SUPREME COURT OF QUEENSLAND

CITATION:	*SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229
PARTIES:	**SGR PASTORAL PTY LTD** (Applicant) **v** **GJ, LE, & JN CHRISTENSEN** (Respondents)
FILE NO/S:	BS No 8386 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	13 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2019
JUDGE:	Bowskill J
ORDER:	**1. The statutory demand dated 12 July 2019 is set aside.** **2. If the respondents wish to contend for some other order as to costs, they are to file and serve submissions by 4pm on 17 September 2019. If no such submissions are filed, the order will be that the respondents pay the applicant's costs of the application, to be assessed if not agreed.** **3. If submissions are filed by the respondents, the applicant is to file submissions in response by 4pm on 20 September 2019 and the matter will be determined on the papers.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SERVICE – OTHER MATTERS – where the applicant applies for an order under s 459G of the *Corporations Act* 2001 (Cth) that the respondents' statutory demand be set aside under s 459H – where the respondents contend the application should be dismissed because it was not properly served within the strict 21 day time period – where the applicants emailed sealed copies of the application and supporting affidavit to the respondents' solicitors on the 21st day of the service period – where the managing clerk of the respondents' solicitors' firm deposes that the email was received at 1:21pm, he saw the email at 2:15pm and he read the email sometime after 4pm, after he had left the office – whether service under s 459G can properly be effected by email – if so, whether service was effected when the email

was received, seen or read – if service was not effected until the email was read, whether service is taken to be effected the next day, given it was after 4pm – if service was not effected until the email was read, whether the documents were not served at the nominated place for service, given the managing clerk was not in the office at that time

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where the applicant applies for an order under s 459G of the *Corporations Act* 2001 (Cth) that the respondents' statutory demand be set aside under s 459H – whether the applicant has shown a genuine dispute about the existence and amount of the debt claimed in the statutory demand in the sense of a plausible contention requiring investigation – whether the applicant has shown it has a genuine offsetting claim which it ought to be entitled to litigate in the ordinary way

Acts Interpretation Act 1901 (Cth) s 28A, s 29
Corporations Act 2001 (Cth) s 109X, s 459G, s 459H
Uniform Civil Procedure Rules 1999 (Qld) r 103, r 105, schedule 1A

Austar Finance Group Pty Ltd v Campbell (2007) 215 FLR 464
Autumn Solar Installations Pty Ltd v Solar Magic Australia Pty Ltd [2010] NSWSC 463
Bauen Constructions Pty Ltd v Sky General Services Pty Ltd [2012] NSWSC 1123
C&E Pty Ltd v Corrigan [2006] 2 Qd R 399
Citation Resources Ltd v IBT Holdings Pty Ltd (2016) 116 ACSR 274
Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd [2015] 1 Qd R 265
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259
Forza Finance Pty Ltd v Vergepoint Sales & Management Pty Ltd [2010] QSC 46
Greenmint Pty Ltd v Mark O'Keeffe [2015] VSC 326
Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542
JJMMR Pty Ltd v LG International Corp [2003] QCA 519
Mills Oakley v Asset HQ Australia Pty Ltd [2019] VSC 98
Newsnet Pty Ltd v Patching (2011) 81 NSWLR 104
Nutri-Care Limited v ACN 080 633 754 Pty Ltd [2009] SASC 72
Players Pty Ltd v Interior Projects Pty Ltd (1996) 133 FLR

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Re World Square Realty Pty Ltd [2013] NSWSC 307
Rochester Communications Group Pty Ltd v Lader Pty Ltd (1997) 143 ALR 648
Seventh Cameo Nominees Pty Ltd (unreported, Supreme Court of Victoria, 24 April 1998)
Woodgate v Garard Pty Ltd (2010) 239 FLR 339

COUNSEL: S P Colditz for the applicant
KN Wilson QC for the respondents

SOLICITORS: PHV Law Solicitors and Consultants for the applicant
Australian Property Lawyers for the respondents

[1] The applicant applies for an order under s 459G of the *Corporations Act* 2001 (Cth) that the respondents' statutory demand be set aside under s 459H, on the basis that there is a genuine dispute as to the existence and amount of the claimed debt, and the applicant has an offsetting claim. The respondents contend the application should be dismissed because it was not properly served within the strict 21 day time period[1] and, in any event, the evidence does not establish a genuine dispute, at least not as to the whole of the debt claimed, and accordingly the statutory demand ought not be set aside.

[2] The statutory demand is dated 12 July 2019. It demands payment of $51,538.32, comprising an amount of $49,823.20 said to be "monies due and owing to the creditor for goods sold and delivered on a running account" by reference to numbered invoices issued from January to April 2019 (totalling $150,327.36) less payments received in April 2019 (of $100,504.16) plus interest calculated pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld).[2]

Does the court have jurisdiction – was the application served within time?

[3] The first question is, when was the statutory demand received by the applicant?

[4] The statutory demand was posted to the applicant, at the address of its registered office, by the respondents' solicitors (Mr Edwards, a Solicitors Managing Clerk, of Australian Property Lawyers) on 12 July 2019.[3]

[5] The applicant says, and I accept, that the statutory demand was not received at the registered office until 17 July 2019. Ms Dunsdon, who is the "client relationship manager" of Prudent Partners, the accountancy practice which is the registered office address for the applicant, has given evidence of this. One of her tasks each day is to scan all of the mail delivered to the office by Australia Post into an electronic document

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1 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265.

