



Précis Paper

Dangers of Statutory Demands Under The Corporations Law

Be very careful before you attempt recovery by statutory demand under the Corporations Law. Also a caution to those who do not appear - it will not save them from an order for costs.

Discussion Includes

- Statutory demands under the *Corporations Act 2001* (Cth)
- What types of defects in a statutory demand or supporting affidavit will cause the statutory demand to be set aside?
- The "substantial injustice" criterion for setting aside a statutory demand
- Failing to comply with a statutory demand and extensions of time to comply
- Costs: where party files a submitting appearance

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Dangers of Statutory Demands Under The Corporations Law

1. In this edition of BenchTV, Christopher Wood (Barrister) and Daniel Krochmalik (Barrister) discuss the NSW Court of Appeal's (Beazley P; Barrett & Gleeson JJA) decisions in *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262; and (No 2) [2014] NSWCA 317 (Costs), which considered setting aside statutory demands. Mr Wood and Mr Krochmalik successfully acted as counsel for the appellants, Kisimul Holdings Pty Ltd, in the Court of Appeal.

Material Facts & Legal Issues

2. Kisimul applied under s 459G of the *Corporations Act 2001* (Cth) to set aside two statutory demands served on it by Clear Position. The affidavit accompanying the statutory demand did not contain the statement: "I believe that there is no genuine dispute about the existence or amount of the debt", as was required under the *Supreme Court (Corporation) Rules 1999* (see Form 7 in Schedule 1) and s 459E (3). Stevenson J dismissed each application at first instance, notwithstanding the error. The question for the Court of Appeal was whether Stevenson J erred in not finding the omission constituted "some other reason" within s459J(1)(b) why the demand should be set aside.

SECTION 459G:

Company may apply

- (1) *A company may apply to the Court for an order setting aside a statutory demand served on the company.*
- (2) *An application may only be made within 21 days after the demand is so served.*
- (3) *An application is made in accordance with this section only if, within those 21 days:*
 - (a) *an affidavit supporting the application is filed with the Court; and*
 - (b) *a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.*

SECTION 459E:

Creditor may serve statutory demand on company

- (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 459J:

Setting aside demand on other grounds

- (1) *On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:*
 - (a) *because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or*
 - (b) *there is some other reason why the demand should be set aside.*
- (2) *Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.*

Resolution of the Case

3. The Court of Appeal unanimously held that the statement: "I believe that there is no genuine dispute about the existence or amount of the debt", by a deponent of a s 459E(3) affidavit provides a significant measure of assurance that the objectives of Pt 5.4 of the *Corporations Act* are being observed by the creditor. The absence of this statement meant that this measure of assurance was lacking and put Kisimul into a position of uncertainty from which the legislation intended it should be protected. Accordingly, the primary judge was found to have erred as to the absence of some other reason why the demand should be set aside and the appeal was allowed.

Costs Orders

4. The respondent had filed a submitting appearance save as to costs in the appeal proceedings and was not represented at the hearing. The respondent claimed that, because it filed a submitting appearance, it should not be required to pay costs and that the Court should make no order as to costs. The appellant claimed the respondent should be ordered to pay its costs on the ordinary basis. The Court held that the filing of a submitting appearance by a party occupying a true adversarial position in a commercial dispute and concerned with nothing but its own economic welfare could not be allowed to operate as insulation from the costs consequences of requiring the appellant's claim to proceed to a curial determination rather than co-operating in consensual resolution of it. As such, the respondent was ordered to pay the appellant's costs of the proceedings in the Court of Appeal and in the Supreme Court at first instance.
5. Mr Wood noted: "it is a handy little reminder for practitioners that a submitting appearance doesn't give you any kind of insurance policy against an adverse cost result and that the need

to engage with, for example, settlement negotiations or at least put on aggressive offers that might then affect any question of costs becoming very important."

Extensions of Time to Comply with Statutory Demands

6. In order to appeal a first instance judgment on Statutory Demands, a prospective appellant requires an extension of time to comply with the demand rather than a stay of the orders. Extensions of time to comply with statutory demands may be made outside the time for compliance by amending a previous order extending the time. This is done by using the powers of the court rather than the *Corporations Act 2001* (Cth).

Significance

7. A statutory demand will be set aside pursuant to s 459J(1)(b) of the *Corporations Act* if the accompanying affidavit does not state that the deponent believes that there is no genuine dispute about the existence or amount of the debt. This case serves as a reminder to creditors that the process provided for in Part 5.4 of the Act must be strictly adhered to in order to take advantage of the presumption of insolvency where there has been non-compliance with a demand for payment of a debt.
8. It should be noted that the litmus test for a valid statutory demand remains one of "substantial compliance". The issue for the Court will be whether or not the party who has received the statutory demand has in some way been misled by the demand. It remains to be seen whether, notwithstanding the authority in *Kisimul*, the Courts will continue to make allowances for minor errors.
9. Certainly, Mr Wood states: "I don't think the decision can be taken as any kind of carte blanche authority for the idea that any defect in an Affidavit is going to be necessarily fatal."

BIOGRAPHY

Christopher Wood

Barrister, 13 Wentworth Selbourne Chambers, Sydney

Christopher was admitted as a Lawyer in 1998. He was called to the Bar in 2001 and is now a member of its Practice Development Committee. He has authored many publications across a broad range of subjects. His practice is primarily in bankruptcy and insolvency, equity and trusts, intellectual property and commercial law.

Daniel Krochmalik

Barrister, 3 St James Hall, Sydney

Daniel was admitted as a Lawyer in 2008 and called to the NSW Bar in 2013. In the same year he was awarded the Con Varnavas Award for the highest aggregate score in the NSW Bar Examinations. His practice encompasses many different areas.

BIBLIOGRAPHY

Focus Cases

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No 2) [2014] NSWCA 317 (Costs)

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

Benchmark Link

http://benchmarkinc.com.au/benchmark/weekly_composite/benchmark_19-09-2014_weekly_civil_law_review.pdf (Costs)

http://benchmarkinc.com.au/benchmark/composite/benchmark_20-08-2014_insurance_banking_construction_government.pdf

Judgment Link

<http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=174019> (Costs)

<http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=173305>

Cases

Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd [2013] NSWCA 344

Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd [2008] HCA 9

Ceduna Marina Development Co Pty Ltd v Bria [2012] SASC 115; 281 LSJS 274

Legislation

Corporations Act 2001 (Cth)

Supreme Court (Corporation) Rules 1999 (NSW)