

Liquidations

Can the 21 day period to set aside a statutory demand be extended?

The important question whether a debtor can apply to set aside a statutory demand after the 21 day period has expired was considered in four recent cases. Two of the cases concluded that the 21 day period cannot be extended, the other two cases concluded that it can. It is likely that the matter can only be solved by amendment to the Corporations Law.

Section 459G(2) provides that an application to the court for an order setting aside a statutory demand may only be made within 21 days after service of the demand. In each of the four cases the debtor company applied after the 21 day period to set aside the statutory demand.

In the two cases where the debtor successfully extended the period, the court relied on section 1322(4)(d) of the Corporations Law which provides generally that a court may extend time periods referred to in the Corporations Law. In one of the cases where the court found for the debtor, the court noted that as there appeared to be a genuine dispute as to the amount of the debt, and in light of the serious consequences to the company, the court should exercise its discretion in favour of the debtor company and allow it to file its application out of time.

The courts that decided against the debtors did not think that sections 459F and 459G could operate sensibly if the court could increase the time span. If a creditor could not rely on the statutory presumption of insolvency which is provided by a debtor's noncompliance within the fixed period it would not have a firm basis for action. Further, a creditor would not know when it could confidently bring a winding up application which is based on the debtor's failure to comply with a statutory demand.

The cases finding for the debtors are *Cavetina Pty Ltd v Synthetic Dye Works Industries Pty Ltd* (1994) 14 ASCR 274 and *Sydar Pty Ltd v K Simmonds Finance Pty Ltd*, Supreme Court of New South Wales, Santow J, 30 March 1995.

The cases finding for the creditors are *David Grant & Co Pty Ltd (receiver appointed) v Westpac Banking Corporation* (1995) 15 ACSR 771 and *Streets Ahead Pty Ltd v Amelia Developments Pty Ltd (in liquidation)*, Supreme Court of Western Australia, Master Adams, 1 March 1995.

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