Re **AD-A-CAB HOLDINGS PTY LTD**

[Appn 6871/1996]

Supreme Court, Brisbane (Mackenzie J.)

25 September; 25 October 1996

Corporations – Companies – Winding up – Winding up by Court – Grounds for winding up – Inability to pay debts – Bona fide dispute as to indebtedness – Application to set aside statutory demand – Validity of statutory demand – "Substantial injustice" – "Some other reason" – Defects – Failure to specify address for service in State in which demand served – Overstatement of amount of debt – Corporations Law ss 459G(1), 459J. (A.Dig. 3rd [171]).

The *Corporations Law* relevantly provides:

"**459G(1) [Company may apply]** A company may apply to the Court for an order setting aside a statutory demand served on the company.

…

459J(1) [Defect or other reason] 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.

459J(2) [Mere defect] Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

Held, refusing an application to set aside a statutory demand:

(1) That a failure to specify in a statutory demand an address for service in the State in which it was served did not require the demand to be set aside under s. 459J unless that failure would cause substantial injustice.

Kalamunda Meat Wholesalers Pty Ltd v. Reg Russell & Sons Pty Ltd (1994) 128 A.L.R. 149, 153; *Chains & Power (Aust) Pty Ltd v. Commonwealth Bank of Australia* (1994) 15 A.C.S.R. 544, 553; *Chase Manhattan Bank Australia Ltd v. Oscty Pty Ltd* (1995) 17 A.C.S.R. 128, 138; *First Line Distribution Pty Ltd v. Whiley* (1995) 13 A.C.L.C. 1216, 1219; *Turner Equity Pty Ltd v. Melvista Park Pty Ltd* (1995) 18 A.C.S.R. 399, 403; *Delta Beta Pty Ltd v. Vissers* (1996) 20 A.C.S.R. 583, 586; *Portrait Express (Sales) Pty Ltd v. Kodak (Australasia) Pty Ltd* (1996) 20 A.C.S.R. 746, 757 followed.

Scandon Pty Ltd v. Dome Supplies Pty Ltd (1995) 17 A.C.S.R. 662 not followed.

(2) That it was a question of fact in each case whether a statutory demand sufficiently specified the debt and the basis upon which it was calculated.

Topfelt Pty Ltd v. State Bank of New South Wales Ltd (1993) 12 A.C.S.R. 381; *Chains & Power (Aust) Pty Ltd v. Commonwealth Bank of Australia* (1994) 15 A.C.S.R. 544, 550–551; *Delta Beta Pty Ltd v. Vissers* (1996) 20 A.C.S.R. 583, 586–587 followed.

(3) That an overstatement of the amount of a debt in a statutory demand did not require it to be set aside under s. 459J in circumstances in which the creditor conceded the overstatement prior to the hearing and the demand correctly specified the amounts of other debts.

Khadine Pty Ltd v. Giant Bicycle Co. Pty Ltd (1995) 16 A.C.S.R. 421; *Portrait Express (Sales) Pty Ltd v. Kodak (Australasia) Pty Ltd* (1996) 20 A.C.S.R. 746 distinguished.

CASES CITED

The following cases are cited in the judgment:

Chains & Power (Aust) Pty Ltd v. Commonwealth Bank of Australia (1994) 15 A.C.S.R. 544.
Chase Manhattan Bank Australia Ltd v. Oscty Pty Ltd (1995) 17 A.C.S.R. 128.
David Grant & Co. Pty Ltd v. Westpac Banking Corporation (1995) 184 C.L.R. 265.
Delta Beta Pty Ltd v. Vissers (1996) 20 A.C.S.R. 583.
First Line Distribution Pty Ltd v. Whiley (1995) 13 A.C.L.C. 1216.
Kalamunda Meat Wholesalers Pty Ltd v. Reg Russell & Sons Pty Ltd (1994) 128 A.L.R. 149.
Khadine Pty Ltd v. Giant Bicycle Co. Pty Ltd (1995) 16 A.C.S.R. 421.
Morris Catering (Australia) Pty Ltd; Re (1993) 11 A.C.S.R. 601.
Portrait Express (Sales) Pty Ltd v. Kodak (Australasia) Pty Ltd (1996) 20 A.C.S.R. 746.
Scandon Pty Ltd v. Dome Supplies Pty Ltd (1995) 17 A.C.S.R. 662.
Topfelt Pty Ltd v. State Bank of New South Wales Ltd (1993) 12 A.C.S.R. 381.
Turner Equity Pty Ltd v. Melvista Park Pty Ltd (1995) 18 A.C.S.R. 399.

