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Wollongong Coal Limited v Gujarat NRE India Pty Ltd [2015] FCA 221

## FACTS

On 20 March 2014, Gujarat NRE India (**GNI**) served a statutory demand (**the Demand**) pursuant to s.459E of the Corporations Act 2001 (Cth) (**the Act**) on Wollongong Coal Limited (**Wollongong Coal)** claiming that Wollongong Coal owed it $6,570,398.06 (**the debt**).

The schedule described the debt as 'monies loaned to the company on x date with the accompanying amount', and 'less repayment received from the company on x date with the accompanying amount'.

The date of the demand is 20 March 2014, and the accompanying affidavit to the demand was affirmed on 19 March 2014.

The affidavit deposes to the fact that the business records of the creditor were inspected, and that the debt was due and payable.

On 11 April 2014, Wollongong Coal advanced ten reasons why the demand should be set aside, the reasons which are subject to analysis, being:

1. Alleged defects in the Demand and verifying affidavit, relying on s.459J to set aside the demand as the verifying affidavit to the demand predates the execution of the demand;
2. That the description of the debt is deficient/defective;
3. That the claimed amount is not a debt; and
4. That there is an alleged dispute about the existence of the debt and an offsetting claim which is relied on to set aside the demand under s.459H of the Act.

On observation throughout the case, Wigney J stated that Wollongong's application to set aside the Demand has turned out to be regrettably complex, if not tortuous, stating that:

> *"The statutory scheme was plainly intended to simplify the procedures for statutory demands so that disputes in relation to the existence or amount of debts could be dealt with quickly and without undue technicality. As long ago as 2004, Finkelstein J queried whether the scheme had achieved its objective: Quadrant Constructions Pty Ltd v HSBC Bank Australia Ltd [2004] FCA 111 at [5]. This case demonstrates the prescience of his Honour's observations."*

## ISSUES

i. **Ground 1:** Whether an affidavit that verifies a statutory demand and affirmed 13 hours before the execution of the statutory demand (with a different date) is defective and gives rise to 'some other reason' to set aside a statutory demand under s.459J(1)(b).

ii. **Ground 2:** Whether the demand should be set aside under s.459J(1)(a) or (b) – because the description of the debt in the demand is either deficient or defective.

iii. **Ground 3:** That the claimed amount if not a debt for the purposes of s.459E and as such, should be set aside.


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iv. **Ground 4:** That the statutory demand should be set aside as there a genuine dispute for the purposes of s.459H.

**FINDING**

**Ground 1:** In assessing Ground 1, Wigney J assessed the argument put forth by Wollongong Coal, which relied on the decision of the Full Court of the Supreme Court of Western Australia in *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* (2002) 172 FLR 35 (***Wildtown***), whereby four principles were laid out and clearly established in proceeding cases in relation to an accompanying affidavit to a statutory Demand, being:

1. *An accompanying affidavit that predates a demand does not or cannot verify the demand;*
2. *Such an affidavit does not satisfy the requirement in s 459E(3);*
3. *The requirement in s 459E(3) is an important safeguard in the statutory scheme and is therefore mandatory; and*
4. *Except perhaps in one situation, non-compliance with s 459E(3) will justify, if not compel, the setting aside of the demand under s 459J(1)(b) of the Act. It is not necessary to point to any substantial injustice.*

Wildtown notes at [58] An exception to the established principles is a circumstance where non-compliance with s 459E(3) of the Act arising from a defective accompanying affidavit might be cured, and therefore might not lead to the setting aside of the demand, is where an "updating affidavit" has been served:

An updating affidavit is defined as a later affidavit which is served either with the demand or within a reasonable time before the expiration of the 21 days available to the debtor to apply to set aside the demand, which verifies that the debt referred to in the demand remained due and payable on the date the demand was made:

Wigney J considered the respondents argument, which relied on the case: *In the matter of Gemaveld Pty Limited* [2012] NSWSC 582 whereby Black J dealt with an argument that a verifying affidavit sworn on the same day as the demand was defective because it was sworn earlier that same day.

At [14]-[16] of that judgement, Black J resolved the matter on the basis that the plaintiff had not established the factual basis of that challenge. His Honour nevertheless went on to say that an affidavit sworn earlier, but on the same day, as a demand could verify the debt.

Wigney J held that, Black J's statements were observations, and were obiter observations, and directed to the case at hand.

Wigney J held that the Accompanying affidavit is defective and as such, the demand is set aside under s.459(1)(b).

**Ground 2**: Wigney J considered the verifying affidavit, which contained no further particulars or details of the loans, their terms or conditions or how they arose.

