SUPREME COURT OF QUEENSLAND

CITATION:	*Telstra Corporation Ltd v Ivory & Ors; Telstra Corporation Ltd v Solar-Mesh (Australia) & Ors* [2008] QSC 123
PARTIES:	**IN THE MATTER OF TELSTRA CORPORATION LIMITED ACN 051 775 556** **TELSTRA CORPORATION LIMITED** **(ACN 051 775 556)** Applicant/respondent and **KENNETH CLYDE IVORY** First Respondent/ applicant and **SOLAR MESH AUSTRALIAN SALES PTY LTD** **(ACN 006 311 628)** Second Respondent and **SOLAR-MESH PTY LTD** **(ACN 054 275 197)** Third Respondent and **SOLAR-MESH (AUSTRALIAN DISTRIBUTION) PTY LTD (ACN 055 251 922)** Fourth Respondent and **IN THE MATTER OF TELSTRA CORPORATION LIMITED ACN 051 775 556** **TELSTRA CORPORATION LIMITED** **(ACN 051 775 556)** Applicant/ respondent and **SOLAR-MESH AUSTRALIA (A FIRM)** First Respondent/ applicant and **KEN IVORY INDUSTRIES PTY LTD** **(ACN 002 794 130)** Second Respondent and **K & K JAH PTY LTD** **(ACN 080 877 872)** Third Respondent
FILE NO/S:	10536 of 2006 10542 of 2006
DIVISION:	Trial Division

PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland, Brisbane
DELIVERED ON:	11 June 2008
DELIVERED AT:	Supreme Court at Brisbane
HEARING DATE:	14 March 2008
JUDGE:	Lyons J

ORDERS

1. **The applications filed on 11 January 2007 in BS 10542/06 and BS 10536/06 are dismissed.**
2. **The evidence in application BS 10542/06 is received as evidence in application BS 10536/06 and the evidence in application BS 10536/06 is received as evidence in application BS 10542/06.**
3. **Mr Ivory pay the costs of Telstra in applications BS 10542/06 and BS 10536/06 of and incidental to the applications, including any reserved costs on an indemnity basis.**
4. **The material forwarded to the court in both applications by Mr Ivory on 21 February 2008 is to be sealed in an envelope and marked "not to be opened except by order of a Judge of the Supreme Court of Queensland."**
5. **All correspondence on Supreme Court files BS 10536/06 and BS 10542/06 is to be sealed in an envelope and marked "not to be opened except by order of a Judge of the Supreme Court of Queensland."**
6. **Documents 17, 19, 20, 21, 22, 23, 24, 25, and 26 on Supreme Court file BS 10536/06 are to be sealed in an envelope and marked "not to be opened except by order of a Judge of the Supreme Court of Queensland."**
7. **Documents 7, 8, 10, 11, 12, 13, 14, 15, and 16 on Supreme Court file BS 10542/06 are to be sealed in an envelope and marked "not to be opened except by order of a Judge of the Supreme Court of Queensland."**
8. **The affidavit of JA McDonnell sworn 14 March 2008 is to be sealed in an envelope and marked "not to be opened except by order of a Judge of the Supreme Court of Queensland."**
9. **Documents 2 and 3 on Supreme Court file BS 10536/06 are to be re-sealed in an envelope and**

marked "not to be opened except by order of a Judge of the Supreme Court of Queensland."

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – PROCEDURAL REQUIREMENTS – SERVICE OF APPLICATION – where the documents to set aside the statutory demand were served at the respondent/applicant's nominated address for service – where the address for service was the last known address of the place of residence of the respondent/applicant - where the respondent/applicant was interstate at the time of service – where the respondent/applicant was not served personally – whether there was valid service under the *Corporations Act* 2001 (Cth)

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – GENERAL RULES – where an order was made by a Supreme Court Judge to set aside a statutory demand – the respondent/applicant sought orders to set aside this order on the basis that it was made in his absence – whether there was a real question to be tried – whether the court should exercise its discretion under the *Uniform Civil Procedure Rules* 1999 (Qld) to set aside the perfected orders

