

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

S ECI 2021 01294

IN THE MATTER of SCEAM CONSTRUCTION PTY LTD (ACN 141 136 816)

SCEAM CONSTRUCTION PTY LTD
(ACN 141 136 816)

Plaintiff

v

OWNERS CORPORATION NO. 711686W

Defendant

JUDGE: Hetyey AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 6 July 2021
DATE OF JUDGMENT: 6 July 2021 (given *ex tempore*, revised)
CASE MAY BE CITED AS: Re Scaem Construction Pty Ltd
MEDIUM NEUTRAL CITATION: [2021] VSC 437

CORPORATIONS - *Corporations Act 2001* (Cth) - Part 5.4 - Insolvency - Statutory demand - s 459G - Application to set aside demand - New grounds sought to be advanced - Whether precluded by 'Graywinter principle' - Where defects not referred to in s 459G affidavit but apparent from face of documents annexed - s 459H - Whether genuine dispute about existence and/or amount of debt - s 459J(1)(a) - Where alleged defects in statutory demand - No substantial injustice arising - s 459J(1)(b) - Whether some other reason to set aside statutory demand - Whether order of Victorian Civil and Administrative Tribunal due and payable - Where affidavit accompanying statutory demand predates demand - Whether there is an affidavit which verifies the statutory demand for purposes of s 459E(3) - Statutory demand set aside.

PRACTICE AND PROCEDURE - Costs - Discretion - Plaintiff ultimately successful in setting aside defendant's statutory demand - Successful ground only referred to day prior to hearing - Order that plaintiff pay portion of defendant's costs.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr T W J Greenway	SLF Lawyers
For the Defendant	Mr M-Q T Nguyen	Walpole Menzies

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HIS HONOUR:

Introduction

1 In this proceeding, the plaintiff, Scream Construction Pty Ltd, seeks to set aside a statutory demand issued on 1 April 2021 by the defendant, Owners Corporation No. 711686W (**'the statutory demand'** or **'the demand'**). The statutory demand is sought to be set aside under s 459H of the *Corporations Act 2001* (Cth) (**'the Act'**) on the ground that there is a genuine dispute about the existence of the debt the subject of the demand. In addition, it is argued there are defects and other reasons to justify the setting aside of the demand under s 459J of the Act.

Background

2 The statutory demand is for a sum of \$60,787.00 and relates to an order made by the Victorian Civil and Administrative Tribunal (**'VCAT'**) dated 8 December 2020 (**'the VCAT order'**) and an accompanying finding that the plaintiff was liable for damages for breach of the statutory warranty under s 8 of the *Domestic Building Contracts Act 1995* (Vic).

3 The plaintiff's originating process was filed on 26 April 2021. It placed reliance upon ss 459G, 459H and 459J of the Act and was supported by a short affidavit affirmed by Mr Matthew Charles Allen, the plaintiff's director, on 24 April 2021 (**'the s 459G affidavit'**). The s 459G affidavit set out the following matters in relation to the alleged genuine dispute concerning the statutory demand:

Nature of Genuine Dispute

7. We are currently in discussions with the Owners Corporation No. 711686W
8. We had a meeting with the Owners Corporation Manager Andrew James Bonwick at his office on the 20/4/21 to discuss the Stat Demand and why it had been issued.
9. We stated we still have not received the cost orders from VCAT relating to these proceedings so we do not agree with you issuing us a Stat Demand as the VCAT Cost Orders have not been issued as yet from these proceedings.

Conclusion

10. On the basis of the matters raised in this affidavit, I believe there exist [sic] a genuine dispute regarding the amounts claimed by the Owners Corporation C/ - Walpole Menzies Lawyers in the Statutory Demand.

4 As previously observed, the VCAT order concerns the plaintiff's liability for damages for breach of statutory warranty. It does not relate to the question of costs in the relevant VCAT proceeding. Further, the s 459G affidavit only refers to the existence of a genuine dispute in the context of s 459H(1)(a) of the Act. There are no matters explicitly referred to in that affidavit directed to whether the statutory demand should be set aside on the basis of any alternative ground (such as an offsetting claim under s 459H(1)(b) of the Act or because of some defect or other reason under s 459J of the Act).

5 The matter was first returnable before the Court on 19 May 2021. At that hearing, Mr Allen sought to appear on the plaintiff's behalf. This is despite the fact that the originating process was prepared and filed by SLF Lawyers. Mr Allen explained that whilst he had sought for a lawyer to appear on the day, the lawyer's spouse was ill. To put things on a proper footing, I gave the plaintiff limited dispensation from r 1.17 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* ('**the Rules**') to appear on the day without a solicitor but explained that if the matter was to proceed any further without the plaintiff having legal representation, it would need to make a formal application for dispensation supported by proper material.