Wigney J in assessing the description of the Debt in the Demand and whether it can be said to be, or give rise to, a "defect in the demand" for the purposes of s 459J(1)(a), began by construing the definition of a defect as defined under s 9 of the Act in the following terms:

***defect***, in relation to a statutory demand, includes:


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(a) an irregularity;

(b) a misstatement of an amount or total;

(c) a misdescription of a debt or other matter; and

(d) a misdescription of a person or entity.

Wigney J assesses the ordinary definition of "defect" as it is an inclusive definition within the legislation. A defect, according to ordinary meaning, means "a lack or absence of something necessary or essential for completeness; a shortcoming or deficiency; an imperfection".

Wigney J notes that a statutory demand must be in the prescribed form: s 459E(2)(e) of the Act. The prescribed form for a statutory demand makes it clear that the demand must "describe" the debt: Form 509H, *Corporations Regulations 2001* (Cth): *LSI Australia v LSI Holdings; LSI Australia v LSI Consulting* [2007] NSWSC 1406 (***LSI***) at [54]. If the demand "is so vague or ambiguous that it fails to identify, to a reasonable person in the shoes of a director of the debtor company, the general nature of the debt to a sufficient degree that the director can assess whether there is a genuine dispute as to the existence or amount of the debt, then there is a lack of something necessary for completeness, and therefore a defect in the demand": *LSI* at [54].

Wigney J held: "On the face of it, there is nothing vague or ambiguous about the description of the Debt in the Demand. Nor, without more, could it be said that there is any misdescription. When served, it is clear that Gujarat NRE India claimed that the Debt arose as a result of a loan made on 16 April 2013 and two loans made on 24 June 2013. The issue concerning the sufficiency of the description, and whether it amounts to a misdescription, only really arises by reason of the evidence of Mr Jagatramka later led by Gujarat NRE India which sought to characterise the Debt (or most of it) as arising as a result of a payment made under a sub-underwriting agreement".

**Ground 3:** Wigney J notes that the debt is described in the demand as a "loan" and notes that an amount owed as a result of a loan or loan agreement is a debt for the purposes of s.459E of the Act.

**Ground 4**: Wigney J clarifies that the Court is required only to determine if there is a dispute and, if so, whether it is genuine. It is not expected that the Court will decide contentious facts or issues or weigh or determine the merits of the alleged dispute: *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290 at 295; *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACSR 601 at 605; *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601 at [47].

Wigney J states that various verbal formulations have been put forward to describe or explain what may constitute a genuine dispute, of which include "a plausible contention requiring investigation" (*Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787); a dispute which is "bona fide and truly exist[s] in fact", the grounds for alleging the existence of which are "real and not spurious, hypothetical, illusory or misconceived" (*Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452 at 464); and "a sufficient degree of cogency to be arguable" (*Panel Tech Industries v Australian Skyreach (No 2)* [2003] NSWSC 896 at [18].

He notes that the dispute 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": *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* [2008] VSCA 70; (2008) 66 ACSR 67 at [71]. These various formulations of the meaning of the statutory phrase can be helpful, provided that they do not become a substitute for the terms of the statute: *Viva Olives Pty Ltd v Origin Olives Australasia Pty Ltd* [2012] FCA 545 at [7].


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Thus, Wigney J finds that: the contentions and evidence advanced by Wollongong Coal are sufficient to establish both that there is a dispute concerning the existence of the alleged Debt and that the dispute is genuine.

**QUOTE**

His honour held:

*'In contrast, I would not accept that, as a matter of fact, an affidavit sworn at 11.55am or 11.59am on 19 October could not verify a debt asserted to be due and payable in a statutory demand signed at noon on that day. I do not consider that that such a construction of the section is required by the terms of s 459E(3) of the Corporations Act or by any of the authorities dealing with affidavits sworn prior to the day on which the statutory demand is signed. I can see no reason why the Court should adopt an approach which, first, will encourage arid inquires as to which of the signature of a statutory demand and the swearing or affirmation of the verifying affidavit occurred first within a short time frame on the same day and, second, is likely to have the consequence that statutory demands will fail for technical reasons.*

*That approach would, in my view, be inconsistent with Parliament's intent when introducing Pt 5.4 of the Corporations Act, namely to ensure that disputes in respect of statutory demands would be resolved on the basis of the "commercial justice" of the matter rather than on the basis of "technical deficiencies": Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth) para 688; F. Assaf, Statutory Demands: Law and Practice at [7.1]. That approach would also, in my view, be inconsistent with the general approach that the law does not take account of fractions of a day: Lester v Garland (1808) 15 Ves 248; 33 ER 748; Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd above at [55].*

**IMPACT**

This case shows the courts strict approach in assessing the validity of an affidavit in support of a statutory demand while attempting to deliver commercial justice.

Further, it is important that the supporting affidavit in support clearly explains the debt and reasons why it is due and payable as a debt.


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