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT- WHERE FRAUD, MISPREPRESENTATION OR SUPPRESSION OF MATERIAL FACTS – where an order was made by a Supreme Court Judge to set aside a statutory demand – the respondent/applicant sought orders to set aside this order on the basis of fraud – where there were no fresh facts since the making of the order – where there was no evidence of fraud provided by the applicant – whether the court should exercise its discretion under the *Uniform Civil Procedure Rules* 1999 (Qld) to set aside the perfected orders

CORPORATIONS – LEGAL CAPACITY AND RELATIONS WITH OUTSIDERS – EXTERNAL LITIGATION PROCEDURE – PROCEDURE BEFORE TRIAL – where the applicant/respondent was a large company – where there was no resolution of the Board of Directors of the applicant/respondent to apply to set aside the statutory demand – where General Counsel for the applicant/respondent instructed external solicitors to apply to set aside the statutory demand – where such conduct was part of General Counsel's ordinary duties – whether General Counsel for the applicant/respondent had implied authority from the Board of Directors to instruct external solicitors to

apply to have the statutory demand set aside

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENERALLY – whether the applicant/respondents had standing to set aside statutory demand

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – OTHER CASES – where the application to set aside a statutory demand was to be "signed by a solicitor" – where the applicant/respondents signed the Originating Application in the name of the firm and not in the name of a solicitor – whether the proceedings are nullified, may be set aside or are capable of amendment

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – PROCEDURAL REQUIREMENTS – SERVICE OF APPLICATION – where an Originating Application seeking orders to set aside a statutory demand was served on the respondent/applicant together with two affidavits – where further affidavits were not filed and served with the Originating Application – where the further affidavits were relied on by the applicant/respondents at the hearing – whether the applicant/respondents were entitled to rely on the further affidavits at the hearing

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – the application made by the respondent/applicant was "hopeless from the start" – the respondent/applicant made allegations of fraud on the part of the applicant/respondent – the respondent/applicant had a considerable court history – the respondent/applicant failed to comply with orders of the Supreme Court – a voluminous amount of irrelevant material was forwarded to the court by the respondent/applicant – material forwarded to the court was scandalous – whether costs should be awarded against the respondent/applicant on an indemnity basis

Acts Interpretation Act 1901, s 28A
Corporations Act 2001 (Cth),s 109X, s 459E, s 459G, 458H, s 459J
Bills of Exchange Act (Cth), s 28
Supreme Court Act 1995 (Qld), s 51, s 259
Uniform Civil Procedure Rules 1999 (Qld), r 16, r 367, r 371, r 440, r 667, r 668

Allianz Australian Workers' Compensation (NSW) Ltd v Woodfast Joinery (Aust) Pty Ltd (2003) NSWSC 587, cited
Ampthill Peerage Case [1977] AC 547, cited
Australian Underwriting Agencies Pty Ltd v QBE Insurance Ltd [1999] FCA 568, cited
AWA Ltd v Daniels trading as Deloitte Haskins & Sells (1992) 7 ACSR 759, cited
Boughen v Abel (1978) 1 Qd R 138, cited
Capper's Pty Ltd v L & M Newman Pty Ltd [1960] NSWR 143, cited
Colgate Palmolive v Cussons Pty Ltd (1993) 46 FCR 225, [1993] FCA 536, cited
D'Orta- Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265; [1995] HCA 43, cited
Gamser v Nominal Defendant (1977) 136 CLR 145; [1977] HCA 7, cited
Gargan v Commonwealth of Australia and Telstra [2005] NSWSC 1178, cited
Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1996) 70 FCR 452, cited
Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549, cited
Ivory v Telstra Corporation Ltd & Anor [2002] QCA 457, cited
Monroe Schneider Associates Inc v No. 1 Raberem Pty Ltd (No. 2) (1992) 37 FCR 234, cited
Quitstar Pty Ltd v Cooline PacificPty Ltd (2002) 168 FLR 213, applied
Re Louisbridge Pty Ltd (1994) 2 Qd R 144, cited
Rodgers v ANZ (2005) QSC 365, cited
Sproule v Long [2000] QSC 232, cited
Stone v ACE-IRM Insurance Broking Pty Ltd (2004) 1 Qd R 173, cited
The Rochester Communications Group Pty Ltd v Lader Pty Ltd (1997) 143 ALR 648; (1997) 23 ACSR 380, applied
Wentworth v Rogers (No. 5) (1986) 6 NSWLR 534, cited

