Equity Division
Supreme Court
New South Wales

Case Name:	**In the matter of Essential Media and Entertainment Pty Limited**
Medium Neutral Citation:	**[2020] NSWSC 990**
Hearing Date(s):	24 July 2020
Date of Orders:	31 July 2020
Date of Decision:	31 July 2020
Jurisdiction:	Equity - Corporations List
Before:	Rees J
Decision:	Statutory demand set aside.
Catchwords:	CORPORATIONS — Statutory demand — Application to set aside — whether affidavit accompanying demand complied with s 459E(3) *Corporations Act 2001* (Cth) – affidavit sworn by director – no resolution of board authorising demand – importance of affidavit at [50]-[55] – principles regarding authority of director at [56]-[59] – whether can ratify unauthorised demand – statute overrides common law – creditor to authorise statutory demand when issued or possibly cure within the 21 days for payment – otherwise cannot retrospectively confer authority by ratification at [60]-[68] – as a matter of fact, director was authorised. CORPORATIONS — Winding up — Statutory demand — Genuine dispute — principles at [77]-[81] — loan apparently arranged by common director of lender and borrower — advance of loan not otherwise authorised by lender – receipt of loan not otherwise authorised by borrower — lender and borrower both appear to consider common director liable – genuine dispute. CORPORATIONS — dispute whether "due and payable" under s 459E *Corporations Act 2001* - principles at [96]-[102] — genuine dispute.
Legislation Cited:	*Corporations Act 2001* (Cth), ss 236, 237, 459E(1),

459E(3), 459H(1)(a), 459J(1)(b)
Supreme Court (Corporations) Rules 1999, r 5.2

Cases Cited:

A R Pilot Pty Ltd v Gouriotis [2007] NSWSC 396
Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd [2009] FCA 499
AspectFP Pty Ltd v Messer [2019] VSC 249
Australian Securities and Investments Commission v Rich (2009) 75 ACSR 1; [2009] NSWSC 1229
AWA Limited v Daniels trading as Deloitte Haskins & Sells (1992) 7 ACSR 759
Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd (2013) 85 NSWLR 601; [2013] NSWCA 344
Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd (2013) 85 NSWLR 601
Chadmar Enterprises v IGA Distribution Pty Ltd [2005] ACTSC 39; (2005) 53 ACSR 645
Chase Manhattan Bank Australia Limited v Oscty Pty Limited [1995] FCA 1208; 17 ACSR 128
Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389
Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Australia) Pty Ltd [2000] HCA 35 at [20]; (2000) 201 CLR 520
David Grant & Co Pty Ltd v Westpac Banking Corp [1995] HCA 43; (1995) 184 CLR 265
Dennis Hanger Pty Limited v Kanambra Pty Limited (1992) 10 ACLC 284
Eumina Investments Pty Ltd v Westpac Banking Corp [1998] FCA 824; 84 FCR 454
Evans v Levy [2011] NSWCA 125
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In the matter of Forza Plumbing Systems Pty Ltd [2013] NSWSC 1234
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NA Investment Holdings Pty Limited v Perpetual Nominees Limited (2010) 79 ACSR 544; [2010] NSWCA 2010
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146
NT Resorts Pty Limited v Deputy Commissioner of Taxation (1998) 16 ACLC 957; (1998) 153 ALR 359
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Texts Cited:	Dal Pont, *Law of Agency,* (2001) 200 Farid Assaf, *Statutory Demands and Winding Up in Insolvency* (2nd ed, 2012, LexisNexis Butterworths) Professor Ian Ramsay and Dr Robert (Bob) Austin, *Ford, Austin and Ramsay's Principles of Corporations Law* (15th ed, 2012, LexisNexis Butterworths) Perry Herzfeld and Thomas Prince, *Interpretation* (2nd ed, 2020, Thomson Reuters)
Category:	Principal judgment
Parties:	Plaintiff: Essential Media and Entertainment Pty Ltd Defendant: Hilton Cordell & Associates Pty Limited
Representation:	Counsel: Mr JP Knackstredt (Plaintiff) Mr EA Walker (Defendant) Solicitors: Somerville Legal (Plaintiff)

	K&L Gates (Defendant)
File Number(s):	2020/111804

JUDGMENT

1 **HER HONOUR:** This is an application to set aside a statutory demand issued by Hilton Cordell & Associates Pty Limited to Essential Media and Entertainment Pty Ltd. The demand sought payment of $190,000 said to be owed pursuant to loans advanced in February and March 2019. The perhaps unusual features of this application is that the lender and borrower are television producers; the monies came from a bank account holding royalties which would not ordinarily be used to make loans; whilst the lender and borrower had a common director who appears to have instigated the transfer of funds, his co-directors on either side of the transaction were unaware of it and would not have agreed to it; the statutory demand was issued in the midst of the controversy generated by discovery of the transfers; on the borrower providing documents indicating the common director's knowledge and involvement in the transfer, support for the demand was withdrawn but re-instated on payment of money by the common director.

2 Essential Media seeks to set aside the demand on three bases:

(a) the affidavit accompanying the demand did not comply with section 459E(3) of the *Corporations Act 2001* (Cth) as it was not sworn by a person with the authority of the creditor company;

(b) there is a genuine dispute about the existence of the debt within the meaning of section 459H(1)(a) of the *Corporations Act*; and

(c) if there was a loan, then there is a genuine dispute as to whether the loan is "due and payable" within the meaning of section 459E(1) of the *Corporations Act*.

3 In support of the application, Essential Media relied on the evidence of Gregory Quail, the sole director and chief executive officer of Essential Media, and Darren Taylor, chief financial officer. Neither was required for cross-examination. Hilton Cordell called no witnesses but tendered documents.

FACTS

4 Hilton Cordell is a company which operates in the television production sector. Christopher Hilton and Michael Cordell are directors and equal shareholders. Mr Hilton is a television producer. Whilst the company is no longer producing television shows, it continues to collect royalties from past shows.

5 Essential Media also produces television shows including documentaries, television drama, factual series and lifestyle programs. The company was established by Mr Hilton, his wife Sonja Armstrong and their business partner Ian Collie. Essential Media has offices in Sydney, Los Angeles, Dallas, Vancouver and Auckland. Essential Media derives income from network production payments and royalties accruing from television programs which it has produced. Popular shows produced by Essential Media include “Rake”, “Doctor Doctor”, “Gourmet Farmer” and “Texas Flip N Move”. As the shows continue to be broadcast on television channels and streaming networks locally and internationally pursuant to licencing agreements, Essential Media continues to generate income from royalties.

6 Hilton Cordell and Essential Media each have a “collections account” which holds royalties received and, at regular intervals, distributes the royalties to stakeholders involved in the creation and production of television shows including Screen Australia, Screen NSW, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). Mr Quail explained that the purpose of a collections account is to collect royalties from television shows, hold the monies on trust and disburse the royalties to the stakeholders involved in the production. The funds in the collections account are kept separate from the general operating bank account or, at least, the evidence was that this was how the monies should be held. According to Mr Quail:

> …In my many years in the television industry I had never seen a collections account used as a loan facility, nor to fund company operating expenses.
>
> …Using a collections account as a loan facility … goes against the very purpose of these accounts as it means that funds are not available to be

> disbursed immediately, if and when our contracts dictate that royalties need to be paid.

This understanding was shared, at least, by Mr Cordell. In response to Mr Hilton saying a member of staff frequently used the collections accounts to manage cash flow, Mr Cordell replied, "For the [r]ecord [my company] has never used collections accounts as a de-facto loan [f]acility."

7 In 2012, Mr Quail and Mr Hilton began to co-produce a television show for the American market and, in July 2018, Mr Quail became a director of Essential Media. Mr Hilton became the Chief Executive Officer overseeing the financial side of the business and Mr Quail became Chief Content Officer and Executive Producer, overseeing the production side of the business. Mr Quail spent much of his time in the United States, overseeing the production and sale of television programmes. Mr Quail and Mr Hilton held fortnightly management meetings at which Mr Hilton reported on the financial performance of the company.

8 The Chief Financial Officer of Essential Media was Darren Taylor, whose primary role was to manage the cash flow of Essential Media and associated companies within the Essential Media group. Mr Taylor was assisted by a number of accounts staff, including Lorraine Pickering, described by Mr Quail as "Production Accountant" and by Mr Taylor as "Company Accountant". Ms Pickering had worked for Mr Hilton for many years, including at Hilton Cordell where she was Head of Accounts at the same time as she was employed by Essential Media.

9 In January 2019, Mr Taylor and Mr Quail became concerned about Essential Media's financial position. Mr Taylor noticed the cash resources of Essential Media were low. Mr Taylor arranged weekly meetings with two of the main accounts staff, Ms Pickering and Bianca Panuccio, and also arranged a fortnightly meeting with Mr Hilton to review the cash forecast and payments. Mr Quail formed the view that the company had excessive overheads. Whilst Mr Quail had not viewed the company's accounting records, he was aware how much revenue the television programmes he was producing might

generate and formed the view that the company needed to make serious cutbacks.

10 In January 2019, Mr Quail spoke to Mr Hilton about his concerns and said that Essential Media was losing money and needed to reduce expenditure including staff and overheads. Mr Quail also expressed a concern that Mr Hilton was exaggerating income projections and considered that there was not enough television programmes to cover current expenditure; drastic steps were needed. Mr Quail organised a meeting of management staff, including Mr Hilton, and set out a plan to facilitate major cutbacks in expenditure. This is confirmed by an email from Mr Quail to Mr Hilton, Mr Taylor and others of 21 January 2019 entitled "Difficult decisions we will make this week" including a "brutal" list of staff cuts, pay cuts and ceasing production on various shows.

11 However, by the end of January 2019, Mr Hilton told Mr Quail that he had spoken to another director of Essential Media and there would be no cutbacks as Mr Hilton had demonstrated that his income projections were correct. None of Mr Quail's suggestions were implemented. At subsequent management meetings, Mr Hilton advised that the company's cash flow position was strong and meeting income forecasts. Mr Quail continued to produce television programs and was reliant upon what he was told by Mr Hilton about the financial state of the business.

