

COST CONSEQUENCES FOR FAILURE TO WITHDRAW DEFECTIVE STATUTORY DEMAND

Creditors and debtors must take care in ascertaining whether a statutory demand is valid and complies with the legislative requirements. In circumstances where flaws are identified, parties should act quickly to resolve the deficiencies or risk having the order set aside and indemnity costs being awarded.

In a recent application to set aside a statutory demand, the Honourable Justice Leeming in the Supreme Court of New South Wales, ordered that a statutory demand be set aside and the defendant creditor pay the plaintiff debtor's costs of the application on an indemnity basis. In making this order, Justice Leeming determined that the early requests made by the plaintiff debtor to the defendant creditor seeking for the invalid statutory demand to be withdrawn, which included copies of relevant authorities supporting the plaintiff debtor's position, warranted an order for indemnity costs.

In the Matter of Colour Metal Pty Ltd [2021] NSWSC 1012, HFW Australia acted on behalf of the plaintiff, Colour Metal Pty Ltd ("**Colour Metal**") in an application to set aside two statutory demands ("**Statutory Demands**") that had been issued by Mr Geoffrey Summers ("**Mr Summers**") and West Horse Pty Ltd ("**West Horse**"). The amount in the Statutory Demands consisted of a "judgment debt" obtained from an earlier judgment in the Supreme Court of Victoria, together with post-judgment interest. The Statutory Demands were not accompanied by a supporting affidavit verifying the post-judgment interest.

Under section 459E(3) of the *Corporations Act 2001* (Cth) ("**Act**"), a statutory demand is required to be accompanied by a supporting affidavit verifying the amounts stated therein, unless the debt is a "judgment debt". Colour Metal asserted that the Statutory Demands ought to be set aside on the basis that they were not accompanied by supporting affidavits which verified the amounts claimed for post-judgment interest. On the other hand, Mr Summers and West Horse argued that the post-judgment interest claimed was part of the judgment debt under section 101(2) of the *Supreme Court Act 1986* (Vic) as it attached to the judgment by virtue of section 101 of that act.

The Supreme Court of New South Wales ordered that the statutory demands be set aside, reinforcing the position that a claim for post-judgment interest is separate and distinct from a judgment debt. In the circumstances, West Horse and Mr Summers should have served a supporting affidavit to verify the post-judgment amount in order to comply with section 459E(3) of the Act. Despite there being a divergence between the laws in Victoria and New South Wales in the way post-judgment interest is calculated, the authorities were patently clear that Mr Summers' and West Horse's claim for post-judgment interest were separate and distinct from the judgment debt awarded. Justice Leeming concluded that the definition of "judgment debt" under the Act ought not to be affected by the broader definition ascribed to it in the Victorian legislative regime. As such, it followed that the ordinary rule of serving a supporting affidavit with the statutory demand under section 459E(3) of the Act applied.

In making the determination, his Honour affirmed and applied Justice Black's line of reasoning in the analogous case of *Re GTH Equipment Pty Ltd [2017] NSWSC 1617* ("**GTH Equipment**"). In *GTH Equipment*, the debtor sought to set aside a statutory demand issued against it by a creditor on the basis that the demand included a claim for interest under section 101 of the *Civil Procedure Act 2005* (NSW) and failed to provide a supporting affidavit to verify the amount. Justice Leeming also made references to *Re Cooperbrown Pty Ltd [2019] NSWSC 1341* and *Ming Tian Real Property Pty Ltd [2020] NSWSC 212*, subsequent decisions which cited *GTH Equipment* with approval.

On the issue of indemnity costs, Justice Leeming noted that Colour Metal had, soon after receiving the Statutory Demands, written to the solicitors for Mr Summers and West Horse, unequivocally advising them of Colour Metal's position and inviting them to withdraw the Statutory Demands on that basis. The authorities relied on in support of Colour Metal's position were the same as those referred to by Justice Leeming. His Honour reasoned that both parties could have avoided the unnecessary costs of proceeding to a hearing, had Mr Summers and West Horse simply reissued the Statutory Demands, supported by affidavits verifying the post-judgment interest.

This case is a cautionary tale to both creditors and debtors. In circumstances where it would have been simple for a creditor to reissue a statutory demand, the creditor ought to have done so. Failure to take sensible steps in this regard resulted in an order for indemnity costs. On the other hand, debtors who receive a statutory demand should seek prompt legal advice to determine whether the demand is valid and, if it is not, to notify the creditor of the demand's deficiencies.

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