SUPREME COURT OF QUEENSLAND

CITATION:	*ACN 114 733 569 Limited v Income2Wealth Pty Ltd* [2023] QSC 73
PARTIES:	**ACN 114 733 569 Limited** (Applicant) **v** **Income2Wealth Pty Ltd** (Defendant)
FILE NO/S:	309 of 2023
DIVISION:	Trial
PROCEEDING:	Civil
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 April 2023
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2023 Respondent's further written submissions: 10 February 2023 Applicant's further written submissions: 17 February 2023 Respondent's written reply submissions: 24 February 2023
JUDGE:	Ryan J
ORDER:	**Application granted.** **The statutory demand is set aside.** **Unless a party wishes to submit otherwise (in which case they are to let my associate know, by email, within 7 days, so that a timetable for written submissions may be set), the respondent is to pay the applicant's costs of the application, on the standard basis.**
CATCHWORDS:	CORPORATIONS - WINDING UP - WINDING UP IN INSOLVENCY - STATUTORY DEMAND - SUPPORTING AFFIDAVIT - TIME FOR MAKING OR FILING – where, on the face of the statutory demand and accompanying affidavit, the affidavit pre-dated the statutory demand and was liable to be set aside for that reason – where, during the statutory 21 day period, the respondent asserted that there was no defect in the statutory demand – where the applicant brought an application to have the demand set aside for a reason other than a defect in the demand, namely that the affidavit could not verify the demand because it was, on its face, sworn a day beforehand – where, for the purposes of

responding to the application, the respondent produced evidence to show that there was in fact a defect in the demand and it bore the wrong date: it was actually signed on the same day as the affidavit was sworn – whether the demand ought to be set aside

Corporations Act 2001 (Cth), sections 9, 450J(2), 459(1)(b), 459E, 459E(3), 459E(2), 459E(3), 459G, 459J, 459J(1)(a), 459J(1)(b), 459J(2), 459H, 459H(3), Part 5.4, Part 7.6,
Corporations Regulations 2001 (Cth), Schedule 2, Form 509H

B & M Quality Constructions Pty Ptd v Buyrite Steel Supplies Pty Ltd (1994) 15 ACSR 433, cited
Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd (2005) 53 ACSR 645, considered
Dovelle Pty Ltd v Australian Macfarms Pty Ltd (1998) 43 NSWLR 717, cited
In the matter of Gemaveld Pty Limited [2012] NSWSC 582, considered
In the matter of Nanevski Developments Pty Limited (No 2) [2019] NSWSC 1217, considered
In the matter of Unity Resources Group Australia Pty Limited [2015] NSWSC 1174, considered
Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd (t/a Royce Roofing Services)(1998) 29 ACSR 11, considered
Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [2014] NSWCA 262, considered
Main Camp v Australian Rural [2002] NSWSC 219, cited
Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd [2002] NSWSC 219, cited
McDermott Projects Pty Ltd v Chadwell Pty Ltd [2001] QSC 322, considered
Plate Impressions Pty Ltd v JRL Consortium Group Pty Ltd [2016] QSC 274, considered
Portrait Express (Sales) Pty Ltd v Kodak (A'asia) Pty Ltd (1996) 20 ACSR 746; 14 ACLC 1095, considered
Pundazoie Company Pty Ltd v Wang Qibo, unreported Victorian Supreme Court, 1 July 2021, considered
Saferack Pty Ltd v Marketing Heads Australia Pty Ltd [2007] NSWSC 1143, cited
Spencer Constructions Pty Ltd v G & M Aldridge (1997) 76 FCR 452, considered
Technology Licensing Limited v Climit Pty Limited [2001] QSC 84, cited
Topfelt Pty Limited v State Bank of New South Wales Limited [1993] FCA 589, considered

Dale Cliff, *Statutory Demands – what went wrong?*, QUT Law Journal 1997, considered

COUNSEL: Michael May and Jayleigh Sargent for the Applicant
Gary Radcliff for the Respondent

SOLICITORS: Colin, Biggers & Paisley for the Applicant
Radcliffs for the Respondent

[1] The applicant company applied to set aside a statutory demand made by the respondent. I granted the application, on the basis that the statutory demand was not accompanied by an affidavit which verified that the debt claimed was due and owing at the time the demand was made. My reasons follow.

Legislation

[2] The relevant provisions of the *Corporations Act* 2001 (Cth) are set out below. I have emphasised (by bolding) the portions of the provisions which were particularly relevant to this application, namely, provisions about: the verifying affidavit; defects in statutory demands; and the time a debtor has to respond to a statutory demand to avoid a presumption of insolvency.

> **459E Creditor may serve statutory demand on company**
>
> (1) A person may serve on a company a demand relating to:
>
> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
>
> (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
>
> (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
>
> I 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; aI(e) must be in the prescribed form (if any); and

(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.

(4) A person may make a demand under this section relating to a debt even if the debt is owed to the person as assignee.

(5) …

(6) …

459G Company may apply

(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.

459J Setting aside demand on other grounds

(1) 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) **Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.**

[3] As above, section 459E(2) of the *Corporations Act* requires that the statutory demand be in the prescribed form – that is, Form 509H of Schedule 2: regulation 1.0.03 and Schedule 1 of the *Corporations Regulations* 2001 (Cth). Form 509H requires a creditor's statutory demand to include statements that: (1) The company owes the creditor the amount of the debt; and (2) "Attached is the affidavit of [X], dated [Y], verifying that the amount is due and payable by the company".

Factual background

[4] The applicant is the responsible entity of a number of managed investment schemes and the holder of an Australian Financial Services Licence. In pursuance of a deed between the applicant and the respondent, dated 16 May 2018 (the **Authorised Representative Deed**), the respondent became the authorised representative of the applicant (see Part 7.6 of the *Corporations Act* 2001 (Cth)). The respondent provided advice to its clients and its clients (or, I assume, at least some of them) invested in the applicant's schemes. The client investors' application forms, which were submitted to the applicant, contained a direction to the applicant to pay money to the respondent – being, in effect, the fee charged by the respondent to the client for its services.

[5] On 23 September 2022, the applicant's financial services licence was suspended.

[6] On 2 November 2022, the respondent's solicitors wrote to the applicant, alleging that it had breached the Authorised Representative Deed because its licence had been suspended. The respondent's solicitors alleged that the applicant owed the respondent more than $1 million in authorised representative fees for "services rendered" to the applicant.

[7] The applicant disputed the allegation that fees were owing and the dispute resolution process under clause 16 of the Authorised Representative Deed was engaged.

[8] According to the respondent, on 1 June 2022, the parties resolved matters and a payment program was agreed – as evidenced by an email from a representative of the applicant, Brian Keene, to Paul Wilson and Kerry Armstrong of the respondent. According to the respondent, the email amounted to a "total admission of indebtedness".

[9] There was however further correspondence between the solicitors for the applicant and the respondent in November and December 2022. The first in that chain, dated 9 November 2022, was from the applicant company's solicitor to the respondent's solicitor, Corey Radcliff. Among other things, it raised a dispute about the amount said to be due and payable.

[10] On 22 November 2022, Mr Radcliff emailed the applicant's solicitors and informed them that unless a "satisfactory response" was received by close of business that day, he had been instructed to serve a creditor's statutory demand for the fees that were agreed, without further notice. Correspondence between the parties continued, including about whether the deed had been terminated upon the suspension of the applicant's licence and whether the respondent had disclosed confidential information.

