SUPREME COURT OF QUEENSLAND

CITATION:	*Plate Impressions Pty Ltd v JRL Consortium Group Pty Ltd* [2016] QSC 274
PARTIES:	**PLATE IMPRESSIONS PTY LTD ACN 105 262 637** (applicant) **v** **JRL CONSORTIUM GROUP PTY LTD ACN 151 231 720 AS TRUSTEE FOR THE CONSORTIUM GROUP TRUST** (respondent)
FILE NO/S:	No 5441 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 November 2016 (reasons and directions); 5 December 2016 (final orders)
DELIVERED AT:	Brisbane
HEARING DATES:	10 June 2016; 3 August 2016 Respondent's further submissions dated 10 June 2016; Supplementary Outline of Submissions on behalf of the applicant dated 13 June 2016; Further Supplementary Outline of Submissions on behalf of the applicant dated 1 December 2016
JUDGE:	Burns J
ORDER:	**The orders of the court are that:** **1. The statutory demand served by the respondent on the applicant and dated 9 May 2016 is, pursuant to s 459H of the *Corporations Act* 2001 (Cth), set aside;** **2. The respondent shall pay the applicant's costs of and incidental to the application to be calculated on the standard basis.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – THE DEMAND – SERVICE OF DEMAND – where the respondent issued a draw down notice to the applicant pursuant to a loan facility agreement – where the applicant refused to pay the sum sought – where the respondent then served on the applicant a demand pursuant to s 459G of the *Corporations Act* 2001 (Cth)

– where the demand was served via post pursuant to s 109X of the *Corporations Act* 2001 (Cth) – where there was a dispute as to the date of delivery of the demand – whether the application to set aside was brought within the time limit provided by s 459G(2) – whether the court has jurisdiction to entertain the application

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SOME OTHER REASON – where the respondent issued a draw down notice to the applicant pursuant to a loan facility agreement – where the applicant refused to pay the sum sought – where the respondent then served on the applicant a demand pursuant to s 459G of the *Corporations Act* 2001 (Cth) – whether the verifying affidavit failed to comply with the requirements of s 459E(3) of the *Corporations Act* 2001 (Cth) because it purported to verify a different debt to that described in the demand – whether the demand should be set aside for "some other reason" pursuant to 459J(1)(b) of the Act

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – SUBSTANTIAL INJUSTICE – where the respondent issued a draw down notice to the applicant pursuant to a loan facility agreement – where the applicant refused to pay the sum sought – where the respondent then served on the applicant a demand pursuant to s 459G of the *Corporations Act* 2001 (Cth) – where the creditor was misnamed in the demand – whether that defect caused substantial injustice to the applicant debtor – whether the demand should be set aside pursuant to s 459J(1)(a) of the Act

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – OFFSETTING AND OTHER LIKE CLAIMS – GENERALLY – where the respondent issued a draw down notice to the applicant pursuant to a loan facility agreement – where the applicant refused to pay the sum sought – where the respondent then served on the applicant a demand pursuant to s 459G of the *Corporations Act* 2001 (Cth) – whether there is a genuine dispute regarding the existence or amount of the debt to which the demand relates within the meaning of s 459H(1)(a) of the Act – whether the applicant has an offsetting claim against the respondent within the meaning of s 459H(1)(b) of the Act

Acts Interpretation Act 1901, s 29
Corporations Act 2001 (Cth), s 5C, s 9, s 109X, s 459E, s 459G, s 459H, s 459J

Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation [2005] ACTCA 3; (2005) 157 ACTR 22, cited
Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd [2008] HCA 9; (2008) 232 CLR 314, followed
B & M Quality Constructions Pty Ltd v WG Brady Pty Ltd (1994) 116 FLR 218, cited
Derma Pharmaceuticals Pty Ltd v HSBC Bank Australia Ltd [2005] SASC 48; (2005) 188 FLR 373, cited
Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACLC 669, followed
Fancourt v Mercantile Credits Ltd [1983] HCA 25; (1983) 154 CLR 87, followed
John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd (1994) 14 ACSR 250, followed
Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd (1998) 29 ACSR 11, cited
Lane Cove Council v Geebung Polo Club Pty Ltd (No 2) (2002) 41 ACSR 15, followed
Meehan v Glazier Holdings Pty Ltd [2005] NSWCA 24; (2005) 53 ACSR 229, followed
Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd [1996] NSWSC 199; (1996) 132 FLR 300, cited
Re Morris Catering (Australia) Pty Ltd (1993) 11 ACSR 601, followed
Re Scandon Pty Ltd (1996) 14 ACLC 124, cited
Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd [1997] FCA 681; (1997) 76 FCR 452, followed
Topfelt Pty Ltd v State Bank of NSW Ltd [1993] FCA 589; (1993) 47 FCR 226, cited

COUNSEL:	D de Jersey for the applicant N J Shaw for the respondent
SOLICITORS:	Thynne & Macartney for the applicant Vantage Law for the respondent

[1] This application concerns a loan facility agreement for a townhouse development in Sherwood.