6 At the hearing, Mr Allen sought to raise additional technical grounds in support of the application to set aside the statutory demand. He said that the demand failed to identify the current registered office of the plaintiff and omitted the end notes which are included in form 509H of the *Corporations Regulations 2001 (Cth)*. These were not matters explicitly referred to in the s 459G affidavit. I explained to Mr Allen that there may be an argument as to whether the plaintiff was prevented from raising grounds outside the 21-day statutory period contemplated by s 459G in accordance with the principle set out in *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452 ('**the Graywinter principle**'). Mr Allen

requested that the plaintiff company be afforded an opportunity to argue these points at a final hearing. However, he indicated that no further evidence would be relied upon by the plaintiff.

7 At the same time, the defendant sought orders for the dismissal of the plaintiff's application on the basis that the material in support did not disclose any coherent grounds to set aside the statutory demand.

8 Orders were ultimately made listing the matter for final hearing today and requiring the plaintiff to file and serve short submissions by 9 June 2021 identifying, by reference to the affidavit evidence, why there is a genuine dispute in respect of the debt claimed in the demand and/or 'some other reason' that the demand should be set aside under s 459J of the Act. In addition, by 16 June 2021, the plaintiff was required to file and serve any affidavit in support of an application for dispensation of the requirement under r 1.17 of the Rules in order to permit the plaintiff to appear and conduct the proceeding without a lawyer. No such application was ultimately made.

9 The plaintiff filed submissions on 8 June 2021 and responsive submissions were filed by the defendant on 29 June 2021. The defendant also relies upon an affidavit of Mr Andrew James Bonwick, Body Corporate Manager, affirmed on 18 May 2021 in opposition to the application. On 5 July 2021, the plaintiff filed submissions in reply, although they were not contemplated by the Court's orders of 19 May 2021.

10 By its written submissions, the plaintiff seeks to advance two further contentions to set aside the statutory demand, namely that:

- (a) the amount claimed in the statutory demand is not 'due and payable' for the purpose of s 459E of the Act because the VCAT order is not enforceable; and
- (b) the affidavit in support of the statutory demand predates the statutory demand itself, which is 'some other reason' to justify setting it aside under s 459J(1)(b) of the Act.

Statutory provisions and legal principles

11 Section 459E of the Act relevantly provides:

- (1) A person may serve on a company a demand relating to:
 - (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
 - (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
- ...
- (3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:
 - (a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
 - (b) complies with the rules.

12 Section 459G of the Act states:

- (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 the statutory period¹ after the demand is so served.
- (3) An application is made in accordance with this section only if, within that period:
 - (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.

13 Section 459H(1) of the Act provides:

- (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;
 - (b) that the company has an offsetting claim.

¹ The term 'statutory period' is defined in s 9 of the *Corporations Act 2001* (Cth) as: '(a) if a period longer than 21 days is prescribed – the prescribed period; or (b) otherwise – 21 days'.

14 The principles concerning what constitutes a genuine dispute for the purpose of s 459H(1) of the Act are well-established and I do not propose to set them out extensively here. However, it is appropriate to note the following propositions which emerge from the authorities concerning the requirements of a genuine dispute:

- (a) the dispute must be 'bona fide and truly exist in fact';²
- (b) 'the grounds for alleging the existence of a dispute [must be] real and not spurious, hypothetical, illusory or misconceived';³
- (c) the dispute must 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 ... Something "between mere assertion and the proof that would be necessary in a court of law" may suffice';⁴
- (d) a genuine dispute may involve a 'plausible contention requiring investigation' and raising the same sort of considerations as the 'serious question to be tried' test that applies in the case of interlocutory injunctions;⁵
- (e) the Court should not uncritically accept statements about an alleged genuine dispute which are 'equivocal, lacking in precision, inconsistent with undisputed contemporary documents ... or inherently improbable ...';⁶
- (f) if the dispute appears to be something 'merely created or constructed in response to the pressure represented by the service of the statutory demand',

² *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452, 464 (Northrop, Merkel and Goldberg JJ) ('*Spencer Constructions*'), cited with approval by the Victorian Supreme Court of Appeal in *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)* [2015] VSCA 330, [49] (Kyrou, Ferguson and Kaye JJA) ('*Malec*').

³ *Spencer Constructions* (n 2) 464, cited with approval by the Victorian Supreme Court of Appeal in *Malec* (n 2).