[11] On 30 November 2022, Mr Radcliff wrote to the applicant's solicitors and said *inter alia* that there was no offsetting claim or valid dispute about the debt owed, and that the respondent intended to issue a creditor's statutory demand for payment after 7 days.

[12] On 9 December 2022, the applicant's solicitors wrote to Mr Radcliff proposing a "without prejudice" discussion to resolve the dispute and stating that the amount owed had not yet been agreed. It is enough to say that nothing was resolved.

[13] At about 9.36 am on 22 December 2022, a statutory demand by the respondent for about $1.2 million and its accompanying affidavit were delivered to the applicant's Post Office Box. The demand and affidavit came to the applicant's attention on 9 January 2023 when the mail was collected. The demand and affidavit were contained in an envelope which also included a covering letter dated 20 December 2022 (the dates are important), which informed the applicant that a statutory demand and accompanying affidavit were enclosed.

[14] The demand itself, which was in Form 509H, was dated 21 December 2022 and was signed by the respondent's solicitor, Corey Radcliffe. Paragraph 2 of the demand stated:

> Attached is the affidavit of Paul Wilson dated 21 December 2022, verifying that the amount is due and payable by the company.

[15] Paul Wilson is a financial planner and the sole director of Income2Wealth.

[16] The affidavit accompanying the demand was sworn by Mr Wilson at "2 Pine Avenue Hahndorf SA 20-12-2022" – that is, on 20 December 2022 – not 21 December 2022.

[17] Thus, on the face of the documents, the affidavit pre-dated the demand by one day. As the authorities discussed below reveal, that circumstance warranted the setting aside of the statutory demand because an affidavit which pre-dates a statutory demand, even by one day, cannot verify that the debt *is* due and payable as at the date of the demand as the legislation requires.

[18] On 10 January 2023, the applicant's solicitors wrote to the respondent's solicitors, requesting the respondent withdraw its demand on various grounds. Their letter was sent by email at 9.25 am. One of the grounds alleged a defect in the demand and omissions and inaccuracies in the affidavit. It was expressed as follows (my emphasis):

> *Defect in Statutory demand*
>
> We note that the statutory demand at paragraph 2 specifies an attached affidavit dated 21 December 2022.
>
> However, the attached affidavit is dated 20 December 2022.
>
> *Omissions and inaccuracies in accompanying affidavit*
>
> We note that the affidavit accompanying the statutory demand:
>
> - does not state that Mr Wilson is authorised by your client to make the affidavit;
> - does not exhibit the invoices said to give rise to the demand;
> - incorrectly asserts that your client was engaged by our client to "sell financial products and interests" in managed investments schemes and unregistered manager investment schemes operated by our client when no such authority was conferred by the AR Deed; and
> - **is (as noted above) sworn on a date prior to the date of the demand**.

[19] The letter also noted that the period for compliance with the statutory demand (the 21 days) would lapse on 30 January 2023.

[20] In reply, by email dated 10 January 2023 at 3.12 pm, in response to the defects/omissions arguments above, the respondent's solicitor said "Our client's statutory demand is not defective".

[21] On 12 January 2023, the applicant filed and served the present application; an affidavit of Glen Walter Williams, which was sworn on 11 January 2023; and an affidavit of Robert McArdle, which was also sworn on 11 January 2023. Mr Williams is one of the applicant's solicitors. Mr McArdle is a director of the applicant who is also a solicitor.

[22] Mr Williams' affidavit annexed the correspondence between the parties, including the letter from the applicant's solicitors, dated 10 January 2023, which raised the defects and omissions as explained above.

[23] Mr McArdle's affidavit dealt with the dispute between the parties and their attempts to resolve it. It also dealt with the moneys said to be due and payable. In paragraph 29, Mr McArdle referred to the statutory demand dated 21 December 2022 and the accompanying affidavit dated 20 December 2022. He made the point that the affidavit referred to in the demand, dated 21 December 2022, was not served.

[24] Thus, the respondent was promptly informed by the applicant, on 10 January 2023, the day after the applicant received the statutory demand, that the demand was vulnerable to being set aside because its accompanying affidavit was sworn a day before the demand was made.

[25] On one view, the respondent was *reminded* of that ground by the applicant on 12 January 2023, when Mr Williams' affidavit was served because it attached that letter. At the least, the respondent was again informed that there was an issue with dates by paragraph 29 of Mr McArdle's 12 January 2023 affidavit.

[26] But it was not until several weeks later, when the respondent prepared material in response to this application, that the respondent *corrected* the position it took on 10 January 2023 by filing affidavits which proved that the respondent's solicitor had put the wrong date in the statutory demand in two places. The relevant affidavits were those of Paul Wilson and Corey Radcliff. Each affirmed their affidavit on 6 February 2023 and filed it the next day, 7 February 2023. It will be recalled that the

time for the applicant's response to the statutory demand had expired on 30 January 2023.

[27] Mr Wilson affirmed in his affidavit that he spoke to Corey Radcliff on 20 December 2021 and told him that he may not be able to see a Justice of the Peace until the following day – the 21 December 2022. As it turned out, he *was* able to meet with a Justice of the Peace on the 20th and he emailed his sworn affidavit to Mr Radcliff at 3.44 pm on 20 December 2022. He said he instructed Mr Radcliff to sign a statutory demand on behalf of the Respondent that day – that is, on 20 December 2022.

[28] Mr Radcliff affirmed in his affidavit that it had been "brought to his attention" that the statutory demand contained a reference to an affidavit sworn by Mr Wilson on 21 December 2022. Mr Radcliff did not say *when* the matter had been "brought to his attention" or by whom.

[29] In his affidavit, he acknowledged that Mr Wilson's verifying affidavit was actually sworn on 20 December 2022. He recalled speaking to Mr Wilson on the 20th and being told that Mr Wilson might not get to see a Justice of the Peace until the next day. He acknowledged that he received Mr Wilson's affidavit on the 20th, by email, at 3.44 pm and that he received instructions to sign the statutory demand that day (20 December 2022). He continued –

> I had previously informed my assistant to amend the Statutory Demand to reference 21 December 2022 and in the haste of sending the Statutory Demand on Tuesday 20 December 2022 I overlooked the date.

[30] Mr Radcliff affirmed that the mail register recorded the demand and affidavit as having been posted on 20 December 2022 and noted that the covering letter was dated 20 December 2022.

[31] Mr Radcliff did not explain how he came to assert, incorrectly, on 10 January 2023, that there was no defect in the statutory demand.

[32] Obviously, if the statutory demand had been dated correctly by Mr Radcliff, then the applicant would have had no argument to make about the accompanying affidavit pre-dating it. But the applicant was not told that the statutory demand

contained that "defect" until after the time for its response to the demand had lapsed.

[33] It is reasonable to infer that the respondent did not consider whether there existed the defects/omissions/inaccuracies in, or in relation to, its demand as alleged by the applicant on 10 January 2023 until *after* the date had passed for the applicant to decide whether to file an application to have the demand set aside.

[34] It is reasonable to infer that the respondent would not have asserted that there was no defect in its demand if it had considered the matter on 10 January 2023.

