DELTA BETA PTY LTD v VISSERS

FEDERAL COURT OF AUSTRALIA — GENERAL DIVISION

NICHOLSON J

2 April, 9 May 1996 — Perth

Statutory demand — Defect — Application to set aside — Substantial injustice — Confirming affidavit — Corporations Law ss 459E, 459H, 459J — (CTH) Federal Court Rules O 71 r 36A.

D, a corporation, sought to set aside a statutory demand given by E, primarily on the basis that the failure to set out individual amounts owing for each of the debts comprising the total amount demanded would cause substantial injustice. The statutory demand also omitted the schedule required by the prescribed form. In addition, it was claimed that the statutory demand should be set aside for some other reason (ie under CL s 459J(1)(b)) because the confirming affidavit was sworn by a solicitor having no actual knowledge of the alleged indebtedness by D.

Details of the individual debts claimed under the statutory demand were set out in correspondence between E and D, however, the correspondence was inconclusive.

Held, setting aside the statutory demand:

(i) The statutory demand did not comply with CL s 459E(2) because it did not set out the individual debts allegedly owed by E (although the aggregate amount was stated).

Chippendale Printing Co Pty Ltd v DCT (NSW) (1995) 55 FCR 562; 15 ACSR 682; 13 ACLC 299, followed.

(ii) As a result, the statutory demand was defective – either under para (a) of the CL s 9 definition of defect or under the ordinary meaning of that term.

Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd (1994) 51 FCR 446; 128 ALR 149; 13 ACSR 525; 12 ACLC 391; *Topfelt Pty Ltd v State Bank of NSW Ltd* (1993) 47 FCR 226; 120 ALR 155; 12 ACSR 381; 12 ACLC 15, followed.

(iii) Substantial injustice will not necessarily arise wherever the individual amount of debts making up a stated total is not expressed.

Jarpab Pty Ltd v Mark Winter (t/a Boldon Haulage) (1994) 14 ACSR 255; 12 ACLC 688; *Chippendale Printing Co Pty Ltd v DCT (NSW)* (1995) 55 FCR 562; 15 ACSR 682; 13 ACLC 299, approved.

(iv) Substantial injustice will not arise where a statutory demand makes clear sufficient information to enable the debtor to determine whether it is liable for the amounts claimed from its own records if those records have been adequately kept.

Topfelt Pty Ltd v State Bank of NSW Ltd (1993) 47 FCR 226; 120 ALR 155; 12 ACSR 381; 12 ACLC 15, approved.

(v) This was not a case where D was able to identify and know the amounts said to be owing by reference solely to information within its possession and control. Accordingly, substantial injustice would be caused to D unless the statutory demand was set aside.

(vi) A confirming affidavit which fails in a substantial way to meet the requirements of CL s 459E(2) does not result in a defect in the statutory demand itself.

Hamilhall Pty Ltd (in liq) v A T Phillips Pty Ltd (1994) 54 FCR 173; 15 ACSR 247; *Besser Industries (NT) Pty Ltd v Steelcon Construction Pty Ltd* (1995) 129 ALR

308; 15 ACSR 596; *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433; 13 ACLC 88, approved.

(vii) The swearing of affidavit by a person who had no knowledge whether the amounts claimed were owed by D was a sufficient "other reason" within CL s 459J(1)(b) to provide a separate ground for setting aside the statutory demand. The hearsay assertions of the deponent bring to the statutory demand a verisimilitude to which it is not entitled.

(viii) This was not a case where the power of dispensation appearing in Federal Court Rules O 71 r 36A(3) was appropriate. Without needing to decide the matter, it appeared that such an order should precede the making of the affidavit.

Application

This was an application to set aside the statutory demand under CL s 459J.

K Sutherland instructed by *Corrs Chambers Wesgarth* for the applicant.

D Stone instructed by *Williams & Hughes* for the respondent.

Nicholson J. The applicant seeks an order that the statutory demand for payment of debt (the statutory demand) served upon the applicant by the respondent on 8 January 1996 pursuant to s 459E of the Corporations Law be set aside pursuant to ss 459H and 459J(1).

The first paragraph of the statutory demand reads as follows:

1. The company owes Mr Everhard Vissers of 54 Rue de Rennes, 75006 Paris, France ("the creditor") the amount of $166,719.00 being the amount of the debt described in the Schedule.