COUNSEL:	T Sullivan for the applicant/respondent (Telstra Corporation Limited) No appearance by the respondent/applicant
SOLICITORS:	Mallesons Stephen Jaques for the applicant/respondent K Ivory acted on his own behalf

The current applications

[1] There has been a longstanding dispute between Mr Kenneth Ivory who is the first respondent in BS 10536/06 and Telstra Corporation Limited ("Telstra"). The dispute relates to a complaint by Mr Ivory that he suffered loss and damage to his various businesses, known as the Solar Mesh Entities, during periods from 1994 to

1996, when he alleges that certain telephone services were not provided to these businesses.

[2] During Telstra's Annual General Meeting on 14 November 2006, Mr Ivory served a Creditor's statutory demand on Telstra, dated 6 November 2006 ("the statutory demand"). The statutory demand, which was also addressed to the Commonwealth of Australia, was served by Mr Ivory on behalf of himself and "…the group of individual entities that he is the founder and managing director…known as the Solar Mesh entities" who are the first, second and third respondents in BS 10542/06 and the second, third and fourth respondents in BS 10536/06. The alleged debt claimed was in the sum of five billion, three hundred and eighty six million, nine hundred and forty three thousand, seven hundred and sixty seven dollars ($5,386,943,767) plus interest as well as the "…overdue 22 September 2006 proportionate fully franked dividend payments."

[3] On 4 December 2006 Telstra lodged Originating Applications commencing two proceedings (BS 100536/06 and BS 10542/06) directed at the first respondent Mr Ivory and his six companies as respondents under s 459G and s 459J of the *Corporations Act* 2001 (Cth) seeking orders that the statutory demand be set aside.

[4] Mr Ivory did not appear at the hearing of Telstra's applications on 14 December 2006 and there was no appearance by any of the corporate respondents. The transcript of the hearing records that Counsel for Telstra advised the Court that Mr Ivory claimed not to have been served personally. The Affidavits of Service, however, indicated that service had been effected, within the 21 day time limit, by leaving the material at the place noted in the statutory demand as the place for service. The affidavit material[1] also indicates that Mr Ivory was in contact with the solicitors for Telstra on 13 December 2006 and was aware of the application but disputed service.

[5] At the hearing on 14 December 2006 Counsel for Telstra proceeded to identify a series of problems with the statutory demand served by Mr Ivory at the AGM:

- The statutory demand was also addressed to the Commonwealth but as it is not a corporation the Commonwealth is not an entity to which the procedure applies;

- There was no affidavit attached to the statutory demand as required by s 459E (3) of the *Corporations Act*;

- There was no basis for the statutory demand being considered as a judgment debt as the demanded debt is a judgment debt given by the Court of Faculties which is an ecclesiastical court of the Archbishop of Canterbury and has no jurisdiction to award the judgment in a civil proceeding. The jurisdiction of the Court of Faculties only relates to the appointment of notaries. A notary cannot in fact exercise the powers of the Court of Faculties. In any event, Telstra was not given any opportunity to defend the claim in that Court;

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1 Affidavit of JA McDonnell, filed 19 February 2007.