Three transfers

12 On 28 February 2019, according to a Westpac payment summary, Ms Pickering transferred $50,000 from Hilton Cordell's collection account to Essential Media's collections account with the description recorded on the Westpac payment summary of "Loan HCA". The monies were then transferred from Essential Media's collections account to Essential Media's general operations account and expended. According to Essential Media's MYOB accounting records – which were entered by Ms Pickering – the monies were recorded as "Loa[n] HCA Coll". Thus, according to Hilton

Cordell's bank statement and the MYOB records of Essential Media at least, the $50,000 was a loan, most likely from Hilton Cordell to Essential Media.

13 On about 4 March 2019 at a weekly cash flow meeting, Ms Pickering told Mr Taylor that she had used some of Hilton Cordell's funds to pay expenses of Essential Media. Mr Taylor asked why she had done this and Ms Pickering said that they did not have enough cash to pay suppliers and payroll. Mr Taylor asked how the transaction had been accounted for and was told by Ms Pickering, "I have entered it into the MYOB as a loan so that we can repay it later". Mr Taylor assumed, based on what Ms Pickering told him, that the funds came from Hilton Cordell. Mr Taylor was aware that Mr Hilton was associated with Hilton Cordell. Mr Taylor was willing to allow the accounting entry to stand as he understood that Ms Pickering had personal knowledge of the transaction. Mr Taylor says that, if Ms Pickering had asked his permission before transferring the funds, he would have asked that she not borrow from another entity but delay payments to suppliers instead.

14 Mr Taylor reviewed the company's accounting records and saw that Ms Pickering had transferred $50,000 into Essential Media's collection account and then transferred the monies to Essential Media's general operating bank account. Mr Taylor sent an email to Mr Hilton as he thought the transfer from Hilton Cordell was strange. In Mr Taylor's experience, it was uncommon to borrow money from another company to pay expenses and he felt the need to report it to Mr Hilton in case he was not already aware of the transaction. Mr Taylor advised in the email, "Lorraine … has dipped into the Hilton Cordell royalty account to cover pay". Mr Taylor did not receive a reply to his email. Mr Taylor also saw Mr Hilton that day and told him that Ms Pickering had borrowed cash from the Hilton Cordell collections account. Mr Hilton simply replied, "Yep OK" and did not appear surprised or unhappy.

15 On 4 March 2019, Ms Pickering transferred $100,000 from Hilton Cordell's collections account to Essential Media's collections account with the description recorded on the Westpac payment summary of "Loan". According to Essential Media's MYOB accounting entry made by Ms Pickering, the

receipt was recorded as “Loan HCA”. Thus, according to Hilton Cordell’s bank statement and the MYOB records of Essential Media at least, the $50,000 was a loan, most likely from Hilton Cordell to Essential Media.

16 On 7 March 2019, in the course of reviewing accounting records, Mr Taylor became aware of the second transfer. He spoke to Ms Pickering and asked whether she had borrowed more money from Hilton Cordell and Ms Pickering said, “Yes, I just made another transfer of $100,000 to [Essential Media]”. Mr Taylor sent another email to Mr Hilton bringing it to his attention, advising “Lorraine has borrowed $150k from the HCA collections account (more than she originally said she would) …”. Mr Taylor wanted to make sure that Mr Hilton was aware that a higher amount was being used. Mr Taylor received no reply.

17 On 14 March 2019, Ms Pickering paid $40,000 from Hilton Cordell’s collections account to Essential Media’s collections account with the description recorded on the Westpac payment summary of “Loan eme”. According to Essential Media’s MYOB accounting entry made by Ms Pickering, the receipt was recorded as “loan hca” and the accounting entry in respect of the transfer to Essential Media’s general operating account indicated that the transfer was for credit card reimbursement. About a fortnight later, Mr Taylor became aware of the third transfer. Having brought the first two transfers to Mr Hilton’s attention, Mr Taylor felt no need to report the third transfer.

18 It is less clear from Hilton Cordell’s bank statement and the MYOB records of Essential Media whether this was a loan to Essential Media, or repayment of a loan from Essential Media advanced through the use of an Essential Media credit card. Essential Media’s credit cards included a corporate American Express card for Mr Hilton. Mr Hilton used the American Express credit card frequently. According to Mr Quail, Mr Hilton and his wife used the American Express card for personal expenses and Essential Media’s accounts staff set up a personal loan account within the MYOB system. The expenses charged

to this account included expenses incurred for a trip to London and France in June 2019 and a trip to Europe in September and October 2019.

19 On 22 March 2019, Mr Taylor sent an email to Ms Pickering and Ms Panuccio advising of changes to the cash forecast including "Repay HCA: deferred to mid-May". Hilton Cordell relies on this as evidence of an acknowledgement by Essential Media of an obligation to repay the advances, whilst Essential Media says it reflects that Mr Taylor was relying on what Ms Pickering had told him.

Termination of Mr Hilton's employment

20 On 2 April 2019, Mr Hilton was issued with a notice of improper conduct in respect of matters unrelated to these proceedings. On 25 October 2019, at the conclusion of an investigation by the Human Resources Department, Mr Hilton's employment was terminated for cause by reason of alleged serious misconduct. Upon Mr Hilton's termination, Mr Quail became chief executive officer of Essential Medial and took over the financial operations as well as the production side of the business.

21 About two days later, Mr Quail came to learn that over time some $950,000 had been transferred from Essential Media's collections account to its operations account to pay general company debts. Indeed, the collections account had been in debit since at least 2009. The indebtedness of the collections account had worsened by some $400,000 since Mr Quail became a director of Essential Media. Mr Quail said that it appears that Essential Media's collections account was effectively used as an overdraft facility since 2009. Mr Quail was not aware of this until he became chief executive officer in October 2019. Had he been aware, Mr Quail would have immediately stepped in to stop this happening; having a collections account with a negative balance posed a number of risks to the company.

22 Further, Mr Quail came to learn that the company had failed to report collections revenue to stakeholders. Mr Quail contacted representatives of the ABC, Screen Australia and Screen NSW to explain what had happened

and to enter into a payment plan to meet Essential Media's obligations to stakeholders. In evidence are several emails and agreements evidencing Mr Quail's efforts to regularise the company's dealings with its stakeholders.

Discovery of transfers

23 In addition, Mr Quail came to learn of the three transfers from Hilton Cordell to Essential Media in February and March 2019. Mr Quail says that the transfers were likely made into Essential Media's operating account to improve the apparent financial position of the company. Essential Media's cash flow report incorporated the opening and closing bank balances for each week and the movement of cash. This report created a detailed forecast on Essential Media's cash balances. When these transfers were made, the cash flow forecast was dire. Mr Hilton was under significant pressure to lower this indebtedness when the transfers were made. Mr Quail said that the transfer of Hilton Cordell's funds "propped up" Essential Media's bank accounts which were used as a guide to the company's overall financial position when considering its assets and liabilities. The accounts were then used by Mr Hilton to suggest to management that Essential Media was performing well.

24 Mr Cordell was also unaware that the transfers had been made. As Mr Cordell later described it, in January 2020 Mr Hilton "casually mentioned $190K had gone missing". In January 2020, Mr Quail spoke to Mr Cordell about the transfers. Mr Cordell told Mr Quail that he did not know anything about the transfers until Mr Hilton had called him that week and, "Chris said he didn't know anything about it either and had only just found out about it himself in January 2020". Mr Quail advised that this was "rubbish" as he had been informed by Mr Taylor that Mr Hilton authorised the transfers.

25 Although Mr Hilton and Mr Cordell did not give evidence, a series of emails and text messages between them were produced on subpoena and tendered by Essential Media. On 14 February 2020, Mr Hilton sent an email to Mr Cordell,

> Look forward to receiving some emails from Lorraine [Pickering] proving that [E]ssential was holding [Hilton Cordell] money in trust to disburse to [i]nvestors/owners. She and I no longer have access to our Essential [e]mails. … Meanwhile Lorraine told me there's about $31,500 in the 3 [Hilton Cordell] bank accounts. She says no-one from Essential has got the ability [t]o log in to these accounts so the money should be safe.

Mr Hilton asked that Ms Pickering send Mr Cordell and himself $15,000 each from Hilton Cordell's remaining funds. The suggestion from Mr Hilton's email appears to have been that Essential Media was holding Hilton Cordell money in its collections account to disburse to stakeholders. There was also a suggestion that Essential Media had been able to access Hilton Cordell's bank accounts in the past.

26 On 17 February 2020, Mr Cordell replied that he was not comfortable transferring funds from Hilton Cordell, and further:

> I'd like to [g]et some clarity around the outstanding $190k loan from [Hilton Cordell] to Essential [t]hat you mentioned in our call. As a director of [Hilton Cordell] can you let me know [h]ow much has been loaned to Essential and on what terms. I'm [c]oncerned about this on a number of levels.

27 Mr Hilton replied:

> $190k was borrowed from [Hilton Cordell's] Collections Account in 3 tranches in [2]019. There is no documentation of the loan which is why it's [i]mportant that we demonstrate that [Essential Media] was disbursing funds as a matter [o]f history.
>
> Given you probably don't have a copy of our original emails [a]greeing to this arrangement the best way of demonstrating this is the [e]mails and reports from Lorraine to you.
>
> If you don't want to help try to secure this money that[']s up to you.

The suggestion in this email was that Essential Media had been using Hilton Cordell's collections account monies "as a matter of history" and that there was an email or emails, apparently with Mr Cordell, agreeing to the arrangement and, in addition, reports from Ms Pickering to Mr Cordell reporting on implementation of the arrangement.

28 Mr Cordell disclaimed that he had agreed to such an arrangement:

> I'm willing to help secure the money but it's [d]isturbing to learn [Hilton Cordell] funds were loaned to [Essential Media]. I wouldn't [h]ave agreed to that. Can I get better sense of where the $190k is [l]ikely to be disbursed if it can be retrieved …

29 On 19 February 2020, Mr Cordell sought further information from Mr Hilton, noting that he was considering taking legal action.