After four other paragraphs of formal information the statutory demand then concluded with the following:

Amount owing pursuant to the audited accounts of the Respondent as at 30 June 1994 and for salary and reimbursements payable to the Applicant.	**Amount of Debt** $166,719.00

In support of its motion the applicant relies upon the allegation of a defect in the statutory demand causing substantial injustice; defects in a verifying affidavit; alleged abuse of process; and the existence of a genuine dispute between the creditor and the debtor.

Defect causing substantial injustice

Section 459E relevantly provides:

(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

. . .

(e) must be in the prescribed form (if any); and

. . .

(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.

Section 459G(1) provides a company may apply to the court for an order setting aside a statutory demand served on the company. On such an application it is provided by s 459J that:

(1) ... 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.

The purport of this section is supported also by s 467A which provides that an application under the part which includes s 459G must not be dismissed merely because of a defect or irregularity in connection with the application "unless the Court is satisfied that substantial injustice has been caused that cannot otherwise be remedied (for example, by an adjournment or an order for costs)".

The "prescribed form" required by s 459E(2)(e) is Form 509H, the first paragraph of which reads:

1. The company owes (name) of (address) ("the creditor") *the amount of $(insert amount), being the amount of the debt described in the Schedule. *the amount of $(insert total amount), being the total of the amounts of the debts described in the Schedule.

The conclusion of the Form reads:

SCHEDULE

Description of the debt (indicate if it is a judgment debt, giving the name of the court and the date of the order)	Amount of the debt
	*Total Amount

Where the amount demanded is comprised of multiple debts it is said there are two possible constructions of s 459E(2), namely, a demand which relates to two or more debts also relates to single debts and must therefore comply with both paras 459E(2)(a) and (b); alternatively, paras 459E(2)(a) and (b) are mutually exclusive: cf *Jarpab Pty Ltd v Mark Winter (t/a Boldon Haulage)* (1994) 14 ACSR 255; 12 ACLC 688 at 691 and *Chains and Powers (Aust) Pty Ltd v Commonwealth Bank of Australia* (1994) 55 FCR 562; 15 ACSR 682; 13 ACLC 73 at 78, 79. In *Chippendale Printing Co Pty Ltd v DCT (NSW)* (1995) 15 ACSR 544; 13 ACLC 229 at 243, Lindgren J noted the two possible constructions of subss 459E(2)(a) and (b) but, having regard to the relevant excerpts of Form 509H including the Schedule to it, reached the view that a statutory demand relating to multiple debts must at least give a "description" of the individual debts and state their amounts as well as state the total of those amounts.

I agree with Lindgren J that the Schedule to Form 509H requires both a description of the individual debts as well as the total amount. Section 459E(2)

requires the demand not only satisfy paras (a) and (b) but also para (e) namely, the prescribed form. It follows that if the demand does so, and it relates to two or more debts, it will both specify the individual debts and the total amounts. In my opinion it is not necessary to engage in construction of paras (a) and (b) alone because the reading of them in conjunction with para (e) makes the application of the subsection clear. Compliance with para (e) in the case of multiple debts necessarily involves compliance with para (b) and has the consequence that the demand specifies individual debts and the total amount of all debt.

The next issue which arises is whether the absence of specification of individual debts in the statutory demand constitutes a "defect". The expression "defect" is defined in relation to a statutory demand in s 9 of the Corporations Law to include:

(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.

This definition is an inclusive one so that a "defect" within the ordinary meaning of that term would be a defect for the purposes of the Corporations Law: *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* (1994) 51 FCR 446; 128 ALR 149; 13 ACSR 525; 12 ACLC 391 at 395; cf *Topfelt Pty Ltd v State Bank of NSW Ltd* (1993) 47 FCR 226; 120 ALR 155; 12 ACSR 381; 12 ACLC 15 at 24 per Lockhart J.

In my opinion the statutory demand contains defects which either fall within para (a) of the inclusive definition as an irregularity or within the ordinary meaning of the term "defect". The first defect is that the reference to the Schedule required by the prescribed Form 509H to a "Schedule" is omitted from the statutory demand. In addition, the statutory demand fails to set out the amount of the individual debts said to comprise the total amount demanded. In this respect the demand is accordingly "defective" in that it is incomplete because it fails to identify the individual amounts said to make up the total amount due and owing.