- The purported Certificate of Judgment does not give judgment for any sum but merely witnessed Mr Ivory's signature on documents prepared by him;

- The judgment debt had its origins in a document described as a Bill of Exchange but it is no such document as it records an agreement and does not state an amount or value on its face. In *Gargan v Commonwealth of Australia and Telstra*,[2] the Supreme Court of NSW had already determined that this Bill of Exchange had not been accepted by the Commonwealth and is not liable on it. Accordingly, Telstra cannot be liable. No party has signed the bill as required by s 28 of the *Bills of Exchange Act* 1909 (Cth); and

- Whilst the statutory demand did not refer to the underlying dispute in this case, the amount claimed is the amount which Mr Ivory alleges is due to him and his entities based on his underlying dispute. Telstra disputes the allegations which are at the base of the claims and there have been independent investigations, including one by the Telecommunications Industry Ombudsman which stated the claims had no foundation. There is therefore a genuine dispute as to liability and quantum of the claim underlying the "judgment".[3]

[6] At the hearing of those applications, therefore, Counsel for Telstra submitted that the statutory demand should be set aside. A statutory demand is liable to be set aside pursuant to the provisions of s 459H(1) and s 459J(1) of the *Corporations Act* if there is a genuine dispute about the debt, if there is some defect in the demand, substantial injustice will be caused, or there is some other good reason. Having considered the affidavit material, Fryberg J ordered that the statutory demand served by Mr Ivory on Telstra be set aside and that he pay the applicant's costs of and incidental to the applications. Whilst extensive reasons were not given by His Honour, it was clear that his Honour considered that the statutory demand served by Mr Ivory was "all nonsense".[4]

[7] On 11 January 2007 Mr Ivory filed applications on files BS 10536/06 and BS 10542/06 seeking the following orders:

1. To have the orders, made in default of appearance on 14 December 2006, set aside;
2. To have this matter decided by a trial before a jury;
3. That all costs orders obtained to date by Telstra against Mr Ivory that are still outstanding or yet to be taxed be stayed and be dealt with as an issue in the jury trial sought;
4. Requiring compliance with s 51 and s 259 of *Supreme Court Act* 1995 (Qld);
5. That s 472 the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") be observed; and
6. That costs be reserved to the jury trial.

History of Mr Ivory's dispute with Telstra and previous applications

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2 [2005] NSWSC 1178 at [7]-[8.]

3 Affidavit of DGS Field, filed 5 December 2006.

4 Transcript of proceedings, 14 December 2006, p 5, l 24.

[8] The current issues before me therefore relate to Mr Ivory's applications to set aside the orders of 14 December 2006. Mr Ivory, however, has a long and complex history in relation to a number of other matters in this court, in both the Trial Division and the Court of Appeal, which commenced a decade ago.

[9] The nature of the initial dispute was summarised by the Court of Appeal in 2002[5] in the following terms:

> "The extensive appeal record shows that the appellant has been involved in one way or another in actual or apprehended litigation with the respondent Telstra Corporation Limited since about 1994. That has included both personal involvement, and the appellant's interest in litigation conducted by a company or companies with which he is associated. For its part Telstra has made demands for payment of debts it claims to be owed by the appellant, or by a company or companies with which he is associated…he has brought or caused action to be brought in which it is claimed that Telstra's conduct has caused substantial economic loss to the appellant and at least one company with which he is closely associated. Summarised, he alleges that when Telstra replaced 008 calls with 1800 calls, he suffered significant financial loss, either personally or through a company or companies he conducted, by reason of calls not received."

[10] A clear understanding of the issues Mr Ivory wishes to raise in his current applications is complicated by a number of factors. Mr Ivory confusingly refers to the same issues and facts in every court document he files, regardless of the file number and initiating documentation and many of the documents filed by him are not in the appropriate form. In many instances, he does not file documents at all but, rather, forwards documents by facsimile or otherwise sends documents directly to the judicial officer involved in the hearing of his matters.

[11] Essentially, all the actions in the last decade relate to a dispute with Telstra involving the damage Mr Ivory and his various companies claim they suffered during specified periods. As well as the two current applications, there are six other files which involve Mr Ivory and his companies, namely; BS 9084/99, BS 9083/99, CA 4059/01, CA 4223/01, BS 7433/05 and BS 5878/06.

