Equity Division
Supreme Court
New South Wales

Case Name:	**In the matter of Black Tie Holdings Pty Ltd**
Medium Neutral Citation:	[2022] NSWSC 781
Hearing Date(s):	2 June 2022
Date of Decision:	16 June 2022
Jurisdiction:	Equity - Corporations List
Before:	Meek J
Decision:	Amended Originating Process dismissed with costs.
Catchwords:	CORPORATIONS – Winding up – Statutory demand – Demand issued for loan debt – Interstate address nominated in demand – Whether debt "due and payable" – Whether nullity – Demand not a nullity - Other defects alleged including alleged lack of verification – Service of Originating Process by email to solicitor for creditor – Effect of s 600G and the deeming provisions in ss 105A and 105B of the *Corporations Act 2001* (Cth) – Whether originator believes on reasonable grounds electronic address for the addressee to be a current for receiving electronic communications s 9 *Corporations Act 2001* (Cth) – Service valid – Failure to attach SEPA notice – Whether unconscionable reliance on defects – Whether applicant can rely on ground not raised in affidavit in support of application EXPERT EVIDENCE – ss 105A and 105B of the *Corporations Act 2001* (Cth) – When is an electronic communication sent and received – "capable of being retrieved"
Legislation Cited:	*Corporations Act 2001* (Cth), ss 9, 105A, 105B, 109X, 459E, 459G, 459H, 459J, 600G, Pt 5.4 *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) *Service and Execution of Process Act 1992* (Cth), ss 9, 15, 16

Service and Execution of Process Regulations 2018 (Cth), cl 6

Cases Cited:

2020 Construction Systems Pty Ltd v Dryka & Associates Pty Ltd [2010] WASC 22
Elan Copra Trading Pty Ltd v JK International Pty Ltd [2005] SASC 501; (2005) 56 ACSR 416
Faji (Australia) Constructions Pty Ltd v AC Professional Accounting Pty Ltd [2009] NSWSC 180
Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd (2019) 99 NSWLR 397; [2019] NSWCA 60
Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1996) 70 FCR 452
Hopetoun Kembla Investments Pty Ltd v JPR Legal Pty Ltd [2011] NSWSC 1343; (2011) 87 ACSR 1
In the matter of AMP Life Ltd [2018] NSWSC 855
In the matter of Bioaction Pty Ltd [2022] FCA 436
In the matter of Elgar Heights Pty Ltd (No 1) [1985] VR 657
In the matter of Harmon International Holdings Pty Ltd [2019] NSWSC 413; (2019) 136 ACSR 94
In the matter of Horizons (Asia) Pty Ltd [2021] NSWSC 1690
In the matter of International Materials & Technologies Pty Ltd [2013] NSWSC 787; (2013) 282 FLR 362
In the matter of LDW Constructions Pty Ltd [2019] NSWSC 1159
In the matter of Leasing Holdings Pty Ltd (formerly Charlie Lovett Pty Ltd) [2015] NSWSC 771
In the matter of Urban Solutions Group Pty Ltd [2015] NSWSC 1940
Joe Mangraviti Pty Ltd v Lumley Finance Ltd [2010] NSWSC 61
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in Liq) [2015] VSCA 330
NT Resorts Pty Ltd v Deputy Commissioner of Taxation (1998) 16 ACLC 957
Ogilvie v Adams [1981] VR 1041
Players Pty Ltd v Interior Projects Pty Ltd (1996) 133 FLR 265
Primespace Property Investment Ltd v Vienne Pty Ltd [2015] FCA 326
Roberts v South East Asia Communications Pty Ltd [2003] NSWSC 800

	Sheslow v Diamond Rose NL [2005] NSWSC 492; (2005) 54 ACSR 376 *Slap Corp Pty Ltd v Civil, Infrastructure & Logistics Pty Ltd* (2017) 50 VR 542; [2017] VSC 168 *SP Hay Pty Ltd (ACN 093 703 765) v David Gray & Co Pty Ltd (ACN 008 671 127)* [2019] SASC 6; (2019) 133 ACSR 504 *Tokich Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Ltd (in liq)* [2004] NSWSC 527 *Ultimate Manufacturing Pty Ltd v Lyell Morris Pty Ltd* (1995) 13 ACLC 1268 *Woodgate v Garard Pty Ltd* [2010] NSWSC 508; (2010) 239 FLR 339
Texts Cited:	F Assaf, *Assaf's Winding Up in Insolvency* (3rd ed, 2021, LexisNexis)
Category:	Principal judgment
Parties:	Black Tie Holdings Pty Ltd (Plaintiff) Z4life Pty Ltd (Defendant)
Representation:	Counsel: N J Allan / B Flaherty (Plaintiff) H Fielder (Defendant) Solicitors: Safe Harbour Lawyers (Plaintiff) Stone Group Lawyers (Defendant)
File Number(s):	2022/51310

JUDGMENT

1 **HIS HONOUR**: The application before the Court is an application by the plaintiff (**the company**) against the defendant for relief related to a statutory demand (**statutory demand/demand**) served by the defendant on 31 January 2022.

2 The originating process filed on 2 February 2022 sought relief that the statutory demand be set aside pursuant to s 459G *Corporations Act 2001* (Cth) (**Corporations Act**). All references to sections in the judgment are references to the Corporations Act, unless otherwise indicated.

3 The company filed an amended originating process on 20 April 2022 seeking alternative relief that the demand is null and void; alternatively orders pursuant to s 459J(1)(a) Corporations Act setting aside the demand and alternatively an order under s 459J(1)(b) Corporations Act setting aside the demand.

4 The company's application raised many issues in support of the relief claimed.

5 For the reasons which follow I have determined to dismiss the amended originating process.

6 The company relied upon evidence from Caroline Macdonald, the sole director of the company, Jovan Sarai (**Mr Sarai**), the solicitor for the company and an expert witness, Dr Allan Charles Watt (**Dr Watt**).

7 The defendant relied upon evidence from James Boxell a director of the defendant (**Mr Boxell**), Robert Colin Tidy a shareholder of the defendant (**Mr Tidy**) and two solicitors, namely Brendan Reidy (**Mr Reidy**) and Mia Behlau (**Ms Behlau**).

The statutory scheme

8 Winding up in insolvency is dealt with under Pt 5.4 Corporations Act.

9 A creditor of a company may apply to the Court for an order that the company be wound up in insolvency: s 459P(1)(b).

10 On an application under s 459P the Court may order that an insolvent company be wound up in insolvency: s 459A.

11 The Court must presume that the company is insolvent if, during or after the three months ending on the day when the application was made, the company failed (as defined by s 459F) to comply with a statutory demand: s 459C(2)(a).

12 Section 9 Corporations Act defines *"statutory demand"* and *"statutory period"*.

> "***statutory demand*** means:
>
> (a) a document that is, or purports to be, a demand served under section 459E; or
>
> (b) such a document as varied by an order under subsection 459H(4).
>
> ***statutory period*** means:
>
> (a) if a period longer than 21 days is prescribed—the prescribed period; or
>
> (b) otherwise—21 days."

13 Division 2 of Pt 5.4 Corporations Act deals with matters relating to a statutory demand and Div 3 deals with applications to set aside a statutory demand.

14 Section 459E deals with provisions regarding service of a statutory demand including provisions regarding the debt on which the demand is based, the form of the demand and verification and compliance provisions in relation to demands based on a debt that is not a judgment debt.

15 Section 459E(1)–(3) is in the following terms:

> "(1) A person may serve on a company a demand relating to:
>
> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or

(b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.

(2) The demand:

(a) if it relates to a single debt—must specify the debt and its amount; and

(b) if it relates to 2 or more debts—must specify the total of the amounts of the debts; and

(c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within the statutory period after the demand is served on the company; and

(d) must be in writing; and

(e) must be in the prescribed form (if any); and

(f) must be signed by or on behalf of the creditor.

(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."

16 The prescribed form of a demand is form 509H (**PF**) which inter alia requires:

(a) that the amount claimed must be due and payable: [2] PF;

(b) that the affidavit verifying the amount claimed must be verified by someone who has sufficient source of knowledge to appropriately verify: [2] PF;

(c) the insertion of an address for service of copies of any application and affidavit in the state or territory in which the demand is served on the company, being, if solicitors acting for the creditor, the address of the solicitors: [6] PF; and

(d) the description of the debt to separate out in a case where two or more debts are relied upon the separate debts and amount of debts: schedule PF.

17 The statutory period to comply with a demand, is as noted above 21 days.

18 Section 459F sets out provisions as to when a company is taken to have failed to comply with a statutory demand.

19 If, as at the end of the period of compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period: s 459F(1).

20 The period for compliance with a statutory demand is generally the statutory period after the demand is served: s 459F(2)(b).

21 If the company applies in accordance with s 459G for an order setting aside the demand, the period for compliance with the statutory demand may differ from the statutory period depending on how the s 459G application is determined: s 459F(2)(a).

22 A company may apply to the Court for an order setting aside a statutory demand served on the company: s 459G(1).

23 However, the application may only be made within the statutory period after the demand is served: s 459G(2).

24 For a valid application to be made within that period, an affidavit supporting the application must be filed with the Court and copies of the application and supporting affidavit are served on the person who served the demand on the company: s 459G(3).

25 The provisions of s 459H apply where on a s 459G application the Court is satisfied of either both of the following:

(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;

(b) that the company has an offsetting claim;

: s 459H(1).

26 The "respondent" means the person who served the demand on the company: s 459H(5).

27 Section 459H has effect subject to s 459J: s 459H(6).

28 There is provision for setting aside a demand on grounds other than a genuine dispute or an offsetting claim and this is set out in s 459J.

29 Section 459J provides as follows:

> "**459J Setting aside demand on other grounds**
>
> (1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
>
> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
>
> (b) there is some other reason why the demand should be set aside.
>
> (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

30 Unless the Court makes, on an application under s 459J, an order under s 459H or 459J, the Court is to dismiss the application: s 459L.

31 Section 15 of *Service and Execution of Process Act 1992* (Cth) (**SEPA**) provides that an initiating process issued in a State may be served in another State.

32 However, s 16 SEPA provides that Service is effective only if copies of such notices as are prescribed are attached to the process, or the copy of the process, served.

33 Clause 6 of the Service and Execution of Process Regulations 2018 (Cth) provides that, for the purposes of s 16, Form 1 in sch 1 is the SEPA prescribed form (**SEPA notice**).

34 Section 9 SEPA provides that service of a process, order or document under SEPA on a company is to be effected by leaving it at, or by sending it by post to, the company's registered office.

Corporate details

35 The evidence on the hearing included ASIC searches for the company, the defendants and Stone Group Lawyers Pty Ltd (**SGL**), the solicitors for the defendant.

36 The ASIC search for the company as at 3 March 2022 discloses Ms Macdonald as the sole director and secretary: CB 430.

37 It also discloses that there are 100 issued shares in the company, all said to be beneficially held by Progressive Investment Management Pty Ltd: CB 430–431.

38 The principal place of business of the company is an address in Chatswood (as from 30 March 2021) and the registered office of the company is listed as being Trend Partners Pty Ltd (**Trend Partners**) at 52 O'Connell Street, Parramatta NSW 2150 (as from 23 November 2020): CB 430.

39 The ASIC search for the defendant reveals that Mr Boxell is the sole director and secretary of the defendant and that Kym Raymond Gallagher (**Mr Gallagher**) was a secretary of the defendant as between 29 July 2020 and 8 February 2022: CB 440.

40 There are 200 ordinary issued shares in the defendant, with the search disclosing that Mr Boxell and Mr Tidy hold 100 shares beneficially each. Prior members holding some shares included Krack Properties Pty Ltd, ZCVC Pty Ltd and Zipett Magazine Pty Ltd: CB 440–441.

41 The principal place of business and the registered office of the defendant is listed as being 72 Martin Street, Belgrave VIC 3160, in each case as from 23 July 2020.

42 The ASIC search for SGL discloses the principal place of business (from 23 July 2018) and registered office (from 16 August 2018) as being "Southport Central Tower 3" Suite 31106 Level 11 9 Lawson Street Southport QLD 4215: CB 271.

The statutory demand

43 The statutory demand in these proceedings is dated 19 January 2021. That date appears to be a mistake for 19 January 2022. There is some dispute in the proceedings about whether the mistake is significant or not. I address this below.

44 The demand was addressed to the company at "52 O'Connell Street, Parramatta in the State of New South Wales".

45 Paragraphs 1–3 of the demand are as follows:

> "1. The Black Tie Holdings Pty Ltd owes Z4Life Pty Ltd of 72 Martin Street, Belgrave in the State of Victoria ('the creditor') the amount of two hundred and twenty-five thousand, three hundred and seventy-five dollars dollars [sic] ($225,375), being the amount of the debt described in the Schedule.

2. The amount is due and payable by the company to the creditor.

3. Attached is the affidavit of James Boxell dated 19 January 2022 verifying that the amount is due and payable by the company."

46 Paragraph 7 of the demand is as follows:

"7. The address of the creditor for service of copies of any application and affidavit is care of Stone Group Lawyers, solicitors are acting for the creditor, Suite 3116, Level 11, 9 Lawson Street, Southport in the State of Queensland."

: see e.g. CB 155.

47 In the schedule at the end of the demand, the detail for the description of the debt and amount of the debt is as follows:

"Unpaid Loan Amounts which are due and payable in the sum of $225,375."

48 The demand is signed by Mr Boxell in his capacity as director of the defendant.

Affidavit in support of the demand

49 On 19 January 2022. Mr Boxell affirmed an affidavit accompanying the statutory demand: CB 31.

50 The contents of that affidavit are as follows:

"*1. I am a director of the Creditor named in the Creditor's Statutory Demand, which this affidavit accompanies, relating to the debt owed to the Creditor by Black Tie Holdings Pty Ltd (**the Debtor Company**).*

2 I am the person who, on behalf of the Creditor, had the dealings with the Debtor Company that gave rise to the debt.

3 At the request of the Debtor Company, between the dates of November 2020 and December 2021 the Creditor advanced loan amounts to the Debtor Company totalling $311,375. The purpose of the loans advanced by the Creditor to the Debtor Company was to cover shortfalls in cash flow for development and other expenses relating to the Debtor Company's business.

4 The loan amounts were advanced by the Creditor to the Debtor Company on the basis that the loan amounts would be repaid on

demand or upon a dissolution of a partnership between the Creditor and the Debtor Company.