2 Affidavit of Edwards, at exhibit DWE-01.

3 Edwards at [3].

management system, which maintains an electronic record of each piece of mail that has been delivered, and its date of delivery. An electronic record printed from that system[4] records that for SGR Pastoral Pty Ltd, "Correspondence_Australian Property Lawyers_Debt demand_SGR Pastoral Pty Ltd" was received on 17 July 2019. Ms Dunsdon confirms this correspondence is the letter enclosing the statutory demand (at [5]). Ms Dunsdon goes on to say:

> "6. Each day I personally collect the mail from the office's post box.
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> 7. I recall that on each of Monday 15 July 2019, Tuesday 16 July 2019, and Wednesday 17 July 2019, I attended the office's post box at my usual time of around 9am, personally collected all items of the mail to be delivered to the office that day, took the items back to the office, and recorded each of them in the electronic record.
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> 8. I recall that on Wednesday 17 July 2019, one item of the correspondence I collected from the office's post box that day stood out as being memorable. I remember that it was a statutory demand served on a corporate client, SGR Pastoral Pty Ltd, by a firm of solicitors."

[6] The respondents submit that there is an internal inconsistency within Ms Dunsdon's affidavit (between [4], in which she says mail is delivered to the office, and [8], in which she says she collected the letter from "the office's post box"), and also between Ms Dunsdon's affidavit and correspondence from the applicant's solicitor of 5 August 2019 (in which it is said that "Prudent Partners go to the Fortitude Valley post office on a daily basis and collect mail"[5]). Accordingly, the respondents submit the court should proceed on the basis the statutory demand was received in the ordinary course of the post, on 15 or 16 July 2019.[6] If this be accepted, on any view the application was served out of time.

[7] However, I do not consider there is any inconsistency in Ms Dunsdon's affidavit. When she refers to "the office's post box" in [7] and [8], reading the affidavit as a whole, I take that to be a reference to the post box for the office, at the premises of the office (as opposed to a post *office* box, at a post office). That is consistent with what she says at [4], that each day the mail is delivered "to the office" by Australia Post. Further, the reference to the electronic record of mail received supports what she says at [8] of her affidavit. The solicitor's correspondence of 5 August 2019 does not support

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4 Exhibit JD-01 to Ms Dunsdon's affidavit.

5 Edwards, exhibit DWE-02, at p 10.

6 Relying upon the combined operation of s 109X(1)(a) of the *Corporations Act* and ss 28A(1)(b) and 29 of the *Acts Interpretation Act* 1901 (Cth); and *Mills Oakley v Asset HQ Australia Pty Ltd* [2019] VSC 98 at [28]. See also Edwards, exhibit DWE-02, at p 80 (confirmation from Australia Post that the article was received at the Stafford Delivery Centre on 15 July 2019, and "in most cases" "items are delivered the same day").

a different conclusion. Ms Dunsdon is the person who collected the mail, and scanned the correspondence into the system. There is no reason not to accept her evidence. It is likely the solicitor was mistaken, or misunderstood the position, when writing the letter of 5 August.

[8] I proceed on the basis the statutory demand was received on 17 July 2019.

[9] On that basis, it is uncontroversial that the 21 days in which an application to set aside the statutory demand had to be made (s 459G) expired on 7 August 2019.

[10] So the next question is whether the application and supporting affidavit were properly served within time.

[11] It is common ground that the original (hard copy) documents were not served at the respondents' solicitors address until 9 August 2019 (so out of time).

[12] However, sealed copies of the application and supporting affidavit, as filed with this court on 7 August 2019, were served, by email sent on 7 August 2019 to two email addresses belonging to the respondents' solicitor, Australian Property Lawyers: one was the email address from which legal correspondence had been sent to the applicant's solicitors' firm on 31 July and 5 August 2019; the other was the address appearing on the letterhead of the solicitors (under cover of which the statutory demand was served).[7]

[13] The evidence of Mr Edwards (the Managing Clerk of Australian Property Lawyers) is that:

1. The email (enclosing a letter, the filed originating application and supporting affidavit of Mrs Ritchie) was <u>received</u> by Australian Property Lawyers on 7 August 2019 at about 1:21pm.[8]

2. The email was not <u>seen</u> by him until around 2:15pm on 7 August 2019. Mr Edwards says:

> "I had been working on other files, and whilst I saw the email come in before 2:15, there was nothing on the face of the email that dictated what the attachments were as it made reference to 'correspondence' and nothing more – the attachments bear a numerical name as opposed to a document name which is descriptive of the contents[9] – and as

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7 Affidavit of Eustace at [3]; the email received is part of exhibit DWE-02 to Mr Edwards' affidavit, at p 16.

8 Edwards at [8].

9 The email (Edwards, exhibit DWE-02, at p 16) has the subject line "SGR Pastoral Pty Ltd outstanding dispute with Christensen"; has three attachments; and says in the body of the email "Please see attached correspondence for your attention".

such I did not read the email and its attachments until sometime after 4:00pm."[10]

3. Although this does not appear in Mr Edwards' affidavit, I was informed by senior counsel for the respondents that when Mr Edwards read the email and its attachments "sometime after 4:00pm" he was no longer at the office, he was working from home. The applicant did not object to the matter proceeding on that factual basis.

[14] The issues to be determined are:

1. Whether service under s 459G can properly be effected by email.

2. If so, what time service was effected.

3. If it was not until after 4:00pm, when Mr Edwards actually read the email, whether service is taken to be effected the next day.

4. If service was not effected until Mr Edwards actually read the email, whether the documents were properly served at the nominated place for service, since Mr Edwards was not in the office when he read the email.

[15] Section 459G(3) of the *Corporations Act* provides that:

> "An application [to set aside a statutory demand] is made in accordance with this section only if, within those 21 days:
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> (a) an affidavit supporting the application is filed with the Court; and
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> (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company."

