SCANDON PTY LTD v DOME SUPPLIES PTY LTD

SUPREME COURT OF VICTORIA

SENIOR MASTER MAHONY

28 June, 11 August 1995 — Melbourne

Winding up — Statutory demand — Names — Demand not specifying current company name or ACN — Address for service outside state — Affidavit not complying with form — No "substantial injustice" — Whether defects constituted "some other reason" for setting aside statutory demand — Corporations Law ss 459E, 459G, 459J, 465B — Corporations Regulations Form 509H — Federal Court Rules O 71 r 36A(1).

Statutory interpretation — "Some other reason" — Corporations Law s 459J(1)(b), 465B(2).

The respondent served a statutory demand on the applicant in Victoria but gave a Queensland address as its address for service by the applicant of any application and affidavit under CL s 459G. The demand did not specify the respondent's current name or its ACN. Additionally, in the "Important Note" prescribed by the form in the Rules of the Federal Court to follow the jurat of the affidavit it was asserted that proceedings were pending between the parties, whereas the form stated "no proceedings are pending". The applicant served the respondent within time at the specified Queensland address with copies of the documents required for an application under s 459G, but sought to have the demand set aside for, inter alia, specifying an address outside Victoria.

Held, setting aside the demand:

(i) Section 459J(1)(a) could never apply to a defect in a statutory demand such as in this case. If the defect caused the company to fail to effect service within the time limit, the consequence would be inability to apply for the setting aside of the demand. The application would not be "under" s 459G, s 459J would have no operation, and so the "substantial injustice" which, in such a case, had produced this result could not be remedied as provided for by s 459J(1)(a). Where, as here, the application was in accordance with s 459G, the fact that the applicant had managed to effect service meant that there would not be "substantial injustice" and s 459J(1)(a) did not apply. If such a statutory demand could not be set aside under s 459J(1)(b), it would *never* be set aside for that cause.

(ii) Where there were no exceptional circumstances the opportunity ought to exist for the court to register clearly and appropriately the importance of due compliance with the requirements of para 6 of Form 509H.

(iii) The exception in s 459J was constituted by the *whole* of subs (1), not limited to subs (1)(a). Giving effect to the plain and natural meaning of the words used in the section, the result was that the court might set aside a defective statutory demand on the basis of a sufficient reason other than the reason that otherwise "substantial injustice will be caused".

(iv) It was not to be assumed that the author of either the second reading speech or the explanatory memorandum had adverted to the many circumstances in which a defective demand might properly be set aside because the defect was of major significance. For that reason and because of their necessarily general nature, it was considered that they provided an insufficient basis to support a conclusion that s 459J, as passed by the Parliament, was to have a restricted ambit for which it did not, by its own clear words, provide.

(v) It was also not readily to be assumed that a stipulation that there be "some other reason", as in s 459J(1)(b), necessarily provided a total contrast with what had gone

before. Its effect might be cumulative, widening the category after an example of its content had been expressly given, as for example in s 465B(2).

(vi) The specification in subs (1)(a) of "substantial injustice" as the criterion for setting aside a defective demand must have the effect that for a defect which was not productive of "substantial injustice" to constitute "some other reason" for setting the demand aside under subs (1)(b), it must have significance as compelling as would "substantial injustice". In a case involving a defect of such gravity it was manifestly appropriate that the court could be empowered to set the demand aside; and a construction favouring the existence of such power was to be preferred to one which would deny it.

(vii) Accordingly the court had jurisdiction under s 459J(1)(b) to set aside the demand and would so order.

Topfelt Pty Ltd v State Bank of NSW Ltd (1993) 12 ACSR 381, followed.

Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd (1994) 13 ACSR 525; *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (in liq)* (1994) 14 ACSR 565; *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia* (1994) 15 ACSR 544; *Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation* (1995) 15 ACSR 682; *Chase Manhattan Bank Australia Ltd v Oscty Pty Ltd* (1995) 17 ACSR 128, not followed.

Hornet Aviation Pty Ltd v Ansett International Air Freight (1994) 16 ACSR 445, distinguished.

(viii) The defects constituted by the respondent's failure to state its current name and its ACN were such as to constitute "some other reason" to set aside the demand under s 459J(1)(b). A company seeking to obtain the benefit of the provisions of the Corporations Law by serving a statutory demand must observe basic requirements for disclosure of its identity which were imposed by the Corporations Law, particularly when those requirements were so serious that not to observe them attracted the operation of penal provisions.

Topfelt Pty Ltd v State Bank of NSW Ltd (1993) 12 ACSR 381; *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (in liq)* (1994) 14 ACSR 565, followed.

B & M Quality Constructions Pty Ltd v W G Brady Pty Ltd (1994) 12 ACLC 970, distinguished.

(ix) Since there was no basis for concluding that there was a prohibition of an affidavit to accompany a statutory demand if the debt was the subject of a pending proceeding, it would not be reasonable to read the second statement of the "Important Note" as purporting to constitute such a prohibition. The statement as it appeared in the form simply reflected the situation normally obtaining when such an affidavit was made. If the facts were otherwise, the creditor would be obliged to alter the statement sufficiently to reflect the truth. The complaint of the applicant concerning the affidavit which accompanied the demand was not such as to provide "some other reason" to set aside the demand under s 459(1)(b).

Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd (1995) 16 ACSR 596, followed.