[2] The agreement was entered into by the applicant, Plate Impressions Pty Ltd, as lender with the respondent, JRL Consortium Group Pty Ltd as trustee for the Consortium Group Trust, as borrower on 21 October 2015. Two earlier, and similar, agreements had been entered into by the respondent with other lenders. Each agreement was secured by a registered mortgage in favour of the lender. Under the agreement to which the applicant was a party, the respondent was entitled to draw down funds up to a limit of $500,000.

Prior to the commencement of this proceeding, $166,000 had been drawn down under the agreement.

[3] The respondent is misnamed in the agreement as "JRL Consortium Pty Ltd ACN 151 231 720 as trustee for the JRL Consortium Group Trust"; the word "Group" has been omitted. The relevant bill of mortgage however correctly names the mortgagor as "JRL Consortium Group Pty Ltd ACN 151 231 720 as trustee…".

[4] On 12 April 2016, the respondent issued the applicant with a drawdown notice in the sum of $280,250.41. On the following day, the applicant received a report from a quantity surveyor which raised a number of issues. The applicant then refused to pay the sum sought in the drawdown notice.

[5] Under cover of a letter dated 9 May 2016, the solicitors for the respondent served a demand on the applicant pursuant to s 459G of the *Corporations Act* 2001 (Cth) together with an affidavit sworn by its director, Mr Lewington. By its terms, the demand required payment of the sum sought under the drawdown notice within 21 days.

[6] By the originating application, the applicant seeks an order pursuant to s 459G CA setting aside the demand. It contends that the demand is defective and, in any event, that there is a genuine dispute or offsetting claim with respect to the sum demanded. The respondent, on the other hand, maintains that it served a valid demand and dismisses the applicant's contentions about the existence of a dispute or offsetting claim as being either unsupported or immaterial to the applicant's obligations under the agreement.

[7] Before turning to the parties' respective contentions, it is necessary to deal first with a preliminary issue that has been raised by the respondent, because it goes to the jurisdiction of the court to entertain this application.

Jurisdiction

[8] Section 459E CA allows a person to serve a statutory demand on a company with respect to a debt owed by the company to that person where the debt is "due and payable"[1] and in an amount that is at least the statutory minimum.[2] To be effective, a demand must conform to the following requirements specified in sub-s (2) and sub-s (3):

> "(2) The demand:
>
> (a) if it relates to a single debt--must specify the debt and its amount; and
>
> (b) if it relates to 2 or more debts--must specify the total of the amounts of the debts; and
>
> (c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within 21 days after the demand is served on the company; and
>
> (d) must be in writing; and
>
> (e) must be in the prescribed form (if any); and

---

1 Section 459E(1) CA.

2 The statutory minimum is defined to be $2,000: s 9 CA.

(f) must be signed by or on behalf of the creditor.

(3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:

(a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and

(b) complies with the rules.

…"[3]

[9] Where a demand is served on a company and the company disputes the demand, the company must apply within 21 days to set aside the demand. There is no power to extend this time once it has expired.[4] The governing provision is s 459G CA. It is in these terms:

"(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 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."

[10] Here, the applicant contends that the statutory demand and accompanying affidavit were served on Thursday, 12 May 2016. If that is accepted, the application was made within the time limit provided under s 459G(2) CA, because it was filed on 1 June 2016 and served the next day. The respondent however contends that the demand and affidavit were served on Tuesday, 10 May 2016 and, if that is so, the application was made too late and the court will not have jurisdiction to entertain it.

[11] Section 109X CA relevantly provides that a document may be served by "leaving it at, or posting it to, the company's registered office".[5] That is what happened here; the respondent's solicitors posted the demand and accompanying affidavit to the registered office of the applicant – Unit 2, 93 Commercial Road, Newstead. What is not so clear is when service should be regarded as having been effected.

[12] In that regard, reference must be had to s 29(1) of the *Acts Interpretation Act* 1901 (Cth) which provides as follows:[6]

"Where an Act authorizes or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary

---

3 Sections 459E(2) and 459E(3) CA.

4 *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2008] HCA 9; (2008) 232 CLR 314.

