

SUPREME COURT OF QUEENSLAND

CITATION: *J & K Homes Pty Ltd v Evans Lawyers* [2017] QSC 24

PARTIES: **J & K HOMES PTY LTD**
(applicant)

v

EVANS LAWYERS
(respondent)

FILE NO/S: BS327 of 2017

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 3 March 2017

DELIVERED AT: Brisbane

HEARING DATE: 3 February 2017

JUDGE: Brown J

ORDERS: **The order of the court is that:**

- 1. The application in paragraph [1] of the application to set aside the statutory demand be dismissed.**
- 2. That paragraphs [5]-[8], [9] and [10] of the application be dismissed.**
- 3. That the proceeding insofar as it is constituted by paragraphs [2]-[4] of the originating application otherwise be transferred to the Queensland Civil and Administrative Tribunal pursuant to s 53 of the *Queensland Civil and Administrative Tribunal Act 2009*.**
- 4. The applicant pay the respondent's costs on a standard basis until 24 January 2017 and thereafter on an indemnity basis.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – where the applicant seeks to set aside a statutory demand issued by the respondent – where there is a threshold issue as to whether the court has jurisdiction to determine the application on the basis that the application to set aside the statutory demand was not made within 21 days, pursuant to s 459G of the *Corporations Act 2001* (Cth) – where the applicant contends that the 21 days does not include public holidays, weekends, and the Christmas

period, and therefore the application was on time – where the respondent contends that the 21 days does include public holidays, weekends, and the Christmas period – whether the application to set aside the statutory demand has been made in time and the court has jurisdiction to hear the application

Acts Interpretation Act 1901 (Cth), s 29(2), s 36, s37
Corporations Act 2001 (Cth), s 9, rule 1.9(4) Sch 1A of the, s 105, Pt 5.4, s 459G

Supreme Court (Corporations) (WA) Rules 2001, O 81G r 7(4)

Legal Profession Act 2007 (Qld), s 328, s 338(b)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 53

Uniform Civil Procedure Rules 1999 (Qld), r 995

Angel Cove Pty Ltd v Global Enterprises (WA) Pty Ltd: Angel Cove Pty Ltd v Di Lallo Holdings Pty Ltd [2001] WASC 23, cited

Bluechip Development Corporation (Cairns) P/L (ACN 117 021 566) v PMP Realty P/L (ACN 092 304 633) [2009] ACTSC 33, cited

Career Framing Online P/L v BES Training Solutions v Buckland [2010] NSWSC 460, cited

David Grant & Co P/L v Westpac Banking Corp (1995) 184 CLR 265, cited

SV Steel Supplies P/L v Palwizat [\[2007\] QSC 24](#), considered

COUNSEL: M J Ohlson (Sol) for the applicant
 P G Jeffrey for the respondent

SOLICITORS: Michael J Ohlson Lawyers for the applicant
 Evans Lawyers for the respondent

- [1] **BROWN J:** The applicant seeks to, inter alia, set aside a statutory demand issued by the respondent on the grounds that:
- (a) the applicant currently has a statutory defence to the statutory demand pursuant to s 338(b) of the *Legal Profession Act 2007* (Qld);
 - (b) there are defects in the statutory demand and substantial injustice will be incurred by the applicant unless the demand is set aside;
 - (c) there is a genuine dispute about the entire debt claim; and
 - (d) there is a genuine offsetting claim which exceeds the amount of the alleged debt.

Threshold question

- [2] There is a threshold question as to whether the Court has jurisdiction to determine the application on the basis that the respondent asserts that the originating application to set aside the statutory demand has not been made within 21 days after the demand was served as required by s 459G(2) and (3) of the *Corporations Act 2001* (Cth). This

is an absolute limitation of time in which a company may apply for an order setting aside a statutory demand.¹ There is no power on the part of the Court to extend time for the making of such an application.²