⁴ *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* (2008) 66 ACSR 67, 79 [71] (Dodds-Streeton JA) ('*TR Administration*').

⁵ *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601, 608 [31] (Beazley P, Meagher and Gleeson JJA) ('*Britten-Norman*').

⁶ *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787 (McClelland CJ in Eq), cited with approval by the Victorian Supreme Court of Appeal in *TR Administration* (n 4) and *Malec* (n 2).

then it is not advanced in good faith and will not be regarded as genuine;⁷
and

(g) whilst the underlying nature of the dispute about the existence of a debt 'must be exposed', the Court will not deal with the merits and nothing of substance will be decided.⁸

15 Section 459J of the Act is in the following terms:

- (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; or
 - (b) there is some other reason why the demand should be set aside.
- (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.

16 In *Re MHC Pathology Pty Ltd ('Re MHC Pathology')*,⁹ I made the following statements about the operation of s 459J:¹⁰

The case law makes clear that sub-paragraphs (a) and (b) of s 459J(1) are mutually exclusive.¹¹ The only source of power to set aside a demand on the basis of a defect is found in s 459J(1)(a) and not s 459J(1)(b).¹² In other words, the provisions do not overlap.

The term 'defect' as it appears in s 459J is given a wide and inclusive definition by s 9 of the legislation and may encompass an irregularity, a misstatement of an amount or total, a misdescription of a debt or other matter, or a misdescription of a person or entity. But the expression 'defect' in s 459J does not imply any degree of proportionality or distinguish between defects which are major or minor in nature.¹³ Even significant defects in a demand are to be determined under s 459J(1)(a).¹⁴

⁷ *Creata (Aust) Pty Ltd v Faull* (2017) 125 ACSR 212, 224 [47] (Barrett AJA, with Gleeson and White JJA agreeing).

⁸ *Quadrant Constructions Pty Ltd v HSBC Bank Australia Ltd* [2004] FCA 111, [4] (Finkelstein J).

⁹ [2020] VSC 789 (*Re MHC Pathology*).

¹⁰ *Ibid* [64]–[66], [75].

¹¹ See *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* (1994) 13 ACSR 525; *Spencer Constructions*.

¹² *Spencer Constructions* 458–9 (Northrop, Merkel and Goldberg JJ); *Daewoo Australia Pty Ltd v Suncorp-Metway Ltd* (2000) 33 ACSR 481, 493–4 [44]–[45] (Austin J) (*Daewoo v Suncorp-Metway*).

¹³ *Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd* (2002) 20 ACLC 726. See also Farid Assaf, *Statutory Demands and Winding Up in Insolvency* (Lexis Nexis, 2nd ed, 2012) [7.12].

¹⁴ *Spencer Constructions* 459 (Northrop, Merkel and Goldberg JJ).

The question of whether substantial injustice will arise unless the demand is set aside depends on the nature of the particular defect identified and the surrounding circumstances.¹⁵ ...

[T]he authorities are clear that the 'other reason' required by s 459J(1)(b) cannot be a defect in the demand.¹⁶ Something else is required. In *Arcade Badge Embroidery Co Pty Ltd v DCT*,¹⁷ the Court of Appeal of the Australian Capital Territory found that the other reasons envisaged by s 459J(1)(b) include 'conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice'.¹⁸ Whilst the discretion conferred by the provision is broad, a judge should not set aside a statutory demand under s 459J(1)(b) simply because she or he subjectively considers it fair to do so.¹⁹ The Court's power under the sub-section exists to maintain the integrity of the statutory demand procedure in Part 5.4 of the *Corporations Act* and to counter its subversion.²⁰

17 Lastly, it is important to note that a plaintiff's affidavit in support of an application under s 459G of the Act must contain sufficient facts to support its case.²¹ The affidavit need not detail the evidence supporting the dispute and may assert material facts in the nature of a pleading.²²

18 In the recent case of *133 Walsh Street Pty Ltd v BMF Pty Ltd* ('**133 Walsh Street**'),²³ Gardiner AsJ reviewed the relevant authorities,²⁴ including the Victorian Court of Appeal's decision in *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)* ('**Malec**'),²⁵ and summarised the application of the *Graywinter* principle in this way:²⁶

When applying the *Graywinter* principle, Courts regard grounds are being 'raised' when they are evident on the face of a document annexed to an affidavit even if not referenced in the affidavit itself. Nonetheless, the Court of Appeal in this state considers that the 21 day affidavit is required to provide 'fair notice' or to 'fairly alert' the opposing party to the grounds on which the an [sic] applicant to set aside a statutory demand relies. The test of

¹⁵ *Condor Asset Management Ltd v Excelsior Eastern Ltd* (2005) 56 ACSR 223, 231 [25] (Barrett J); *Randall Pty Ltd v Chepan Pty Ltd* [2009] NSWSC 848 [15] (Barrett J).