(x) The statutory demand would therefore be set aside under s 459J(1)(b) because of the significance of the defects in the demand, albeit not productive in this case of "substantial injustice" to the applicant to which s 459J(1)(a) could apply.

Application

This was an application to set aside a statutory demand under s 459G. The facts appear sufficiently form the judgment of the court.

A Rodbard-Bean instructed by *Moores* for the applicant.

G Grigoriou instructed by *Purves Clark Richards* for the respondent.

Senior Master Mahony. In this proceeding, the applicant, Scandon Pty Ltd, seeks an order under s 459G of the Corporations Law setting aside a statutory demand served on it by the respondent, named in the statutory demand and in this proceeding as "Dome Supplies Pty Ltd".

Apart from any question of genuine dispute or offsetting claim, the applicant seeks the order on three bases directed to the validity of the demand:

(1) Service of the demand was duly effected on the applicant at its registered office in Victoria, but the demand specified an address in Queensland as the address for service on the respondent of the originating process and affidavit required with respect to any application under s 459G for the demand to be set aside.

(2) The demand named "Dome Supplies Pty Ltd" as the creditor but did not specify its ACN. The applicant's evidence was that the company with which it had dealings giving rise to the demand has not been called "Dome Supplies Pty Ltd" since 15 June 1993 when it changed its name to Powermate (Australia) Pty Ltd. It is clear from an affidavit filed on behalf of the respondent that the ACN specified by the applicant in the title of the proceeding as that of the respondent is correct; and that it is the ACN of the company which so changed its name

(3) The affidavit accompanying the demand was in the form prescribed by the Rules of the Federal Court, but in the "Important Note" which the form prescribed by those rules requires to follow the jurat, it was asserted that proceedings are pending between the parties concerning the debt the subject of the statutory demand, whereas the form states "no proceedings are pending . . ."

Mr Rodbard-Bean of Counsel for the applicant also sought to rely on the cumulative effect of the objections: cf *Hornet Aviation Pty Ltd v Ansett International Air Freight* (1994) 16 ACSR 21 at 24. For reasons which will become apparent, it is sufficient that I consider them separately.

Address for service in statutory demand

The applicant's first objection to the demand was founded on s 459E(2)(e) of the Corporations Law and Form 509H of the Corporations Regulations. The section provides that a statutory demand "must be in the prescribed form (if any)". The form which has been prescribed is Form 509H. Paragraphs 5 and 6 of the form are as follows:

> 5. Section 459G of the Corporations Law provides that a company served with a demand may apply to a court having jurisdiction under the Corporations Law for an order setting the demand aside. An application must be made within 21 days after the demand is served and, within the same period:
>
> (a) an affidavit supporting the application must be filed with the court; and
>
> (b) a copy of the application and a copy of the affidavit must be served on the person who served the demand.
>
> 6. The address of the creditor for service of copies of any application and affidavit is (*insert the address for service of the documents in the State or Territory in which the demand is served on the company, being, if solicitors are acting for the creditor, the address of the solicitors*).

The importance of para 5 of the form is obvious. The requirements which s 459G imposes on a company served with a statutory demand are onerous. Within 21 days after service, it must determine whether to pay the debt or to seek to secure or compound the debt to the satisfaction of the creditor or to apply to set aside the demand; and, if the last, to instruct solicitors so that preparation, filing and service of the requisite originating process and supporting affidavit may all be achieved within the 21 days. If companies were not accorded the courtesy of information as to those requirements, there would be very few applications in accordance with the section.

This is perhaps more generally appreciated now than it has been. Subject to a pending appeal to the High Court, the disagreement about the power of the court to extend the time for an application under s 459G appears, on balance, to have been resolved in favour of the view which has, from the outset, been taken in this court, that is, that there is no such power: see *Texel Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 298. Although by a majority, McPherson JA dissenting, the Court of Appeal in Queensland reached a different conclusion in *Cavetina Pty Ltd v Synthetic Dyeworks Industries Pty Ltd* (1994) 14 ACSR 274; 12 ACLC 768, the Full Court of this court, in effect, unanimously affirmed *Texel* in *David Grant & Co Pty Ltd (Rec apptd) v Westpac Banking Corporation* (1995) 15 ACSR 771; and *Texel* and *David Grant* have now been followed, unanimously, by the New South Wales Court of Appeal: *J & E Holdings Pty Ltd v Vaughan* (15 June 1995, Priestley, Sheller and Powell JJA, not yet reported).

Thus, the requirements of s 459G are indeed onerous and inescapable; and, as I have indicated, the information contained in para 5 of the form is vital to a company served with a statutory demand.

The complaint in this case is not about the respondent's reproduction of para 5. It is directed to its failure to follow para 6, by not specifying an address for service in Victoria. Paragraph 6 is meaningful in the context of para 5 and is similarly important.

Having regard to the complexities attending service out of the jurisdiction, whether elsewhere in Australia or outside Australia, it is not surprising that there is a requirement in the form that the creditor specify an address for service in the same state or territory as that in which the company is served. Indeed, if there is occasion for surprise, it is that the Legislature, having chosen to impose a requirement for service of an application under s 459G within 21 days after service of the statutory demand, should have failed to include such a provision when the new Pt 5.4 was inserted in the Corporations Law. Fortunately, the Executive, when exercising the option to prescribe a form of statutory demand, adverted to the importance of making the stipulations in para 6 of the form.

