- (3) the demand ought to be set aside on other grounds.

It was thought that the general power could be applied to situations where improper or invalid service had occurred or where there were mistakes in the Notice of Demand and the parties served would be significantly prejudiced by the error.

Curiously, the Explanatory Memorandum provides that the new regime was intended to be a complete code for the resolution of disputes involving statutory demands. That point is adopted by the High Court decision in *David Grant & Co Pty Ltd v Westpac Banking Corporation*.⁴ Having said that, the Explanatory Memorandum provided that the courts should resolve the issues not on mere technicalities but on the basis of commercial justice.

Specifically, the Explanatory Memorandum stated:

This division, together with proposed division 4, also provides a means of dealing with statutory demand disputes in such a way that an alleged defect in the statutory demand does not have the effect of prolonging proceedings leading to the commencement of a winding up, by requiring debtor companies to raise genuine disputes (about, for example, whether a debt is owed) at an early stage, rather than after winding up procedures have commenced.

Accordingly, the purpose of s459J was designed to ensure that the court did not set aside a statutory demand merely because of a defect. The subsection was intended to prevent technical points being taken in order to avoid compliance with a statutory demand.

The Changes

Section 459E is the cornerstone of the changes to the statutory demand procedure. It establishes the mechanism for the preparation and the form of the statutory demand whilst s459G, on the other hand, creates the mechanism by which a company served with a statutory demand can dispute it.

In summary, the major changes to the old statutory demand regime can be classified under the following headings:

- (1) the demand;
- (2) setting aside the demand;
- (3) the effect of the failure to comply with the demand.

The Demand

The procedure with respect to preparation and service of statutory demands has been substantially amended to attempt to achieve a uniform code for the preparation of a statutory demand. First, the legislation now specifies the form (Form 509H) which the demand must take. Second, if the debt is not a judgment debt, the legislation now requires that an affidavit which verifies that the debt is due and payable by the company be served with the statutory demand. Depending on the State or Territory, the affidavit in support of the statutory demand must generally

⁴ (1995) 184 CLR 265.

be sworn by a person having knowledge of the facts.⁵

Although the *Federal Court Rules* and the NSW Supreme Court Rules do provide that affidavits prepared in accordance with any other State or Territory will be sufficient, there is no reciprocity in the other States and Territories of Australia.⁶ That is something to be wary of.

Notwithstanding that each State and Territory has enacted the Corporations Law as uniform law, each State has its own rules to govern the Law. The Federal Court also has a separate set of rules governing matters arising from the Law. If consistency has been sought, it has certainly not been achieved. For instance, decisions in New South Wales (eg *B & M Quality Constructions Pty Ltd v Buyrite*

5 Rule 52 of the *Corporations Rules* 1993 (Qld)

In WA important requirements are set out for inclusion in the affidavit. The affidavit in WA must be sworn by a person who can depose to the indebtedness of the company from his own knowledge. (Rule 67 of Order 81G of the *Supreme Court Rules of WA*)

In South Australia s10A of the *Corporations Rules* 1993 (SA) provides:

An Affidavit pursuant to s459E(3) of the law shall:

- (a) be made by:
 - (i) the plaintiff;
 - (ii) where there is more than one plaintiff by one of them;
 - (iii) where the plaintiff is a corporation, by a member or officer of the corporation having knowledge of the facts so far as they known to the corporation;
 - (iv) where the person serving the demand is the crown, by an officer of the crown having knowledge of the facts so far as they are known by the crown.
- (b) set out the facts entitling the deponent under paragraph (a) to make the affidavit;
- (c) state the source of the deponent's knowledge of the matters stated in the affidavit concerning the debt or debts;
- (d) state that the deponent believes those matters to be true; and
- (e) state that the deponent believes there is no genuine dispute about the existence or amount of the debt or debts to which the demand relates.

Rule 49A(3) of the *Rules of the Supreme Court of Tasmania* 1965 provides that the affidavit must be made by a person who can depose to the indebtedness of the company from his own knowledge. The affidavit must be in Form 23B.

Order 71 Rule 36A of the *Federal Court Rules* is in substantially the same terms as the Tasmanian rules.

Part 80A Rule 1B of the *Rules of the Supreme Court of New South Wales*.

Order 7A. 01 of the *Rules of the Supreme Court of Victoria* sets out those persons who may swear the affidavit but does not require them to have knowledge of the facts or any other requirement as to knowledge.

6 It should be noted that the form of affidavit sworn for the purpose of the *Federal Court Rules* was altered for any statutory demand served after 31 March 1996. Order 71 Rule 36AB(1) of the *Federal Court Rules* provides:

1. An affidavit referred to in s459E(3) of the *Corporations Law* must:
 - (a) subject to sub rule (2), be made by the creditor or, that there is more than one creditor, by one of them; and
 - (b) set out the facts entitling the deponent to make the affidavit; and
 - (c) state the source of the deponent's knowledge of the matter stated in the affidavit concerning the debt or debts; and
 - (d) state the deponent believes those matters to be true; and

Steel Supplies Pty Ltd)⁷ have little relevance in Queensland.

The inconsistency might well lead to greater confusion and possibly forum shopping, particularly between the State Courts and the Federal Court.

Setting Aside Demands

The most significant change is the procedure for setting aside statutory demands. Section 459G allows a company to apply to set aside a statutory demand provided that the application and affidavit in support of the application are filed and served within 21 days of service of the demand.

On such an application, the court might vary the demand and overcome deficiencies which, under previous law, were fatal.

However, a Court can only set aside a demand on the basis of a technical defect, if that defect causes substantial injustice, or if there is some other reason why the demand should be set aside. This provision has also been the subject of extensive debate which will be considered subsequently.

The new Act also provides that if a company fails to comply with a demand within the 21 day period, or fails to successfully apply to set the demand aside, the company will be presumed to be insolvent. In view of that, a company should act positively when served. The ramifications are dealt with below. There is another reason why it should do so. A company can no longer rely upon a ground to contest the winding up application which was available prior to that 21 day period expiring.

The Consequence of a Statutory Demand

If the company fails to comply with the statutory demand it may be wound up based on the presumption of insolvency. However, the presumed insolvency only operates for a period of six months from the date the application is filed, unless the court orders otherwise.

The Problems

The changes, which became effective on 23 June 1993, have created numerous

-
- (e) state that the deponent believes there are now genuine dispute about the existence or amount of the debt or debts to which demand relates.

Order 71 Rule 36(AB) (2) of the *Federal Court Rules* provides:

2. In the case of a creditor that is:

- (a) a corporation - an affidavit by a member or officer of the corporation having knowledge of the facts so far as they are known to the corporation is taken to be an affidavit by the creditor; and
- (b) the crown - an affidavit by the an officer of the crown having knowledge of the facts so far as they are known to the crown is taken to be an affidavit by the creditor; and
- (c) the company to which a liquidator or provisional liquidator has been appointed - an affidavit by the liquidator or provisional liquidator is taken to be an affidavit by the creditor.