5 Section 109X(1)(a) CA.

6 See also *Lane Cove Council v Geebung Polo Club Pty Ltd (No 2*) (2002) 41 ACSR 15 at [42] per Barrett J; *Derma Pharmaceuticals Pty Ltd v HSBC Bank Australia Ltd* [2005] SASC 48; (2005) 188 FLR 373.

course of post."[7]

[13] Thus, unless the contrary is proved, service of the demand and accompanying affidavit in this case shall be deemed to have been effected at the time when the letter enclosing those documents "would be delivered in the ordinary course of the post". In that regard, it is to be observed that the focus of the provision is on delivery rather than on receipt and, as such, the contrary proof to which the provision is concerned is proof concerning delivery rather than proof concerning receipt.[8]

[14] Affidavit evidence on this topic was received on the hearing of the application from both sides. No application was made for leave to cross-examine any of the deponents.

[15] The respondent relied on an affidavit from its solicitor, Mr Dahl. It was to the effect that he posted the demand and accompanying affidavit together with his covering letter by express post to the registered office of the applicant on 9 May 2016. He swore that he placed those documents in a properly addressed and prepaid "Express Post Envelope", sealed it and then personally attended the Australia Post office in Wamuran on the afternoon of 9 May. There he handed the envelope to an Australia Post employee and, in return, he was supplied with an "Article Lodgement receipt". The receipt, as well as the envelope, bore a unique tracking number. Mr Dahl subsequently used this tracking number to track the progress of the envelope through the delivery system by logging onto an Australia Post website. According to the website, the envelope is recorded as being received by Australia Post at Wamuran at 4:18 pm on 9 May 2016, with "Australia Post for delivery" at 7:27 am on 10 May 2016 at "Albion, Qld", and "delivered" at 2:09 pm on 10 May 2016 at "Albion, Qld".

[16] After service of the originating application and supporting affidavit material on 2 June 2016, Mr Dahl read that it was contended on behalf of the applicant that the envelope had not been delivered until 12 May 2016. He telephoned an Australia Post customer service representative to discuss that issue. By reference to the respective postcodes, the service representative told him that the envelope had been posted to a "next day delivery guarantee area". By reference to the tracking number, she confirmed that, according to the records of Australia Post, delivery occurred at 2:09 pm on 10 May 2016. When questioned as to "how accurate the information was when the recipient states otherwise", the representative told Mr Dahl that 2:09 pm was the time when the envelope "left our hands and [was] delivered to the address". Mr Dial asked her how this "can be investigated further", but was advised that a "Delivery Issue enquiry" could only be "initiated by the recipient".

[17] It is to be noted that the affidavit does not supply any explanation for why the delivery location appears in the records as "Albion, Qld", when the recipient's address was Newstead but, based on what Mr Dahl has deposed regarding his conversation with the customer service representative, it seems to me to be likely that the reference to "Albion, Qld" is a reference to the location of the Australia Post distribution centre from where the envelope was collected for delivery to recipient's address in Newstead. How or when that occurred is not revealed. The obvious point is that the records exhibited to Mr Dahl's affidavit would not appear to record the time or date of actual delivery of the envelope in

---

7 By s 5C(2) CA, the *Acts Interpretation Act* 1901 (Cth) applies.

8 *Lane Cove Council v Geebung Polo Club Pty Ltd (No 2*) (2002) 41 ACSR 15 at [43] per Barrett J. And see *Fancourt v Mercantile Credits Ltd* [1983] HCA 25; (1983) 154 CLR 87 at 96-97.

Newstead. Rather, it is likely that they record the time and date when the envelope left "Albion, Qld". That is the location where, to use the customer service representative's words, the envelope "left [their] hands". Accordingly, Mr Dahl's affidavit does not go so far as to prove the time and date when the envelope was actually delivered to the applicant's address in Newstead.

[18] That said, although I am not satisfied that the evidence adduced on behalf of the respondent establishes when the envelope containing the demand and accompanying affidavit was delivered to the registered office of the applicant, the respondent is still entitled to, and does, rely on the deeming effect of s 29(1) of the *Acts Interpretation Act*. In that respect, based on what the customer service representative told Mr Dahl, the envelope would have been delivered in the "ordinary course of the post" on 10 May 2016. The onus is then on the applicant to attempt to displace that presumption.

[19] To do so, the applicant relies on an affidavit from its financial controller, Ms Frazer, together with an affidavit from its receptionist, Ms Sassella.

[20] Ms Frazer swore that she was in Sydney on 10 and 11 May 2016 but in the applicant's office at Newstead on 12 May. At approximately 4 pm, Ms Sassella came to see her with the demand, accompanying affidavit and covering letter from the respondent's solicitors. She asked Ms Frazer what to do with the documents and was told to date stamp them and hand them to her. Ms Frazer wanted to give the documents to Mr George, a director of the applicant. However, as Mr George was not in the office at that time, Ms Frazer emailed a scanned copy of the documents to him. That occurred at approximately 4:23 pm on 12 May 2016.