Service out of Australia of an application under s 459G would, in most (if not all) cases, not be possible within 21 days after service of a statutory demand. The requirements of s 459G are sufficiently onerous without adding to them the performance of such a feat as service outside Australia.

It was plainly the intention of those responsible for Form 509H that it also should not be the concern of companies served with statutory demands to effect service in other states and territories. This was eminently practical, since in the ordinary course it could be expected – and, I believe, experience has demonstrated the expectation more than justified – that solicitors would often be instructed late in the period and obliged to meet the requirements of the section and, in particular, that of service on the creditor, with considerable alacrity. Additional burdens of compliance with the requirements of the Service and

Execution of Process Act 1992 and service outside the state or territory in which the company was served would not be justifiable.

Thus, the impossible, or near impossible, and the unjustifiable were eliminated by the imposition of the requirement in para 6 of the form for an address for service in the same state or territory as a statutory demand is to be served. This properly reflected the obvious balance of convenience in the peculiar circumstances obtaining.

A creditor is not obliged to serve a statutory demand. If he determines to do so, he may take whatever time he desires about its preparation, and that of any accompanying affidavit. Because a statutory demand may attract an application under s 459G, the creditor is required to advert to that possibility and, if the creditor is outside Australia or the company is to be served in another state or territory, the creditor must also take whatever time is necessary to establish an address for service in the state or territory in which the company is to be served. The further requirement specified in para 6 means that if the creditor is acting by a solicitor, and that solicitor is outside the state or territory of the company, an agent must be engaged there so that the agent's address may be specified as the address for service.

In this proceeding it was common ground that on the 17th day after service of the demand the respondent was served at its specified address for service in Queensland with copies of the notice of motion and supporting affidavit in this proceeding. It was also common ground that such service was efficacious under the Service and Execution of Process Act 1992 because the requisite notice was attached to the copy of the notice of motion served: see s 16 of the Act; and reg 4 and Form 1 of the Service and Execution of Process Regulations.

In submitting that the demand should be set aside for specifying an address for service outside Victoria, Mr Rodbard-Bean relied on the mandatory terms in which s 459E(2)(e) is expressed. Contrary to that section, the demand was not in the prescribed form.

Ms Grigoriou of counsel for the respondent emphasised that there had been effective service of the notice of motion and supporting affidavit – well within the time limited by s 459G. She submitted that this negatived, beyond dispute, any question of prejudice or "injustice" to the applicant by reason of the failure of the statutory demand to conform to the requirements of para 6 of the form. There was no question in this proceeding of the applicant's having been deprived of the remedy provided by s 459G through failure to make the application in accordance with the section. On this basis she relied on s 459J. It provides:

> (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.

Ms Grigoriou submitted that, while the failure to specify an address for service in Victoria was a defect in the statutory demand (see the inclusive definition of "defect, in relation to a statutory demand" in s 9), the conclusive absence of prejudice to the applicant meant that s 459J(1)(a) had no application; and, as a result, s 459J(2) operated to prevent my setting aside the statutory demand on this ground.

It is true, for the reasons advanced by Miss Grigoriou, that the statutory demand in this case could not be set aside on the ground that "substantial injustice will be caused unless the demand is set aside".

It appears, however, that s 459J(1)(a) could *never* apply to a defect in a statutory demand such as that in this case.

The "substantial injustice" one would expect a company to suffer through specification in a statutory demand of an address for service outside the state or territory in which the company is served, is the consequence of failure within the time limited duly to serve its application and affidavit out of the jurisdiction. That consequence is inability to apply for the setting aside of the demand. From the cases to which I have referred it may be divined that a failure to satisfy what I have described as the onerous and inescapable requirements of s 459G results in an application's not being "in accordance with" the section and therefore not "under" the section: see, for example, *David Grant* (1994) 14 ACSR 569 at 572 (per Hayne J); and *Cavetina*, supra, ACSR at 773 (per McPherson JA), cited by Smith J in *David Grant* 15 ACSR at 780. If an application is not "under" s 459G, s 459J has no operation, and so the "substantial injustice" which, in such a case, has produced this result cannot be remedied as provided for by s 459J(1)(a).

On the other hand, where, as in this case, the proceeding is "in accordance with" and "under" s 459G and s 459J has the capacity to apply to it, the fact that the applicant has managed to effect service out of the jurisdiction means that there will not be "substantial injustice". Thus, where in such a case the application is "under" s 459G, 459J(1)(a) does not apply.

Assuming for present purposes that subs (1)(b) is wide enough to permit the court in an appropriate case to set aside a demand for a defect to which subs (1)(a) does not apply, I would consider that the defect in the demand the subject of this proceeding is sufficiently significant to warrant my making such an order. That significance would constitute the "other reason" upon which the court must found a decision under subs (1)(b).

The specification of an address for service outside the state or territory in which a statutory demand is served places the company served in jeopardy of being deprived of a remedy under s 459G which the Legislature clearly intended it to have available if appropriate to its circumstances.

The significance of the defect may be tested by considering what the result would be if it were held that such a statutory demand should not be set aside under s 459J(1)(b). In that event, the result would be that such a statutory demand would *never* be set aside for that cause, because, as I have sought to stress, in cases where the applicant did not achieve service out of the jurisdiction, there would be no application "under" s 459G and the power to sat aside the statutory demand, whether under s 459H or s 459J, would not exist: supra.