*5 Exhibited to this Affidavit and marked with the letters **JB-01** is a true copy of balance sheets prepared by the Debtor Company documenting the loan amounts advanced.*

6 The Debtor Company repaid to the Creditor the sum of $120,000 by transferring ownership of a company car leaving a balance of $191,375 owing.

7 In or about November 2021, the Creditor advanced the sum of $34,000 sent to the company for a corporate sale of 80,000 tokens. Despite payment for the 80,000 tokens the Debtor Company failed or refused to transfer ownership for the tokens. In the premises of this transaction the Debtor Company is truly and unjustly indebted to the Creditor for a further $34,000.

8 In total, the Debtor Company owes to the Creditor the sum of $225,375.

9 Despite demand, failed to remit repayment of the balance of the Loan Sum in the amount of $191,375 in breach of the terms of the Loan Agreement nor did the Debtor Company repay to the Creditor the sum of $34,000 for the 80,000 tokens that it was paid for but did not deliver.

10 The Creditor has made demand of the Debtor Company for payment of the of $225,375.

11 By email from Carolyn Macdonald dated 17 December 2021, the Debtor Company acknowledged the existence of the debts owed and unpaid Sum and promised to repay it to the Debtor Company.

12 Despite demand, and in breach of the terms of the Loan Agreement and the acknowledgement of debt, the Debtor Company has neglected to repay to the Creditor the unpaid portion of the Loan Sum.

13 I have on today's date reviewed the bank account maintained by the Creditor and verify that the sum of $225,375 (or any other amount) has not been deposited by Debtor Company to the Creditor's bank account.

14 I believe that there is no genuine dispute about the existence or amount of the debt."

Service of the demand

51 On 20 January 2022 SGL sent a letter to the company addressed to the registered office of the company marked to the attention of "*The Proper Officer*" and also by email to "*caroline@zwallet.digital*": CB 316.

52 The letter indicated that SGL had been engaged to act upon behalf of the defendant and stated that pursuant to s 109X Corporations Act, the statutory demand and affidavit of Mr Boxall affirmed 19 January 2022 in support of the demand were enclosed by way of service.

53 The letter included the following:

> "***What is required of You***
>
> *Our client requires that you attend to payment of the* ***debt*** *within 21 days of being served this notice.*
>
> *Should you fail to comply with the above, we hold instructions to apply to the court for orders for the winding up of Black Tie Holdings Pty Ltd upon the presumption it is insolvent.*
>
> *If you have any queries, please contact Mia Behlau of this office on (07) 5635 0180 or by email below.*"

54 The letter concludes under the name of SGL with a signature and then underneath the signature the following:

> "***Mia Behlau***
> *Partner*
> *E mbehlau@stonegroup.com.au*": CB 316.

55 The letter contained at the top right-hand corner under the logo for SGL the following:

> "*Southport Central Commercial*
> *Tower 3, Suite 31106, Level 11*
> *9 Lawson Street Southport QLD 4215*"

56 On 31 January 2022 the letter was received by the company's accountants Trend Partners. The letter at CB 316 is impressed with a received stamp with the date 31 January 2022.

57 Ms Macdonald indicates that on or about 31 January 2022 she received a letter from Trend Partners attaching correspondence and the statutory demand and the affidavit of Mr Boxell: CB 9.

58 The company engaged Mr Sarai of Safe Harbour Lawyers (**SHL**) to act in relation to the matter.

Correspondence about instructions for service

59 On 17 February 2022 at 12:09 PM Mr Sarai sent an email to the email address for Ms Behlau: CB 329.

60 The email indicated that SHL acted for the company and referred to the letter dated 20 January 2022 enclosing the statutory demand, noting that it had been served on "*our client's accountants*" (being the registered office of the corporation) on 31 January 2022 and requested Ms Behlau to advise if she held instructions to accept service of the originating process to set aside the demand, and further noting that Mr Sarai anticipated that the originating process would be filed the next day, 18 February 2022: CB 329.

61 Mr Sarai indicates that on the same day on or around 12:17 PM he received a read receipt confirmation: CB 331. Ms Behlau indicates that she does not recall seeing or reading that email and states that she has never received a read receipt request from Mr Sarai, nor ever clicked to confirm a read receipt on any email that Mr Sarai has sent to her. She states that prior to the commencement of the proceedings she was not familiar with Mr Sarai and does not recall having ever exchanged emails with him: CB 58–59.

62 There was no email from Ms Behlau indicating any instructions to accept service.

Filing and service of the Originating Process and Supporting Affidavit

63 On 21 February 2022 Mr Sarai caused to be filed with the Court an originating process at 10:37 PM: CB 1.

64 Mr Sarai states that on 21 February 2022 on or around 10:50 PM AEST he served via email to Ms Behlau's email address sealed copies of the originating

process and an affidavit of Ms Macdonald late on 21 February 2022 (**OP service email**): CB 18.

65 A copy of the OP service email bearing the timing of 9:50 PM on 21 February (CB 356) and at 10:50 PM (CB 359) is in evidence (the difference in time being explained by time differences between NSW and Queensland).

66 Mr Sarai states that on 22 February 2022 on or around 9:19 AM he received a read receipt message from Ms Berlau: CB 18, 385.

67 Mr Sarai further deposes to the fact that he caused a copy of the originating process and affidavit of Ms Macdonald to be express posted to the attention of Ms Berlau using the address listed in paragraph 7 of the statutory demand and also on 22 February 2022 caused the documents to be express posted to the proper officer of the defendant at the Belgrave registered office address and by email correspondence to Mr Boxell and Mr Tidy.

68 It is common ground in the proceedings that other than the OP service email sent to Ms Berlau on 21 February 2022 the other methods of attempted service of the originating process by Mr Sarai were effected outside the statutory period for compliance with the demand.

69 It is common ground that the statutory period for compliance with the demand expired at midnight on 21 February 2022.

70 Dr Watt, a digital forensics expert, prepared two reports dated 12 May 2022 and 19 May 2022 respectively annexed to affidavits affirmed by him in the proceeding. The affidavits and reports were admitted without objection.

71 In his first report Dr Watt gave evidence to the effect that the OP service email was sent at 21 February 2022 at 10:50:10 PM (AEDT), equating to 21:50:10 (AEST) Brisbane: CB 74.

72 In his second report, Dr Watt examined an additional electronic copy of the email and concluded that the OP service email took 24 seconds to arrive from the time it was sent and confirms that it was "*capable of being retrieved*" at that time: CB 115–116.

73 Subject to the effect of the statutory provisions and other arguments referred to below, there is no factual dispute that the OP service email was capable of being retrieved by Ms Berlau at or from the time indicated by Dr Watt, and in any event, prior to midnight on 21 February 2022.

Affidavit in support of the Originating Process

74 The affidavit of Ms Macdonald dated 21 February 2022 in referring to the demand made a number of statements including:

(a) that she had never had direct dealings with Mr Boxell and that all her dealings with the defendant were via "*its authorised representative*" Mr Tidy;

(b) the company had a complex legal and financial relationship with the defendant;

(c) the company claimed that the defendant is in breach of various obligations which it owed to the company, as a consequence the company has a claim for damages against the defendant;

(d) the claim that the defendant purportedly advanced loan amounts to the company totalling $311,375 was false;

(e) the company does not and has never borrowed any monies from the defendant and that the defendant has never advanced any monies to the company as claimed whatsoever: CB 9.

75 Ms Macdonald then went on in the affidavit to refer to the relationship between the parties and made reference to the company engaging the defendant on

or about 1 August 2021 (CB 198-206), under a consultancy agreement (**consultancy agreement**) (though bearing the date 23 July 2021 on the execution page: CB 206), to assist in token sales via its platform, which consultancy agreement she stated had been terminated in or about December 2021. I will refer to the consultancy agreement as such, although it is described on its front page as "*Independent Contractor Agreement*": CB 198. Its efficacy as a document is disputed, as will be seen below.

76 Ms Macdonald stated that the company had paid $320,000 to the defendant under the consultancy agreement being:

(a) payment of $120,000 by way of motor vehicle transfer (a Mercedes-Benz) to the defendant "*as agreed by the parties*"; and

(b) monthly payments of $40,000 per month totalling $200,000 as per an annexure: CB 10.

77 Ms Macdonald in the affidavit denied that she had sent any email to the defendant or its representatives on 17 December 2021 or any other date in which she had acknowledged the existence of the debts claimed or promised to repay any debt to the defendant.

78 Ms Macdonald further stated that the parties had never entered into any loan agreement as asserted.

79 Ms Macdonald indicated that there was a genuine dispute about the amount of the debt, and that the company has an offsetting claim "*which greatly exceeds the amount of the alleged debt*": CB 10.

Ms Macdonald's March affidavit

80 On 25 March 2022 Ms Macdonald affirmed a further affidavit. The affidavit dealt with a number of topics including service of the demand. The affidavit

reiterated a number of assertions made in her February affidavit. Ms Macdonald annexed a copy of the consultancy agreement which she asserted that Mr Tidy had executed on behalf of the defendant, annexed various minutes of Zoom meetings said to have taken place with representatives of the defendant including Mr Tidy and Mr Gallagher, and also annexed a copy of a notice of termination said to have been dated 5 November 2021.

81 Ms Macdonald in her March affidavit annexed an email she sent to Mr Tidy on 8 December 2021 at 4:33 PM referring to, amongst other things, "*the $40k per month sales retainer BT has been paying details attached… since July 21 so 5 months* ***now terminated***". She indicates Mr Tidy acknowledged receipt later that day at 5:57 PM in an email in which he set out a response.

82 In the March affidavit Ms Macdonald revised her claim about the total of monthly payments made under the consultancy agreement indicating that over $320,000 of payments had been made, although she corrected that in a later affidavit affirmed on 27 April 2022 to resume the position that the company had only paid the defendant a total of $320,000, with only $200,000 paid under the consultancy agreement: CB 26.

83 Ms Macdonald's March affidavit persisted with assertions that there had been non-performance under the consultancy agreement by the defendant causing significant loss and damages to the company, claiming that these losses and damages surpass the total paid to the defendant under the consultancy agreement: CB 16.

Consultancy agreement, notice of termination and minutes of meetings

84 I pause to note that the validity of the consultancy agreement, service of the notice of termination and contents of minutes of meetings was hotly disputed in the proceedings by the defendant.

85 Mr Tidy gave evidence regarding the disputed consultancy agreement and in response to the purported offsetting claim: CB 50–55. Suffice it to say that he

has a disputed and contested account regarding the so-called consultancy agreement.

86 Mr Tidy denied his signature was on the consultancy agreement.

87 Mr Boxell said that he had never sighted the consultancy agreement.

88 Both disputed that they had ever seen a notice of purported termination.

89 Mr Tidy indicated that whilst he had attended meetings with Ms Macdonald via Zoom, stated that he had never received any copies of minutes of meetings with the content as asserted by Ms Macdonald.

90 In cross examination Mr Tidy accepted that he had on 8 December 2021 at 5:57 PM (CB 286) sent a responsive email to an email 4:33 PM from Ms Macdonald (CB 283). Mr Tidy stated he was dyslexic: T37, 40.

91 I noted that the subject heading as between the two emails has been altered to some degree. Mr Tidy responded (T41-42):

> "*A. Obviously by her because what we would have got and what Kym Gallagher would have got was "document shared with you, Z4Life website". I would have never seen termination of any agreement because I would have responded back saying there's never been - all this stuff that has been provided, like the document that she's relying on, if you have a look at my two signatures, and my signature is so far from what they've written, your Honour, that it's a hundred per cent been manipulated and I believe it's fraudulent and I wanted to get an expert to do that, but we have a case.*"

The nature of the parties' relationship

92 There were a number of odd aspects of the evidence in the proceedings.

93 One odd aspect was the general evidence of the parties describing their relationship with each other. There was a disconnect in the evidence.

94 Ms Macdonald's affidavits in the proceedings, in describing the relationship between the company and the defendant, principally directed attention to the

consultancy agreement: CB 10, 14–16, 27. The tenor of Ms Macdonald's affidavits suggest that the relationship between the company and the defendant commenced in or about mid-2021 and was formalised by the consultancy agreement.

95 In her affidavit affirmed on 27 April 2022 Ms Macdonald made reference to the consultancy agreement and stated that the company "*is the owner and entered into a brand partner arrangement to operate the online platform known as Zipett. The platform allows its members to transact using cryptocurrency called ZIPC*". Ms Macdonald claimed that the defendant was contracted to promote and sell ZIPC tokens to the existing members and also to bring new members to the platform via its sources and channels and that proceeds from sale of any ZIPC tokens were to be deposited to the company's nominated bank accounts "*as the sole property of the Plaintiff as determine*[d] *as the payment for operating the platform*": CB 27.

96 Ms Macdonald asserted during the period of five months (seemingly the period July/August 2021 – November/December 2021) the defendant diverted revenue and income from sales from the company to the defendant, misappropriating the revenue and also failed to meet sales targets: CB 27.

97 The defendant's evidence indicated that the relationship occurred significantly earlier.

98 Mr Boxell indicated that in or around November 2020 he engaged Mr Tidy as a consultant to assist the defendant in identifying potential investment opportunities: CB 34.

99 Mr Tidy indicates that at about that time he developed a concept on behalf of the defendant which amongst other things involved developing a crypto currency digital wallet known as "*Z-Wallett*" and a crypto currency known as "*Zipett Coin*" (the **Zipett Project**).

100 Mr Tidy states that in or about February 2021 he contacted Ms Macdonald to discuss engaging the company's services to build the digital platform/technology required to give effect to the Zipett Project: CB 45.

101 Mr Tidy states that in or about February 2021 the company agreed to develop the digital platform/technology, but given the nature of the Zipett Project as much of the work that was required would be identified as the process progressed, the defendant did not enter into a formal service agreement in writing with the company. Instead, the parties worked from "*a mutually agreed project planning document*" which Mr Tidy says was prepared at the commencement of the Zipett Project outlining (amongst other things) the products, processes, user interfaces, project timelines and projected costs which were to form part of the Zipett Project (**Project Plan**). Mr Tidy exhibited a copy of the project plan: CB 45–46, 159–171.

102 Mr Tidy states that the project timeline and projected costs were broken into three stages. Under the first stage referred to in the Project Plan, the Android and iOS application (**App**) framework and design were due to be completed by 30 March 2021, with a total cost of the first stage to be $38,000 (**Stage One Works**).

103 He states that the Stage One Works were important because once this was complete, the App would be ready to launch and start generating income for the defendant: CB 46.