[21] Ms Sassella's duties required her to collect, open and stamp the mail that the applicant received each day. In her affidavit, she swore that she would "check the post box at the front of the building at about 10 am each day and again at about 2:30 pm to 3 pm each day". She confirmed that Mr George and Ms Frazer were in New South Wales on 10 and 11 May 2016. However, she was in the office on those days and checked the post box "twice each day on both of those days". She swore that the "letter from JRL Consortium Group Pty Ltd … with the statutory demand was not in the post box on 10 May or 11 May 2016". On 12 May 2016, she again checked the post box on two occasions. The "second time" she checked, at around 3 pm, there "was a letter in an express post envelope with the statutory demand and an affidavit". She took this "paperwork" to Ms Frazer who told her to date stamp it and give it to Ms Frazer so that she could provide it to Mr George.

[22] It was submitted on behalf of the respondent that Mr Dahl's affidavit established "the fact of delivery" of the demand and accompanying affidavit on 10 May 2016. For the reasons I have already expressed, I do not accept that submission; the evidence establishes when the envelope containing those documents left "Albion, Qld", but it does not establish when it was delivered to the address of the applicant's registered office in Newstead. It was also submitted on behalf of the respondent that the evidence adduced on behalf of the applicant could not "exclude the possibility that delivery was effected prior to 12 May 2016 and only establishes that the [documents] came to the attention of employees of the applicant on 12 May 2016." I disagree. Ms Sassella checked the applicant's postbox twice per day on 10, 11 and 12 May 2016. Importantly, she deposed that the envelope was not in the postbox until the "second time" she checked on 12 May 2016, at around 3 pm. Because the evidence adduced on behalf of the respondent does not go to the proof of

actual delivery, Ms Sassella's evidence in these respects stands alone and should be accepted.

[23] I find that the envelope containing the demand and affidavit was delivered to the address of the registered office of the applicant at some time between the two occasions when Ms Sassella checked the postbox on 12 May 2016. I am therefore satisfied that the applicant has proved the contrary of the statutory presumption, that is to say, that the envelope containing the demand and affidavit was not delivered in the ordinary course of the post but, instead, was delivered on 12 May 2016. That was when the demand and affidavit were served.

[24] It follows that this application has been made within the time limit provided by s 459G(2) CA and, as such , the court has jurisdiction to entertain it.

[25] I turn then to the grounds advanced by the applicant to set aside the demand.

Consideration

[26] For the applicant, it was submitted that the demand should be set aside because:

(a) the affidavit accompanying the demand does not verify the debt that is claimed by the respondent to be owing;

(b) the demand contains an irregularity in the identification of the applicant that works a substantial injustice; and

(c) There is a genuine dispute as to the debt referred to in the demand as well as an offsetting claim.

[27] These submissions seek to engage s 459H CA (as to (c) above) and s 459J CA (as to (a) and (b) above). Those provisions are in these terms:

> "**Determination of application where there is a dispute or offsetting claim**
>
> **459H**
>
> (1) **[Application of section]** This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:
>
> (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
>
> (b) that the company has an offsetting claim.
>
> (2) **[Formula for calculating the substantiated amount of demand]** The Court must calculate the substantiated amount of the demand in accordance with the formula:
>
> Admitted total — Offsetting total
>
> where:
>
> ***admitted total*** means:
>
> (a) the admitted amount of the debt; or
>
> (b) the total of the respective admitted amounts of the debts;
>
> as the case requires, to which the demand relates.

offsetting total means:

(a) if the Court is satisfied that the company has only one offsetting claim — the amount of that claim; or

(b) if the Court is satisfied that the company has 2 or more offsetting claims — the total of the amounts of those claims; or

(c) otherwise — a nil amount.

(3) **[When court must set aside demand]** If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.

(4) **[Court's power where substantiated amount meets statutory minimum]** If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(5) **[Definitions]** In this section:

admitted amount, in relation to a debt, means:

(a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt — a nil amount; or

(b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt — so much of that amount as the Court is satisfied is not the subject of such a dispute; or

(c) otherwise — the amount of the debt.

offsetting claim means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

respondent means the person who served the demand on the company.

(6) **[Effect]** This section has effect subject to section 459J.