¹⁶ *Spencer Constructions* 458-9 (Northrop, Merkel and Goldberg JJ); *Daewoo v Suncorp-Metway* 493-4 [44]-[45] (Austin J).

¹⁷ (2005) 157 ACTR 22.

¹⁸ *Ibid* 26 [27] (Crispin P, Gray and Marshall JJ). See also *Hoare Bros Pty Ltd v DCT* (1996) 19 ACSR 125; *Neutral Bay Pty Ltd v DCT* (2007) 25 ACLC 1341.

¹⁹ *Meehan v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229, 240 [60]-[61] (Santow and Tobias JJ, and Young CJ in Eq).

²⁰ *Rinfort Pty Ltd v Arianna Holdings Pty Ltd* (2016) 111 ACSR 607, 633 [84] (Black J).

²¹ *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452, 459 (Sundberg J).

²² *Ibid*; *Kortz Ltd v Data Acquisition Pty Ltd* (2006) 155 FCR 556, 565-6 (Greenwood J).

²³ [2020] VSC 650 ('**133 Walsh Street**').

²⁴ *Ibid* [20]-[31].

²⁵ *Malec* (n 2).

²⁶ *133 Walsh Street* (n 23) [30]-[31].

'fair notice' to the defendant by way of the 21 day affidavit prevents an applicant from changing its position if it seeks to raise a new claim which was not evident or available from inference in the 21 day affidavit or its exhibits.

An applicant to set aside a statutory demand will not infringe the *Graywinter* principle if it fairly alerts or gives fair notice to the creditor of the nature of the dispute or offsetting claim (or 'some other reason under s 459J') which it ultimately seeks to agitate in the application in its 21 day affidavit. The applicant may supplement the evidence in relation to such a ground but if such supplementary evidence is not referable to a ground of which fair notice was given in the 21 day affidavit, the *Graywinter* principle will be infringed and that dispute or claim or 'some other reason' will not be permitted to be agitated in the application. The question as to whether the principle is infringed will involve an analysis of the evidence which is filed and require an assessment of the character of the ground which the respondent creditor contends offends the *Graywinter* principle. If, on an objective analysis, such an exercise results in a conclusion that what is sought to be agitated departs from what was raised in the 21 day affidavit, that ground will not be permitted to be agitated in the application.

- 19 One of the authorities considered by Gardiner AsJ in *133 Walsh Street* was *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* ('*Saferack*').²⁷ In that case, Barrett J (as his Honour then was) considered that 'a ground is "raised" ... if the ground is evident from the supporting affidavit, even if only because it can be discerned from some annexed document the content of which "reveals it"'.²⁸ His Honour further held it to be sufficient to raise a defect in a statutory demand or its accompanying affidavit where those documents are annexed to the affidavit filed in support of an application to set aside a statutory demand, even if the alleged defect is not expressly set out within the body of that affidavit.²⁹ Barrett J's decision in *Saferack* has since been cited without criticism by the Victorian Court of Appeal in *Malec*, the New South Wales Court of Appeal in *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd*,³⁰ and in various other decisions.³¹

Genuine dispute

- 20 The specific matters referred to in the s 459G affidavit were not further developed in

²⁷ (2007) 214 FLR 393 ('*Saferack*').

²⁸ *Ibid* 400 [25].

²⁹ *Ibid* 398–400 [22]–[26].

³⁰ *Britten-Norman* (n 5) 611 [45].

³¹ See *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* (2012) 297 ALR 372, 377 [31] (Young JA); *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* (2015) 104 ACSR 425, 450 [130] (Wigney J); *Re UGL Process Solutions Pty Ltd* [2012] NSWSC 1256, [30] (Black J); *Re Nanevski Developments Pty Ltd* [2019] NSWSC 1204, [5] (Rees J).

the plaintiff's written or oral submissions and did not appear to be pressed at the hearing. I will briefly deal with them in any event. In my view, those matters do not suggest a *bona fide* and genuine dispute for the purpose of s 459H. Insofar as the plaintiff's affidavit material refers to the existence of discussions between the parties directed to the resolution of the subject matter of the proceeding in VCAT, it is unclear how any such discussions could give rise to a genuine dispute about whether the debt claimed in the statutory demand is due and payable. The plaintiff's characterisation of these settlement discussions is both vague and lacking in precision. There is nothing to distinguish this ground from mere assertion. Further, there is nothing in the plaintiff's material to suggest the settlement discussions occurred at any time prior to the issuing of the statutory demand. On the other hand, Mr Bonwick, on behalf of the defendant, has given more detailed evidence about the nature and extent of the settlement discussions between the parties. It is his evidence that those discussions, which commenced on 20 April 2021, ultimately proved unproductive and that no agreement between the parties was ever reached.