⁷ (1995) 13 ACLC 88.

problems. The cases reveal that the same words have been subject to a variety of interpretations in the different jurisdictions of Australia. This paper will focus on two of the major debates:

- (1) Section 459G – *David Grant & Co Pty Ltd v Westpac Banking Corporation*;⁸ and
- (2) Section 459J

David Grant

It is useful to set out the full text of s459G:

- (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
- (2) An application **may only** be made within 21 days after the demand is so served.
- (3) An application is made in accordance with this section if and only if, within those 21 days:
 - (a) an affidavit supporting the application is filed with the Court; and
 - (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

For years, the State courts grappled with the proper interpretation of the words ‘may only’. Some courts held that although the scheme was mandatory, the words ‘*may only*’, were capable of relaxation by the use of s1322 of the Law.

Unfortunately, the differing approaches arose notwithstanding the facts of the cases in the different State courts were substantially the same.

High Court (David Grant)

After three years of uncertainty, a purported resolution of this issue came via the High Court decision in *David Grant*.

In *David Grant*, the appellants were three companies. The respondent served statutory demands on the appellants. The appellants filed and served applications under s459G of the *Corporations Law* to set aside those demands. The applications were filed and served outside the twenty-one day period specified in s459G.

Both at first instance and in the Court of Appeal, the courts held that s1322 of the Law and s467A of the Law could not be used to extend the period set out in s459G.

The High Court’s judgment was delivered by Gummow J and was adopted by the remainder of the court.

His Honour commenced with a review of the provisions of Part 5.4 of the Law. The first issue considered by his Honour was the interrelationship between s459G and s1322. The conclusion reached by his Honour was:

8 (1995) 184 CLR 265.

The force of the term 'may only' is to define the jurisdiction of the Court by imposing a requirement as to time as an essential condition of the new right conferred by s459G. An integer or element of the right created by s459G is exercised by application made within the time specified ... This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word 'only' in s459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter and that if you treat s.1322 as authorising the Court to extend the period of 21 days specified in s459G would deprive the word 'only' of effect.⁹

Relevant considerations in his Honour's decision were:

- (1) the amendments to Part 5.4 specifically include the power to extend periods though not the period set out in s459G;
- (2) the period specified in s459G is an integral part of the operation of Part 5.4. In particular, his Honour referred to s459F which sets out the consequence of the failure to comply or successfully set aside the statutory demand. One of those circumstances is if the company failed to file and serve its application within the period specified. In particular any extension granted under s1322 in his Honour's view 'could not modify what otherwise would be the operation of the definition of the 'period of compliance' with the statutory demand set out in s459F(2)';
- (3) in his Honour's view, the same principles applied to the operation of ss70 and 467A of the Law.

Post David Grant

Two notable decisions have discussed the implications of the High Court's decision in *David Grant*. The first is the decision of Cohen J in *Vicbar Pty Ltd & Anor v Development Constructions (New Castle) Pty Ltd*.¹⁰

In that case, the company failed to serve the application and affidavit within the 21 day period specified by s459G.

The Court followed *Re J & E Holdings Pty Ltd*,¹¹ a pre-David Grant decision which interpreted s459G in identical terms to the High Court in *David Grant*.

In reaching his conclusion, Cohen J commented:

I regret that the terms of s459G are so restrictive as to prevent a proper examination of the merits upon which the Plaintiffs claims are based. Although Part 5.4 of the Corporations Law is intended to provide a system for the making of demands and the disputing of those demands, the effect of the Court not having any power to extend time or to alleviate technical defects in the filing or service of documents means that in cases

9 *Ibid* at 277.

10 (1995) 13 ACLC 1220.

11 (1995) 36 NSWLR 541.

where there may be a genuine dispute an injustice may well be done ...

The precise effect of *David Grant*, beyond its own facts, is still not clear. An example is where the application and affidavit are filed within the 21 days, but not served. Such a situation arose in *Centurian Constructions Pty Ltd v Beca Developments Pty Ltd*.¹²

In that case, McLelland CJ applied *David Grant*. His Honour held that there was no valid application before the Court as s459G had not been complied with. He held that the application and supporting affidavit must be not only filed, but served within the 21 day period.

Chief Justice McLelland stated:

There is room for argument that this passage does not address the position where a summons is filed within the twenty-one day period but served outside the period, but I consider that a consequence of the construction of ss459C, 459F and 459G earlier advanced by His Honour is that there can be no effective application under s459G unless the requirements of ss. (2) and (3), both in relation to filing and service, are complied with.¹³

The Effect of David Grant

It is arguable that the High Court decision returns statutory demand procedures to the days of technical battles which the Harmer Report sought to avoid.

It is apparent given the decision of *Centurian Constructions Pty Ltd v Beca Developments Pty Ltd*¹⁴ and to a lesser extent *Vicbar Pty v Development Constructions*¹⁵ that *David Grant* has ruled out any argument that the court has power to extend the period for the filing and service of an application and affidavit to set aside a statutory demand. It has also been the uniform view of State courts, that s467A cannot be used to extend the time. Thus it seems that the period specified in s459G is mandatory.

However, one wonders whether that really is the end of the matter.

Minor errors on behalf of either the company or its solicitors may lead to the result that a company with a genuine dispute as to the existence or the amount of the debt may be prevented from raising those issues in its defence. This was the issue raised by Cowen J in *Vicbar v Development Constructions*.¹⁶

Robert Baxt¹⁷ is of the view that “a more commercial interpretation of legislation which will result in what many will regard as a sensible commercial conclusion is to be preferred”. In the writer’s view, the interpretation now given to s459G may well

12 (1996) 129 FLR 364.

13 *Ibid* at 366.

14 *Ibid*.

15 (1995) 13 ACLC 1220.

16 *Ibid*.

17 R Baxt ‘National Corporate Law: two steps forward, one step back’ (1995) 23(2) ABLR 148 at 149.

be uncommercial particularly if an application is brought one day late. That interpretation is also contrary to the stated objective which was described as follows:

The report took the view that the legislation should specifically provide for the determination of disputed debt issues and other disputes in respect of a statutory demand.

The Explanatory Memorandum went on to state:

The provisions in relation to the setting aside of statutory demands are intended to be a complete code for the resolution of disputes involving statutory demands, and to do so on the basis on (*sic*) the commercial justice of the matter, rather than on the basis of technical deficiencies.”

If it was the intention of the legislature that companies be given the opportunity to dispute debts, why should such a rigid interpretation be imposed which denies a company the right to raise a genuine dispute because of a technical defect?

Despite its harsh consequences the view in *David Grant* seems to have been accepted¹⁸ as the correct interpretation of the legislation.

There are, however, a number of checks and balances which significantly diminish that concern.

Firstly, the courts consider it policy¹⁹ that solvent companies should not be wound up upon the application of a creditor. Therefore even if a company inadvertently fails to apply to set aside the demand it is still able to defeat an application to wind up based on that demand if it is able to show the court that it is solvent. This is specifically dealt with in s459S. However, so as to defeat the application, the court might impose conditions obliging the company to pay the debt.

