

update

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Friday Facts: Responding to statutory demands – step on it, fast!

The recent High Court case of Aussie Vic Plant Hire Pty Ltd (“Aussie Vic Plant Hire”) v Esanda Finance Corporation Ltd (“Esanda Finance”) has confirmed the position that once the time for compliance with a statutory demand has expired, no application by the debtor can be made to extend that time.

The only remedy available to the debtor company is to defend itself by proving its solvency, which can not only be difficult but also costly.

Under the provisions of the *Corporations Act* 2001 (the “Act”) an unpaid creditor can serve a statutory demand on a debtor company requiring payment of the debt within 21 days after service.

If the debtor company does not comply with the statutory demand, or make an application to the Court to set it aside within the 21 days, the debtor company is deemed to have committed an “act of insolvency”. Relying on that “act”, a creditor can make an application for an order to wind up the debtor company and the Court must presume that the company is insolvent. The onus of proof of insolvency is then reversed and the debtor company must prove it is solvent.

The test of solvency is set out in the Act and can be summarised as being the debtor company demonstrating that it is able to pay its debts as and when they fall due.

Aussie Vic Plant Hire applied to the Supreme Court of Victoria for an order to set aside the statutory demand by Esanda Finance for the amount of \$400,000. Master Efthim dismissed the application however granted an extension of time to comply with the statutory demand.

Aussie Vic Plant Hire appealed from the decision of Master Efthim to a single judge of the Supreme Court on a hearing de novo (being a new hearing on the merits to set aside the statutory demand).

The appeal was lodged before the time for compliance had expired but did not get allocated a hearing date before that time. An application was made to extend the time and both that application and the appeal came on for hearing before Justice Whelan. Justice Whelan was asked by the debtor company to extend the period for compliance. His Honour took the view that he was unable to do so, given the provisions of the Act. On appeal to the Court of Appeal, the Court agreed with Justice Whelan’s view. Aussie Vic Plant Hire appealed to the High Court.

The issue before the High Court was whether section 459F(2), which fixes the period for compliance with a statutory demand as 21 days, can be extended by the Court on the basis of s.459F(2)(i) which states ‘if, on hearing the application under section 459G [to set aside statutory demand]... the Court makes an order that extends the period for compliance...’ that period becomes the period for compliance.

The High Court considered the meaning of the power to extend, with reference to sections 9 and 70 of the Act, which provide that there is a power to extend the period for compliance, even if the power has ended, unless a contrary intention appears in the Act.

The High Court held that it could not extend the time for compliance with the statutory

demand because of the contrary underlying policy of the Act for the speedy resolution of applications to wind up companies in insolvency. This policy is demonstrated by (but not limited to):

- the absolute limitation in section 459G of the time within which a company may apply for an order setting aside a statutory demand to 21 days, which cannot be extended (*Davis Grant & Co Pty Ltd v Westpac Banking Corporation*) and the other fixing of times within other sections of the Act (sections 459E(2)(c) and 459F(2) for instance); and
- provisions of the Act which seek to focus attention at the hearing of an application to wind up in insolvency on whether the company is insolvent, rather than upon formal adequacy of steps, such as the deeming of a company to be insolvent upon failure to comply with a statutory demand (section 459C(2)).

This decision absolutely verifies that the Court is unable to extend time for compliance with a statutory demand and exemplifies the need to take immediate steps to either comply with a demand or to make an application to it set aside within 21 days, to avoid the unfavourable consequences of the presumption of insolvency.

An application to set aside a statutory demand is a relatively simple one, requiring

the debtor to raise a genuine dispute as to the debt, or show defect in the creditor's compliance with provisions of the Act, in its form or service.

If the deadline is missed, to avoid winding up, the company has no alternative but to demonstrate its solvency, which is significantly more costly to the company involved.

For more information

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