104 Mr Tidy indicates that the company has not completed the Stage One Works, because there are critical bugs in the Apps which have not been fixed.

Defendant's case regarding advancing funding to the company

105 Significantly, Mr Tidy states that prior to the company commencing the Stage One Works he met with Ms Macdonald and discussed funding requirements for the Zipett Project and had a conversation in words to the following effect:

"*Ms Macdonald:*	*In order to take on this project, we will need some capital. We will need Z4Life to advance funds to cover our costs and expenses, which can be repaid at a later stage as a loan once the project has launched.*
Me:	*How much do you need?*
Ms Macdonald:	*Approximately $85,000.00.*
Me:	*We can arrange for Z4Life to loan Black Tie $85,000.00 to help you start the project.*"

106 Mr Tidy indicates that in order to provide the company with sufficient capital to commence the Stage One Works the defendant advanced $85,000 in four separate tranches being amounts totalling $70,000 paid on 18, 21 and 27 January 2021 and a further $15,000 payment on 10 March 2021: CB 46–48.

107 Mr Tidy states that from time to time, Ms Macdonald contacted him by telephone to request the defendant loan the company further funds to pay wages, invoices and other expenses such as licensing fees: CB 47.

108 Mr Tidy says that the amounts advanced to the company at the request of Ms Macdonald formed part of a running loan balance which he describes as "*Loan Agreement*".

109 He refers to an example of Ms Macdonald requesting an advance as occurring on 26 May 2021 with the text message he sent to her "Sent boys 55K to cover coms and a contribution of 10k to office // 75K to you as loan": CB 47, 193.

110 Mr Tidy states that pursuant to the Loan Agreement the defendant advanced a total of $668,000 to the company in tranches between the period 18 January 2021 and 29 October 2021: CB 47.

111 In Mr Tidy's affidavit he sets out a table with amounts between those dates totalling up to $668,000.

112 The table includes:

(a) the four amounts I have referred to above, totalling $85,000;

(b) further sums totalling $443,000 advanced between 24 March 2021 and 20 July 2021 from the defendant's Westpac account to the bank account of the company; and

(c) two further payments of $40,000 on 29 July 2021 and $100,000 on 29 October 2021.

113 There are copies of bank records which record payments in those amounts in evidence (or at least $660,000, I could not separately locate a statement for the sum of $8,000 said to be advanced on 14 May 2021).

114 Thus, it can be seen at least chronologically that *prior* to the date of the disputed consultancy agreement document, whether the operative date be 23 July 2021 or 1 August 2021 (CB 198, 206), the defendant had advanced the four amounts said to have been initial $85,000 loan between 18 January 2021 and 10 March 2021 and the further sum of $443,000 between 24 March 2021 and 20 July 2021.

115 Mr Tidy states that on or about 12 September 2021 the defendant advanced $120,000 to the company as payment for 3 million DOTALK coins and claims that despite attending to payment the company did not transfer ownership of the coins to the defendant: CB 48.

116 Mr Tidy states that on or about 13 October 2021 the defendant advanced $34,000 to the company as payment for 84,000 Zipett coins and claims that despite attending the payment the company did not transfer ownership of the Zipett coins to the defendant: CB 48.

117 Mr Tidy states that in or about October 2021, he received a text message (CB 254) from Ms Macdonald stating "*We will just do adjustment of $34k on loan account*" but says the defendant never received any confirmation of that adjustment: CB 49.

118 Mr Tidy says that the payments from the defendant to the company on 12 September 2021 and 13 October 2021 are recorded in the account statements from the defendant's Bendigo bank account: CB 49. There are account statements at CB 249 and 256 which appear to record those payments.

119 Both parties appear to agree that there was transfer of a Mercedes Benz motor vehicle from the company to the defendant.

120 Ms Macdonald as noted above had indicated that the transfer had taken place on 29 December 2021 with a payment (or perhaps an allocation) of an amount of $120,000: CB 10. Her assertion was that the payment had been made in the context of the consultancy agreement: CB 10, 14. She asserted that all payments made to the defendant were under the consultancy agreement for the sale of tokens on the defendant's platform and that no monies had ever been paid or transferred to the defendant as loan repayments: CB 15.

121 Mr Tidy on the other hand, whilst agreeing that the sum was $120,000, indicated that it was to be reduced from the total amount owing under what he describes as the loan account: CB 49.

122 Both Ms Macdonald and Mr Tidy produced documentation regarding the transfer of the motor vehicle.

123 Mr Tidy annexed an email from Ms Macdonald dated 19 December 2021 to him which in its terms suggests that the vehicle be transferred to Mr Tidy privately at a consideration of $170,000: CB 290–291. Mr Tidy responded indicating that as the defendant had "*paid the money out*" he believed the best course of action was to transfer the vehicle to the defendant: CB 292.

124 The following day 20 December 2021 Mr Tidy sent another email to Ms Macdonald copied to Mr Boxell and Mr Gallagher regarding the vehicle stating "*Jim will do all of this today and you can adjust the loan account*". He indicated that although the current value was $140,000 "*we are obviously happy to do*

at the original and adjust mums 50k for her car loan and 120k off ours": CB 293. The "*original*" appears to be a reference to the amount of $170,000: CB 290-291.

125 Later in the morning of 20 December 2021 Ms Macdonald replied to the email from Mr Tidy stating inter alia "*Our records will be $120,000 from Z4life loan cleared and $50,000 helen tidy loan cleared, this was never an asset of BT and was always your car*": CB 294. Ms Macdonald annexed some subsequent emails. However, none of them (CB 297, 299–304) qualify what appeared to be the arrangement that the sum of $120,000 would be reduced from what she described as the "*Z4life loan*": CB 294.

The claimed amount

126 The above background details give the context for understanding the amount claimed in the statutory demand and the supporting affidavit of Mr Boxell.

127 Mr Tidy states that as part of the reporting process under the Zipett Project the company was to provide the defendant with updates regarding Stage One Works, which would sometimes include reference to the company's financial statements.

128 He states that in or about December 2021, as part of the usual weekly financial updates received from the company (which commenced on 1 October 2021) he was given a copy of the company's balance sheet dated 10 December 2021 by Michael Wang who he understood to be responsible for overseeing the company's finances: CB 49–50. He exhibited a copy of the balance sheet: see CB 288.

129 The balance sheet is a somewhat unusual document. It is extracted below:

Created: 10/12/2021 5:11 PM

Black Tie Holdings Pty Ltd T/A ZIPETT
52 O'Connell St
Parramatta
NSW 2150 Australia
ABN: 67 122 572 490
Email: accounts@zipett.com

Balance Sheet

As of 10/12/2021

Assets			
Bank Account-CBA 7561		$5,190.09	
Bank Account-CBA 0619Treasury		$235,994.19	
BBX Account		$41,254.55	
AUDZ Account		($6,166.50)	
Crypto Currecy Holding		$5,000.00	
Trade Debtors		$2,000.00	
Other Assets			
Piper Alderman-Trust Account	$40,000.00		
Prepayment	$23,768.71		
Prepayment-Insurance Deposit	$230,000.00		
Non Current Assets			
Loan-Carolin Macdonald	($150,000.00)		
Loan- Z4 Life PL	($311,375.00)		
Loan-Helen Tidy	($50,000.00)		
Loan-Credit Card Prepayment	($12,195.24)		
Loan-DoTalk	$65,000.00		
Fixed Asset			
Motor Vehicle-BENZ	$154,545.45		
Fixed Asset-Computer	$2,872.73		
Total Assets			$275,888.98
Liabilities			
Trade Creditors		$142,618.45	
GST Liabilities			
GST Paid	($47,241.27)		
Total GST Liabilities		($47,241.27)	
Total Liabilities			$95,377.18
Net Assets			$180,511.80
Equity			
Retained Earnings		$32,926.81	
Current Earnings		$147,584.99	
Total Equity			$180,511.80

This report includes Year-End Adjustments.

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130 Listed in the balance sheet as non-current assets, albeit conventionally they would be regarded as being liabilities, are included the following amounts:

"Loan-Carolin Macdonald	($150,000.00)
Loan- Z4 Life PL	($311,375.00)
Loan-Helen Tidy	($50,000.00)"

131 I raised the unusual nature of the balance sheet with counsel during the hearing: see T12.

132 Mr Allan suggested "*They are excluded from the balance sheet analysis, that is the total equity at the bottom is $180,000, they have been parked*": T12.

133 Both Mr Boxell and Tidy address the calculation of the amount of $225,375, which is referred to in the statutory demand.

134 Mr Boxell did so in the affidavit accompanying the statutory demand (CB 31), as noted above.

135 Mr Tidy did so in his 7 April affidavit. Using the balance sheet as a starting point, Mr Tidy indicates that the amount is calculated as follows:

(a) loan according to the balance sheet equals $311,375

(b) plus $34,000 in respect of the ZIPC equals $345,375

(c) less $120,000 in respect of the vehicle equals $225,375.

136 He goes on to state that the amount referred to does not represent the total amount owing from the company to the defendant, rather the amount "*represents the total amount admitted by Black Tie in its Balance Sheet as the outstanding loan from Z4Life and is the amount referred to in the statutory demand issued by Z4Life*": CB 50.

137 Mr Tidy states that on 4 January 2022 he was forwarded an email chain from Mr Gallagher who he says was also involved with the Zipett Project regarding discussions of a proposed block chain as a service agreement: CB 50, 305–309. He refers to an email from Ms Macdonald on 4 January 2021, which amongst other things, includes the end the words "*Billing can be taken off the Z4life loan*": CB 308.

Cross examination

138 The circumstances in which cross examination may be undertaken on an application to set aside a statutory demand is referred to by Rees J in *In the matter of Horizons (Asia) Pty Ltd* [2021] NSWSC 1690 at [3] – [6].

139 Each of Ms Macdonald, Ms Berlau, Mr Tidy and Mr Boxell were cross-examined on the application.

140 Ms Macdonald cross-examination readily accepted that her assertion that she had never had direct dealings with Mr Boxell and that all her dealings with the defendant with via Mr Tidy (CB 9) was false: T17.

141 I otherwise address some of the cross examination on the issues below.

Issues advanced

142 A variety of issues were advanced by the company in support of the application to challenge the statutory demand.

143 Because of issues regarding service of the originating process and the SEPA notice this affected how the issues for determination by the Court were framed by the parties: Company's written submissions dated 20 May 2020 (**PWS**) [1]-[3]; Defendant's written submissions (**DWS**) [2]-[4], [39]-[40].

144 The company apprehended that the service and SEPA notice matters might preclude it from relying upon certain of the Corporations Act provisions to set aside a demand.

145 The company sought to address these matters by the relief in the amended originating process seeking a declaration to the effect that the demand was null and void. The company sought to do this by relying upon the decision of Brereton J in *In the matter of International Materials & Technologies Pty Ltd* [2013] NSWSC 787; (2013) 282 FLR 362 (***IMT***).

146 The company raised arguments against the demand based upon what was said to be non-compliance with the PF. It is said that the document lacks the essential character of a statutory demand, within the meaning of s 459E(2) Corporations Act and failed in a fundamental way to comply with the form requirements prescribed by s 459E(2): PWS [1].

147 The PWS indicated that company seeks alternative relief, setting aside the demand on the hypothesis that it is valid, because substantial injustice would otherwise arise. That injustice is said to be due to defects within the same document citing s 459J(1)(a): PWS [2].

148 The PWS also stated that there are 'other' reasons why the demand should be set aside (s 459J(1)(b)) including the mentioned failure of the demand to follow the PF. The 'other' reasons were said to include problems in the demand's supporting affidavit: PWS [2].

149 A final basis for relief mentioned in the PWS [3] namely, "*that if the demand is not a nullity then it should be set aside, pursuant to s 459H, because there is a genuine dispute about the existence of the demanded debt*" was not pursued by the company at the hearing: T 9.39-.45.

150 Mr Allan in opening the case appeared to ground the nullity argument principally on what I describe below as the due and payable issue and address issue allegedly creating a misleading character of the demand inherent in the demand document: T5.

151 Mr Allan submitted that there is "*no need* [for me] *to go on and consider whether there are internal problems to the demand, or explore at any deep level the relationship between the parties*": T5.

152 Notwithstanding the PWS, Mr Allan conducted the case for the company on the basis that there are certain avenues of challenge to the demand that are closed off to him namely s 459G (genuine dispute) and s 459J(1)(a) (substantial injustice): T12.16-.20.

153 Essentially the issues were as follows:

(1) Did the demand served so lack the essential character of a demand such that it was a nullity (**nullity issue**) because of non-compliance with the PF in the following respects:

(a) the amount claimed was not due and payable (**due and payable issue**) and

(b) it incorrectly specified an interstate address for service (**interstate address issue**)?

(2) In consideration of the nullity issue does it matter whether the company was in fact mislead or not or is the alleged misleading character of the document per se sufficient to underpin the nullity argument (**misleading effect issue**)? See T6 (Mr Allan).

(3) If the demand was a valid demand, and not a nullity, was the Originating Process effectively served within the 21-day period (**effective service issue**)?

(4) What is the effect of the failure of the company to attach a SEPA notice (**SEPA notice issue**)?

154 In the event that I found that the demand is a valid demand Mr Allan submitted that there was some other reason for setting aside the demand pursuant to s 459J(1)(b). Mr Allan connected this with the SEPA notice issue: T7.1-.5. Essentially the company sought to address this by claiming that the defendant engaged in unconscionable conduct because of the operation of SEPA (PWS [6] and [33]-[36]; DWS [54]) and thus argued the defendant was estopped by relying upon the demand.

155 The "some other reasons" advanced by Mr Allan were the following matters (T6):

(1) the address issue;

(2) a complaint that the amount claimed collated several loans into a single sum in the demand such that the company could not identify the debt claimed (**separate debt issue**);

(3) the due and payable issue;

(4) Mr Boxell did not have appropriate knowledge to verify the demand but relied upon hearsay from Mr Tidy (**verification issue**); and

(5) the cumulative effect of the above.

156 The company also complained that the demand was incorrectly dated being 19 January 2021 (**date issue**). This submission was said to be not merely a question of what date Mr Boxell signed the document but alternatively to be connected to the amount due if it is taken as a "reference date" for the demand, asserting that as at 19 January 2021 according to Mr Tidy only $85,000 was owing as at 19 January 2021 rather than the $225,375 claimed amount: T57.19-.31.