If a creditor is unsuccessful in applying to wind up a company based on the company's failure to comply with the statutory demand or its failure to apply to set aside the statutory demand, on the grounds of solvency, the creditor will be returned to the same position it was in before it served the statutory demand. Consequently, both the creditor and the company will have wasted significant time and money. If the court took the approach of looking to 'the commercial justice of the matter', the position might be otherwise. This issue was addressed in *Liverpool Cement Renderers (Aust) Pty Ltd v Landmarks Constructions (NSW) Pty Ltd*.²⁰

In that case Tamberlin J found there was a genuine dispute as to whether the debt was due. Nevertheless, His Honour dismissed the company's application as it had not been filed and served within the twenty one days. The company sought to argue that in any event it was solvent. His Honour followed *Chippendale Printing*

18 PD Lane 'Setting Aside A Statutory Demand' (1994) QLSJ; *David Grant*; *Texel Pty Ltd v Commonwealth Bank of Australia* [1994] 21 VR 298.

19 *Kekatos v Holmark Construction Company Pty Ltd* (1995) 121 FLR 39.

20 (1996) 19 ACSR 411.

*Co Pty Ltd v DFC of T*²¹ in holding that solvency was not a matter that could be argued on an application to set aside a statutory demand. That question could only be raised on the winding up application. This decision represents a prime example of the legislation operating contrary to the manner it was initially intended.

If an interpretation consistent with the Explanatory Memorandum was adopted (ie the commercial justice of the matter) the demand ought to have been set aside because a genuine dispute existed. Instead, the parties were forced to a further hearing, where, if the company was able to prove solvency, the application would then be dismissed

Under the current regime s459S would not assist the company because, by failing to apply to set aside the statutory demand, it is precluded from raising a genuine dispute at the application to wind up. The court will only give leave for the company to raise the issue if it is material to proving that the company is solvent.

Another mechanism by which the courts have minimised the effect of s459G was set out by Senior Master Mahoney in *Ultimate Manufacturing Pty Ltd v Lyell Morris Pty Ltd*.²²

In that case, a statutory demand was served by a New South Wales creditor on a company in Victoria. The statutory demand was defective in that it did not comply with Form 509H. The statutory demand did not specify an address for service for the creditor in the State in which the demand was served. The company applied to set the demand aside, filing the application and supporting affidavit within the 21 day period specified in s459G, and then purported to serve that material within the 21 days. The application however omitted the notice required by s16 of the *Service and Execution of Process Act 1992*. The failure to serve that document meant the application was not properly served.

The Master was urged by the creditor to dismiss the company's application. This was untenable in the Master's view as it was the creditor's failure to comply with the legislation which required the company to serve its application outside the state. The company, of course, compounded the error by doing so improperly.

Given the interpretation of s459G by the High Court, it was impossible for the Master to waive the non-compliances and allow the parties to argue the merits of the statutory demand on its face. The Master considered that he had no option but to dismiss the company's application but, in doing so, the Senior Master circumvented s459G by making the following order:

- (1) The respondent is to inform any court to which it makes an application for the winding up of the company based on the 'defective demand' that in this proceeding-
 - (a) the demand was held defective in that it did not specify an address of the respondent for service in Victoria;
 - (b) it was also held that the applicant had not made an application under s459G but that this was due to the defect and was not the fault of the applicant;

21 (1995) 55 FCR 562.

22 (1995) 13 ACLC 1268.

- (c) it was further held that if there were a winding up application based on the defective demand, the respondent could expect to be required to show cause why s467A(b) should not apply so as to require the application be dismissed.
- (2) That a copy of the order as authenticated be attached to the winding up application.
- (3) Because it was the respondent's fault that the application to set aside its demand must be dismissed, I shall order that it pay the applicant's costs.

Although commendable in his efforts to overcome an otherwise draconian result, the decision highlights the chasm between an approach based on the 'commercial justice' of the matter and technical pedantry.

Helman J in *Re Commercial Trade Finance Pty Ltd*²³ stated that there is clear authority in the decision of the High Court in *David Grant* for the order made by Senior Master Mahoney.²⁴ In particular, His Honour quoted the following passage from the decision of Gummow J:

No doubt, in some circumstances, the new Part 5.4 may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with the perceived defects in the pre-existing procedure in relation to Notices of Demand. It also may transpire that a winding up application in respect of a solvent company is threatened or made for an improper purpose which amounts to an abuse of process in the technical sense of that term, as explained in *Williams v Spautz*.²⁵ However, in an appropriate case, injunctive relief may then be available to the company in a court of general equity jurisdiction.²⁶

Helman J was however, of the view that:

Before such a drastic step is taken the court asked to take it will of course require the factual basis upon which it is asked to act to be properly established.

On the facts before him, Helman J decided not to impose conditions similar to those imposed by Senior Master Mahoney. The reason set out by his Honour was that there was a clear factual distinction between the two cases. In *Re Commercial Trade Finance Pty Ltd* the applicant had simply failed to file and serve its material in accordance with s459G: although it filed the application and affidavit on the twenty first day, it did not serve the material until the twenty third day. The failure to comply with the legislation was not explained and was presumed to be simply tardiness. In *Ultimate Manufacturing* the company filed and served its material within the 21 day period but because of its failure to annex the notice required by s16 of the *Service and Execution of Process Act 1992* (Cth) it had failed to comply with s459G. Arguably, this was simply incompetence.

23 (1996) 14 ACLC 259.

24 *Ultimate Manufacturing Pty Ltd v Lyell Morris Pty Ltd* (1995) 13 ACLC 1268.

25 (1992) 174 CLR 509 at 518-522, 532-537.

26 (1996) 14 ACLC 259 at 261-262.

If the reasoning in *Ultimate Manufacturing* is correct (which seems to be the view of Helman J in *Commercial Trade Finance Pty Ltd*) the decision of *Helman J*²⁷ is difficult to reconcile in principle.

An analysis of Senior Master Mahoney's decision reveals that it was not the actual defect in the demand but the potential consequences of the defect at the time the demand was served which concerned the Master. The Master stated:

The reasons in *Scandon Pty Ltd v Dome Supplies Pty Ltd*²⁸ also refer to the requirement and the importance of the requirement that the address for service specified in a demand be an address in the State or Territory in which the company is served. Not to satisfy that requirement is to place the company served in jeopardy of not making an application "under s459G". The reasons in *Scandon* show why this is so; and that, if the application cannot be treated as 'under s459G', the court lacks jurisdiction to set the demand aside under either s459H or s459J ...²⁹

His Honour went on:

The applicant will fail in direct consequence of the failure of the respondent to satisfy the requirement that an address in Victoria be specified in the demand. In other words, because of that failure the applicant has been prevented from having the opportunity the legislator intended for any company served with a statutory demand to seek an order that the demand be set aside.

It is of course relevant that in *Ultimate Manufacturing* the demand was received by the creditor within the 21 days but in *Re Commercial Trade Finance Pty Ltd* the application was not received until after the 21 days had expired.

Nevertheless, the consequence of the creditor's failure was the same. The company, in both cases, was in exactly the same position, having received a defective demand which prevented it on an 'objective analysis' (to use the words of the Senior Master) from applying to set the demand aside.

