JUDGMENT : **BARRETT J.** Supreme Court. New South Wales. Equity Division. Corporations List. 6th November 2008

1 On 9 May 2008, the plaintiff filed an originating process seeking the following orders:

"1. An order that the statutory demand dated 18 April 2008 served by the Defendant on the Plaintiff be set aside.

2. An order that the statutory demand dated 22 April 2008 served by the Defendant on the Plaintiff be set aside.

3. An order that the Defendant pay the Plaintiff's costs including on an indemnity basis."

2 The plaintiff thus seeks by a single originating process an order that a statutory demand dated 18 April 2008 served on it by the defendant be set aside and an order that a statutory demand dated 22 April 2008 served on it by the defendant be set aside. It is not disputed that each statutory demand was served on the plaintiff by the defendant in conformity with s 459E of the *Corporations Act* 2001 (Cth) on the date it bears.

3 Each statutory demand relates to a judgment debt arising from the filing in the District Court, pursuant to s 25 of the *Building and Construction Industry Security of Payment Act* 1999, of an adjudication certificate under that Act. Judgment was entered, in one case, in the sum of $204,305.51 and, in the other, in the sum of $312,961.23. The judgments were entered on 18 April 2008 and 22 April 2008 respectively.

4 The defendant maintains that the plaintiff has not, in respect of either statutory demand, taken the course contemplated by s 459G of the *Corporations Act*:

"*(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 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(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."

5 It is the contention of the defendant that the plaintiff has not made such an application in respect of either statutory demand because the originating process incorporates a claim for an order setting aside the first statutory demand and a claim for an order setting aside the second statutory demand. The defendant says that the only course the section allows is one under which a single originating process advances a claim for an order setting aside a single statutory demand. The plaintiff's contention is that the several distinct claims, each in respect of a different statutory demand served by the single defendant, are properly included in the one originating process.

6 It is necessary to refer to a number of decided cases. In ***Help Desk Institute Pty Ltd v Adams*** (1998) 17 ACLC 18, Young J (as he then was) said (at 21): *"[T]here can only be one summons dealing with one demand."*

7 His Honour made that statement after an examination of the statutory language, including, in particular, s 459G(2) which, by use of the words "after the demand is so served", fixes a time limit. That time limit is immutable: ***David Grant & Co Pty Ltd v Westpac Banking Corporation*** [1995] HCA 43; (1995) 184 CLR 265". Young J said: *"If more than one demand was contemplated, one would have expected the legislature to have said 'after the demand is so served, or if more than one demand is served, by 21 days after the first of such demands is served'."*

8 The case before Young J involved two statutory demands bearing the same date served on the plaintiff by different persons on the same day. Each demand concerned a separate and distinct debt. The summons advanced a claim for an order in respect of one demand and a separate claim for an order in respect of the other demand.

9 ***Calquid Pty Ltd v A & DR Illes Pty Ltd*** [2000] NSWSC 558; (2000) 34 ACSR 523, a decision of Santow J, involved a situation in which, in his Honour's words (at [39]), "one summons and accompanying affidavit are relied upon to set aside more than one statutory demand". While the judgment does not make this clear, one may perhaps assume that there were two distinct prayers within the one summons.

10 ***Calquid*** concerned distinct debts allegedly due by one debtor to one creditor and arising from a single building contract. The debts related to separate and successive progress claims for separately certified work. The statutory demands were served on different days.

