IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2021 00854

IN THE MATTER of PUNDAZOIE COMPANY PTY LTD (ACN 101 489 605)

PUNDAZOIE COMPANY PTY LTD (ACN 101 489 605) Plaintiff

v

WANG, QIBO Defendant

JUDGE:	Efthim AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	15 June 2021
DATE OF JUDGMENT:	1 July 2021
CASE MAY BE CITED AS:	Re Pundazoie Company Pty Ltd

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S Clement	Gadens Lawyers
For the Defendant	Ms A Carruthers	Verge Legal

HIS HONOUR:

1 The plaintiff, Pundazoie Company Pty Ltd, applies pursuant to s 459G of the *Corporations Act 2001* (Cth) ('the Act') to set aside a statutory demand dated 2 March 2021, which was served on it by the defendant's solicitor, Verge Legal.

2 The demand claims that the plaintiff is indebted to the defendant, Qibo Wang, also known as Dylan Wang, in the sum of $547,994.52. The debt is described in the schedule of the demand as:

> Amount owing under the Secured Loan Agreement between the creditor and the company dated 23 October 2017, repayment of which was due on 23 October 2020, including default interest at 15% from the due date to the date of this Statutory Demand.

Affidavits

3 The plaintiff relies on the affidavits of its director, Gabriel George Haros, sworn on 23 March 2021, 28 May 2021 and 10 June 2021, respectively. The defendant relies on his affidavit affirmed on 20 May 2021.

<u>Background</u>

4 On 23 October 2017 the parties entered into a secured loan agreement ('the Loan Agreement'). The Loan Agreement contains the following relevant terms:

– the principal loan amount was $400,000 (Item 8 of the Schedule);

– the lender was to pay 20% of the loan amount immediately upon execution of the agreement, and the balance of 80% within 30 days after execution (clause 4.1);

– subject to the meaning of the "Effective Date", the term of the loan was three years (Item 11 of the Schedule);

– if the lender fails to pay the balance of the loan to the borrower within 30 calendar days after execution of the agreement, then the "Effective Date" is deemed to be the date that the balance of the funds is fully received (Item 6 of the Schedule);

– the total interest was 30% of the principal loan amount (Item 9 of the Schedule);

– the default interest rate was penalty interest plus 5% (Item 10 of the Schedule);

– repayment was to be made three years after the Effective Date (Items 6 and 12

of the Schedule); and

– the agreement may only be varied or replaced by a document duly executed by the parties (clause 11.3).

5 The defendant failed to pay the balance of the loan to the borrower within 30 calendar days after execution of the agreement. Rather, payments of the loan amount were made to the plaintiff between 23 October 2017 and 19 December 2017.

6 On 2 October 2020 the defendant's former solicitor, Ashley Ngion, sent an email to Mr Haros enquiring whether arrangements were in place to make the repayments.

7 Mr Haros replied the same day stating that arrangements were not yet in place but that he was "working on it and will know more next week when [he]'ll contact [Ms Ngion]."

8 On 26 October 2020 Ms Ngion sent an email to Mr Haros requesting an update on repayment. Mr Haros replied a few minutes later saying that he was "working very hard to secure the means to repay the secured debt." He then asked whether the defendant would be "prepared to provide an extended date and if so on what terms he might find this acceptable?"

9 Later than night Ms Ngion replied that the defendant would require the plaintiff's audited financial statements for financial years 2018-2020, which were due to be sent to the defendant per the Loan Agreement but had not yet been received, in order to consider an extension and appropriate terms.

10 On 29 October 2020 Mr Haros sent to Ms Ngion copies of the plaintiff's financial statements for the two years to the end of financial year 2019, the returns for 2019/2020 having not then been completed. Mr Haros then proposed the following:

– to extend the term for the repayment of the loan for a period of up to 12 months;

– that on repayment, the plaintiff will include an additional interest factor of $5,000.00 for every (extended) month; and

– the plaintiff will provide to the defendant and his associates the first right of refusal to engage in a partnership with the plaintiff to licence its projects in

China.

