

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2025 01036

IN THE MATTER of ML & NB Pty Ltd (ACN 657 782 851)

BETWEEN:

FLEXICOMMERCIAL PTY LIMITED
(ACN 644 644 860)

Plaintiff

v

ML & NB PTY LTD
(ACN 657 782 851)

Defendant

<u>JUDICIAL REGISTRAR:</u>	Gitsham JR
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	6 June 2025
<u>DATE OF RULING:</u>	23 July 2025
<u>CASE MAY BE CITED AS:</u>	Re ML & NB Pty Ltd
<u>MEDIUM NEUTRAL CITATION:</u>	[2025] VSC 444

CORPORATIONS - Application for winding up - Presumed insolvency - Statutory demand - Whether a plaintiff can rely on statutory demand issued by a supporting creditor for purpose of statutory presumption - *Corporations Act 2001* (Cth) - Part 5.4 - Winding up in insolvency.

CORPORATIONS - *Corporations Act 2001* (Cth) - Procedure - Application for winding up - Leave to amend originating process - Function of ss 459Q, 467, 467A to cure defect or irregularity - Whether there is material prejudice to the defendant where statutory demand relied on in originating process is amended.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J. Schulz of Counsel	Bridges Lawyers
For the Defendant	Mr P. Hunt, solicitor	Hunts Law

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JUDICIAL REGISTRAR:

A Introduction

- 1 The plaintiff seeks orders for leave to amend its originating process seeking to wind up the defendant company in insolvency.
- 2 The circumstances of this case are somewhat novel in that the plaintiff seeks to amend its originating process to rely upon a statutory demand issued by a supporting creditor, BP Australia Pty Ltd (**BP Australia**) prior to the commencement of the winding up application.
- 3 For the reasons set out below I am of the view that the plaintiff should be granted leave to amend its originating process to rely upon the statutory demand issued by BP Australia in support of its application to wind up the defendant for failure to comply with a statutory demand.

B Background

- 4 On 28 February 2025, the plaintiff, FlexiCommercial Pty Ltd, filed an originating process seeking orders winding up the defendant company, ML & NB Pty Ltd pursuant to s 459A of the *Corporations Act 2001* (Cth) (**'Act'**). The details of the application are pleaded as follows:

A. Details of application

This application is made under s 459P of the *Corporations Act 2001* (Cth). It is an application for ML & NB Pty Ltd ACN 657 782 851 (**Defendant**) to be wound up in insolvency relying on the failure by the Defendant to comply with a statutory demand, alternatively that Defendant is insolvent within the meaning of s95A of the *Corporations Act 2001* (Cth).

...

C. Application for winding up on ground of insolvency

1. The Plaintiff relies on failure by the Defendant to comply with a statutory demand. A copy of that statutory demand (**Demand**) is attached to this originating process and marked **A**.
2. The demand was served by Therese Diab, who sent the Demand by express post to the Defendant's registered address, being c/- Classic Accounting Plus, Suite 4A, 14 Chapman Road, Geraldton WA 6530, on 20 January 2025 and service is deemed to have been effected on 30 January 2025.

3. The Defendant failed to pay the amount of the debt demanded or to secure or compound for that amount to the Plaintiff's reasonable satisfaction within 21 days after the Demand was served on the Defendant.
- 5 A copy of the statutory demand is attached to the originating process. It is dated 17 January 2025 (**'Plaintiff's statutory demand'**). The foundation for the Plaintiff's statutory demand is a judgment debt obtained against the Defendant in the District Court of New South Wales on 20 December 2024 in the sum of \$267,289.65.
- 6 The affidavit of Kailum Dennis Latimer-Micek dated 24 February 2025 and filed in support of the originating process says a copy of the statutory demand is attached to the originating process and the demand was deemed served on the registered office of the defendant on 30 January 2025. Mr Latimer-Micek relies upon the affidavit of service dated 24 February 2025 sworn by Therese Diab, an office assistant employed by the plaintiff's solicitors (**'Diab affidavit'**).
- 7 The Diab affidavit states that the statutory demand was served on the Defendant at its registered office being Classic Accounting Plus, Suite 4A, 14 Chapman Road, Geraldton WA 6530 (**'Geraldton address'**).
- 8 A search of the Australian Securities and Investment Commission's Register completed the day before the originating process was filed, records the Geraldton address as the address of the Defendant's registered office from 13 December 2024. Prior to that (i.e., until 12 December 2024), the address of the Defendant's registered office was 'Windich House', Unit 1 58 Windich Street, Esperance WA 6450 (**'Esperance address'**).
- 9 On 31 March 2025, a Notice of Appearance was filed in the proceeding by Roe Legal Services on behalf of the Defendant. The grounds of opposition to the winding up application are that the Defendant is solvent and the Court should exercise its discretion to dismiss the application pursuant to s 467(1) of the Act. The grounds do not include any claim that the statutory demand is defective in any way or was not served on the Defendant.
- 10 On 1 April 2025, BP Australia filed a notice of appearance in the proceeding as a supporting creditor.