Regrettably, there is continuing uncertainty as to the circumstances which will require the adoption of the regime in *Ultimate Manufacturing* and those that will not.

That uncertainty is reflected in the decision of Senior Master Mahoney in *Highfield Woods Pty Ltd v Bayview Crane Hire Pty Ltd*.³⁰ The facts are relevantly the same as those in *Ultimate Manufacturing Pty Ltd*.³¹

The company, somewhat curiously, argued that its application was unsustainable and should be set aside. The company then sought the same orders as the Senior Master had made in *Ultimate Manufacturing*. The creditor argued that it was prepared

27 *Supra* n.23.

28 (1995) 13 ACLC 1256.

29 *Supra* n.24 at 1270.

30 (1996) 14 ACLC 599.

31 (1995) 13 ACLC 1268.

to waive the non-compliance with the *Service and Execution of Process Act 1992* (Cth) in order to allow the court to finally determine the application on its merits. The creditor also submitted that the Senior Master should not follow the decision in *Scandon* in that the failure to specify an address in the State in which the demand is served is not a defect which would permit the Master to set the demand aside.

Senior Master Mahoney followed his earlier decision in *Ultimate Manufacturing*³² in dismissing the application on conditions.

The case again highlights the consequences of a strict interpretation of s459G. Leaving aside the creditor's attempt to overturn *Scandon*, the submission regarding the waiver of non-compliance surely was logical, given that the parties had incurred significant costs in bringing and defending the application and the issue upon which the application was set aside was not a matter which they sought to raise.

The effect of the decision in *David Grant* is that it contradicts entirely the purpose of the changes to the statutory demand procedure. The intention of the changes was that an application be determined on the commercial justice of the matter rather than on an argument as to technical deficiencies in order to avoid an unnecessary application to wind up a company.

The effect of the decision in *Highfield*³³ is that the parties are left significantly poorer though without a resolution of the dispute that they sought to raise by serving the statutory demand.

Summary

It is evident given the decisions leading up to *David Grant* and those subsequent to it that the statutory demand procedure has been less than successful. Whilst 'teething problems' were inevitable, there is still uncertainty in the operation of the procedure. Three years on, the number of decisions relating to s459G is astounding. Despite a clear pronouncement by the High Court in *David Grant* we are still left with interpretational problems as to when the consequences of that decision will be varied. The variation adopted by Senior Master Mahoney in *Ultimate Manufacturing* does of course assist in diminishing the effect of the High Court decision though it is itself uncertain in its application. That is clearly evident from *Re Commercial Trade Finance*.

The purpose of the amendments as expressed in the Explanatory Memorandum was to enable companies to have a genuine dispute as to a debt heard prior to a winding up application. The failure to specify an address for service in the state in which the demand is served is clearly 'a technical deficiency'. It would have been just as easy for Senior Master Mahoney³⁴ to have heard the substantive application and impose conditions on his order to the effect that the demand was defective but that in his view a genuine dispute arose notwithstanding that the application was

32 *Ibid.*

33 (1996) 14 ACLC 599.

34 *Ultimate Manufacturing Pty Ltd v Lyell Morris Pty Ltd* (1995) 13 ACLC 1268.

not brought within the time specified. Even the procedure adopted by Senior Master Mahoney has circumvented the purpose of the legislation which was to determine disputes at a date prior to the winding up.

Both the respondent and the applicant were at fault in *Ultimate Manufacturing* despite the comments of Senior Master Mahoney. The failure to attach the s16 Notice as required by the *Service and Execution of Process Act 1992* was a procedural defect equivalent to the failure to specify a place for service within the state. Could the application have not been heard on its merits by waiving both defects.

The position is that we are left with a significant uncertainty as to the interpretation of s459G. Despite the clear pronouncement by the High Court, companies and creditors will continue to be uncertain as to the outcome of applications to set aside a statutory demand.

The legislation has not achieved its stated goal. The interpretation given to s459G by *David Grant* will significantly protract some litigation in respect of statutory demands. It is preferable that 'technical points' not be taken on the interpretation of these sections. The amendments actually sought to avoid the technical nature of its predecessor. By allowing the parties to argue their application, as was intended by the legislator, prior to the winding up application the legislation would achieve its purpose. Currently it does not. The parties are before the court with all material ready to argue the disputed debt. Why should that application not proceed because of a technical deficiency. It would be a very rare case indeed that a creditor would be prejudiced by proceeding. The legislation should be amended to allow the court a discretion to permit extensions of time for filing and serving applications to set aside statutory demand; thereby enabling the legislation to achieve its objectives.

Section 459J

The section gaining the most substantive discussion outside s459G is s459J. That section provides that:

- (1) On an application under s459G, the Court may by order set aside the demand if it is satisfied that:
 - (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
 - (b) there is some other reason why the demand should be set aside.
- (2) Except as provided in ss(1), the Court must not set aside a statutory demand merely because of a defect.

The Explanatory Memorandum to the amendments provides:

Proposed ss459L(2) (enacted as s459J) provides that, except as provided in subs(1), the Court must not set aside a statutory demand merely because of a defect. This subsection is aimed directly at overcoming the prolonged proceedings which can result from legal disputation in relation to the effectiveness of a statutory demand which occurs on the hearing of a case for the winding up of a company.

A number of questions have arisen in the interpretation of that section. In particular, the following:

1. What is a defect in a demand?
2. What constitutes substantial injustice?
3. What is meant by the words 'there is some other reason why the demand should be set aside'?
4. How is subs(2) to be interpreted?

The latter two of these questions has gained the most significant discussion.

Defect

Section 9 of the *Corporations Law* defines a defect. It includes:

- (a) any regularity; and
- (b) a misstatement of an amount or total; and
- (c) a misdescription of a debt or other matter; and
- (d) a misdescription of a person or entity".

Importantly, 'defect' is an inclusive definition and does not purport to exclude matters which are not dealt with in the definition. It is appropriate to deal with the cases that have interpreted the concept of a defect.

The definition of 'defect' in the Law was analysed by Lockhart J in *Topfelt Pty Ltd v State Bank of New South Wales Limited*.³⁵ His Honour said:

The definition of 'defect' is an inclusive definition, so one must construe the term initially according to its ordinary meaning and then introduce into it, if it is otherwise not included, the deemed statutory quotations.

According to its ordinary usage a 'defect' means a lack or absence of something necessary or essential for completeness, a shortcoming or deficiency, and the imperfection. A defect according to ordinary understanding is not necessarily something which is of a minor nature, it may be either major or minor. The reference in the inclusive definition of 'defect' in s9 includes, not only an irregularity, but a misstatement of an amount or total and a misdescription of a debt or other matter and a misdescription of a person or entity, it is plainly designed to ensure that the interpretation of s459J (and other sections) is not to be susceptible of rigorous or narrow reading down of the word 'defects' to exclude major defects and confine its meaning to minor defects or irregularities. The notion of a 'defect' is not to be confined to a misstatement of an amount of a debt to a small or minor misstatement or to an immaterial or minor misdescription of a debt or a person or entity.