Grounds of Application

[35] At the hearing, the applicant relied on the following grounds in support of its application (although it had raised others in pre-hearing correspondence):

(1) The demand was not accompanied by an affidavit which properly verified the debt claimed in it, as required by section 459E(3) of the *Corporations Act* 2001 (Cth) because the affidavit was sworn on 20 December 2022, but the demand was dated 21 December 2022 – warranting its being set aside under section 459J(1)(b) of the Act;

and

(2) there is a genuine dispute about the existence of the debt claimed – warranting its being set aside under section 459H(3) of the Act (the Genuine Dispute Ground).

[36] As indicated above, my decision to set aside the statutory demand was based on the arguments made about the verifying affidavit. I therefore did not need to consider the Genuine Dispute Ground.

[37] I will first discuss the authorities to which I was referred, relevant to the successful ground, before turning to the arguments made by the parties.

Authorities

***Topfelt Pty Limited v State Bank of New South Wales Limited* [1993] FCA 589**

[38] Lockhard J described this case as one which raised "questions concerning the interpretation and operation of the provisions of the Corporations Law which related to the proof of insolvency of a debtor company in winding up proceedings". The relevant amending act introduced the relevant sections into the Corporations Law in 1993 and they commenced on 23 June 1993. This decision was delivered on 7 December 1993, after a hearing on 5 November 1993.

[39] Topfelt mortgaged land to the Bank as security for a loan. After the loan was overdue, the Bank took steps to sell the land. Topfelt asserted that the Bank was not entitled to exercise power of sale as mortgagee, and it sued the Bank for possession of the land. It was not successful. It was ordered to give the Bank possession of the land and to pay to the Bank almost $430,000. On 1 September 1993, the Bank served on Topfelt a statutory demand. The demand stated that Topfelt owed the Bank about $180,000 *together with interest*, which was due and payable. On 13 September 1993, Topfelt applied to have the demand set aside. It argued *inter alia* that the form of the statutory demand did not comply with conditions essential to its validity and that alleged defects in the demand would cause substantial injustice. These arguments were based on the description of the debt and its amount. A complaint was that the demand did not state the source of the Bank's claim to interest, the amount, or the rate. Even though there was no evidence that the debtor was misled, it was argued that the essential uncertainty of the terms of the demand would mislead any debtor company.

[40] The Bank contended that there was no warrant for setting the demand aside in the absence of evidence of substantial injustice by reason of any of its alleged defects.

[41] Lockhart J noted that the amending act made substantial changes to Part 5.4 of the Corporations Law relating to statutory demands and that it was clear, including from the Explanatory Memorandum to the bill, that the (then) new provisions were intended to introduce a new regime for proving insolvency of a debtor company especially where proof of insolvency was to be by way of non-compliance with a statutory demand (which was the method of proof in the majority of cases). His Honour quoted from the Explanatory Memorandum, including the following:

> The provisions in relation to the setting aside of a statutory demand are intended to be a complete code for the resolution of disputes involving statutory demands, and to do so on the basis of the

> commercial justice of the matter, rather than on the basis of technical deficiencies. In particular it is intended to remove the present difficulties which are experienced where difficulties in estimating the extent of the debt may lead to an invalidating of the statutory demand on the basis of a minor overstatement of the amount due …

[42] His Honour also quoted from the second reading speech, including the following:

> … Companies will no longer be able to resist statutory demands on purely technical grounds such as a minor misstatement of the quantity of a debt. Demands will be able to be set aside only where injustice would otherwise be caused.

[43] In discussing the new regime, His Honour observed at [27] that sections 459F and 459G were critical provisions because of the serious consequences to a company if it did not, within the period of 21 days after service of the demand, either comply with the demand or apply to a court for an order under section 459G.

[44] At [38] – [39], his Honour discussed the need for the demand to specify the debt "that is due and payable". His Honour said:

> The statutory demand served on a company must require it to (sic) specify the debt "that is due and payable" to the creditor "and its amount". This is the language of s 459E. In my opinion, the amount for which the demand is made must be the amount that is in fact due by the company to the creditor at the date of the demand …

[45] His Honour then discussed the proper way in which interest on a debt ought to be specified in a demand, which is not relevant to the application before me.

[46] At [46]*ff* his Honour discussed the Parliament's intention (in enacting the new statutory demand regime) to avoid the technicalities which had developed over many years in relation to bankruptcy notices. His Honour referred in particular to section 469J and the need for substantial injustice in the case of "merely" a defect.

[47] His Honour then discussed the inclusive definition of defect in section 9 of the Corporations Law:

> **9 Dictionary**
>
> Unless the contrary intention appears:
>
> …
>
> ***defect***, in relation to a statutory demand, includes:
>
> (a) an irregularity; 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.

[48] Of that definition, his Honour said, at [18], that the inclusion of not only an irregularity, but also of misstatements and misdescriptions was "plainly designed to ensure that the interpretation of s 459J (and other sections) is not to be susceptible of rigorous or narrow reading down of the word "defect" 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 [or] to a small or minor misstatement or to an immaterial or minor misdescription of a debt or a person or entity. Misdescriptions of debts, persons, entities or amounts all fall within the statutory definition of "defect" whether large or small …".

[49] His Honour referred to the definition of "statutory demand" in section 9 and in particular to its inclusion of a document which *purported* to be a statutory demand:

> **9 Dictionary**
>
> Unless the contrary intention appears:
>
> …
>
> ***statutory demand*** means:
>
> (a) a document that is, or purports to be, a demand served under section 459E; or
>
> (b) such a document as varied by an order under subsection 459H(4).

[50] His Honour explained at [51] that Parliament had avoided a regime which differentiated between documents with major defects, which could not be described as statutory demands, and documents with minor defects, which could. However, his Honour acknowledged that some deficiencies in the form of a demand may be "so fundamental that the demands may be incapable of assuming the description of statutory demands within the meaning of the Corporations Law – but that was not a question for his Honour. The demand in the case before him did not meet such a description (although that argument had been made).

[51] Interestingly, his Honour observed that the new regime may have the consequence of *not* discouraging sloppy drafting of statutory demands but that the public benefit

gained by discouraging points being taken about minor defects outweighed that first consequence.

[52] In deciding to set aside the statutory demand, his Honour said at [65]*ff* (my emphasis):

> The statutory demand served by the respondent upon the applicant is plainly defective.
>
> A creditor who issues a statutory demand under the Corporations Law gains the **benefit of the presumption of insolvency** if the notice is not complied with; and the additional benefit that the company may not oppose the application to wind it up on a ground relating to a defect in the statutory demand, without the leave of the Court, because of the provisions of s 459S of the Corporations Law.
>
> **It is not asking too much that creditors who issue statutory demands under the Corporations Law should ensure that the demands are expressed in clear, correct and unambiguous terms. If the creditors wish to have the benefit of the presumption of insolvency, the least they can do is tell the debtor companies in clear terms what amounts are due, whether they include interest or not, and, if so, the amount.**
>
> …
>
> The demand is erroneous because it cannot be complied with **on its face** even allowing for misstatements. The applicant must make enquiries of one kind or another in order to ascertain the amount of interest that is said to be payable …
>
> …
>
> There is no evidence before the Court from the applicant of any specific injustice that it has suffered or may suffer because of the defects in the statutory demand …
>
> Nevertheless, it is not the obligation of a debtor company to calculate the interest which the creditor calls upon him to pay; to make certain and specific something which the creditor has left uncertain and unspecified. Also, in winding up proceedings the Court acts not merely *inter partes*, but also in the public interest. As order for winding up operates *in rem*. **It is in the public interest that provisions of the Corporations Law which require a statutory demand to state the amount of the debt that is due and payable, should be observed**.
>
> In all the circumstances, I am satisfied that the defects in the statutory demand in this case are of such a kind and magnitude that they constitute good reason why the demand should be set aside under s 459J(1)(b).

