

SUPREME COURT OF QUEENSLAND

CITATION: *Income2Wealth Pty Ltd v ACN 114 733 569 Limited* [2023]
QCA 215

PARTIES: **INCOME2WEALTH PTY LTD**
ACN 088 465 123
(appellant)
v
ACN 114 733 569 LIMITED
ACN 114 733 569
(respondent)

FILE NO/S: Appeal No 5884 of 2023 SC
No 309 of 2023

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2023] QSC 73 (Ryan J)

DELIVERED ON: 3 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 12 October 2023

JUDGES: Morrison JA, Applegarth and Williams JJ

ORDERS:

- 1. Appeal dismissed.**
- 2. The respondent is to file any submissions on costs, limited to three pages, within 14 days of the date on which the reasons for judgment are published.**
- 3. The appellant is to file any submission in response, limited to three pages, within 14 days of receipt of the respondent's submissions.**
- 4. The question of costs will be determined on the papers.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN
INSOLVENCY – STATUTORY DEMAND – APPLICATION TO
SET ASIDE DEMAND – GENERALLY
– where there was a defect in the dates in the statutory demand
– where the trial judge granted an application to set aside the
statutory demand – where the appellant submits that the
application to set side the statutory demand should have been
dismissed – where the appellant contends that, based on the
evidence, the relevant test was that under s 459J(1)(a) of the
Corporations Act 2001 (Cth) (**Corporations Act**) – where the
appellant contends that no substantial injustice was
established and the statutory demand should not have been set

aside merely because of the defect in the dates in the statutory demand – whether the primary judge erred in exercising the discretion to set aside the statutory demand pursuant to s 459(1)(b) of the Corporations Act

Corporations Act 2001 (Cth), s 459E, s 459G, s 459J

Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd

[2002] NSWSC 219, cited

Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd

(1998) 29 ACSR 11, cited

Re Gemaveld Pty Ltd [2012] NSWSC 582, cited

COUNSEL: G J Radcliff for the appellant
M J May and J T Sargent for the respondent

SOLICITORS: Radcliffs for the appellant
Colin Biggers & Paisley for the respondent

- [1] **MORRISON JA:** I agree with Williams J.
- [2] **APPLEGARTH J:** I agree with Williams J.
- [3] **WILLIAMS J:** This is an appeal from a decision setting aside a statutory demand pursuant to s 459J(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**).
- [4] The appellant contends that the application to set aside the statutory demand should have been dismissed on the basis that:
- (a) the evidence established that the statutory demand was in fact signed and sent on 20 December 2022 (the same day as the verifying affidavit was sworn), though the statutory demand incorrectly stated the date of its execution as 21 December 2022;¹
 - (b) consequently, the relevant test is that set out in s 459J(1)(a) of the Corporations Act and no substantial injustice was established; and
 - (c) the statutory demand should not have been set aside merely because of the defect in the dates in the statutory demand, in accordance with s 459J(2) of the Corporations Act.
- [5] The respondent (the applicant at first instance) contends that the primary judge’s decision was correct. In particular, it submits that:
- (a) the primary judge did not err in proceeding under s 459J(1)(b) of the Corporations Act as it was a combination of features on the particular facts that amounted to “some other reason” for the statutory demand to be set aside, as opposed to the incorrect date stated in the statutory demand; and
 - (b) the primary judge did not err in exercising the discretion to set aside the statutory demand taking into account the principles identified in the relevant authorities, the statutory context and the particular facts in this case.

¹ And also referred to the affidavit being dated 21 December 2022.

- [6] The respondent also relies on a notice of contention dated 22 May 2023 that the order setting aside the statutory demand could also be supported on the alternative ground that there was a genuine dispute about the existence of the debt claimed in the statutory demand. This ground was raised before the primary judge but was not decided.
- [7] The issue on the appeal is whether the primary judge erred in exercising the discretion to set aside the statutory demand pursuant to s 459J(1)(b) of the Corporations Act. It is only necessary to consider the alternative ground in the notice of contention if an error is made out.

Statutory demand and verifying affidavit

- [8] The appellant served on the respondent a statutory demand dated 21 December 2022 and a verifying affidavit dated 20 December 2022 under cover of a letter dated 20 December 2022.
- [9] Any application to set aside the statutory demand had to be made within 21 days of service pursuant to s 459G of the Corporations Act. Accordingly, any application to set aside the statutory demand had to be filed and served by 12 January 2023.²
- [10] On 10 January 2023, the solicitors on behalf of the respondent wrote to the solicitors on behalf of the appellant requesting that the appellant withdraw the statutory demand, otherwise an application to set aside the statutory demand would be made. The letter identified reasons to justify setting aside the statutory demand, including that:³
- (a) there was a genuine dispute as to the existence and amount of the debt to which the statutory demand related; and
 - (b) the statutory demand specified the verifying affidavit as dated 21 December 2022 but the attached affidavit was dated 20 December 2022.
- [11] The letter also referred to a number of omissions and inaccuracies in the verifying affidavit.
- [12] The response from the solicitors for the appellant was succinct. By email dated 10 January 2023, the respondent's solicitors responded relevantly as follows: "... There is no genuine dispute to the debt.