157 The defendant submitted (DWS [4]) that if the demand is not a nullity and the originating process was effectively served within time, there were issues as to:

(1) whether "substantial injustice" would be suffered by the company if the demand is not set aside under s 459J Corporations Act (**substantial injustice issue**); and

(2) whether there is a genuine dispute about the existence of the debt under s 459H Corporations Act (**genuine dispute issue**).

158 The defendant also submitted that if the demand is not a nullity and that the originating process was not effectively served within the 21-day period required under s 459G, it is unnecessary for the Court to consider the substantial injustice issue and genuine dispute issue: DWS [4], [39]-[40].

159 As I have noted Mr Allan did not press s 459G (genuine dispute) and s 459J(1)(a) (substantial injustice) issues.

Genuine dispute principles

160 In *In the matter of AMP Life Ltd* [2018] NSWSC 855 (***AMP Life***), Gleeson JA stated at [35]-[37]:

> "[35] The approach which the court should take to the assessment of a genuine dispute is well-established. It is for an applicant to prove the existence of such a dispute, but the burden of proof is analogous to that which confronts a party on an application for an interlocutory injunction or summary judgment.
>
> [36] The function of the court is merely to determine the existence of a genuine dispute; it is not to determine whether the debt exists. The court does not weigh the merits of the dispute or engage in a balancing exercise in relation to competing contentions: *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290; (1993) 11 ACSR 362 at 366-367 (Hayne J); *Panel Tech Industries (Aust) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2)* [2003] NSWSC 896 at [18] (Barrett J).
>
> [37] The bar for establishing a genuine dispute is not set high; a "plausible contention requiring investigation" will suffice: *Eyota Pty Ltd v Hanave Pty*

> *Ltd* (1994) 12 ACSR 785 at 787 (McLelland CJ in Eq). Other expressions to similar effect can be found in the authorities including that the dispute is "real and not spurious, hypothetical, illusory or misconceived" and "perception of genuineness (or lack of it)": *Spencer Constructions* at 464 (Northrop, Merkel and Goldberg JJ); *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605 (Thomas J). The court's state of mind concerning the existence of a genuine dispute may range from a clear conviction that the debt does not exist to an opinion that the genuine dispute hurdle has only just been cleared: *Creata (Aust) Pty Ltd v Faull* [2017] NSWCA 300 at [29] (Barrett AJA, Gleeson and White JJA agreeing)."

161 The evidence required to establish a genuine dispute varies in each case, but a mere assertion that a debt is denied will be insufficient: *Tokich Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Ltd (in liq)* [2004] NSWSC 527; (2004) 185 FLR 130 at [20]-[25] per White J; *Hopetoun Kembla Investments Pty Ltd v JPR Legal Pty Ltd* [2011] NSWSC 1343; (2011) 87 ACSR 1 at [69]-[70] per Ward J.

Nullity principles

162 Cases in which a demand is so defective as to render it a nullity are extremely rare: F Assaf, *Assaf's Winding Up in Insolvency* (3rd ed, 2021, LexisNexis) (**Assaf**) [8.27] page 531-532. Assaf notes that any defects relied upon must be defects in the demand and not the supporting affidavit citing inter alia *Roberts v South East Asia Communications Pty Ltd* [2003] NSWSC 800 per Barrett J.

163 It is said that the key reason why there are so few cases where a demand is so defective so as to render it a nullity is because of the width of the definition of "statutory demand" in s 9 in that it includes a document that purports to be a demand served under s 459E: Assaf page 531-532 citing *2020 Construction Systems Pty Ltd v Dryka & Associates Pty Ltd* [2010] WASC 22 Beach J at [35]-[39].

164 As observed by Dart J in *SP Hay Pty Ltd (ACN 093 703 765) v David Gray & Co Pty Ltd (ACN 008 671 127)* [2019] SASC 6; (2019) 133 ACSR 504 (***SP Hay***) at [21]-[26] per Dart J there are a surprisingly large number of cases

dealing with demands which failed to provide an address for service in the correct state: at [22].

165 There are some cases where the alleged defect is gross. For example, *Sheslow v Diamond Rose NL* [2005] NSWSC 492; (2005) 54 ACSR 376 per Barrett J where the creditor used a completely incorrect form referring to "*section 123(1)(a) or 222(1)(A) of the Insolvency Act 1986*".

166 There are some cases where concessions are made. For example, in *Primespace Property Investment Ltd v Vienne Pty Ltd* [2015] FCA 326 (***Primespace***) the plaintiff conceded that it could point to no substantial injustice as a result of the statutory demands providing an address for service in the ACT, as opposed to in NSW: at [15].

167 In other cases such as *AMP Life*, the non-compliance with paragraph 6 of the PF (Form 509) did not have the effect of misleading AMP as to how to commence a valid application under s 459G to set aside the statutory demand. The application was validly served in Western Australia, together with a SEPA notice: at [25]. Gleeson JA thus found it unnecessary to determine the application by reference to the nullity submission.

168 Assaf at [8.31] states that the approach in *IMT* has not met with universal acceptance citing various judgments being *In the matter of Leasing Holdings Pty Ltd (formerly Charlie Lovett Pty Ltd)* [2015] NSWSC 771 at [15]-[28] per Black J (***Leasing Holdings***); *Primespace* at [14]-[15] per Griffiths J; *In the matter of Urban Solutions Group Pty Ltd* [2015] NSWSC 1940 (***Urban Solutions Group***) at [8]-[11] per Black J; *Slap Corp Pty Ltd v Civil, Infrastructure & Logistics Pty Ltd* (2017) 50 VR 542; [2017] VSC 168 at [37]-[75] per Randall AsJ; *AMP Life* at [25] per Gleeson JA; and *SP Hay* at [21]-[26] per Dart J.

169 Whilst in many cases the capacity for a demand which specifies an interstate address (or some other defect) to mislead is readily acknowledged by courts, what is not common is the acceptance of whether injustice has flowed from

that defect and the approach adopted by each court to try to avoid the injustice: see *SP Hay* at [22] per Dart J.

170 Assaf at [8.31] page 536 in particular refers to the decision of Black J in *Urban Solutions Group* at [3] in which His Honour stated:

> "I accept that in exceptional circumstances it may be that the Court may, where a valid application under s 459G of the Act is not before it, make some other form of declaration. In *Re International Materials and Technologies Pty Ltd* [2013] NSWSC 787, Brereton J took that course where there was an issue as to the validity of an address for service specified in a creditor's statutory demand. However, it seems to me that position is the exception rather than the rule, and cannot be permitted to become the rule, lest the time limit within which an application to set aside a creditor's statutory demand under s 459G of the Act must be brought is subverted and the legislative purpose which it is intended to achieve is defeated. …"

171 In *Leasing Holdings* Black J observed (at [16]) that whether the specification of an address for service outside that State is misleading, to the extent necessary to either invalidate the demand or give rise to substantial injustice will depend upon the circumstances in the particular case. I agree.

172 Further, in *Leasing Holdings* Black J (at [17]), after referring to the decision of Mahoney M in *Ultimate Manufacturing Pty Ltd v Lyell Morris Pty Ltd* (1995) 13 ACLC 1268, emphasised the need to focus on whether the defect was causative of an applicant's failure to make an application to set aside the demand.

173 In *Leasing Holdings* Black J found that the address defect issue whilst potentially having a capacity to mislead, was not misleading on the facts: at [26]. Accordingly, His Honour was satisfied that the winding up application in that case should be determined on the basis the demand was effective: at [28].

174 In *SP Hay* whilst Dart J found that the demand to be a valid demand, but to avoid an obvious injustice on the facts, injuncted the defendant from relying on the plaintiff's failure to comply with the demand: at [3].

175 Dart J stated that the approach to question of whether or not an injunction should be granted is simply whether, in the circumstances of the matter, it would be unconscientious for the defendant to rely on the plaintiff's failure to comply with the demand in a winding up application: at [35].

176 Dart J noted that often the critical issue will be the circumstances by which the right or entitlement was acquired: at [37].

177 Specifically, at [39] Dart J stated "As a result of the failure of the plaintiff to comply with the demand, the defendant has obtained a right or entitlement to rely on the presumption of insolvency in the foreshadowed winding up application. The question is whether, on the facts of this matter, it would be unconscientious for the defendant to do so. The answer to the question requires a consideration of the manner in which the right or entitlement was acquired and the injustice the exercise of it would cause the plaintiff."

178 There was no application for injunctive relief in this case.

179 In approaching the company's application for a declaration that the demand is a nullity I propose to adopt the approach taken by Black J In *Leasing Holdings* to consider whether the company was misled and focus on whether the defect was causative of the company's failure to make an effective application to set aside the demand.

Nature of dispute regarding a loan account

180 I have mentioned one odd aspect was the evidence outlining the parties' relationship to one another. Another odd aspect of the matter was an almost complete disconnect in the evidence regarding the whether there was a loan account between the company and the defendant.

181 I have set out above the defendant's case regarding a loan account.

182 The company’s submissions asserted that the evidence is that there is no Loan Agreement, and no repayments because there is no loan: T10.

183 Essentially, the defendant's case is that there was a loan account in place between the parties pre-existing and well before the consultancy agreement alleged by Ms Macdonald.

184 The debt claimed in the statutory demand explained in the context of the supporting affidavit of Mr Boxell bases the amount claimed in the realm of loan less some adjustment to the loan figures.

185 The affidavits of Mr Boxell (6 April 2022) and Mr Tidy (7 April 2022) provide detail in relation to the claimed debt of a balance of a loan account.

186 The affidavits of Ms Macdonald in February and March 2022 simply deny any reference to such a loan account, and as I have said bases the relationship between the parties in the context of the alleged consultancy agreement.

187 Forensically, the affidavit of Ms Macdonald affirmed 27 April 2022 was really the opportunity for her to grapple with the defendant's case in respect of the loan account beyond the denial of its existence.

188 However, Ms Macdonald's affidavit of 27 April 2022, rather than doing that, harks back to the consultancy agreement and sets out assertions in relation to that as I have referred to above. The affidavit does not seek to address evidence about the loan agreement. The affidavit does not seek to address and explain the company's balance sheet which provides the basis or foundation for the amount claimed in the demand.

189 Ms Macdonald does not dispute that the balance sheet was provided by the company to the defendant.

190 Whilst I am mindful that the threshold for establishing a genuine dispute is a relatively low one, the evidence from Ms Macdonald, in particular in her

affidavits in chief, really failed to grapple in any way with the documentary material demonstrating significant monies are undoubtedly advanced from the defendant to the company *prior* to what she asserts is the commencement of the consultancy agreement.

191 There was no evidence in the proceedings from the company's accountant Michael Wang. The fact he was the accountant was confirmed during the hearing: T24.

192 The question arises as to whether there is any inference that might be drawn from the failure to call any evidence from Mr Wang. In *In the matter of Harmon International Holdings Pty Ltd* [2019] NSWSC 413; (2019) 136 ACSR 94 Rees J addressed the issue of whether the Court on the hearing of an application to set aside a statutory demand could or ought to draw a *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inference: see [37]–[40].

193 Ms Macdonald was also cross-examined on her assertions regarding the claim that the company does not and never has borrowed any monies from the defendant and that the defendant has never advanced any monies to the company as claimed whatsoever: CB 9.

194 There are references to loan or loan account in the documentary evidence. They include:

(1) 26 May 2021 – a text message from Mr Tidy to Ms Macdonald: CB 193

(2) October 2021 – a text message from Ms Macdonald to Mr Tidy: CB 254

(3) 10 December 2021 – the Company’s balance sheet: CB 288

(4) 20 December 2021 – an email from Mr Tidy to Ms Macdonald: CB 293

(5) 20 December 2021 – an email from Ms Macdonald to Mr Tidy: CB 294

(6) 31 December 2021 – an email from Mr Gallagher to Ms Macdonald: CB 305-306

(7) 4 January 2022 – an email from Ms Macdonald to Mr Gallagher: CB 307-308

195 Ms Macdonald was asked (T19) regarding the text message in May 2021 appearing at CB 193.

> "*Q. That's a message that Mr Tidy sent to you, is that right?*
> *A. Yes.*
> *Q. And he refers there to 75K loan to you, do you see that?*
> *A. He refers to that, yes, I see that.*
> *Q. And are you saying that he was mistaken?*
> *A. Yes.*
> *Q. And you didn't respond to that, did you, correcting him?*
> *A. I don't know.*
> *Q. You certainly haven't put any response correcting him in evidence, have you?*
> *A. No, I don't believe so.*"

196 Ms Macdonald was asked regarding the text message in October 2021 appearing at CB 254, with particular reference to the use of the words "*loan account*" (T19-20):

> "*Q. The text message exchange between you and Mr Tidy?*
> *A. Yes.*
> *Q. You say, "We will just do an adjustment of 34K on loan account"?*
> *A. That's correct.*
> *Q. And that was referring to the $34,000 Z4Life advanced to you--*
> *A. No.*
> *Q. --in return for coins?*
> *A. No.*
> *Q. The adjustment on the loan account, when you say loan account you are referring to Black Tie's loan account with Z4Life, aren't you?*
> *A. We are referring to Black Tie's holding account that we used for token sale transfers.*
> *Q. That's not a loan account, is it?*
> *A. No, it's not a loan account.*
> *Q. No, But you chose to use the words "loan account" here because that's what it was, you were referring to Z4Life's loan account?*
> *A. Well, we believed it was a holding account for the receiving of share sales as Mr Tidy was contracted as a consultant to promote those share sales.*
> *Q. That's got nothing to do with a loan, does it?*
> *A. No.*"

197 Ms Macdonald was cross examined regarding the loan account references in the emails at CB 293 and 294 (see T20-21) and lastly regarding the email on 4 January 2022 at CB 307 (T22) as follows:

> "*Q. If you turn to page 307. This is another email from you on 4 January this year, do you see that? Can you see that?*
> *A. 4 January, yes.*
> *Q. If you turn the page the very last sentence says, "Billing can be taken off the Z4Life loan"?*
> *A. Yes, I see that.*
> *Q. And you still maintain that Black Tie never had an outstanding loan with Z4Life, is that seriously your evidence?*
> *A. That is my evidence, yep*".