11 Santow J considered that the objection raised in ***Help Desk*** applied to the situation before him. He said at [43] to [45]:

"*43 Thus turning to the present circumstances, while the two demands deal with similar disputes which might have been joined under Pt 8 of the Supreme Court Rules, s459G sets up a statutory regime which is incompatible with an application to set aside being in respect of two statutory demands for separate and distinct debts. Thus, as Young J points out in Help Desk at 20: 'If more than one demand was contemplated one would have expected the legislature to have said, "after the demand is so served or if more than one demand is served, by twenty-one days after the first of such demands is so served"', when dealing in s459G(2) with the mandatory twenty-one day requirement for the application to set aside to be made within time.*

44 Indeed here, with two separate statutory demands served on different days, the first as I have earlier determined on 1 December 1999 and the second on 13 December 1999, the twenty-one days runs from different points of time. That is the very situation that Young J referred to in Help Desk as illustrating the difficulty of reconciling

s459G(2) of the Corporations Law with the use of one application to deal with a multiplicity of statutory demands in respect of distinct debts.

45 I should add that the fact that Young J in Help Desk was dealing with statutory demands issued by different creditors does not relevantly distinguish the reasoning in that case from the situation presently before me."

12 Santow J added (at [46]) observations about the difficulties faced, in such a case, in preparing the supporting affidavit called for by s 459G(3):

"*The difficulties of the contrary interpretation are further illustrated by the problems which arise when s459G(3) is considered. That subsection requires an affidavit 'supporting the application' to be filed with the Court and served on the person who served the demand on the company. Where, as here, there is a separate and distinct indebtedness, though arising out of the same contract, an affidavit supporting the application necessarily has to deal with a plurality of distinct subject matters, even if it so happens that the plaintiff lodging the summons and accompanying affidavit elects to use the same grounds in that accompanying affidavit. One can imagine the complexities that would then follow if the subsequent elaboration of the subject matter of that single affidavit had to bifurcate and deal with each of two distinct debts. Such a contemplation is hardly compatible with the object of Pt 5.4, namely that, 'disputes in relation to the existence or amount of a debt be dealt with quickly ….'*."

13 I next refer to the decision of Douglas J in ***Ambassador At Redcliffe Pty Ltd v Barreau Peninsula Property Pty Ltd*** [2006] QSC 247; (2006) 58 ACSR 607. That case concerned four statutory demands, one served on Ambassador by BPPT and Ambron, one served on Emerald by BPPT and Ambron, one served on Ambassador by BPPT and Kanebay and one served on Emerald by BPPT and Kanebay. The first related to moneys allegedly due by Ambassador to BPPT and Ambron under a contract for the sale of land. The second related to moneys allegedly due by Emerald to BPPT and Ambron as guarantor of the obligations of Ambassador under that contract. The third related to moneys allegedly due by Ambassador to BPT and Kanebay under a sale of business agreement. The fourth related to moneys allegedly due by Emerald as guarantor of the obligations of Ambassador under the sale of business agreement.

14 It is not clear from the judgment just how the originating process was structured and expressed, although Douglas J did refer (at [10]) to "*the joint application*". His Honour decided (at [32]) that the application was "*formally defective in being brought as a single application in respect of the four separate demands*". His Honour said at [16]:

"*[E]ach of the two applicants faced separate demands as purchaser and guarantor in respect of a contract for the sale of land and a separate contract for the sale of a hotel business from two separate groups of respondents. The liabilities claimed are not joint, nor joint and several, and were ones where each of the applicants was seeking to set aside more than one statutory demand against it arising out of separate liabilities. It seems to me to be a case falling squarely within the reasoning of Young J in* ***Help Desk*** *in circumstances where his Honour's reasoning is persuasive and has been followed on several occasions.*"

15 ***Help Desk*** and ***Calquid*** were referred to by Master Harper in ***Filaria Pty Ltd v Carlisle*** [2004] ACTSC 95. That was a case in which a single order was sought setting aside three statutory demands each of which had been served on the plaintiff company by a different person. The claim was thus framed in an "all or nothing" way, so that, according to the manner in which the plaintiff advanced its case, the court's task was to decide whether it should set aside all of the statutory demands or none of them.