- 21 In the s 459G affidavit, it is also suggested there is a genuine dispute because the plaintiff has not received a copy of a costs order made in the VCAT proceeding. This ground is both spurious and misconceived. The statutory demand did not rely on any costs order made by VCAT and only made reference to the VCAT order of 8 December 2020. The s 459G affidavit does not identify how that VCAT order is said to be the subject of a genuine dispute. In any event, it is the defendant's evidence that, on 27 April 2021, VCAT made a subsequent costs order against the plaintiff in favour of the defendant, which was provided to the parties shortly thereafter.

Section 459J grounds

- 22 I turn now to the s 459J grounds sought to be raised by the plaintiff.

Initial grounds raised by the director of the plaintiff

- 23 As will be recalled, at the initial hearing on 19 May 2021, Mr Allen raised two alleged

defects in relation to the statutory demand. He argued that the statutory demand was defective because it failed to disclose the plaintiff's registered office and did not include the accompanying notes. Again, neither of these arguments were developed in the plaintiff's written submissions or pressed at the hearing. Putting to one side whether these arguments are barred by operation of the *Graywinter* principle, I will briefly deal with them for the sake of completeness.

24 Whilst I accept that a failure to refer to the debtor's current registered office constitutes a defect for the purpose of s 459J(1)(a), it is difficult to see how it has caused any substantial injustice to the plaintiff within the meaning of s 459J(1)(a) of the Act.³² Certainly, none has been referred to.

25 Similarly, whilst the failure to include the notes is a defect, it is also not one that is capable of causing substantial injustice.³³ The notes are directed to assisting a creditor in drafting a statutory demand, as opposed to providing guidance to a debtor company.³⁴

26 Accordingly, there is no basis to set aside the demand under s 459J(1)(a) by reason of these defects.

27 However, there are two further arguments now raised by the plaintiff as grounds to set aside the statutory demand under s 459J which warrant closer examination.

Whether the VCAT order is a debt due and payable?

28 The plaintiff places reliance upon s 121 of the *Victorian Civil and Tribunal Act 1998* (Vic) ('**VCAT Act**') which states:

- (1) A person in whose favour a monetary order is made may enforce the order in—
 - (a) if the amount owing under the order is within the

³² See *Re Ad-A-Cab Holdings Pty Ltd* [1997] 2 Qd R 115; *Daewoo Australia Pty Ltd v Suncorp Metway Ltd* (2000) 48 NSWLR 692; *R H Mortgage Corporation Ltd v Kerry Ann Properties Pty Ltd* [2011] NSWSC 298.

³³ *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* (1994) 51 FCR 446; *Re MHC Pathology* (n 9) [74].

³⁴ See *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* [2001] WASC 216, [3] (Bredmeyer M), which was overturned on appeal, on other grounds, in *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* (2002) 172 FLR 35. See also *Re MHC Pathology* (n 9) [74].

jurisdictional limit of the Magistrates' Court, the Magistrates' Court; or

(b) otherwise, either the County Court or the Supreme Court.

(2) For the purposes of the enforcement of a monetary order under subsection (1), the order is taken to be an order of the court in which it is to be enforced.

29 The plaintiff also cites the decision of Sifris J (as his Honour then was) in *Re Kornucopia Pty Ltd (No 4)*,³⁵ where his Honour explained the operation of s 121 of the VCAT Act in this way:

... a monetary order made by VCAT is not a 'judgment debt' for the purposes of enforcement. In order to enforce an order of VCAT, it must be registered with the appropriate court under s 121 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, to be treated as a judgment of that court.³⁶

30 The plaintiff argues the VCAT order is not a debt that is 'due and payable' for the purpose of s 459E(1)(a) of the Act because it is not capable of being enforced. It is said this can only occur when the VCAT order is recorded as an order of a court of competent jurisdiction. Counsel for the plaintiff argued that when this occurs, an order of VCAT is essentially converted into an order of a court and that the VCAT order no longer has effect and cannot co-exist with the court's order. According to the plaintiff, it follows that the VCAT order is not a debt capable of supporting a statutory demand within the meaning of s 459E(1)(a).