11 Ms Ngion replied later that evening that:

> I am instructed that any extension of the term at a minimum will require full payment of the current applicable interest, being 30% of the Principal Amount, and that the monthly interest of $5,000 for the extended term is to be paid in advance. Please advise if this is something that can be agreed, and I will seek instructions accordingly.

12 On 4 November 2020 Mr Haros replied stating:

> As you probably know, the payments made by Dylan were received by us on 23 October, 25 November and 19 December 2017 so there is a little time yet before the principal sum and interest is due for payment on 19 December next..
>
> We are negotiating with a prospective customer at this time which will put us in funds to accede to your client's instructions, however, the next stage requires us to travel to the country and outside the 25 kilometre lockdown limit (which we have scheduled for 14 November in anticipation of travel restrictions being lifted next weekend)..
>
> We will be able to advise immediately thereafter of our ability to accede to your client's request and will revert immediately with our advice if that course is acceptable.

13 On 7 December 2020 Ms Ngion replied requesting an update on the status of the proposed repayment or extension in accordance with her 29 October 2020 email, noting that 19 December 2020 was approaching.

14 Mr Haros replied about an hour later stating:

> It is proposed to accept the extension of term and we are in the process of raising funds for that purpose.
>
> We will revert shortly to confirm arrangements for same.

15 On 14 December 2021 Ms Ngion wrote the following email to Mr Haros:

> Please confirm that payment of $180,000.00 will be made by 19 December 2020. If this cannot be achieved and alternative arrangements not agreed to by Dylan, you are aware that your company will be in default of the loan agreement, and Dylan reserves his right to take all and any further action.
>
> We will also need to prepare a Deed of Variation for the loan extension, costs of which to be borne by Pundazoie Company Pty Ltd.
>
> This confirmation is required by 12 pm tomorrow, Tuesday 15 December 2020.

16 On 15 December 2020, prior to midday, Mr Haros replied the following:

> Further to your email, it is advised we cannot make the required payment of $180,000 by 19 December 2012.
>
> …
>
> Unfortunately, as time is a factor outside our control, we have no way of knowing precisely when funds will be made available to us from this source in order to meet our obligation to Dylan other than asking on what basis your client might accede to our request to extend time for the payment of the $180,000 for three months until 19 February 2021 by which time our agreement should be finalised and funds paid.

17 On 16 December 2020, Ms Ngion replied that:

> I am instructed that it is with great reluctance that Dylan agrees to extend the repayment date to 19 February 2021, subject to an additional AUD$10,000.00 in interest repayable.
>
> Should this be acceptable, Dylan is happy to proceed on the basis of a written confirmation via email from you. However, please note that this does not mean that Dylan agrees to any further extension of the repayment date, and any such further extension will have to be separately agreed.

18 On 17 December 2020 Mr Haros replied accepting the offer contained in Ms Ngion's email of 16 December 2020. Ms Ngion replied shortly thereafter confirming acceptance of the extension ('the Varied Agreement').

19 On 8 February 2021 Ms Ngion sent an email to Mr Haros requesting an update as to the status of the repayment, to which Mr Haros replied about two hours later that the plaintiff's funds for repayment were dependent upon payment from a customer and that the "timing may be a little tight."

20 On 9 February 2021 Ms Ngion sent an email to Mr Haros stating:

> Please provide a copy of the draft terms sheet or any contractual documentation between the PundaZoie Company and the buyer so that we can ascertain that a deal is actually happening. Should a NDA be required, please send through a copy for our review and execution if in order.
>
> Without such supporting documents, it is not likely that Dylan will agree to a further extension of the loan repayment without personal guarantees being provided.

21 On 19 February 2021, following correspondence between Ms Ngion and Mr Haros in

anticipation of the agreed repayment date, Mr Haros sent an email to Ms Ngion stating that the payment had not been made and that he was seeking avenues to rectify this immediately.