Your client does not have an offsetting claim that it is capable of particularising.

Our client's statutory demand is not defective.

Our client does not withdraw the statutory demand.

² The statutory demand and verifying affidavit were served at the earliest when delivered to the PO Box on 22 December 2022. The documents actually came to the respondent's attention on 9 January 2023. The appellant did not accept that service was later than 22 December 2022: see email from the solicitors for the appellant dated 10 January 2023 at AB 281.

³ The letter also included further grounds of an offsetting claim and a contractual dispute resolution clause, which were not ultimately pursued.

We hold instructions to accept service of an application to set aside the statutory demand along with an affidavit with all evidence supporting any application prior to 12 January 2023.”

- [13] Faced with this response, the respondent filed and served an originating application dated 12 January 2023 seeking an order that the statutory demand dated 21 December 2022 be set aside, together with supporting affidavits.
- [14] Affidavit material was filed on behalf of the appellant on 6 February 2023. This affidavit material established that the statutory demand was misdated 21 December 2022 and in fact had been signed on 20 December 2022 and the verifying affidavit had also been sworn on 20 December 2022.
- [15] This position was only clarified on 6 February 2023, as it was not apparent on the face of the covering letter, the statutory demand or the verifying affidavit.
- [16] Both parties relied on written submissions when the application came on for hearing on 9 February 2023 in the Applications List. The primary judge reserved her decision and gave the parties an opportunity to put in further written submissions.
- [17] The primary judge concluded in the reasons for decision delivered on 14 April 2023 (**Primary Decision**) that “some other reason” was established to set aside the statutory demand under s 459J(1)(b) of the Corporations Act.
- [18] The Primary Decision sets out a thorough review of the relevant authorities relied upon by the parties in respect of the issues.
- [19] The review of the relevant authorities included the approach to setting aside a statutory demand for “some other reason” pursuant to s 459J(1)(b). This included that a statutory demand is to be assessed by reference to the content and purpose of the statute, particularly having regard to the requirements in s 459E(3) of the Corporations Act: that is, that a statutory demand is to be accompanied by an affidavit that verifies that the debt claimed in the demand “is due and payable”.
- [20] Further, where an affidavit is sworn before the date of the demand, the demand may be set aside for “some other reason” under s 459J(1)(b) as the affidavit is not capable of verifying the debt referred to in the statutory demand and does not meet the requirements of s 459E(3) of the Corporations Act.⁴ However, the authorities recognise that it may be possible to avoid an order setting aside the statutory demand where a further “updating” affidavit is filed within the 21-day statutory period.⁵
- [21] Where the verifying affidavit predates a statutory demand a discretion arises under s 459J(1)(b) of the Corporations Act. This is a defect “in relation to” a demand and is not a defect in the demand itself. Consequently, it is not governed by s 459J(1)(a) of

⁴ Wildtown Holdings Pty Ltd v Rural Traders Co Ltd (2002) 172 FLR 35 at [58] followed by Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd (2005) 190 FLR 466 at [54]-[56]; Ri-Co Holdings (Australia) Pty Ltd v Allied Sandblasters Pty Ltd [2010] 1 Qd R 293 at [19]-[21] and Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (2015) 104 ACSR 425 at [83] and [90].

⁵ Ambassador at Redcliffe Pty Ltd v Barreau Peninsula Property Pty Ltd [2007] 2 Qd R 199 at [21]; Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd (2005) 53 ACSR 645 at [52]; Ri-Co Holdings (Australia) Pty Ltd v Allied Sandblasters Pty Ltd [2010] 1 Qd R 293 at [19]-[23]; Wollongong Coal Ltd v Gujarat NRE India Pty Ltd (2015) 104 ACSR 425 at [84].

the Corporations Act and there is no need to show “substantial injustice” as required under that subsection.

- [22] In the Primary Decision, her Honour took into account the relevant statutory context including the specific consequences of noncompliance with a statutory demand and also the strict 21-day deadline for any application to set aside the statutory demand or compliance with the demand.
- [23] In these circumstances, her Honour concluded that the discretion should be exercised to set aside the statutory demand where:
- (a) The verifying affidavit appeared, on its face, to predate the statutory demand.
 - (b) The appellant had the opportunity, but failed, to inform the respondent of the true position before 12 January 2023, being the expiry of the 21-day time period for the respondent to apply to set aside the statutory demand.