> I'm keen to get more detail on what happened with the 190k as [i]t has potential implications for me as a Director of [Hilton Cordell]. …
>
> … who actually authorised the transfers from [Hilton Cordell] to Essential [Media]?
>
> Why was there no documentation of the loan?
>
> … What are your exact plans in terms of recovering the money lent to [E]ssential?
>
> … As a Director I'm anxious this money is retrieved and [d]isbursed as it should be to investors and shareholders. …

Mr Cordell requested a copy of the account ledger showing the $190,000 borrowed from Hilton Cordell's collections account.

30 On 20 February 2020, Mr Hilton informed Mr Cordell that a draft settlement agreement was being circulated between himself and Essential Media and the $190,000 would form part of that agreement. On 21 February 2020, Mr Cordell again requested a copy of the account ledger. On 24 February 2020, Mr Hilton reported that "Essential has now marked up the Settlement Deed and deleted [a]ny reference to the [Hilton Cordell] loan". Mr Hilton suggested that it was time for Mr Cordell to approach Mr Quail directly. Mr Cordell replied:

> Would you please advise [m]e who actually authorised Lorraine to make the three transactions from [Hilton Cordell] to [Essential Media] in early 2019.

Mr Hilton replied, "I presume it was [D]arren Taylor (CFO)". Mr Cordell replied, "They say it was [y]ou".

31 Mr Hilton replied,

> "Well they would [w]ouldn't they. I was never asked to authorise any of [t]hose three payments …
>
> … and it doesn't mean they don't owe the [m]oney (the majority of which is to me).

The bracketed text is significant, as it may indicate that Mr Hilton considered that the loan, or part of it, was repayable to him rather than Hilton Cordell, I infer, because of Mr Hilton's entitlement to a portion of the monies in Hilton Cordell's collections account.

32 Mr Cordell asked, "In that case when did [y]ou become aware the funds had been transferred?" Mr Hilton advised that he only became aware that the funds had been transferred on 10 January 2020, being the day after a settlement meeting with Mr Quail when Mr Hilton said that he rang Ms Pickering to ask whether there were any loans to Hilton Cordell that should be included in the agreement. To this, Mr Cordell expressed disbelief:

> I [f]ind it difficult to believe you weren't aware of transfers of [$]190k from [Hilton Cordell] to [Essential Media] while you were a Director of [Essential Media] in early 2019 and [s]till involved in the company. Even if the transfer was requested by [s]omeone else, as you claim, surely Lorraine would have consulted [y]ou.
>
> As [a] Director of [Hilton Cordell] permission should have been sought from me before [t]he transfers to place, which would never have been given. At the very [l]east I should have been advised by either yourself and/or Lorraine [i]mmediately after the transfers happened.
>
> I'm taking legal advice on what [a]ction I should take and will advise Screen Australia that investors [f]unds were removed from the [Hilton Cordell] collections account without my [p]ermission.

Mr Hilton replied, "You can believe what you want. Lorraine [i]s my witness".

33 On 28 February 2020, Mr Cordell emailed Mr Hilton asking whether he was seeking to retrieve the $190,000 from Essential Media and asked to be kept advised on the progress of settlement discussions with Mr Quail, so far as it related to Hilton Cordell. On 1 March 2020, Mr Cordell wrote to Mr Hilton in stronger terms referring to the "illegally transferred" $190,000 and that Mr Cordell was "only alerted about the misappropriation of these funds" recently. Whilst Mr Cordell said he had willingly given his assistance to

Mr Hilton to recover the funds, he now understood that Mr Hilton was not seeking to recover the full amount from Essential Media. Mr Cordell suggested that Mr Hilton was in breach of his obligations as a director of Hilton Cordell, including by failing to seek permission from the board, including Mr Cordell as joint director, regarding the company's course of action over the misappropriated funds. Mr Cordell forbade Mr Hilton from entering into any agreement which did not result in full recovery of the $190,000, reserving his right to take action against Mr Hilton personally.

> I remain deeply [c]oncerned about the original transfer of $190,000 from [Hilton Cordell] to [Essential Media] in [e]arly 2019 and who authorised, or was aware of, these three separate [p]ayments. You did not alert me until mid-February 2020 about the [m]isappropriation of this money. …
>
> If, as you claim, the funds were [t]ransferred without your knowledge or authorisation then [Hilton Cordell] needs to [t]ake urgent legal action for their full recovery. Please advise me of [y]our position on this.

34 Mr Hilton replied that he was "very sorry [t]hat I let these funds [g]et transferred without your approval". Mr Hilton assured Mr Cordell that he was working very hard to recover the full amount and would personally cover the legal costs necessary to do so.

> If [n]ecessary we will file a Statutory Demand. Your co-operation might [be] required to prepare such a document.
>
> … Again I am very [s]orry that this happened on my watch.

35 On 10 March 2020, Mr Cordell sought an update from Mr Hilton on his efforts to have the $190,000 returned to Hilton Cordell's collections account. Mr Hilton advised:

> K&L Gates are sending a letter of [d]emand tomorrow giv[ing] one week to pay before a Statutory Demand is [f]iled for the winding up of [Essential Media].
>
> To prepare the Stat Demand we may need [y]ou to sign an affidavit.

36 On 13 March 2020, K&L Gates sent a letter of demand to Essential Media seeking the repayment of funds loaned by Hilton Cordell. It was said that $190,000 was transferred to Essential Media as a loan due and payable upon

demand. Hilton Cordell called for immediate repayment of the loan. It was said that Screen Australia had been notified that Essential Media had refused to return the funds and, further, that there was no doubt that Essential Media, especially its chief financial officer, Darren Taylor, was well aware of the agreement reached between the parties. Repayment of the loan was sought by 4.00pm on 18 March 2020, failing which a statutory demand would be issued.

The demand and withdrawal

37 On 20 March 2020, the statutory demand was issued and Mr Hilton swore the affidavit accompanying the demand, deposing that he was authorised by Hilton Cordell to make the affidavit. Mr Hilton expressed a belief that there was no genuine dispute about the existence or amount of debt, which was said to be due and payable. The belief so expressed was a curious one given that the emails between Mr Cordell and Mr Hilton indicated that there was no ready acceptance by Mr Quail that Essential Media was obliged to repay the monies. In particular, I have in mind Mr Hilton's email of 24 February 2020, when he advised that Essential Media had made amendments to the settlement deed by deleting any reference to a loan from Hilton Cordell.

38 On 24 March 2020, the statutory demand was served. On receipt, Mr Quail called Mr Cordell and asked whether he knew about the statutory demand. Mr Cordell said that Mr Hilton had mentioned that Essential Media owed Hilton Cordell money but did not explain why. "He just said he was going to demand it back". Mr Quail said that he had emails from Mr Taylor indicating that Mr Hilton knew all about the transfers and Mr Cordell requested a copy of the emails "so I have some clear evidence". Further, Mr Cordell said,

> If I knew Chris had made the transfer himself, I wouldn't have gone along with it and approved the statutory demand.

This evidence was admitted as evidence of what Mr Cordell said, not the truth of what he said. Mr Quail asked whether Mr Cordell now agreed with the statutory demand, and Mr Cordell replied "No I don't, Chris has gone behind

my back on all of this". Mr Quail forwarded the statutory demand to Mr Cordell who replied, "The sooner we can get evidence from Darren proving Chris's mis deeds the better". Mr Cordell requested a copy of Mr Taylor's emails to Mr Hilton in respect of the transfers and a statutory declaration from Mr Taylor. Mr Cordell enquired as to whether he could use this material, "If/when I advise Chris I am withdrawing from the Statutory Demand he has launched on 'our' behalf?"

39 On 2 April 2020, Essential Media's solicitor asked Mr Cordell whether Mr Hilton was authorised to swear the affidavit in support of the statutory demand. Mr Cordell replied:

> I was certainly aware that Chris Hilton took that action. However, given that Chris Hilton has breached his director's duties and [disbursed] money from the Hilton Cordell collections account without authorisation I would not have authorised it. I certainly no longer support the statutory demand and I'm willing to do something to assist you.

40 On 4 April 2020, Mr Taylor signed a statutory declaration setting out the circumstances in respect of each transfer, already described. The statutory declaration, supporting emails and MYOB records were provided to Mr Cordell. Mr Cordell observed that it was "clear proof that Chris Hilton was aware of the transfers from [Hilton Cordell] to [Essential Media]. He failed to inform me of this as a fellow director". Later that day, Mr Cordell emailed Mr Hilton seeking electronic access to the bank statements for the Hilton Cordell collections account. On 7 April 2020, Mr Cordell wrote to Mr Hilton in light of the material supplied by Essential Media.

> 1. It has now been made clear to me you were aware of the three 'loans' made from the Hilton Cordell Collections Account to Essential Media in early 2019… Whether you initiated the transfers in the first place or not, you were clearly made aware of them a year ago and tacitly approved them by failing to object. You did not advise me as a Director of [Hilton Cordell] that company funds were being used to cash-flow another business of yours. Nor was there a loan agreement in place. These are clear breaches of director's duties. I no longer believe your claim that you first learned about the transfers on 10th January this year.
>
> 2. Given your close and long-standing relationship with Lorraine Pickering managing the finances of [Hilton Cordell] and Essential

> Media it also stretches credibility that you did not communicate with her about the transfers from [Hilton Cordell] involving such substantial sums. If you did not personally direct Lorraine to make the transfers I believe she would have sought your permission….
>
> …
>
> 5. …I withdraw my support for the Statutory Demand recently issued by [Hilton Cordell] against Essential Media….

Mr Cordell sought a response to these matters "so we can work out the next steps and retrieve the missing [Hilton Cordell] funds in an appropriate manner". Mr Cordell forwarded his email to Essential Media's solicitor, who Mr Cordell also asked to make a search for any emails between Mr Hilton and Ms Pickering around the time of the three transfers. Mr Hilton responded, "It sounds to [m]e like you are colluding with Essential [Media] on this matter in which case [y]ou'd be in breach of your Directors duties".

