

SUPREME COURT OF QUEENSLAND

CITATION: *Parklands Blue Metal Pty Ltd v. Kowari Motors Pty Ltd*
[2003] QSC 098

PARTIES: **PARKLANDS BLUE METAL PTY LTD**
A.C.N. 010 471 548
(applicant)
v.
KOWARI MOTORS PTY LTD
A.C.N. 058 352 051
(respondent)

FILE NO: 1651 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 11 April 2003

DELIVERED AT: Brisbane

HEARING DATE: 21 March 2003

JUDGE: Helman J.

CATCHWORDS: CREDITOR'S STATUTORY DEMAND – SETTING ASIDE – SERVICE BY FACSIMILE – whether statutory demand has been properly served.

Acts Interpretation Act 1954 ss. 6, 28A(1), 36 & 39(1)(b)
Corporations Act 2001 ss. 109X, 440, 459E, 459G and 601CX.
Uniform Civil Procedure Rules 1999 r. 103

David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 C.L.R. 265
Griffith Producers Co-Operative v Calabria (1997) 15 A.C.L.C. 19
Howship Holdings Pty Ltd v Leslie (1996) 41 N.S.W.L.R. 542

COUNSEL: Mr S.J. English for the applicant
Mr A.J. Moon for the respondent

SOLICITORS: Reynolds Lawyers for the applicant
Connolly Suthers Lawyers for the respondent

- [1] This is an application pursuant to s. 459G of the *Corporations Act 2001* (Cth) that a creditor's statutory demand dated 31 January 2003 and served on the applicant company by the respondent company be set aside.
- [2] The evidence shows that the statutory demand, together with an affidavit sworn on 31 January 2003 by Mr Terrance Bolger, managing director of the respondent, was sent to the applicant, a member of the Mansell group, at facsimile number 07 4634 7184 by a facsimile transmission from the respondent's solicitors which began at 0917 hours and ended at 0919 hours on 31 January 2003. The registered office of the applicant is at the Neil Mansell Transport Building, 149 McDougall Street, Toowoomba, Queensland 4350 and its principal place of business is at the same address, except that instead of the city name, Toowoomba, the suburb name, Wilsonton, is shown. The Telstra *White Pages* show the facsimile number 07 4634 7184 as the facsimile number for Neil Mansell Transport Pty Ltd of McDougall Street, Toowoomba 4350. Accompanying the statutory demand and affidavit was a letter from the respondent's solicitors to the secretary of the applicant which, omitting formal parts, was as follows:

We are the Solicitors for Kowari Motors Pty Ltd.

We enclose herewith copies of the following:

1. Creditor's Statutory Demand for Payment of Debt – 31 January 2003; and
2. Accompanying Affidavit of Terance Talbot Frank Bolger – 31 January 2003.

The original of those documents is being sent to Toowoomba for service on your registered office.

If you have any queries please contact the writer.

- [3] It was not in issue before me that the statutory demand and accompanying affidavit were posted on 31 January 2003 to the applicant. It is asserted by the applicant, and not put in issue by the respondent, that those documents would have been received by the applicant in the ordinary course of post on 3 February 2003.
- [4] In a letter dated 13 February 2003 to Mr Bolger the applicant's solicitors referred to a conversation on 28 January 2003 and to their acting for 'the Neil Mansell Group'. The solicitors recorded on p.1 that their client – which can only have been the applicant, the letter being headed 'RE: PARKLANDS BLUE METAL PTY LTD' – 'confirms receipt of a creditor's statutory demand for payment of debt on 31 January 2003, with an Affidavit in support signed by you'. In the same letter, on p.3, the following appeared:

Our client confirms the creditors statutory demand was served on their registered office on 31 January 2003. It therefore expires on 21 February 2003.

They are instructing a Barrister to immediately prepare an application and affidavit in support to set aside your statutory demand on the basis that it has been improperly served. That application will involve a Supreme Court hearing where the triable issues referred to in this letter will be raised.

Costs will be sought against you in the Supreme Court for the improper issue of the statutory demand.