- [3] The applicant does not cavil with the fact that the 21 day requirement for the filing and service of an application pursuant to s 459G was one which could not be extended, but asserts that the calculation of the 21 days is to be determined in accordance with r 1.9(4) of Schedule 1A of the *Uniform Civil Procedure Rules 1999* (Qld).
- [4] There was no dispute that service of the statutory demand had occurred on 19 December 2016.³ The applicant filed and served its originating application on 11 January 2017 (“the application”).
- [5] The applicant accepts that if the 21 days is not calculated as the applicant contends, then the applicant has not served its application and supporting affidavit pursuant to s 459G in the period required. It should have, on that calculation, been filed and served by 9 January 2017. According to the applicant’s contention however, the 21 day period did not expire until 17 January 2017. According to the applicant, the period between Christmas and New Year’s Day was not to be included in the calculation of the 21 day period. The applicant provided no authority in support of its argument.
- [6] According to the applicant’s argument:
- (a) pursuant to s 37 of the *Acts Interpretation Act 1901* (Cth), “Where in any Act any reference to time occurs, such time shall, unless it is otherwise specifically stated, be deemed in each State or part of the Commonwealth to mean the legal time in that State or part of the Commonwealth.”;
 - (b) the *Corporations Act* is an Act and “such time shall unless it is otherwise specifically stated” apply because there is not a time specifically stated in s 459G of the *Corporations Act*;
 - (c) “legal time in that State” requires that the 21 day count be calculated in accordance with Queensland law and specifically r 995 and Sch 1A of the UCPR;
 - (d) Rule 995 of the UCPR applies to a proceeding in the Supreme Court under the *Corporations Act* and therefore to an application to set aside a statutory demand.
- [7] Rule 1.9(4) of Sch 1A of the UCPR provides:

“1.9 Calculations of time

In calculating a period of time for the purpose of these rules, the period beginning on 25 December in a year and ending at the end of 1 January in the next year is not to be counted.”

- [8] Section 459G specifically refers to “days”. This is in contrast to “business days” which is defined in s 9 of the *Corporations Act* to mean “a day that is not a Saturday, a Sunday, or a public holiday or a bank holiday in the place concerned.”

¹ *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314 at [17].

² *David Grant & Co P/L v Westpac Banking Corp* (1995) 184 CLR 265.

³ Affidavit of Katrina Margaret Bourne CFI 2 at [2].

- [9] The fact that the 21 days specified in s 459G may include a period of public holidays which may lead to some parties having shorter time to respond and harsh results given the Court has not got the power to extend the time prescribed, has been recognised by the courts.⁴
- [10] In the decision of *SV Steel Supplies P/L v Palwizat* [2007] QSC 24 a statutory demand was served on 22 December 2006. In that case, the application to set aside the statutory demand was filed outside the 21 day period which the Court attributed to a possible mistaken belief by the recipient as to when service occurred.⁵
- [11] Cullinane J at [33] commented as follows:
- “Many factors may impinge upon the recipient of a statutory demand receiving the benefit of the full 21 days within which to act under s 459G. These might include weekends, Easter and other holiday periods, or absence from the office of the only person who has any knowledge of or involvement in or connection with the matter. ...”
- [12] His Honour found that the application was out of time and that there could not be any extension of the statutory period. He commented that case may be an example of the harshness with which the scheme for which Pt 5.4 of the *Corporations Act* provides can operate in some circumstances in the absence of any power to extend the time specified in s 459G.⁶
- [13] In the respondent’s further submissions, the respondent identified two further cases where the statutory demand had been served before Christmas and the calculation of time was determined by calculating 21 consecutive days from the day after the date of service of the application: *Bluechip Development Corporation (Cairns) P/L (ACN 117 021 566) v PMP Realty P/L (ACN 092 304 633)* [2009] ACTSC 33 at [20]-[21]⁷ and *Career Framing Online P/L v BES Training Solutions v Buckland* [2010] NSWSC 460. In the latter case, service had occurred on 23 December 2009 and the filing of each originating process with a supporting affidavit on 19 January 2010 was found to have occurred outside and not within the period of 21 days referred to in s 459G(2) and (3).⁸ While those cases did not specifically consider the application of the equivalent to r 1.9(4), they are consistent with the fact that 21 days says what it means, namely 21 consecutive days which begin and end at midnight.⁹
- [14] In a decision of *Angel Cove Pty Ltd v Global Enterprises (WA) Pty Ltd: Angel Cove Pty Ltd v Di Lallo Holdings Pty Ltd* [2001] WASC 23, Bredmeyer M considered whether O 81G r 7(4) *Supreme Court (Corporations) (WA) Rules 2001* applied to extend time for the filing of a statutory demand. In that regard r 7(4) was in substantively the same terms as r 1.9(4) of Sch 1A of the UCPR. In that case his Honour found O 81G r 7(4) did not apply to the applications to set aside a statutory

⁴ See for instance the comments of Gummow J in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 279 with whom the majority agreed.