41 On 7 April 2020, Essential Media's solicitors wrote to K&L Gates requesting that the statutory demand be withdrawn as the monies claimed in the statutory demand were not a debt owed by Essential Media but a debt owed by Mr Hilton. It was said that the monies claimed had been transferred into the operating account of Essential Media without the knowledge or consent of Mr Quail. "The transfer was solely for personal benefit of Mr Hilton to cover up his failings as a financial manager. The money was transferred in secret and in direct breach of his duty as a director to act in good faith, in the best interests of the company and not to put his own personal interests before that of the company". On 8 April 2020, Mr Cordell emailed Mr Hilton:

> You are clearly involved [i]n a much broader, complex and bitter battle with Essential Media. It is [n]ot a battle I wish to be part of. You have a responsibility to make [g]ood on the money that went missing on your watch and then be left to [s]ettle your own disputes with Essential [Media].

42 Mr Hilton promptly replied:

> Lorraine clearly had a habit of … dipping into the [C]ollections Accounts to make payroll and then to repay when cash came [i]n. I think the evidence is clear that I didn't [o]rchestrate as much as turn a blind eye. …

> You say I have a responsibility to make [g]ood on the money. But how can I do that if you side with [Essential Media] and undermine the legal strategy to recover the funds?
>
> … Pressing a Statutory Demand is the [s]urest way to make sure this debt get's repaid soon …
>
> I am appealing [for] your support to [r]ecover the money by supporting the Statutory Demand as I thought we had [a]greed to do.

43 On 9 April 2020, Mr Hilton wrote to Mr Cordell again,

> I don't understand what you [t]hink is inappropriate about the legal advice I have been following. Essential has the money and the path we were on, until it was [d]erailed, was the way to exert maximum pressure.

A deal to support demand

44 On 9 April 2020, Mr Cordell replied:

> I was [h]appy to support the Statutory Demand when you made repeated assurances [y]ou had no involvement in the transfer of [Hilton Cordell] funds. Upon making my own [e]nquiries with Essential Media about the transfers I discovered you were [b]eing dishonest with me. The emails and the stat dec reveal you had full [k]knowledge of the transfers and approved of them without informing me. [T]his is a black and white breach of your director's [d]uties…
>
> It is abundantly clear … that Essential [M]edia, Greg Quail and yourself are in a complex, protracted and deeply [a]crimonious series of legal battles that I don't want to be [d]rawn into. You have a personal obligation as a director of [Hilton Cordell] to make [g]ood on the money that's missing and be left to fight these battles on [y]our own.
>
> My [p]osition is that you bear the immediate personal responsibility as a [d]irector who breached his duties, to return the missing [Hilton Cordell] funds. I [w]ill only support the Statutory Demand if you immediately disburse my [s]hare of the $190,000 that has gone missing on the understanding that we [a]gree to disburse funds to creditors in an appropriate manner.
>
> I also reserve my right to report this breach to [A]SIC.

Thus, Mr Cordell saw the primary responsibility to repay the money as resting on Mr Hilton.

45 Mr Hilton agreed to Mr Cordell's request and requested confirmation that Mr Cordell continued to support the statutory demand as Mr Hilton was concerned that he would be liable for indemnity costs if the statutory demand

was set aside on the basis that Mr Cordell did not support it. Mr Cordell advised that he would agree to withdraw his objection to the statutory demand on the receipt of $80,000 as an initial down payment on his share of the funds but, until the entire matter was satisfactorily resolved, reserved his right to refer Mr Hilton's actions to the Australian Securities and Investments Commission (*ASIC*). Negotiations ensued and ultimately Mr Cordell agreed that, if he received $40,000 that day, he would instruct K&L Gates to proceed with the statutory demand. The money was paid.

46 On 10 April 2020, Mr Cordell called Mr Quail and informed him of the arrangement reached with Mr Hilton. On 14 April 2020, these proceedings were commenced.

47 On 10 April 2020, Mr Cordell sent Mr Hilton a draft agreement regarding the outstanding debt. Recitals to the agreement drafted by Mr Cordell's solicitor provided:

> …
>
> B. In early 2019, Hilton breached his director's duties to [Hilton Cordell] by allowing the transfer of $190,000 held in [Hilton Cordell]'s Collections Account to Essential Media ….
>
> C. The transfer was made by Essential [Media] personnel in three tranches without Cordell's knowledge or permission on 28 February 2019 ($50,000), 4 March 2019 ($100,000), and 14 March 2019 ($40,000) (the "**Debt**"). The Debt was incurred when Hilton was also a director of Essential [Media].
>
> D. In February 2020, Hilton obtained Cordell's support to issue a creditor's statutory demand on behalf of [Hilton Cordell] to recover the Debt from Essential ("**Statutory Demand**"). Since the Statutory Demand was issued, Cordell has become aware that Hilton knew of the transfers in early 2019 and intentionally elected not to inform Cordell.
>
> E. As an interim resolution to the issues between them, Cordell has agreed to accept a partial payment of the Debt from Hilton on the terms and subject to the conditions of this Agreement.

48 The draft agreement provided that, following receipt of $40,000 in partial payment of the Debt, "Cordell will not withdraw his support for the Statutory Demand, and will advise Essential [Media] that the Statutory Demand remains

on foot". The agreement further provided that, if the statutory demand was successful, then the recovered monies would be held in Hilton Cordell's collections account. Mr Hilton would agree not to make any arrangements to settle the Debt or the statutory demand without consultation with and approval of Mr Cordell. If the statutory demand was unsuccessful, then the draft agreement provided that Mr Hilton would be personally liable for and would return the balance of the Debt to Hilton Cordell's collections account by no later than 31 April 2020 regardless of any efforts made by Mr Hilton to recover the Debt from Essential. That is, Mr Cordell regarded the three transfers as constituting a debt owed by Mr Hilton to Hilton Cordell.

49 The agreement was never signed (a subpoena issued to Mr Cordell did not result in production of an executed copy). Rather, a circulating resolution was passed by the directors of Hilton Cordell, signed by Mr Hilton on 14 May 2020 and Mr Cordell on 18 May 2020. The recitals noted that the company had issued a statutory demand, these proceedings had been commenced supported by an affidavit from Mr Quail setting out his conversations with Mr Cordell regarding the withdrawal of his support for the demand and "Cordell has since advised the Company of his support for the Statutory Demand". The directors resolved that all actions carried out by Mr Hilton to issue the statutory demand and swear the affidavit in support of it be ratified and confirmed. Mr Hilton was also authorised to act on behalf of Hilton Cordell to continue to instruct K&L Gates to act for the company as defendant in the proceedings.

AFFIDAVIT ACCOMPANYING DEMAND

50 Section 459E(1) of the *Corporations Act 2001* (Cth) provides that a person may serve a demand on a company relating to a debt or debts that the company owes which are "due and payable". Section 459E(3) provides:

> **459E Creditor may serve statutory demand on company**
>
> …

(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.

51 Rule 5.2 of the Supreme Court (Corporations) Rules 1999 provides:

5.2 Affidavit accompanying statutory demand (Corporations Act s 459E (3))—Form 7

For the purposes of subsection 459E(3) of the Corporations Act, the affidavit accompanying a statutory demand relating to a debt, or debts, owed by a company must:

(a) be in accordance with Form 7 and state the matters mentioned in that Form, and

(b) be made by the creditor or by a person with the authority of the creditor or creditors …

52 Form 7 contains the following paragraph:

3 *[State the source of the deponent's knowledge of the matters stated in the affidavit in relation to the debt or each of the debts, eg 'I am the person who, on behalf of the creditor(s), had the dealings with the debtor company that gave rise to the debt', 'I have inspected the business records of the creditor in relation to the debtor company's account with the creditor']*.

53 As Barrett J explained in *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* (2007) 214 FLR 393; (2007) 25 ACLC 1392; [2007] NSWSC 1143 at [35]:

It is made clear by rule 5.2(b) that, if the creditor is a corporation and therefore incapable of swearing an oath (*Pathe Freres Cinema Ltd v United Electric Theatres Ltd* [1914] 3 KB 1253), the affidavit must be sworn by an individual acting with the creditor's authority. Form 7 in Schedule 1 to the Supreme Court (Corporations) Rules requires that the deponent of the affidavit state his or her relationship to the creditor, "eg … 'a director of the creditor' …". The making of the affidavit by a corporate creditor's director is therefore, not surprisingly, a common occurrence expressly contemplated.

54 As his Honour further explained at [39]:

… It is thus envisaged by the legislation not only that a company which claims to be a creditor will state in the demand itself that the debt is due and payable

> but also that some human being acting with the authority of that company and capable of swearing an affidavit (and therefore of being punished for perjury) will independently form and state an opinion that the debt is due and payable…

55 In *Portrait Express (Sales) Pty Limited v Kodak (Australasia) Pty Limited* [1996] NSWSC 199; (1996) 20 ACSR 746, Bryson J considered that there was a clear distinction between a defect in a demand and a defect in an affidavit verifying the demand as an affidavit which was incorrect had a different and higher order of importance than an incorrect demand. The requirement of verification, and the responsibilities attaching to it, which fell on the officer swearing the verification and on the creditor were "more than another form to fill in": at 758. The exercise of verifying a demand "must be carried out in a responsible way, and regard must be paid, with a strictness appropriate for verification, to the need to review the available information and observe whether what is being verified confirms to the information in the creditor's own hands": at 758.

Authority of deponent

56 The best evidence that a creditor company has conferred its authority on a director to swear an affidavit accompanying a statutory demand is a resolution of the board. As Hammerschlag J explained in *Junker v Hepburn* [2010] NSWSC 88 at [42]:

> Ordinarily, where a company has more than one director, a single director does not have authority to bind it. A director's normal power is to bind the company only by joining with other directors in a collective resolution of the board of directors: *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 198, 205.

57 But a resolution may not be necessary where the deponent's role and responsibilities encompass such matters. For example, in *Telstra Corporation Limited v Ivory; Telstra Corporation Limited v Solar-Mesh (Australia)* [2008] QSC 123, the General Counsel in Dispute Resolutions for Telstra was considered to have authority as part of her ordinary duties to instruct solicitors to commence proceedings to set aside a statutory demand; it was not necessary for there to be a resolution of the board of directors of Telstra: per

Lyons J at [82]-[83] citing Rodgers CJ in *AWA Limited v Daniels trading as Deloitte Haskins & Sells* (1992) 7 ACSR 759. Her Honour noted that the scope of authority conferred on an officeholder was an enquiry of fact to be determined having regard to the size of the company, the nature of its commercial undertakings and the role and responsibility of the officeholder: at [87], citing Dal Pont, *Law of Agency,* (2001) 200.