[12] Mr Ivory also repeatedly requests that costs orders be set aside which have nothing to do with current proceedings but, rather, relate to the two cost orders made in file BS 9084/99 and in the two subsequent appeals from those costs orders, CA 4059/01 and CA 4223/01, as well as the cost assessment for BS 7433/05.

[13] Further, Mr Ivory repeatedly requests, in every document he files, that he would like his applications to be decided by a jury.

The history of this application

[14] After Mr Ivory filed his applications in these two matters on 11 January 2007, the applications were listed for hearing on 21 February 2007.

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5 *Ivory v Telstra Corporation Ltd & Anor* [2002] QCA 457.

[15] Mr Ivory subsequently filed 12 affidavits in support of his applications on 15 January 2007, and a further affidavit on 21 February 2007. He has, therefore, filed 13 affidavits in relation to both files.

[16] A number of circumstances have prevented Mr Ivory's applications being dealt with in an expeditious fashion. On 8 February 2007 Mr Ivory became ill in the presence of the Supreme Court Senior Deputy Registrar during a costs assessment in a related matter. One week later, on 16 February 2007, Mr Ivory's wife died.

[17] On 19 February 2007 Mr Ivory wrote to Mallesons Stephen Jaques Solicitors ("Mallesons"), who are the solicitors for Telstra, and to the Associate to Moynihan SJA:[6]

- Alleging that someone in the respondent solicitors' firm had forged the signature of one of the original founding partners;
- Foreshadowing an adjournment application on 21 February 2007 for medical reasons on his part with costs orders against the respondent;
- Seeking the respondent's "approval" authorising the presiding Judge on 21 February 2007 to make a preliminary declaratory order based on all the material currently before the courts, including final orders if this order is favourable to Mr Ivory;
- Advising that costs orders will be sought against the legal representatives personally including punitive damages;
- Seeking an order that all costs orders obtained to date by Telstra that are still outstanding or are yet to be taxed be stayed, and become an issue before a jury of 12 jurors. The costs orders referred to relate to completely unrelated applications – namely BS 9084/99 and BS 7433/05;
- Alternatively, orders staying the two 14 December 2006 court orders, and an adjournment from 21 February 2007 to a date to be fixed, sufficient to enable him to deal with his grief and personal health risks.

The hearing on 21 February 2007 and subsequent events

[18] The first return date of Mr Ivory's applications was 21 February 2007 and on that date Mr Ivory appeared in person and sought an adjournment. Moynihan SJA ordered that the applications be adjourned to a date to be fixed with costs reserved, given Mr Ivory's ill health and recent bereavement. Mr Ivory was to inform the solicitors for Telstra by 4.00 pm on 30 March 2007 of a date by which he would be ready to proceed.

[19] On 30 March 2007 Mr Ivory advised[7] Mallesons by facsimile, attaching a medical certificate, that he would require two months before he was able to proceed due to ill health. A further medical certificate from Dr Gordon Mor, dated 31 May 2007, indicated that Mr Ivory had a severe grief reaction to the sudden death of his wife, and that he also suffered from a heart condition and general cardiovascular disease. The letter advised that Mr Ivory required at least another two months before he could proceed with his court business.

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6 Affidavit of KC Ivory, filed 21 February 2007.

7 Exhibit "JAM 2" to the Affidavit of JA McDonnell, filed 1 October 2007.

[20] On 30 July 2007 there was a further letter from Mr Ivory to the Court, the Telstra Board, and others, which annexed the medical certificate dated 26 July 2007 from Dr Mor, advising that Mr Ivory would require at least three months before he would be able to carry on with court business. The letter also raised the following issues:

- a reference to the two applications, and "…various court tax costing matters being unlawfully pursued";
- a further request to have orders of 14 December 2006 set aside;
- further allegations of wrongdoing by Telstra, their legal representatives and others; including failing to have the Originating Applications signed by a practising solicitor; thereby invalidating them; failing to properly file such application within 21 days of the statutory demand being made; failing to properly serve him with the originating process; fraudulently procuring court orders on 14 December 2006; allegations of a failure to disclose the respondent's alleged lien over the Commonwealth of Australia's shares for a debt of $5.386 billion dollars owing to him in the T3 prospectus; and
- allegations that he was assaulted and battered by Telstra employees on 14 November 2006 in an attempt to prevent him from serving board members at the Telstra AGM a Notarial Certificate disclosing his "lien over shares".