31 The plaintiff's counsel confirmed at the hearing that this ground was put as 'some other reason' to set aside the statutory demand under s 459J(1)(b) and also by way of a genuine dispute for the purpose of s 459H.

32 Regardless of the appropriate characterisation of the argument under the relevant legislative provisions in Part 5.4 of the Act, I accept the defendant's contention that the ground is barred by the *Graywinter* principle because it is not referable to a ground of which fair notice was given in the s 459G affidavit. The ground is neither evident nor available from inference on a generous reading of the s 459G affidavit or

³⁵ [2020] VSC 7.

³⁶ Ibid [156]. Whilst his Honour was apparently describing the operation of an earlier version of that statutory provision, his characterisation remains applicable to the provision as it currently stands.

its exhibits. The mere fact that the VCAT order is exhibited to the affidavit does not appear to be sufficient to fairly notify the defendant of the evidentiary basis for the submission now sought to be made. Further, whilst complaint was made in the s 459G affidavit about the non-provision of a costs order from VCAT, and evidence given about the existence of attempted settlement negotiations between the parties, none of those matters could support the very specific argument now raised that the VCAT order is not due and payable.

33 However, even if I am wrong in this analysis and the *Graywinter* principle does not prevent the plaintiff from now raising this argument, the argument cannot succeed for the following reasons.

34 *First*, for the purpose of s 459E of the Act, a debt is due and payable when it is ascertainable, immediately payable and presently recoverable or enforceable by action.³⁷ There is nothing to suggest the VCAT order is deficient in any of these respects. Critically, there is no impediment to the defendant seeking to recover or to enforce the order in accordance with s 121 of the VCAT Act. For example, there is no stay on the operation of the VCAT order which would suspend the legal effect of the rights conferred on the defendant by the order. Further, s 118 of the VCAT Act makes clear that the VCAT order came into operation immediately after it was made. Although the plaintiff's counsel pointed out that non-compliance with a monetary order of VCAT does not constitute an offence for the purposes of s 133 of the VCAT Act, that does not seem to be important here. Whilst not a judgment debt, in my view, the VCAT order records a debt which is nevertheless due and payable.

35 *Secondly*, the plaintiff's submissions appear to mischaracterise the operation of s 121 of the VCAT Act. Section 121(1) facilitates a process by which a successful party can seek to enforce an order of VCAT and s 121(2) makes clear that for the purpose of enforcement the order is taken to be an order of the court in which it is to be

³⁷ *Re Elgar Heights Pty Ltd* [1985] VR 657, 669, 671 (Ormiston J); *Remuneration Data Base Pty Ltd v Pauline Goodyer Real Estate Pty Ltd* [2007] NSWSC 59, [39]-[42] (White J); *NA Investments Holdings Pty Ltd v Perpetual Nominees Ltd* (2010) 79 ACSR 544, 552-3 [63] (Lindgren AJA); *Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd* (2002) 20 ACLC 726, 731-2 [17] (Barrett J).

enforced. However, the language of s 121 does not suggest that an order of VCAT is spent once the process of enforcement is pursued by the successful party.

36 *Thirdly*, the evidence demonstrates that the VCAT order was in fact recorded in an order of the Magistrates' Court of Victoria on 22 February 2021 (although the Magistrates' Court order is not referred to in, or annexed to, the statutory demand).

37 *Lastly*, there is no principle contained within the Act that only judgment debts which are capable of enforcement may be claimed in a statutory demand. Instead, s 459E(3) of the Act provides that, in the case of a judgment debt, there is an exemption from the strict requirement that a statutory demand be accompanied by a supporting affidavit. As Siopis J held in *Anderson Formrite Pty Ltd v CASC Hire Pty Ltd*,³⁸ the rationale for the exemption is because '[t]he judgment speaks for itself as to the amount which is due and payable and, prima facie, also in relation to the absence of a genuine dispute'.³⁹ Of course, there are innumerable examples in the authorities of debts which are due and payable but not confirmed by way of judgment; for example, a debt arising from an unpaid invoice. In my view, a creditor who wishes to rely upon an order obtained in VCAT to support a statutory demand may do so without first taking steps to enforce the order within a court of competent jurisdiction, so long as the statutory demand is verified by an affidavit in accordance with s 459E(3) of the Act.

Supporting affidavit pre-dates statutory demand

38 I now come to the plaintiff's last ground, raised for the first time in its submissions in reply filed yesterday.

39 The plaintiff submits that the statutory demand is supported by the affidavit of Mr Andrew James Bonwick affirmed on 31 March 2021, and therefore predates the demand which is dated 1 April 2021. The plaintiff contends that this discrepancy constitutes 'some other reason' to set the statutory demand aside for the purpose of s 459J(1)(b).