⁵ *SV Steel Supplies P/L v Palwizat* [2007] QSC 24 at [32].

⁶ *SV Steel Supplies P/L v Palwizat* [2007] QSC 24 at [32] at [37] referring to Gummow J in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (Supra) at 279.

⁷ *Civil Procedure Rules*, Sch 6, 1.9(4).

⁸ *Career Framing Online P/L v BES Training Solutions v Buckland* [2010] NSWSC 460 at [27] and [31].

⁹ *Autumn Solar Installations Pty Ltd v Solar Magic Australia Pty Ltd* [2010] NSWSC 403 at [9]

demand made under s 459G of the *Corporations Act*. The 21 days was not prescribed by the order¹⁰ but fixed by s 459G.¹¹ His Honour considered because the 21 day period was fixed by s 459G, then O 81G r 7(4) did not apply. His Honour noted¹² that to the extent that s 36(2) of the *Acts Interpretation Act* may apply to provide for service on the next business day if time under s 459G expired on a public holiday, that was by operation of statute not by a rule such as O 81G r 7(4), consistent with the pre-eminence of a statute over rules.

- [15] In that regard s 105 of the *Corporations Act* and s 36 *Acts Interpretation Act* are relevant legislative provisions which deal with the calculation of time. Section 36(2) applies to the circumstance where the last day for doing a thing expires of a Saturday, Sunday or holiday and provides for it being done on the next business day. They have been applied to determining when the 21 day period commences for the purpose of s 459G and also where the 21 day period expires on a Saturday, Sunday or holiday.¹³ While its application implicitly allows an applicant extra time it does not extend the time in s 459G per se but has application because the time expires on the weekend or a public holiday. By contrast to the Sch 1A they specifically apply to the calculation of a period of time specified in an Act. Rule 1.9(4) of Sch 1A applies to the calculation of a period of time for the purposes of the rules and cannot affect the 21 day period prescribed by s 459G of the *Corporations Act*.
- [16] The applicant relies on s 37 of the *Acts Interpretation Act* (Cth) to ultimately lead to the application of r 1.9(4) UCPR. Section 37 refers to “a reference to time”. That is directed to the date or time specified in a Commonwealth Act and provides that it refers to the time or date in the relevant part of the Commonwealth or State unless specifically stated.¹⁴ It does not deal with the calculation of time and has no application to the calculation of time for the purposes of s 459G of the *Corporations Act*.
- [17] Rule 1.9(4) of Schedule 1A does not apply for the purpose of the calculation of time for determining the 21 day period pursuant to s 459G. Accordingly the application to set aside the statutory demand which was filed on 11 January 2017 was filed on the 23rd day after the demand was served.
- [18] As the applicant did not file and serve its application within the 21 day period required, the Court has no power to make an order setting aside the statutory demand.¹⁵
- [19] The applicant in its application seeks additional relief under the *Legal Profession Act* 2007 (Qld), which largely flows from the matters which it seeks to establish as a “genuine dispute” to the statutory demand. The applicant indicated at the hearing that it did not pursue paragraphs [5],¹⁶ [6], [7] and [8]. The applicant also only applied to

¹⁰ Which equates to Schedule 1A of the UCPR.

¹¹ [2001] WASC 23 at [5].

¹² [2001] WASC 23 at [5] – [6].

¹³ See for example *Autumn Solar Installations Pty Ltd v Solar Magic Australia Pty Ltd* [2010] NSWSC 403 at [5]; *Black Cat White Cat Pty Lt v Royal Park Services Pty Ltd* [2004] SASC 71 at [5].

¹⁴ Laws of Australia at [25.1.1180]; For an example of its application see *Rowe v Electoral Commissioner* (2010) 243 CLR 1; [2010] HCA 46 at [103] per Gummow and Bell JJ.

¹⁵ *David Grant & Co P/L v Westpac Banking Corporation* (1995) 184 CLR 265; *Gusdote P/L v Ashley* [2011] FCRA 250 at [91].