22 On 2 March 2021 Mr Wang's current solicitors served the statutory demand for $547,994.52. Even though it is not stated in the statutory demand, the amount claimed is calculated as follows:

Loan	$400,000.00
Interest under Loan Agreement (being 30%)	$120,000.00
Subtotal	**$520,000.00**
15% interest from 23 October 2020 to 2 March 2021 (131 days) (being penalty interest + 5% as per the Loan Agreement)	$27,994.52
TOTAL	**$547,994.52**

<u>Genuine Dispute</u>

The Law

23 Section 459G of the Act provides:

> **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.

24 When an application alleges a genuine dispute the Court is guided by s 459H of the Act. Section 459H states:

> **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;

…

25 The meaning of a genuine dispute in the context of the challenge of a statutory demand was formulated by McLelland CJ in *Eyota Pty Ltd v Hanave Pty Ltd*.[1] His Honour said:

> It is, however, necessary to consider the meaning of the expression "genuine dispute"… in my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth" (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of facts unsupported by evidence": cf *South Australia v Wall* (1980) 24 SASR 189 at 194.[2]

26 In *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd*,[3] Dodds-Streeton JA (as her Honour then was), with whom Neave and Kellam JJA agreed, referred to the principles that are to be taken into account in determining a genuine dispute and off-setting claim. Her Honour said:

> As the terms of s 459H of the C*orporations Act* and the authorities make clear, the company is required, in this context, only to establish a genuine dispute or off-setting claim. It is required to evidence the assertions relevant to the alleged dispute or off-setting claim only to the extent necessary for that primary task. The dispute or off-setting claim should have a sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile. As counsel for the appellant conceded however, it is not necessary for the company to advance, at this stage, a fully evidenced claim. Something "between mere assertion and the proof that would be necessary in a court of law" may suffice…[4]

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1 (1994) 12 ACSR 785.
2 Ibid 787.
3 (2008) 66 ACSR 67.
4 Ibid [71].

27 It is not for the Court to determine the merits of a dispute when an application is made to set aside a statutory demand. In *Mibor Investments Pty Ltd v Commonwealth Bank of Australia*,[5] Hayne J said:

> …at least in most cases, it is not expected that the Court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of the dispute. All that the legislation requires is that the Court conclude that there is a dispute and that it is a genuine dispute.[6]

Plaintiff's Submissions

28 The plaintiff submits that there is a genuine dispute regarding the existence of the debt and that a genuine dispute will exist if there is a "plausible contention requiring investigation" that the company is not so indebted as alleged.[7]

29 The plaintiff submits, first, that the statutory demand relates only to an alleged debt owing pursuant to the Loan Agreement rather than the Varied Agreement. As a result, the Loan Agreement has no debt owing under it and there is no demand for the amount owing under the Varied Agreement.

30 Second, it submits that the only amount that the plaintiff owes to the defendant is $190,000.00, rather than $547,994.52. The balance under the Varied Agreement is not due to be repaid until 19 December 2021. The defendant's acquiescence to extend the Loan Agreement is stated in writing and confirmed in writing. His desire to resile from that is an issue for trial and not something which is agitated by a genuine dispute. It submits that if the statutory demand is not to be set aside entirely, it should be varied to this amount.

31 Third, it submits that in the alternative, if the Loan Agreement was not varied, the defendant ought to be estopped from denying the variation and denying that the repayment date was 19 December 2020. The defendant's agent represented that the Varied Agreement had been made and the plaintiff relied on the representation.

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5 (1993) 11 ACSR 362.

6 Ibid 366-7.

7 *Soudan Lane Pty Ltd v Glen Bradshaw t/as Pacific Coast Digital* [2007] NSWSC 772, [5] (White J).

32 Fourth, it submits that in the alternative, ignoring the Varied Agreement, the repayment date in the Loan Agreement was not 23 October 2020 and default interest cannot accrue from that date. Rather, the repayment date was 19 December 2020, resulting in an overstatement in the statutory demand of $12,394.52.

33 Fifth, it submits that the Loan Agreement is a "small business contract" for the purposes of the *Australian Securities and Investments Commission Act 2001* (Cth) ('the ASIC Act') and breaches it in seeking to enforce terms that are penalties and/or unfair terms, giving rise to a genuine dispute. It cites the interest rate at 30 per cent and default interest rate at 15 per cent as penalties. The defendant also asserts that cl 8.2 of the Loan Agreement (whereby the defendant has the unilateral ability to determine whether a default has occurred) is an unfair term.