16 Counsel also referred me to cases in which applications in respect of several statutory demands advanced by means of a single summons or originating process have been found to be unexceptionable. The cases are ***Femley Pty Ltd v Salken Engineering Pty Ltd*** [1999] NSWSC 334 (Santow J) and *Isaco Pty Ltd v Davey* [2003] NSWSC 1043; (2003) 47 ACSR 483 (Barrett J). Each was a case in which several persons were jointly and severally liable for a single debt (or alleged debt), each was served with a statutory demand and all joined in a concerted action seeking to have the demands set aside. In the ***Femley Pty Ltd*** case, Santow J began by referring to the problems that can arise in relation to the supporting affidavit. His Honour said (at [14]):

"*There is, in addition, some force in the contention that the scheme of Pt 5.4 could not work as intended if, in relation to non-jointly owed debts, each company with its separate indebtedness were in the one application with the one accompanying affidavit to attempt to set aside the statutory demand applicable to it, on varying grounds as between each company. Grounds for setting aside each statutory demand for each alleged debtor company need to be separately identified, where there are non-joint debts; how could this be done with the one composite affidavit and one composite application? Even if for separate and distinct debts such gymnastics could be achieved, at least as a matter of drafting, Pt 5.4 would fail to achieve expeditious resolution of disputes as to such alleged debts as Parliament intended.*"

17 Santow J then said (at [15]): "*With a joint debt such as a partnership debt, these difficulties fall away because the same grounds to set aside will apply uniformly to each alleged debtor company. Thus if the debt be a joint debt, the one application would rely on precisely the same matters in seeking to set aside the applicable statutory demand, even though it be a separate statutory demand for each company.*"

18 Observations made by Austin J in ***Gujarat NRE Australia Pty Ltd v Williams*** [2006] NSWSC 518 are also pertinent. That case concerned an alleged debt due to three persons. Each of the three served a statutory demand on the alleged debtor company which then sought, in one proceeding, to have each statutory demand set aside. Austin J said (at [12]):

*"It is appropriate to observe that the present defendants have not sought to make any submission arising out of the fact that, although there were three statutory demands served on Gujarat Australia, Gujarat Australia made only one application to set aside all three statutory demands, rather than three separate applications (see **Help Desk Institute Pty Ltd v Adams** (1999) 17 ACLC 18; **Calquid Pty Ltd v A & D R Illes Pty Ltd** (2000) 34 ACSR 523; **Filaria Pty Limited v Carlisle & Ors** [2004] ACTSC 95). Without the benefit of argument, I should say that, were the Help Desk issue raised, I would be inclined to distinguish that line of cases, having regard to the fact that the three statutory demands all purportedly relate to the same debt arising out of the same dispute, are all directed to the same alleged debtor and were all served at the same time."*

19 The last case to which reference should be made is ***Cooloola Dairys Pty Ltd v National Foods Milk Ltd*** [2004] QSC 308; [2005] 1 QdR 12. That case was mainly concerned with the question whether a creditor who alleges that several debts are due must include all the debts in a single statutory demand or whether it is permissible for a separate demand to be served in relation to each debt. One submission addressed to Chesterman J in support of the proposition that all debts should be covered by one demand was referred to at paragraph [24] of the judgment:

"Apart from the textual analysis, which appears to me to involve reading into the words of s. 459E(1) a proviso that is not there, the only reason advanced for construing the subsection so as to require a creditor to include all debts owed by the same debtor in the one demand is the inconvenience and expense of having to bring separate applications to challenge each demand. This concern assumes, of course, that the debtor has a genuine dispute or offsetting claim to answer each demand. More importantly any inconvenience is unnecessary. The debtor can in the one application brought pursuant to s. 459G seek orders that all or some of the demands be set aside."

20 For present purposes, it is the last sentence of Chesterman J's judgment that is relevant. There is there a clear assumption (it cannot, I think, be classified as a considered finding) that several statutory demands can be challenged in a single s 459G proceeding, at least where they have been served by the one alleged creditor.