[16] The person who served the demand on the applicant is the respondent creditors.[11] However, the statutory demand specifies that the "address of the creditor for service of copies of any application and affidavit is C/- Australian Property Lawyers Pty Ltd, 22 Fulham St, Toogoolawah QLD 4313".

[17] It is well established that the requirement in s 459G(3)(b) to serve the documents "on the person who served the demand" is met where the documents are served at the address for service specified in the statutory demand.[12]

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[10] Edwards at [9].

[11] *Players Pty Ltd v Interior Projects Pty Ltd* (1996) 133 FLR 265 at 269 per Lander J.

[12] See *Newsnet Pty Ltd v Patching* (2011) 81 NSWLR 104 at [23]-[26] per White J, and the authorities there referred to, including *Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648 at 669-670 per Beaumont J and 681-682 per Moore J. See also *Re World Square Realty Pty Ltd* [2013] NSWSC 307 at [16]-[17].

[18] It follows from this that personal service of the application and supporting affidavit on the creditor is not required, for the purposes of s 459G(3).[13]

[19] The respondents maintained a submission that personal service is required; because the application is required to be made by filing an originating application,[14] and r 105 of the *Uniform Civil Procedure Rules* 1999 (Qld) requires an originating process to be personally served. However, the respondents did not take issue with the proposition that service on the creditors' solicitor at the address nominated in the statutory demand is sufficient.[15] The effect of the respondents' argument, then, is that personal service on the creditors' nominated agent is required. That is both counter-intuitive and inconsistent with the settled authorities referred to in footnotes 12 and 13. The UCPR apply to a proceeding such as this, but only to the extent they are relevant and not inconsistent with the *Corporations Proceedings Rules*.[16] The *Corporations Proceedings Rules* do not prescribe any method of service of the application;[17] and r 105 is not relevant, where the creditor has nominated, as required by the prescribed form for a statutory demand, an address for service of any application and supporting affidavit. As Lander J said in *Players Pty Ltd v Interior Projects Pty Ltd* (1996) 133 FLR 265 at 268-269:

> "It is readily apparent why the form would provide for an address for service of any application and affidavit, that is because of the onerous requirements of s 459G and so as to make it entirely clear to any party who wished to make an application under that section upon whom and where the document under s 459G ought to be served… It seems to me that the regulations therefore contemplate that the party to whom the s 459E notice is directed will, if that party makes an application under s 459G, serve that application at the address nominated in the Form 509H notice and not be required to serve the creditor either at the creditor's own address or at the registered office of the creditor if the creditor is a company… It is clear enough to me that the intention is to facilitate the service of an application under s 459G not to impede service or make service of such an application more difficult."

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[13] See *Woodgate v Garard Pty Ltd* (2010) 239 FLR 339 at [44](i), and the authorities there referred to, including *Forza Finance Pty Ltd v Vergepoint Sales & Management Pty Ltd* [2010] QSC 46 at [14]-[16] per Daubney J; see also *Newsnet Pty Ltd v Patching* at [30]-[31] and [33]-[35] per White J.

[14] See r 2.2(1)(a) of the *Corporations Proceedings Rules* (schedule 1A to the UCPR).

[15] Oral submissions at T 1-19.

[16] See r 1.3(2) of the *Corporations Proceedings Rules*.

[17] Cf r 2.7 of the *Corporations Proceedings Rules,* which deals with service, but does not prescribe any particular method of service. Likewise, the *Corporations Act* does not prescribe any mode of service of an application under s 459G.

[20] Lander J rejected an argument that the rules of court applied to require personal service (at 271); Young J in *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542 at 544-545 expressly agreed.

[21] It is appropriate to confirm, consistently with the many authorities which have determined this point, that service of an application and supporting affidavit under s 459G is sufficient if the documents are served at the address for service nominated in the statutory demand, and that personal service under the UCPR is not required.

[22] I turn next to the means by which the documents are to be served at the nominated address. In *Howship Holdings Pty Ltd v Leslie,* albeit in the context of discussing the meaning of personal service, Young J said (at 544):

> "The ordinary meaning of 'service' is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains the document are usually immaterial."

[23] Self-evidently, where personal service is not required, the means by which documents are served at a nominated address is immaterial, provided they arrive there. This was the view expressed by Chernov J in *Seventh Cameo Nominees Pty Ltd* (unreported, Supreme Court of Victoria, 24 April 1998[18]) where his Honour said:

> "In my view, it is sufficient for the purposes of s 459G(3) if copies of the application and affidavit are served at the relevant address, that being the address nominated by the giver of the statutory notice. Thus, service may be effected if copies of the relevant documents are left at the nominated address. In a sense, **how they come to be left there is irrelevant** (see Young J in Howship Holdings Pty Ltd v Leslie, at p 442). For instance, the copy documents may be left by someone attending at the address in question and leaving them there. If that had occurred in this case, then in my view, proper service would have been effected of the relevant documents. The **same object is achieved if the copies arrive at that address as a result of being sent by way of a facsimile transmission**. What is required by s 459G(3) is that the respondent should receive copies of the relevant documents at the address nominated by it. Once that has occurred, the requirement of s 459G(3) as to service of the relevant documents is satisfied…
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> Speaking generally, the purpose of the various rules which deal with service is to ensure that the respondent has proper notice of the application that is to be made against it. That seems to be the aim of s 459G(3).

