Book Launch

Farid Assaf, "Statutory Demands and Winding Up in Insolvency", 2nd edition

---

Acting Justice Young, as he now is, told me recently that he had just spent a week in the Equity Division on company cases and had found Mr Assaf's new book very helpful. The beauty of it, he said, is that it refers to a particular proposition about statutory demands and says that there are seven first instance decisions on it, four in favour and three against. He said nothing about any discretion that this might be thought to confer on the first instance judge.

Before offering a few thoughts of my own about statutory demand proceedings, I want to quote from a 2005 article in the Australian Law Journal[1] written from the practitioner's perspective. The learned authors are Lee Aitken and Hugh Stowe. They said this:

> "No instructions are more sweet than those that require counsel to seek to set aside a wanton statutory demand. The facts in the brief are in short compass; the law is reasonably clear; the company judge or master ever courteous; the unsuccessful defendant (by definition) solvent; the successful applicant entitled (usually) to indemnity costs – you can be back in the pavilion (with the fee note typed and despatched) by lunch time."

Let us now visit the umpire's room occupied by the ever-courteous judge or master.

The judicial officer will be wary about doing too much too soon. These cases have a habit of settling – more often than not on the morning of the hearing. I have in my bottom drawer a number of partial drafts of s 459G judgments discarded when the case settled after I had spent several hours reviewing the papers and beginning to

---

[1] L Aitken and H Stowe, " Issues in Corporate Insolvency: Statutory Demands and the Corporations Act, s440A" (2005) 79 *Australian Law Journal* 182.

write. The judge who has learned the lesson the hard way will very likely defer any close attention to the file until almost the last minute.

It is true that the players are often back in the pavilion by lunchtime, no doubt in many cases with fee note typed and dispatched. The umpire might have delivered an *ex tempore* judgment or reserved for a short time with a view to giving judgment in the afternoon. If the whole matter can be completed within the day, it is much better for all concerned. But therein, I suppose, lies one of the reasons for the phenomenon that Mr Justice Young mentioned. Let me give you an example.

In May last year, in *Zipvac Australia Pty Ltd v Hurwitz*[2], I gave an *ex tempore* judgment about the perennial issue of service of the originating process in a s 459G case. I said that where the defendant is a natural person, it is necessary to effect personal service in accordance with the Uniform Civil Procedure Rules. A week or two later I heard another case – *The Site Foreman Pty Ltd v Brand*[3]– which raised a similar issue. I reserved in that one and, on reflection, had to acknowledge that the earlier view was too narrow, although, on the facts, it would have made no difference to the actual result in the *Zipvac* case. Unfortunately, *Zipvac* has been reported in one of the specialised sets of reports[4] and the revision in *The Site Foreman* has not been reported[5].

The cases about service are, of course, a product of the sudden death nature of the statutory demand procedure and its time limit.

Some of you may have seen in the June issue of the Law Society Journal[6] an article about one of Professor Peter Butt's property law tours of England. Each tour takes in the sites of notable easements and restrictive covenants, hotly disputed leases,

---

[2] [2011] NSWSC 392.
[3] [2011] NSWSC 451.
[4] (2011) 5 BFRA 535.
[5] Subsequently reported in the New South Wales Law Reports: (2011) 81 NSWLR 96.
[6] D Bluth, "The Road to Leudson: A Property Lawyers' Pilgrimage" (2012) 50(5) *Law Society Journal* 62.

defective roots of title and the like – even High Trees House, described in the journal article as "a large, elegant 1930s apartment building with rounded walls and windows in the marine style".

When I retire, I intend to supplement the judicial pension by offering statutory demand tours concentrating on cases about disputed service. We will start at Wyong and imagine the process server with his torch at night peering at the mail box marked 1A on the outside wall of the office building at 14 Pacific Highway[7]. Travelling south, we shall stop at North Sydney to view the upper floor of the building in Miller Street and the plastic in-tray in somebody else's office that is the solitary trace of the vanished firm of accountants[8]. From there, it is not far to Cremorne Point and the row of mail boxes on the street frontage of the block of home units exposed to the depredations of the passing public[9]. Next, we go to the City to inspect the mail box in the foyer of 370 Pitt Street where the lifts are switched to security at 6pm[10]. And finally, west to Silverwater to peer through the locked glass doors fronting Egerton Street behind which – tantalisingly close but unattainable – is the accountant's office[11].