[53] Spencer Constructions was unsuccessful at first instance in having a statutory demand set aside. It had contended that there were defects in the demand and that there was a genuine dispute about the existence of the debt the subject of the demand. The primary judge held that the defects did not warrant an exercise of discretion under section 459J(1)(b) as they did not produce substantial injustice and were not of such a character as to warrant "the clear disapprobation of the Court". His Honour also held that the disputes alleged failed to meet the threshold of genuineness.

[54] An appeal against the decision of the primary judge was dismissed. In this discussion of the case, I have focused on the "defects" arguments.

[55] Three defects were identified by the applicant, namely, that:

(a) The demand was not directed to the appellant at its registered office which was current at the time of service of the statutory demand;

(b) The demand was served in New South Wales but specified an address in Victoria, being the address of the respondent's solicitors, for service of any application under section 459G of the *Corporations Law*;

and

(c) The affidavit accompanying the statutory demand was in the form specified in the *Rules of the Supreme Court* 1986 (Vic) and was not in the form required by either the *Federal Court Rules* 1979 (Cth) or the *Supreme Court Rules* 1970 (NSW).

[56] On appeal, the appellant argued that the demand should be set aside for "some other reason" under section 459(1)(b) because the gravity of the defects was such that "the Court should show its disapprobation and warn persons wishing to rely on the statutory demand procedure of the importance of complying with the relevant statutory and regulatory requirements".

[57] The respondent accepted that there were defects in the demand but contended that they were of no substance or consequence.

[58] The Court considered section 459G and continued, at page 457*ff*, distinguishing between defects *in* the demand and defects *in relation to* the demand (my emphasis):

> What is the consequence of a defect? As a matter of construction, it appears to us that the section is intended to operate as follows. If the defect is "in the demand" it is only to be set aside if substantial injustice will be caused by the defect unless the demand is set aside: see s 459(1)(a) and (2). If there is any other defect, **including a defect in relation to the demand rather than in the demand itself**, then the demand may only be set aside if the Court is satisfied that there is some reason why the demand should be set aside: see s 459J(1)(b) and (2).
>
> If our construction is correct the statute itself provides for the consequences of non-compliance in the case of "a defect" so that, in respect of a defect in or in relation to a demand, strict compliance with the statutory provisions is not a precondition to the validity of the demand. It is now well settled that the consequence of failing to comply with a statutory requirement is not a question of categorisation into a mandatory/directory dichotomy. Rather it is a question of legislative intent … Section 459J(2) makes it quite clear that the legislative intent is that **defects in relation to statutory demands** are not to result in invalidity save and except as provided in s 459J(1). **Given that role there is no basis for construing s 459J(2) as being limited to defects in demands rather than defects in relation to demands**.
>
> In summary, s 459J(2) prevents the Court from setting aside statutory demands "merely because of a defect" except as provided in subs (1). **Section 459J(2) is the legislative prescription which ensures that defects alone, whether in the statutory demand or in relation to the statutory demand, will not result in invalidity**.
>
> …
>
> … 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 defect in statutory demands. As we have pointed out a defence *in* a demand only gives rise to an entitlement (if substantial injustice is established) to have the demand set aside under s 459J(1)(a), but not under s 459J(1)(b). **Accordingly, the "other reason" required by s 459J(1)(b) must, in our view, be a reason other than a defect in the demand.**
>
> … [After referring to the definition of "statutory demand" in section 9 of the *Corporations Law*] [S]o long as a document *purports* to be a statutory demand, the power of the Court to set it aside on the basis that there is a defect in or in relation to the demand is to be determined by reference to s 459J. That offers further support for our view that even significant defects in a demand are to be determined under s 459J(1)(a) rather than s 469(1)(b).

***Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd (t/a Royce Roofing Services*) (1998) 29 ACSR 11**

[59] This matter followed *Spencer Constructions*. In it, one of the bases for seeking the setting aside of a statutory demand was that its accompanying affidavit did not comply with the relevant rules of court.

[60] In *Kezarne*, Austin J observed that the headnote of Spencer Constructions stated that it disapproved of a decision of McLelland CJ in Equity in *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433. Austin J considered the headnote misleading. In the *B & M* case, McLelland CJ set aside a statutory demand where its accompanying affidavit was not made by a member of the creditor corporation. His Honour found that the departure from that requirement was a matter of substance because the requirement served a public interest function, as well as protecting the debtor company against unwarranted statutory demands, by ensuring that the person swearing to or affirming relevant matters was someone associated with the creditor, and likely to have direct knowledge of those matters. The failure to comply provided "some other reason" why the demand was to be set aside. Austin J observed that McLelland CJ's reasoning was consistent with the view of the Full Federal Court in *Spencer Constructions*. His Honour explained (at 16)*ff* (my emphasis):

> … **[W]here the complaint is not about a defect in the demand itself, the question is whether the matter complained of provides some "other reason" sufficient to justify setting aside the demand under section 459J(1)(b).** The Full Federal Court indicated that the ultimate issue is one of legislative intent. McLelland CJ in Equity's judgment helpfully goes further, by spelling out the matters of public interest which the statutory demand procedure is intended to serve, and drawing attention to the role of the affidavit in the legislative scheme.
>
> …
>
> The point of difference between the Full Federal Court and McLelland CJ in Equity is this – McLelland CJ in Equity construed the word "defect" in s 459J(2) as referring to a "defect in the demand" of the kind dealt with in s 459J(1)(a). Therefore, if the court is proceeding under s 459J(1)(b) because the complaint is not about a defect in the demand itself, his Honour would take the view that s 459J(2) is irrelevant. In the Full Federal Court's view the word "defect" in s 459J(2) is wider than the expression "defects in the demand" in s 459J(1)(a) … and consequently s 469J(2) is relevant to

> an application under s 459J(1)(b) based on a defect in relation to but not in the demand, such as a defect in the accompanying affidavit.
>
> As long as it is clear (and, with respect, the Full Federal Court's judgment makes it clear) that a defect in the demand cannot be dealt with otherwise than under s 459J(1)(a), the difference between McLelland CJ in Equity and the Full Federal Court as to the construction of s 459J(2) may not be of any great significance. As McLelland CJ in Equity observed …, **if a defect in the accompanying affidavit is (contrary to his view) a defect for the purposes of s 459J(2), the court's intervention to set aside the demand in circumstances such as those before him would not be "merely" because of the defect, but rather on the basis that the defect operated in the particular circumstances in a manner which provided good reason for the intervention.**
>
> …
> …
> … **The court should not act under s 459J(1)(b) unless … there is some good reason relevant to the purposes for which that provision exists – or in the Full Federal Court's words in *Spencer Constructions*, a reason relevant to the "legislative intent".** Disregard of the court's rules with respect to verification raises issues which go beyond a "mere" defect of the kind referred to in s 450J (2) for the reasons set out by Bryson J [in *Portrait Express (Sales) Pty Ltd v Kodak (A'asia) Pty Ltd* (1996) 20 ACSR 746; 14 ACLC 1095].