Such a result could set the requirements of para 6 of the form at nought because, notwithstanding s 459E(2)(e), a statutory demand which did not observe the requirements of para 6 would not be set aside in cases where it could be; and, in all the rest, the power to set it aside would not exist.

It may or may not be apparent at the time a statutory demand with such a defect is presented for signature what impact the defect would have. That the company will, if such a demand is signed and served, be placed in the jeopardy to which I have referred, however, ought be sufficient to induce avoidance of the defect and a realisation that to proceed to serve such a demand may result in unhappy consequences for the creditor.

There may be an exceptional case – for example, where the company has invited the creditor to specify an address for service outside the state or territory where it is served, perhaps because it has solicitors in that other place and intends to make any application under s 459G there – in which a different result would be appropriate. Where, however, there are no exceptional circumstances, as in this case, it seems to me, assuming the court is so empowered, that the opportunity ought exist for the court to register clearly and appropriately the importance of due compliance with the requirements of para 6 of Form 509H.

The remaining question, however, is whether the court is so empowered. Ms Grigoriou supported her submission that the power to set aside a statutory demand for a defect is, by s 459J(2), limited to cases where, as a result of a defect, "substantial injustice will be caused unless the demand is set aside" as provided for by s 459J(1)(a), by referring to *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* (1994) 13 ACSR 525. In that case, Hill J of the Federal Court said (at 529):

> . . . paras (a) and (b) of s 459J(1) should be read so as to be mutually exclusive. Such a construction would, but for the terms of s 459J(2), be clearly correct. But notwithstanding the reference in s 459J(2) to subs (1), not merely subs (1)(a), I am of the view that the provisions of s 459J(1)(b) relate only to cases where there is a reason other than the existence of a defect in the demand. Put in another way, if the case is one where a defect in the demand is alleged, a notice could only be set aside if the case is one where because of the defect substantial injustice would be caused unless the demand was set aside. Such a construction accords with what is said in the second reading speech and the explanatory memorandum to which I have referred.

Kalamunda was a case in which a document otherwise following Form 509H omitted the notes which follow the schedule in the form. Hill J concluded that the document was a statutory demand because it was, or purported to be, a demand served under s 459E (see the definition of "statutory demand" in s 9); that the omission of the notes was a "defect"; and that, as it was conceded that s 459J(1)(a) had no application, the statutory demand could not be set aside because of the provisions of s 459J(2).

It may also be said that the defect in that case was such that, unless subs (1)(a) could be relied upon, it would be difficult to see how a case could be put for setting the demand aside. Where there is due compliance with the requirements as to signature of the demand, the debt demanded exceeds $2000, the debt is a judgment debt or the demand is accompanied by the requisite affidavit, and the creditor does not claim as an assignee, no problem for the company could arise from the omission of the notes. In short, such a defect usually could not be compared for gravity with that in the demand in this case.

I also interpolate at this point that it was not submitted in this proceeding, and, in my view, rightly, that the document served was not a statutory demand. Accordingly, the first issue in *Kalamunda* has not concerned me.

The construction of s 459J adopted by Hill J in *Kalamunda* has been endorsed by Cox J of the Supreme Court of Tasmania in *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (in liq)* (1994) 14 ACSR 565 at 567; by Sackville J of the Federal Court in *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia* (1994) 15 ACSR 544 at 542-3; and by Lindgren J of the Federal Court: see *Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation* (1995) 15 ACSR 682 at 697, 699; and *Chase Manhattan Bank Australia Ltd v Oscty Pty Ltd* (1995) 17 ACSR 128 at 138.

If this were all, then I conceive that, in the interests of uniformity or consistency, I should have to adopt that construction of s 459J; and, irrespective of the policy considerations to which I have referred as warranting it, to treat the setting aside of the demand in this case as an option which is not open under the legislation: see *David Grant* 15 ACSR at 774 per Brooking and J D Phillips JJ.

However, it is not all.

Before *Kalamunda*, Lockhart J of the Federal Court had reached a different conclusion in *Topfelt Pty Ltd v State Bank of New South Wales Ltd* (1993) 12 ACSR 381. In that case, the statutory demand was held to be defective because in the schedule the sum demanded – which arose out of a judgment – was insufficiently specific. Counsel for the applicant inter alia submitted that, if the demand was a statutory demand within s 459E, the court should hold that there was a defect which would cause substantial injustice unless the demand were set aside "or there is some other reason why it should be set aside: s 459J(1)" (see at 385). Lockhart J held that the demand was a statutory demand (at 396); that its sufficiency had to be judged in the context in which it was served, that being "at a late stage in the curial conflict between the parties . . . and in the setting of contested litigation in the Supreme Court" (ibid.); that there was no evidence from the applicant "of any specific injustice that it has suffered or may suffer because of the defects in the statutory demand" (ibid.); and concluded (at 397):

> 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 reasons why the demand should be set aside under s 459J(1) (b).

Accordingly, if there has been a lack of uniformity or consistency in the construction of s 459J, it would seem to have begun with *Kalamunda*, and has been continued in subsequent cases.