58 In the context of issuing a statutory demand, McKechnie J, with whom Murray and Wheeler JJ agreed, observed in *Horizon Star Pty Limited v Carina Holdings Pty Limited* [2003] WASCA 94 that the issue of authority is a question of fact, citing *Dennis Hanger Pty Limited v Kanambra Pty Limited* (1992) 10 ACLC 284. In *Horizon Star*, a director of the creditor company signed the demand and the accompanying affidavit but did so in the absence of a meeting of the board of directors authorising her to do so. In fact, there was a disagreement between the directors and it was clear that, if a meeting had taken place, no authority to issue the demand would have been given by the deadlocked board. The Court of Appeal concluded that the notice of demand was a nullity. Whilst the statements of authority of the director who issued the demand were *prima facie* evidence of the fact, that evidence had been displaced: at [19]. At [20]:

> Mrs Franke had no ostensible authority to act on behalf of Carina Holdings. Her only function was to participate in proceedings of the Board: *Northside Developments Pty Ltd v Registrar General* [1990] HCA 32; (1989-90) 170 CLR 146 per Dawson J at 205; *Smith v Henniken-Major & Co (A Firm)* (2002) 3 WLR 1848. The Master may be right in his surmises as to what might have occurred if a meeting had taken place. However, the fact remains that no meeting was held and in consequence no authority was given to Mrs Franke to issue the notice of statutory demand.

59 *Horizon Star* was distinguished in *Kern Group (Paddington) Pty Limited v Armstrong* [2011] QSC 133 where the affidavit verifying the demand of a creditor trust was sworn by one of its two trustees, where the terms of the trust deed gave a wide discretion to the trustees as to the exercise of their powers: per Boddice J at [16]-[18]. *Horizon Star* was also distinguished in *Range Resources Limited v Lind Asset Management LLC* [2015] WASC 238, where Master Sanderson considered that it was disingenuous to suggest that

the plaintiff was unsure of the authority of the officer signing the affidavit verifying the demand or to call into question his capacity to sign the demand: at [23]. At [25]:

> … I am satisfied Mr Easton had authority to sign the affidavit. The purpose of the affidavit in support is for someone with knowledge of the debt to give sworn evidence that 'the subject of the demand exists, is due and payable and therefore there is an absence of a genuine dispute': see Assaf F, *Statutory Demands and Winding Up in Insolvency* (2nd ed) [3.29]. As Mr Easton was the person intimately involved in this transaction it is he who should properly have signed the affidavit. For instance, if Ms Brownstein had signed the affidavit there may have been some doubt as to whether or not she was sufficiently connected with the transaction to be able to verify a genuine belief there was no dispute as to the amount demanded. There is no substance in the plaintiff's complaints.

Both *Kern Group* and *Range Resources* simply reflect the fact that the judicial officer was satisfied on the evidence that the person swearing the affidavit verifying the demand did, in fact, have authority to do so.

Retrospective authority?

60 There is no doubt as a general proposition that a company can ratify the acts of its directors and retrospectively cure any want of authority. The question is whether the common law principle applies unabated in the statutory context of section 459E. Consistent with the notion of parliamentary sovereignty, legislation can modify the common law and, in the case of inconsistency, legislation prevails over the common law: Perry Herzfeld and Thomas Prince, *Interpretation* (2nd ed, 2020, Thomson Reuters) at [9.40] and the cases there cited.

61 Section 459E(3) provides in terms that “the demand *must be accompanied by* an affidavit” that verifies the debt and complies with the rules. The terms of the statute indicate that its requirements in respect of the affidavit be satisfied *when the demand is issued* or so proximate in time that it may fairly be described as “accompanying” the demand. Such a construction is consistent with the approach taken by Brereton J in *In the matter of Unity Resources Resources Group Australia Pty Limited* [2015] NSWSC 1174 where the affidavit accompanying the statutory demand was sworn before the date on

which the demand was issued. Brereton J held that it was implicit in section 459E(3) that the affidavit must be sworn on the date of the demand and not on an earlier date: at [5]. Nor could a later affidavit sworn months after the demand was served cure the problem. At [12]:

> … The better view, it seems to me, is that if an updating affidavit is made on or after the date of the demand and served in circumstances that can be regarded as accompanying the demand, that may well cure the problem. But, at the very least, that would require service within the 21 day period for compliance with the demand and it may well require service contemporaneously with the demand. A similar view was taken in *Chadmar Enterprises v IGA Distribution*.

62 Further, Brereton J held that it was necessary to set aside a statutory demand that was not accompanied by an affidavit complying with section 459E(3) in order to preserve the undistorted operation of Part 5.4 of the *Corporations Act* and to promote the objects which it was intended to serve, as described in *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262: at [14]. Brereton J considered that the absence of a proper and compliant accompanying affidavit would typically, if not invariably, result in the demand being set aside: at [15].

63 The authorities referred to by Brereton J bear reproduction. In *Chadmar Enterprises v IGA Distribution Pty Ltd* [2005] ACTSC 39; (2005) 53 ACSR 645, Higgins CJ observed at [52]:

> A debtor only has 21 days to apply to set aside the demand. If a later "updating affidavit" could be effective, a debtor could be deprived of its right to have the demand set aside save on the ground of "genuine dispute".

64 In *Kisimul Holdings*, Barrett JA was concerned with the absence of a statement in the accompanying affidavit that the creditor believed there was no genuine dispute as to the amount demanded. The importance of strict adherence to the requirements of the rules was explained at [32]-[34]:

> [32] The quality of the debt as undisputed is central to the proper working of Part 5.4. A presumption of insolvency can be allowed to arise through non-compliance with a demand for payment of a debt only if the debt is uncontroversially owing, due and payable. Unless the debt

is of that kind, it cannot safely be presumed that non-payment is the product of inability to pay.

[33] A creditor seeking the benefit of a statutory presumption of insolvency through service of a statutory demand has a responsibility to ensure that, so far as it is aware, the debt relied on is owing, due, payable and undisputed — or, more accurately, a responsibility not to rely on the debt unless it genuinely believes it to be of that kind. And the company served with the demand has a right, secured to it by s 459E(3)(b) and the provision of the rules requiring adherence to Form 7, to be assured that the demanding creditor recognises that responsibility and has conscientiously formed a belief that the responsibility has been discharged.

[34] The statement by the deponent of the s 459E(3) affidavit of belief of absence of genuine dispute therefore provides a significant measure of assurance that the objectives of Part 5.4 are being observed by the creditor. Absence of the statement means that that measure of assurance is lacking and puts the recipient company into a position of uncertainty from which the legislation intends that it should be protected.

65 I consider that the same analysis can be applied to the requirement that the affidavit be sworn by the creditor or by someone with the authority of the creditor. The recipient of a statutory demand is entitled to be assured on receipt of a demand that it is issued with the authority of the creditor, and that the person swearing the accompanying affidavit has authority to state the matters there set out. The recipient of the demand can then choose to pay it or not by reference to the critical consideration, being the recipient's solvency. Failure to pay will be a clear indicator of insolvency, consistent with the presumption that failure to pay gives rise. As Barrett J put it more eloquently in *Willard King Organisation (1978) Pty Ltd v CT Franchises Pty Ltd* [2009] NSWSC 97 in the context of an accompanying affidavit which did not depose that the debt was due and payable at [23]:

> … The company is entitled to know that the creditor has satisfied itself that the debt is due and payable and is thus of the quality necessary to sustain a statutory demand. If that assurance is not given, the company cannot fairly be put to the choice of paying the claimed amount, seeking to have the demand set aside or suffering the imposition of a presumption of insolvency.

66 If a creditor company could retrospectively cure an absence of authority when a demand was issued, the safeguards afforded by the requirement that the affidavit accompanying the demand be sworn by an authorised person, as

described in *Saferack* and *Portrait Express,* would be eroded. The requirements of section 459E(3) must be satisfied when the demand is issued in order to preserve the undistorted operation of Part 5.4 of the *Corporations Act*. Thus I conclude that section 459E(3) overrides the common law rule that any want of authority can be cured by a ratifying resolution. The person making the affidavit which accompanies a demand must have authority to do so when the demand is issued or, possibly, within the 21 day period before payment is required.

67 In *Ox Operations Pty Ltd v Land Mark Property Developments (Vic) Pty Ltd (in liq)* [2007] FCA 1221*,* the directors ratified the plaintiff company's commencement of proceedings to set aside a statutory demand, which Finkelstein J held had the result of retrospectively authorising the commencement of legal proceedings by the company. It will be recalled that section 459G of the *Corporations Act* requires such an application to be filed within 21 days of service of the demand, failing which the Court has no jurisdiction to set aside the demand: *David Grant & Co Pty Ltd v Westpac Banking Corp* [1995] HCA 43; (1995) 184 CLR 265 per Gummow J for the Court at 276-7. Other cases addressing the same difficulty were canvassed by Black J in *Rinfort Pty Ltd v Arianna Holdings Pty Ltd* [2016] NSWSC 251; (2016) 306 FLR 413 at [26]-[37]. In *Rinfort*, leave was granted under section 237 to bring proceedings on behalf of a company to set aside a statutory demand where the proceedings had been commenced in time but without the requisite authority. As to why the Court how power to do so notwithstanding that the proceedings had not been properly commenced within the 21 day period, Black J held at [38]-[39]:

> [38] … As a matter of the construction of s 459G of the *Corporations Act*, an application to set aside the Demand was here filed within the 21 day period specified in the *Act*, albeit it was irregularly filed. It does not seem to me that the policy of s 459G of the *Corporations Act*, to which I have referred above, would be promoted by the position for which Arianna Holdings contends. A policy that any issue in respect of a creditor's statutory demand should be identified and determined promptly is satisfied where an application to set it aside is filed within the 21 day period, so as to place the creditor on notice of the dispute, even if there is an issue as to whether that application was properly authorised, which is subsequently resolved by ratification, or by the

> grant of leave under ss 236–237 of the *Corporations Act*, or by the dismissal of the proceedings if neither ratification nor the grant of such leave occurs.
>
> [39] I can also see no reason in the terms of ss 236–237 of the *Corporations Act* or in its policy … why a company should be less able to bring a meritorious application to set aside a creditor's statutory demand where its directors are deadlocked than where they are not.