198 I asked Ms Macdonald regarding the balance sheet (CB 288) produced by the company's accountant. Her evidence was as follows (T22-23):

> "*Q. There is a document at page 288 of the court book which is a balance sheet. Firstly, can you tell me what that document is?*
> *A. It's a balance sheet.*
> *Q. Did you prepare it or somebody else prepare it?*
> *A. My accountant prepares that.*
> *Q. And you see under the heading of "Non-Current Assets" there's reference to a loan?*
> *A. Yes.*
> *Q. For Caroline Macdonald $150,000?*
> *A. Yes.*
> *Q. What's your understanding of that?*
> *A. My understanding of that is we were using those accounts for token share sales that we were doing and - and that's how it was accounted for as a, like a holding account.*
> *Q. And there's reference to a loan Z4Life--*
> *A. Yes.*
> *Q. --PL and a figure of $311,375?*
> *A. Yes.*
> *Q. What's your understanding of that?*
> *A. We were using those as holding accounts as we were working through token sale transfers, as Mr Tidy was contracted as sales consultant by Black Tie to do token sales. He would often put the token sales in his own account and then it would transfer over to ours.*
> *Q. On the face of it it suggests that Black Tie Holdings owes Z4Life a sum of $311,375 as a loan?*
> *A. Yes, I see that now.*
> *Q. You say you see that now?*
> *A. Yes. After going through these - after receiving the stat demand and all the work that we've gone through I see that our accounting was inadequate at the time and we have accounts labelled on a balance sheet incorrectly.*"

199 Mr Fielder further asked (T23):

"*Q. Ms Macdonald, you referred to the non-current assets on page 288 of the court book recording accounts where money was taken in by Black Tie in exchange for tokens, is that right?*
A. Correct.
Q. Helen Tidy is listed there, isn't she?
A. Yes.
Q. Helen Tidy never got any tokens from Black Tie, did she?
A. No."

200 Whilst I am mindful of the nature of the proceedings, I consider that there is no genuine dispute that amounts were advanced from the defendant to the company as loans.

201 In this regard I have had regard to the following:

(1) The balance sheet referring to $311,375 as a loan (CB 288) is the company's own document.

(2) Ms Macdonald's affidavit of 27 April 2022 does not seek to address Mr Boxell's and Mr Tidy's evidence about the loan agreement. The affidavit does not seek to address and explain the company's balance sheet which provides the basis or foundation for the amount claimed in the demand.

(3) The references to loan or loan account in the documentary evidence above including from Ms Macdonald referring to a "*loan account*" (CB 254); "*Z4life loan*" (CB 294), "*Billing can be taken off the Z4life loan*" (CB 308) and failure to qualify messages from Mr Tidy referring to "*loan*" (CB 193) and "*adjust the loan account*" (CB 293).

202 I have considered the statement of Ms Macdonald in oral evidence that "*we have accounts labelled on a balance sheet incorrectly*": T 23. However, in light of the other matters and the absence of evidence from Mr Wang, I do not regard her statement as sufficiently creating a genuine dispute that amounts were advanced from the defendant to the company as loans.

203 The more problematic issue is the terms of the advances and whether they were due and payable. I will address this after dealing with the separate debt issue.

Separate debt issue

204 Mr Allan submitted the aggregation of the alleged loans into a single amount in the demand, without explanation, was a defect productive of a substantial injustice to the company (as) there was no way for it to know what each supposed loan was about: PWS [41]

205 Mr Allan elaborated in oral submissions that if there are several loans you need to break down the loan, each and every one you say is owing, and by not doing so, you create a defect in the demand: T6,44.

206 I am not persuaded that there is any lack of clarity regarding the amount claimed as a loan or how it was calculated.

207 There is clear reference in the documentary material to a loan account. The complete denial on the company's part of that simply does not fit in any plausible way with the documentary material.

208 Mr Allan on behalf the company sought to challenge the amount claimed in a number of ways. Whilst seeking to maintain denial of any loan account (which does not fit comfortably or plausibly with the documentary evidence) he pointed to the wording used in the schedule to the demand and in paragraph 3 of the supporting affidavit "*loan amounts*" necessarily should be construed as being plural and that traditional contract law would view amounts advanced between parties as being separate and discrete amounts rather than being essentially a loan balance at a given point of time which was going by the company to the defendant.

209 Mr Fielder submitted that whilst multiple sums were advanced by the defendant to the company over from January to October 2021, those

advances were all pursuant to the one loan agreement and were part of a running loan balance: DWS [35] citing Mr Tidy's affidavit at CB 47[13].

210 The evidence of Mr Tidy regarding the nature of how the loans were advanced was not challenged by Ms Macdonald in her 27 April affidavit (albeit that she had earlier denied the assertion of any loans).

211 The way the parties conducted themselves well prior to the alleged consultancy agreements coming into effect appears fairly clearly to have been a form of running loan balance in a similar way as to how a business running account operates.

212 It is clear that a loan balance between parties can form the basis for a statutory demand. The same is true of running accounts: e.g. *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in Liq)* [2015] VSCA 330.

213 I have outlined above how the defendant explains its case regarding the funding and the claimed amount.

214 The claimed amount is based on the company's balance sheet. Accepting the balance sheet is an odd document, it is the company's document. The adjustments to the $311,375.00 amount being the $34,000 amount and $120,000 amount are the subject of evidence involving Ms Macdonald. I do not accept there was no way for the company to know what the claimed debt related to. I do not accept the amount claimed involved plural debts such as might have required the defendant to separate out every advance in the schedule to the statutory demand.

Due and payable issue

215 The issue regarding whether amount claimed was due and payable is another intriguing aspect of the evidence.

216 Mr Allan directed attention to wording in paragraph 4 of the affidavit accompanying the demand stating that "*the loan amounts would be repaid on demand or upon a dissolution of a partnership between the Creditor and the Debtor Company*".

217 Mr Allan submitted that Mr Boxell did not mention any specific demand made nor any partnership dissolution date did not outline how loan arrangements might operate between partners, given that dissolution of the partnership could instantly create offsetting claims to a partnership's various assets: PWS [13].

218 There is an issue as to whether this ground can be raised. The affidavit filed with the originating process must support the application: s 459G(3)(a). It has been said that an applicant cannot rely on any ground for setting aside that demand which was not raised in the initial affidavit filed within that 21 day limit: Assaf at [5.41]-[5.45] discussing inter alia *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452. The Court has cautioned against describing this as the "*Graywinter* principle": *Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd* (2019) 99 NSWLR 397; [2019] NSWCA 60 at [40] per Bell P. However, it is accepted that an applicant may supplement an initial affidavit in support of an application to set aside a statutory demand by leading further evidence relevant to matters raised by the initial affidavit: Assaf at [5.48].

219 In relation to the company's submission that the alleged debt was not "presently due and payable." Mr Allan directed my attention to the decision of Finkelstein J in *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 16 ACLC 957 at 964:

> "Before I leave this topic there is one final matter that I should mention. It may be open to argument that where the only debt that is specified in a statutory demand is a debt that is not due and payable then the demand is not a statutory demand at all. It is true that a statutory demand is defined by s 9 to include a demand that purports to be a demand. That is, a demand that professes or claims to be a statutory demand will be a statutory demand for the purposes of the Corporations Law: see *Kalamunda* at ACLC 395-396;

> FCR 452. Nevertheless, there may be a case where a document that professes to be a statutory demand contains such a serious deficiency that it is impossible to treat the document as a statutory demand no matter what it professes to be: *Topfelt* at ACLC 24-25; FCR 238; *Kalamunda* at ACLC 395-396; FCR 452. In this case it is not necessary to decide whether the demand is a statutory demand because it has not been established that the debts were not due and payable when the demand was served."

220 Ms Macdonald's initial affidavit asserted the company does not and has never borrowed any monies from the defendant and that the defendant has never advanced any monies to the company as claimed whatsoever: CB 9.

221 Having regard to s 459G(3)(a), I do not consider that it is open to the company to assert that the claimed debt, which it denies, is not due and payable. Nonetheless, if I am wrong about that, I address the matter below.

222 Mr Allan cross examined Mr Boxell on the statement in paragraph 9 of the affidavit accompanying the demand to indicate that the wording "Despite demand, failed to remit repayment of the balance of the Loan Sum…" was not right in the sense that apart from the statutory demand no demand had been made. The questioning included the following (T52):

> "*Q. Where it says "despite demand", that is incorrect, isn't it, so far as it refers to anything other than the statutory demand?*
> *A. Yeah, that's correct, but we would have spoke to Black Tie and that's where it's gone from there.*
> *Q. You say you would have spoken but you don't recall any moment in time where Z4Life has demanded any money of Black Tie, do you, prior to the issue of the statutory demand in this case?*
> *A. Not to - yeah, that's probably correct. There was correspondence, as in phone calls, but that's as far as it went.*"

When are loans due and payable

223 In the context of s 459E, a debt is said to be due and payable when it is ascertainable, immediately payable and presently recoverable or enforceable by action: Assaf at [3.44] page 167 citing *In the matter of Elgar Heights Pty Ltd (No 1)* [1985] VR 657.

224 Generally, where monies are advanced from one party to another the monies are regarded as being instantly owing without necessity to actually make a

formal demand. The law in this regard was explained by Fullagar J in *Ogilvie v Adams* [1981] VR 1041 at 1043.

225 In order to prevent a cause of action for recovery arising instantly, the parties must expressly contract out of that situation by words clearly inconsistent with it: *Ogilvie v Adams* at 1043.

226 It then becomes necessary to look at the arrangements between the parties said to give rise to the loan agreement.

227 As I have outlined above, the discussion which was the genesis for funds being advanced took place as between Mr Tidy and Ms Macdonald prior to the company commencing what Mr Tidy describes as the Stage One Works: CB 46.

228 The initial discussion according to Mr Tidy followed a request from Ms Macdonald for the sum of approximately $85,000, which he states she indicated (CB 47[10]):

> "*which can be repaid at a later stage as a loan once the project has launched*."

229 Ms Macdonald in her 27 April affidavit did not deny that such a conversation occurred nor otherwise respond to it.

230 Mr Tidy indicated, as I have noted above, the project timeline and projected costs were broken into three stages, and that under the first stage of works the work done was to be completed by 30 March 2021: CB 46[7].

231 He stated that the reason that the Stage One Works was so important was because once this was completed, the App would be ready to launch and start generating income for Z4Life: CB 46[8]. He further indicated that the company has not completed the Stage One Works, because there are critical bugs in the Apps which have not been fixed: CB 46[9].

232 Mr Tidy states the project never launched and was seemingly abandoned (CB 46[9]). Mr Fielder submitted that the project had failed at that time, and the monies became then payable: T77-78.

233 Mr Allan directed my attention to the email from Mr Gallagher to Ms Macdonald dated 31 December 2021 (CB 306, paragraphs 10 and 13 of the email) submitting Mr Gallagher was "*saying the app has been approved*" and "*both parties to agree on a sign over date, some future date in 2022, not yet arrived, for the existing website, an app and platform as well as messaging to coin holders*": T86.27-87.2. Mr Allan submitted that "*I would say don't readily accept the idea that the project failed and that created a situation for a debt to be due and payable*": T88.1-.2.

234 However, the responsive email from Ms Macdonald (CB 307-308) does not indicate any agreement as suggested but does conclude with the statement "*Billing can be taken off the Z4life loan*".

235 In any event, the further discussions between Mr Tidy and Ms Macdonald by which she requested that the defendant loan the company further funds to pay wages, invoices and other expenses were according to Mr Tidy later separate requests for the lending of money apart from the $85,000 amount (CB 47[12]). Mr Tidy describes the advances as forming part of a running loan balance, which he calls the "Loan Agreement": CB 47[13].

236 The further monies lent as claimed by Mr Tidy are 11 payments totalling $443,000 lent as between 24 March 2021 and 20 July 2021 and further sums of $40,000 on 29 July 2021 and $100,000 on 29 October 2021.

237 Ms Macdonald in her 27 April affidavit did not deny that such conversations occurred nor otherwise respond to Mr Tidy's evidence regarding those sums.

238 Under conventional loan law those further sums were instantly repayable.

239 I do not accept the submission that some form of formal demand was required before the defendant could issue the statutory demand.

240 I do not accept that the argument that the claimed amount was not due and payable because there was no demand and made the demand a nullity.

Partnership and alleged dissolution

241 In relation to Mr Allan's submission regarding dissolution of partnership, it is understandable as to why he has raised this matter.

242 This is the wording that Mr Boxell uses in paragraph 4 of the affidavit accompanying the statutory demand.

243 There was some discussion between myself and counsel regarding this: T64.30-65.9, 78.1-.30.

244 Having regard to s 459G(3)(a) and noting that an applicant cannot rely on any ground for setting aside that demand which was not raised in the initial affidavit, I do not consider that it is open to the company to assert that the claimed debt is not due because of the existence of a partnership relationship such that the recovery of it would be precluded until there had been a formal termination of partnership and taking of accounts. Nonetheless, if I am wrong about that, I address the matter below.

245 If there had been what might be conventionally or properly described as a form of partnership between the defendant and the company that might assume some significance.

246 Ordinarily, where a partnership agreement has been terminated and the balance of the partnership agreement has not been ascertained or agreed-upon, any outstanding balance is not a debt capable of supporting a statutory demand. Rather, the respective parties have a right for the taking of an account: Assaf at [3.69] page 184.

247 However, apart from that curious reference in the affidavit accompanying the statutory demand, few of the objective materials before the Court explain how the relationship between the parties was in any way a partnership.

248 Mr Boxell whilst cross examined on not issuing a demand, was not cross examined on the expression "*dissolution of a partnership*".

249 Subject to the following, there is really nothing in any of the documentary material suggestive of any conventional or even ad hoc partnership.

250 The consultancy agreement put forward by Ms Macdonald (but disputed by Mr Boxell and Mr Tidy) contains mixed and confusing references to partnership.