Defendant's Submissions

34 The defendant submits that the plaintiff only disputes the quantum of the demand and that, as at least $180,000.00 of the debt is undisputed, the demand must inevitably remain on foot. He submits that there is, however, no dispute as to the quantum or existence of the debt.

35 He submits that the correspondence between the parties clearly shows that:

- the loan and interest (ie: $520,000.00) was due and payable on 23 October 2020;
- the plaintiff was in breach of its obligations under the Loan Agreement (regarding payment and provision of financial records);
- the Varied Agreement was conditional on the additional $10,000.00 paid in advance;
- the Varied Agreement required that the plaintiff make payment of the revised interest calculation of $180,000.00 by 19 February 2021; and
- having failed to comply by 19 February 2021 with the conditions on which the Varied Agreement would be made, the total amount owing under the Loan Agreement was due and payable.

36 He submits that the bar for proving a genuine dispute is relatively low, but the grounds for alleging one must not be spurious, hypothetical, illusory or

misconceived.[8]

Consideration

37 The main issue is whether the date of repayment has been varied. The plaintiff only needs to demonstrate that it is plausible that the final repayment date was extended to 19 December 2021.

38 On 29 October 2020 the defendant's solicitor advised the plaintiff that an extension of the repayment term would require repayment of applicable interest being 30 per cent of the applicable amount ($120,000.00) and $5,000.00 per month for the extended term in advance ($60,000.00). If the extension was granted, the plaintiff would need to pay $180,000.00 by 19 December 2020.

39 On 7 December 2020 an email was sent by the plaintiff proposing to accept the extension of term and advising the defendant that the plaintiff was in the process of raising funds for that purpose.

40 On 15 December 2020 the plaintiff advised the defendant that it could not pay the $180,000.00 and requested that it be given an extension to pay the $180,000.00 on 19 February 2021. The defendant agreed to extend the payment subject to an additional $10,000.00 being paid.

41 The defendant submits that the Varied Agreement required the company make payment of $190,000.00 by 19 February 2021. As that was not paid by 19 February 2021 there was no Varied Agreement. When read in context with the previous emails, in my view it is likely that an extension was granted to 19 December 2021 and the plaintiff was required to pay the sum of $190,000.00 by 19 February 2021. Based on the correspondence, it is at least plausible that the repayment of the loan was extended to 19 December 2021. That is all that the plaintiff needs to show to demonstrate a genuine dispute.

42 In the statutory demand the defendant claims interest from 23 October 2020. There is

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8 *Helti (Australia) Pty Ltd v Vulcan Steel Pty Ltd* [2015] VSC 192, [11] (Efthim AsJ), citing *Powerhouse Australasia Pty Ltd v Vim* [2006] VSC 508.

clearly a dispute regarding the effective date being the date upon which the repayment was to be made. The plaintiff, on 4 November 2020, sent an email to the defendant, which stated that the payments made by the defendant were received by the plaintiff on 23 October, 25 November and 19 December 2017, respectively, and indicated that the principal sum of interest would be due as a payment on 19 December 2020. On 14 December 2020 the defendant wrote to the plaintiff seeking confirmation that the payment of $180,000.00 would be made by 19 December 2020. The effective date, on the evidence, was 19 December 2020.

43 As I am of the view that there is a genuine dispute, the statutory demand should be varied to claim $190,000.00 (the payment due on 19 February 2021). The plaintiff has admitted that this amount is owing and the demand should be varied to claim this amount. On the plaintiff's case, it owes $190,000.00 up to 19 February 2021 and the balance of $400,000.00 must be paid by 19 December 2021. That makes a total of $590,000.00 that is owing to the defendant. The defendant, on the other hand, has issued a statutory demand for $547,994.52.

44 The plaintiff asserts that the Loan Agreement seeks to enforce terms, including those regarding interest, that are contractual penalties and are unfair terms within the within the meaning of the ASIC Act. It also says that the Loan Agreement is a "small business contract" for the purposes of the ASIC Act and that several terms of the Loan Agreement are unfair and, therefore, may be declared void or the entire contract declared void as a consequence.