***Portrait Express (Sales) Pty Ltd v Kodak (A'asia) Pty Ltd* (1996) 20 ACSR 746**

[61] In *Portrait Express*, Bryson J said (14 ACLC at 1105), "I see a clear distinction between a defect in a demand as a ground for setting aside the demand and a defect in an affidavit purportedly verifying the demand as a ground for setting aside the demand. **An affidavit which is incorrect has a different and higher order of importance to a demand which is incorrect. There are some deficiencies in procedure which the Court should not allow to be successful, whether or not they have any high practical significance in terms of justice between the parties in the instant case** … [I]t seems to me that the opportunity ought to exist for the Court to register clearly and appropriately the importance of the requirement of verification of demands. **I cannot see the requirements of verification and the responsibilities in relation to it which fall both on the officer swearing the verification and on the creditor as no more than another form to fill in, errors in which the debtor can have put right on application to the Court**".

[62] His Honour also said (my emphasis) –

> In my view, the dominant consideration is the need to ensure the **purity** of the manner in which creditors follow statutory procedures which are preliminary to litigation and for which verification is required by law. I do not find it possible to see deficiencies of the kinds which exist in affidavits as something which can be disregarded. **It is not enough that a responsible officer should support a statutory demand by oath or affirmation; the exercise must be carried out in a responsible way, and regard must be paid, with a strictness appropriate for verification, to the need to review the available information and observe whether what is being verified conforms to the information in the creditor's own hands.** If there had been a conscientious review of Kodak's own records, the affidavits made in this case could not have been made. In my opinion, I should not allow this. I should not allow it whether or not there are genuine offsetting claims.

B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd **(1994) 15 ASCR 433**

[63] In this case, McLelland CJ in Eq held that the accompanying affidavit, which had not been sworn by an officer of the creditor, but instead by someone who could only have second hand knowledge of relevant matters, was non-compliant with the rules in a substantial way – not merely a technical way. The requirement as to the identity of the author of the affidavit was designed to serve the public interest as well as protect the company from unwarranted demands, by "endeavouring to ensure, within practical limits, that the person who must put his or her oath or solemn affirmation to the relevant matters (and thereby risk a conviction for perjury if a knowingly false statement is made) is the person associated with the creditor who is most likely to have direct knowledge of those matters. The express requirement in the rule that the person making the affidavit depose to his or her belief that there is no genuine dispute is a significant mechanism for filtering out cases where there is in fact such a dispute, so as to prevent such cases from reaching the court on such an application as the present, with the consequence waste of time and resources …"

[64] Also, in discussing section 459J(2), his Honour said a failure to comply with the rules was not a "defect" in the demand – but even if it were, the court would not be

acting "merely" because of the defect. His Honour considered that that phrase "merely because of a defect" connoted acting merely because there was a defect without regard to the significance of the defect in the particular circumstances.

***McDermott Projects Pty Ltd v Chadwell Pty Ltd* [2001] QSC 322**

[65] Holmes J, as her Honour then was, dismissed an application to set aside a statutory demand on the basis that the demand was not verified because there was no coincidence of date between the demand and its accompanying affidavit. The affidavit was sworn four days before the demand was made. Her Honour declined to follow the approach of Chesterman J in an almost identical matter, *Technology Licensing Limited v Climit Pty Limited* [2001] QSC 84. In *Technology Licensing* his Honour set aside a statutory demand because a mandatory requirement of section 459E(3) had not been met: the accompanying affidavit was sworn four days before the demand was made. Her Honour instead adopted the reasoning of Santow J in *Dovelle Pty Ltd v Australian Macfarms Pty Ltd* (1998) 43 NSWLR 717 and held that "the non-concurrence of the respective dates of the statutory demand and verifying affidavit does not invalidate the statutory demand but rather constitutes a "defect" within the meaning of section 459J of the *Corporations Act*". There was no suggestion that part of the debt had been paid in the intervening four days and accordingly her Honour held that the defect in the demand did not cause substantial injustice.

***Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd* (2005) 53 ACSR 645**

[66] In this case, a statutory demand was set aside on the ground that it was not validly supported because the demand was issued on 7 September 2004, but the affidavit purporting to support the demand was dated 2 September 2004. Higgins CJ held that a compliant affidavit had to be completed before the demand was delivered to the debtor; and that an essential requirement of it was that it purported to verify the debt particularised in the demand with which it was delivered. At [58] his Honour said, "An affidavit pre-dating the demand notice is no mere "defect". The affidavit is, in form and substance, ineffective to verify the demand. Hence s 459J does not save it".

***In the matter of Gemaveld Pty Limited* [2012] NSWSC 582**

[67] In this matter, the application to set aside a statutory demand could not establish that the affidavit was actually sworn prior to the signature of the demand – and the application to set the demand aside was dismissed. Black J went on to elaborate on the ultimate question for the Court at [12]*ff.* His Honour explained the question was whether the affidavit *in fact verifies* that the debt is due and payable.

> Section 459E(3) of the *Corporations Act* requires that, unless the relevant debt is a judgment debt, a statutory demand must be accompanied by an affidavit that "verifies the debt, or the total of the amounts of the debts, is due and payable by the company". The ultimate question for a Court is not, in my view, the precise timing of the signature of the statutory demand and swearing of the verifying affidavit, but whether the affidavit in fact verifies that the debt is due and payable by the company. The requirement in s 459E(3) reflects the legislative intention 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: *Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd* [2002] NSWSC 219; (2002) 20 ACLC 726. That intent is satisfied so long as the statutory demand and affidavit are signed and sworn or affirmed contemporaneously.

[68] His Honour differentiated between matters in which there were days between the swearing of an affidavit and the date of the demand, and those in which the affidavit and demand were sworn/dated the same day. His Honour also explained that the intention behind Part 5.4 was to allow for the resolution of issues about statutory demands to be based on commercial justice, rather than technical deficiencies.

[69] At [14] – [17] his Honour said:

> There are, of course, a number of cases where affidavits sworn prior to a statutory demand have been held not to verify that statutory demand, and that has been held to give rise to a defect for the purposes of s 459J … However, those cases variously related to affidavits sworn between a day and several days prior to the date of the statutory demand … It is obvious enough that an affidavit sworn on say, 4 or 18 October could not, in fact, verify a debt claimed to exist on 19 October, because that debt might well have been repaid in the intervening day or days.
>
> By contrast, I would not accept that, as a matter of fact, an affidavit sworn at 11.55 am or 11.59 am on 19 October could not verify a debt asserted to be due and payable in a statutory demand signed at noon on that day …
>
> … Parliament's intent when introducing Part 5.4 of the *Corporations Act* [was] to ensure that disputes in respect of statutory demands

> would be resolved on the basis of the "commercial justice" of the matter rather than on the basis of "technical deficiencies": Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth) para 688; F. Assaf, *Statutory Demands: Law and Practice* at [7.1]. [An approach which would encourage arid inquiries as to which of the signature of the demand and the swearing or affirmation of the verifying affidavit occurred first within a short time frame; and which would likely have the consequence that statutory demands would fail for technical reasons] would also, in my view, be inconsistent with the general approach that the law does not take account of fractions of a day …

***Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262**

[70] The question for the Court of Appeal in this case was whether a statutory demand should be set aside because the accompanying affidavit did not contain a statement from its deponent to the effect that the deponent believed there was no genuine dispute about the amount or existence of the debt. It was said that the omission amounted to "some other reason" why the demand ought to be set aside. That argument failed at first instance. It succeeded on appeal.

