



Précis Paper

Setting Aside a Statutory Demand - Genuine Disputes

Statutory demands play a central role in commercial law. A statutory demand poses a real threat to any company that receives one.

Discussion Includes

- What is a statutory demand?
- Setting aside creditors' statutory demands
- Test for whether a "genuine dispute" exists
- Variation of a statutory demand: consequences for time limits on payment
- Costs
- Pitfalls in bringing an application to set aside a statutory demand
- Advice for companies in receipt of a statutory demand

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Setting Aside a Statutory Demand - Genuine Disputes

1. In this edition of BenchTV, Sarah Hill (Barrister) and David Currie (Barrister) discuss the Supreme Court of New South Wales' (Barrett AJA) recent decision in *In the matter of Jodegan Pty Limited* [2016] NSWCA 1090 which involved an application to set aside a creditor's statutory demand. Mr Currie appeared for the plaintiff, Jodegan Pty Limited.

Statutory Demands

2. A statutory demand is a written demand that is served on a company that owes a person or entity money greater than \$2000. Once a statutory demand is served on a company, the company has 21 days to either pay the debt or make an application in either the Supreme Court or Federal Court seeking orders to set aside that statutory demand under s459G of the *Corporations Act 2001* (Cth).

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.*
3. The Court may set aside or vary a statutory demand if there is a genuine dispute.

SECTION 459H:

Determination of application where there is a dispute or offsetting claim

- (1) *This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:*
 - (a) *that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;*
 - (b) *that the company has an offsetting claim.*
- (2) *The Court must calculate the substantiated amount of the demand in accordance with the formula: Admitted total – Offsetting total*

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4. The threshold for a genuine dispute is relatively low. McLelland CJ in Eq in the case of *Eyota Pty Limited v Hanave Pty Limited* [1994] 12 ACSR determined that the court needs to determine whether there is "a plausible contention requiring investigation" for there to be a genuine dispute as to the debt. This raises similar considerations as the "serious question to be tried" criterion which arises in applications for an interlocutory injunction or for the extension or removal of a caveat.
5. If after the 21 days neither the debt is paid nor an application is made to set aside the statutory demand, a presumption of insolvency is invoked. An application can then be made to either the Supreme Court or Federal Court to wind up the company on the presumption of insolvency.

In the matter of Jodegan Pty Limited [2016] NSWCA 1090

6. In this case the defendant company served the creditor's statutory demand on the plaintiff company. There were two debts identified in the creditor's statutory demand:
 - a. First debt was for \$72,646.75
 - b. Second debt was for around \$13,296.66
7. The plaintiff alleged that there was a genuine dispute as to both of the debts in the statutory demand. in relation to expert determination and an expert determination agreement

i. Background – First Debt

8. The two parties were electrical companies. The defendant company was a head contractor and the plaintiff was a sub-contractor. Works were being conducted at a Wagga hospital. A contract came into existence between the two parties. The plaintiff had commenced its works pursuant to the contract at the hospital when a dispute arose between the two parties and ultimately the contract was terminated.
9. Three invoices were issued by the defendant on the plaintiff pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW). The third invoice had not been paid and was referred to an adjudicator for an adjudication certificate to be issued. The adjudicator found that there were sums owing to the defendant by the plaintiff and issued a certificate. Once the certificate was issued and served on the plaintiff, those sums were paid by the plaintiff. However, the defendant alleged that there was still a dispute between the parties.

10. The defendant referred the matter for expert determination, under a clause in the contract that allowed for the referral of disputes for expert determination. Ultimately the expert held that a net sum of \$72,646.75 was owing by the plaintiff to the defendant.
11. In the expert determination, the defendant claimed that there was an overpayment, a default and rectification works. That claim was said to exceed \$250,000. The clause in the contract that the defendant sought to rely upon stated that the experts determination should be final and binding upon the parties except where a claim is in excess of \$250,000. It is important to note that when the defendant made its claim for expert determination, the plaintiff argued at the hearing that its claim was in excess of \$250,000 and thus the expert's determination was not binding. This resulted in the first debt owing in the statutory demand.

ii. Background – Second Debt

12. The second debt was said to be owing in relation to the defendant's fees from the expert determination process.

iii. Supreme Court

13. In the Supreme Court, the defendant argued that the approach by the plaintiff to the binding determination clause had been misconstrued in the sense that there is a distinction between "claim" (singular) and "claims" (plural). The defendant argued that the word "claim" in the clause had referred to each of the defendants' claims when he made his application for expert determination and not one of the multiple claims had individually exceeded the \$250,000 threshold. On the other hand, the plaintiff argued that because there was some ambiguity around the interpretation of the clause, this amounted to the threshold of a genuine dispute being met and thus the statutory demand should be set aside.
14. His Honour found that there was not a genuine dispute regarding the second debt and thus the plaintiff was still required to pay the \$13,296.66. However, his Honour found that there was a genuine dispute as to the first debt in the statutory demand, accordingly his Honour varied the statutory demand by reducing the amount thereof to \$13,296.66.
15. When a statutory demand is varied, s459F of the *Corporations Act* sets out what is required. In this case the plaintiff was required to pay the \$13,000 within 7 days of the judgment.

SECTION 459F

When company taken to fail to comply with statutory demand

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- (2) *The period for compliance with a statutory demand is:*

- (a) *if the company applies in accordance with section 459G for an order setting aside the demand:*
 - (i) *if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand--the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or*
 - (ii) *otherwise--the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of; or*
- (b) *otherwise--21 days after the demand is served.*

16. It is possible for the Court to determine the construction of a contract, however generally the construction of a contract will not be determined in disputes under s 459H of the *Corporations Act* to set aside a statutory demand (*Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* [2012] NSWCA 365).

iv.. Costs

17. In this case, both parties had some success as the plaintiff's genuine dispute case succeeded in respect of the first debt but not the second. Consequently, his Honour found that it was appropriate for each party to bear their own costs.

Implications

18. When serving a statutory demand, a creditor should be fairly certain that a genuine dispute does not exist. Otherwise they will be exposed to legal costs if there is a successful application to set aside the statutory demand. Consequently, creditors should seek legal advice prior to serving a statutory demand.
19. When a company is served with a statutory demand, the company should seek immediate legal advice in order to consider whether or not to bring an application to set it aside. If the advice is to file an application in either the Supreme or Federal Court seeking an order to set aside the statutory demand, they must file and serve the application prior to the 21st day after service of the statutory demand. It should be noted that 21 days is a very tight timeframe and failure to act quickly in getting advice may see the company wound up.

BIOGRAPHY

David Currie

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David was admitted to the Bar in 2009, after spending 5 years as a commercial litigation lawyer at The Argyle Partnership Lawyers. David's practice encompasses a wide range of legal issues such as Commercial & Corporations Law, competition & consumer protection, Wills and Probate (including succession and family provision) and property & trusts.

Sarah Hill

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Sarah was admitted a Lawyer in 2003, before being called to the NSW Bar in 2004. She graduated from Sydney University with Honours. She practices in a variety of areas including administrative law, equity, commercial law, building & construction, wills & probate, trusts, estates, banking and bankruptcy.

BIBLIOGRAPHY

Focus Case

In the matter of Jodegan Pty Limited [2016] NSWCA 1090

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_11-08-2016_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/57a9392ce4b058596cb9e384>

Cases

Eyota Pty Limited v Hanave Pty Limited [1994] 12 ACSR

Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd [2012] NSWCA 365

Legislation

Building and Construction Industry Security of Payment Act 1999 (NSW)
Corporations Act 2001 (Cth)