Setting aside demand on other grounds

459J

(1) **[Court's power to set aside demand]** On an application under section 459G, 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) **[When court must not set aside demand]** Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

Verification of the debt

[28] As earlier mentioned, s 459E(3) CA requires the demand to be accompanied by an affidavit verifying that the debt is due and payable by the company. The applicant argues that the affidavit accompanying the demand in this case does not comply with this requirement, because the demand claims that there is a debt due and payable by the applicant "pursuant to a drawdown notice issued by the creditor to the company under a Facility Agreement between the company and the creditor dated 21 October *2016*" whereas the affidavit of Mr Lewington refers to the debt as being "in relation to a draw down request under a Facility Agreement dated 21 October *2015*". Thus, as counsel for the applicant submitted, the "affidavit and the … demand purport to reference differently dated facility agreements".

[29] It is clear that the date specified for the agreement in the demand is wrong. This is a defect in the demand within the meaning of s 9 CA,[9] but the court must not set aside a demand merely because of a defect.[10] It will only be where the court is satisfied that a substantial injustice will be caused because of a defect that the court may order that the demand be set aside.[11] To be clear, I do not accept as correct the proposition that a defect in a demand may lead to its setting aside in the absence of substantial injustice.

[30] Here, it cannot be seriously suggested that the defect in the demand has caused any injustice, let alone substantial injustice. The mistake as to the year of the agreement was an obvious one. There is no evidence of any agreement between the parties other than the one entered into on 21 October 2015. The amount specified in the schedule to the demand is the same as the amount that is sought in the draw down notice. There is no evidence that the applicant was confused as to the debt referred to in the demand or that it was in any way prejudiced in its response to the demand because of the mistake. Indeed, the correspondence that passed between the solicitors for the parties after service of the demand makes it clear that there was no confusion at all as to the debt in issue.

[31] Of course, the applicant does not rely on the defect in the demand to set it aside. Instead, it points to the different descriptions (by year) of the debt verified by the affidavit and the debt claimed in the demand to ground its attack. It argues that the affidavit fails to comply with the requirements of s 459E(3) CA because it purports to verify a different debt to that described in the demand. Because of this, the applicant submits that there is "some other reason why the demand should be set aside": s 459J(1)(b) CA.

[32] Although the language of s 459J(1)(b) CA – "some other reason" – appears at first glance to be of wide import, the legislative intent of Pt 5.4 of the Act is such that the court must be satisfied that a "sound or positive ground or good reason" exists before setting aside a demand under this provision.[12] As Young CJ in Eq remarked in *Meehan v Glazier*

---

9 By s 9 CA, a defect, in relation to a statutory demand, includes "a misdescription of a debt or other matter".

10 Section 459J(2) CA. And see *Topfelt Pty Ltd v State Bank of NSW Ltd* [1993] FCA 589; (1993) 47 FCR 226.

11 Section 459J(1)(a). And see *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452 at 457-458.

12 *Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* [1996] NSWSC 199; (1996) 132 FLR 300 at 311 per Bryson J; *Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd* (1998) 29 ACSR 11 at 18 per Austin J; *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24; (2005) 53 ACSR 229 at [35] per Santow JA (with whom Tobias JA and Young CJ in Eq agreed).

Holdings Pty Ltd:[13]

> "Although the wording of s 459J(1)(b) of the *Corporations Act* appears wide, its context and history requires reading it down to encompass in general terms only cases where the Court is satisfied that injustice will be caused unless the demand is set aside because of a defect relating to, but not in, the demand.
>
> …
>
> It is not possible to set out fully the cases that might fall within s 459J(1)(b) nor if it were possible would it be wise to do so. The sort of case that will be covered will include gross defects in supporting affidavits and documentation and where the alleged creditor has made statements or representations relating to the statutory demand which have reasonably induced a change of the alleged debtor's position.
>
> A judge is not at liberty to set aside a demand under s 459J(1)(b) merely because he or she subjectively considers it fair to do so."[14] [citations omitted]

[33] I respectfully agree with these remarks. Section 459J(1)(b) is not concerned with trifles. Before the provision may be called in aid to set aside a demand, the court must be satisfied that the reason advanced to justify such a course is one of real substance.

[34] That, however, is not the case here. The deponent of the affidavit describes the debt claimed by the respondent with reference to the correct date and swears that it is due and payable. Otherwise, the affidavit complies in all respects with the prescribed form.[15] The argument that the affidavit verifies a different debt to that claimed in the demand must be rejected. The mistake as to the year of the agreement in the description of the debt in the demand was, as I have already held, obvious. The demand should be read and understood, as I have no doubt it was by the applicant, as a reference to the agreement entered into by the parties on 21 October 2015. Considered in that way, the affidavit verifies the same debt. The requirements of s 459E(3) CA were accordingly met.