45 No oral submissions were made in relation to this submission. I do not have to deal with this argument as I have determined that there is a genuine dispute. However, in my view, the interest clause will not be construed as a penalty and it is not out of all proportion to any legitimate interest of the defendant in the enforcement of the primary obligations of the Loan Agreement. The sum of $400,000.00 was loaned to a corporate plaintiff on the basis that the defendant would receive his money back in three years with a total amount of 30 per cent and, to date, there has been no payment. I doubt whether a court would interfere in the agreement struck between these parties.

Defects of the Statutory Demand

The Law

46 Section 459J(1)(a) of the Act provides:

> **S 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;
>
> …

47 The dictionary in s 9 of the Act provides the following definition:

> ***"defect"***, in relation to a statutory demand includes:
>
> (a) an irregularity; and
>
> (b) a misstatement of an amount or total; and
>
> (c) a misdescription of a debt or other matter; and
>
> (d) a misdescription of a person or entity.

48 In *Topfelt Pty Ltd v State Bank of New South Wales*,[9] Lockhart J commented that there may be cases in which a statutory demand may contain defects so fundamental that the statutory demand is denied the status of a statutory demand within the meaning of the Act.

49 His Honour stated:

> The new Pt 5.4 of the Corporations Law does not recognise two regimes: one dealing with documents that suffer from major defects such that they cannot be described as statutory demands for the purposes of Pt 5.4 of the Corporations Law; and another dealing with documents that suffer only from minor defects and are capable of being saved from invalidity by the operation of s 459J(2). This is a distinction which the Parliament has sought to avoid and which for many years bedevilled the law and practice relating to bankruptcy notices.
>
> There may, however, be cases where deficiencies in the form of demands are so fundamental that the demands are incapable of assuming the description of statutory demands within the meaning of the Corporations Law. This is a

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9 (1993) 120 ALR 155.

> question to be decided in future cases. The demand in the present case is not, for reasons mentioned later, a demand of this kind.
>
> The regime which Act No 210 of 1992 has put in place permits objections to defects in statutory demands to be taken by debtor companies; but the time to do this is primarily before any application to wind up the company is made by a creditor. Application should be made under s 459G within 21 days after service of the statutory demand. Points as to the validity of such demands may be raised at the hearing of that application 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). If a debtor company, having been validly served with a statutory demand which tells it, as the prescribed form does, of its right to apply to set aside a demand, but the company fails to so apply, it may challenge the demand on the ground of some defect in it upon the hearing of the application to wind it up, but only with the leave of the court; and that leave cannot be given unless the court is satisfied that the ground is material to proving that the company is solvent: s 459s.[10]

50 In *Crema Pty Ltd v Land Mark Property Developments Pty Ltd*,[11] Dodds-Streeton J (as her Honour then was) was of the view that only deficiencies of a gross and exceptional character would deny a document the status of a statutory demand. However, a more lenient approach has been adopted in cases such as *Townview Holdings Pty Ltd v Sunstate Design and Construct Pty Ltd*,[12] and *Re Beralt Pty Ltd*,[13] where a failure to include warnings as to the consequences of failing to comply with a statutory demand contained in Form 509H (the prescribed form for a statutory demand) was such that a document was held not to come within the description of a statutory demand for the purposes of the Act.

51 McKerracher J in *Inter Mining Pty Ltd v Lake Johnston Pty Ltd*,[14] and Rangiah J in *Poolrite Australia Pty Ltd (in liq) v Structural Pools Aust Pty Ltd*,[15] did not follow *Townview*. McKerracher J stated:

> Having regard to Lockhart J's observation as to the nature of a defect, I am also unable to accept that "essentiality" referred to by Lake Johnston assists its arguments. Where a statutory demand lacks something essential for completeness that circumstance, even if major, is a mere defect. As noted in *Topfelt*, a demand will be a "statutory demand" as long as it meets the s 9 definition even if it contains one or more defects. A defect in a statutory

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10 Ibid 167-8.
11 (2006) 58 ACSR 631.
12 (2012) 30 ACLC 12-061.
13 (1999) 17 ACLC 1702.
14 (2013) 95 ACSR 632.
15 (2013) 217 FCR 50.

demand only amounts to a ground to set it aside where it causes substantial injustice: s 459J(1)(a).