[21] On 2 August 2007 Mallesons sought a review by a Judge. On 3 August 2007 Mr Ivory sent a facsimile to Mallesons , the Associate to Moynihan SJA and others, including the Telstra Board, and the Minister for Telecommunications, which:

- referred to a facsimile by Mallesons on 2 August 2007 being unlawfully signed with a forged signature;
- alleged failure of the Supreme Court Registrar to properly seal his two applications signed 11 January 2007, Telstra's Originating Applications filed 4 December 2006 and the Court's orders of 14 December 2006;
- made reference to various matters raised in his letter of 30 July 2007; and
- indicated his intention to rely on his medical certificates.

The directions hearing - 5 November 2007

[22] A directions hearing was listed before me on 5 November 2007. On 2 November 2007 Mr Ivory sought to have the matter adjourned due to his medical conditions but was advised by the Registry that the matter would remain listed for a short directions hearing on that date and that he could provide written submissions if he was unable to attend.

[23] Mr Ivory did not appear at the directions hearing on 5 November 2007 but provided extensive written submissions. I made the following orders in respect of each application on that date (References to the 'applicant' in the order are references to the initial applicant Telstra):

1. The application would be heard without a jury;
2. Mr Ivory was to provide to the Court by 1 February 2008, reports about his current health and the prognosis in relation to his heart condition from his General Practitioner and Cardiac or other specialist;

3. The applicant was to provide to the Court and Mr Ivory an amended Outline of Submissions and any further affidavits by 8 February 2008, such material was to relate solely to the issues in applications BS 10536/06 and BS 10542/06 and not to issues only arising in other proceedings between any of the parties;
5. Mr Ivory was to provide an Outline of Submissions that solely related to the issues in applications BS 10536/06 and BS 10542/06 and not to issues only arising in other proceedings between any of the parties, by 29 February 2008;
6. The applicant was to provide any Outline of Submissions in Reply by 7 March 2008;
7. All objections to affidavit material and any responses to those objections were to be submitted in writing by 7 March 2008 and a determination in relation to that affidavit material would be made on the papers. The parties were to be advised of the ruling by 4.00 pm on 11 March 2008;
8. The matter was set down in the applications list on 14 March 2008 at 2.30 pm with a time estimate of two hours and, pursuant to r 367 of the *Uniform Civil Procedure Rules* 1999 (Qld), one hour was to be allocated to allow Mr Ivory to make oral submissions and one hour to the applicant to make oral submissions;
9. Either party had liberty to apply, on not less than seven days written notice to the other; and
10. The costs of the hearing were to be costs in the proceedings.

[24] Mr Ivory did not provide the required medical reports by the requisite date. On 7 March 2008, however, a letter was forwarded to the Court by Mr Ivory, enclosing a letter from his General Practitioner dated 7 March 2008, indicating that Mr Ivory had ischaemic heart disease and angina and that additional emotional and physical stress "...may well result in a worsening of his symptoms or, worse, a life threatening cardiovascular event (heart attack or stroke)." He advised that it would be August 2008 before Mr Ivory was fit to attend his court matters. In a letter dated 26 February 2008, Mr Ivory's heart specialist indicated that Mr Ivory had ischaemic heart disease and moderate angina. He advised that "…he would not be surprised if these symptoms impacted on his ability to successfully conduct the legal processes in which he is involved."

The hearing - 14 March 2008

[25] Mr Ivory did not appear at the hearing on 14 March 2008, having previously indicated to the solicitors for Telstra that he would be relying on his medical certificates to obtain an adjournment. This material was also forwarded to the Court. The first question that arose, therefore, was whether the matter was to proceed.

