Article Information

Authors: Sarah Drinkwater, Tim Logan, Warren Jiear
Service: Dispute Resolution & Litigation, Restructuring & Insolvency

Polytrade v Glass Recovery Services

It is trite law that a statutory demand cannot be issued where there is a genuine dispute as to the alleged debt. A recent matter in the Supreme Court of Victoria, Polytrade Pty Ltd v Glass Recovery Services Pty Ltd [2015] VSC 164, considers, amongst other things, the appropriate orders for costs when statutory demands are withdrawn (here, before proceedings were filed to set it aside).

Background

The Defendant had issued a statutory demand pursuant to section 459E of the *Corporations Act 2001* (Cth) (**the Act**), for a total debt owing of $2,698,191 (the Statutory Demand) on the Plaintiff on 24 January 2015, and received on 27 January 2015. The time to comply with Statutory Demand would lapse at the end of the 17th February 2015.

On 16 February 2015, just prior to the Statutory Demand expiring, the Plaintiff engaged solicitors who urgently prepared an application to set aside the Statutory Demand and supporting documentation.

While preparing the application, the Plaintiff's solicitors also wrote to the solicitors for the Defendant (on 16 February 2015 at 9.02am) setting out that there was a genuine dispute as to the debt allegedly owed, requesting that the Statutory Demand be withdrawn, and that the Defendant provide a cheque to the Plaintiff in the amount of $5,000 on account of legal costs expended by the Plaintiff in preparation of the application to set aside the demand and supporting material.

The solicitor for the Defendant responded (at 16 February 2015 3.57pm) saying that their client 'would consider withdrawing the Statutory Demand' but required the Plaintiff to respond to certain queries. The Plaintiff's solicitor responded to the queries at 8.39am on 17 February 2015.

The Defendant withdrew the Statutory Demand by email at 11.15am on 17 February 2015, but did not provide any money in satisfaction of the Plaintiff's costs, as demanded. At no time did the Defendant conceded that there was a genuine dispute.

Accordingly, despite the Statutory Demand being withdrawn, the Plaintiff proceeded to file its originating application, specifically seeking its costs on an indemnity basis. The Plaintiff could not properly file an application for the demand to be withdrawn pursuant to section 459G of the Act, as it had already been withdrawn prior to the application being filed.

Accordingly, the Plaintiff's application was only with respect to costs.

Legislation with respect to costs

Section 459N of the Act provides that *"Where, on application under section 459G, the Court sets aside the demand, it may order the person who served the demand to pay the company's costs in relation to the application."*

Section 24(1) of the *Supreme Court Act 1986* (Vic) provides that orders in relation to costs are at the discretion of the Court (subject to other sections, or Acts). This section applied to the current application due to the operation of rules 1.3 and 63.02 of the *Supreme Court Corporations Rules 2013* (Vic).

Precedents referred to

The Judge was pointed to (by the Plaintiff) various precedents, however, the Judge was able to distinguish those cases because either:

- Whilst a statutory demand had been withdrawn, there was at least one valid application before the court enabling a costs order to be appropriately made, or
- The statutory demand was withdrawn after the application was made to set it aside.

The Judge agreed with the principle that a Court should have power to award costs in circumstances where a statutory demand is withdrawn *after* an application has been made to set aside the demand. However, that was not the case here.

Decision

Whilst the Judge sympathised with the Plaintiff's submission that the service of the Statutory Demand in circumstances where there was an ongoing dispute was an abuse of process, the Court's hands were tied. Associate Justice Randall determined that the Court had no option but to dismiss the Plaintiff's application.

The Judge summarised that the application by the Plaintiff was only ever an application for costs and nothing more.

The Judge did also mention, albeit in passing, that the Plaintiff's predicament was partially of its own doing – in waiting so long before seeking advice after being served with the Statutory Demand. Had the Plaintiff sought advice sooner, its solicitors may have been able to procure withdrawal before being required to prepare an application and supporting affidavit to set aside the Statutory Demand. As it was, the Plaintiff's solicitors were required to prepare those documents urgently, whilst also negotiating with the Defendant, due to the limitation period for making such an application being impending.

Matters to take away

There are a number of matters to take away from this case. We consider the key considerations are as follows:

- An applicant will have at best, remote prospects of obtaining a costs order against the issuer of a statutory demand in circumstances where the demand has been withdrawn before an application to set aside has been made. Such an application is merely an application for costs, nothing more.
- Creditors should be careful and obtain advice before issuing statutory demands. If there is a genuine dispute as to the debt, a statutory demand should not be issued. As was considered by Associate Justice Randall, in circumstances where the demand is set aside, or the demand is withdrawn after an application to set aside has been made, costs can (and generally will) be ordered against the issuer.
- If a company is served with a statutory demand, the company should seek legal advice promptly. Companies only have 21 days after being served in which to make an application to set aside the demand. It may be possible to negotiate for the demand to be withdrawn prior to preparing for such an application, and these opportunities should be explored before going to such a cost. If time is limited when solicitors are engaged, often the only option available is to urgently apply for the demand to be set aside.