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[18] http://www.austlii.edu.au/au/cases/vic/VicSC/1998/187.pdf

> It is not the object of the legislation and the rules governing service to allow a respondent who has the relevant application in his or her hands within the prescribed time, to avoid meeting a case brought against him or her, by recourse to technical arguments as to service. As Lander J in Players Pty Ltd v Interior Projects observed at p 193:
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> > 'The intention is to facilitate the service of an application under s 459G, not to impede service or make service of such an application more difficult.'
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> Further, as Young J in Howship Holdings Pty Ltd v Leslie, has pointed out at p 442:
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> > 'Were it otherwise, one would get to the absurd situation referred to by McInerney J in Pino v Prosser & Hassan [1967] VR 835 at 837, that the defendant who, on his own affidavit admits that he received the writ … should be held not to have been served.'
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> As I have said earlier, it is common ground that the respondent here **received** copies of the relevant documents within the 21-day period. That these copies were transmitted to it or were made available to it through a facsimile transmission, as distinct from someone attending at the relevant premises and leaving them there is, in my view, not relevant. **What is critical is that copies of the relevant documents came into the possession of the respondent at the address nominated by it, within the prescribed time**."[19]

[24] Is there any reason to distinguish service by email, from service by facsimile?

[25] In *Newsnet Pty Ltd v Patching* (2011) 81 NSWLR 104, White J said there was not. At [37], his Honour referred to the decision of Jagot J in *Opensoft Australia Pty Ltd v Miller Street Pty Ltd* [2011] FCA 653. In that case, the address for service nominated in the statutory demand was TW Agency, at a street address in Sydney. Copies of the application and supporting affidavit (not bearing the seal of the court, a proceeding number or a return date) were personally handed to a Mr Daoud, the principal of TW Agency, on the 21st day. That was held to be ineffective service, on the basis of a long line of authority supporting the conclusion that copies of the filed documents is necessary. Later on the 21st day, sealed copies of the documents, as filed, were served by email on Mr Daoud and also on a director of the creditor. Mr Daoud received and read the email on that day. The director of the creditor did not. It was held that service in this way was also ineffective, because the statutory demand specified the address for service as the physical address of TW Agency, and not any electronic address for service, and "it is not the place of TW Agency or Mr Daoud as its principal to accept

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[19] Bold emphasis added.

service by means other than those specified in the statutory demand itself" (*Opensoft* at [54]).

[26] After referring to the decision in *Opensoft*, White J said this:

> "38 Unless there is something to distinguish service by email from service by facsimile, I do not think that this decision can be reconciled with that of Chernov J in *Seventh Cameo Nominees*. **If the electronic copy of the application and supporting affidavit reached the office of TW Agency at the address specified in the statutory demand in a form that was complete and legible, in my view the copy would have been served at that address**. I do not see why it would matter that the document was in electronic, and not paper, form. It would still be a copy of the application and supporting affidavit. There may be issues as to whether and when an email actually reaches the place for service. Austin J discussed this question in *Austar Finance v Campbell* (at [48]). It is not necessary to express a view as to whether an email which is opened from a computer at the address for service without being printed is received at the address at which the computer is located. That will depend on the evidence. It may be that the user accesses the document stored remotely through his or her computer. If, however, the email were printed at the address for service, or **if it were received in electronic form at the address for service**, in my view a copy of the application and supporting affidavit would have been served at that address.
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> 39 Jagot J [in *Opensoft*] accepted the submission for the defendant that it was not the place of TW Agency to accept service by means other than those specified in the statutory demand itself. No doubt that is right, in the sense that service would have to be effected at the address for service, namely the specified place of business of TW Agency. But the creditor is required by the form of statutory demand to specify a place for service. In my view **a creditor is not entitled to limit the ways in which an application to set aside the statutory demand and supporting affidavit can be delivered to the address for service**. **Provided the documents reach the relevant place in complete and legible form, service is effective**."[20]

[27] I agree with White J's analysis; which is consistent with the approach taken in *Seventh Cameo* and also *Austar Finance Group Pty Ltd v Campbell* (2007) 215 FLR 464; and approved in *Woodgate v Garard Pty Ltd* (2010) 239 FLR 339 at [44]. This approach was also adopted by Gardiner AsJ in *Greenmint Pty Ltd v O'Keeffe* [2015] VSC 326 at [16]-[18] (a case in which sealed copies of the documents were served by facsimile and

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[20] Bold emphasis added. See also *Greenmint Pty Ltd v Mark O'Keeffe* [2015] VSC 326 at [16] (Gardiner AsJ also disagreeing with this aspect of *Opensoft*).

email, on the 21st day, at the address for service (of the creditor's solicitor) nominated in the statutory demand).[21]

[28] There is no reason to distinguish between electronic transmission by facsimile or email, other than in terms of the evidentiary question of when such a transmission could be said to be received at the place for service (see *Austar Finance* at [48]-[49] and [55]).

[29] That leads to the next question, when do documents served by email reach the place for service? Is it when the email is received at the place? Or when the email, and any attachments, are actually opened and read?

[30] On White J's analysis, in *Newsnet Pty Ltd v Patching*, it is when the email is received (but not necessarily opened or read). This is apparent from [38] of *Newsnet* (set out above) and also [40]-[41] where White J said:

> "40 In *Austar Finance v Campbell,* Austin J said (at [49]):
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> '[49] Notwithstanding these differences, in my view electronic transmission, whether by facsimile or email, cannot constitute service for the purposes of s 459G(3) unless either:
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> - it is shown that the documents electronically transmitted have actually been received in a readable form by the person to be served; or
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> - the case falls within one of the special exceptions permitted by rules of court.'
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> 41 I do not understand why it would be necessary for the purpose of effective service under s 459G(3)(b) that the document be actually received by the person to be served. **Service at the address for service, that is, service to a place, is effective if made within time, whether or not the document is received by a person**. For this reason I do not accept that service by facsimile can only be effective as informal service and only becomes effective when the document is brought to the attention of a responsible officer (compare *Woodgate v Garard Pty Ltd* (at [44](v))). Nor do I accept that service at an address for service specified in the statutory demand can only be made in accordance with one of the ways prescribed by s 109X of the *Corporations Act* (Cth) (in the case of service on a company), r

[21] This conclusion is also consistent with the approach taken by Daubney J in *Forza Finance Pty Ltd v Vergepoint Sales and Management Pty Ltd* [2010] QSC 46, that because personal service is not required, r 112 of the UCPR provides for a number of ways in which documents may be served, which includes faxing the document (and emailing the document).