The question then arises under s 459J whether "substantial injustice" will be caused unless the demand is set aside.

For the applicant it is submitted a statutory demand will cause substantial injustice where the defects render the debtor incapable of determining the individual amounts owing for each of the debts comprising the total amount demanded.

It is contended for the applicant that the respondent's failure to set out the individual amounts said to be due and owing has caused substantial injustice in that the applicant is unable to identify the individual components said to make up the total amount due and owing. Furthermore it is contended for the applicant that it has been unable from its own records and documents to verify the amounts claimed to be due and owing. It is said, it has therefore been deprived of the right to accurately assess whether or not the respondent is entitled to the amounts claimed.

It is not the case that wherever the individual amount of each debt making up a stated total is not expressed substantial injustice will necessarily arise: cf *Jarpab*, supra, at ACLC 692: *Chippendale*, supra, at ACLC 244. There will not be a substantial injustice where a demand makes clear sufficient information so that the debtor, if its own record keeping has been adequate, is able to determine whether it is liable for the amounts claimed: cf *Topfelt*, supra, at ACLC 27-8.

To consider whether any substantial injustice has resulted from the defects it is necessary to turn to the factual background. The applicant is a company incorporated in Australia and carrying on business in West Perth. M Henry Debey of Malmaison, France is a director of it. The respondent is a resident of Paris who claims to have been formerly employed by the applicant.

A statutory demand dated 5 January 1996 was served upon the applicant on behalf of the respondent claiming the "amount owing under a contract made the 31st day of January 1995 between the Company and the Creditor" and specifying the "amount of debt" as $166,719. An affidavit verifying that debt was sworn by a solicitor for the respondent based on information she had received from him and describing the sum owing as consisting of the sum payable for salary and reimbursements owed pursuant to the contract described in the statutory demand dated 5 January 1996.

By letter dated 8 January 1996 the solicitors for the respondent informed the applicant the respondent did not purport to rely on that demand. It will be observed this first purported demand contained defects of the same character as the statutory demand, in that there was no description of a Schedule and no inclusion of individual amounts making up the total debt.

The statutory demand was verified by an affidavit of the same solicitor based on information she had received from the respondent and her viewing of "the summation of the accounts". That was a reference to a document entitled "Summation of amount owed by Delta Beta to Vissers" which was prepared by the respondent and faxed to the applicant's accountants on 18 December 1995. In the summation the respondent showed three principal amounts as owed to him, namely:

1. Amount owed per 30/6/94 as per audited accounts $60,326.
2. Fiscal year 1994-95: $46,278 including an amount of $40,159 for "direct costs to be reimbursed".
3. Fiscal year 1995-96: $55,036 including $37,500 in respect of nett salary payable for 1/7/95 to 12/95.

The difference between the amounts claimed and the totals so described as owing arise from amounts calculated in the summation by the respondent in respect of Social Security contributions made by him in France. The total amount showed as owing on the summation is $161,640.

The real question which arises is whether from that information the applicant was able to identify and know the amounts said to be owing by it because its books of account were within its own control and knowledge.

In a fax of 18 December 1995 to the accountants for the applicant, the respondent raised four questions of detail directed to the accuracy of the summation prepared by him. On 2 January 1996, he forwarded a further fax to the accountants for the applicants acknowledging receipt of a fax from those accountants on 20 December and stating that, as a consequence of the fax, he had revised the summation of funds owing to him. The amounts in the first and third limbs of the summation remained unchanged but the amount in the second limb was increased by $2260 in respect of "corrections (additional est to be reimb)" to a total of $48,538 with a consequent new total amount as at 31 December 1995 of $163,900. In respect of the total amount the respondent said in the fax to the accountants of 2 January 1996 that he would appreciate if they could advise him as soon as possible if the summation attached was correct from an accounting point of view.

With respect of the first limb of the statutory demand it is apparent that the accountants for the applicant accepted the opening balance of what they described as the "respondent's loan account" was $60,326 and, given the figure derives from the audited accounts, it is clearly one within the knowledge of the applicant.