- 11 On 8 May 2025, Mr Jon Angeloski, a law clerk employed by BP Australia’s solicitors filed an affidavit sworn by him on 18 December 2024 (**‘Angeloski affidavit’**) stating that on 17 December 2024, he served a statutory demand on the Defendant on behalf of BP Australia by ordinary post at the Geraldton address (**‘BP Australia’s statutory demand’**).
- 12 BP Australia’s statutory demand is dated 17 December 2024. The foundation for the that demand is a judgment debt obtained against the defendant in the Magistrates’ Court of Victoria on 5 August 2024 in the sum of \$48,511.35.
- 13 Initially, the proceeding was adjourned on two occasions to allow for discussions between the parties to try and resolve the matter.
- 14 At the third return of the proceeding on 14 May 2025, the plaintiff indicated that it wished to apply to amend the originating process. The plaintiff brought to the Court’s attention that whilst the particulars pleaded in the originating process (together with the sworn statements of Mr Latimer-Micek and Ms Diab) stated that the statutory demand was served on the registered office of the defendant, (at the Geraldton address), the address of the Defendant recorded on the Plaintiff’s statutory demand itself was the Esperance address. Furthermore, exhibited to Ms Diab’s affidavit was a document titled ‘Record of Service’ which records the address for service as the Esperance address.
- 15 Due to the inconsistency in the evidence as to service, the plaintiff is of the view that that it may not be able to prove service of the statutory demand pursuant to s 109X of the Act and therefore would not be able to rely upon the statutory presumption of insolvency afforded under s 459C of the Act.
- 16 The plaintiff submits that the particulars pleaded in the originating process in respect of service of the plaintiff’s statutory demand are a defect or irregularity in the application that can be cured by amending the originating process pursuant to r 36.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (**‘Rules’**) and/or s 467(3)(e) of the Act, to rely upon the BP Statutory Demand in support of its application to wind up the Defendant for failure to comply with a statutory demand.

17 The amendment proposed is in the following terms:

...

C. Application for winding up on ground of insolvency

1. The Plaintiff relies on failure by the Defendant to comply with a statutory demand. A copy of that statutory demand (**Demand**) is attached to this amended originating process and marked **A**.
2. The demand was served by ~~Therese Diab~~ Jon Angeloski, who sent the Demand by ~~express post~~ ordinary pre-paid post to the Defendant's registered address, being c/- Classic Accounting Plus, Suite 4A, 14 Chapman Road, Geraldton WA 6530, on 17 December 2024 ~~20 January 2025~~ and service is deemed to have been effected on ~~30 January 2025~~ 2 January 2025.
3. The Defendant failed to pay the amount of the debt demanded or to secure or compound for that amount to the ~~Plaintiff's~~ Plaintiff's reasonable satisfaction of BP Australia Pty Limited ACN 004 085 616, the creditor for the purpose of the Demand, within 21 days after the Demand was served on the Defendant.

18 The plaintiff says that its inability to rely upon the plaintiff's statutory demand as a basis for a statutory presumption of insolvency does not affect the validity of the application but rather the evidentiary basis upon which it can establish insolvency.

19 The plaintiff says it remains a creditor of the company. It relies on a further affidavit of Mr Latimer-Micek sworn on 4 June 2025, in which he deposes that on 30 January 2025, the Defendant paid the plaintiff \$100,000 in part-payment of the judgment debt. Taking into account the part-payment and interest accruing on the judgment, the plaintiff says, as at the date the originating process was filed, the defendant was still indebted to the plaintiff in the sum of \$167,289.65.

20 The plaintiff also says that BP Australia remains a creditor. By email dated 21 May 2025, Mr Angeloski informed the plaintiff's solicitors that BP Australia had received part payments of the judgment debt from the Defendant in the sums of \$1,400 between 18 September 2024 and 11 December 2024, and \$500 between 18 December 2024 and 22 January 2025. On that basis, BP Australia says its judgment debt was reduced to \$47,311.35 as at the date the BP Australia Statutory Demand was issued and \$46,611.35 as at the date BP Australia filed its Notice of Appearance in the current proceeding.

21 The plaintiff submits that it should be permitted to amend the originating process to rely upon the defendant's non-compliance with BP Australia's statutory demand because:

- (a) it has validly commenced the winding up proceeding pursuant to s 459A of the Act, in its capacity as a judgment creditor;
- (b) at the time it commenced the application, it was compliant with s 459Q of the Act but no longer seeks to rely upon those particulars in support of its winding up application;
- (c) the BP Australia statutory demand expired within the three month period prior to the commencement of the winding up application.
- (d) no substantial injustice will be caused to the defendant. It says that the case against the defendant remains fundamentally the same (i.e., that the company is presumed insolvent and must demonstrate solvency to rebut that presumption) and it remains open to the defendant to oppose the winding up application on the grounds of insolvency and/or the various grounds that may be available to it under s 459S of the Act in respect of BP Australia's statutory demand.

22 The defendant opposes the application.

23 The defendant submits that it is entitled to understand the case it has to meet on the winding up application. It says the plaintiff cannot rely upon BP Australia's statutory demand because at the time BP Australia filed the Angeloski affidavit, the three months following non-compliance with BP Australia's statutory demand had expired. The defendant contends that the prejudice suffered is 'the existence of a windup proceeding starting on something that it should not have been started on'. As the defendant's solicitor submitted at the hearing:¹

And so what the effect of it would be is that you're taking a stale statutory demand to try and cure a defect in an application and back-dating that. And the prejudice that the defendant suffers is that we've had four months of an application and a number of appearances not knowing what it is that it's

¹ Transcript of Proceedings, *ML & NB Pty Ltd (ACN 657 782 851)*, (Supreme Court of Victoria, Gitsham JR, 6 June 2025), 22, [13] – [21].

going to be dealing with and now suddenly it has to deal with a creditor statutory demand from party that's not the applicant.