> 10.21 of the *Uniform Civil Procedure Rules* or s 28A of the *Acts Interpretation Act* (Cth). Those provisions are facultative, not exclusive."

[31] Austin J's conclusion in *Austar Finance* was that service by email was not effective until the document(s) emailed had actually come to the attention of the person to be served; that is, until the person has accessed the email (at [55] and [60]). But it is apparent that Austin J's analysis proceeded from the proposition that personal service was required; involving as that does "a physical encounter" with the document(s) (see at [56]).

[32] A similar conclusion was adopted by Palmer J in the summary of principles in *Woodgate v Garard* at [44](v) (whether service by email "actually brought the document to the attention of a responsible officer").

[33] In contrast, in *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123 Sackar J held, in a different context, that if an email is sent, but not opened or read, but is capable of being retrieved, it has been "received". In that case, the relevant requirement was for documents to be "lodged", which Sackar J found, according to its ordinary meaning, means to "present, formally", and does not carry with it a meaning of ensuring its arrival (at [71]). In addition, the *Electronic Transactions Act* 2000 (NSW) was found to apply, which enabled the lodging party to rely on the provision that the time of receipt of an electronic communication is the time when it becomes capable of being retrieved.[22] In this case, the relevant documents were sent by email on the last day for lodgment, but the email was caught by the recipient's spam filter, and so it was not read or accessed by staff of the recipient until the next day (see at [68]). The fact that the email was capable of being retrieved (albeit from the spam folder) was sufficient to prove the documents had been lodged within time. The case is distinguishable on these two bases: the meaning given to "lodge" and the application of the *Electronic Transactions Act*.

[34] The issue of email service, again in a different context, was also considered by McMurdo J (as his Honour then was) in *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265. In this case, an email was sent, with attachments, comprising some of the documents required to be served. However, there was also reference in the email to a Dropbox link, where other files were held. The email and its attachments were opened and read; but the recipient did not seek to look at the documents within the Dropbox files. In this case, s 39 of the *Acts Interpretation*

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[22] The Queensland equivalent of this is s 24 of the *Electronic Transactions (Queensland) Act* 2001 (Qld); the Commonwealth equivalent is s 14A of the *Electronic Transactions Act* 1999 (Cth). Even if this legislation (relevantly, the Commonwealth Act, as the requirement to serve the documents arises under s 459G of the *Corporations Act*) could otherwise be said to apply in relation to the requirement to serve the application and supporting affidavit, it can only do so if the person "to whom the information is required to be given" consents to that being done by way of electronic communication: see s 9(1)(d) of the Commonwealth Act (and, for completeness, s 11(2)(b) of the Queensland Act). There being no evidence of such consent in this case, the legislative provisions do not apply.

Act 1954 (Qld)[23] applied. McMurdo J applied the reasoning of Austin J in *Austar Finance,* that in the case of an email transmission, nothing can be said to have been "left" at the receiver's premises, at least until the email is accessed. Even though the email and attachments were accessed and read, as the file(s) within the Dropbox (comprising part of the material required to be served) were not part of the data which was contained in the email (at [15] and [28]), the documents were not properly served (at [30]-[33]). As to whether it could be said the documents were effectively informally served, McMurdo J referred to *Capper v Thorpe* (1998) 194 CLR 342, *Howship Holdings Pty Ltd v Leslie* and *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259 (which establish that where a document has actually been received and come to the attention of the person served, regardless of whether a facultative regime has been complied with, there is effective service). His Honour said, at [36], that:

> "… quite apart from s 39 of the *Acts Interpretation Act*, it would be consistent with these authorities that at least the email and its attachments, when opened by the addressees on 23 and 26 August, were then served…."

[35] But in relation to the files in Dropbox, although the documents which were actually read "unambiguously informed [the recipient] that there were other documents which were part of the application and of their location", his Honour said, at [37]:

> "Actual service does not require the recipient to read the document. But it does require something in the nature of a receipt of the document. A document can be served in this sense although it is in electronic form. But it was insufficient for the document and its whereabouts to be identified absent something in the nature of its receipt…"

[36] As already established, the authorities strongly support the conclusion that, where a creditor nominates an address for service in the statutory demand, it is permissible to serve an application and supporting affidavit under s 459G at that address, and personal service is not required. The authorities also support the conclusion that the means by which the documents come to be at that address is immaterial.

[37] In the case of service by email, in my view, what must be shown is that the electronic copy of the application and supporting affidavit was received, in a complete and legible form, at the address for service, within the prescribed time. That is, that the email was sent to an email address that belongs to the nominated agent for service (here, the solicitors, Australian Property Lawyers); that the email attaching the documents to be

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[23] Providing for service of documents required to be served under an Act, on a body corporate, inter alia, by leaving it at the head office, a registered office or a principal office of the body corporate (s 39(1)(b)).

served actually arrived at the email address;[24] and that the email and attached documents were capable of being opened and read (even if they were not opened and read until later).