[35] This ground for setting aside the demand fails.

Misdescription of the creditor

[36] It will be recalled that the word "Group" was omitted from the name of the respondent in the agreement.[16] That omission appears to have been carried over in the drafting of the demand where, like the agreement, the respondent is named "JRL Consortium Pty Ltd ACN 151 231 720 as trustee for the JRL Consortium Group Trust".[17] All other particulars including the Australian Company Number are correct.

[37] This misnomer is, again, a defect in the demand within the meaning of s 9 CA.[18] The applicant submits that the existence of this defect "works a substantial injustice" because, amongst other things, "the demand … does not enable the recipient to comply with it without harbouring doubt as to where the payment is to be directed". It was submitted

---

13 [2005] NSWCA 24; (2005) 53 ACSR 229.

14 Ibid [58], [60]-[61]. And see *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* [2005] ACTCA 3; (2005) 157 ACTR 22 at [27].

15 Form 509H.

16 See [3] above.

17 The same error was made in the verifying affidavit.

18 By s 9 CA, a defect, in relation to a statutory demand, includes "a misdescription of a person or entity".

that this amounts to "some other reason" why the demand should be set aside pursuant to s 459J(1)(b) CA.[19]

[38] This argument can be disposed of briefly. It meets the immediate difficulty that, because the applicant relies on a "defect in the demand", s 459J(1)(b) CA can have no application. Rather, the applicant must look to s 459J(1)(a) CA for relief. But, as already discussed, the court must be satisfied that a substantial injustice was caused because of the defect before it may set the demand aside.[20] The applicant cannot do that and, perhaps for that reason, the ground was not pressed by its counsel in oral submissions.[21]

[39] This ground for setting aside the demand also fails.

A dispute or offsetting claim?

[40] The final ground advanced by the applicant to set aside the demand relies on s 459H(1) CA. The applicant maintains that there is a genuine dispute between the respondent and it about the existence or amount of the debt to which the demand relates and/or that it has an offsetting claim.

[41] The onus is on the applicant to establish that there is a genuine dispute or offsetting claim. In that regard, it is not enough to simply assert in a supporting affidavit that there is a genuine dispute; the evidence, although by no means needing to amount to comprehensive proof, must be such as to persuade the court that the dispute or claim has a proper factual basis.[22] In *Re Morris Catering (Australia) Pty Ltd*,[23] Thomas J remarked:

> "There is little doubt that [the legislation] … prescribes a formula that requires the Court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the Court will examine the merits or settle the dispute. The specified limits of the Court's examination are the ascertainment of whether there is a 'genuine dispute' and whether there is a 'genuine claim'.
>
> It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the Court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another."[24]

[42] Similarly, in *Eyota Pty Ltd v Hanave Pty Ltd*,[25] McLelland CJ in Equity observed:

> "It is, however, necessary to consider the meaning of the expression 'genuine dispute' where it occurs in [s 459H]. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the 'serious question to be tried' criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat.

---

19 In support of this submission, the applicant relied on *B & M Quality Constructions Pty Ltd v WG Brady Pty Ltd* (1994) 116 FLR 218 and *Re Scandon Pty Ltd* (1996) 14 ACLC 124.

20 *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452 at 457-458.

21 T. 1-21.

22 *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250.

23 (1993) 11 ACSR 601.

24 Ibid 605.

25 (1994) 12 ACLC 669.

> This does not mean that the Court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be' not having 'sufficient prima facie plausibility to merit further investigation as to (its) truth' (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence': (cf *South Australia v Wall* (1980) 24 SASR 189 at 194).
>
> But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute. In *Mibor Investments* (at ACLC 1066; ACSR 366-7) Hayne J said, after referring to the state of the law prior to the enactment of Div 3 of Pt 5.4 of the Corporations Law, and to the terms of Div 3:
>
> > 'These matters, taken in combination, suggest that at least in most cases, it is not expected that the Court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the Court conclude that there is a dispute and that it is a genuine dispute.'"[26]

[43] In short, and to adopt the remarks of the Full Federal Court in *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd*, a genuine dispute requires that "the dispute be bona fide and truly exist in fact" and that the "grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived".[27] Much the same approach applies to the court's assessment of the substance of an offsetting claim.[28]

[44] Those principles stated, the applicant argues that there is a genuine dispute about the existence of the debt to which the demand relates as well as an offsetting claim. In particular, it is contended that the respondent is in breach of the agreement in a number of respects and that there is, in any event, a claim against the respondent for misleading or deceptive conduct arising out of certain pre-contractual representations that were made regarding the overall cost of construction. It is convenient to deal with the second of those contentions first.