In *Kalamunda*, Hill J said that "this question of construction" – of s 459J – "appears not to have been argued in *Topfelt*, nor considered by Lockhart J in that case" (13 ACSR at 529). With respect, it does appear to have been submitted by counsel for the applicant in *Topfelt* that the demand could be set aside under s 459J(1)(b): supra. Further, since Lockhart J clearly based his conclusion in *Topfelt* on s 459J(1)(b), it is, with respect, a little difficult to conceive how he could have done that without having considered whether that subsection would enable the conclusion.

It is not clear from the judgment of Hill J in *Kalamunda* what argument was put in that case which induced him to depart from the construction adopted by Lockhart J in *Topfelt*. The passage I have quoted from his judgment (supra) suggests that, apart from his own preference, he supported his conclusion by its perceived accord with the passages he had quoted from the second reading speech and the explanatory memorandum. The difficulty with that is that Lockhart J in *Topfelt* had included the same passages in longer quotations.

Hill J also said that although the reference by Lockhart J to s 459(1)(b) "might suggest that his Honour took a different view from that which I have suggested, the case before his Honour was not one of a mere defect falling within s 459J(2)" (13 ACSR at 529). It may equally be said that it was not a case to which s 459J(1)(a) applied. It does not seem to be any more possible to reconcile *Topfelt* and *Kalamunda* than it is to describe the conclusion in *Topfelt* as reached per incuriam.

Victor Tunevitsch was a case in which a statutory demand for a non-judgment debt was served unaccompanied by the affidavit required in such a case by

s 459E(3). Thus, the demand itself was not defective. Cox J set the demand aside under s 459J(1)(b). He gave no reasons for his preference for the construction of s 459J offered in *Kalamunda*. He also referred to *Topfelt* for the purpose of adopting similar reasoning to that used by Lockhart J with respect to the duties of a creditor serving a statutory demand.

In *Chains & Power*, a statutory demand was challenged for not distinguishing between the principal and interest components of debts demanded. Sackville J held that the demand satisfied the requirements of s 459E. He said that he regarded Lockhart J in *Topfelt* as having "applied s 459J(1)(b) in the absence of an argument that substantial injustice had to be shown if the demand were to be set aside" (15 ACSR at 553). He did not indicate what that argument would be.

In *Chippendale*, Lindgren J also simply expressed agreement with the construction adopted in *Kalamunda*: see 15 ACSR at 699; and in *Oscty*, he simply stated again the effect of the *Kalamunda* construction.

Since *Topfelt*, then, a movement seems to have arisen to the effect that in that case Lockhart J somehow fell into error. With respect, I am unable to join that movement for the following reasons:

1(a) While the construction in *Kalamunda* would have been incontrovertibly correct if s 459J(2) prohibited setting aside a defective statutory demand except as provided in s 459J(1)(a), it is not so limited. The exception is constituted by the *whole* of subs (1). If one simply gives effect to the plain and natural meaning of the words used in the section, the result is that the court may set aside a defective statutory demand on the basis of a sufficient reason other than the reason that otherwise "substantial injustice will be caused".

(b) This is how Lockhart J construed the section. He clearly regarded "some other reason" in s 459J(1)(b) as meaning some reason for setting aside a demand other than the "substantial injustice" ground provided by s 459(1)(a). He said in *Topfelt* (12 ACSR at 393):

> Points as to the validity of [statutory] demands may be raised at the hearing of [an] application [under s 459G] by the court; *but the court must not set aside statutory demands unless substantial injustice will be caused if it does not do so, or there is some other reason why the demands should be set aside: s 459J(1).* [My emphasis]

2(a) The restrictive construction of s 459J(1)(b) adopted in *Kalamunda* and in the subsequent cases involves, in effect, the proposition that the Legislature accidentally omitted to confine s 459J(2) to cases within s 459J(1)(a); but no reason for that view is advanced other than by reference to the second reading speech and the explanatory memorandum. *Topfelt* demonstrates that different interpretations of those sources may be, and are, entertained. The relevant passage from the second reading speech is:

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

Paragraph 687 of the explanatory memorandum refers to the circumstances in which it is envisaged that a demand may be set aside other than because of dispute or cross-claim. It states that this power to set aside:

> would enable the court to take account of matters such as . . . mistakes or misstatements in the notice of demand, in circumstances where this would severely prejudice any party.

The common thread is that minor errors would not suffice to avoid the consequence of non-compliance with a statutory demand. It is not to be assumed that the author of either document had adverted to the many circumstances in which a defective demand might properly be set aside because the defect is of major significance. For that reason and because of the necessarily general nature of the speech and the memorandum, I consider, with respect to those who have found in the quoted words a different import, that they provide an insufficient basis to support a conclusion that s 459J, as passed by the Parliament, was to have a restricted ambit for which it did not, by its own clear words, provide.

(b) Why should subs (2) be regarded as an error of the Legislature? *Not* so to regard it means that in cases such as *Topfelt* and this case, the court may deal appropriately with statutory demands with defects which in the individual case do not cause "substantial injustice" but which are grave in their nature, being contrary to the spirit and intendment of the statutory demand procedures.

3(a) Apart from the impressions given by the second reading speech and the explanatory memorandum, and the hypothesis that Parliament erred in passing s 459J without expressly confining the application of subs (2) to subs (1)(a), it may be that the *expressio unius* principle of statutory construction would be invoked to support the *Kalamunda* construction. I imagine that the reasoning might be that "some other reason" in subs (1)(b) necessarily means "[some reason other than] defect in the demand"; and, accordingly, subs (2) in its reference to "a defect" must and can only refer to subs (1)(a). The style of drafting of the amendments of the Corporations Law which came into effect on 23 June 1993, however, is not such as to encourage confidence in such an analysis.