³⁸ (2005) 147 FCR 379.

³⁹ *Ibid* 391 [62] (Siopis J).

40 As with the previous ground discussed, the defendant argues that the plaintiff's reliance upon this remaining ground offends the *Graywinter* principle because the plaintiff seeks to raise a new ground or introduce a new area of controversy which was not apparent from the content of the s 459G affidavit. In my view, this ground was sufficiently raised in the plaintiff's s 459G affidavit because it is evident on the face of documents exhibited to the affidavit, namely the statutory demand and its own accompanying affidavit. The plaintiff's originating process also made reference to s 459J of the Act, notwithstanding there was no explicit reference to the relevant facts said to engage this provision within the s 459G affidavit itself. It follows that the plaintiff is entitled, consistent with the *Graywinter* principle, to raise this remaining ground.

41 However, because this argument has only been referred to the day prior to the hearing, and the material filed in the proceeding has (with the exception of the plaintiff's 5 July 2021 submissions) not been directed to this point, I consider that the matter is ultimately relevant to the exercise of the Court's discretion on costs.

42 I turn now to the merits of this last ground concerning the date of the affidavit accompanying the statutory demand.

43 In the recent case of *Re Nanevski Developments Pty Ltd (No 2)*,⁴⁰ Rees J held as follows:

Although, where the verifying affidavit is sworn before the date of the statutory demand, there is no defect in the demand itself, there is abundant authority that the demand will be set aside 'for some other reason', including *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* (2002) 172 FLR 35; [2002] WASCA 196 (Templeman J, with whom Steytler and Miller JJ agreed); *In the matter of Gemaveld Pty Limited* [2012] NSWSC 582 per Black J. In this event, it is not necessary for the plaintiff to prove that substantial injustice will be caused unless the demand is set aside, as it would be required to do under section 459J(1)(a). The 'plethora' of cases in support of this proposition (described as such by Randall AsJ in *Stellar Projects (Vic) Pty Ltd v Cambridge Plumbing Pty Ltd* (2017) 324 FLR 279; [2017] VSC 532 at [24]) was recently summarised by Wigney J in *Wollongong Coal Limited v Gujarat NRE India Pty Limited* (2015) 104 ACSR 425; [2015] FCA 221 at [83]–[84]:

83 Since at least 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*), the following four

⁴⁰ [2019] NSWSC 1217 (*Re Nanevski*).

principles or propositions can be considered to be well established: *first*, an accompanying affidavit that predates a demand does not or cannot verify the demand; *second*, such an affidavit does not satisfy the requirement in s 459E(3); *third*, the requirement in s 459E(3) is an important safeguard in the statutory scheme and is therefore mandatory; and *fourth*, 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. The authorities that establish these [principles] include: *Ambassador at Redcliffe Pty Ltd v Barreau Peninsula Property Pty Ltd* [2007] 2 Qd R 199; (2006) 202 FLR 459 (*Ambassador*) at [18]–[20]; *R2M Pty Ltd v Gourlay* [2011] FCA 168 (*R2M*) at [31]–[36]; *Ri-Co Holdings (Australia) Pty Ltd v Allied Sandblasters Pty Ltd* [2010] 1 Qd R 293 (*Ri-Co Holdings*) at [23]; *Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd* (2005) 190 FLR 466 (*Chadmar*) at [54]–[56]; *Technology Licensing Ltd v Climit Pty Ltd* [2002] 1 Qd R 566 (*Technology Licensing*) [24]–[25].

84 The one 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: *Wildtown* at [58]. An updating affidavit is a later affidavit which verifies that the debt referred to in the demand remained due and payable on the date the demand was made: *Chadmar* at [52]. It is tolerably clear, however, that to relevantly cure the non-compliance with s 459E(3), the updating affidavit must be 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: *Chadmar* at [52]; and *Ambassador* at [21].⁴¹

44 I accept that the weight of authority suggests that a supporting affidavit sworn on a date prior to the date of the statutory demand constitutes ‘some other reason’ to set aside the demand in accordance with s 459J(1)(b) of the Act. Because the s 459G affidavit was affirmed a day prior to the issuing of the statutory demand, it does not verify that the debt claimed in the demand was due and payable at the time the statutory demand was issued and, accordingly, it does not meet the requirements of s 459E(3) of the Act. The language of that provision makes clear that the deponent must swear or affirm that the debt described in the statutory demand *is* due and payable as at the day the affidavit is sworn or affirmed. Logically, this requires the affidavit to be sworn contemporaneously with, or after, the date of the statutory demand.⁴²

⁴¹ Ibid [7] (emphasis in original).