21 With all these judicial statements in mind, I return to the present case which involves two distinct debts (or alleged debts) each due to the same alleged creditor and created on different days (18 April 2008 in one case and 22 April 2008 in the other); two distinct statutory demands, one dated 18 April 2008 and the other dated 22 April 2008, which were separately served on the respective dates they bear; and two distinct claims for relief (embodied in the one originating process), each directed exclusively to one of the statutory demands

22 This situation differs from that in ***Help Desk***, ***Ambassador At Redcliffe*** and ***Filaria***. In each of those cases, there were not only several distinct debts allegedly due by the particular company but also a different creditor in respect of each. The situation is closer to that in ***Calquid*** where there were distinct debts allegedly due by the same debtor to the same creditor arising from progress claims under a particular building contract. Points of distinction from ***Calquid*** to which Mr Johnson of counsel pointed on behalf of the present plaintiff are that the debts in the present case are judgment debts and that the ground of challenge to each statutory demand is the existence of an offsetting claim (in ***Calquid***, as in ***Help Desk***, there was reliance on the genuine dispute ground).

23 In the present case, potential problems concerning the supporting affidavit called for by s 459G do not arise. I say this because it is an offsetting claim that is put forward as the ground for setting aside the statutory demand. The affidavit need therefore do no more than prove the existence of an offsetting claim of the requisite magnitude. The one ground, founded on the same evidence, is available to mount the attack on each statutory demand. I shall say more about this later.

24 That leaves as a possible obstacle the fact that, because the statutory demands were served on different days, there are two distinct periods of twenty-one days relevant to the operation of s 459G: see the observation of Young J quoted at paragraph [7] above. Proceeding on the footing that, in this case, one demand was served on 18 April 2008 and the other was served on 22 April 2008, the deadline under s 459G(2) and s 459G(3) in relation to an application for an order setting aside one of the demands is seen to be four days after the corresponding deadline for the other.

25 Young J was of the view that if s 459G had intended that more than one statutory demand could be challenged by means of a single summons or originating process filed under the section, the relevant period of twenty days would have been described by the words "*after the demand is so served, or if more than one demand is served, by 21 days after the first of such demands is so served*". That was put forward by his Honour as the main reason why it is impermissible for several statutory demands to be attacked in one proceeding.

26 In the result, however, Young J's decision does not appear to have turned on this point. His central finding (at 21) was that the affidavit relied on for the purposes of s 459(3)(b) was not, in truth, "a supporting affidavit within the meaning of s 459G(3)" so that *"there has been no filing of a supporting affidavit within the time limits prescribed by the Corporations Law, so it is not possible for the summons to succeed."*

27 Young J continued:

"For that reason, and for others which it is unnecessary to express, I do not believe that I can just strike out, say, prayers 2 and 3 of the summons and let prayer 1 proceed.

Thus, the present summons is not an application within the meaning of s 459G and the court cannot give any relief."

28 The actual decision in *Help Desk* thus seems to have been that there was no application in relation to either statutory demand conforming to s 459G because there was no affidavit as required by s 459G(3) and for other

reasons "which it is unnecessary to express". The circumstance that one summons sought orders in respect of two statutory demands – a matter about which views were expressed – therefore does not appear to have been central to the decision, even though his Honour considered that circumstance to be inconsistent with the legislation.

29 In ***Calquid,*** Santow J decided that the summons and supporting affidavit had been filed and served more than twenty one days after service of one of the statutory demands (it had been served on 1 December 1999; the summons and supporting affidavit were filed and served on 23 December 1999). Given that there was accordingly no s 459G application in respect of that statutory demand – so that the court could, as Young J put it in ***Help Desk***, "*just strike out [one prayer] of the summons and let [the other] proceed*" – the application, to the extent that it was a viable and valid application, related to the second statutory demand only. Santow J's decision really was that that second application failed to comply with s 459G because it was included in the same originating process as the application that he had already decided, on independent grounds, was not made in conformity with s 459G. And given his Honour's observations set out at paragraph [12] above, it seems that problems with the supporting affidavit (and compliance with s 459G(3)) were at the forefront of his mind.