- 24 The defendant also submits that permitting a creditor to amend an originating process to rely on a defendant's failure to comply with a statutory demand issued by a party other than the petitioning creditor, particularly where that petitioning creditor was not aware of at the time of commencing the proceeding, would 'create a mischief' where 'aggressive creditors ... might bring winding up applications which by their very nature have a detrimental effect on the defendant'.²

C Consideration

- 25 The legislative scheme for the resolution of matters concerning the insolvency of a company is found in Part 5.4 of the Act. In *Assaf's Winding Up in Insolvency*³ the learned authors described the scheme as follows:

Part 5.4 is divided into four Divisions. Division 1, headed 'When company to be wound up in insolvency', provides a statutory basis for applications to be made to wind up a company in insolvency [citing s 459A] and provides for certain presumptions to be made in certain proceedings [citing s 459C].

Division 2, headed 'Statutory demand', sets out the circumstances in which a creditor may issue a statutory demand and the formal requirements of the same. Division 3, titled 'Application to set aside statutory demand', contains provisions for the setting aside of statutory demands and the formal requirements for such applications. Division 4, is headed 'Application for order to wind up company in insolvency' and sets out, amongst other things, who has standing to apply for a winding up order, [citing section 459P] the period in which a winding-up application is to be determined and restrictions on the grounds upon which a winding -up application may be dismissed following non-compliance with a statutory demand [citing s 459S].

- 26 One purpose of this legislative scheme is 'to facilitate the quick resolution of the issue of insolvency and the determination of whether a company should be wound up without the interposition of disputes about debts unless they are raised promptly.'⁴ One way in which that purpose is achieved is to 'focus principal attention at the hearing of the winding up application upon whether a company is

² Ibid 23, [15] –[17].

³ Farid Assaf, *Assaf's Winding Up in Insolvency* (LexisNexis, 3rd ed, 2021) ('Assaf') 42 [1.52].

⁴ Ibid at 1.53.

insolvent rather than upon defects in the procedures that precede the institution of the application for winding up'.⁵

- 27 Notably, the function of a winding up application is not to recover an individual debt or enforce a judgment or award.⁶ Rather it is a 'collective process' for the benefit of creditors of the company.⁷ In *Re Lines Bros Ltd (in liq)*⁸ Brightman LJ said:

...If the creditor petitions to wind up a company, or claims in a liquidation initiated by others, he is not engaged in proceedings to establish the company's liability or the quantum of liability (although liability and quantum may be put in issue) but to enforce the liability. Indeed, he is precluded from initiating or supporting a winding-up petition if his status as a creditor is bona fide disputed by the company. The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors.

- 28 This observation was further explained in *Re International Tin Council*⁹ where Millett J relevantly held:

... The issue at the [winding up] hearing is not whether the petitioning and other creditors, some of whom will not yet have established their claims, should be paid, but whether the company is insolvent and, if so, whether it should be wound up or allowed to try and trade out of its difficulties.

- 29 In *O'Mara Constructions Pty Ltd v Avery*¹⁰ the Full Federal Court endorsed the principle that insolvency proceedings are commenced on behalf of all creditors observing that:¹¹

... It must also be kept in mind that insolvency proceedings are generally thought to be for the benefit of all creditors. Thus, pursuant to s 49 of the Bankruptcy Act, if a petitioner does not prosecute the petition with due diligence or if, for any other reason, the court considers it proper to do so, it may order substitution of another creditor for the petitioner. This strongly suggests that the issue at the heart of the petition is the debtor's insolvency and not any individual debt. The debt is only relevant to the petitioner's standing.

- 30 At the hearing of the plaintiff's amendment application, I was taken to a number of authorities which, together, consider the legislative framework in which a winding

⁵ *Aussie Vic Plant Hire v Esanda Finance* (2008) 232 CLR 314 ('**Esanda Finance**') at [14].

⁶ See *Assaf* (n 3) at 1.21.

⁷ *Ibid.*

⁸ [1983] Ch 1 at [20].

⁹ [1987] Ch 419; [1987] 1 All ER 890 at Ch 454-5 [455] as cited in *Assaf* (n 3) 1.21.

¹⁰ (2006) 151 FCR 196; 230 ALR 581; [2006] FCAFC 55.

¹¹ *Ibid* at 596 [56].

up application is commenced. From those, and other relevant authorities, the following principles arise.

- 31 Section 459A of the Act provides that on an application under s 459P, the Court may order that an insolvent company be wound up in insolvency.
- 32 Section 459P of the Act identifies those who may apply for a winding up order. Relevantly, that includes 'a creditor [of the company] (even if the creditor is a secured creditor or is only a contingent or prospective creditor)'.¹²
- 33 In *Emanuelle & Anor v Australian Securities Commission*,¹³ Toohey J said of the operation of ss 459A and 459P:¹⁴

The language of s 459P(2) is simple: an application by the Commission for a company to be wound up in insolvency 'may only be made with the leave of the Court'. Does this provision condition the court's jurisdiction?