Appellant’s position on appeal

- [24] The appellant’s submissions focus on the “true position”: that is, the evidence establishes that the two dates in the statutory demand were incorrect and that the statutory demand itself was signed on and should have been dated 20 December 2022 and reference made to the affidavit being sworn on 20 December 2022.
- [25] The appellant contends that in light of the “true position” the primary judge took the wrong approach. The appellant submits that the correct approach was that the mistake was in the statutory demand and the analysis should have been whether that was a defect such as to justify setting aside the statutory demand pursuant to s 459J(1)(a) or whether it was a “merely” a defect for the purposes of s 459J(2) of the Corporations Act.
- [26] The logic of this submission is that the application to set aside the statutory demand should have proceeded on the basis of what was ultimately proved at the hearing rather than what was known at the time the statutory demand was served and within the 21-day period.
- [27] The appellant contends that primary judge erred in proceeding under s 459J(1)(b) of the Corporations Act. Further, it submits that if the primary judge had proceeded under s 459J(1)(a) of the Corporations Act then the application should have been dismissed as the requirement of substantial injustice was not established and the incorrect date in the statutory demand was a technical or mere defect.
- [28] Accordingly, the appellant submits that the appeal should be allowed and an order made dismissing the application to set aside the statutory demand.

Respondent’s position

- [29] In response, the respondent contends that the primary judge’s decision was correct and that no error has been made out. In particular, the respondent contends that:
- (a) The primary judge was not in error in concluding that there was no way on the face of the documents that the respondent would know that the dates in the

statutory demand were incorrect.⁶ The date of the covering letter does not assist as it could equally have been incorrectly dated. Further, there is no independent way of the respondent verifying the date that the letter and documents were in fact posted as it is not apparent on the face of the documents.⁷

- (b) The primary judge was not in error in concluding that the respondent was entitled to take the documents at face value and the appellant was to bear the consequences.⁸ The respondent submits that this conclusion is entirely orthodox and is an application of the law identified through the review of the relevant authorities and statutory context.⁹

- [30] The legislative intention behind s 459E(3) of the Corporations Act is summarised at the ninth bullet point of [78] of the Primary Decision. Further, this legislative intention was described by Black J in *Re Gemaveld Pty Ltd*¹⁰ as being:

“... that a company receive in the accompanying affidavit a clear and unmistakable assertion that there is a ‘present and unconditional’ obligation to pay the debt demanded.”

- [31] Further, the respondent points to [83] of the Primary Decision, quoting Barrett J in *Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd* [2002] NSWSC 219, as further assisting in respect of this issue. At [22] and [23] Barrett J stated:

“In the light of the radical consequences which may thus result from non-compliance with a statutory demand, the value to be placed on adherence in all material respects to the statutory requirements is necessarily high.

...

What is essential is that the documents put the company on notice in an unambiguous way of all the matters the legislation requires. The creditor’s contention that the debt, as well as being a debt (that is, owing), is both due and payable is one such matter. That contention is indispensable to the full understanding the legislation requires a company receiving a statutory demand to obtain from that demand and its accompanying affidavit. ...”

- [32] The respondent also identifies some ambiguity in the appellant’s submissions as to whether there was in fact a defect in the statutory demand. This is evidenced by the appellant’s submission at [6] that there was no defect and then the submission at [13] that “[w]hat occurred is a classic example of where a situation has arisen ‘merely because of a defect’”.

- [33] However, the respondent contends that the starting point is that the primary judge did not set aside the statutory demand “merely because of a defect”.¹¹ The respondent

⁶ Conclusion at [100] of the Primary Decision

⁷ The affidavit of Corey Radcliff affirmed 6 February 2023 provides some evidence of when the documents were posted.

⁸ Conclusion at [108] of the Primary Decision.

⁹ Including, in particular, the legislative intention of s 459E(3) of the Corporations Law.

¹⁰ [2012] NSWSC 582 at [12].

¹¹ Section 459J(2) of the Corporations Act.

submits that this is clear from her Honour's reasons at [60], [96], [104] and [108]. The primary judge clearly proceeded to set aside the demand because of "some other reason" within the meaning of s 459J(1)(b) of the Corporations Act.

[34] The respondent submits that the factual circumstances here, to the extent that they can be characterised as involving a "defect" within s 459J(2), are not a mere defect. Rather, the factual circumstances here are more properly characterised as being that where:

"the defect operated in the particular circumstances in a manner which provided good reason for intervention".¹²

[35] This characterisation of a defect as a basis for "some other reason" was considered and referred to by the primary judge at [60] of the Primary Decision.