[71] Barrett JA, with whom Beazley P and Gleeson JA agreed, discussed the power to set aside a statutory demand at [18]*ff*. His Honour described the jurisdiction as a remedial jurisdiction under which a Court might deal with cases not within section 459H or 459J(1)(a) in a way that was just.

[72] His Honour referred to authority which described the discretion conferred by section 459J(1)(b) as a "discretion of broad compass which extends to conduct that may be described as unconscionable, an abuse of process or which gives rise to substantial injustice". His Honour referred to authorities which emphasised that section 459J(1)(b) was to be applied in cases where it was necessary to preserve the undistorted operation of Part 5.4 of the *Corporations Act* and to promote the objectives it intended to serve, where there was good reason to deny effect to a statutory demand as creating a ground for the winding up of the debtor company.

[73] His Honour explained that the statement of belief about there being no genuine dispute provided a significant measure of assurance that the objectives of Part 5.4 were being observed by the creditor. The absence of such a statement meant that that measure of reassurance was lacking and placed the recipient company into a position of uncertainty, from which the legislation intended that it be protected. His

Honour found that the primary judge erred in finding that the absence of the relevant statement was somehow offset by other factual matters. His Honour allowed the appeal and set aside the statutory demand.

***In the matter of Unity Resources Group Australia Pty Limited* [2015] NSWSC 1174**

[74] Unity Resources applied to set aside a statutory demand made by SV Partners Advisory. The demand was dated 28 October 2014. The schedule to it referred to invoices verified as payable by the company in an affidavit sworn one day before the date of the demand (that is, on 27 October 2014). One of Unity Resources' grounds was that the demand was not accompanied by a compliant affidavit, because the affidavit was not sworn contemporaneously with the demand, but one day before it. His Honour determined the application on that ground and set aside the demand. His Honour said at [5]*ff* (my emphasis):

> In order to verify that a debt "is due and payable" by the company, it seems to me that it is implicit in [section 459E(3)] that the affidavit must speak as at the date of the demand. It is required to speak to the situation that obtains when the demand is issued. That view is consistent with authority … [His Honour referred to *Wildtown Holdings Pty Limited v Rural Traders Company Limited* [2002] QASCA 196, in which the Court of Appeal of Western Australia held that an affidavit executed two days before a statutory demand could not verify that demand; *Chadmar* and the decision of Chesterman J in *Technology Licensing*].
>
> …
>
> There is authority in Queensland to the contrary – namely, the decision of Holmes J in *McDermott Projects* … – but the balance of judicial opinion in Queensland supports the view of Chesterman J …
>
> …
>
> [In response to an argument that there was no substantial injustice caused by the affidavit pre-dating the demand by one day, his Honour said] … the principle upon which *Wildtown Holdings* and the other cases to which I have referred depend derives from the **implied intent that underlies s 459E that the affidavit speaks to the circumstances as at the date of the demand**. If that be so, then, as it seems to me, it can make no difference whether the affidavit is sworn a month, a week, four days, two days or one day before the date in the demand. In principle, the same consequences must follow.
>
> Moreover, **it is far preferable in this relatively technical area, as a matter of policy, to have a clear line of delineation, rather than a**

> **rule which involves some element of discretion**. If an affidavit sworn one day early were held to be compliant, then what is there to distinguish that from one or two days early, as was held non-compliant in *Wildtown Holdings*, or four days early, as was held non-compliant in *Technology Licensing*, other than some approach akin to the length of the chancellor's foot. **It seems to be that policy strongly supports the view that the line to be drawn is one which reflects the intention of s 459E, that the affidavit speak to the circumstances as at the date of the demand**. As was said in *Wildtown Holdings*, an affidavit executed two days before the demand cannot verify the demand.
>
> [Counsel for the applicant] argued that the problem is cured by an updating affidavit … which deposes that the debts referred to in the statutory demand were due and payable as at the date of the demand and are still due and payable. In my view, that cannot cure the problem … **It is difficult to see how an updating affidavit made and sworn months after the demand was served can result it in being said that the demand was accompanied by an affidavit that verified the debt.** The better view, it seems to me, is that if an **updating affidavit** is made on or after the date of the demand and **served in circumstances that can be regarded as accompanying the demand, that may well cure the problem. But at the very least, that would require service within the 21-day period for compliance with the demand** and it may well require service contemporaneously with the demand.

***In the matter of Nanevski Developments Pty Limited (No 2)* [2019] NSWSC 1217**

[75] In this matter, a statutory demand was set aside because the affidavit verifying the demand was sworn two days before the demand was issued. Rees J held that although section 459E(3) did not *require* the affidavit verifying the debt to be sworn on the date on which the demand was signed, the word "is" suggested that the deponent must swear/affirm that the debt described in the demand *is* due and payable on the day the affidavit is sworn. That required the affidavit to be sworn contemporaneously with or after the date of the demand.

[76] In the case of an affidavit sworn before the date of the demand, Rees J held that while there was no defect in the demand itself, there was "abundant authority" that the demand would be set aside for some other reason. It was not necessary for the plaintiff to show that substantial injustice would be caused unless the demand were set aside, as required by section 459J(1)(a). Her Honour discussed the relevant

authorities in detail including *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* (2002) 172 FLR 35, in which it was held that an affidavit sworn a day or more before the date of the demand was necessarily fatal.

[77] In response to a submission that there was no subversion of the statutory scheme or abuse of process or a gross defect, the demand need not be set aside, her Honour said: "That the affidavit in support identifies a debt which is due and payable at the date of the demand is central to the statutory scheme. To do this, the affidavit cannot pre-date the demand".

Relevant principles

[78] In my view, the authorities establish the following matters of relevance here –

- Disputes involving statutory demands are to be resolved on the basis of the commercial justice of the matter, rather than on the basis of technical difficulties (*Topfelt*).

- There is a distinction to be drawn between a defect *in* a demand and a defect *in relation to* a demand. If the defect is "in the demand" then the demand may only be set aside if substantial injustice will be caused by the defect were the demand not to be set aside: section 459J(1)(a) and (2). For any other defect – including a defect in relation to the demand, rather than in the demand itself – the demand may only be set aside if the Court is satisfied that there is some reason why it should be set aside (*Spencer Constructions).*

- Defects alone, whether in the demand or in relation to the demand, will not result in invalidity. The "other reason" to set the demand aside must be one other than the defect (*Spencer Constructions*).

- A defect in the affidavit accompanying the demand is a defect for the purposes of section 459(2) (*Kezarne*).

- An affidavit which is incorrect has a different and higher order of importance to a demand which is incorrect. The requirements of verification and the responsibilities in relation to it, which fall on the officer swearing the verifying affidavit the creditor create, *something more* than an obligation upon the creditor (and its officers and lawyer) to fill in "*another form*" –

errors in which a debtor can have put right on application to the court (*Portrait Express).*

- The exercise of supporting a statutory demand by affidavit should be carried out in a responsible way (*Portrait Express*).

- The dominant consideration is the need to ensure the purity of the manner in which creditors follow statutory procedures which are preliminary to litigation and for which verification is required by law (*Portrait Express*).

- Having regard to the benefit which accrues to a creditor if the statutory demand is not complied with (the presumption of insolvency), it is not asking too much that creditors who issue statutory demands should ensure that the demands are expressed in clear, correct and unambiguous terms (*Topfelt*).

- The legislative intention behind section 4592E(3) is that a debtor company receive in the accompanying affidavit a clear and unmistakeable assertion that there is a present and unconditional obligation to pay the debt demanded. That intention is satisfied so long as the statutory demand and affidavit are signed and sworn/affirmed contemporaneously (*Gemaveld*).