There appears to be a discrepancy at first reading between the admission of service and the assertion that the statutory demand was ‘improperly served’. If one reads the letter as a whole, however, it is clear that the assertion of improper service was not as to the mode of service, but rather as to the existence of the alleged ‘triable issues’, i.e., to the applicant’s assertion that, for various reasons, not all of the money claimed was owing.

- [5] It is an important issue on this application as to when the statutory demand was served on the applicant. The applicant contends for 3 February 2003 because it contends that service by facsimile transmission of a statutory demand is ineffective. The respondent contends for 31 January 2003 arguing that such service is effective. Section 459E(1) of the *Corporations Act* provides that a person may serve a demand on the company, but that section does not prescribe the manner of service.
- [6] On behalf of the applicant s. 601CX was relied on as prescribing the mode of service on companies such as the applicant, but on behalf of the respondent it was argued, correctly in my view, that s. 109X and not s. 601CX is the relevant provision – correctly because s. 601CX concerns the mode of service on bodies registered under Part 5B.2 (Registrable Bodies) whereas s. 109X is a general provision relating to service on companies.
- [7] Section 109X does not provide for service by facsimile transmission, but, so far as it is relevant to this application, provides that for the purposes of any law, a document may be served on a company by leaving it at, or posting it to, the company’s registered office: s. 109X(1)(a). On behalf of the respondent it was conceded that the *Acts Interpretation Act* 1901 (Cth) does not provide for service by facsimile transmission. Section 28A(1) of that Act provides, so far as it is relevant, that for the purposes of any Act that requires or permits a document to be served on a person then, unless the contrary intention appears, the document may be served on a body corporate by leaving it at, or sending it by pre-paid post to, a registered office or a principal office of the body corporate. On behalf of the respondent it was pointed out, however, that s. 28A(2), so far as it is relevant, provides that nothing in subsection (1) affects the operation of any other law of the Commonwealth, or any law of a State that authorizes the service of a document otherwise than as provided in that subsection. On behalf of the respondent reliance was then placed on s. 39(1)(b) of the *Acts Interpretation Act* 1954 (Qd) which, so far as it is relevant, provides that if ‘an Act’ requires or permits a document to be served on a person, the document may be served on a body corporate by sending it by ‘facsimile or similar facility’ to a registered office or a principal office of the body corporate. It is, however, difficult to see how s. 39(1)(b) assists the respondent, since it applies to provisions of ‘an Act’ which, by ss. 6, and 36 of the *Acts Interpretation Act* confines its operation to Acts of the Queensland Parliament, British or New South Wales Acts that are in force in Queensland, and enactments of an earlier authority empowered to pass laws in Queensland that have received assent.
- [8] It is not necessary to resolve that question, however, since I am persuaded by a second argument advanced on behalf of the respondent, viz. that the admitted receipt of the facsimile transmission of the statutory demand and accompanying affidavit proves that there had been effective service of those documents on the

principles discussed by Young J. in *Howship Holdings Pty Ltd v. Leslie* (1996) 41 N.S.W.L.R. 542. In that case a summons seeking an order pursuant to s. 459G of the *Corporations Law* had been served at a document exchange box. His Honour held that service of a summons at a document exchange box was not of itself good service but proof of actual receipt, albeit through a document exchange box, was effective as service. Young J. observed:

Section 459G(3) of the *Corporations Law* provides that an application to set aside a statutory demand may only be made if the copy of the application and copy of the supporting affidavit are served on the person making the demand within twenty-one days. The decision of the High Court of Australia in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 makes it clear that the legislature intended that if no such application is filed and served within the twenty-one days it is not competent for a court to deal with the application.

Section 459G itself does not deal with what is service. 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. This is clear in cases that have been considered good law over the centuries, including *Hope v Hope* (1852) 4 De GM & G 328 at 341-345; 43 ER 534 at 539-540; *R v Heron*; *Ex parte Mulder* (1884) 10 VLR 314 at 315; *Pino v Prosser* [1967] VR 835 at 838. Some of those cases were complicated by the requirement in the former statutes that a person serving initiating process had to endorse the initiating process, but the principle is clear from them.