35 (1993) 12 ACSR 381.

In *Jarena Pty Ltd v Sholl Nicholson Pty Ltd*,³⁶ Heerey J had to consider whether the failure to specify the nature of the work in a statutory demand constituted a defect. The demand in question set out the amount due but did not state what the amount was for. The judge took the view that the company no doubt knew what the claim related to. Though on a strict interpretation of s459E(2)(a) his Honour took the view that the failure to specify the particulars of how the debt arose was a defect.

The failure to specify the creditor's ACN was conceded in *Scandon Pty Ltd v Power Mate (Australia) Pty Ltd*³⁷ to be a defect.

Section 459E(2) of the Law sets out the requirements of the demand though where the demand relates to a debt not being a judgment debt, s459E(3) requires the demand to be accompanied by an affidavit. The various forms the affidavit must take were addressed earlier. In a case where the creditor fails to accompany the statutory demand with an affidavit, Cox J³⁸ whilst not deciding the point specifically, raised a doubt as to whether this constituted a defect in the demand. His Honour held instead that the failure to accompany the statutory demand with the requisite affidavit was 'some other reason' to set aside the statutory demand in accordance with s459J(1)(b). In the Federal Court and other states of Australia the form of the affidavits supporting a statutory demand include 'important notes'. The omission of these notes was held by Branson J³⁹ to constitute a defect in the demand.

It now appears settled that a 'defect' in the affidavit supporting a statutory demand is not a defect in the demand.⁴⁰

The failure to specify the day on which the affidavit was served in the demand has been considered to be a defect.⁴¹ Further, if three creditors claim a composite debt in one demand, that will also be a defect.⁴² In addition, the fact only one affidavit was sworn thereby constituting hearsay evidence in respect of two of the debts, whilst not a defect, was 'some other ground' sufficient to set aside the statutory demand.⁴³

In a curious judgment, Sackville J⁴⁴ held that there was no requirement in the law that a demand not be misleading. In that context he was referring to the demand before him which failed to separate principal from interest. He held, in the circumstances, that the failure was not a defect.

A company argued before the Supreme Court of Western Australia that⁴⁵ the failure to set out the calculation of capital and interest in a demand constituted a

36 (1996) 14 ACLC 531.

37 (1995) 19 ACSR 120.

38 *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (In Liquidation)* (1994) 117 FLR 330.

39 *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd* (1995) 129 ALR 308.

40 *B&M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 13 ACLC 88; *Dromore Fresh Produce Pty Ltd v W Paton (Fertilizers) Pty Ltd* (1997) 15 ACLC 424; *Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* (1996) 20 ACSR 746.

41 *Hornet Aviation Pty Ltd v Ansett Australia Limited* (1995) 13 ACLC 613.

42 *First Line Distribution Pty Ltd v Paul Whiley & Ors* (1995) 13 ACLC 1216.

43 *Ibid.*

44 *Chains & Power (Aust) Pty Ltd v Commonwealth Bank* (1995) 13 ACLC 73.

45 *Turner Equity Pty Ltd v Melvista Park Pty Ltd* (1995) 18 ACSR 399.

defect. In particular, it was not evident from the demand how the company's obligation to pay interest arose. Further inquiry was needed. The court held that failure would constitute a defect.

It will be recalled that the new legislative scheme attempts to overcome the difficulties of misstating the amount of the debt in the demand. The legislation now provides that the court can vary the demand and must not set aside a statutory demand merely because of a defect.

Having said that, the Court in *Khadine Pty Ltd v Giant Bicycle Co Pty Ltd*⁴⁶ took the view that a 'wildly inaccurate' demand is defective. Master Bredmeyer said:

One of the functions of a statutory demand is to establish grounds for the winding up of the company. Another essential function is that it gives the debtor company the opportunity of paying the sum demanded (or otherwise securing it). If it fails to do that, it is deemed to be unable to pay its debts and that is a ground for its winding up. It is difficult for the debtor company to pay the debt if the demand is widely inaccurate ... I regard the defects as major.

What constitutes a defect should not but for the decisions of Master Bredmeyer in *Khadine Pty Ltd v Giant Bicycle Co Pty Ltd* and of Hill J in *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd*⁴⁷ have any significant effect.

Substantial Injustice

The question of whether a statutory demand contains a defect only really becomes relevant if the defect has the effect of causing substantial injustice. This is not a defined term. The interpretation of what is substantial injustice has been left to the courts.

In what may be an obvious statement, the injustice referred to is that of the company.⁴⁸ One of the most significant changes to the statutory demand procedure is that technical defects in the demand should not constitute grounds to set it aside. This is evidently of importance to the judges in interpreting what is substantial injustice. In *Scandon*⁴⁹ Senior Master Mahony after considering the second reading speech with respect to the amendments and the Explanatory Memorandum concluded "The common thread is that minor errors would not suffice to avoid the consequence of non-compliance with a statutory demand."

The passage is not particularly enlightening, though must be reviewed in the context it was made. In *Zhen Yun (Australia) Pty Ltd v State Bank of South Australia*⁵⁰ Burley J considered the words as follows:

46 (1995) 16 ACSR 421.

47 (1994) 51 FCR 446.

48 *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd* (1995) 129 ALR 308.

49 (1995) 13 ACLC 1256.

50 (1994) 12 ACLC 521.

A reading of ss459E to 459N of the Law requires the conclusion that the legislature set out a detailed code, which is to be strictly adhered to, relating to the giving of statutory demands and the consequences that follow from the giving of such a demand. It is apparent from those sections that immaterial non-compliance will not form a proper basis for the setting aside of the notice, but, where the failure to follow the procedures set out is significant, the notice should be set aside.

Use is made by the courts of the word ‘significant’ as some how descriptive of substantial injustice.⁵¹ However, that does not add much because that is as descriptive as the courts have been. The cases are numerous where the company has failed to place any evidence before the court as to what if any substantial injustice it has suffered.⁵² Presumably practitioners believed the question of substantial injustice was to be determined by an objective approach.

It is arguable however, that the proper test for determining whether a defect causes substantial injustice is subjective. In other words the company must show on an application to set aside the statutory demand that the defect in the demand has or will in fact cause it substantial injustice.

In a combination of the above the courts have adopted a two limbed test. That is:

1. in order for the demand to be set aside because of a defect in the demand the company must show that it will suffer substantial injustice if the demand is not set aside; or
2. if the defect is so fundamental that substantial injustice will arise because the demand could not be construed as a statutory demand⁵³ the demand should be set aside or the form of the demand coupled with evidence of the nature of the alleged debt, make it apparent that the company will suffer substantial injustice by reason of the defect in the demand.⁵⁴

In effect the test is subjective at the first instance and if need be an objective test is adopted.

This two pronged approach is confusing. The second limb does not accord with what is apparently the clear intention of the legislation. Is it not the case that the subjective test falls squarely within the realms of s459J(1)(b). If a demand is so defective as to not constitute a demand then that would be ‘some other reason to set the demand aside.’ This was the position adopted by the courts in cases where the affidavit is required but not annexed to the demand or the affidavit is sworn by a person not contemplated by the legislation.⁵⁵

51 *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 13 ACLC 1256.