APPLICATION

A. M. Daubney for the applicant.

D. O. J. North for the respondent.

C.A.V.

MACKENZIE J.: This is an application to set aside a statutory demand issued under the *Corporations Law* by Westlawn Investment Company Limited against the applicant. The applicant markets illuminated advertising signs attached to taxis. Advertisers purchase the right to advertise on such signs. By a "Deed of Assignment", agreement was entered into whereby the applicant factored debts payable to the applicant under advertising contracts to Westlawn. One element of the agreement was the creation of an "Availability Account" to which Westlawn was to credit amounts payable to the applicant upon the sale to Westlawn of debts due to the applicant under the advertising agreements. The applicant could draw down against such account and could authorise and direct Westlawn to make payments to the company's bank or otherwise (including payments to Westlawn).

There was also a "Repurchase Agreement and Guarantee" between the parties the purpose of which was for Westlawn to provide leasing finance facilities to the owners of taxis to whom the applicant had agreed to lease advertising units. There was a provision in the agreement to the effect that if a taxi operator defaulted under the lease agreement Westlawn, in consultation with the applicant, was obliged to "pursue all legal remedies reasonably available to it for recovery of the balance due" and that at the conclusion of such pursuit the applicant was required within seven days of demand to pay to Westlawn the balance owing under the lease agreement. There was also provision for unrecovered costs of the pursuit of legal remedies to be borne equally by the applicant and Westlawn.

Also relevant to the present proceedings is a transaction reflected in an agreement dated 24 February 1995 between the applicant and Westlawn relating to dealings in connection with a taxi operator named Overs under which Westlawn had provided finance in respect of 42 signs. Overs had defaulted and the applicant had paid, to the date of the agreement, payments owing to Westlawn by Overs. It was agreed that Westlawn would from the date of the agreement accept 28 monthly payments of $4,132 in respect of the purchase price and interest with a final payment of $50,000 at the expiry of the 28th month. It is now common ground that there is no acceleration clause in the agreement and that payments will periodically fall due until June 1997.

The schedule to the statutory demand is in the following form:

SCHEDULE

Description of the debt

(a)	Debt due for advertising units in respect of K.J. Overs pursuant to Repurchase Agreement dated 9 September, 1993 and subsequent agreement dated 24 February, 1995, in the sum of	$125,951.77
(b)	Debt due for advertising units pursuant to Repurchase Agreement dated 9 September, 1993 in the sum of	14,647.44
(c)	Debt due in respect of advertising contracts pursuant to Deed of Assignment dated 8 October, 1993	13,949.96
	Total	**$154,549.17**

In view of the concession that there is no acceleration clause in the agreement relating to Overs the statutory demand overstates the amount of the debt. The amount owing is $41,320, not $125,951.77.

With respect to the deed of assignment payments have been received since the statutory demand was delivered and the amount now owing, according to the respondent's material, is $13,011.62. The amount claimed under the repurchase agreement is the same as that in the statutory demand. Before proceeding to discuss the respective submissions concerning the substantive application it is necessary to deal with a preliminary threshold question. It was submitted that the statutory demand does not comply with Form 509H in that it fails to specify an address for service of Westlawn in Queensland. It was conceded by Mr Daubney for the applicant that notwithstanding the failure to specify an address for service in Queensland the applicant had managed to bring the application within the time prescribed under s. 459G and that it was therefore difficult to argue that the demand should be set aside because "substantial injustice" would be caused by the defect. The combined effect of s. 459J(1)(a) and (2) is that a demand is not to be set aside for a defect in the notice unless substantial injustice will be caused. However it was submitted that failure to specify an address for service in Queensland was a defect of sufficient severity as to be "some other reason why the demand should be set aside" in reliance on s. 459J(1)(b). For this proposition the applicant relied on *Scandon Pty Ltd v. Dome Supplies Pty Ltd* (1995) 17 A.C.S.R. 662.