All these locations I know intimately. I have seen them in photographs. I have heard detailed descriptions of them by process servers in the witness box. And in relation to each, there has been at the forefront of my mind the wise observation of Justice Daryl Davies in *Macrae v St Margaret's Hospital*[12] that "anything might happen to business letters put into a letter box at the gate of the hospital".

No doubt all this has some value but one does sometimes wonder. In one of his short but incisive commentaries on the history of company law, Justice Finkelstein,

---

[7] *James v Ash Electrical Services Pty Ltd* [2008] NSWSC 1112; (2008) 73 NSWLR 95.
[8] *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1143; (2007) 214 FLR 393
[9] *Partners of Piper Alderman v Sharjade Pty Ltd* [2011] NSWSC 6.
[10] *Jin Xin Investment & Trade (Australia) Pty Ltd v ISC Property Pty Ltd* [2006] NSWSC 7; (2006) 196 FLR 350.
[11] *Career Training On Line Pty Ltd v B E S Training Solutions Pty Ltd; v Buckland* [2010] NSWSC 460.
[12] [1999] NSWCA 381; (1999) 19 NSWCCR 1.

in *Quadrant Constructions Pty Ltd v HSBC Bank Australia Ltd*[13], traced the development of the statutory demand process from its origins in the mid-19th century. He referred to the creation of the present system in 1993 and the separation of the genuine dispute or offsetting claim issue from the winding up proceedings, to be dealt with as a preliminary question under a scheme which, as the High Court[14] and Court of Appeal[15] remind us, is meant to be prompt and efficient and may sometimes operate harshly.

Justice Finkelstein then said, in a passage Mr Assaf quotes in the book:

> "The legislation [of 1993] had an immediate effect. Winding up applications were no longer founded on disputed debts. In this regard the legislation achieved its object. It got rid of the handful of cases which transgressed the old rule. On the other hand, the legislation has had (so it seems to me) an unintended effect. The law reports are now replete with applications to have statutory demands set aside. The cases are not confined to deciding whether there is a genuinely disputed debt or an offsetting claim. They raise all manner of procedural arguments, ranging from disputes about the form of the demand, the description of the debt, the service of multiple statutory demands, how the demand must be signed, the manner in which it must be served and the correct address for service, to complaints about the absence of or deficiencies in the requisite accompanying affidavit. The costs expended on these disputes must be enormous. The disputes certainly take up an inordinate amount of court time. The corresponding advantage over the old rule seems negligible or non-existent. It brings to mind the slaying of the Hydra. Perhaps the time has come for Parliament to reconsider the wisdom of the changes."

Justice Finkelstein could have added a reference to the brain-power and ink that have been expended on the question whether an order setting aside a statutory

---

[13] [2004] FCA 111.
[14] *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; (1995) 184 CLR 265.
[15] *Switz Pty Ltd v Glowbind Pty Ltd* [2000] NSWCA 37; (2000) 48 NSWLR 661.

demand or dismissing an application for such an order is final or interlocutory in nature[16].

There is room for reflection here.

But for those whose mission it remains to grapple with the here and now and to get on with the realities of life under s 459G and related provisions, Mr Assaf's second edition will remain as welcome and valuable a companion as the first has been. He is to be commended for producing this new and enlarged edition and building so constructively on his earlier foundation.

I am very pleased to declare this book launched.

R I Barrett
19 July 2012

****

[16] See, for example, the discussion and analysis in *Hardel Pty Ltd v Burrell & Family Pty Ltd* [2009] SASC 77; (2009) 103 SASR 408, a decision of the Full Court of the Supreme Court of South Australia.