(b) Consider, for example, s 465B(2). Section 465B(1) confers on the court jurisdiction to substitute applicants in winding up cases. Subsection (2) is as follows:

> The Court may only make an order if the Court thinks it appropriate to do so:
>
> (a) because the application is not being proceeded with diligently enough; or
>
> (b) for some other reason.

This, I think, boils down to the tritest of propositions, namely, that the court must have a reason for considering it "appropriate" to make an order. The purpose of para (a) is, presumably, to provide the court with an instance of such a reason.

(c) The example of s 465B(2) suffices to demonstrate that it is not readily to be assumed that a stipulation that there be "some other reason", as in s 459J(1)(b), necessarily provides a total contrast with what has gone before. As in the case of s 465B(2), its effect may be cumulative, widening the category after an example of its content has been expressly provided.

4(a) The construction of s 459J adopted by Lockhart J does not conduce to the setting aside of statutory demands for minor defects. The

specification in subs (1)(a) of "substantial injustice" as the criterion for setting aside a defective demand must have the effect – quite apart from the operation of subs (2) – that for a defect which is not productive of "substantial injustice" to constitute "some other reason" for setting the demand aside under subs (1)(b), it must have a significance as compelling as would "substantial injustice". In *Zhen Yun (Aust) Pty Ltd v State Bank of South Australia* (1994) 13 ACSR 801 at 803, Burley J of the Supreme Court of South Australia said:

> A reading of ss 459E to 459N of the Law requires the conclusion that the Legislature set out a detailed code, which is to be strictly adhered to, relating to the giving of statutory demands and the consequences that follow from the giving of such a demand. It is apparent from those sections that immaterial non-compliance will not form a proper basis for the setting aside of the notice, but, where the failure to follow the procedures set out are (sic) significant, the notice should be set aside.

See, also, *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433 at 436, per McLelland CJ in Eq; and *Hoare Bros Pty Ltd v Deputy Commissioner of Taxation* (1995) 16 ACSR 213 at 219.

(b) Cases where demands are set aside "for some other reason" are necessarily cases where there is not a defect causing "substantial injustice . . . unless the demand is set aside". Otherwise, the setting aside would be ordered under subs (1)(a). That does not mean, however, that they may not be cases of defects. Cases within subs (1)(b) may, or may not (as in *Victor Tunevitsch*), involve defects. If they are cases of defects, however, those defects must be of sufficient gravity to warrant the setting aside of the demand albeit "substantial injustice" to the applicant does not flow from them: supra.

(c) In a case involving a defect of such gravity, it is manifestly appropriate that the court be empowered to set the demand aside; and a construction favouring the existence of such a power is to be preferred to one which would deny it. This may be supported by considering where would be the logic in the court's being able to set aside a demand because it was not accompanied by an affidavit when an accompanying affidavit was required (see *Victor Tunevitsch*), but not being able to set aside a demand with a "foreign" address for service when that has placed the company served in jeopardy of not being able to make an application under s 459G at all! A construction which would produce such a result is not to be preferred, unless it is required by very plain words. Here, it can be established only by taking an unnecessarily restrictive view of the operation of s 459J.

(d) I have already indicated that, in the circumstances of the case, the defect in the demand in *Kalamunda* was minor; and, as such, incapable of justifying the setting aside of the demand either under s 459J(1)(a) or s 459J(1)(b). Minor defects of little or no significance could not support the setting aside of a demand, not only because of subs (2), but because that would deprive subs (1)(a) of effect.

5(a) It may add little but I note that in *Kalamunda* and the subsequent cases it was not necessary to the conclusion reached for the *Kalamunda* construction to be adopted. The distinction between the circumstances

in *Topfelt* and those in *Kalamunda* was drawn by Santow J of the Supreme Court of New South Wales in *Jarpab Pty Ltd v Winter* (1994) 14 ACSR 255 at 259.

(b) In *Victor Tunevitsch*, Cox J set aside the demand under s 459J(1)(b). That was the same course as was taken in *B & M Quality*, a case involving a defective affidavit accompanying a statutory demand. In *Chains & Power*, Sackville J regarded the demand as not defective. It followed from this that if he were wrong about that, the defect was not significant: see 15 ACSR at 553. *Chippendale* was similar: see 15 ACSR at 699-700. So was *Oscty*: see 17 ACSR at 137.

6. On appeal in *Hornet Aviation*, the Full Court of the Federal Court (Jenkinson, Beaumont and Von Doussa JJ) said ((1995) 16 ACSR 445 at 447):

> By s 459J it is, in effect, provided that a demand may be set aside because of a defect only if "substantial injustices" will otherwise be caused.

At first sight, this may appear to provide appellate support for the *Kalamunda* construction. I do not consider this is so. First, none of the relevant cases is mentioned. Secondly, *Hornet Aviation* was a case of two alleged defects which Northrop J had held were minor. The Full Court took little time in rejecting the appeal in so far as it was against those findings. It was clearly not concerned to dwell on s 459J. Thirdly, the Full Court, in referring to "substantial injustices" was not quoting s 459J(1)(a), which concerns the singular, "substantial injustice". The reference to "substantial injustices" is, in my view, wide enough to be consistent with the analysis that a defect warranting the setting aside of a statutory demand under s 459J(1)(b) must be for a reason as compelling as "substantial injustice": supra. A defect which has placed a company in jeopardy of not being able to apply under s 459G could properly be said to involve one of the "substantial injustices" to which the Full Court referred.