30 Particularly in light of the fact that Young J's observations about the unacceptability of the inclusion of two applications in one summons were apparently not essential to his decision and that the subsequent decisions of Santow J, Douglas J and Master Harper did no more than adopt, without discussion or analysis, what had been said by Young J, it is desirable that the present case be approached from first principles.

31 The initial questions arising are:

(a) whether the plaintiff, by filing the originating process on 9 May 2008, applied to the court for an order setting aside the statutory demand dated 18 April 2008 and served by the defendant on that day; and

(b) whether the plaintiff, by filing that same originating process on 9 May 2008, applied to the court for an order setting aside the statutory demand dated 22 April 2008 and served by the defendant on that day.

32 If each of those questions is answered in the affirmative, two further questions will arise:

(c) whether the plaintiff applied to the court, in each case, within twenty-one days after the demand was served; and,

(d) whether the affidavit of 9 May 2008 filed with the originating process on that date is, in truth, an affidavit supporting both the application in respect of the statutory demand dated 18 April 2008 and the application in respect of the statutory demand dated 22 April 2008.

33 Question (d) was not raised directly before me except inferentially by the references in submissions to the observations of Young J and Santow J regarding the difficulties with affidavits in the challenges based on genuine dispute that were before them and the point of distinction here arising from the fact that the challenge is based on offsetting claim. I shall return to the matter of the affidavit presently.

34 I am of the opinion that each of questions (a) and (b) above must be answered "Yes". By paragraph 1 in the originating process, the plaintiff makes application for an order setting aside the statutory demand dated 18 April 2008 served on it by the defendant on that day. By paragraph 2 of the originating process, the plaintiff makes application for an order setting aside the statutory demand dated 22 April 2008 served on it by the defendant on that day. The originating process is thus the vehicle by which each of those distinct applications is made.

35 I do not think that the legislation requires this court to proceed according to an abstract rule of general application that "*there can only be one summons dealing with one demand*". At the same time, however, one originating process dealing with several demands may founder because the affidavit put forward as a supporting affidavit is not in truth of that character. It might also founder if in the ***Filaria*** form embodying a claim for a single order in respect of multiple demands: see paragraph [15] above.

36 There are two reasons for thinking that there is no requirement that the court proceed according to any abstract rule of general application that "*there can only be one summons dealing with one demand*". First, I do not think that it is discernible from the language of s 459G: the proposition advanced by Young J in ***Help Desk*** in the words quoted at paragraph [7] above is, I think, met by observing that the time limit expressed by the words "after the demand is so served" can quite easily be applied separately to each claim in an originating process of the kind now before me to determine whether the application represented by that claim is within time.

37 The second reason is that, in proceedings under the *Corporations Act* commenced in this court, the rules of procedure in this court apply: ***Gordon v Tolcher*** [2006] HCA 62; (2006) 231 CLR 334. Under rule 6.18(1)(a) of the *Uniform Civil Procedure Rules* 2005, a plaintiff may, in any originating process, claim relief against the defendant in respect of one or more causes of action if the plaintiff sues in the same capacity and claims the defendant to be liable in the same capacity in respect of each cause of action. Each claim of the present plaintiff to have a statutory demand set aside is a distinct cause of action that lies against a single defendant in a single capacity at the suit of a single plaintiff in a single capacity. The conditions for the operation of the rule are thus satisfied. (That would not be so in a case like ***Help Desk, Ambassador At Redcliffe*** or ***Filaria*** where there were several issuers of statutory demands and therefore several defendants; the question of joinder would then probably be governed by rule 6.19).

38 As to question (c) above and the twenty-one day time limit under s 459G(2), the simple facts are that the originating process filed on 9 May 2008 was filed within twenty-one days after 18 April 2008 and within twenty-one days after 22 April 2008.