In *Kalamunda*, Hill J also concluded (at FCR 452; ALR 155; ACSR 531) that the demand was a statutory demand as, on its face, the document professed to be a statutory demand made under the then Corporations Law. The omission of notes which constituted part of the prescribed form did not alter that conclusion.

All of this is not to say that a demand could never be a nullity. Although the issue is not presently relevant, it is to be noted that courts have alluded to the possibility that a demand may be so fundamentally defective that it would not be treated as a statutory demand and, therefore, it will be a nullity: see, for example, *Topfelt* at FCR 238 ; ALR 166 ; ACSR 392 ; *Kalamunda* at FCR 452; ALR 155; ACSR 531; *2020 Construction Systems Pty Ltd v Dryka & Associates Pty Ltd* [2010] WASC 22 at [39] and [40]–[43]. However, that can only occur in the "very rare" case where the demand falls outside anything that could be a purported demand for the purpose of the s 9 definition of statutory demand: *Dromore Fresh Produce Pty Ltd v W Paton (Fertilizers) Pty Ltd* (1997) 23 ACSR 230 at 234; 137 FLR 307 at 311 per Young J. The deficiencies would have to be of a "gross and exceptional character": *Crema Pty Ltd v Land Mark Property Developments Pty Ltd* (2006) 58 ACSR 631; [2006] VSC 338 at [110] per Dodds-Streeton J. Since *Kalamunda* it has been accepted that if a demand professes or claims to be a demand served under s 459E, then it is a statutory demand notwithstanding any defects.

In the present case, no one receiving the document could have been in any doubt that it was, or purported to be, a demand under s 459E of the CA. That is very clear from the text of the document.

In short, Inter Mining's demand was not a nullity. Rather, it was a statutory demand as it is a document that purports to be served under s 459E of the CA. The omission of the boxed warning was a mere defect. As a defect it provides no basis for the summary dismissal of the winding-up application in the absence of substantial injustice: s 467A.[16]

Plaintiff's Submissions

52 The plaintiff submits, first, that if the Court holds that the debt "exists" but it is not yet "due and payable", then the statutory demand can also be set aside pursuant to s 459J of the Act.[17] That is because there is a plausible contention that the repayment date for the underlying loan (however it is characterised) is 19 December 2021.

53 Second, it submits that neither the statutory demand nor the supporting affidavit served with it set out the calculations for the alleged debt. A statutory demand is required by Form 509H to "describe" the debt that is claimed. If the demand is so

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16 *Inter Mining Pty Ltd v Lake Johnston Pty Ltd* (2013) 95 ACSR 632, [40]-[44].

17 *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359, 367 (Finkelstein J).

unclear or ambiguous that it fails to identify, to a reasonable person in the shoes of the debtor company, the nature of the debt to a sufficient degree, that is a defect in the demand which may cause substantial injustice because of the serious consequences that flow from statutory demands.[18]

54 Third, it submits that the statutory demand does not comply with the form prescribed by Schedule 2 of the *Corporations Regulations 2001* in the following ways:

- paragraph 3 of the statutory demand replaces the prescribed words of "within the statutory period after service" with the words "within 21 days after service", which purports to potentially limit the legislated time to respond;
- the statutory demand does not properly specify the alleged debt; and
- the notes to the statutory demand differ materially to the prescribed form in various respects, including that drastically misstating paragraph 5, to which the prescribed form provides:

> The statutory period is 21 days or a longer period prescribed by the regulations. For a 7-month period in 2021, a longer period of 6 months is prescribed in relation to a company that is eligible for temporary restructuring relief (see the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*).