[45] The problem with the representations claim is the evidence. Mr George deposes to having received a copy of what is described as a "Pre-Commencement Report" from Herron Todd White prior to "agreeing to provide the funding facility to the respondent" and then asserts that it was represented by the respondent to the applicant that (a) the "total construction cost for the development would be in the order of approximately $1,200,000" and (b) apart from the funding which the other lenders had agreed to provide, the respondent "had sufficient funding in place to complete construction of the development at that budgeted cost". However, Mr George has not deposed to whether the representations were made by the provision of the report or in some other written or oral

---

26 Ibid 787.

27 [1997] FCA 681; (1997) 76 FCR 452 at 464.

28 The expression, "offsetting claim", is defined in s 459H(5) to mean "a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates)".

manner, who provided the report or otherwise made the representations, when the representations were made, whether the applicant relied on them or how it is that the applicant has suffered any loss in consequence.

[46] To the unsatisfactory state of the evidence may be added that there is nothing in the Herron Todd White report to suggest that it consisted of anything more than an "indicative estimate of the construction cost budget (for checking purposes)". Even then, it was made clear that the estimate – $1,280,606 inclusive of GST – was not based on a full review of all relevant plans. Furthermore, the agreement contains an "entire agreement" provision by which the parties agreed that, relevantly, any pre-contractual representations not incorporated in the agreement would not bind them and "may not be relied on by them".[29]

[47] On the evidence advanced to the court to support the representations claim, I am unpersuaded that it is possessed of sufficient merit to conclude that there is a genuine dispute or offsetting claim. Of more substance, however, is the contention that there is a genuine dispute regarding the applicant's claim that the respondent is in breach of the agreement. In that regard, it is necessary to say something about the course of events revealed by the evidence.

[48] In early March 2016 the applicant was informed by the respondent that the construction costs for the development had been revised upwards from the initial projected costs of $1,280,606 to $1,691,000, with the major component being civil works construction costs of $387,734, which the respondent said had not been included in the initial projection. Leaving aside the reliability of the initial projection, the applicant's perception at least was that the construction costs had "blown out". Accordingly, it commissioned a report from a quantity surveyor to which I have earlier made reference.[30] It was provided on 13 April 2006, one day after the drawdown notice was issued.

[49] The contended effect of the opinions expressed by the quantity surveyor in that report was summarised in a letter from the applicant's solicitors to the respondent's solicitors dated 22 April 2016,[31] which summary was later incorporated in the written submissions on behalf of the applicant:[32]

> "1. the original cost of construction of the development was inaccurate, in that a reasonable estimate for the cost of construction was in the order of $1,500,000 not the $1,200,000 which was represented;
>
> 2. many of the costs and rates attributed to various items in the draw down notices were well outside acceptable rates;
>
> 3. there is no justification for any claim for a variation of the building contract;
>
> 4. the cost of the work actually completed by the builder to [22 April 2016] was $440,067.00 plus GST which was significantly less than the amount already claimed by [the respondent] and paid under draw down notices and less than half of the total amount for which [the respondent] has submitted draw down notices;
>
> 5. the builder was overpaid for work completed to [22 April 2016];

---

29 Clause 17.2

30 Above at [4].

31 Affidavit of Peter Alexander Jolly filed 1 June 2016, Exhibit RAJ-1.

32 Outline of Submissions on behalf of the Applicant at par 32.

…

7. the standard of work completed on the site is not good;

8. an estimate of the cost of the works required to complete the project was $1,072,570.00."

[50] The steps subsequently taken and the correspondence (by email and letter) that later passed between the respective solicitors for the parties leaves me in no doubt that a dispute arose with respect to each of the above matters. Indeed, it must be said that the respondent, through its director, Mr Lewington, rejects each of the propositions underlying the quantity surveyor's opinion. I am satisfied that, at the time when the demand was served, there was a genuine dispute about these matters.

[51] However, for the respondent, it was submitted in writing that:

> "[These] questions need not be decided because there is nothing in the facility agreement that makes payment of a drawing conditional on the value of the work performed being any particular sum. The effect of the funding agreement is that the respondent may draw funds as and when they are required and commence paying interest from the date the funds are drawn. The applicant has no right under the contract to inquire into the amount, value or quality of the work performed".[33]

[52] In oral submissions, the respondent's counsel repeated the submission that the court "need not decide [these] questions of fact".[34] It was submitted that, although there was "a genuine dispute about those matters, ... that has nothing to do with the debt".[35] It was argued that the applicant, as lender, was simply obliged to pay a call. In particular, it was submitted that the right to a drawdown under the agreement was not conditional on the work "having been performed or being of a particular value".[36] It was submitted that the applicant was a "funder who unconditionally agreed to give money when it was asked for".[37]

[53] These submissions do not withstand scrutiny.