There is to be found in the authorities, in some respects, a conflict but also a difference of approach to such a provision. This is to some extent explained by the particular language with which the courts have had to grapple. As a starting point it must be noted that the jurisdiction of the Federal Court under the Corporations Law is conferred by State legislation. Section 42(3) of the Corporations (SA) Act 1990 (SA) reads:

Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the Corporations Law of South Australia

Not only is s 459P(2) not a jurisdiction conferring provision, it does not create a cause of action or go to the relief that may be granted. It is s 459A that empowers the court to order that an insolvent company be wound up in insolvency. That provision, read with s 42(3) of the Corporations Act (SA) Act is, relevantly the source of the Federal Court's jurisdiction.

- 34 Section 459C of the Act identifies certain statutory presumptions available to be made on an application under s 459P. That section relevantly provides:

Section 459C Presumptions to be made in certain proceedings

(1) [Effect of section] This section has the effect for the purposes of:

(a) an application under section 234, 459P, 462 or 464; or

...

¹² *Corporations Act 2001* (Cth) ('Act') s 459P(1)(b).

¹³ (1997) 144 ALR 359.

¹⁴ *Ibid* at 368 - 369.

(2) **[Where Court must presume insolvency]** The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:

(a) the company failed (as defined by section 459F) to comply with a statutory demand; or

...

(3) **[Where presumption rebutted]** A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the application.

35 Section 459E provides that a person may serve on a company a demand relating to a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum.¹⁵ The demand must specify the debt and its amount;¹⁶ it must require the company to pay the total amount of the debt 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;¹⁷ it must be in writing;¹⁸ in the prescribed form (if any);¹⁹ and it must be signed by or on behalf of the creditor.²⁰

36 Pursuant to s 459F of the Act, a company has 21 days to comply with the statutory demand. Section 459G permits the company, strictly within that 21 day period, to apply to the Court to set aside the statutory demand.

37 Where a creditor has issued a statutory demand to a debtor company in accordance with these provisions, that statutory demand can then be used in accordance with the processes set out in the Act to facilitate proof of a company's insolvency.²¹ Without the benefit of a statutory presumption under s 459C of the Act, a creditor may otherwise be required to demonstrate actual solvency by way of evidence addressing the financial position of the company as a whole.²² What the statutory

¹⁵ Act (n 11) s 459E(1).

¹⁶ Act (n 11) s 459E(2)(a).

¹⁷ Act (n 11) s 459E(2)(c).

¹⁸ Act (n 11) s 459E(2)(d).

¹⁹ Act (n 11) s 459E(2)(e).

²⁰ Act (n 11) s 459E(2)(f).

²¹ Assaf (n 3) 3.2; *Chen v Kornucpia* (2019) 349 FLR 35 ('**Chen v Kornucpia**') at [134]; see also *Equipped Constructions Pty Ltd v Form Architects Pty Ltd* [2006] NSWSC 500 at 24.

²² See Act (n 11) s 95A.

demand process provides is a “convenient method of proof” that a company is unable to pay its debts.²³

- 38 Accordingly, where a creditor seeks to rely upon the presumption in s 459C of the Act, s 459Q of the Act sets out the requirements for an application to wind up a company in insolvency when relying upon a failure to comply with a statutory demand.²⁴

459Q Application relying on failure to comply with statutory demand

If an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the application:

- (a) must set out particulars of service of the demand on the company and of the failure to comply with the demand; and
- (b) must have attached to it:
 - (i) a copy of the demand; and
 - (ii) if the demand has been varied by an order under subsection 459H(4) – a copy of the order; and
- (c) unless the debt, or each of the debts, to which the demand relates is a judgment debt – must be accompanied by an affidavit that:
 - (i) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company; and
 - (ii) complies with the rules of court.

- 39 The role of the statutory demand as an evidentiary function was highlighted in *Australian Beverage Distributors Pty Ltd v Cranswick Premium Wines Pty Ltd*²⁵ where Barrett J held:²⁶

A company on which a statutory demand is served is in no sense required to comply with it. It may, if it wishes, allow the statutory presumption of insolvency to arise (by not paying the demanded sum) and, if a winding up application follows, seek to show that it is in fact in a solvent state so that a

²³ Assaf (n 3) 3.2 citing *Clarke & Walker Pty Ltd v Thew* (1967) 116 CLR 465 at 467; [1967] ALR 633 at 634 . See also *Createc Pty Ltd v Design Signs Pty Ltd* (2009) 71 ACSR 602; [2009] WASCA 85 at [2] per Martin CJ (with whom Owen and Miller JJA agreed); and *Commonwealth Bank of Australia v Garuda Aviation Pty Ltd* [2013] WASCA 61; (2013) 45 WAR 92; 93 ACSR 168 at [20]

²⁴ Rule 5.4(2) of the *Supreme Court (Corporations) Rules 2023* also requires the creditor to swear an affidavit that verifies service of the statutory demand; the company’s failure to comply with that demand and whether and what to extent the debt the subject of the demand remains due and payable.

²⁵ (2004) 50 ACSR 544.

²⁶ Ibid at 547 [16].

winding up order is not justified. **The statutory demand process is no more than a process that defines where the burden of proof lies in the winding up proceedings.**

40 It has been determined that there are circumstances in which an application which does not comply with the requirements in s 459Q does not render an application to wind up a company ‘invalid in the sense that it is a nullity’.²⁷ Such circumstances include where a copy of the statutory demand is not attached to the application²⁸; or the statutory demand has not yet expired²⁹.