In that case, as in the present case, the creditor had given an address for service in a State other than the State in which the notice was served. After detailed analysis a Victorian Senior Master concluded that even though the defect did not cause "substantial injustice" and was therefore unable to be set aside under s. 459J(1)(a) it might nevertheless be set aside (even though it was a "defect" which did not cause "substantial injury") under s. 459J(1)(b) if the defect was of sufficient gravity to warrant doing so. It was held that failure to specify an address for service in the State in which the demand was served was "sufficiently significant". An influencing factor in the decision that there was a residual power, even in the case of a defect, to set aside a demand under s. 459J(1)(b) was that there would be no remedy otherwise in a case where a failure to specify the address for service in the State resulted in the debtor failing to apply within the time limited by s. 459G.

The fact that Part 5.4 of the *Corporations Law* might operate harshly in some cases was recognised as a consequence of the legislative scheme by the High Court in *David Grant & Co. Pty Ltd v. Westpac Banking Corporation* (1995) 184 C.L.R. 265. The High Court also pointed to the remedy of injunctive relief which would be available in limited circumstances.

In *Scandon Pty Ltd v. Dome Supplies Pty Ltd*, the Senior Master followed the decision of Lockhart J. in *Topfelt Pty Ltd v. State Bank of New South Wales Ltd* (1993) 12 A.C.S.R. 381 in which s. 459J(1)(b) was employed to set aside a demand which inadequately described the basis for the claim and the amount of interest claimed. Notwithstanding that, the recent trend of authority has been in the direction of holding that where what is relied on is a "defect" relief can only be given if "substantial injustice" will be caused unless the demand is set aside (*Kalamunda Meat Wholesalers Pty Ltd v. Reg Russell & Sons Pty Ltd* (1994) 128 A.L.R. 149,

153; *Chains & Power (Aust) Pty Ltd v. Commonwealth Bank of Australia* (1994) 15 A.C.S.R. 544, 553; *Chase Manhattan Bank Australia Ltd v. Oscty Pty Ltd* (1995) 17 A.C.S.R. 128, 138; *First Line Distribution Pty Ltd v. Whiley* (1995) 13 A.C.L.C. 1216, 1219; *Turner Equity Pty Ltd v. Melvista Park Pty Ltd* (1995) 18 A.C.S.R. 399, 403; *Delta Beta Pty Ltd v. Vissers* (1996) 20 A.C.S.R. 583, 586; and *Portrait Express (Sales) Pty Ltd v. Kodak (Australasia) Pty Ltd* (1996) 20 A.C.S.R. 746, 757). As there was no reason to suggest that substantial injustice would be caused by the failure to specify an address for service in Queensland, I am satisfied that the demand cannot be set aside for that reason. Rather than laying down rules to be mechanically applied the cases suggest that it is a question of fact in each case whether the demand sufficiently specifies the debt and the basis upon which it is calculated. (See e.g. *Delta Beta Pty Ltd v. Vissers*, 586–587, *Chains & Power (Aust) Pty Ltd v. Commonwealth Bank of Australia*, 550–551 and *Topfelt Pty Ltd v. State Bank of New South Wales Ltd*).

The factual context in which the present case arises is that by letter dated 25 July 1996 a list of 16 debts remaining unpaid for periods in excess of 120 days was sent to the applicant by the respondent. The debts were tabulated and gave information as to the account number, the client's name, the date when the account was "last paid" and the payout figure as at 31 July 1996. On 4 June 1996 a letter containing information relating to the first 10 accounts on the list in the letter of 25 July 1996 had been sent. Each letter referred to clause 11(a) of the Deed of Assignment which was to the effect that in the event of any of the debts purchased pursuant to the agreement which remained unpaid in whole or in part by any of the advertisers at the expiration of 120 days following the last day of the month in which they were purchased, the applicant would within 30 days thereof purchase from the respondent the total of the amount outstanding of such debts at face value. Clause 11(b) provided that in the event of the debts not being repurchased the applicant would pay to the respondent by way of liquidated damages a sum equal to 21 per cent per annum calculated on a daily basis until repurchase. In the letter of 25 July 1996 each amount shown as the payout figure is higher than the corresponding entry in the letter of 4 June 1996 for clients shown in both letters.

The only reasonable conclusion a debtor could draw was that an additional liability was accruing in accordance with clause 11(b). The means for deciding whether there were grounds for disputing liability or quantum were within the knowledge of the debtor by reference to its own records. The amount shown in the letter of 25 July 1996 is identical to that demanded in the notice dated 1 August 1996.