[54] Under the agreement, the facility is only to be used by the respondent for the purpose of financing the construction of the building works.[38] Furthermore, the "commitment" represented by the applicant's obligation to pay up to the limit of the facility ($500,000) would be "automatically postponed" on an event of default unless otherwise agreed to by the applicant in writing.[39] An event of default is defined to mean a number of things[40] and, amongst them, is a failure on the part of the respondent to "perform any other undertaking or obligation" under, relevantly, the agreement.[41] One of those obligations is obviously to apply funds advanced for the sole purpose of the building works.[42] Another is to "expeditiously and without intermission … erect and complete the building work on

---

33 Respondent's Outline of Submissions at par 14.
34 T. 1-29 l. 1.
35 T. 1-29 ll. 14-15.
36 T. 1-30 ll 6-7.
37 T. 1-31 l. 27.
38 Clauses 2.2 and 10.2(f).
39 Clause 2.4.
40 Clause 11.1.
41 Clause 11.1(b).
42 Clauses 2.2 and 10.2(f).

the development land in accordance of the best skills and practices and to the satisfaction of" the applicant.[43] Otherwise it is simply not accurate to submit, as it was, that the applicant has no ability under the agreement to inquire about the amount, value or quality of the work being performed; the respondent was obliged under the agreement to provide the applicant with "any information in relation to the building work which the [applicant] requires from time to time".[44] Indeed, the applicant is empowered to enter on the property and take over the building works after an event of default under the agreement.[45]

[55] Perhaps even more fundamentally, the nature of the facility manifested by the agreement was not one under which the applicant was "obliged to pay at call" and, contrary to the submission made on behalf of the respondent, the applicant did not unconditionally agree to give money when asked. Rather, the applicant was not obliged to respond to the issue of a drawdown notice where there was, relevantly, an event of default.[46]

[56] It is not possible, nor desirable, to express any view about whether the matters in dispute which were summarised in the correspondence from the applicant's solicitors are such as to give rise to an event of default. Not all of the matters there summarised will be capable of doing so. Nonetheless, the opinions expressed by the quantity surveyor which appear in points 2, 3, 4, 5 and 7 of the extracted summary are capable in my view of doing so. There being a genuine dispute about those matters, the demand must be set aside unless the "substantiated amount" is less than the statutory minimum: s 459H(3) CA. If, on the other hand, the "substantiated amount" is less than the statutory minimum, the Court may vary the demand: s 459H(4) CA.

Addendum

[57] The above reasons were delivered on 24 November 2016. The parties were then directed to file and serve written submissions within seven days regarding (1) whether, in light of those reasons and on the evidence already before the court, the demand should be set aside or varied; (2) if the demand is set aside or varied, the conditions (if any) that ought to be imposed; and (3) costs. At the time those directions were made, the respondent's counsel informed the court that the respondent was under external administration and foreshadowed the possibility that the liquidator might not provide instructions to make any further submissions. That has proved to be correct; instructions from the liquidator have not been forthcoming but, through the respondent's solicitors, the liquidator has confirmed that it is not intended to make any further submissions. The applicant however filed and served a supplementary outline of submissions on 1 December 2016 in which it was submitted that the demand should be set aside and the respondent ordered to pay its costs of the application.

[58] Subsections 459H(1) and (2) CA require the court to "calculate the substantiated amount of the demand in accordance with the formula: Admitted total – Offsetting total". Section 459H(2) CA defines "Admitted total" to mean, relevantly, "the amount of the debt" to which the demand relates. Accordingly, if the court is satisfied that there is a genuine dispute about the existence of the debt, the "admitted amount" will be "nil": s 459H(5(a) CA. Here, there was a genuine dispute about the matters the subject of the opinions

---

43 Clause 17.13. And see clause 9.2 of the mortgage where a similar provision appears.
44 Clause 17.13(d).
45 Clause 17.12.
46 Clause 4.1(b).

expressed by the quantity surveyor in points 2, 3, 4, 5 and 7 of the extracted summary. The "Admitted total" must therefore be "nil" and, for that reason, there is no need to consider whether there is an "Offsetting total" because the "substantiated amount" will still be "nil". In those circumstances, s 459H(3) CA requires the court to set aside the demand. As to costs, there is no reason why they should not follow the event.

Disposition

[59] The demand will accordingly be set aside and the respondents ordered to pay the applicant's costs of and incidental to the application to be calculated on the standard basis.