[38] In this regard, I agree with and adopt White J's approach in *Newsnet.* To the extent that Austin J in *Austar Finance* is to be understood as articulating a requirement that service by email is not effective until the email is actually opened and the documents are read, I disagree and prefer the approach of White J, which is consistent with the general principles as to service, including as discussed by McMurdo J in *Conveyor & General Engineering Pty Ltd v Basetec Services*, that actual service does not require the recipient to read the document. However, as McMurdo J said, "it does require something in the nature of a receipt of the document".

[39] This is also consistent with the well-established principle, in the case of service by non-electronic means, that if hard copies of the documents are left at the nominated place for service[25] on a particular day, even if that was by sliding an envelope containing the documents under a closed door (and even if that was after office hours), that would be effective service on the day of delivery.[26]

[40] I can see no reason why the position should be any different, in the case of electronic copies of the documents received either by facsimile transmission or email.

[41] Of course, as foreshadowed by White J in *Newsnet* at [38], there may be evidentiary issues as to whether and when an email has actually arrived at, or reached the email address. Where the documents are physically left at the nominated place for service, that can be established by evidence from the person who did that. Where the documents are delivered by email, proof that the documents actually reached the nominated place for service may depend not only on evidence from the person who sent the email, but also potentially electronic data and evidence from the recipient.[27] Where the Commonwealth *Evidence Act* 1995 applies, there are rebuttable presumptions which

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[24] Cf, by analogy, *Russell v Minister for Home Affairs* [2019] FCAFC 110 at [22] (in relation to the meaning of "capable of being retrieved … at an electronic address" in s 14A of the *Electronic Transactions Act* 1999 (Cth)).

[25] For example, as in accordance with s 109X(1)(a) of the *Corporations Act* (which provides for service on a company by leaving the document at the registered office) or s 28A(1)(b) of the *Acts Interpretation Act* 1901 (Cth) (which provides for service on a body corporate by leaving it at the head office, registered office or a principal office of the body corporate) or at the address for service nominated in the statutory demand.

[26] See *Cornick Pty Ltd v Brains Master Corporation* (1995) 60 FCR 565 (in the case of a statutory demand, placed under the door, at 5:45pm); *SV Steel Supplies Pty Ltd v Palwizat* (2007) 208 FLR 113 (also a statutory demand, placed under the door, when the office was closed); *Nutri-Care Ltd v ACN 080 633 754 Pty Ltd* [2009] SASC 72 (in the case of an application under s 459G, where the documents were placed in the mail slot of the place nominated as the address for service in the statutory demand, at 8.15pm on the relevant date); and *Career Training on Line Pty Ltd v BES Training Solutions Pty Ltd* [2010] NSWSC 460 at [28] and [29] (service of a statutory demand by placing it under a locked door at 1.30pm, held to be service effected at the time of delivery). These cases are referred to in *Woodgate v Garard Pty Ltd* at [44](ii).

[27] Cf *Austar Finance* at [22], [56] and [60] (regarding the evidence in that case as to when an email is "received" in the receiver's computer).

would facilitate proof of these matters (see s 161); however that provision does not apply to proceedings in this Court (see ss 4 and 5 of the Commonwealth *Evidence Act*), and there is no equivalent Queensland legislation. In any event, apart from that evidentiary issue, I can see no reason to treat service of the documents, in hardcopy or electronic form, at the nominated place for service, any differently.

[42] There is such evidence in this case. It was uncontroversial that the email addresses to which the documents for service were sent belonged to Australian Property Lawyers. Mr Edwards deposes to the email being received by his employer firm, Australian Property Lawyers, at about 1:21pm on 7 August 2019. He saw the email at 2:15pm. It is reasonable to infer the documents, which were attached to this email, reached the place for service in complete and legible form, because they were able to be opened and read by Mr Edwards later that day. The fact that he did not open and read the email until later that day (after he had left the office) does not support a conclusion that the documents were not served, electronically, at the place nominated for service, on 7 August 2019. I find that they were so served, by no later than 2.15pm, when Mr Edwards saw the email, from which it can be found the email and attachments actually arrived at the email address of the place for service.

[43] Even if this conclusion is wrong, and the approach taken by Austin J in *Austar Finance* is to be preferred (to the effect that service is not effected until the email is opened and read), the evidence is that the email, and attached documents, were actually read by Mr Edwards on 7 August 2019, sometime after 4.00pm.

[44] There are three points in relation to this.

[45] First, that is evidence of the actual receipt of the documents served, such as to invoke the principle that where it is clear the documents have been actually received and come to the attention of the person to be served, or a person with authority to deal with the matter on behalf of the person to be served, there is effective service.[28]

[46] Next, as to the timing, I have no hesitation in finding that service was effected on 7 August 2019, even though the email was not read until after 4.00pm. That is supported by the decision of Barrett J in *Autumn Solar Installations Pty Ltd v Solar Magic Australia Pty Ltd* [2010] NSWSC 463 at [8]-[11] as to the ordinary meaning of "day", as beginning and ending at midnight. It is also supported by the reasons of Keane JA (as his Honour then was) in *C&E Pty Ltd v Corrigan* [2006] 2 Qd R 399. In that case, the application was served at 4.30pm on the 21st day. The creditor argued that r 103 of the UCPR[29] operated to deem service to have been effected on the 22nd day. Justice Keane observed that r 103 may be understood as referring only to documents the

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[28] *Howship Holdings Pty Ltd v Leslie* at 544-545; *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259 at [58]. This is reflected in r 117 of the UCPR.