52 *Chippendale Printing Co v DFC of T* (1995) 55 FCR 562, *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia* (1995) 13 ACLC 73, *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd* (1995) 129 ALR 308.

53 *Topfelt Pty Ltd v State Bank of New South Wales* (1993) 12 ACSR 381.

54 *Turner Equity Pty Ltd v Melvista Park Pty Ltd* (1995) 18 ACSR 399.

55 *Supra* n.40.

Summary

To date the concept of substantial injustice has been dealt with in an apparently consistent manner. That is not to say of course that the absence of a definition of substantial injustice has caused companies to misinterpret the legislation and unsuccessfully attempt to set aside a statutory demand. The concept of a subjective then an objective use of the words 'substantial injustice' will lead to unnecessary confusion. Inherent in the concept of substantial injustice is that each judge will interpret the degree of injustice required to set the demand aside differently. It of course can be brushed aside as "teething problems", in the sense that with time Courts of Appeal will resolve what is and what is not substantial injustice. To date however the courts seem to have taken a very technical view.⁵⁶ It is hoped that the interpretation will be clarified by the Appeal Courts.

Interpretation of s459J

A more fundamental debate has arisen in respect of s459J. The debate centres around the question as to whether a defect in a demand can be "some other reason to set aside a statutory demand" (s459J(1)(b)) or whether the defect must cause substantial injustice before a defect will enable the court to set a demand aside.

The position was first discussed by Lockhart J in *Topfelt Pty Ltd v State Bank of New South Wales*.⁵⁷ In that case a statutory demand was served by the Bank claiming the sum of \$179,722.73 "together with interest from 11 March 1993 to date and continuing being the amount of the debt described in the Schedule." The company argued that the demand was defective in that it did not state the source of the bank's right to interest, the amount or the rate of the interest, and it claimed interest as a continuing liability. Further no address for payment of the amount claimed in the statutory demand was specified. In holding that the demand should be set aside the judge stated:

In all the circumstances I am satisfied that the defects in the statutory demand in this case are of a kind and magnitude that they constitute good reasons why the demand should be set aside under s459J(1)(b).⁵⁸

Whilst innocuous in itself this passage has led to substantive debate in the Courts as to the proper interpretation of s459J.⁵⁹

The contrary view of the interpretation of s459J is found in the judgment of Hill J in *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd*.⁶⁰ In that case

56 *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 13 ACLC 1256, *Jarena Pty Ltd v Sholl Nicholson Pty Ltd* (1996) 14 ACLC 531.

57 (1993) 12 ACSR 381.

58 *Ibid* at 397.

59 Notably in *Scandon*.

60 (1994) 51 FCR 446.

the statutory demand served upon the company omitted the notes required by Form 509H. Hill J concluded that the failure to include the notes was a defect. It was apparently conceded in argument by the creditor that s459J(1)(a) did not apply. His Honour held that he was precluded, because of the way that section had been drafted, from setting the demand aside under s459J(1)(b).

His Honour stated:

... paras (a) and (b) of s459J(1) should be read so as to be mutually exclusive. Such a construction would, but for the terms of s459J, be clearly correct. But notwithstanding the reference in s459J(2) to subs(1), not merely subs(1)(a), I am of the view that the provisions of s459J(1)(b) relate only to cases where there is a reason other than the existence of a defect in the demand. Put in another way, if the case is one where a defect in the demand is alleged, a notice could only be set aside if the case is one where because of the defect substantial injustice would be caused unless the demand was set aside. Such a construction accords with what is said in the Second Reading Speech and the Explanatory Memorandum to which I have referred.

This view has been followed in numerous subsequent cases.⁶¹ In *Scandon*⁶² Senior Master Mahoney spent a considerable piece of his judgment analysing why he believes *Kalamunda* is incorrect.

In determining which of the arguments will be applied it is helpful to review the decisions in which the issue has been discussed. In *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (In Liquidation)*,⁶³ Cox J relied upon *Kalamunda* which in his view was the better of the two decisions on the point. His Honour states:

I respectively agree with Hill J in *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd*⁶⁴ that in s459J, para (a) and (b) should be read so as to be mutually exclusive. Thus, if the omission to accompany the demand with the required affidavit could be regarded as ‘a defect in the demand’ it could only justify the Court setting it aside if it led to substantial injustice.

In complete contradiction however, his Honour went on:

I entertain some doubt that such an omission could be said to be a defect in the demand but it is unnecessary to express a final view on that point. The omission is capable however of constituting ‘some other reason why the demand should be set aside’ within the meaning of para (b).

61 *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd* (1994) 117 FLR 330; *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia* (1995) 13 ACLC 73; *Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation* (1995) 55 FLR 562; *Chase Manhattan Bank Australia Ltd v Oscly Pty Ltd* (1995) 17 ACSR 128.

62 *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 13 ACLC 1256 at 1262.

63 (1994) 117 FLR 330.

64 (1994) 51 FCR 446.

If his Honour was purporting to follow the decision of Hill J in *Kalamunda*, it was imperative that His Honour decide whether the absence of the affidavit was a defect or not. If it was a defect, His Honour has reached the wrong conclusion based on his own reasoning. If *Kalamunda* was to be followed and the failure to include the affidavit was a defect, Cox J was not permitted on the reasoning in *Kalamunda* to set the demand aside because there was no evidence before him that substantial injustice was caused to the company.

It is arguable that His Honour has 'had a bet each way' in supporting *Kalamunda* though applying *Topfelt*.

Lindgren J also agreed with *Kalamunda* in *Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation*⁶⁵ though on the facts it was unnecessary for him to discuss the point.

An analysis was made of the two competing arguments by Sackville J in *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia*.⁶⁶ His Honour supported the view of Hill J as opposed to Lockhart J's view in *Topfelt*. In particular, his Honour stated:

I am inclined to the view that Lockhart J did regard the failure as a defect, but applied s459J(1)(b) in the absence of an argument that substantial injustice had to be shown if the demand were to be set aside. Be that as it may, I think that the statutory regime is intended to allow a demand to be set aside for a 'defect' only if substantial injustice would otherwise be caused.⁶⁷

And finally in *Chase Manhattan Bank Australia Limited v Oscopy Pty Ltd*⁶⁸ Lindgren J affirmed his decision in *Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation*⁶⁹ that as the company did not prove substantial injustice had been caused, he was prevented from setting aside the demand because of the defect.

Against the above is a forceful decision of Senior Master Mahoney in *Scandon*. Hill J in *Kalamunda* supports his departure from the decision of Lockhart J in *Topfelt* on the basis that:

This question of construction appears not have been argued in *Topfelt*, nor considered by Lockhart J in that case. Although the reference by his Honour to s459J(1)(b) (at ACLC 27-28: ALR 171) might suggest that His Honour took a different view from that which I have suggested, the case before His Honour was not one of a mere defect falling with s459J(2).

Senior Master Mahoney was critical of the assumption reached by Hill J given

65 (1995) 55 FCR 562.