55 The plaintiff submits that the defendant's affidavit does not comply with the requirements of Form 7 of the *Supreme Court (Corporations) Rules 2013* because the description of the debt differs to the description in the statutory demand. Further, the affidavit omits parts of the prescribed form of affidavit set out in Schedule 1 to the *Oaths and Affirmations (Affidavits, Statutory Declarations and Certifications) Regulations 2018*, being that it omits the sentence:

> The contents of this affidavit are true and correct and I make it knowing that a person making a false affidavit may be prosecuted for the offence of perjury.

Defendant's Submissions

56 The defendant submits that there is no substantial injustice caused by any defect consisting in lack of clarity. The demand was in the prescribed form and could not rationally have been opaque to the plaintiff.

18 *LSI Australia v LSI Holdings; LSI Australia v LSI Consulting* [2007] NSWSC 1406, [54]-[57] (Austin J).

Consideration

57 The statutory demand does contain defects. Paragraph 3 of the demand replaces the prescribed words by inserting the words "within 21 days after service", instead of, "within the statutory period after service". I note that the statutory period is now 21 days. This does not cause any confusion.

58 I also note that the statutory demand served on the plaintiff is not in accordance with the statutory form. Note 2 to the statutory demand served on the plaintiff states:

> The amount of the debt or, if there is more than one debt, the total amounts of the debts, must exceed the statutory minimum of $2,000.

59 Note 2 to the statutory form states:

> The amount of the debt or, if there is more than one debt, the total of the amounts of the debts, must exceed the statutory minimum. The statutory minimum is $2,000 or a greater amount prescribed by the regulations. For a 7-month period in 2021, a greater amount of $20,000 is prescribed in relation to a company that is eligible for temporary restructuring relief (see the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*).

60 Note 5 to the statutory demand served on the plaintiff states:

> This form was amended in 2006 as part of amendments of the *Corporations Regulations 2001*. For the period of 12 months after the commencement of those amendments a person may comply with paragraph 459E(2)(e) of the *Corporations Act 2001* in relation to a statutory demand for payment of debt by using:
>
> (a) the version of this form that was in force immediately before the commencement of the amendments; or
>
> (b) this version of the form.

61 Note 5 of the notes to the statutory form states:

> The statutory period is 21 days or a longer period prescribed by the regulations. For a 7-month period in 2021, a longer period of 6 months is prescribed in relation to a company that is eligible for temporary restructuring relief (see the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*).

62 There is a defect here because the form of the demand served on the plaintiff is not in the correct form. However, when considering those defects, it is clear that they are not so fundamental that the demand is denied the status of a statutory demand within the meaning of the act.

63 The description the debt is also defective because the plaintiff has not provided the calculations of how the debt was incurred. However, there is no evidence that that defect or the other defects raised cause injustice. The plaintiff clearly understood how the demand was calculated. There is no major defect here and the cumulative effect of the defects does not mean that anyone receiving the document could have been in any doubt that this was a statutory demand under s 459E of the Act. The demand will not be set aside on that ground.

64 The plaintiff submits that the demand should be set aside in its entirety and not be varied due to these defects. I repeat: there is no substantial injustice caused by these defects and the plaintiff has admitted that it owes $190,000.00 to the defendant. In these circumstances, there is no reason why the demand should not be varied.

65 The plaintiff submits that there is an abuse of process here because the defendant was aware of the correspondence and it cast a statutory demand in the broadest possible terms to put pressure on the plaintiff, with the expectation that the amount claimed would get "whittled down to a smaller number". It is also submitted that where there is a undisputed or substantiated amount, it is an abuse of process for a party to grossly inflate the amount claimed in the statutory demand, and that the overstatement can provide grounds under s 459J of the Act to set aside the demand.

66 I do not accept that there is an excessive overstatement. The plaintiff has claimed what it perceives is payable under the agreement. I have said that there is a dispute. I do not accept that the defendant issued the demand so that the Court would later whittle down the amount claimed to an undisputed amount. There is no abuse of process.

Conclusion

67 The statutory demand does contain defects but not to the extent that substantial injustice will be caused unless the statutory demand is set aside. The plaintiff has been able to demonstrate the existence of a genuine dispute. The plaintiff concedes that it owes $190,000.00. The statutory demand will be varied to claim $190,000.00.