See, more recently, *In the matter of Ulan Stone Pty Ltd* [2020] NSWSC 937.

68 *Ox Operations* is not authority for the proposition that a company may retrospectively authorise the issue of a statutory demand with the consequence that any non-compliance with section 459E is cured. The language of section 459E and the policy behind the statutory demand regime require a different result. Recipients of statutory demands must be able to decide within the 21 day period whether they should pay the demand or not. A significant factor in that decision is the assumption – which the recipient is entitled to make – that the demand was issued with the authority of the creditor.

Submissions

69 Essential Media submits that Mr Hilton's affidavit in support of the statutory demand contained a false statement, being "I am authorised by the Creditor to make this affidavit on its behalf." Thus, it is said that the affidavit is defective which is sufficient reason to have the demand set aside pursuant to section 459J(1)(b) of the *Corporations Act*. Essential Media relied on *Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452, where the Full Federal Court (Northrop, Merkel and Goldberg JJ, at 458) confirmed that a defect in a document relating to a statutory demand may be sufficient for the grant of relief under section 459J(1)(b). The affidavit was a document that related to the demand and thus a defect in the affidavit was sufficient to have the demand set aside. Lack of approval by the creditor can lead to a statutory demand being set aside: *In the matter of Access Elevators Australia Pty Ltd* [2016] NSWSC 739.

70 Essential Media submitted that, as Hilton Cordell had two directors at the time, the position was as stated by Hammerschlag J in *Junker v Hepburn* [2010] NSWSC 88 at [42], being a single director does not have authority without a resolution of the board of directors. As Hilton Cordell had not produced any evidence to show that Mr Hilton was authorised to swear the affidavit at the time it was sworn, an adverse inference should be drawn: *Katsilis v Broken Hill Proprietary Co Ltd* (1977) 18 ALR 181 at 196-198 (Barwick CJ); *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419 (Handley JA); *Evans v Levy* [2011] NSWCA 125 at [43] (Campbell and Young JJA and Sackville AJA agreeing); *Zaccardi v Caunt* [2008] NSWCA 202 at [27] (Campbell JA, Allsop P and Barr J agreeing); generally, *Jones v Dunkel* (1959) 101 CLR 298. It was submitted that Mr Cordell's position had vacillated from denying awareness of the amounts said to have been lent by Hilton Cordell to Essential Media, admitting awareness of the statutory demand but denying any support for it, to supporting the demand. It was submitted that any support by Mr Cordell for the pursuit of the demand arose after the supporting affidavit was sworn. Alternatively, Essential Media submitted that if Mr Cordell did authorise the issuing of the demand, he did so on the basis of Mr Hilton's deceit and his consent was void: *Papadimitropoulos v R* (1957) 98 CLR 249; [1958] ALR 21. With respect, this submission was pitched too high.

71 Further, it was submitted that Hilton Cordell could not ratify the affidavit so as to retrospectively cure the defect: *Unity Resources* per Brereton J at [5] and [12]; *Chadmar Enterprises v IGA Distribution Pty Ltd* at [52]. A circulating resolution prepared *after* that 21-day period had expired could not retrospectively cure an otherwise defective affidavit. Further, Essential Media submitted that the existence of the circulation resolution supported the lack of authority as at 20 March 2020: why would it be thought necessary to ratify something that was already authorised? If there had been a resolution or even an informal agreement between the directors that the action could be taken, then it wouldn't matter if Mr Cordell changed his mind and there would be no need to ratify what had already happened. Rather, there was no evidence from Mr Cordell, no evidence from Mr Hilton and no document

establishing there was an authorisation for the statutory demand to be issued being evidence which only the defendant could supply.

72 Hilton Cordell agreed that where one director of a two director company causes a statutory demand to be issued without authority, the statutory demand might be a nullity and liable to be set aside under section 459J of the *Corporations Act*: *Horizon Star Pty Ltd v Carina Holdings Pty Ltd* [2003] WASCA 94. However, Hilton Cordell submitted that the evidence showed that the affidavit was sworn with the approval of Mr Cordell and was not in any way irregular. The suggestion that the affidavit was false rested upon communications Mr Quail had with Mr Cordell after the demand was issued. Those communications showed that Mr Cordell was aware of the demand being issued and "approved the statutory demand" but was willing to remove his support for the demand after speaking to Mr Quail. A deal was then done between Mr Hilton and Mr Cordell where money was paid by Mr Hilton to Mr Cordell to maintain his support for the demand. Any payment of money by Mr Hilton to Mr Cordell was said to be of no moment but an internal matter concerning only Hilton Cordell and its principals; all that mattered was that the demand was issued regularly with the support of all directors of Hilton Cordell, and Hilton Cordell maintained the demand.

73 Even if Mr Cordell removed his support for Hilton Cordell maintaining the demand, that was irrelevant as Mr Cordell reversed his position and, for the sake of certainty, Hilton Cordell ratified Mr Hilton's conduct in causing the demand to be served and Hilton Cordell to defend the proceedings. To the extent there was any irregularity, it had been cured in the ordinary way. A step taken by a director without authority may be ratified. Ratification has the effect that the company is entitled to take advantage of the act as if the director had been authorised when he or she acted: Professor Ian Ramsay and Dr Robert (Bob) Austin, *Ford, Austin and Ramsay's Principles of Corporations Law* (15th ed, 2012, LexisNexis Butterworths) at [15.110] and [15.150]; *Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Australia) Pty Ltd* [2000] HCA 35 at [20]; (2000) 201 CLR 520 at 533; *McHugh v Eastern Star Gas Ltd* [2012] NSWCA 169 at [48]. Ratification by

the board of directors of the unauthorised commencement of proceedings by a company to set aside a statutory demand has been held to cure the irregularity and avoid the action being void *ab initio*: *Ox Operations*. The same principle was said to apply to regularise a statutory demand served without authority.

Conclusion

74 There was no resolution of the directors of Hilton Cordell authorising Mr Hilton to issue the statutory demand or swear the affidavit in support, or at least no resolution on or before the day that the affidavit was sworn. But that is not the end of the matter. It is clear that, once Mr Cordell became aware that $190,000 had been transferred from Hilton Cordell's collections account to Essential Media, he wanted the money back and he wanted Mr Hilton to pursue the retrieval of the funds with expedition and without compromise. On learning that Mr Hilton was in settlement discussions with Essential Media, Mr Cordell stated emphatically that Mr Hilton should not discount the amount of money to be paid to Hilton Cordell but should recover every penny. On 1 March 2020, Mr Hilton assured Mr Cordell that he was taking appropriate steps, which may include issuing a statutory demand: at [34]. On 10 March 2020, Mr Hilton advised that K&L Gates were sending a letter of demand before a statutory demand would be issued and Mr Cordell's assistance may be needed in signing the affidavit for the statutory demand: at [35].

75 Whilst there is a gap in contemporaneous documents from 10 March 2020 until the statutory demand was issued on 20 March 2020, and thus there is no evidence that Mr Cordell either expressly approved or sought to dissuade Mr Hilton from this course of action, the contemporaneous documents indicate that Mr Cordell was aware that a statutory demand may issue and was content for this to be done. Mr Hilton was entitled to infer from his communications with Mr Cordell that he was authorised to take that step. Why Mr Hilton did not get Mr Cordell to swear the affidavit, as he earlier indicated he may need to, is not known but is consistent with an apprehension by Mr Hilton that he had authority to swear the affidavit himself.

76 That Mr Hilton had such authority is consistent with what Mr Cordell represented to Mr Quail on 24 March 2020, being that Mr Cordell had "approved the statutory demand". It is consistent with what Mr Cordell told Essential Media's solicitor on 2 April 2020 when asked whether Mr Hilton was authorised to swear the affidavit being, "I was certainly aware that Chris Hilton took that action". It is consistent with Mr Hilton's email to Mr Cordell of 8 April 2020, at [42], that he thought they had agreed to seek to recover the money by issuing the statutory demand. It is also consistent with Recital D in the draft agreement prepared by Mr Cordell's solicitor on 10 April 2020: at [46]. On the balance of probabilities, I find that Mr Hilton did have the authority of Hilton Cordell to issue the statutory demand and swear the affidavit in support on 20 March 2020. If I am wrong about this, then I consider that Hilton Cordell's circulating resolution of May 2020 did not cure any lack of authority.

"GENUINE DISPUTE"

77 Section 459H of the *Corporations Act* provides that, on an application under section 459G, the Court may set aside a statutory demand where there is a genuine dispute about the existence or amount of debt or where there is an offsetting claim in an amount greater than the debt. The principles relating to both genuine disputes and offsetting claims are well-settled. The threshold to establish a genuine dispute about the existence of a debt is a relatively low one. Black J conveyed the principles in *In the matter of Gorji Property Investment Pty Limited* [2018] NSWSC 1671 at [14] to [15]:

> [14] … In *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452 at 464, the Full Court of the Federal Court held that a "genuine dispute" must be bona fide and truly exist in fact, and the ground for that dispute must be real and not spurious, hypothetical, illusory or misconceived. In *Panel Tech Industries (Aust) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2)* [2003] NSWSC 896 at [18], Barrett J (as his Honour then was) formulated that proposition as follows, in a proposition applied in subsequent cases:
>
> > "Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds,

> indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."