- A Court must set aside a statutory demand if necessary to preserve the undistorted operation of the *Corporations Act* Part 5.4 and to promote the objectives it is intended to serve (*Unity Resources* at [14] and *Kisimul* at [21]).

- While the discretion is broad, a Court may not set aside a statutory demand under section 459J(1)(b) simply because it considers it fair to do so. Statutory demands should stand unless there are reasons of "appropriate seriousness" for setting them aside (*Portrait Express*).

- To verify that a debt is due and payable by the debtor company, it is implicit in section 459E(3) that the accompanying affidavit must speak as at the date of the demand (*Unity Resources*). It makes no difference whether the affidavit was sworn a month, week four days, two days or one day

beforehand – it is preferable to have a clear line of delineation rather than a rule which involves some element of discretion (*Unity Resources*).

- An affidavit pre-dating the demand is no mere defect. The affidavit is, in form and substance, ineffective to verify the demand. Section 459J cannot save it (*Chadmar*).

- In the case of an affidavit sworn before the date of the demand, there is "abundant authority" that the demand will be set aside for some other reason. It is not necessary for the plaintiff to show that substantial injustice would be caused unless the demand were set aside (*Nanevski*).

- An updating affidavit – served in circumstances that can be regarded as accompanying the demand may cure a problem or defect – but *at the least* that would require service within the 21-day period for compliance with the demand (*Unity Resources*).

Submissions

[79] The applicant submitted that there was inadequate verification of the debt claimed in the demand because the affidavit was sworn on the day before the demand was signed (or at least appeared to be). It argued:

(a) Inadequate verification of the debt claimed in a demand is not a defect *in* the demand – but rather a defect *in relation to* the demand. Therefore, the issue fell to be determined under section 459J(1)(b), and there was no need for the applicant to show substantial injustice.

(b) The requirement that the demand be accompanied by an affidavit which verified that the debt "is" due and payable is mandatory. It is an important safeguard in the operation of the statutory scheme. Failure to comply is not a mere technicality – but rather goes to the heart of what the regime intended to achieve (referring to *Portrait Express*).

(c) It is clear that an affidavit sworn one or more days before the date the statutory demand was sent is not capable of verifying the debt referred to in the demand and does not satisfy 459E(3) (referring to *Wildtown Holdings*).

(d) Although relief under section 459J(1)(b) is discretionary, those circumstances "justified, if not compelled", or "typically, if not invariably resulted in" the setting aside of the demand.

[80] The applicant acknowledged that – in fact – the supporting affidavit was actually sworn on the same day as the demand was made. However, the applicant submitted evidence of that fact did not solve the problem. It argued (my emphasis) –

> "An affidavit sworn on a date earlier than the **date stated** on the statutory demand (**whether or not that date is the date that the demand was in fact sent**) subverts the intended operation of the statute so as to give rise to "some other reason" to set aside the demand.

[81] The applicant contended that this was so because, *inter alia* –

(a) The consequence of an unanswered statutory demand was radical. Failure to comply gave rise to a presumption of insolvency, to be relied upon in an application to wind up a company;

(b) The requirement to file and serve an application to set aside a statutory demand and accompanying affidavit within the 21-day statutory period was strict and could not be extended by the court; and

(c) By the *Greywinter* principle, the applicant was limited to the grounds identified in affidavits filed in the 21-day period.

[82] It was, therefore, critical that the recipient of a demand be given the information it needed to make an informed decision about the response it ought to make to the demand – including the grounds to rely upon in defending it – within the statutory period of 21 days. In other words, what was communicated to the applicant "on the face of the documents" was of critical importance to the regime.

[83] The applicant referred to the following statements of Barrett J in *Main Camp v Australian Rural* [2002] NSWSC 219 at [22] and [23]:

> 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 …

[84] The applicant submitted that, whatever the date the demand was in fact sent, on the face of the documents, the supporting affidavit did not verify that the debt claimed "is" due and payable because it was sworn a day earlier than the date of the demand.

[85] It was only *after* the critical 21-day period that the applicant was told that the demand was in fact sent on 20 December 2022 – not 21 December 2022. Before then, the respondent's position was that the statutory demand was not defective. The applicant submitted that the respondent ought not to be permitted to *now* deprive it of a ground to have the demand set aside.

[86] The respondent submitted that the date on the statutory demand must have been incorrect when it was typed. Thus, there was a *typographical error* on the face of the demand and nothing more. It was a mere defect, insufficient to warrant the setting aside of the demand.

[87] In his written submissions, counsel for the respondent referred to paragraphs 7.22 and 7.42 of Assaf's text in which, he said, examples were given of courts not setting aside demands in the face of defects. He did not take me to any particular case.

[88] He referred to *Topfelt* and Lockhart J's observation that a defect in the demand meant "a lack or absence of something necessary or essential for completeness, a shortcoming, a deficiency; and imperfection". He submitted that the defect here was of that sort and it did not affect the cogency of the demand.

[89] During oral submissions, I referred to the observation made in *Portrait Express* that the relevant documents were not to be treated as just another form and asked counsel for the respondent how much latitude a creditor was entitled to in this context when it came to clerical errors – bearing in mind that there were documentary elements to the regime which were critical to it.

[90] Counsel replied that the error here was a mere defect and nothing more. The debtor company knew the demand was coming. It had been on the "negotiating table" since June of 2022. If, "bare of everything else", the statutory demand "just came

and there were the two dates and the [patent] errors" that was a different situation. Counsel submitted that I had to take the history between the parties into account – although I said to him that it seemed to me that there was almost invariably a history of discussions about the debt in these cases and the threat of a statutory demand. He continued to emphasise the fact that it was not claimed that substantial injustice was occasioned. Nor, he said, was there any need to counter any "attempted subversion" of the legislation.

[91] In further written submissions, by way of a brief email sent to my associate and the applicant's lawyers, counsel for the respondent told me that he had not been able to locate an authority on "all fours" with the present case. However, more generally, he listed "by way of further assistance to the Court" the following –

(a) *Plate Impressions Pty Ltd v JRL Consortium Group Pty Ltd* [2016] QSC 274 (paragraphs 31 to 39);

(b) *Pundazoie Company Pty Lld v Wang Qibo* unreported Victoria Supreme Court 1 July 2021;

(c) *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143; and

(d) Dale Cliff "*Statutory Demands – what went wrong*" 1997 QUT Law Journal

[92] Counsel for the respondent provided no analysis of this material. Nor did he make any submissions about how I might use it.

[93] Counsel for the applicant prepared a short note in response to the respondent's email. They submitted that: *Plate Impressions* was distinguishable; *Saferack* was against the respondent; they were unable to find the "*Pundazoie"* decision; and Mr Cliff's article should be treated with caution including because point 4 in the summary on page 78 of it was wrong.

[94] More generally, as to section 459J, counsel for the applicant submitted that:

(a) The applicant was compelled by the statutory regime to apply to set aside the demand and identify its ground before the respondent disclosed the "facts" about the dates on the demand and the affidavit. It could not be said that the

applicant was (by this application) taking advantage of a mistake or defect. It was unaware of the mistake or defect.

(b) The applicant was not relying upon a mere defect in the demand – its argument was about inadequate verification that the debt was due and owing.