41 In *Chen v Kornucopia*³⁰ Sifris J considered the operation of s 459Q at length. At [132] his Honour said (citations omitted and emphasis added):

[132] First, I disagree with the characterisation given by Colvin J, that “an application which is brought in a manner that does not conform to s 459Q is invalid”, with the result that:

Even if the requirements of section 459Q can be met, but they are not properly attended to, then there is no valid application.

Rather, as Barrett J said in *Lavercombe*, and with which I agree, the originating process is not “invalid”, in the sense that it is a nullity. It is “defective”, and the effect of non-compliance with s 459Q is that an application for the winding up of a company cannot be maintained with reliance upon a failure to comply with a statutory demand as the basis for the allegation that the company is insolvent. The plaintiff would need to establish a separate basis for winding up the company that does not involve the statutory demand (such as, establishing insolvency by evidence). **If it does not rely on other grounds, the application must be dismissed (unless cured under s 467 and 467A), not because it is invalid, but because there are simply no grounds relied upon to support an otherwise valid winding up application.**

42 Sections 467 and 467A provide:

Section 467 Court’s powers on hearing application

(1) **[Court’s powers]** Subject to subsection (2) and section 467A, on hearing a winding up application the Court may:

- (a) dismiss the application with or without costs, even if a ground has been proved on which the Court may order the company to be wound up on the application; or
- (b) adjourn the hearing conditionally or unconditionally; or

²⁷ *Chen v Kornucopia* (n 20) at 74 [132].

²⁸ *Ibid.*

²⁹ *In the matter of DG Haulage Pty Ltd* [2017] VSC 780 (**DG Haulage**).

³⁰ *Chen v Kornucopia* (n 20).

- (c) make any interim or other order it thinks fit.

...

- (3) **[Procedural directions]** The Court may, on the application coming on for hearing or at any time at the request of the applicant, the company or any person who has given notice of intention to appear on the hearing of the application:

...

- (e) allow the application to be amended or withdrawn.

Section 467A Effect of defect or irregularity on application under Part 5.4 or 5.4A

An application under Part 5.4 or 5.4A must not be dismissed merely because of one or more of the following:

- (a) in any case – a defect or irregularity in connection with the application;
- (b) in the case of an application for a company to be wound up in insolvency – a defect in a statutory demand.

- 43 The power to amend an originating process³¹ is also found in r 36.01(1) of the Rules which provides that:

36.01

- (1) For the purpose of –
 - (a) determining the real question in controversy between the parties to any proceeding; or
 - (b) correcting any defect or error in any proceeding; or
 - (c) avoiding multiplicity of proceedings –

the Court may, at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.

- 44 For the reasons that follow I am of the view that in the circumstances of this case, the defect in the plaintiff's originating process for the purposes of either s 459C or s 459Q of the Act does not, invalidate the application such that it is a nullity and can be cured under s 467(3) of the Act.

³¹ Rule 36.01(2) of the Rules says that r 36.01(1) applies to an originating process.

- 45 The jurisdiction of the Court on the present application is invoked pursuant to ss 459A and 459P of the Act.
- 46 On its face, the originating process relies upon two grounds in support of the application to wind up the company: first, pursuant to s 459C for failure to comply with a statutory demand; and secondly and alternatively, that the company is insolvent within the meaning of s 95A of the Act. Accordingly, the plaintiff will be required at the trial of the proceeding to either:
- (a) prove insolvency in the sense that it can demonstrate that statutory presumption under s 459C has occurred; or
 - (b) prove actual insolvency.
- 47 In commencing its application (and now seeking to amend), the plaintiff continues to rely upon its standing as a creditor by reason of the judgment obtained against the defendant on 20 December 2024 and which remains unpaid.
- 48 Section 459C identifies a series of events which can be relied upon to presume insolvency. The language of s 459C is particular. It says that the Court must presume that the company is insolvent if, during or after the three months ending on the day the application was made, the company failed to comply with **a statutory demand**. That drafting is consistent with the language of s 459Q which also refers to 'a failure by a company to rely upon **a statutory demand**'. Neither s 459C nor s 459Q refer to '**the** statutory demand' or '**the applicant's** statutory demand' or '**the creditor's** statutory demand'.
- 49 There is nothing in the language of ss 459C (or 459Q) which, in my view, requires an plaintiff to rely upon a failure to comply with the statutory demand served by that plaintiff and plaintiff alone – nor should there be. The statutory demand process is not one which is designed to allow a particular creditor to recover *its* particular debt. Rather, it is to permit a creditor to apply for a company to be wound up in insolvency on the grounds that an insolvency event (such as failing to comply with a statutory demand) has occurred. In seeking to wind up the company, the creditor is invoking a process where it may recover some of its debt (in the liquidation) but in manner where its recovery will be achieved through a distribution to it and all other

creditors of the company (subject to their respective priorities in the liquidation). It is inherent in that purpose that where a company has failed to comply with a statutory demand, as long as that demand meets the temporal requirements of s 459C and the applicant remains a creditor of the company, the application may proceed. To that end, the language of s 459C in only requiring non-compliance with **a statutory demand** is consistent with the underlying purpose of a winding up application which is to bring that application on behalf of all creditors on the question of the company's solvency.