78 In *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601; [2013] NSWCA 344, the Court of Appeal (Beazley P, Meagher and Gleeson JJA) said in the context of an offsetting claim, at [30]:

> It is settled law that s 459H requires the Court to be satisfied that there is a "serious question to be tried": see *Scanhill v Century 21 Australasia* [Pty Ltd (1993) 47 FCR 451] at 467, or "an issue deserving of a hearing" as to whether the company has such a claim against the creditor: see *Chase Manhattan Bank Australia Limited v Oscty Pty Limited* [1995] FCA 1208; 17 ACSR 128 at [42] per Lindgren J; *Eumina Investments Pty Ltd v Westpac Banking Corp* [1998] FCA 824; 84 FCR 454 per Emmett J (as his Honour then was). The claim must be made in good faith: *Macleay Nominees v Belle Property East Pty Ltd* [2001] NSWSC 743]. In that case, Palmer J observed, at [18], that good faith, in this context, meant that the offsetting claim was arguable on the basis of facts that were asserted "with sufficient particularity to enable the Court to determine that the claim is not fanciful".

Their Honours make it clear that a similar standard of proof is required whether an offsetting claim or a genuine dispute is alleged.

79 It is not for the Court to engage in an assessment of a deponent's credit on an application such as this: *Britten-Norman* at [46]. What is called for is an assessment of the kind described by McLelland CJ in Eq in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787; (1994) 12 ACLC 669 at 671 (approved in *Britten-Norman* at [46]) (citations omitted):

> This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth", or "a patently feeble legal argument or an assertion of facts unsupported by evidence".

80 In *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* (2008) 66 ACSR 67; [2008] VSCA 70, Dodds-Streeton JA, with whom Neave and Kellam JJA put the test in the following terms, at [71]:

> As the terms of s 459H of the *Corporations Act* and the authorities make clear, the company is required, in this context, only to establish a genuine dispute or off-setting claim. It is required to evidence the assertions relevant to the alleged dispute or off-setting claim only to the extent necessary for that primary task. The dispute or off-setting claim should 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. …

81 Often cited is the judgment of Thomas J in *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACLC 919; (1993) 11 ACSR 601 at 605, which provides useful guidance:

> It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it), the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.
>
> The essential task is relatively simple — to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).

82 Here, Mr Quail and Mr Taylor were not cross-examined and Hilton Cordell called no witnesses. Thus, I have proceeded on the basis that Mr Quail and Mr Taylor's evidence of what was said and done is correct. I also have the benefit of contemporaneous records of communications between Mr Hilton and Mr Cordell already described.

Submissions

83 Essential Media submitted that there was no evidence of a written or oral loan agreement with Hilton Cordell, and there was evidence to the contrary. Mr Hilton was, at the time of the purported loans, a director of both Essential and Hilton Cordell but did not tell his fellow directors at Essential Media (Mr Quail) or at Hilton Cordell (Mr Cordell) of the fact that they had a liability and an asset respectively. Nor had Mr Hilton recorded anywhere, or informed any of his co-workers (or the Court) of, the terms of these dealings of which he was fully aware. This was said to raise concerns as to whether Mr Hilton had elected to hold back important information which related to the enforceability (or otherwise) of any loan. It was submitted that an adverse

inference ought be drawn: *Katsilis v Broken Hill*; *Commercial Union Assurance Co of Australia Ltd v Ferrcom*; *Evans v Levy*; *Zaccardi v Caunt*; *Jones v Dunkel*.

84 Essential Media submitted that the absence of loan documents meant that the Court would need to infer the existence of a loan agreement from the conduct of the parties. This required compelling evidence: *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* [2009] FCA 499 per Sundberg J at [39]-[40]. There was no such compelling evidence here, and certainly no evidence from Hilton Cordell. As a result, it was submitted that there was a genuine dispute as to whether the transfers from Hilton Cordell to Essential Media were a loan or something else and the demand ought be set aside: *In the matter of Tuffrock Pty Ltd* [2015] NSWSC 738 at [15] (Black J).

85 Hilton Cordell submitted that the suggested genuine dispute was in truth a dispute with Mr Hilton in his performance as a director of Essential Media rather than a genuine dispute as to the existence of the debt owed to Hilton Cordell. As to the latter, at the time of transfers, Mr Hilton was a director and Chief Executive Officer of Essential Media. Essential Media had cash flow difficulties. There was no doubt that the monies were transferred. The transfers were recorded in Essential Media's MYOB records as a loan. This was admissible evidence of the existence of the loans: sections 286, 1305, and the definition of 'books' in section 9 of the *Corporations Act*. Mr Taylor's emails to Mr Hilton in March 2019 evidenced an understanding by Mr Taylor that the transfers were to be used to meet the operating expenses of Essential Media, that Ms Pickering had "borrowed $150k from the HCA collections account" and that Hilton Cordell would be repaid.

86 Whilst Hilton Cordell accepted that there was no written loan agreement, a contract can be formed orally or by conduct. It was submitted that the evidence clearly showed that, at the time the transfers were made, Essential Media was in need of the funds, was aware (through Mr Taylor) that Hilton Cordell was transferring money to assist, used the funds and considered itself obliged to repay the money. The suggestion that Mr Hilton was personally

liable to repay the money was said to be fanciful. Impugning Mr Hilton's conduct as a director of Essential Media did not make Mr Hilton liable to Hilton Cordell in Essential Media's stead. Even if Essential Media was able to establish any of the allegations it made against Mr Hilton, it would have no more than a claim against Mr Hilton in relation to his directorship of Essential Media. Such a case could not absolve Essential Media of its liability to Hilton Cordell. Essential Media's argument it was not liable to repay the money failed to exhibit any plausible contention, was patently feeble, and did not warrant setting aside the demand.

Conclusion

87 On the evidence before the Court on this application, there is no doubt that $190,000 was transferred from Hilton Cordell's collections account to Essential Media's collections account. Further, Mr Cordell was unaware that the transfers were made at the time and, if he had been asked, would not have agreed to the funds being transferred, including because the collections account held royalties on behalf of stakeholders. Whether Ms Pickering and/or Mr Hilton had authority to advance a loan on behalf of Hilton Cordell in the absence of Mr Cordell's knowledge and approval is unclear.

88 It also appears that – at the receiving end of the transfer – Mr Quail, a director of Essential Media, was unaware of the transfers until seven months later. The fact that Mr Quail was unaware of the transfers at the time may not be surprising given the differing roles which he and Mr Hilton performed at the company. Nor was Mr Taylor aware until after the transfers had been made. Mr Taylor says that, if he had been asked by Ms Pickering whether to make the transfers, he would not have agreed. Whether Ms Pickering and/or Mr Hilton had authority to borrow funds on behalf of Essential Media in the absence of Mr Quail's knowledge and approval is unclear.

89 A loan is just like any other contract: there must be offer and acceptance, consideration and an intention to create legal relations. It is difficult to divine these elements, particularly given the apparent absence of knowledge and

agreement by either the lender or borrower, and the lack of consideration received by Hilton Cordell.

90 Hilton Cordell's bank records and Essential Media's MYOB records *are* evidence that the transfers were loans. The application of section 1305 was, however, elucidated by Austin J in *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229 at [397]-[398]:

> **[397]** Section 1305(1) does not make the company's books conclusive evidence of the matters they contain, in the sense of requiring the tribunal of fact to make a finding in terms of the content of the books in the absence of proof to the contrary by the opposing party. The books are prima facie evidence of the matters stated in them, but the weight of that evidence is to be measured in accordance with the common sense of the tribunal of fact (*Phipson on Evidence*, 16th edn (2005), at [7–17]).
>
> **[398]** In my view it would be open to the tribunal of fact to find that the prima facie evidence constituted by the company's books is outweighed by other evidence (including evidence adduced by the proponent of the books, even if the opponent does not give evidence about them); or by some quality or characteristic of the books themselves, even if there is no other evidence. In particular, if a book has the appearance of a draft or (being electronic) has a file title indicating that it is a draft, that alone may be sufficient (all other things being equal) for the tribunal of fact to reject the book as evidence of the matter stated in it, notwithstanding that the book is prima facie evidence of that matter; a fortiori if, in addition to having the appearance of a draft, the book contains inconsistencies or ambiguities or the matter otherwise demands explanation.

See also *Whitton v Regis Towers Real Estate Pty Ltd* (2007) 161 FCR 20; [2007] FCAFC 125; *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377; [2008] VSCA 93; *In the matter of Shot One Pty Ltd (in liquidation)* [2017] VSC 741 at [243]-[244]; *In the matter of Pulse Interactive Pty Limited (in liquidation)* [2019] NSWSC 22; (2019) 134 ACSR 461.

91 The veracity of the evidence comprising Hilton Cordell's bank records and Essential Media's MYOB records is diminished by the fact that the records were made by Ms Pickering, who appears to have been acting on the instructions of Mr Hilton. The veracity of Mr Taylor's emails to Mr Hilton in March 2019 suffer from the same defect, being that Mr Taylor gave unchallenged evidence that he was relying on what Ms Pickering had told him

about the transfers. In the case of the third transfer, the contemporaneous banking and MYOB records are unclear and are consistent with the transfer being repayment of a loan *from* Essential Media advanced through the use of the company's credit card.

92 Assuming for the moment that the transfers were loans, then the further question is whether the loans were by Hilton Cordell or by Mr Hilton from his entitlement to a portion of the funds in Hilton Cordell's collections account. Mr Cordell's emails with Mr Hilton after he became aware of the transfers are consistent with Mr Cordell, at least, regarding Mr Hilton as primarily liable to repay the monies.

93 It is not necessary on an application such as this to decide which characterisation of events will prevail. The only issue is whether there is a genuine dispute as to the existence of the debt within the meaning of section 459H as interpreted by the cases to which I have referred. It seems to me that there is a *bona fide* dispute which truly exists in fact, on grounds which are real and not spurious, hypothetical, illusory or misconceived. Essential Media's stance that, whatever the transfers were, the monies were not loans by Hilton Cordell to Essential Media has a sufficient degree of cogency to be arguable. To suggest that it is not obliged to repay funds which were unsolicited is not a novel legal proposition. Thus I find that a genuine dispute exists and the statutory demand must be set aside.