(c) Absence of proof of verification is not a technicality. Further, notions of "justice" are to be assessed having regard to the purpose of the legislation. Principles of justice might require the setting aside of a demand even if there is no genuine dispute about the debt. There is no residual discretion not to set aside a demand where the relevant subversion of the statutory purpose is established.

(d) In effect, the respondent was attempting to rely upon a "updating affidavit" served outside the 21-day period to verify the debt – something which was contrary to the legislation.

[95] In the respondent's further written submissions in reply, it repeated its argument that a Court must not set aside a demand merely because of a defect. In the present case, there had been a year of non-payment by the debtor; correspondence foreshadowing the making of the statutory demand; and then the issuing of the demand albeit with wrongly stated dates. The respondent continued: "There is nothing more, no matter how it is presented. The prohibition in the second subsection is engaged. The affidavit on its face obviously pre-dates the demand. But when the true facts are known, that is not what happened. There was an error – nothing more".

Discussion & Conclusion

[96] I accept without question that a demand must not be set aside merely because of a defect. That point is made in all of the authorities – including *Plate Impressions.* And that is the argument made in the article to which I was referred. The article is critical of the 1993 reforms to the statutory demand regime. It suggests that the regime allows for the setting aside of demands for trivial defects which produce no injustice ("technical pedantry" is how the author described it). However, nothing in the article is of assistance to me in this matter. Further, for what it is worth, the article was published in 1997 – not all that long after the new regime took effect. Many of the author's concerns have been settled by the authorities in the two plus

decades since the article was published. And, obviously, I am to be guided by the authorities.

[97] It is enough to say that *Saferack* does not assist the respondent.

[98] I was not able to find the *Pundazoie* case until the respondent attached it to its reply written submissions. That was another case which made the point that a court may only set aside a statutory demand containing a defect where the defect would otherwise cause substantial injustice; or where it amounted to a deficiency of a gross and exceptional character, which denied the document the status of a statutory demand. But what I am dealing with here is not a straightforward "defect" case.

[99] This case is unusual. Rather than an applicant attempting to rely upon a defect in a statutory demand as a basis for setting it aside – here, the respondent is attempting to rely upon a defect, of which the applicant was unaware, to resist its demand being set aside "merely" on that basis.

[100] There was no way in which the applicant could know, on the face of the documents sent to it, that the dates stated in the statutory demand were incorrect. It proceeded on the basis that the affidavit pre-dated the demand. That circumstance – according to the authorities – clearly warranted the demand being set aside. When the applicant very properly and promptly raised its concerns about the dates with the respondent's solicitor, on 10 January 2023, it was told bluntly that there was no defect in the demand. Understandably, it pressed ahead with its application.

[101] It was not until the relevant 21-day period had lapsed – indeed, it was not until about a week after it had lapsed, and about a month after the applicant first brought to the respondent's attention the issues with the dates – that the respondent revealed that the demand contained a defect.

[102] For obvious reasons, the respondent wishes to characterise the question for me as one concerning whether the "defect" *in* the demand warrants it being set aside, where no injustice is alleged. But that is not the applicant's case. And the question for me is not in fact that simple.

[103] The question for me is whether the respondent creditor can defeat the applicant debtor's application to set aside the demand on the basis that the applicant's

application is based on a "defect" in the statutory demand, of which the applicant was unaware at the time it made its application *and which the respondent did not reveal during the relevant 21-day period, despite having an opportunity to do so.*

[104] The authorities make it plain that an affidavit which pre-dates the statutory demand may be conceptualised as a *defect* – though not a mere defect – *in relation to a statutory demand* and there is, as Rees J said, "abundant authority" in support of its resulting in the setting aside of the demand, for some other reason. That other reason is that such an affidavit cannot verify the debt as required by the legislation.

[105] In this case, during the relevant 21-day period, from the applicant's point of view, the affidavit accompanying the statutory demand pre-dated it. For obvious reasons, the applicant chose to rely upon that fact – a defect in relation to the demand though not in the demand – as a basis for contending that the statutory demand ought to be set aside.

[106] The respondent characterises what occurred differently. It says in actual fact, the affidavit was sworn on the same day as the demand was dated. My lawyer simply made a mistake and put the wrong date in the demand (twice) because he was told that Mr Wilson would not be able to swear the affidavit until 21 December 2022 and he forgot to change the date back to 20 December 2022 when, as it turned out, the affidavit was sworn on that date. Thus, the applicant relies for its argument on a defect in the demand – the misstatement of a date – and nothing more. It cannot point to substantial injustice and there is therefore no warrant for setting the statutory demand aside on the basis, merely, of that defect.

[107] In my view, *if the respondent had produced evidence of the mistake within the 21-day period* the demand might have been "saved" on this ground. But instead, the respondent responded to the points made by the applicant about the dates by asserting – I assume without checking – that there was no defect in the demand. In my view, it is too late now to rely on the facts asserted by Mr Wilson and Mr Radcliff to defeat the applicant's complaint about the non-concurrent dates. I have reached that conclusion bearing in mind the statements in the authorities about the creditor's responsibilities – particularly given the benefit accruing to it if the demand is not met, or an application to set aside the demand is not made, within the 21-day period.

[108] To summarise, in my view, where –

- the authorities are clear that a statutory demand is liable to be set aside if the verifying affidavit accompanying it pre-dates it;
- within a day of the debtor receiving the demand, the debtor's lawyer told the creditor's lawyer that non-concurrent dates were an issue rendering the statutory demand liable to be set aside;
- the creditor/the creditor's lawyer apparently did not check the dates of the documents for inaccuracies, but instead asserted that there was no defect in the demand;

  and

- the creditor did not provide evidence that the affidavit and the demand were sworn and signed on the same date until after the 21-day period elapsed,

the applicant is entitled to take the documents at face value and the creditor is to bear the consequences.

[109] A statutory demand is not just another form. The verifying affidavit, required by law to accompany the demand, serves the public interest.

[110] It is not too much to ask a creditor, who stands to benefit from the statutory demand regime by a presumption of insolvency, to take care in completing the necessary documents. The authorities make it abundantly clear that concurrent dates matter – and the reason why.

[111] It is, in my view, even less to ask a creditor to check its dates when the debtor has provided very timely advice that they are non-concurrent.

[112] Correspondence between lawyers, in an effort to resolve matters in lieu of a hearing, is to be encouraged – and not just in this context. Lawyers ought to treat one another's concerns or issues, raised in correspondence, seriously.

[113] In this case, the applicant brought its application on the basis of the respondent's cavalier, but incorrect, response to the applicant's issues with the dates of its

documents: a response the respondent's lawyer did not correct until the statutory period had lapsed. Nor did the respondent's lawyer explain when he first became aware that the dates were wrong or why he did not check the date issue when it was first raised by the applicant.

[114] In my view, as in *Portrait Express*, this is a case in which the deficiency in procedure is such that the Court should not allow the respondent to be successful. The applicant was entitled to proceed on the assumption that there was no defect *in* the demand, as the respondent asserted. It was entitled to proceed on the basis that the affidavit pre-dated the demand and to rely on the abundant authority to the effect that such a circumstance warranted the setting aside of the demand.

Order

[115] My order is that the statutory demand be set aside.

Costs

[116] Unless a party wishes to argue to the contrary, the respondent is to pay the applicant's costs of the application on the standard basis.

If a party wishes to argue that some other costs order ought to be made, then they are to contact my associate within seven days of the delivery of this judgment and a timetable will be set for brief written submissions.