- 50 Furthermore, the concept of a plaintiff to a winding up proceeding relying upon a statutory demand issued by another creditor in respect of that other creditor's debt is not a foreign one under the Act.
- 51 Section 465B of the Act permits a creditor who has filed an appearance in the proceeding to be substituted as the plaintiff to the proceeding as long as the creditor is a creditor for the purposes of s 459P of the Act and there is no genuine dispute in respect of the supporting creditor's debt. Once substituted, the new plaintiff is permitted to rely upon the presumption of insolvency pleaded by the original plaintiff. There is no requirement for a supporting creditor seeking to rely on such a ground to have served its own statutory demand in respect of its own debt. To the contrary, the supporting creditor will seek (and be permitted) to rely upon the original plaintiff's statutory demand as the basis upon which the presumption of insolvency arises. Again, that approach is entirely consistent with the focus of the proceeding being on the defendant's solvency as opposed to recovery of a particular debt in respect of a particular creditor. The presumption of insolvency in that case exists, regardless of the identity of the plaintiff.
- 52 In requiring non-compliance with **a statutory demand**, s 459C places the focus of the proceeding on an event occurring which a creditor may rely upon to establish the statutory presumption of insolvency. In my view, limiting the words of s 459C to only permit a plaintiff to rely upon a statutory demand in respect of its own debt is reading words into that section which are not there.

53 That is not to say that s 459C is without its limits. I referred earlier to the temporal requirements of that section. The Court in *Esanda* held that the relevant question for a Court on a winding up application is:

... whether any of the identified events in section 459C has occurred at any time after the commencement of the relevant period. The Act does not require any further consideration of whether the event persists at the date of the application for winding up.³²

54 That temporal focus was also considered to in *DG Haulage*, where it was held that where a winding up application had been made prior to the time for expiry the application could be amended so as to rely upon a later presumption of insolvency so long as that presumption was operative prior to the hearing.³³

55 If leave is granted in this case, the amendment will operate from the date of the originating process.³⁴ As at that date (28 February 2025), the expiry of BP Australia's statutory demand (being 2 January 2025), was still within the three month period prescribed by s 459C of the Act.

56 In my view, it is open to permit the plaintiff to rely upon a statutory presumption of insolvency by reason of the defendant's failure to comply with a statutory demand issued by BP Australia where that failure to comply occurred during or after the 3 month period ending on the day the plaintiff's application was made.

57 Turning then to s 459Q of the Act. The originating process and affidavit filed in support both appear on their face to comply with the requirements under s 459Q of the Act. The originating process relies upon a statutory demand dated 17 January 2025 which the plaintiff says was served on the registered office of the company at the Geraldton address. It attaches a copy of that statutory demand. The affidavit of service of the statutory demand says that the statutory demand was served on the registered office as at the time the statutory demand was served.

58 Whilst the 'error' as identified by the plaintiff is that the address stated on the statutory demand and the 'record of service' exhibited to the affidavit use the former

³² *Esanda Finance* (n 5) at [21].

³³ *DG Haulage* (n 28).

³⁴ r 36.01 of the Rules and in particular the commentary at [I 36.01.20] of *Civil Procedure Victoria* as referred to in *Chen v Kornucopia* (n 3) at 49 [141].

registered office, the defect in the originating process is reliance upon that event as the one which gives rise to the statutory presumption.

59 In *Kornucopia Sifris J* said of s 459Q:

[134] Thirdly, by contrast to the position here, s 459Q of the Act is not the section pursuant to which an application for the winding up of a company is made. That is s 459P (or ss 234, 462 or 464). Section 459Q can instead be characterised as a provision which is ancillary or additional to s 459P, and facilitative of the means by which proof of insolvency can be adduced by a plaintiff. Prior to setting out the pre-conditions with which s 459Q is concerned, it states “If an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand the application must”. That section presupposes that there is “an application for a company to be wound up in insolvency”, which is that brought under s 459P. **Upon there being an application made by a competent applicant under s 459P, the Court is vested with jurisdiction to make orders as it sees fit with respect to that application. There is nothing in the text of ss 459Q or 459P which ties the jurisdiction of the Court, granted by s 459P, with the requirements of s 459Q.** The word “If” contained within the s 459Q premises the conditions which “must” be met for that otherwise valid application to “rel[y] on a failure by the company to comply with a statutory demand” as the basis for the allegation that the company is insolvent. **The effect of non-compliance does not affect the validity of the applicant, but rather, the basis upon which a plaintiff can establish insolvency (that is, by presumption if there is compliance or be evidence if there is not).** It could not, therefore, be said that event if there is non-compliance with s 459Q, that there is, as was the case in *David Grant*, “no application under Pt 5.4 before the court” for remedial orders to be made in respect of.

60 The nature of the amendment sought is not one where the plaintiff seeks to rectify its status as a creditor pursuant to s 459P nor is it seeking to amend or add a ground upon which it now wishes to rely.³⁵ Indeed, it is not even seeking to rely upon an alternative presumption under s 459C of the Act. Rather, the plaintiff wishes to amend the particulars to the grounds currently pleaded to rely upon a different event, being the defendant’s failure to comply with BP Australia’s statutory demand in support of its grounds under s 459C(1) of the Act.