[29] Rule 103 provides that: "If a document is served on a person after 4.00pm, the document is taken to have been served on the next day."

service of which is authorised or required by the UCPR itself, or where the time for service is fixed by the UCPR itself; and noted that the application to set aside a statutory demand is not such a document, since the authority for the application is s 459G of the *Corporations Act*.[30] Keane JA said, at [28]-[29]:

> "It was established by the High Court's decision in *David Grant & Co Pty Ltd v Westpac Banking Corporation* that the time allowed by s 459G(3) of the Act for the service of an application to set aside a statutory demand cannot be extended by reliance upon procedural provisions similar to those contained in the UCPR. In my view, by a parity of reasoning, the time allowed by s 459G(3) cannot be cut down by such procedural provisions. To construe r 103 of the UCPR to operate in that way would be to abridge by eight hours the time allowed for an application by s 459G(3). Construed in this way, r 103 of the UCPR would detract from the right to apply to set aside a statutory demand conferred by the Act. It is unlikely that the Commonwealth Parliament contemplated that the rights conferred by s 459G could be cut down in this way. The construction of r 103 for which the respondent contends would thus give rise to difficulties by reason of the terms of s 109 of the *Commonwealth Constitution.*
>
> In my view, r 103 of the UCPR should not be understood as purporting to affect the time for service provided by s 459G(3) of the Act."

[47] Senior counsel for the respondents submitted that these observations were obiter, as the case was decided on a different point, and pressed for r 103 UCPR to be applied. I am not convinced the observations were obiter. Although the issue of the date of service was raised by notice of contention, and the appeal was determined on another basis, as explained by Keane JA at [21] there was potential practical (costs) significance to the contention, and so it was addressed, and a finding was made (at [30]). Williams JA and Muir J each agreed with Keane JA. But in any event, the reasoning of Keane JA on this point is thoroughly persuasive, and I adopt and apply it here.[31]

[48] Thirdly, as to the location of Mr Edwards when he read the email, I reject the respondents' submission that this means the documents were not served at the nominated address for service. Given the strictness of the regime according to which an application to set aside a statutory demand may be made, in my view it would be absurd[32] to conclude that the recipient can avoid a finding of effective service in

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[30] Referring to the decision of Hayne J, then of the Supreme Court of Victoria, at first instance in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1994) 12 ACLC 895.

[31] See also *Nutri-Care Limited v ACN 080 633 754 Pty Ltd* [2009] SASC 72 at [10], where it was said that in the context of the strict regime under s 459G according to which an application to set aside a statutory demand might be made "[i]t would be somewhat draconian to add a further limit to the section and read it to mean that any relevant service had to take place within business hours".

[32] See *Seventh Cameo Nominees*, referring to *Howship Holdings Pty Ltd v Leslie* at 442; and *Austar Finance* at [36].

circumstances where the email was actually received, and they saw the email when they were in the office (the place of service), but did not open and read it until they had left the office. That would be akin to accepting that a person could pick up an envelope left at the place for service, and then walk down the road to a coffee shop, or go home, before opening it, and in that way avoid a finding of effective service. The documents are served, at the place for service, when the email actually arrives, in retrievable and readable form, at the electronic address. The evidence in this case is that the emailed documents were actually received at the electronic email address of the nominated place for service. The documents are still received at the electronic email address of the nominated place for service, even if a person, as in the case of Mr Edwards, accesses that email remotely from another place.

[49] I am satisfied the application was properly served within time and therefore that there is jurisdiction to deal with the application.

Has the applicant shown a genuine dispute and/or offsetting claim?

[50] For the following reasons, I am also satisfied that the applicant has shown that there is a genuine dispute about the existence and amount of the debt claimed in the statutory demand and that the applicant has an offsetting claim, for the purposes of s 459H(1) of the *Corporations Act*.

[51] The relevant principles concerning whether there is a genuine dispute under s 459H were summarised by McKerracher J in *Citation Resources Ltd v IBT Holdings Pty Ltd* (2016) 116 ACSR 274 at [17]. The threshold is not high or demanding; a genuine dispute means there must be a plausible contention requiring investigation; and it is only if the applicant's contentions are so devoid of substance that no further investigation is warranted that the applicant will fail. The court is not called on to determine the merits of, or to resolve, the dispute.

[52] An offsetting claim means a genuine claim that the company has against the respondents, even if it does not arise out of the same transaction or circumstances as the debt to which the demand relates (s 459H(5)). The claim must not be spurious or artificial, or have been "manufactured or got up simply for the purpose of defeating the demand made against the company": *JJMMR Pty Ltd v LG International Corp* [2003] QCA 519 at [18].

[53] The statutory demand is dated 12 July 2019. The debt claimed in the statutory demand is said to be monies due and owing to the respondent creditors for goods sold and delivered, being the amount of $49,823.20 representing the amount outstanding for invoices issued between January and April 2019 (totalling $150,327.36), less payments made in April 2019 (of $100,405.16).

[54] The applicant operates a cattle feed lot. The goods it acquired from the respondents were cattle fodder, including grass hay, corn stubble, fodder and cane tops. This was

pursuant to an oral agreement between the applicant and the respondents, on the basis of requests for supply from the applicant, subject to an agreed price per tonne for each kind of fodder, which was subject to variation by agreement.[33]

[55] Mrs Ritchie, the director of the applicant, says that "[i]t is an acknowledged industry standard with respect to feed lots and suppliers of fodder to feed lots that when fodder is contracted to be delivered according to weight, that the deliveries of fodder are accompanied by a weigh bridge docket that evidences the gross weight of the vehicle carrying the fodder [and] the tare weight of that vehicle (that is the unloaded weight with a full tank of fuel) from which it can be ascertained what the actual weight of the load is…"[34] The applicant contends it was an implied term of the agreement between the parties that deliveries of fodder would be accompanied by these weigh bridge dockets, as proof of the accuracy of the weight of fodder being delivered (and accordingly the accuracy of the amount charged to the applicant).