251 Clause 19 at CB 200-201 negates a partnership relationship between the parties:

> "***19. CAPACITY/INDEPENDENT CONTRACTOR***
> *19. In providing the Services under this Agreement it is expressly agreed that the Contractor is acting as an independent contractor and not as an employee. The Contractor and the Client acknowledge that this Agreement does not create a partnership or joint venture between them, and is exclusively a contract for service.*"

252 On the other hand, clause 28 at CB 202 refers to terms being to "*the Business Partnership covered in this Agreement*" and "*the affiliate partnership*" neither of which terms are defined in the document:

> "*28. EXCLUSIVITY*
> *The Contractor acknowledges that it shall not at any time during the Term without express and written consent of the Client be concerned or interested either directly or indirectly in the sub-licensing, licensing, distribution, marketing, advertisement or publication of any other business and/or business platform similar to the Business Partnership covered in this Agreement, which is so capable of restricting, damaging or competing against the Business Partnership covered in this Agreement.*
> *The Contractor acknowledges that it is exclusive in this agreement with the Zipett Platform and Black Tie Holdings and cannot be in conjunction with any other industry-related businesses. This would be considered a breach of this agreement. If this breach occurs the affiliate partnership will be immediately terminated with all future revenue share earnings forfeited.*"

253 Importantly, none of the materials prior to the consultancy agreement refer to a partnership.

254 There is limited reference by Ms McDonald to "partnership" in an email dated 8 December 2021 (CB 283) as follows:

> "*Again, this partnership was built on the premise that Sales were Z4lifes responsibility, sales targets and budgets agreed and sales targets have not been met, there has been no restriction on Z4life working with Sales co. its that Sales co. has not wanted to work with Z4life.*
> *Z4life has at all times said it would work a corporate sales channel, this channel has now been set up as a Z4life channel with new partners not BT*
> *..*
> *..*
> *Z brand – now that Z4life is sectioning off with new partners (ZVCV) does Z4life want the Zipett Brand? I will be clear that I am not interested in partnering publicly with people I don't know and havent seen any documentaiton before websites go live, this all reflects on Z brand so if this wants to remain as Rob Tidy partner with whomever then we need to draw the line now rather than later*" (typographical errors in original)

255 In none of the body of Ms Macdonald's four affidavits does she ever describe the nature of the relationship between the company and the defendant as one of partnership.

256 In cross examination of Mr Tidy by Mr Allan on the question of payment of $40,000 a month (as referred to in the evidence of Ms Macdonald), Mr Allan put to Mr Tidy that Mr Tidy's assertion that the amount ($40,000 a month) was delay damages was wholly incorrect - which he denied. He further put that it was by way of sales retainer.

257 The questions were:

> "*Q. Can I suggest to you, sir, the suggestion in your affidavit that Black Tie was paying $40,000 a month in delay damages to Z4Life is wholly incorrect?*
>
> *A. No, it's not incorrect because--*
>
> *Q. Indeed, that $40,000 per month was being paid by way of sales retainer?*
>
> *A. No, it was not. It was because Caroline, as per the document you've got there in court, said that by last March it would be finished. I paid well above the $45,000 that was agreed because we went into a full partnership. I put*

the money up. She was to put in the expertise of her developer and her resources of her office and her BBX database of 110,000 users. So never once was there a retainer. Yes, I was to be paid $40,000 a month. It actually started at $1200 a day to cover my expenses because I was doing road shows up to Cairns on a weekly basis to promote sales. So yes, it was expenses. She agreed to that in front of Jim and myself and Kym who were the parties involved with Z4Life at the time."

258 The reference above by Mr Tidy to "*I paid well above the $45,000 that was agreed because we went into a full partnership*" is intriguing.

259 Mr Fielder submitted (T78) that "*I think that word might have been used by the witnesses without the intent for it to carry its full legal meaning. They were certainly involved in a project together but I don't say to your Honour that this is a case that involved a dissolution of a partnership.*"

260 I accept that submission. I do not think the comment provides a plausible basis for considering that the relationship between the parties was truly that of partnership or for finding that the amount claimed in the demand ought properly be viewed as being monies owed and referable to a partnership context, such that a balance between the company and the defendant could only ever be worked out following a formal termination of partnership and taking of accounts.

261 In oral submissions after the various deponents had been cross examined Mr Allan took up the point as follows:

"*ALLAN: … The other point that Mr Boxell did do in January was spell out, in a cursory way, the so-called relationship between the parties which leads to the debt which I say is owing. He intimates in paragraph 4 that the parties are in something of a partnership that might some day dissolve.*

My point there is - that is at page 404 of the court book - that there has been no dissolution of any partnership or joint venture or anything of that nature; and I will take you to the correspondence which shows that it is an ongoing or, shall I say, movable feast. In other words there has been no dissolution.

One can see correspondence in the court book from December and January of this year which shows the parties still trying to amicably trying to work out what to do next, given their respective ownership of parts of the Zipett coin and marketplace infrastructure. Indeed, it might be useful for me to actually not flag it for later, but show you the documents I'm talking about now.

…

ALLAN: Yes, he questions that; and I'm going to this document now for the limited purpose of saying to your Honour that, from this point forwards, we see correspondence indicating that there has been - as I speak, there has been no dissolution, identifiable dissolution of the parties' relationship, as would trigger a debt due and payable, if that makes sense.

Mr Boxell says there is a partnership, let that be so; whatever that quite means, we don't know. I'm saying let that be so.

HIS HONOUR: These are all important questions, aren't they? Because, if there is truly a partnership, then potentially, on one view, you only ever end up with an amount owing after formal dissolution of the partnership and taking of accounts and working out who owes what.

ALLAN: If there was a dissolution of a classic partnership here, there may be money instantly flowing from Z4Life to Black Tie, or half of what was owing from Black Tie to Z4Life might be immediately returned to Black Tie. You would have this complex division of assets. None of that has occurred, of course.

I mean, I would go even further and say it would be entirely [in]*appropriate for one partner to serve a statutory demand on another partner in the course of a dissolution of a partnership until everybody knew what the position was on the accounts, and, if it is something less than a type of partnership that equity recognises, if it's some sort of joint venture or contractual arrangement between the parties which in which assets and liabilities are shared or to which they have to each contribute, even then we are in a position now where that hasn't occurred and nobody knows the final resting place on the accounts, and a demand is again inappropriate.*

My limited point is that, from this date forwards, we see in the court book forward for about 50 pages the parties going backwards and forwards about what they are going to do next, and they still haven't worked it out. Therefore, when Mr Boxell says in his verifying affidavit a trigger event for the debts which you owe us is the dissolution of the partnership, I simply say the trigger has not occurred, there has been no trigger, and move onto the next point which is, well, has there been a demand? I cross-examined him squarely on that. Can you point me to a demand which Z4Life has made for the so called statutory demand and his answer, as I recall it in effect, is, no, I can't.

He went on to have some conversations, but that is hardly satisfactory evidence of a demand. Had there been a demand of any sort in this 400 pages of material, we would have seen it, but there is no none. So the debt is not due and payable."

262 However, there was a distinct lack of clarity regarding how it might be genuinely asserted that there was a partnership.

263 In the passage above Mr Allan talked about it almost in hypothetical terms submitting:

> "*Mr Boxell says there is a partnership, let that be so; whatever that quite means, we don't know. I'm saying let that be so.*" (T64.30)

264 The impression that I have is that the company has for the purpose of challenging the demand focussed upon the reference to dissolution of a partnership but without ever seriously making an assertion that there was such a partnership.

265 If this was a case of a partnership one would have expected Ms Macdonald to have made that evident in at least one of the four affidavits she put before the Court in support of the application. She did not. In the above context, I am not persuaded that the amount claimed as a loan balance is plausibly referable to a partnership relationship such that the recovery of it would be precluded or stymied until there had been a formal termination of partnership and taking of accounts.

Date issue

266 I am not persuaded that the date on the demand being 2021 was a defect such as to amount to a substantial injustice or to render the demand a nullity. There is no evidence that the company was misled or confused by the date issue.

Interstate address and misleading effect issues

267 In relation to the issue regarding the interstate address in the statutory demand, the defendant accepted that it was obviously a defect: DWS [24]. However, the defendant stated that it caused no injustice to the company.

268 The defendant argued that the company did not suffer any prejudice or injustice by reason of the address specified in the statutory demand because the company knew exactly where to send the documents and that it sent the

documents by post to the registered offices of both the company and the company's solicitor.

269 Further, the defendant submitted that it did so after the expiry of the 21 day period and also without attaching the required SEPA notice: DWS [24] & [25]. It submitted that the company's lateness in sending the documents was caused by its own doing and the attempt to serve by post at the time that it did, even to an address in New South Wales, would have been impossible by that time: DWS [26].

270 Mr Allan submitted that the non-compliance with paragraph 6 of the PF was positively misleading referring to the decision of Lander J in *Players Pty Ltd v Interior Projects Pty Ltd* (1996) 133 FLR 265 at 269 and the decision of Brereton J in *ITM* at 367 [16]: PWS/27, 29, 49. Mr Fielder in the DWS submitted as follows:

> "27. PS [22] and [27] and [41] also asserts that Black Tie was positively misled about SEPA requirements and the fact that the address in the demand was not the company's registered office. PS [30] asserts that Black Tie was "*deprived*" of information of an essential matter (presumably Z4Life's registered address) which misled Black Tie into making an ineffective application. This is simply not the case for the reasons above.
>
> 28. Black Tie relies on the decision in *Re International Materials & Technologies Pty Ltd* [2013] NSWSC 787. In that case, the Court found at [16] that the specification of the interstate address in the demand "entrapped" the debtor into failing to comply with SEPA and thereby precluding it from making a valid and effective application. The Court found this misled the debtor into making an ineffective application.
>
> 29. The rule in *Re International Materials* only applies in "*exceptional circumstances*" and does not apply here because, contrary to the facts in that case, service by post to *both* Z4Life's solicitor and Z4Life's registered office was not effected in time; *Kookaburra Educational Resources Pty Limited v MacGear Limited Partnership* [2021] FCA 797 at [72]. At [74] of *Kookaburra* the Court also noted that the proper forum for raising alleged defects in a demand, where an application to set it aside is brought out of time, is at the hearing of any winding up application.
>
> 30. In any event, there is no evidence before the Court that Black Tie was misled, which is fatal to Black Tie's argument; *Re Leasing Holdings Pty Ltd* [2015] NSWSC 771 at [25] and [27] (Black J). In fact, the

> evidence referred to in paragraph 25 above shows the opposite. It follows that the demand did not have the effect of misleading Black Tie about where to send originating process.
>
> 31. For those reasons, Black Tie's contention that the demand ought to be declared void due to the specification of an interstate address should be rejected."

271 Mr Allan in oral submissions submitted that the misleading character of the demand document is not altered by anything that the company or its solicitor did at the time, rather misleading character is inherent in the document itself: T5.20–.23.

272 As noted above I consider I should apply the principles in *Leasing Holdings* and consider whether the company was misled and focus on whether the defect was causative of the company's failure to make an effective application to set aside the demand, as distinct from some fault of the company.

273 I accept that the misstatement of the address is, as acknowledged by the defendant, a defect.

274 I also acknowledge that the interstate address listed was not the company's registered office.

275 However, I am not satisfied that the defect was such a fundamental or misleading character as to render the statutory demand as a nullity.

276 There was no evidence by the company or Ms Macdonald that the company had been misled. Even on the company's own evidence when one looks at the disputed consultancy agreement and the disputed termination document, both documents indicate that the company and Ms Macdonald were well aware of the registered office of the defendant long before the demand was served: CB 198, 202 and 259.

277 Further, I am not satisfied that there was such substantial injustice as would provide a reason for setting aside the demand.

Verification issue

278 The company claimed the demand and the supporting affidavit was that it was said that it lacked appropriate verification.

279 Mr Allan cross examined Mr Boxell regarding the amount in the statutory demand and how that was calculated by reference to the figure of $311,375 in his affidavit of 6 April 2022 and the affidavit in support of the statutory demand. In particular cross examination focused on paragraph 9 of Mr Boxell's 6 April affidavit that the loan amounts were advanced in the period from November 2020 to December 2021.

280 The cross examination confirmed (as the affidavit had indicated) that the information had been given to Mr Boxell by Mr Tidy. The cross examination then proceeded to explore that fact by reference to questions as to whether the first loans were made in November 2020 and then in December 2020 to which Mr Boxell indicated that they were: T46. His answer is at odds with the schedule produced by Mr Tidy at CB 48 which indicates the amounts advanced in particular with the initial $85,000 loan amount occurred first in January 2021.

281 The tenor of the cross examination on this and in relation to the affidavit supporting the demand was that Mr Boxell was reliant upon Mr Tidy for the information therein and that accordingly the amounts were not appropriately verified. The cross examination proceeded for some time: see T46–51.

282 Whilst I am not convinced that Mr Boxell was, at the time of the cross examination precisely or correctly across the calculation of the amount in the statutory demand and the figures for the detail in his affidavit supporting the demand, he did state that he "*went through every bank statement and had a look at them*": T51.1.

283 When it was put to him that he did not look at the statements at the time of the January 2022 supporting affidavit he accepted that "*I probably didn't at that time*": T51.16–.18.

284 Accepting that, I was left with the impression that Mr Boxell had at least at some time prior looked at the bank statements. In any event, I accept his evidence that both from the affidavit accompanying the demand and oral evidence that he relied upon information received from Mr Tidy.

285 Mr Allan by reference to the decision of Barrett J in *Faji (Australia) Constructions Pty Ltd v AC Professional Accounting Pty Ltd* [2009] NSWSC 180 (***Faji***) submitted that the claimed amount in the demand had not been appropriately verified. Barrett J at [23]–[29] stated the following:

> "[23] Having regard to that content, it is clear that the deponent solicitor does not identify the source of the knowledge which he considers enables him to make the statements he makes. It may be that he had a copy of the memorandum of fees referred to in the schedule to each statutory demand. But that would have given him no insight into the dealings between the Faji companies and the defendant. Beyond actual sight of the invoices or memoranda of fees, he could only have relied on what he was told by someone — quite possibly Mr Chen; so that when he says, for example, that he believes that the amount specified in the demand is due and payable, he can only be reporting something that he was told by someone else, namely, that the amount became due and payable and that it has not been paid. His own belief cannot be anything but a reflection of someone else's belief communicated to him.
>
> [24] In para 3 of the document the solicitor says, 'I believe these matters to be true'. Again, his position as a solicitor could not be expected to give him independent knowledge of anything enabling him to say that.
>
> [25] In para 4, he deposes to a belief on his part that there is no genuine dispute about the existence or amount of the debt. That presupposes an insight on his part into communications and discussions between the principals (that is, the defendant company and each of the Faji companies) from which the absence of allegations of dispute by the Faji companies is entirely absent. As with the earlier statements, he can have known nothing of these matters except what he was told by his client.
>
> [26] In the *Portrait Express* case (above) at p 758, Bryson J saw fit to observe that the court must "register clearly and appropriately the importance of the requirement of verification of demands".
>
> [27] In *B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Pty Ltd* (1994) 15 ACSR 433, McLelland CJ in Eq referred to the requirements

that are now imposed by a combination of r 5.2(a) of the Supreme Court (Corporations) Rules 1999 and paras 4 and 5 of Form 7 prescribed by those rules. After referring to the specifications in predecessor rules concerning affidavits for s 459E(3) purposes, his Honour said at pp 435–436:

> It is important in this regard to bear in mind that the relevant matters include not only a belief as to the existence and amount of the debt, but also a belief as to the absence of any genuine dispute about the existence or amount of the debt. The express requirement in the rule that the person making the affidavit depose to his or her belief that there is no genuine dispute is a significant mechanism for filtering out cases where there is in fact such a dispute, so as to prevent such cases from reaching the court on such an application as the present, with a consequent waste of time and resources. This mechanism would be substantially weakened unless a person likely to have personal knowledge of the existence of a dispute if there is one makes the affidavit. A statement of a belief that there is no genuine dispute based solely on hearsay is unlikely to have anything like the same degree of reliability. I therefore do not regard what has occurred in the present case as a merely technical breach of the rules.