61 The BP Australia statutory demand was issued on 17 December 2024. The evidence before the Court states that the statutory demand was served on the registered office of the company as at that date. There is no evidence that any application was made

³⁵ Although on the basis of the findings in other cases that may not result in the application being invalid in the sense that it is a nullity.

to set aside BP Australia's statutory demand or otherwise that the statutory demand was satisfied within statutory period for compliance of 21 days. Whilst the defendant has made some payment to BP Australia in respect of the debt, those payments have not satisfied the statutory demand. The evidence is that as at the date the plaintiff made the winding up application a statutory demand (BP's demand) had expired and the full debt remain unpaid.

62 Now, the defendant's solicitor says that part of the prejudice that might be suffered by the defendant by reason of the amendment is that the defendant does not know what debt it is responding to. With respect, that concern is entirely what ss 467(3) and 467A of the Act are intended to resolve.

63 In *Chen v Kornucopia*, Sifris J held:

[139] It is my view that the construction set out above is not only open on the words of the Act, but gives adequate effect to its purpose, insofar as it would permit otherwise meritorious applications to be pursued rather than dismissed or prolonged on technical or procedural grounds, whether or not the defect complained of caused injustice to the company. That too is a matter towards which s 467A is directed; defects and irregularities which cause no material prejudice. Opportunistic conduct (namely, procedural omissions or defaults by plaintiffs which cause no material prejudice to defendants, but which defendants take advantage of) must not be looked at favourably by the Court, especially in light of considerations of efficient civil procedure and the timely and just resolution of real issues which arise in winding up applications. In this respect, the following observation of Doyle J (with whom Parker and Lovell JJ agreed) in *Heirloom Vineyards Wine Company Pty Ltd v Sante Wines Pty Ltd*, is particularly apt:

It is true that the operation of s 467A does not extend to cure defects that have the consequence that the court's jurisdiction under s 459G has not been invoked. However, the existence of s 467A is consistent with an intention on the part of the legislature that the overall focus be on matters of substance rather than form. It is also true that in emphasising a focus upon the commercial justice of the dispute, and upon substance over form, the legislature most likely had in mind that it would typically be recalcitrant debtors who might seek to exploit technicalities or matters of form, rather than creditors. But I do not think that it follows that substance is to be preferred over form only where that is to the advantage of the creditor. Rather, it is a general approach that should guide the Court in its consideration of issues ...

- 64 The statutory regime provided in Part 5.4 of the Act is designed to ensure that by the time a defendant faces a winding up application the question of whether there is a genuine dispute in respect of the debt ought to have been determined (other than in particular circumstances for the purposes of s 459S). Again, that is to ensure that the focus of winding up application is on the solvency of the company and not the liability of the defendant to the plaintiff for the debt which gives the plaintiff standing.
- 65 Accordingly, it is incumbent on a defendant to (a) dispute a debt claimed in another court in those proceedings; (b) dispute the foundation for the statutory demand within the 21 period prescribed under the Act; or make an application in the winding up proceeding pursuant to s 459S of the Act.
- 66 In the case of the BP Australia statutory demand, that demand was issued in respect of a judgment debt obtained in the Magistrates Court of Victoria on 5 August 2024. That judgment was obtained in default of appearance and no application has been made to appeal or otherwise set aside that decision. Accordingly, the judgment stands. Upon the issuing of the statutory demand the defendant did not apply to set aside the BP Australia statutory demand within the 21 day period.
- 67 Furthermore, and assuming that the defendant may have faced at some point in this proceeding with an application for substitution by BP Australia, the existence of the statutory demand served by BP Australia which has expired and with which the defendant has failed to comply, may limit the basis upon which the defendant could challenge BP Australia's status as a creditor.³⁶
- 68 Now, the defendant has foreshadowed that should the amendment be allowed it may wish to be heard on any application under s 459S of the Act. That is fine. That application may still be available to the defendant should it wish to make it.
- 69 To that end, the defendant will not, in my view, suffer any substantial injustice should leave be granted to amend the originating process to allow the plaintiff to rely upon BP Australia's statutory demand.

³⁶ See *Bibby Financial Services Australia Pty Ltd v Wolf Industries Australia Pty Ltd* (2004) 49 ACSR 45.

- 70 Indeed, the fact of this amendment being one which goes to the evidentiary foundation of the claim is highlighted by the plaintiff's submission that any prejudice that might in fact be suffered, would fall on the plaintiff itself. Should the defendant make its foreshadowed application under s 459S of the Act, the plaintiff will be at an evidentiary disadvantage in that it does not have direct knowledge of the BP Australia debt. I agree, however, with plaintiff counsel's submission that those are matters of evidence and trial – not a question of jurisdiction on the application.
- 71 The function of ss 467 and 467A of the Act is to ensure that defects or irregularities in an application do not undermine an otherwise meritorious application such that matters are dismissed for technical or procedural reasons.³⁷ Section 459C(2)(a) requires there to be an event in the nature of failure to comply with 'a' statutory demand in order for the presumption of insolvency to arise. Section 459Q of the Act is a facilitative provision by which the plaintiff seeks to adduce evidence of insolvency. The matters articulated in the originating process are particulars of the s 459C 'event' and the 459Q process. Contrary to the defendant's submission that it does not know what case it has to answer, the proposed amendment to the originating process will amend those particulars and provide clarity as to the case that the defendant must meet before it is required to put on its evidence and submissions in opposition.
- 72 I should note that at no stage during the course of the proceeding (or this application to amend) has the question of actual service of the plaintiff's statutory demand arisen nor have I been asked to resolve the question of whether service was effected. The plaintiff has not lead any evidence as to how the error in the affidavit of service came about, nor is a submission made one way or the other as to whether the plaintiff's statutory demand came to the attention of the defendant.
- 73 Furthermore, the issue of service of the plaintiff's statutory demand has not at any time during the course of the proceeding been raised by the defendant. No application was made to set aside the statutory demand nor has any application

³⁷ Chen v Kornucpia (n 20) at 77-78 [139].

been made pursuant to s 459S to oppose the winding up application on the basis that the statutory demand was never served.