66 (1995) 13 ACLC 73.

67 *Ibid* at 80.

68 (1995) 17 ACSR 128.

69 (1995) 55 FCR 562.

that Lockhart J could only have reached his decision based on s459J(1)(b) after a consideration of that subsection.

After reviewing the authorities which follow *Kalamunda*, Senior Master Mahoney set out six reasons why he believed those cases were wrong. In summary, Senior Master Mahoney's six points are:

1. The exception in s459J(2) is not limited to s459J(1)(a). If one simply gives effect to the plain and natural meaning of the words used in the section, the result is that the court may set aside a defective statutory demand on the basis of a sufficient reason other than the reason that substantial injustice will be caused.
2. The general nature and effect of the second reading speech and the Explanatory Memorandum are not sufficient to support an argument that the legislation contained an error. The court should interpret the legislation, not what the court thinks the legislation should be.
3. It is arguable that the *expressio unius* principle of statutory interpretation could be used to suggest that the reference to "some other reason" in s459J(1)(b) is to be interpreted as 'some other reason other than a defect in the demand'. 'The style of drafting of the amendments of the *Corporations Law* which came into effect on 23 June 1993, however, is not such as to encourage confidence in such an analysis.'
4. For a defect, which is not shown to produce substantial injustice, to constitute 'some other reason' to set the demand aside, the reason must be of 'a significance as compelling as would substantial injustice'. Where the defects are of sufficient gravity then it is only appropriate the court be given the power to set aside the statutory demand.
 ... where would be the logic in the courts being able to set aside a demand because it was not accompanied by an affidavit when an accompanying affidavit was required (see *Victor Tunevitsch*), but not being able to set aside a demand with a 'foreign' address for service when that has placed the company served in jeopardy of not being able to make an application under s459G at all!
5. In reaching the conclusion in *Kalamunda* the court need not have addressed this argument at all. In *Kalamunda* the defects were of a minor nature and did not cause substantial injustice. The demand could therefore not be set aside either on the first limb or the second limb.
6. The judgment of the Full Court of the Federal Court in *Hornet Aviation Pty Ltd v Ansett Australia Limited*⁷⁰ cannot be taken by the use of the words 'by s459J it is, in effect, provided that a demand may be set aside because of a defect only if substantial injustices will otherwise be caused' to be appellate court support for *Kalamunda*.

70 (1995) 13 ACLC 613.

In *Portrait Express (Sales) Pty Ltd v Kodak (Australasia)*⁷¹ Bryson J considered the debate in some detail. Having made that consideration Bryson J concluded:

It is not necessary to come to a conclusion between these views to dispose of the present case. I am inclined towards the Kalamunda view, for textual reasons.

My preference is based on the text of s459J and generally of Pt 5.4, including Div 3, which seem to show that a decision to set aside a demand because of defect (sic) in the demand can only be made under para (a) and cannot be made under para (b). The reference to substantial injustice in para (a) and its absence from para (b) seem to show that it is not essential for a decision to set aside a demand under subpara (b) that there should be a substantial injustice. As substantial injustice is required for a decision under para (a) and is not referred to in para (b) it must be intended that there be some difference in their operation. The Court should not act under para (b) which is discretionary, unless the decision to do so is supported by some sound or positive ground or good reason which is relevant to the purposes for which the power exists.⁷²

In *Sewmail (Australia) Pty Ltd v Booby Traps Pty Ltd*,⁷³ Burley J formed the view that a difference in the amount specified in the demand from the amount specified in the schedule to the demand was a defect. Further, His Honour considered the defect would result in substantial injustice. Though if he was wrong, the defect was of such a substantial nature as to constitute grounds for setting the demand aside.

Justice Nicholson in *Delta Beta Pty Ltd v Vissors*,⁷⁴ stated that whilst the defects in the demand before him did not cause substantial injustice they were sufficient to constitute some other reason to set the demand aside.

The debate is particularly relevant, in a consideration of whether the failure to specify an address for service in the state in which the demand is served is reason itself to set the demand aside. In *Scandon*, Senior Master Mahony considered the court should enforce strict compliance with the form in which a demand is to take. As such, in the Master's view, it would be only in exceptional circumstances that a demand which fails to comply with the prescribed form should not be set aside.

Whilst being prevented from ruling consistently with his decision in *Scandon*, the Master made the bizarre decision referred to at pages 63 and 64 of this paper to endorse his stand.

Master MacReady in *Beta Trading Co Pty Ltd v Specialise Laminators Co Pty Ltd*⁷⁵ addressed squarely the construction question raised by s459J. The Master stated:

There are two approaches apparent from the cases. The first restricts the setting aside of the demand because of a defect to those cases where the defect would cause substantial

71 (1996) 20 ACSR 746.

72 *Ibid.*

73 (1997) 15 ACLC 628.

74 (1996) 14 ACLC 941.

75 (1997) 15 ACLC 270.

injustice. The second is the demand can be set aside under s.459J(1)(b) if the Court finds there is some other reason why the defect would justify the setting aside of the demand.⁷⁶

The Master expressly adopted the decision of Senior Master Mahoney in *Scandon*. The Master also took the view that the wider interpretation as he described it of s459J supported the general philosophy of the new provisions that disputes with demands should be dealt with prior to the application to wind up.

Contrary to the above MacKenzie J in *Re Ad-A-Cab Holdings Pty Ltd*⁷⁷ stated his view was that the trend of the authorities was that a demand would only be set aside if substantial injustice could be shown.

The issue recently became before the Full Court of the Federal Court in *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd*.⁷⁸ Three defects were asserted by the Applicant as constituting grounds to set the demand aside. They were:

- (1) The demand was addressed to the Respondent's previous registered office.
- (2) The demand did not provide an address for service in the state in which it was served.
- (3) The accompanying affidavit did not comply with the rules of the Federal Court, as it was in the form prescribed by the Rules of the Supreme Court of Victoria.

In upholding the validity of the demand the Full Court has provided superior court authority supporting Hill J in *Kalamunda Meats* and specifically criticised *Scandon* and *B&M Quality Constructions*.

The Full Court stated:⁷⁹

Section 459J(1) and (2) constitute the statutory code for defects in a demand; within that code the legislature did not distinguish between degrees of defects in statutory demand. As we have pointed out a defect in a demand only gives rise to an entitlement (if substantial injustice is established) to have the demand set aside under s459J(1)(a), but not under s459J(1)(b). Accordingly, the 'other reason' requested by s459J(1)(b) must, in our view, be a reason other than a defect in the demand.

In respect of Senior Master Mahoney's comments in *Scandon*, the Full Court stated:⁸⁰

Insofar as [the Master's] decision suggests that a defect in a demand can be set aside under s459J(1)(b) when the defect is not productive of substantial injustice, we would, with respect, disagree.

76 *Ibid.*

77 (1996) 14 ACLC 1763.

78 (1997) 24 ACSR 292 at 353.

79 *Ibid* at 361.

80 *Ibid* at 360.