It is against that background that the complaint of Mr McKelvey, managing director of the applicant, that it was impossible by reference to the demand or the letters of 4 June 1996 and 25 July 1996 to determine how the amount was calculated, how much was "interest" and the period and rate of "interest". If there is a defect I do not accept that it would lead to substantial injustice in the present case. It would be easy by reference to the records of the company to ascertain whether the debts were 120 days old and if so how much liquidated damages in accordance with clause 11(b) was legitimately claimable. The applicant put in no material to suggest that there was any ground for disputing the calculations. In my view in a case like this, where there is no complexity about the source and

rate of the liquidated damages, a mere assertion to the effect that it is all too hard does not suffice. That that is not an unduly harsh comment is reinforced by my impression of Mr McKelvey who was called for cross-examination on his affidavit.

Mr McKelvey also deposed that Westlawn had made many deductions from the Availability Account without prior authorisation or direction of the applicant. He claimed by reference to documents that the total amount deducted without the company's authorisation and direction exceeded $48,000. This would, if substantiated, be an offsetting claim. In deciding whether there is a genuine dispute or a genuine offsetting claim the principle applicable is that described by Thomas J. in *Re Morris Catering (Australia) Pty Ltd* (1993) 11 A.C.S.R. 601 where he sald that division 3 of Part 5.4:

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

Contradictory of Mr McKelvey's claim in his affidavit, there is an affidavit from Mr Smith, Collections Manager of the respondent, to the effect that two directors and an employee of the applicant met with himself, the managing director and the general manager of the respondent on 21 February 1996. At that meeting it was agreed that funds coming in from new and repeat business could be utilised to reduce indebtedness in lieu of paying the factored amount on to the applicant under the Deed of Assignment. As a result of that agreement funds from new and repeat contracts were used to reduce indebtedness rather than paying the factored moneys to the applicant. The letters relied on by Mr McKelvey to support his claim were the method employed to account to the applicant for the moneys so utilised. Mr Smith also deposed that no-one on behalf of the applicant ever queried the arrangement. None of the parties to the meeting connected with the applicant put in material to dispute this version of events and it appeared from Mr McKelvey's evidence that he was overseas at the time when the arrangement was entered into. He did not suggest that the arrangement was not entered into but said that it was not reflected in the company's records. He could not explain why there had been no complaint about the deductions. In the circumstances, applying the test in *Re Morris Catering* the evidence goes beyond the question of whether one party is more likely than the other to succeed or that the eventual state of the account between the parties is more likely to be one result than the other. My clear perception is that there is no genuine claim having regard to the uncontradicted evidence of the arrangement and the remoteness of any likelihood, having regard to the state of the evidence, that it could be challenged. I should also note that it was pointed out that if the moneys

employed pursuant to the agreement had to be restored to the applicant that would have the effect of increasing the amount due to the respondent by a corresponding amount.

With respect to the Repurchase Agreement, Mr McKelvey deposed that it was impossible to ascertain from the letter of 4 June 1996 in which $22,155.10 was demanded, the basis of calculation of that sum. That sum differs from the amount demanded on 1 August ($14,647.44). Mr McKelvey also deposed that the process of pursuing legal remedies had not been complied with. He further deposed that during the currency of the agreement the applicant had paid the respondent more than $22,000 in circumstances where the respondent had not pursued legal remedies against the clients. The applicant claimed restitution of that amount. I note again that if that were to be successful the effect would be to increase the debt by a corresponding amount.

The letter of 4 June 1996 demanded payment in respect of accounts in arrears in a sum which would be due on 30 June 1996. The particular accounts were set out in an annexure to the letter. On 28 June 1996 a letter containing an "updated status list of current leases" with the respondent was forwarded to it by the applicant. This was followed by a letter of 3 July 1996 which included a payment of $12,487.25 to the respondent's account as a "progress payment of our debt reduction programme". Instructions as to the amounts to be credited to specific accounts were given. The letter refers to amendment of the list set out in the letter of 28 June 1996 because additional leases were finalised as a result of the payments.

This is not a case where the applicant does not have the means of verifying from its own records, without onerous enquiry, what accounts are in arrears and to what extent. Mr McKelvey's complaint that the letter of 4 June 1996 did not enable him to ascertain the basis upon which the sum of $14,647.44 was demanded on 1 August 1996 is misdirected in view of the correspondence to which I have referred. The demand identified the agreement. No evidence was called to positively dispute the amount demanded. Mr Smith has on behalf of the respondent deposed it is the correct sum calculated in accordance with the agreement. I am satisfied there is nothing in the applicant's complaint in this regard.

