



CONSTRUCTION LAW UPDATE No. 807

Collecting the cash

Introduction

In *Blayney Wholesale Foods Pty Ltd v BIS Cleanaway Ltd* the NSW Supreme Court was asked to determine whether a statutory demand should be set aside.

The facts

Blayney entered into a three year contract with Cleanaway providing for monthly payments in exchange for regular waste removal services. Blayney failed to pay an amount due. The contract terms entitled Cleanaway to terminate the contract and claim half the monthly fee for the remaining months of the three year term. Cleanaway terminated the contract and claimed \$43,945 from Blayney. Blayney refused to pay and Cleanaway issued a statutory demand for the debt.

Statutory demands

Sending a statutory demand under the *Corporations Act 2001* is a relatively low cost start down the path to attempt to recover a debt owed by a company.

A company receiving a statutory demand must apply to the court within 21 days to set it aside or the demand can be used as evidence of insolvency. This timeline cannot be extended by the court or by agreement.

Failure to apply within the 21 day period can result in an application to wind up the company and have a liquidator appointed. Statutory demands usually result in payment of a genuine debt unless the recipient is unable to pay.

Blayney responds

Within the 21 day period, Blayney applied to the Supreme Court to set aside the statutory demand on four separate grounds:

1. That there was a genuine dispute about the existence of the debt;
2. That there was a genuine dispute about the amount of the debt;

3. That the demand contained technical defects;
4. That the affidavit in support of the demand was deficient.

Many applications to set aside statutory demands traverse one or more of these four grounds.

Dispute about the existence of the debt

An application to set aside a statutory demand must be supported by an affidavit setting out the grounds for the attack. Blayney had filed such an affidavit stating that the contract was not signed by an authorised officer of Blayney and that the signatory had been induced into signing the contract by representations that the agreement was limited in time and effect.

Cleanaway claimed that the initial affidavit filed by Blayney did not raise sufficient material to bring the existence of the debt into question. Cleanaway relied on earlier cases that have found that when applying to set aside a statutory demand, the applicant cannot raise grounds for setting it aside that were not raised in the initial affidavit.

Blayney had subsequently filed other affidavits with more detail, explaining that a person named “Leanne” had attended at Blayney’s offices. Leanne had convinced Mr Gaeta, an employee of another company in the Blayney Group, to sign a blank contract. Mr Gaeta said that Leanne had told him the contract’s only function was to protect Blayney for the next 12 months against impending substantial price rises. Mr Gaeta said that Leanne had told him not to worry about the blank sections of the contract as she would fill in all the details and come back to talk about it.

Cleanaway had provided waste removal services for various companies in the Blayney Group. There were then two issues; the contract was not signed on behalf of the correct Blayney company and the services may have also been provided to other Blayney companies.

Cleanaway said that Blayney should not be allowed to rely on these subsequent affidavits because it had not raised the issues in its initial affidavit. However, the Court determined that the subsequent affidavits amplified issues that were raised in the first, and allowed Blayney to rely on all of the filed material.

When deciding to set aside a statutory demand because of the existence of a genuine dispute, the Court does not have to reach a conclusion on the conflicting evidence, but has to decide whether there is a “plausible contention requiring investigation” or a “real but not spurious, hypothetical or misconceived” dispute.

In *Blayney* the Court decided that the affidavit evidence led to a conclusion that there was a genuine dispute as to the existence of the debt.

Dispute about the amount of the debt

As the Court determined that there was a genuine dispute about the whole debt, it did not need to examine whether there was a dispute about the amount of the debt.

Often, there are live issues about the amount of the debt. In such cases, the Court will look at claims and cross claims. If the Court is satisfied that there is no genuine dispute about a portion of the claimed debt, the Court will make an order that the demand is modified to the undisputed amount of the debt, provided it is greater than \$2,000.

Technical defects in the demand

The Court also examined the third issue: whether the demand was technically defective because the accompanying affidavit did not adequately explain how the amount of the debt had been calculated. The Court said that a month before the demand was issued, an adequate explanatory letter had been sent to Blayney with the invoice that had not been paid. It said that where an invoice and covering letter are sent shortly before a demand is served, a creditor is expected to cross reference all of the documents they have received and not look at the affidavit in isolation.

Authority for the affidavit in support

The affidavit in support of a statutory demand must be from the creditor itself, or must state that the creditor authorises the affidavit maker. Blayney’s affidavit omitted to state that Blayney authorised the maker of the affidavit, who was its national Credit Manager. But the Court said it was sufficient to simply identify

the affidavit maker as the national Credit Manager in order to cloak him with sufficient authority to make the affidavit.

Conclusion

Due to the existence of a genuine dispute the Court set aside the statutory demand.

Statutory demands are powerful tools in collecting cash where there is no dispute that money is owed. Even if there are competing claims and counterclaims, the Court can decide there is no dispute about a portion of the amount and refuse to set aside the demand for the undisputed amount. Statutory demands can be served for amounts in excess of \$2,000.

Companies that fail to respond to statutory demands do so at their peril.

Due to the draconian nature of the statutory demand procedure, it is essential that the demand is technically correct and follows the rules set out in the *Corporations Act*.

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