[28] These observations of McLelland CJ in Eq caused me to say in *Standard Commodities Pty Ltd v Société Socinter Département Centragel* [2005] NSWSC 254 ; (2005) 54 ACSR 489 at [13]:

> McLelland CJ in Eq regarded the hearsay nature of the statements in the affidavit as constituting 'some other reason' for setting aside the statutory demand under s 459J(1)(b). His Honour expressed a like opinion in *L M & W J Taylor Pty Ltd v Armour Timber & Trading Pty Ltd*, above. In *Hamilhall Pty Ltd (in liq) v A T Phillips Pty Ltd* (1994) 54 FCR 173; (1994) 15 ACSR 247, Branson J referred to the need for the s 459E(3) affidavit to be made by someone who could depose to the relevant matters from his or her own knowledge. In *Delta Beta Pty Ltd v Vissers* (1996) 20 ACSR 583, Nicholson J said, in relation to an accompanying affidavit made by a solicitor, that 'the hearsay assertions of the deponent bring to the statutory demand a verisimilitude to which it is not entitled'. His Honour regarded this as a sufficient 'other reason' to set aside the demand under s 459J(1)(b).

[29] The affidavit in this case makes it clear that the deponent did not have first-hand knowledge of the matters to which he deposed. The sworn assurance that the recipient of a statutory demand is entitled to expect as to the essential substance of the demand, the existence of the debt, its quality as a debt due and payable, and the absence of genuine dispute about its existence or amount, was denied the Faji companies in this case. No one who might have been expected to have first-hand knowledge of those matters — for example, a company officer with access to the books and records of the defendant company — was put forward by the defendant company to give that sworn assurance."

286 Mr Fielder submitted that the decision of Barrett J was not an obstacle in the case.

287 He noted that in *Faji* the demand had been verified by a solicitor who did not identify the source of his knowledge.

288 He further noted that in this case Mr Boxell is the sole director of the company and as most directors would obtained at least some of their information from their executives and employees: T80–81.

289 I am satisfied that on the facts of this matter the affidavit was appropriately verified for the purposes of the statutory provisions by Mr Boxell relying partly by his own inquiries and partly on Mr Tidy who was clearly involved in the dealings between the company and the defendant.

Effective service issue

290 The only method of service in the case which was claimed to be arguably effective was email service.

291 In 2020, the Corporations Act was amended by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) with effect from 16 December 2020 (the **2020 Reforms**). The 2020 Reforms expanded the scope for electronic communication of documents required or permitted to be given under Chapter 5 dealing with External Administration.

292 I was referred to the decision of Cheeseman J in *In the matter of Bioaction Pty Ltd* [2022] FCA 436 (***Bioaction***) dealing with the 2020 Reforms.

293 Section 600G was amended as part of the 2020 Reforms.

294 The 2020 Reforms introduced ss 105A and 105B into the Corporations Act which establish statutory presumptions in respect of the time and the place where electronic communications are sent and received: *Bioaction* at [52].

295 The company relied upon provisions in ss 105A, 105B and 600G Corporations Act to establish effective service of the originating process. Those provisions are relevantly as follows:

"**105A When is an electronic communication *sent* and *received***

(1) This section applies in relation to an electronic communication unless otherwise agreed between the originator and the addressee of the electronic communication.

(2) An electronic communication is ***sent***:

(a) when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator; or

(b) if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator—when the electronic communication is received by the addressee.

Note: Paragraph (b) would apply to a case where the parties exchange electronic communications through the same information system.

(3) ..

(4) An electronic communication is ***received*** when the electronic communication becomes capable of being retrieved by the addressee at the addressee's nominated electronic address.

(5) It is to be assumed that an electronic communication is capable of being retrieved by the addressee when it reaches the addressee's nominated electronic address.

(6) Subsection (4) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 105B.

105B Place where an electronic communication is sent or received

(1) This section applies in relation to an electronic communication unless otherwise agreed between the originator and the addressee of the electronic communication.

(2) An electronic communication is taken to have been sent:

(a) if the addressee is a company or registered scheme and the originator is a member of the company or registered scheme—from the address of the originator as contained on the register of members of the company or registered scheme at the time the communication is sent; and

(b) if the originator has a registered office and paragraph (a) does not apply—from the registered office of the originator; and

(ba) if the originator has a principal place of business in Australia and neither paragraph (a) nor (b) applies—the address of the originator's principal place of business in Australia; and

(c) otherwise:

(i) from the most recent physical address nominated by the originator to the addressee; or

(ii) if the originator has not nominated a physical address as mentioned in subparagraph (i)—from the originator's usual residential address in Australia.

(3) An electronic communication is taken to have been received:

(a) if the originator is a company or registered scheme and the addressee is a member of the company or registered scheme—at the address of the addressee as contained on the register of members of the company or registered scheme at the time the communication is received; and

(b) if the addressee has a registered office and paragraph (a) does not apply—at the registered office of the addressee; and

(ba) if the addressee has a principal place of business in Australia and neither paragraph (a) nor (b) applies—the address of the addressee's principal place of business in Australia; and

(c) otherwise:

(i) at the most recent physical address nominated by the addressee to the originator; or

(ii) if the addressee has not nominated a physical address as mentioned in subparagraph (i)—at the addressee's usual residential address in Australia.

600G Electronic communication of documents

(1) Subject to subsection (7), this section applies to any document that is:

(a) required or permitted to be given to a person (the ***recipient***); or

(b) required to be signed by a person;

under:

(c) this Chapter; or

..

..

Giving a document

(2) The document may be given to the recipient by means of an electronic communication.

(3) The document may be given by giving the recipient (by means of an electronic communication or otherwise) sufficient information to allow the recipient to access the document electronically.

(4) However, an electronic communication or electronic access may only be used if, at the time the electronic communication is used or information about the electronic access is given:

(a) it is reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference; and

(b) there is a nominated electronic address in relation to the recipient.

296 It was submitted that where s 600G(2) permits that a document may be given to the recipient by means of an electronic communication that that provision applies because the provisions regarding statutory demands sit within Ch 5 of the Corporations Act dealing with external administration: s 600G(1)(c).

297 Section 105A(4) provides that an electronic communication is received when the electronic communication becomes capable of being retrieved by the addressee at the addressee's nominated electronic address.

298 The expression "nominated electronic address" in relation to the addressee of an electronic communication is defined in s 9 Corporations Act:

"***nominated electronic address***, in relation to the addressee of an electronic communication, means:

(a) the most recent electronic address nominated by the addressee to the originator of the electronic communication as the electronic address for receiving electronic communications; or

(b) if:

(i) the addressee has nominated an electronic address as mentioned in paragraph (a) and the originator knows, or there are reasonable grounds to believe, that the address is not a current electronic address for the addressee; or

(ii) the addressee has not nominated an electronic address as mentioned in paragraph (a);

> an electronic address that the originator believes on reasonable grounds to be a current electronic address for the addressee for receiving electronic communications."

299 The defendant submitted that Ms Behlau's email address was not a nominated electronic address because the address was not nominated by Ms Berlau as "addressee" to "the originator" (said to be Mr Sarai). I accept that that is technically correct, having regard to paragraph (a) of the definition.

300 However, Mr Allan in his written submissions in particular relied upon paragraph (b) of the definition to the effect that the nominated address can be an electronic address that the originator believes on reasonable grounds to be a current electronic address for the addressee for receiving electronic communications: PWS [17].

301 The letter from SGL dated 20 January 2022 to the company clearly indicates that contact regarding the matter should be directed to Ms Berlau and provided an email address for Ms Berlau: CB 398.

302 The company and more particularly Mr Sarai in his email communication with Ms Berlau on 17 February 2022 (CB 329) and more particularly on 21 February 2022 in serving the originating process (CB 356, 359) had, I find reasonable grounds to believe that the email address was a current electronic address for the company for receiving electronic communications – particularly when Mr Sarai referenced the defendant's solicitor's letter dated 20 January 2022 in his email dated 17 February 2022.

303 In those circumstances, I am satisfied that, subject to the SEPA issue, service by email was a permissible and effective form of service in order to engage the statutory provisions for the service to be effected within a 21 day period.

SEPA notice issue

304 It is common ground that the company failed to attach the requisite SEPA notice to its originating process.

305 There is authority to the effect that failure to comply with SEPA means that service has not been affected regardless of whether the originating process was received within the prescribed 21 day period. Mr Fielder (DWS [53]) cited *Elan Copra Trading Pty Ltd v JK International Pty Ltd* [2005] SASC 501; (2005) 56 ACSR 416 at [46].

306 The comments of White J in *Elan* at [46] appears directed to the issue of prejudice.

307 Nonetheless White J at [27] does indicate that by reason of s 16 of SEPA service is effective only if copies of such notices as are prescribed are attached to the process served.

308 Reference was made to the decision of Brereton J in *IMT*. His Honour does not expressly deal with s 16 of SEPA. However, from his Honour's discussion of the submissions in relation to SEPA at [5]-[9], there is nothing in that discussion suggestive that the provisions of s 16 are not mandatory or that failure to comply with them is not required. White J in *Elan* in discussing the SEPA provisions confirms that the provisions, in particular the requirement in s 16 for the attachment of a prescribed notice, are mandatory and failure to comply with them renders service ineffective: at [27]-[31].

309 There is no suggestion in the evidence that there was any agreement between the parties to the effect that compliance with s 16 of SEPA was not required and no suggestion that any such term could properly be implied.

310 In *Elan* White J (with whom Doyle CJ and Perry J agreed) rejected any argument of waiver on the facts: [34]–[43].

311 White J also found that the appellant was unable to establish any detrimental reliance necessary to support the waiver or election argument: at [41].

312 The company argued that in the event that the Court was satisfied that the statutory demand was a valid document (i.e. not a nullity), and that it did not

attach the relevant SEPA notice, that the Court should in its equitable jurisdiction consider that the defendant was estopped from taking the point, or alternatively, it seems argued that under the provisions of s 459J it should be otherwise set aside.

313 Is appropriate to set out the written submissions in this respect from the company's submissions as follows:

> "**The demand should otherwise be set aside (s 459J *Corporations Act*)**
>
> 31. The analysis of this case should end at this point. There is no statutory demand in existence whose substance needs to be reviewed. But Z4Life has recently served affidavits pressing the debate over the demanded $225,375. The debate is based in the faulty premise that there is a valid demand. It is therefore necessary to only briefly address it, so as to cover the alternative relief sought in Black Tie's amended originating process at prayers 1B, 1C and 1.
>
> 32. The debate arises, however, only if the court is satisfied that it has before it a valid process or application by Black Tie to set aside the demand. Z4Life says that Black Tie's originating process did not attach the relevant *SEPA* notice that is required in any interstate service of process. It says attaching the notice was vital to making a valid application within 21 days. It says Black Tie cannot therefore get orders now setting aside the demand on the basis of a genuine dispute or offsetting claim (Sarai, Annexure 9).
>
> 33. This contention overlooks the equitable jurisdiction of the court, and its ability to estop a creditor from taking a legal point which it would be unconscionable for it to rely upon in the circumstances of the case. There is a line of cases which indicate that the court has a robust ability to stop a creditor, before any winding up petition is brought, from unconscionably using the black letter of company law as a way to take advantage of a debtor who genuinely disputes a debt.
>
> 34. The ability of the court to act in this matter is seen in *Woodgate v Garard* (2010) 219 FLR 339; [2010] NSWSC 508 at 349 [44](iii) and *Re Mangraviti Pty Ltd* [2010] NSWSC 61 [10] – [14]. In those cases the court discussed (and in *Mangraviti* held) that a demand could be set aside, pursuant to s 459J(1)(b), even if the recipient had not applied to set aside the demand within 21 days of service.6 The robustness of this power is then seen in cases like *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* (2005) 157 ACTR 22; [2005] ACTA 3,7 where the ACT Court of Appeal discussed its power in terms or unconscionability, or abuse of process, in the circumstances surrounding the service of a statutory demand (at 26 [26] – [30]).
>
> 35. In *Elan Copra Trading Pty Ltd v JK International Pty Ltd* (2005) 195 FLR 229; [2005] SASC 501 White J (with whom Doyle CJ and Perry

P agreed) said, in *obiter dicta*, that it was doubtful whether *SEPA* requirements could be waived by a creditor. They distinguished waiver, however, from estoppel by representation, which they expressly did not consider (at 240 [38]). In *Arcade Badge*, above, the court (Crispin P, Gray and Marshall JJ) also said they would 'leave for another day issues relating to the nature and extent of the court's powers to prevent injustice in circumstances where a representation by a creditor has induced a company not to apply at all to set aside the statutory demand within the 21-day time limit' (at 27 [35]). Both cases, in other words, left open the question of equity using its remedial power to prevent unconscionable behaviour.

36. The question at hand is whether an estoppel can operate to prevent Z4Life saying there was no *SEPA* notice and thus no application to set aside the demand based on a genuine dispute. The answer is that there is no reason why a superior court, invested with a jurisdiction in equity and in company law, cannot apply an equitable principle to a company matter. If it can, and *Woodgate, Mangraviti* and *Arcade Badge* suggest so, as does *Rochester Communications Group Pty Ltd v Lader Pty Ltd*,8 then it can estop a creditor from saying that no *SEPA* notice means the court cannot hear about a genuine dispute over the debt.

37. The *SEPA* notice, which is attached to these submissions, refers to the nature of the originating process, the authority of *SEPA*, the right to see a transfer of the proceedings to another State or Territory, and the requirement to file an appearance in the court if the claim in the demand is contested. The form recommends that its recipient take legal advice. It is evidently drafted for a lay audience. One might fairly say, in this case, that a creditor who uses its lawyers' address as the place for service is not a creditor who needs a notice recommending that it take legal advice.