[36] Further, the respondent submits that as the primary judge was proceeding under s 459J(1)(b) of the Corporations Act there was no error by her Honour in not considering the issue of "substantial injustice". Her Honour correctly recognised that "substantial injustice" is only relevant under s 459J(1)(a) of the Corporations Act.

[37] The respondent also submits that the primary judge was not in error in concluding at [105] of the Primary Decision that the circumstances involved a defect "in relation to" the demand, and not merely a defect "in the demand".

[38] Her Honour accepted the submission that the erroneous date in the demand undermined the verifying affidavit's capacity to give the clear and unmistakable verification that the debt specified in the demand "is" due and owing as required by s 459E(3) of the Corporations Act. That is, the error in the date in the statutory demand impeded the affidavit operating to verify the debt as being due and owing to the necessary level of certainty.

[39] This analysis recognises that the error in the date in the statutory demand impacted the verification of the debt as required by s 459E(3) of the Corporations Act, thereby providing the basis for "some other reason" to set aside the statutory demand.

[40] The respondent contends that the appellant:

(a) fails to engage with the analysis and application of the relevant law undertaken by the primary judge in the Primary Decision; and (b) has failed to demonstrate an error.

[41] Ultimately, the respondent submits that the primary judge's exercise of the discretion was not in error. The respondent submits that it was a proper exercise of the discretion pursuant to s 459J(1)(b) of the Corporations Act to set aside the statutory demand where (despite the actual date that the statutory demand was signed):

(a) the verifying affidavit appeared, on its face, to pre-date the statutory demand; and

¹² Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd (1998) 29 ACSR 11 at 17.

- (b) the appellant had the opportunity, but failed, to inform the respondent of the true position before expiry of the deadline for the respondent to apply to set aside the statutory demand.

Consideration

[42] It is evident from the Primary Decision that:

- (a) the primary judge clearly understood the relevant facts. Her Honour proceeded on the basis that:
- (i) the statutory demand was actually signed on 20 December 2022 and the verifying affidavit was also sworn on 20 December 2022;
 - (ii) the error in the date of the statutory demand was not apparent on the face of the statutory demand and the verifying affidavit;
 - (iii) the inconsistency in the dates was raised with the solicitors for the appellant promptly and prior to the expiry of the 21-day statutory period;
 - (iv) the solicitors for the appellant unambiguously confirmed that there was no defect in the statutory demand;
 - (v) within the 21-day statutory period no steps were taken to “correct” the error in the dates in the statutory demand or to “update” the verifying affidavit;
- (b) the primary judge concluded that the failure to correct the “false impression” on the face of the statutory demand and the verifying affidavit was relevant to whether “some other reason” was established for the purposes of s 459J(1)(b) of the Corporations Act;
- (c) section 459J(1)(a) of the Corporations Act was not applicable as the facts did not give rise to a defect “in the demand” and consequently it was not necessary to consider whether there was “substantial injustice”;
- (d) there was a defect “in relation to” the statutory demand in the sense that the discrepancy between the date of the verifying affidavit and the error in the date in the statutory demand undermined the verifying affidavit, therefore meeting the requirement of s 459E(3) of the Corporations Act; and
- (e) consistent with the authorities and in the statutory context, this was “some other reason” within s 459J(1)(b) of the Corporations Act and in the circumstances the statutory demand should be set aside.

[43] Consequently, the appellant has not established any error in the primary judge proceeding under s 459J(1)(b) of the Corporations Act or in the exercise of the discretion.

[44] Even though the actual date of the statutory demand was the error as established by the evidence ultimately provided just prior to the hearing, that position was not rectified within the statutory timeframe.

[45] The incongruence between the date of the verifying affidavit and the statutory demand apparent on the face of those documents, together with the confirmation by the

solicitors for the appellant that there was no defect in the statutory demand, impeded the verifying affidavit from providing a clear and unmistakable assertion that there was a present and unconditional obligation to pay the debt demanded.¹³

[46] These circumstances were a sufficient basis to be satisfied of “some other reason” to set aside the statutory demand pursuant to s 459J(1)(b) of the Corporations Act.

[47] Accordingly, the appeal must fail and it is not necessary to consider the alternative ground identified in the notice of contention.

Orders

[48] The appropriate orders are:

1. Appeal dismissed.
2. The respondent is to file any submissions on costs, limited to three pages, within 14 days of the date on which the reasons for judgment are published.

¹³ As discussed in *Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd* [2002] NSWSC 219 at [22] and [23].

3. The appellant is to file any submission in response, limited to three pages, within 14 days of receipt of the respondent's submissions.
4. The question of costs will be determined on the papers.