

The importance of dealing with statutory demands in a timely manner

When served with a statutory demand a company has 21 days to pay the debt, negotiate an outcome or apply to have the statutory demand set aside. Upon the expiration of 21 days the company is deemed insolvent and an application can be made to wind it up.

Following this expiration date, the company cannot make an application to set aside the statutory demand, even if it has grounds to do so. Instead, it has to oppose the winding up application if it is to avoid being wound up. The most common ground for setting aside a statutory demand is that the debt is in dispute.

In the case of *Re Bulwinkel Enterprise Pty Ltd*, the executor of a deceased estate served a statutory demand on Bulwinkel Enterprises Pty Ltd (Bulwinkel), who failed to make an application to set aside the statutory demand or otherwise deal with the matter within 21 days (due to a number of claimed reasons, including that its accountant did not stress the importance of the statutory demand). The executor subsequently applied to have Bulwinkel wound up.

Bulwinkel opposed the executor's application relying on section 459S of the *Corporations Act 2001* (Cth), which provides that a company may seek permission of the court to oppose a winding up application, on the ground that the statutory demand could have been set aside if an application was made within time. If the company disputes the debt, the court will only grant permission to argue that the statutory demand could have been set aside if it is "material to proving the company is solvent". This differs from the position where an application to set aside the statutory demand is made within time. If an application to set aside is made within time the company will only need to show there is a genuine dispute as to the debt, and will not be put to the additional task of showing the dispute is also material to proving insolvency.

In this case the Court granted permission to Bulwinkel to argue there was a genuine dispute as to the debt. It was found that the dispute was "likely to influence the determination" of solvency and so was "material" for the purposes of the Act. However, after reviewing the evidence, including evidence from Bulwinkel's accountant, the Court ultimately found that the debt was owing and that Bulwinkel was insolvent.

Opposing a winding up application is a more onerous task than applying to set aside a statutory demand. Where there is a dispute about the debt, the company must show that the dispute is material to proving solvency (as was the case with Bulwinkel). Opposing a winding up application may also require an accountant to give evidence, which adds additional cost.

A winding up application (even if successfully opposed) can have other negative consequences for a company. Once an application to wind up a company is made, a public notice of the application is published on the ASIC insolvency notices website. This may have an effect on the company's commercial transactions with other entities.

It's important for a company served with a statutory demand to ensure the matter is properly dealt with before the 21 day period after service, to avoid additional costs and inconvenience further down the track.

To discuss this case further, or for more information about statutory demands or winding up applications please contact:

Leneen Forde

Principal
Sladen Legal
03 9611 0142
lforde@sladen.com.au

or

Andrew Blyth

Lawyer
Sladen Legal
03 9611 0184
ablyth@sladen.com.au

Sladen Legal
Level 5, 707 Collins Street
Melbourne 3008
Victoria Australia

PO Box 633
Collins Street West
Victoria 8007

T +61 3 9620 9399
F +61 3 9620 9288

sladen.com.au