"DUE AND PAYABLE"

94 It is thus not necessary for me to consider the third issue but in deference to the parties' detailed submissions, I will briefly do so. Essential Media submitted that if the Court finds there was a loan, then it was not "due and payable" when the statutory demand was issued, or there is a genuine dispute as to whether the loan is due and payable: *Tuffrock* at [12]-[13] and [15]. As to the first matter, Essential Media submitted that where a debt is alleged to have arisen under a loan, it is critical to examine the terms of the loan to determine if the debt is actually due and payable: *In the matter of Litigation*

Insurance Pty Limited [2017] NSWSC 334 at [34]-[39] (Gleeson JA). Since there was no written loan agreement or any evidence of an oral agreement, the Court could not assess the terms of the loan to identify whether the loan was actually "due and payable". Thus, the oft-cited principle that, where a loan is found to exist but terms of repayment are absent, the loan is repayable on demand, cannot be applied here: cf. *Ogilvie v Adams* [1981] VR 1041 at 1043 (Fullagar J). As to the second matter, Essential Media submitted that the factual circumstances surrounding the purported loan meant it could not be due and payable as Essential Media was in dire need of money at the time and it could not have been intended that the loan be immediately repaid. The situation was said to be analogous with *Tuffrock* at [17], where the loan was repayable either after reasonable notice had been given or when the company was able to repay it, having regard to its own operating and financial constraints.

95 Hilton Cordell submitted that a simple contract of loan which does not provide for the time of repayment is understood to create an obligation to repay immediately: *Haller v Ay*re [2005] 2 Qd R 410 at [19]-[22], [26]-[32] citing *Ogilvie v Adams*. Thus in the present case, the loans were due and payable. The facts and arguments advanced in *Tuffrock* were said to be different and have no relevance here. In *Tuffrock*, the issue was not whether there was a *loan simpliciter* repayable on demand but whether the terms of the loan required repayment upon the recipient of the loan considering it appropriate to do so having regard to the company's financial and operating position. The observation made by Black J at [17] that the loan did not become due for payment until a reasonable time after the statutory demand was served was responsive to a submission made to the effect that it was an implied term of the loan that it was repayable upon reasonable notice being given. What Black J said was not a statement of principle applicable to *loans simpliciter*. Even if what Black J said was a statement of general principle, it would be inconsistent with *Ogilvie* and the later decisions noted by Keane JA in *Haller* at [19]-[22] and [26]-[32], and should not be followed.

Conclusion

96 Drawing on my judgment in *In the matter of ReNu Waste Pty Limited* [2020] NSWSC 108 at [22]-[32], section 459E(1) of the *Corporations Act* provides that a person may serve a demand on a company relating to a debt or debts that the company owes which are "due and payable". A debt is 'due and payable' when it is ascertainable, immediately payable and presently recoverable or enforceable by action: *Re Elgar Heights Pty Ltd* (1985) 9 ACLR 846; [1985] VR 657 at 669 and 671 (per Ormiston J); *Remuneration Data Base Pty Ltd v Pauline Goodyer Real Estate Pty* Ltd [2007] NSWSC 59 at [39]-[42] (per White J); *NA Investment Holdings Pty Limited v Perpetual Nominees Limited* (2010) 79 ACSR 544; [2010] NSWCA 2010 at [63] (per Lindgren AJA); *Main Camp Tea Tree Oil Limited v Australian Rural Group Ltd* (2002) 20 ACLC 726; [2002] NSWSC 219 per Barrett J at [17].

97 The learned author of Farid Assaf, *Statutory Demands and Winding Up in Insolvency* (2nd ed, 2012, LexisNexis Butterworths) considers that such an interpretation is consistent with the underlying policy and purpose of Part 5.4 of the *Corporations Act* as the statutory presumption of insolvency should arise only in clear cases of indebtedness and the debt in question is one about which no other inference can be drawn in the event of non-payment, other than that the company was unable to pay it: at [2.36]. Further, in determining whether a debt is 'due and payable' for the purposes of section 459E, the courts tend to adopt a pragmatic and commercial approach: at [2.38]. See, for example, *HL Diagnostics Pty Ltd v Psycadian Ltd* [2005] WASC 234 per Master Newnes at [30]; *Binshell Pty Limited v Broadway Australia Pty Limited* [2002] NSWSC 54 per Barrett J at [39]-[40].

98 A company may not dispute the existence of the debt claimed by the creditor, but dispute that the debt is "due and payable". The courts have vacillated as to whether such a dispute should be dealt with under section 459H(1)(a), section 459J(1)(a) or section 459J(1)(b): see *Portrait Express* at 751 per Bryson J cf *NT Resorts Pty Limited v Deputy Commissioner of Taxation* (1998) 16 ACLC 957; (1998) 153 ALR 359 at 367 per Finkelstein J; *A R Pilot*

Pty Ltd v Gouriotis [2007] NSWSC 396 per Barrett J at [19] and *In the matter of Forza Plumbing Systems Pty Ltd* [2013] NSWSC 1234 per Brereton J at [19]. In *In the matter of MK Group Phoenix Pty Ltd* [2014] NSWSC 1467, Black J concluded that a statutory demand claiming monies which were not due and payable gave rise to a defect in the demand that would cause substantial injustice for the purposes of section 459J(1)(a), would also be an abuse of the statutory demand procedure for the purposes of section 459J(1)(b), and, in that case, should also be set aside by reason of a genuine dispute as to whether the monies were due and payable: at [27] and [41]. In *Tuffrock*, Black J noted that a genuine dispute as to whether the debt is due and payable can provide a sufficient basis to set aside a creditor's statutory demand under section 459J(1)(b), and was satisfied in that case that a genuine dispute had been established as to whether the debt was due and payable and set the demand aside under section 459J(1)(b): at [15] and [18].

99 The same approach was taken by Barrett AJA in *In the matter of PostNet Australia Pty Ltd* [2017] NSWSC 160 at [16]-[17] and Gleeson JA in *In the matter of Longjing Pty Ltd* (2017) 123 ACSR 456; [2017] NSWSC 1534 at [44]. More recently, in *AspectFP Pty Ltd v Messer* [2019] VSC 249, Gardiner AsJ concluded that the plaintiff's proposed construction of a loan agreement was completely untenable, being that interest would only be payable at the plaintiff's whim if and when it decided to repay the principal debt: at [23]. On the proper construction of the loan agreement, interest was due and payable. There was thus no genuine dispute under section 459H that the interest was due and payable.

100 As to the onus and standard of proof, Gleeson JA noted in *Longjing* at [46]:

> … it is common ground that the same approach in terms of "onus" should apply under s 459J(1)(b) to the issue whether the debt the subject of the demand is not presently due and payable, as would be the case if the issue arose in the context of whether there was a "genuine dispute" in relation to the debt under s 459H(1). That is, the relevant question is whether there is a "plausible contention requiring investigation" that the debt is not presently due and payable: *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601 at [55] (Beazley P, Meagher JA and Gleeson JA).

101 In this regard, Gleeson JA expressed doubt as to the majority view in *MNWA Pty Ltd v Deputy Commissioner of Taxation* (2016) 250 FCR 381; [2016] FCAFC 154 that proof on the balance of probabilities applied, noting that the majority's comments were *obiter*: at [47]-[48]. Those doubts were shared by Black J in *In the matter of JF Essential Power Pty Limited* [2018] NSWSC 435 at [24], where his Honour followed the dissenting judgment in *MNWA*:

> … It is only necessary for [the plaintiff] to establish that there is a plausible contention requiring investigation that the debt is not presently due and payable, and it need not establish that matter on the balance of probabilities: *MNWA Pty Ltd v Deputy Commissioner of Taxation* [2016] FCAFC 154; (2016) 117 ACSR 446 at [131]; *Re Longjing Pty Ltd* … at [46].

In *JF Essential Power*, there was a genuine dispute whether there was a loan as opposed to an investment of capital or a gift in an inter-family transaction. The evidence established that there was a serious question to be tried as to whether any debt owed was due and payable on demand or only when the borrower had the capacity to pay it, a condition which was not then satisfied.

102 Thus, when a company applies to set aside a statutory demand on the basis that there is a genuine dispute, not as to the existence or the amount of the debt, but whether it is due and payable within the meaning of section 459E, then the Court may set it aside either under section 459H(1)(a), 459J(1)(a) or 459J(1)(b), but, whichever route is taken, the Court must be satisfied before doing so that there is a *"plausible contention requiring investigation" that the debt is not presently due and payable.*

103 Returning to the facts at hand, when the transfers were made, Essential Media had significant cash flow difficulties. A contention by Essential Media that it was a term of the loan that the monies were repayable within a reasonable period of time of a demand being made or repayable when Essential Media was able to do so seems to be a plausible one. That Hilton Cordell intended to be repaid once Essential Media's operating cash flow improved cannot be said to be a spurious argument devoid of merit.

104 Of course, demand was made a year later, on Friday, 13 March 2020 at 12.36pm. Repayment was sought by 4pm on Tuesday, 18 March 2020. This allowed Essential Media four calendar days – or two business days – to pay $190,000. Whether this was a reasonable period of time, or whether Essential Media was obliged to repay the monies or not given its ability to do so (of which there was no evidence) also seems to be a plausible contention requiring investigation. Thus, I would also have set aside the statutory demand on this basis.

105 Finally, it is important to note that the creditors' statutory demand regime under Part 5.4 of the *Corporations Act* does not exist to collect debts that are the subject of dispute or debts where significant offsetting claims are known to exist. The provisions of Part 5.4 of the *Corporations Act* are intended to create a summary procedure to give rise to a presumption of insolvency rather than to collect debts: *In the matter of Halal Meats Pty Ltd* [2015] NSWSC 2041 at [23] (Black J). This was classically a case where a statutory demand should not have been issued as it must have been clear to Hilton Cordell that Essential Media disputed its obligation to repay the transferred funds. Whilst Mr Hilton considered that pressing the demand was the "[s]urest way to make sure this debt get's repaid soon" and "was the way to exert maximum pressure", that is not the purpose of a statutory demand.

ORDERS

106 For these reasons, I make the following orders:

(1) Pursuant to section 459G of the *Corporations Act 2001* (Cth), order that the statutory demand dated 20 March 2020 issued by Hilton Cordell & Associates Pty Limited to Essential Media and Entertainment Pty Ltd be set aside.

(2) Order the defendant to pay the plaintiff's costs of these proceedings.

I certify that this and the 46 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Kelly Rees.

31 July 2020 K. Adams

…… ……..

Dated Associate

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