[56] Deliveries of fodder from the respondents to the applicant commenced in August 2018. Invoices were sent subsequent to the deliveries.[35]

[57] The applicant contends that, in breach of the implied term of the agreement, the deliveries of fodder were not accompanied by any weigh bridge docket. No weigh bridge dockets were provided with the invoices either. Mrs Ritchie deposes, on the basis of information and belief, that her husband, who is the applicant's purchasing officer, and other "feed lot staff", "on numerous occasions" telephoned the respondents, and spoke to one of them, asking for the weigh bridge documents. They received assurances that the weigh bridge documents would be sent through, and so paid the amounts claimed on the invoices. I infer, from [10] of Mrs Ritchie's affidavit, that these requests were made prior to 23 January 2019.[36]

[58] After the applicant received invoices, on 23 January 2019, for deliveries made in December 2018, which did not include weigh bridge dockets, Mrs Ritchie queried two of the invoices (which reflected delivery on two separate occasions of precisely the same weight) and then confirmed, in writing, the applicant's request for weigh bridge dockets to be provided.[37]

[59] The deliveries continued, in February and March 2019, and the applicant continued to pay the invoices on the basis of verbal promises by one of the respondents that weigh bridge documents would be forthcoming.[38] Further invoices were sent on 1 May 2019.

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[33] Ritchie at [4].

[34] Ritchie at [5].

[35] Ritchie at [6].

[36] Ritchie at [7], [8] and [9].

[37] Ritchie at [11]-[12]; email dated 1 February 2019, exhibit 6 to the affidavit of Ritchie.

[38] Ritchie at [15].

Mrs Ritchie emailed back on 31 May 2019 asking the respondents when they would "be able to provide the documentation requested"; that is, the weigh bridge dockets.[39] No response was received. A further email was sent on 11 June 2019, this time from Mrs Amanda Ritchie (the mother of Mrs Ritchie's husband, Garth, who is described as the "effective owner of the feed lot"), again requesting the weigh bridge dockets so that the charges could be verified.[40]

[60] On 19 June 2019, the respondents sent an email to the applicant, attaching outstanding invoices and some weigh bridge dockets. Mrs Ritchie says in her affidavit that the dockets supplied "did not cover all the claims in the invoices and in some instances did not actually prove the weight of the fodder as only gross weights were listed". She goes through this in more detail in her affidavit, by reference to invoices 41, 42 and 48.[41] Mrs Ritchie says that, "on those invoices alone", there is a genuine dispute as to the amount of $19,678, given the anomalies as between the amounts invoiced, and the documentation provided. Mrs Richie also says that, in the absence of documentation as to the proper weight of deliveries (I infer, based on her analysis of the documentation that was eventually provided) "there is likely to be substantial overcharging by the respondent from August 2018 onwards". The applicant has already paid a total of $496,078.56 to the respondents, as Mrs Ritchie says, on the basis of the assurance that weigh bridge dockets would be provided. She says that even if there was a 10% error in relation to the weights of fodder delivered previously, the applicant would have been overcharged about $49,600. She says "[w]e desire to have this properly litigated and to get disclosure of all of the weigh dockets relevant to the invoices" referred to in the material.[42]

[61] The applicant also refers to other proposed claims against the respondents, including for the loss of five cattle who died as a result of eating a supply of hay which was full of mould; and losses associated with a tractor being damaged when bales of hay were dumped on the tractor.[43] There is also an amount relating to a delivery of hay which was "full of water and were not at all safe to be consumed by cattle", the cost of which Mrs Ritchie says was originally credited by the respondents, but later charged again.[44]

[62] It is clear from the email correspondence exhibited to Mrs Ritchie's affidavit that the dispute about the provision of weigh bridge dockets, in order to verify the amounts for which the applicant was invoiced, arose well before the statutory demand was issued. It could not be said to be manufactured or got up simply for the purpose of defeating the demand made against the applicant.

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39 Ritchie at [16] and [17], and exhibits 8 and 9.

40 Ritchie at [18] and exhibit 10.

41 Ritchie at [20]-[25], exhibit 11.

42 Ritchie at [26].

43 Ritchie at [13] and [14].

44 Ritchie at [15].

[63] On the evidence which is before the court, and bearing in mind the relevant principles, I am satisfied the applicant has shown a genuine dispute about the existence and amount of the debt claimed in the statutory demand, and has shown that it has a genuine offsetting claim, in each case in the sense of a plausible contention requiring investigation, and which it ought to be entitled to litigate in the ordinary way. I consider the contentions raised by Mrs Ritchie in her affidavit to be genuine; and, taken together, the matters she raises, if ultimately established, exceed the amount of the debt claimed in the demand.

[64] The applicant also properly challenges the claim made in the statutory demand for interest pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld). Section 58(3) confers a discretion on the court to order that there be included in the amount for which judgment is given by that court interest for part or all of the period between the date the cause of action arose and the date of judgment. The section does not confer a right on a party to charge or claim interest, which may then be claimed as part of a debt demanded under s 459E of the *Corporations Act.* The claim for interest under this section should not have been included.

Orders

[65] Being satisfied the application and supporting affidavit were properly served within the 21 day time period, and that the applicant has shown a genuine dispute and offsetting claim which potentially exceeds the whole of the amount claimed in the statutory demand, it is appropriate to order that the statutory demand be set aside.

[66] It also seems appropriate to order that the respondents pay the applicant's costs of the application, to be assessed if not agreed. However, I will hear from the parties about this.