With respect to those who have adopted a different construction of the section, for these reasons I follow Lockhart J and conclude that I have jurisdiction under s 459J(1)(b) to set aside the demand served by the respondent on the applicant.

Accordingly, as I have already indicated I would do if I were able, I shall order that the statutory demand the subject of this proceeding is set aside, with costs.

I shall not refer here to what I conceive would be the proper course to follow to protect a company which has been effectively deprived of its remedy under s 459G by a creditor's failure to specify an address for service in the state or territory in which the company is served. The next case argued before me after this proceeding was one which involved that circumstance: *Ultimate Manufacturing Pty Ltd v Lyell Morris Pty Ltd.* I shall publish my reasons for my conclusions in that proceeding immediately after these.

I turn now to the applicant's second objection to the demand.

Failure of creditor to use its name and ACN

A company is obliged by the Corporations Law to "set out its name, in legible characters, on . . . every public document of the company that is signed, issued or published" (s 219(2)). The same applies to its ACN (s 219(3)). A statutory demand by a company is a "public document" for these purposes: ss 9 and 88A, because it is an instrument of the company "that is signed, issued or published under or for the purposes of [the Corporations Law]" (s 88A(1)(a)(ii)); or simply

because it is an "official notice" of the company (s 88A(1)(c)). Failure to comply with the requirements of s 219(2) or s 219(3) is an offence (s 1311(1)(b)) for which the penalty is $1000 or imprisonment for 3 months or both (s 1311(3)(a) and Sch 3).

The matters set forth in the preceding paragraph demonstrate that the respondent's failures to state its current name and its ACN in the statutory demand involved serious breaches of the Corporations Law. To their extent, the demand must be regarded as defective.

The respondent was obliged to call itself by its current name; and, if it doubted whether the applicant would identify it by that name, the doubt could have been dispelled by referring *also* to its former name as such.

In this case, notwithstanding the failures of the respondent to disclose its name and ACN, the applicant manifestly knew the identity of the company which served the demand, and the transaction as the result of which it was alleged that the applicant was that company's debtor: cf *Hornet Aviation* (1994) 16 ACSR 21 at 24, per Northrop J. Perhaps that was *because* the respondent identified itself by its former name.

Thus, the applicant was not harmed by the defects. The applicant could not, and did not, claim to have suffered any prejudice or "injustice" through the defects I am presently considering. Section 459J(1)(a) could not apply.

The significance of the defects, therefore, was quite different in this case from what it might have been if the name used as that of the creditor had been such as to disguise its true identity from the applicant. If that had happened and the demand were not set aside, there would be "substantial injustice" caused by the defect because, as a result of it, all or some of the applicant's time to pay, secure or compound for the debt demanded would pass without its knowing the identity of its alleged creditor. Plainly, such a situation is not contemplated by a legislative scheme which establishes a presumption of insolvency if within a limited time there is failure to pay, secure or compound. If this had been such a case, s 459J(1)(a) could have applied.

The question which arises with respect to these defects, then, is the same as arose with respect to that constituted by the specification of an address for service outside Victoria. Are they such that they constitute "some other reason" to set aside the demand under s 459J(1)(b)?

In my view, they are.

A company seeking to obtain the benefit of provisions of the Corporations Law by serving a statutory demand must observe basic requirements for disclosure of its identity which are imposed by the Corporations Law, particularly when those requirements are so serious that not to observe them attracts the operation of penal provisions.

The reasoning is analogous to that of Lockhart J in *Topfelt* (12 ACSR at 396), and of Cox J in *Victor Tunevitsch* (14 ACSR at 568). Lockhart J said:

> 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 to tell the debtor companies in clear terms what amounts are due, whether they include interest or not, and, if so, the amount.

Cox J quoted this passage from *Topfelt* and added:

> Equally valid in my view is the contention that it is not asking too much of a creditor whose debt is not the subject of a judgment to verify on oath that the debt is due and payable as specifically required by the Act.

It is also "not asking too much" that other specific requirements of the Corporations Law, such as those imposed by ss 219(2) and 219(3), be observed in the preparation of a statutory demand by a company. If an application under s 459G is made in respect of a demand by a company in which demand those requirements have not been observed, the same result ought follow as in *Topfelt* and *Victor Tunevitsch*.

This proceeding is somewhat different from *B & M Quality Constructions Pty Ltd v W G Brady Pty Ltd* (1994) 12 ACLC 970 to which I was referred by counsel (and which is to be distinguished from the *B & M Quality* case to which I have referred, supra). First, the statutory demand served named the creditor as "W G Brady Pty Ltd (ACN 063 937 995)"; and the defendant to the proceeding – which was for an injunction – was also so-named. In what Young J of the Supreme Court of New South Wales described as "Alice in Wonderland Mad Hatter litigation", it was the plaintiff's case that the defendant did not exist – which, of course, constituted an immediate bar to its obtaining relief. Secondly, while there was no company named "W G Brady Pty Ltd", there was a company with the ACN 063 937 995, which was called "W & J Brady Pty Ltd". Thus, there would seem to have been a minor misdescription of the creditor in the statutory demand in that case. It was not a case where the name used by the creditor was not its name but a former name; and it was not a case where the creditor's ACN was not stated. The creditor's ACN was stated and provided the means of ascertaining the actual name of the creditor and that there had been a minor misdescription of it in the statutory demand.