The Full Court drew a distinction between 'defects in a demand' and 'defects in relation to a demand'. Section 459J(1)(a) relates solely to defects in the demand. The Court found that the effect of s459J(2) should not be limited to defects in the demand but could also include defects in relation to the demand. As a consequence, in the Full Court's opinion, they should not set aside a demand because of a defect alone, whether in the demand itself or in relation to the demand.

The Full Court⁸¹ concluded that:

... in the absence of substantial injustice, a Court is precluded by s459J from setting aside a demand solely on the ground that it contains defects.

In summary, the Full Court held:

- (1) defects can occur in the demand or in relation to the demand;
- (2) any form of defect alone is not sufficient to set aside a demand;
- (3) a defect in the demand is sufficient to set the demand aside if it causes substantial injustice;
- (4) the words 'some other reason' in s459J(1)(b) means a reason other than a defect;
- (5) the reference to defects in s459J(2) is a reference to defects in a demand and in relation to a demand.

Unfortunately, the Full Court did not enlighten us on what is 'some other reason' to set the demand aside.

Summary

The differing interpretations of s459J will result in similar inconsistencies to that which occurred in respect of s459G. The most obvious deficiency is that borne out by the decision in *Scandon* itself. If in the Federal Court the same facts occurred, it being presumed that the failure to include an address for service was a defect though the company failed to show that it had been caused substantial injustice, the demand could not be set aside. Irrespective of whether the decision is correct or not, it is the inconsistent interpretation of the legislation which will lead to the confusion. The certainty which creditors and companies require, and the Explanatory Memorandum attempted to achieve with respect to statutory demand is therefore absent on two fronts:

1. What is a defect?
2. What is the effect of the defect?

The Explanatory Memorandum in relation to what is now s459J states:

81 *Ibid* at 361.

This sub-section is aimed directly at overcoming the prolonged proceedings which can result from legal disputation in relation to the effectiveness of a statutory demand which occurs on the hearing of the case for the winding up of a company.

The narrow interpretation of s459J propounded by Hill J and the Federal Court does directly support the Explanatory Memorandum. It does so in the sense that by narrowing the type of demand which the court will set aside (usually on technical grounds) the court is minimising the possibility that a further demand and further proceedings will result. By not setting aside the demand for what can usually be described as technical grounds, the court is reducing the length of potential proceedings as was the intention of the Explanatory Memorandum.

Justice Hill's judgment is however encouraging poor drafting. As pointed out by Senior Master Mahoney, s459J(1)(b) should only be invoked for defects which are as sufficiently substantial to equate to causing substantial injustice. Whilst that concept will depend upon the interpretation given to it by each individual judge, it is considered appropriate by some courts that a failure to comply with the legislation with regards to statutory demands should preclude the creditor proceeding to winding up. Some courts have adopted the view that a party should not be permitted to wind up the company, not on the basis that such a defect does not cause substantial injustice but because objectively the demand is not a 'statutory demand'. This interpretation would avoid the consequences raised by Lockhart J in *Topfelt Pty Ltd v State Bank of New South Wales Ltd*⁸² that documents which bear no resemblance to a statutory demand are held because of the narrow interpretation of s459J to be sufficient.

The Explanatory Memorandum clearly limited the ability to set aside demands to defects causing substantial injustice. The Full Court's decision accords with the intent of the Explanatory Memorandum. The purpose (as set out earlier) was to avoid prolonged proceedings. Is it not the case by expanding the ambit of those types of demand which can be set aside, (as was done in *Scandon*) such an interpretation has contradicted the intention of the amendments. Take for example the failure to include a supporting affidavit. This is a classic example of a technical defect leading to the unnecessary setting aside of a statutory demand. Substantial injustice can not usually be caused by the failure to include it. Again would it not be preferable to hear the application on its merits, given both parties have expended time, energy, and money preparing and attending the hearing. By setting aside the demand the court is simply inviting the re-service of the statutory demand and a further application to set it aside. Again, it is the inconsistency in the interpretation of this section which will cause difficulty.

It is hoped that the Full Court's interpretation will be adopted by the State Courts. By so doing the effect should be that demands will not be set aside for purely technical reason and disputes will be dealt with promptly by the Courts.

82 (1993) 12 ACSR 381.

Conclusion

This paper has focused on two of the major changes to the statutory demand procedure and how those changes have worked in practice. The predominant overall change to the statutory demand procedure was:

1. to introduce a mechanism whereby disputes regarding statutory demands were dealt with prior to the application to wind up.
2. to emphasis that procedure as a hearing of the substantive issue of whether there was a 'genuine dispute' on the basis of commercial justice and for the outcome not to be affected by technical points.

We have been left with an extremely technical procedure notably dominated by the now resolved debate on s459G, and the as yet unresolved debate on s459J. This paper has not addressed the issue of what is a genuine dispute. That issue is one which will always turn on the facts of the particular case and is of its very nature somewhat uncertain.

The legislation required an interpretation which equated with its goals as set out in the Explanatory Memorandum quoted throughout this paper. Applications to set aside statutory demands should be determined on the commercial justices of the matter. The debate surrounding s459G has served no purpose other than to delay the dispute to another day. Take for example the solvent company served with a statutory demand. It fails to apply to set the demand aside in that it serves it's application and affidavit outside the twenty one day period. The effect given *David Grant* is two fold. First the company will be unsuccessful in it's attempt to set aside the demand because of the strict interpretation of s459G. Secondly the creditor will be unsuccessful in winding up the company as it is solvent.

The net result is that both the creditor and the company are back where they started. If the court had dealt with the demand on the first return date the dispute as to the debt or a determination that the dispute was frivolous could have been made. The effect of the current interpretation is that the first application becomes pointless. This is contrary to the purpose of the change set out in the Explanatory Memorandum which states:

The rules in this sense penalise debtor companies who do not give early notice of all the issues they have with the statutory demand, since needless delay and expense will occur if those issues are raised only at the winding up hearings.

This is unfortunate as both parties have expended time and money to appear only for the dispute to be determined another day because of a 'technical defect'. If the outcome of the application is that a genuine dispute is raised the parties are then able to press their claims in the appropriate forum. If the court determines there is no genuine dispute it would be a brave solvent company to then not pay the debt. In all, a satisfactory resolution. A penalty of costs could be imposed on the

company, if it successfully defends the application, it having failed to comply with s459G.

The same proposition arises in respect of s459J. An overly technical interpretation of the legislation leads to applications being determined on the basis of technicalities which forces the parties to argue the real dispute on a fresh application, thereby prolonging the proceedings. This was not the intention of the legislature as is outlined in the Explanatory Memorandum. An example was used above regarding the failure to include the affidavit in support of the statutory demand. To set aside a demand based on this ground is clearly a technical matter. If it does not cause substantial injustice and both parties are before the court 'ready' to argue the merits of the case why should the court force the parties to start again because of technical matters.

Commercial justice is not served by technical point scoring. The Courts should be wary not to place great weight on a few selected words within, the scheme to the detriment of the scheme itself. If both parties are before the court, let the battle proceed and save the time and cost of further later battles about the same matter.

It is hoped the legislation will be amended in order that the amendments can achieve the purpose for which they were designed.