¹⁶ On the basis that the court gave an order under paragraph 4 of its application.

the Magistrates Court for a costs assessment on 2 February 2017¹⁷ which appears to render any orders under paragraphs [9] and [10] in respect of costs assessments presently unnecessary. On the basis of the affidavit evidence, it is evident that those issues for which relief is sought in paragraphs [2]-[4] of the application under s 328 *Legal Profession Act* raise matters of factual dispute. Such matters were not appropriate to be dealt with by application and should not have been included in the originating application to set aside a statutory demand.

- [20] In relation to the relief sought at paragraphs [2] – [4] of this application, there are clear factual disputes in relation to the factual contentions of the applicant which have been outlined in the affidavit of Mr David Evans. That should have been evident from at least the exchange of correspondence between the applicant’s solicitor and the respondent’s solicitor of 24 December 2016¹⁸ and the respondent’s response of 24 January 2017. Given the factual issues evident, the application for such relief should not have been pursued in the hearing of 3 February 2017¹⁹.
- [21] The originating application to set aside a statutory demand is made under rule 2.2 of the *Corporations Rules* in Schedule 1A it is required to be in accordance with form 2 and does not apply generally to all applications outside matters under the *Corporations Act* or the *ASIC Act*. The originating application insofar as it seeks relief for the matters other than setting aside the statutory demand does not render it a nullity.²⁰
- [22] There is power in rule 1.8 provides for the Court to make directions in relation to the practice and procedure to be followed in a proceeding. Rule 367 UCPR also empowers this Court to make any order or direction about the conduct of a proceeding.
- [23] While s 328 of the *Legal Profession Act* refers to an application to an application to set aside a costs agreement being able to be determined by the Tribunal or Supreme Court, in relation to paragraphs [2]-[4] of the application I consider that they should be transferred to QCAT pursuant to s 53 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) given the small amount involved, the factual matters that have to be resolved and that QCAT has jurisdiction to determine such applications under s 328 of the *Legal Profession Act*. It is appropriate for QCAT to make directions as to how the matter should proceed.
- [24] The respondent has asked for indemnity costs. Given that the time limit fixed by s 459G is well known as a pre-requisite to the existence of the court’s jurisdiction to set aside a statutory demand the application was doomed to fail²¹, notwithstanding the novel argument put forward by the applicant. In this regard I note that the respondent informed the applicant that they had filed the application to set aside the statutory demand out of time specifically referring to the High Court decision in *David Grant & Co Pty Ltd v Westpac Banking Corporation*. They invited it to withdraw the application and indicated that the respondent would not seek costs.²² On 24 January in a further letter to the respondent’s solicitor the applicant noted that

¹⁷ Affidavit of David Evans (CFI 10) ex DAE-1.

¹⁸ Rule 1.2 Schedule 1A.

¹⁹ As was the case for all relief in paragraphs [2]-[9] of the application

²⁰ Rule 371 UCPR.

²¹ *Carinda Homes Pty Ltd v Highlands Austral Pty Ltd* [2003] FCA 275.

²² Affidavit of David Evans (CFI 7) Ex DAE-1 p 63.

they disputed the allegations made against the firm contained in the applicant's affidavit material and that the originating applications were misconceived²³. By that stage the applicant should have recognised that its application to set aside the statutory demand was doomed to fail and that there was going to be factual dispute as to relief sought in paragraphs 2-10 of the application such that it was not appropriate to proceed with the application and the hearing of 3 February 2017. In the circumstances, the respondent should have withdrawn the application to set aside the statutory demand having been given the opportunity to withdraw it without cost and when it had no worthwhile prospects of success²⁴ and not otherwise proceeded with the relief sought in paragraphs 2-10 of the application, after 24 February 2017. I am satisfied that it is appropriate to order that the costs of the respondent be awarded on an indemnity basis after 24 January 2017 and prior to that on a standard basis.

[25] I order that:

1. The application in paragraph [1] of the application to set aside the statutory demand be dismissed.
2. That paragraphs [5]-[8], [9] and [10] of the application be dismissed.
3. That the proceeding insofar as it is constituted by paragraphs [2]-[4] of the originating application otherwise be transferred to the Queensland Civil and Administrative Tribunal pursuant to s 53 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).
4. The applicant pay the respondent's costs on a standard basis until 24 January 2017 and thereafter on an indemnity basis.

²³ Affidavit of David Evans (CFI 7) ex DAE-1 p 70

²⁴ *Elliot Harvey Securities Ltd v Raynel* [2015] QSC 212 [12] – [14].