38. Yet that is the stance Z4Life is adopting. Having invalidly recorded its lawyers' address in the demand, contrary to *SEPA*, Z4Life now seeks to capitalise on that fact by saying those lawyers did not receive the requisite *SEPA* notice.

39. Z4Life's position is manifestly unconscionable. When it has not given Black Tie a place for service within New South Wales of the process, nor any warning about the *SEPA* requirements in the covering letter to its demand, and when it has deleted from the Form 509H template the words 'insert the address for service of the documents in the State or Territory in which the demand is served on the company' to replace them with a Queensland address, such that the demand gives no hint that interstate service is legally wrong, then the Court can and should use an equitable remedy to prevent a legal point being unconscionably taken. In this case, Z4Life should be estopped from saying that the demand did not attach a *SEPA* notice. Expressed more fully, it should be estopped from saying there is no valid application to set aside the demand for want of a *SEPA* notice.9

40. On that approach the court is then able to consider whether the demand is unacceptably defective, in the sense that defects within the

document will cause a substantial injustice unless it is set aside (section 459J(1)(a)).

41. Z4Life's decision to record its solicitors' address in Queensland as the address for service, without any qualifying information, created a defect productive of substantial injustice to Black Tie, because it misled it into serving process at the wrong interstate address (and is so serious as to in truth render the demand a nullity, as discussed above). The aggregation of the alleged loans into a single amount in the demand, without explanation, was also a defect productive of a substantial injustice to Black Tie — there was no way for it to know what each supposed loan was about (*Condor Asset Management*, above, at 229 [14] – [29]). The verifying affidavit was also apparently based on hearsay (discussed below). Thus the same reasons and more that lead to the demand being found a nullity also mean that it would have been liable to an order setting it aside, were it not a nullity."

314 In oral submissions Mr Allan stated that T88:

> "*The last thing I say is that my friend says I can't outflank the SEPA requirement by pleading an estoppel or utilising s 459J, but the authority he uses for that point is Brereton J's decision in Cummins in which his Honour referred, in turn, to the Elan Copra decision of the South Australian Supreme Court Full Court, which I refer to at length in my written submissions, in which the Court was only dealing in obiter with the question of waiver and didn't actually touch upon the topic of estoppel*."

315 During the course of the oral argument I asked Mr Allan about how the equitable jurisdiction would operate. The discussion proceeded as follows:

> "*HIS HONOUR: What equitable jurisdiction am I exercising or would I be exercising as you have described, how does that interact with the statutory scheme?*
>
> *ALLAN: Well, it--*
>
> *HIS HONOUR: I mean Equity has notions - I am not suggesting this is necessarily this case - but sometimes Equity deals with cases where there's a fraud on a power or something like that but what would be my equitable jurisdiction to - how do you put that argument?*
>
> *ALLAN: I can't give you more rigour on that than saying that you would be acting to prevent an injustice and by the conscience of the defendant, and the reason I can't go beyond those key concepts is because--*
>
> *HIS HONOUR: Has there ever been a case where a judge has used notions of unconscionability in Equity to do what you are trying to do?*
>
> *ALLAN: So you have got the Arcade--*

HIS HONOUR: This is the estoppel case.

ALLAN: That's the estoppel case.

HIS HONOUR: Is that the only case on it?

ALLAN: No. RK Badgett is one example where they said "we'll leave the question of estoppel for another day". You've got the Rochester case which I refer to in my written submissions - I can give you a copy of it - where a Full Court of the Federal Court said estoppel is a possibility. You've got the New South Wales--

HIS HONOUR: What sort of estoppel is it?

ALLAN: That was an estoppel by representation in that case, which they were considering but didn't actually decide. It said that the concept of estoppel was available, which brings me back in a way to what I said at the beginning which was that estoppel as a rule of evidence in a way and this Court's ability to admit evidence or not of key points such as whether or not the notice in fact as a matter of evidence had a SSEPA notice attached to it.

I was going to say this as a final thing because I have to and I should that the New South Wales Court of Appeal has said that there is no room for estoppels which extend the time period over the Corporations Act. Now, at first blush that might look like exactly a point against me, square against me. That was Bathurst CJ who gave that decision in Boss in 2018, and I have got a reference in my case book to that.

But his Honour and the Court of appeal weren't dealing there with a SSEPA situation, which is what we are dealing with here, and my basic contention here is that when the topic is whether or not a person has been served whether service has been effective, we are not really talking about the Corporations Act and the winding up schemes, we are talking about questions of service, and that seems to be a fertile ground for saying, well a party can hardly come to Court and say they haven't been served or served properly when they are here and they are the people who caused the problem in the first place. That's why I differentiate my position from what the Chief Justice said about estoppels in the Corporations Act. That's the long tale of my case.

So in summary, your Honour, a declaration and a nullity is not a situation which my friend suggests requires exceptional circumstances. He uses a decision of Black J as support for that supposed rule but Black J in the Leasing Holdings decision, which I happen to actually put in my written submissions because it actually helps my case, was dealing with a situation in a winding up application there, he wasn't dealing with a statutory demand case, and he was dealing with a situation in which the recipient had not decided to try and challenge the statutory demand in the way that I am challenging it now. So his Honour said "well, look, how can you seriously tell us in a winding up application that you were misled at the time if you did nothing about it".

So that was the context in which Black J used the phrase "exceptional circumstances". I would say the preferable approach is the one which

> *Brereton J took, which is to say look at all these various possibilities for when the objective character of the document is fatal because it essentially lacks the essential ingredients for demand and indeed can be seen in an objective manner to mislead the recipient; and I emphasise, I've said more than once that was objective manner because his Honour as I read out said that there was no necessary intent on the part of the drafter to mislead the recipient but nonetheless that was the effect of the document at the time it was made.*"

316 Mr Fielder in his written submissions addressed the estoppel argument at [54]-[59].

317 Essentially, he indicated that based on the decision in *Elan* the requirements of SEPA cannot be waived or outflanked.

318 He further argued that there was no detrimental reliance sufficient to support the estoppel argument because the company served the documents to the defendant's registered office, albeit out of time and without attaching the SEPA notice: PWS [56].

319 Mr Fielder argued that the decisions in *Joe Mangraviti Pty Ltd v Lumley Finance Ltd* [2010] NSWSC 61 and *Woodgate v Garard Pty Ltd* [2010] NSWSC 508; (2010) 239 FLR 339 both concerned cases of setting aside a statutory demand where "fair notice" of the demand had not come to the attention of the debtor and indicated that that did not arise on the facts here: DWS [57]. I accept that.

320 Mr Fielder further stated that a recent decision of Black J had considered a principle from *Mangraviti*, and expressly found that he should not follow it, citing *In the matter of LDW Constructions Pty Ltd* [2019] NSWSC 1159 at [12]. In *LDW Constructions*, Black J stated at [6]-[14]:

> "[6] Mr Blackman fairly accepts the jurisdiction does not exist under s 459G of the Act, so far as the application was not brought within 21 days of the service of the Demand at the Company's registered office. That service was compliant service for the purposes of s 109X of the Act. Mr Blackman in effect submits that there is a freestanding jurisdiction to set aside the Demand, where an application is not within time for the purposes of s 459G of the Act, arising under s 459J of the Act.

[7] Mr Blackman relies on four cases for that submission. The first, which should not be treated as authority for that proposition, is the decision of Barrett J in *Faji (Australia) Constructions Pty Ltd v AC Professional Accounting Pty Ltd* [2009] NSWSC 180 ('*Faji*'). His Honour there observed that the grounds for setting aside a creditor's statutory demand exist quite independently under s 459J of the *Act* of whether a genuine dispute as to the debt has been shown. That proposition is plainly correct, and the authorities demonstrate that a creditor's statutory demand can be set aside for some other reason although no genuine dispute is established. That case is not, however, authority that s 459J is available when an application is outside time under s 459G of the *Act* because, as Mr Blackman fairly accepts, that was not the position in *Faji*. His Honour was doing no more than observing that, where an application to set aside a creditor's statutory demand was filed within time, and jurisdiction was established under s 459G of the *Act*, s 459J could be relied on although a genuine dispute was not established.

[8] In a subsequent decision of Palmer J, that proposition seems to have been somewhat expanded, to permit an application to set aside a creditor's statutory demand to be brought under s 459J of the *Act*, where there was a lack of "fair notice" of the demand, even in circumstances that the application to set aside the demand was out of time: *Mangraviti Pty Ltd v Lumley Finance Ltd* [2010] NSWSC 61 ('*Mangraviti*'); note also *Woodgate v Garard Pty Ltd* [2010] NSWSC 508, to which Mr Blackman referred, but to which I was not taken in submissions. That case was applied in the Supreme Court of the Australian Capital Territory by Master Harper in *Piast Enterprises Pty Ltd v Toorallie Holdings Pty Ltd* [2010] ACTSC 116, where Master Harper observed at [16] that:

> 'Notwithstanding the apparent inconsistency with s 459G as to the essential requirement of an application to set aside a statutory demand that it be made within twenty-one days of service of the demand, I take the view that as a Master I should follow the decision of Palmer J. I am accordingly persuaded that the court has the power to set aside the demand under s 459J despite the fact that application was not made within twenty-one days of service of the demand.'

[9] Plainly, Master Harper was there not necessarily approving the reasoning of Palmer J, so far as the introductory words of his observation pointed to a potential difficulty with it, but fairly following that decision where it was a decision of a Judge of this Court.

[10] Subsequently, the Court of Appeal has had occasion to consider the scope of s 459G of the Act, and the policies which it serves, in *Chief Commissioner of State Revenue v Boss Constructions (NSW) Pty Ltd* [2018] NSWCA 270. Bathurst CJ, with whom Leeming JA and Sackville AJA agreed, there referred to the observations of the Court of Appeal in *TQM Design & Construct Pty Ltd v KCL Developments Pty Ltd* [2011] NSWCA 7 at [29] as to the structure of the creditor's statutory demand regime, as constituting 'a carefully formulated series of interlocked steps which have substantial consequences and the objects of which require precise compliance for their attainment.' His Honour also there referred to *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; (1995) 184 CLR 265 at 270, where Gummow J, with whom other members of the High Court agreed, described the provisions relating to creditor's statutory demands as

constituting ‘a legislative scheme for quick resolution of the issue of solvency and the determination of whether the company should be wound up without the interposition of disputes about debts, unless they are raised promptly’. As the Court of Appeal recognised in *Boss Constructions* above, *David Grant* above is in turn authority that the time limit in s 459G of the Act cannot be extended by the Court.

[11] The decision in *Boss Constructions* is in turn authority, as Mr Blackman fairly accepted, that that time limit cannot be sidestepped by reason of an estoppel, and Bathurst CJ there observed at [27] that that reflected not only the history of the legislation, what was said by *David Grant* above as to its policy, but also the need for the determination of applications to set aside creditor’s statutory demands within precisely established time limits. The Court of Appeal also there recognised that that conclusion may produce harsh results, but that that is to be balanced against the public interest in determining applications to wind up insolvent companies promptly and avoid injustices that may be caused by the continued trading of such companies. It should also be recognised, of course, that a party that has been unable to raise a matter in an application to set aside a creditor’s statutory demand may be able to raise that matter in opposition to a winding up application, under s 459S of the *Corporations Act*, with leave if necessary, or as a matter going to the exercise of the Court’s discretion as to whether to wind up a company.

[12] In the present case, it is not apparent to me that there is any basis on which it could be said that the Company did not have fair notice of the Demand by service of the Demand at its registered office. That, after all, is the structure for service contemplated by s 109X of the *Act*, and the Company, by nominating the address of its registered office, provides an address at which documents of significance, including creditor’s statutory demands, may be served. Even assuming in the Company’s favour that any question of lack of fair notice arises on the facts, I am satisfied I should not follow the reasoning of Palmer J in *Mangraviti* to which I have referred above. It seems to me that that reasoning finds no support from the decision in *Faji,* to which Palmer J referred, because that was not a case where the application to set aside the creditor’s statutory demand had been served out of time.

[13] It also seems to me that that reasoning is inconsistent with the terms of the relevant statutory provisions. Section 459G of the *Act* specifies when a company may apply to the Court for an order setting aside a creditor’s statutory demand, and provides that application may only be made within 21 days after the demand is so served. Section 459J in turn provides that, *on an application under s 459G*, the Court may only set aside the demand if it is satisfied of the matters set out in that section (emphasis added). With the greatest of respect to his Honour’s reasoning, I am unable to see that s 459J can apply, or the grounds to which it refers can be raised, where no application under s 459G is available, because the application was not brought within time.

[14] This conclusion is consistent with the reasoning of the Court of Appeal in *Boss Constructions*, although I recognise that the Court of Appeal did not there have to deal with the question of whether the scope of s 459J extended outside the scope of s 459G of the *Act*. Notwithstanding *Mangraviti*, for the reasons I have indicated, I am satisfied that such an application of s 459J is

> not available and that I should not follow those earlier decisions which have taken a contrary view."

321 I accept the analysis of Black J above and I am not satisfied that there is any argument that fair notice of the demand had not come to the attention of the company.

322 I am not satisfied that there is any sufficient basis for arguing that was any unconscionable conduct engaged in by the defendant because of the operation of SEPA (or otherwise for that matter).

323 All of the company's arguments regarding unconscionable conduct really come back to the form of the demand. There was no evidence by the company or Ms Macdonald that the company had been misled in responding to the demand.

Conclusion

324 In the above circumstances I am not satisfied that the statutory demand, as argued by the company, was so fatally defective or caused such substantial injustice or was misleading as to amount to a nullity.

325 Mr Allan also submitted that the cumulative effect of the matters complained of regarding the demand and affidavit in support and the cumulative effect of the prejudice constitutes the demand as a nullity: T70.27–.36.

326 However, I do not accept that that is the case.

327 Although I accept that the originating process, together with the supporting affidavit was effectively served by email on the defendant by service to the email addressed to Ms Berlau, the failure to annex the SEPA notice was fatal.

328 I am not satisfied that the defendant was estopped or that there was any unconscionability in the defendant's conduct such that the defendant could not argue that the failure to annex the SEPA notice was fatal.

329 For the reasons I have given, I am not satisfied that the “some other reason” bases argued should prevail.

330 In the circumstances I make the following orders:

(1) Dismiss the Amended Originating Process filed on 20 April 2022.

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

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I certify that the preceding 330 paragraphs
are a true copy of the reasons for judgment herein
of the Honourable Justice Meek

Associate

Date: 16 June 2022