However, on 18 December 1995 the applicant's accountants faxed the respondent advising that while they had gone through the cashbook and extracted all entries relating to him they were as yet unable to finalise the balance in his loan account and the loan account would need to be properly reconciled when the accounts were done.

In respect of the second limb of the statutory demand, the payments to be reimbursed, there is evidence that when the applicant receives a claim for reimbursement it will require further details of the costs claim to ensure they are justified as being for the benefit of the applicant and only when clarification and verification is complete will a claim for reimbursement be allowed. Without description of what the cost was incurred for, details of the costs claim, details of how the costs were incurred for the benefit of the company, the applicant cannot deal with claims for "reimbursements". The demand in the second limb for reimbursements is based on the respondent's statement of costs he says he incurred for the applicant which he has asked the applicant's accountants to verify. It is these matters which were the subject of the accountants qualification that verification is still required as a precondition to finalisation of the loan account.

The inconclusiveness of the figures provided by the applicant's accountants to the respondent with respect to the loan account is supported also by a fax dated 5 January 1996 to the respondent from those accountants in which it was said the respondent's method of arriving at what the applicant owed him "looks okay" but asked him to "please keep in mind that further verification may be needed at a later date".

In addition, there is affidavit evidence from M Debey that the applicant will require a full explanation of three amounts in particular, namely $4602, $11,829 and $1500, the nature of which is unknown to the applicant. In respect of the latter amount it is asserted for the applicant that such costs were specifically not authorised before they were incurred and that the respondent has accepted he should offer an explanation in writing how they came to be incurred.

Returning to the description and amount of debt appearing in the statutory demand it is apparent that the "amount owing" pursuant to the audited accounts of the applicant as at 30 June 1994 is known to the applicant. However, the amounts claimed "for salary and reimbursements payable to the [respondent]" are not so known. Furthermore, the difference between the amount claimed of $166,718 and the amount claimed in either of the summations is unexplained. It is apparent also that the resolution of the claims is not dependent upon knowledge and information solely within the possession and control of the applicant – it depends also upon the specification of the nature of claim by the respondent and, at least in one case, by submission of a written account of the circumstances in which it was incurred.

It follows this is not a case where the applicant is able to identify and know the amount said to be owing by reference solely to information within its possession and control. I therefore consider substantial injustice will be caused to the applicant unless the demand is set aside.

Accompanying affidavit

The point is also taken on behalf of the applicant that the accompanying affidavit purporting to be in compliance with s 459E(3) sworn by the solicitor for the respondent is of a hearsay nature and unreliable.

From oral testimony given by the solicitor it is apparent her knowledge derived from a consideration of the first summation. It is apparent when the solicitor swore she had viewed the summation of accounts, that alone could not have entitled her to also swear as to the total indebtedness of the applicant to the respondent nor as to the amount of salary and reimbursements.

Whether the service of a demand accompanied by an affidavit which fails in a substantial way to meet the requirements of s 459E(3) results in "a defect in the demand" for the purposes of s 459J(1)(a) is undecided although it would seem to be doubtful: cf *Hamilhall Pty Ltd (in liq) v A T Phillips Pty Ltd* (1994) 54 FCR 173; 15 ACSR 247 at 249 and *Besser Industries (NT) Pty Ltd v Steelcon Construction Pty Ltd* (1995) 129 ALR 308; 15 ACSR 596 at 605. I agree with Branson J in her reasons in those decisions that it is more likely such a failure would constitute a defect in the service of the demand rather than the demand itself.

The defect which it is said exists in the affidavit in the present case is that it fails to comply with the rules as required by s 459E(3)(b) in that it is not "made by a person who can depose to his or her own knowledge of the indebtedness of the company" in accordance with O 71 r 36A(3) of the Rules of the Federal Court (FCR). The question then is whether that defect is a sufficient "other reason" why the demand should be set aside pursuant to s 459J(1)(b). Section 459J(2) would not exclude that possibility because I agree with McLelland CJ in equity in *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433; 13 ACLC 88 at 91 that the word "defect" in that subsection must be read as a defect in the demand itself. Furthermore, as there stated, the question is whether the defect is a sufficient other reason and not just whether the demand should be set aside because of the defect alone.