74 Regardless, whether or not the plaintiff is able to demonstrate actual service that is a matter that goes to the plaintiff's ability to prove the grounds upon which it relies not to the jurisdiction of the Court on the application itself.

75 There is one further matter I should mention. In its oral submissions, the defendant's solicitor suggested that such an approach might be open to abuse by 'aggressive creditors' who may seek to commence proceedings without service of the statutory demand.

76 It is true to say that compliance with the processes provided pursuant to s 459Q are critical because of the seriousness and consequences of winding up proceedings.

77 In *Chen v Kornucopia*, Sifris J said (citations omitted):

[138] Seventhly, there being no bar to the jurisdiction of the Court to make a remedial order (whether that is an amendment, dispensation, or some other order) to cure a defective application, the Court must do so unless it is of the opinion that this would cause the company the subject of the application to suffer substantial injustice that could not be remedied by some other means. Of course, the commencement of winding up proceedings is a serious matter with potentially grave financial consequences, and that step should only be taken where "there is a proper foundation for the presumption upon which commencement of the application is based." But that is the matter with which s 467A is concerned. A company without notice of the particulars which support an attempt to have it wound up would, in the vast majority of cases, have no difficulty in establishing "substantial injustice" of a kind that should result in the application's dismissal. The Court will not look favourably upon abuses of the statutory regime consisting of where a winding up application is filed prior to the expiry of a statutory demand, or without an adequate supporting affidavit which verifies the debt, or indeed without any contemporaneous affidavit. Brereton J described this in powerful terms in *Re Vangory Holdings Pty Ltd*, in the case of a supporting affidavit which did not verify the relevant debt:

In my view, the role of s 459Q(3) is very similar. Its function is to require a creditor, before instituting proceedings reliant on the presumption of insolvency – and in which, by reason of s 459S, the defendant will ordinarily be precluded from disputing the existence of the debt – to give close and serious attention to the existence of the debt a second time, this time before instituting proceedings. In such proceedings, a creditor has many advantages, s 459S being perhaps the most obvious

of them. It is not asking too much of a creditor who seeks to invoke those draconian consequences first to comply strictly with the requirements that trigger them.

- 78 It is incumbent upon plaintiffs who apply to wind up a company by reason of failure to comply with a statutory demand that the statutory processes are followed closely and that attention is paid to ensure the correct steps are being taken and accurate evidence is placed before the Court. I do not however think that the effect of granting the plaintiff leave to amend its application on this occasion will ‘open the floodgates’ to applications commenced by plaintiffs without service of a statutory demand. I disagree. An application commenced in the circumstances described by the defendant would likely face either an application to dismiss the proceeding because it was without foundation or otherwise an abuse of process, each of which would operate as a disincentive to that type of “aggressive” application.
- 79 In the present case, where there has been an error in identifying proper service of a statutory demand and where another ‘event’ under s 459C of the Act exists, the desirability of maintaining an otherwise valid application brought by a plaintiff creditor with proper standing means the application should not be dismissed where the defect can be cured and there is no prejudice to the defendant.
- 80 For the reasons I have explained above, I am satisfied that the plaintiff should be granted leave to amend the originating process to rely upon BP Australia’s statutory demand because:
- (a) the jurisdiction of the Court has been properly invoked pursuant to s 459A of the Act;
 - (b) the plaintiff has standing as a creditor of the defendant pursuant to s 459P of the Act by reason of the judgment debt obtained on 20 December 2024 which, as at the date of the proceeding was unsatisfied;
 - (c) on the current evidence, the statutory demand issued by BP Australia on 17 December 2024 was *prima facie* deemed served on the registered office of the defendant on 2 January 2025;

- (d) assuming service on that day, the defendant failed to comply with BP Australia's statutory demand by 23 January 2025, a date three months prior to the date of the originating process, being 28 February 2025;
- (e) the defect in the plaintiff's originating process is one which is capable of being cured by reason of an amendment pursuant to s 467(3) of the Act;
- (f) there is no substantial injustice to the defendant in the plaintiff relying upon BP Australia's statutory demand. The defendant has not been deprived of any opportunity to challenge BP Australia's statutory demand or the underlying judgment by reason of the amendment. Those opportunities were available well before proceedings commenced and the defendant has chosen not to do so. The effect of the amendments is to particularise the matters on which the plaintiff intends to rely in seeking orders winding up the defendant. The defendant will still have the opportunity to make any necessary amendments to its grounds of opposition and tailor its evidence to the case as it is now put.

81 I will make orders in the form sought by the plaintiff.

SCHEDULE OF PARTIES

S ECI 2025 01036I

BETWEEN:

FLEXICOMMERCIAL PTY LIMITED (ACN 644 644 860) Plaintiff

- v -

ML & NB PTY LTD (ACN 657 782 851) Defendant

- and -

B P AUSTRALIA PTY LTD (ACN 004 085 616) Other Party