39 The filing on 9 May 2008 of the originating process advancing two applications can thus be seen to entail conformity with s 459G(2) in that an application for an order setting aside each statutory demand was filed within twenty-one days after service of that statutory demand. Each such conforming application was an application advanced by means of an originating process which also advanced the other application.

40 Returning to question (d) above and the matter of the supporting affidavit, the single affidavit put forward in this case by reference to s 459G(3) is Mr Cannavo's affidavit of 9 May 2008 filed on that day. That affidavit appears to delineate and seek to establish an offsetting claim or offsetting claims for liquidated and unliquidated damages and defect rectification costs under the building contract that gave rise to the adjudication certificates that led to the judgment debts on which the statutory demands are based. As it happens, the contention of the plaintiff (as yet untested, of course) is that the offsetting claim or claims exceed the aggregate of the amounts in the two statutory demands. It is therefore unnecessary to address in this case the question whether it would have been sufficient for the offsetting claims to exceed only the greater of the debts claimed by the statutory demands. I nevertheless digress to make some observations on the matter.

41 Under s 459H(2), the "*substantiated amount*" of a statutory demand is, in essence, the amount by which the demanded (and undisputed) debt exceeds the amount of the established offsetting claim (or the aggregate of the established offsetting claims, where there are several); and under s 459H(3), the court must set aside the statutory demand if the substantiated amount is less than $2000 (being the "statutory minimum). If two demands are served by the same creditor on the same company in respect of separate debts, there is no apparent reason, on the face of the legislation, why one offsetting claim alleged by that company cannot be advanced as a ground for setting aside each demand; although I do note that in the part of his judgment in ***Cooloola Dairys*** quoted above, Chesterman J seemed to assume (not unnaturally, one might think) that, if, as here, two demands are sought to be set aside in one proceeding, a plaintiff relying on the offsetting claim ground would have to show an offsetting claim in respect of each alleged debt, the implication being that the same offsetting claim could not be relied on twice.

42 This point would arise in the same way if two statutory demands were served on a company by the same creditor within the space of a few days (as in the present case) and two originating processes were filed under s 459G, one in respect of each. The point would also arise where the statutory demands were served, say, six months apart and one originating process was filed six months after the other. In each of these situations, an offsetting claim established as a ground for setting aside the first demand would, if still in existence in undiminished form when the second application came before the court, constitute grounds for setting aside the second demand as well. Given the statutory language in s 459H, it would seem to be irrelevant that the offsetting claim had been, as it were, exhausted in whole or in part because used as a basis for obtaining an order setting aside another statutory demand at an earlier time. However, as I have said, this point does not arise in this case and I refrain from expressing any concluded view on it.

43 Returning to the present case, my conclusion is that, by means of the originating process filed on 9 May 2008, the plaintiff made both an application under s 459G in relation to the statutory demand dated 18 April 2008 served on it by the defendant on 18 April 2008 and an application under s 459G in relation to the statutory demand dated 22 April 2008 served on it by the defendant on 22 April 2008; and that each of those applications was supported by the affidavit of Mr Cannavo filed with the originating process.

44 It may be that in some cases of this general kind, matters such as those canvassed in *Help Desk* and *Calquid* concerning the affidavit put forward as an affidavit supporting each application will mean that there has been failure to comply with s 459G(3). For that or some other reason (for example, that the claim is in the *Filaria* form: see paragraph [15] above), an attempt to challenge two or more statutory demands under s 459G by means of a single originating process may fail. But, having regard to the nature of the grounds advanced through Mr Cannavo's affidavit by reference to s 459H(1)(b) alone and to the separate claims in paragraphs 1 and 2 of the originating process, no such objection arises here.

45 I am satisfied that the plaintiff has made a valid and regular application under s 459G in respect of each of the statutory demands served on it by the defendant (being the demand of 18 April 2008 and the demand of 22 April 2008).

46 The hearing may continue accordingly.

Mr J T Johnson – Plaintiff instructed by Blackstone Waterhouse Lawyers
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