In *B & M Quality Constructions*, supra, McLelland CJ considered that where an affidavit required pursuant to Pt A r 15 of the Rules of the Supreme Court of New South Wales required the deponent to state a belief there was no genuine dispute and the statement was based solely on hearsay, it would not be merely a technical breach of the rules. In the present case the affidavit was not required to and does not attest to the absence of a genuine dispute.

It is clear this is not a case where the deponent was a person who could depose of her own knowledge by virtue of being in possession of the relevant books and records – the opposite was the case: cf *Hamilhall*, supra, at ACSR 249. The defect is certainly more than the failure to include an important note in the affidavit: cf *Besser*, supra, at ACSR 605. It is not, however, a case where there is an entire absence of a verifying affidavit: *Neylon v Bluegrass Developments Pty Ltd* (27 June 1994, Fed C of A, Drummond J, unreported). Nor are the present circumstances ones which came within the contemplation of those considering the enactment of s 459J(1)(b): cf *Chippendale*, supra, at ACLC 241-2; *Hoare Bros Pty Ltd v DCT (NSW)* (1996) 135 ALR 677; 19 ACSR 125.

For the respondent reference is made to the power of dispensation appearing in FCR O 71 r 36A(3) where it is provided that the rule applies "unless the Court orders to the contrary". It appears to me such an order should precede the making of the affidavit but I do not decide that point finally because it has not been argued

in those terms before me. If there is a power to dispense with the requirements of the rule after the making of the affidavit, it falls to the court to consider whether that power should be exercised. In my opinion it should not because no basis has been shown to the court for varying the normal application of the rule.

In my opinion the circumstances of this case make it appropriate for the defect in the affidavit to ground a sufficient "other reason" within s 459J(1)(b) of the Corporations Law for the reason that the hearsay assertions of the deponent bring to the statutory demand a verisimilitude to which it is not entitled. The summation is one prepared by the respondent and the salary and reimbursements are not finalised as debts. The effect of the swearing of the affidavit is to seek to obtain for the respondent the statutory effect of the statutory demand and the presumptions which attach to it under the Corporations Law. In my opinion, that circumstance raises the defect in the affidavit beyond a mere defect and to one of significance in all the circumstances of this case.

Abuse of process

For the applicant it was initially contended the respondent has commenced proceedings before the Conciliation Board for industrial disputes in Paris in relation to the same amounts the subject of the statutory demand so that the statutory demand constitutes an abuse of process and should be set aside on that ground.

An affidavit of the respondent sworn 1 April 1996 deposes that the French proceedings are materially different from the claim made in the statutory demand and relate to breach of a employment contract the locus of which was France. The affidavit evidence also is that the French proceedings do not involve any claim in respect of salary or other payments for the year to 30 June 1994 or salary from 1 July 1994 to 1 January 1995. The French proceedings do involve a claim for arrears of salary from 1 January 1995 but to the extent these are successful the respondent has undertaken not to present a winding up petition in this or any other Australian court in respect of it.

It was apparent from affidavit evidence of M Debey that the applicant had not been served with detailed accounts referred to in the French petition so that the applicant was not in a position for it to be deposed on its behalf accurately that the amounts the subject of the French petition include the amounts the subject of the respondent's statutory demand. Leave was therefore given to the applicant to file an affidavit in reply. From that it appears that a conciliatory hearing took place in the French proceedings on 9 April 1996, following which those proceedings have been adjourned for 12 months. In the light of that further evidence the case for the applicant no longer relies upon contentions of abuse of process.

I accept the respondent's evidence in respect of the French proceedings. In my opinion, there is no ground upon which the claim for dismissal of the statutory demand on the ground of abuse of process can succeed.

Genuine dispute

Submissions were made on behalf of the applicant in relation to the existence of a genuine dispute and the provisions of s 459H but, inasmuch as that section is to be read subject to s 459J – see s 459H(6) – it is not necessary for those submissions to be addressed.

For these reasons I consider that the application should be granted.

Orders

(1) An order that the statutory demand for payment of debt served upon the applicant by the respondent on 8 January 1996 pursuant to s 459E of the Corporations Law be set aside pursuant to ss 459H and 459J(1).

(2) The respondent pay the applicant's costs of the application.

DAVID FRIEDLANDER
SOLICITOR