Foreword

The Honourable Justice R P Austin[1]

Proving that a trading company is insolvent, or solvent, is a major forensic exercise, even in the case of a small business. Solvency in the legal sense is likely to depend on expectations about the timing of receipts and payments, which are partly matters of commercial judgment and partly matters of detailed fact. A temporary lack of liquidity is not insolvency,[2] but an 'endemic shortage of working capital' is a different matter.[3] As Palmer J has recently observed:[4]

> The first is an embarrassment, the second is a disaster. It is easy enough to tell the difference in hindsight, when the company has either weathered the storm or foundered with all hands; sometimes it is not so easy when the company is still contending with the waves.

In the courts, as well as in commercial life, the need to determine whether a company is insolvent arises very often. For the courts, the most obvious occasion for doing so is on an application for an order for the winding up of a company in insolvency. Because of the volume of evidence that needs to be digested upon a fully contested determination of the question, and the fine judgments involved, it is vitally important for the courts to have a useful mechanism to assist their decision-making process.

The statutory demand is the mechanism relied upon by Australian law. Its function is to facilitate proof of insolvency in winding-up proceedings, by creating a rebuttable presumption that a company that

1. BA, LLM (Syd), D Phil (Oxon), Corporations Judge, Supreme Court of New South Wales.
2. *Sandell v Porter* (1966) 115 CLR 666 at 670.
3. *Hymix Concrete Pty Ltd v Garritty* (1977) 2 ACLR 559.
4. *Hall v Poolman* (2007) 65 ACSR 123; [2007] NSWSC 1330 at [266].

fails to comply with a properly served demand is insolvent. The statutory demand, at first called a 'summons', emerged in the United Kingdom, largely borrowed from bankruptcy law, in 1844.[5] Remarkably, this was before the concept of limited liability had been established. The idea was refined and separated from its bankruptcy origins by the Companies Act 1856 (UK).[6] It is striking that very little has changed about the essential concept in the ensuing 152 years. That is a testament to its utility.

A price has always been extracted for procuring a deemed or presumed insolvency. The creditor must adhere strictly to the requirements for a statutory demand, as laid down by company law. I recall that one of the first jobs I was asked to undertake as an articled law clerk in 1965 was to prepare a '222 notice' under the Companies Act 1961 (NSW). I botched the job, because of failure to adhere to the formal requirements. Fortunately I was able to rectify my mistake before there were any consequences. Today, creditors' lawyers are not always so lucky. The summary procedure for challenging a statutory demand, introduced as a result of the Harmer reforms in 1992, has meant that deficiencies are likely to be exposed in open court, sometimes in a crowded court, during the running of a Corporations List. The embarrassment can be acute, not to mention the adverse consequences for the client.

Therefore, the legal profession will warmly welcome the publication of this well-organised and clearly written treatise on the statutory demand. By systematically identifying and explaining the legal requirements and the pitfalls, Mr Assaf has addressed a palpable need for exposition and assistance.

There are further reasons for welcoming this publication. Since the introduction of the procedure for challenging statutory demands, there has been an outpouring of judicial decisions on this subject, well in excess of the volume of decisions on any other chapter of corporate law. At least part of the explanation for this phenomenon has to do with the fact that statutory demand cases tend to be half-day cases, capable of being fixed for hearing at an early date. The cases often raise a short and readily resolvable point of law or fact. They tend to be fought hard and they are unlikely to be settled by agreement of the parties — often because, in the typical case, the creditor finds it difficult to accept that the court's task is not to decide whether the debt is owing, but only whether there is a genuine dispute about it.

Whatever the explanation for the volume of published decisions, the judicial product is a rich vein to be mined by those interested in the

5. Winding Up Act 1844, 7 & 8 Vict c 111, s 7.
6. 19 & 20 Victoria c 47, s 68.

development of legal ideas and 'applied' jurisprudence. One strand of thinking in the cases is governed by the High Court's reasoning in *David Grant*[7] and, more recently, *Aussie Vic Plant Hire*.[8] The cases at first instance demonstrate what happens when judges, acting under instructions to adhere closely to the letter of the law and not to recognise deviations or condone errors, are confronted with the variety of human experience. By and large the judges have kept their nerve, but the capacity of litigants to bring unusual fact situations to the court must never be underestimated.

Consider, for example, *Austar Finance Pty Ltd v Campbell*.[9] On the last day for service of an application to set aside a demand (a Friday), the plaintiff's lawyer purported to serve the application and affidavit by facsimile to the defendant's home office, but only part of the transmission was received. Half an hour later, the plaintiff's lawyer scanned the documents into his computer and attached them to an e-mail, which he sent to the defendant. But by then the defendant had gone out, and he did not open the e-mail until the following Monday morning. The requirements for a valid application were held not to be satisfied, and under the *David Grant* principle the deficiency could not be cured. Similarly extreme fact situations can be found in other cases, and we can look forward to many more.

Another strand of judicial thinking shows the judges' propensity, even when operating under the *David Grant* principle, to create and cultivate encrustations upon the statutory text. The best example of this is the so-called '*Graywinter*' doctrine,[10] which deals with what the affidavit filed with an application to set aside a statutory demand must contain. The doctrine is based upon nothing more explicit than the statutory proposition that an affidavit 'supporting' the application must be filed within 21 days after the demand is served.[11]

I took up my judicial appointment ten years ago, after careers as a legal academic and as a solicitor. I had not thought much about statutory demands for 30 years. What struck me, when I returned to the subject as a judge, is how important they are for the work of the court. Uncontested winding-up applications based on failure to comply with a statutory demand are processed by court registrars like sausages. I suspect that in many cases the application is not contested precisely because of the demand, failure to comply with which has placed the

7. *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265; 18 ACSR 225.
8. *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 82 ALJR 564; [2008] HCA 9.
9. *Austar Finance Pty Ltd v Campbell* (2007) 215 FLR 464; [2007] NSWSC 1493.
10. *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452; 21 ACSR 581.
11. See Mr Assaf's explanation of the principle at 4.31–4.33 and 5.37–5.41 .

onus on the company to prove that it is solvent. Just think of the effect that abolition of the statutory demand would have on the volume of judicial work. Insolvency would have to be proved in every case, many more cases would be contested, and the wheels of justice would be clogged. I can think of no better contributor than the statutory demand to the 'just, quick and cheap' administration of justice in commercial litigation.[12]

In the Supreme Court of New South Wales, where a Corporations List Judge sits every day and, additionally, some statutory demand cases are heard by an Associate Justice, there are typically several of these cases every week. But happily the statutory criteria enable cases to be processed quickly and, I believe, fairly and efficiently. The quantity of judicial work in statutory demand cases is a small price to pay for avoiding the need to adjudicate insolvency in every case.

I therefore hope that the profession will be able to welcome second, third and subsequent editions of Mr Assaf's work, and that students of jurisprudence will enjoy the collateral benefits.

R P Austin
Supreme Court of New South Wales
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12. Civil Procedure Act 2005 (NSW) s 56.