⁴² Ibid [5]. See also *Re Unity Resources Group Australia Pty Ltd* [2015] NSWSC 1174, [5] (Brereton J).

45 Here, the problem is compounded by the fact that the VCAT order is not a judgment debt which would provide the defendant with an exemption from the requirement to include a supporting affidavit. Further, the statutory demand does not refer to or exhibit the order of the Magistrates' Court, which would have brought the debt within the concept of a 'judgment debt'. Moreover, the defendant did not serve upon the plaintiff any 'updating' affidavit in support of the statutory demand within the statutory period for compliance.

46 There is, in effect, no verifying affidavit for the purpose of s 459E(3). This fundamental departure from the clear operation of Part 5.4 of the Act means there is 'some other reason' to set aside the statutory demand under s 459J(1)(b).

Conclusion and costs

47 In view of the above matters, I will set aside the statutory demand.

48 Following the delivery of these *ex tempore* reasons, I heard the parties on the question of costs and made a ruling to the following effect.

49 The Court has a wide discretion in relation to costs.⁴³ The discretion is absolute, unconfined and unfettered but must still be exercised judicially, that is, not by reference to irrelevant or extraneous considerations, but upon facts connected with the litigation.⁴⁴ Although not designed to control the exercise of the Court's discretion, there is a general rule that, in the absence of good reason to the contrary, a successful litigant should recover his or her costs.⁴⁵

50 The plaintiff seeks its costs in accordance with this general rule.

51 Where a plaintiff company succeeds in setting aside a statutory demand, the Court will usually order that the company be awarded costs pursuant to the general rule

⁴³ See s 24 of the *Supreme Court Act 1986* (Vic) and s 65C of the *Civil Procedure Act 2010* (Vic).

⁴⁴ See *Innes-Irons v Forrest* [2017] VSC 10, [5] (Derham AsJ); *Towercom Pty Ltd v Fahour (No 4)* [2013] VSC 585, [6] (Derham AsJ) ('*Towercom*'); *Latoudis v Casey* (1990) 170 CLR 534, 557 (Dawson J) ('*Latoudis*'); *Oshlack v Richmond River Council* (1998) 193 CLR 72, 86 [34] (Gaudron and Gummow JJ) ('*Oshlack*').

⁴⁵ *Towercom* (n 44) [7] (Derham AsJ); *Ritter v Godfrey* [1920] 2 KB 47, 52-3 (Lord Sterndale MR); *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, 809 (Viscount Cave LC); *Milne v Attorney-General (Tas)* (1956) 95 CLR 460, 477 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ); *Oshlack* (n 44) 86 [35] (Gaudron and Gummow JJ).

that costs should follow the event,⁴⁶ however, each case will turn upon its own facts.⁴⁷ For example, in *Eumina Investments Pty Ltd v Westpac Banking Corporation*,⁴⁸ Emmett J ordered that a plaintiff company pay the defendant creditor's costs notwithstanding that an order was made setting aside the relevant statutory demand under s 459J(1)(b).

52 Whilst the majority of the plaintiff's arguments to set aside the defendant's statutory demand have either not been pressed or have not succeeded, it has ultimately demonstrated that because the affidavit in support of the statutory demand was premature, there is 'some other reason' to set the demand aside. Although this ground was successful, it was first referred to the day prior to this final hearing at the 'eleventh hour'. As already noted, the material filed in the proceeding (save for the plaintiff's submissions of 5 July 2021) did not address this ground. I accept the defendant's submission that the general rule that costs follow the event should not apply. In the exercise of the Court's discretion, it is appropriate that the defendant be awarded a portion of its costs. The order will be that the plaintiff pay 60% of the defendant's costs of and incidental to the proceeding on a standard basis, such costs to be taxed in default of agreement.

⁴⁶ *Global v Sensis* [2007] NSWSC 967.

⁴⁷ See Farid Assaf, *Statutory Demands and Winding Up in Insolvency* (Lexis Nexis, 2nd ed, 2012) [8.11] and the cases referred to there, namely: *Ford Motor Co of Australia Ltd v Arrowcrest Group Pty Ltd* [2003] FCA 597; *ilinvest Pty Ltd v Metyor Inc* [2003] NSWSC 879; *Blazai Pty Ltd v Palasty* [2011] NSWSC 225.

⁴⁸ (1998) 84 FCR 454.