I would also set aside the demand under s 459J(1)(b) for the defects in it constituted through the failure of the respondent to observe the requirements of ss 219(2) and 219(3).

Affidavit accompanying the demand

The Corporations Law requires that the affidavit accompanying a statutory demand for a non-judgment debt must verify that the debt is due and payable and "must comply with the rules": s 459E(3). The complaint of the applicant in this proceeding is that the affidavit, while generally in the form of that required by the rules of the Federal Court, did not follow that form in a material respect.

Order 71 r 36A(1) of the Federal Court Rules is as follows:

> An affidavit verifying that a debt is due, for the purposes of subsection 459E(3) of the Corporations Law, must:
>
> (a) be in accordance with Form 93B; and
> (b) contain the statement (sic) headed "Important Note" set out in the form; and
> (c) not state a proceedings number.

The heading, "Important Note", follows the jurat of the affidavit the subject of Form 93B. There are three "statements" under the heading. They are:

> (1) This affidavit accompanies a statutory demand under section 459E of the Corporations Law.
> (2) No proceedings (or, if applicable, no winding up proceedings) have been commenced in respect of the debt to which the affidavit relates.
> (3) Any questions relating to this affidavit or the debt to which it relates should be directed either to the person named as creditor or the creditor's solicitors.

In this proceeding the second statement under the heading, "Important Note", in the affidavit accompanying the demand was as follows:

> Proceedings have been commenced in respect of the debt to which the debt relates.

The contention of the applicant was that the affidavit did not comply with the Federal Court Rules as required by s 459E(3)(b) because it did not state that "no proceedings" or (if applicable) "no winding up proceedings" had been commenced, but instead stated that "proceedings have been commenced . . .".

This, then, was a point going to the adequacy of the affidavit verifying the demand; and comparable, in that respect, with the first *B & M Quality* case to which I have referred, *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433, a decision of McLelland CJ in Eq. If the demand were to be set aside, it would be under s 459J(1)(b).

Neither the Corporations Law nor the Federal Court Rules provide that an affidavit accompanying a statutory demand may not be made if there is a proceeding on foot with respect to the debt the subject of the demand the affidavit is to accompany. As to the words in parenthesis in the second statement of the "Important Note", it is also to be observed that neither is there any prohibition of such an affidavit if there is a winding up proceeding on foot with respect to the debt. (Normally, of course, there would not be a winding up proceeding already on foot with respect to a debt made the subject of a statutory demand. That could, however, occur; for example, in a case where there is a contention that the company is severally indebted to two or more creditors, one of whom has already commenced a winding up proceeding.)

Since there is no basis – particularly in the Corporations Law – for concluding that there is a prohibition of an affidavit to accompany a statutory demand if the debt is the subject of a pending proceeding, it would not be reasonable to read the second statement of the "Important Note" as purporting to constitute such a prohibition. That statement as it appears in the form simply reflects the situation normally obtaining when such an affidavit is made. If the facts are otherwise, the creditor would be obliged to alter the statement sufficiently to reflect the truth.

Thus, since it cannot be assumed that the second statement of the "Important Note" under the jurat of the affidavit in this case was wrong, there can be no criticism of the respondent on that ground.

The content of the second statement is unusual. As to its history, I recall a draft of the Federal Court Rules in which the form equivalent to Form 93B provided for the affidavit to be headed, "IN THE FEDERAL COURT ". At that time the note equivalent to the second statement had an obvious significance. The heading gave the impression the affidavit was made in a proceeding in the Federal Court and the statement was designed to correct that impression. It would be inappropriate for me to speculate as to its current significance, particularly as it has been amended once to include the words in parenthesis.

The complaint of the applicant concerning the affidavit which accompanied the demand is not such as to provide "some other reason" to set aside the demand under s 459J(1)(b).

In *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd* (1995) 16 ACSR 596 at 605, Branson J of the Federal Court described the failure of a creditor to comply with s 459E (3) by omitting the *whole* of the "Important Note" from an affidavit based on Form 93B as "technical". He concluded that the deficiency was not such as to constitute "some other reason" to set the demand aside under s 459J(1)(b). He added, ibid:

> If I were to set aside the statutory demand by reason of the failure to include the "important note" in the accompanying affidavit I would, in my view, be doing so "merely because of a defect". By reason of s 459J(2) I do not have the power to do so.

I note in passing that the last sentence in this passage indicates an operation of s 459J(2) extending to the affidavit accompanying a statutory demand. Such an operation would seem inconsistent with the *Kalamunda* construction which would appear to confine the operation of s 459J(2) to defects in a statutory demand. For the reasons I have already expressed in favour of a non-limited construction of s 459J, I respectfully agree not only with the conclusion of Branson J concerning the significance of the omission of the "Important Note", but also with his view of the operation of s 459J(2).

Conclusion

As I have previously indicated, the statutory demand the subject of this proceeding will be set aside under s 459J(1)(b) because of the significance of the defects in the demand, albeit not productive in this case of "substantial injustice" to the applicant to which s 459J(1)(a) could apply.

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SOLICITOR