With respect to the allegation that legal remedies have not been pursued against the lessees Mr M. J. Doherty, managing director of the respondent, deposed that Mr McKelvey requested that the respondent not repossess units from lessees who were in arrears and agreed that the applicant would pay the leases out. He deposes that some payments were made by the applicant but the accounts again fell into arrears. After more conversations about that, Mr McKelvey directed him not to repossess the units because of the bad publicity and the costs involved. This version of events is not contradicted. In the circumstances notwithstanding the complaint that there is an offsetting claim on the basis that voluntary payments were made I am not persuaded that there is a genuine claim.

The final matter is that the notice of demand claims amounts that were not then due. It is conceded by the respondent that in respect of the Overs agreement there was no acceleration clause and that therefore the amount demanded should have only been the total of outstanding instalments ($41,320) instead of $125,951.77 as claimed. Mr Daubney for the applicant submitted on the basis of *Khadine Pty Ltd v. Giant Bicycle Co. Pty Ltd* (1995) 16 A.C.S.R. 421 that the demand should be set aside because it was

"wildly inaccurate". The nature of the inaccuracy in that case was that credit had not been given for substantial sums that had been paid and that post-judgment interest, which the respondent sought to claim, was not referred to in the demand. That is a somewhat different situation from the present case where the cause of the inaccuracy is not a mathematical failure to state the sum due accurately nor a failure to refer to a component relied on. In the present case the inaccuracy is the result of the misconstruction of the document creating the debt, of which the applicant was obviously aware because the point was taken in Mr McKelvey's affidavit.

I was not specifically asked by Mr Daubney for relief on the basis that injustice would be caused because sums which had not fallen due were included in the demand. I am conscious of *Portrait Express (Sales) Pty Ltd v. Kodak (Australasia) Pty Ltd* in which Bryson J. held (at 750) that the inclusion in the demands of debts which were not due for payment was a defect and that their inclusion was an injustice to the plaintiffs in that they were placed under a need to apply to set aside the demands or to pay the moneys which were not due. The present case is one where in respect of the Overs debt there is now no issue about the amount owing. It was not contested at the hearing and was conceded in favour of the applicant that there was no acceleration clause. There is no reason to suppose that had that been the only debt the demand would have been persisted in thereby forcing the applicant to apply to have it set aside. That is somewhat different from *Portrait Express* where the respondent vigorously supported the proposition that the whole of the only debt claimed was owing and the applicant was forced to bring the proceeding for that reason alone. The contentious issues in the present case were related to the two other agreements under which debts were claimed to be owing. Those were resolved, after evidence and submissions, against the applicant leaving demands in excess of $28,000 intact. There is no reason to disagree with the notion that injustice may be caused to the recipient of a demand in circumstances like those in *Portrait Express* and that in such circumstances it may be appropriate to set aside the demand. Factually it is different from the present case. Because of the particular facts of the present case, where the applicant's proposition about what was owing under that particular agreement was not in dispute and the real foci of the application were the other sums claimed by the respondent I am not satisfied that there is "some other reason" why the demand should be set aside within the meaning of s. 459J(1)(b).

That being the case I am satisfied that the substantiated amount of the demand at 1 August 1996 was, following the categories in the demand, as follows:

(a)	$41,320.00
(b)	$14,647.44
(c)	$ 13,949.96
Total	$69,917.40

If, as appears from the affidavits of Mr Smith sums totalling $938.16 have been paid subsequent to the demand being made such moneys and any moneys paid subsequently will be taken into account in reducing the liability of the applicant. The orders are as follows:

1. I order that the demand be varied by substituting in para. (a) thereof the sum of $41,320.00 in lieu of $125,951.77 and by substituting as the "Total", the sum of $69,917.40 in lieu of $154,549.17.

2. I declare the demand, as so varied, to have had effect as from when the demand was served on the applicant.
3. The order in para. 1 hereof is conditional upon the respondent refraining from commencing proceedings relating to the demand within 14 days of the date of these orders.
4. The application to set aside the demand is refused with costs including reserved costs to be taxed.

Orders accordingly.

Solicitors: *Blundells* (Tweed Heads South) by *Drake Walker & Leahy* (town agents)(applicant); *Pollack Greening & Hampshire* (Grafton) by *Stephens & Tozer* (town agents) (respondent).

K. E. DOWNES
Barrister