If this were not so, one would get the absurd situation referred to by McInerney J in *Pino v Prosser* (at 837), that the conclusion would be one which is:

‘... remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ ... should be held not to have been served.’

(pp. 543-544)

Young J. held that s. 109X of the *Corporations Law* was not a code governing service. Section 109X, by providing that a summons ‘may be served’ by certain means, is facultative not mandatory:

The document could have been served under s. 109X, but the mere fact that it has not been does not disqualify it from service if the document came into the possession of the addressee. (p.544)

- [9] There is, I think, no reason to refrain from applying the principle explained by Young J. in *Howship Holdings Pty Ltd v. Leslie* to service of a statutory demand under s. 459E of the *Corporations Act*. To ignore the admissions of receipt, and, it should be noted, service, of the documents of the kind before me in this case would be artificial in the extreme. I therefore conclude that service of the statutory demand and the accompanying affidavit occurred when, on behalf of the applicant, it was admitted that it had taken place, i.e., on 31 January 2003.

- [10] I should add that I am not persuaded that the decision of McLelland C.J. in Eq. in *Griffith Producers Co-Operative v. Calabria* (1997) 15 A.C.L.C. 19 should be applied in this case. In that case his Honour held that the electronic transmission of the terms of a statutory demand to a company by facsimile did not constitute service of the demand for the purposes of ss. 459E and 459G of the *Corporations Law*. The company was a body registered as a co-operative to which the provisions of parts 5.4-5.7 of the *Corporations Law* applied. The relevant legislation concerning service of documents on a co-operative provided that a document might be served on a co-operative by post or by leaving it at the registered office of the co-operative with a person who appeared to be aged sixteen or more. His Honour held that service of a statutory demand on a corporation, being an unofficial entity with no physical existence, must be effected 'formally in accordance with the applicable statutory procedure'. There is no reference in his Honour's reasons to admissions of the kind made in this case. Such admissions in my view overcome any inadequacies in the method of service of the kind referred to by McLelland C.J.
- [11] An application under s. 459G may only be made within twenty-one days after the statutory demand is served (subsection (2)), and within those twenty-one days an affidavit supporting the application must be filed with the court and a copy of the application, and a copy of the supporting affidavit, must be served on the person who served the demand on the company (subsection (3)). Time cannot be extended under s. 459G: *David Grant & Co Pty Ltd v. Westpac Banking Corporation* (1995) 184 C.L.R. 265.
- [12] This application was filed on 21 February 2003 together with an affidavit supporting the application sworn by Mr Philip Desmond. Although service by facsimile transmission was attempted before 4.00 p.m. on 21 February 2003 it appears that it did not begin until 16:12 hours on that day ending at 16:22 hours, because the TX REPORT issued by the Post Office from which the transmission was made shows 'ST. TIME 21/02 16:12' and 'USAGE T 10'01'. Mr Desmond in an affidavit filed on 21 March 2003 swore that he paid for the transmission at 3.45 p.m. and it began immediately after payment, but the copy of the Australia Post receipt exhibited to his affidavit shows that time to have been 15:54 hours. Mr Desmond also swore that the facsimile transmission ended at 4.12 p.m. whereas the TX report shows that as the 'ST. TIME', which I take to be 'start time'. Rule 103 of the *Uniform Civil Procedure Rules 1999* provides that if a document is served on a person after 4.00 p.m. the document is taken to have been served on the next day. Accordingly, at best for the applicant the documents they sought to serve on 21 February 2003 are taken to have been served on 22 February 2003. Even if Mr Desmond was correct as to the time of completion of the transmission, service was not complete until after 4.00 p.m. It follows that the twenty-one days provided for in s. 459G had expired before service of the document and that this application must be dismissed.
- [13] There were other issues raised on the hearing of the application, but it is unnecessary for me to consider them further.
- [14] I shall invite further submissions on costs.