[26] Counsel for Telstra submitted that the matter should proceed as Mr Ivory had essentially been granted an adjournment in excess of 12 months and had been given ample opportunity to provide written submissions and to file any material in support of his applications. Furthermore, Counsel for Telstra contended that the applications by Mr Ivory are misconceived and as they are futile no further adjournments should be entertained.

Should Mr Ivory's applications be adjourned?

[27] A perusal of the material indicates that Mr Ivory had sent substantial volumes of material to the solicitors for Telstra and to the court. It is clear that Mr Ivory has, indeed, turned his mind to the actual issues necessary to support his applications and forwarded substantial material in support of his applications to the solicitors for Telstra and the Court. I note, however, that this material is in an inappropriate form and was not filed but, rather, posted directly to the presiding Judge.

[28] The current applications are Mr Ivory's applications that were filed on 11 January 2007 and relate to the original application by Telstra to set aside the statutory demand. That application by Telstra was in fact successful and the statutory demand in matters 10536/06 and 10542/06 was set side. Mr Ivory's applications seek to revisit those orders.

[29] The orders made by Fryberg J on 14 December 2006, therefore, have essentially been in abeyance for some 16 months because of Mr Ivory's current applications and he seeks a further adjournment. The principles set out in the decision of Wilson J in *Ivory v Telstra Corporation Ltd & Anor*[8] are equally applicable to the current applications. In that decision her Honour held:

> "I respectfully agree with the observation of Mahoney JA in *Ley v R De W Kennedy (Finance) Pty Ltd* as cited in the later decision of *Raybos Australia Pty Ltd & Anor. v Scitec* that the right of a litigant to present his case –
>
> > 'must not be seen as giving … an absolute right to conduct a case, or to conduct a case in the manner and for the time that such a person chooses, whatever that choice may be. That right must be balanced against the rights of other parties who are involved in the litigation, including the right … not to be involved in pointless litigation and to have the litigation conducted properly and with reasonable promptitude; and it must be balanced against the right of the public generally not to have the court's time wasted.
> >
> > ...
> >
> > What steps will be appropriate, in a particular case, to prevent injustice being done to parties who find themselves involved in litigation conducted in this way, must, of course, be determined in the light of the facts of that a case; but it should be clear that it is proper that steps be taken to that end.'"

[30] At the commencement of the hearing on 14 March 2008 I therefore had to determine whether Mr Ivory's applications should be adjourned. In coming to a determination I took the following matters into account:

- I considered that Mr Ivory's current medical conditions were not such as to prevent him from filing documents, providing submissions, and instructing legal representatives if he so wished. Mr Ivory had in fact forwarded voluminous amounts of material to the Court. In addition, Mr Ivory had been given three months' notice of the hearing and, accordingly, had ample time to prepare.

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8 [2002] QCA 457 at [85].

- Mr Ivory had not complied with the order of 5 November 2007. He had not provided the medical reports by the date required or in the terms required by the order. The two letters which were supplied were not reports and they did not provide sufficient detail in relation to Mr Ivory's underlying condition and prognosis. In particular, it had not been established whether Mr Ivory's condition was any different from the medical issues he raised in his previous litigation. It was not, therefore, established that Mr Ivory was not fit to pursue his litigation.

[31] I therefore determined that the matters should not be further adjourned given the time which had already expired and the fact that Mr Ivory had not complied with the orders of 5 November 2007 and provided reports about his current health. Mr Ivory had been given every opportunity to provide material and had forwarded material to the court. The matter, therefore, proceeded on 14 March 2008 in Mr Ivory's absence.

The objections to the unfiled material and the affidavits previously filed

[32] In coming to a determination in relation to the two applications currently before me, I consider it appropriate that orders should be made that evidence in each application be received as evidence in the other application.

[33] In response to the order of 5 November 2007, Mr Ivory filed no material but forwarded documents directly to the solicitors for Telstra and to me with a direction that the documents were directed to "…Her Honour …while sitting … within her private chambers." This material consisted of some 200 pages of documents sent on 21 February 2008. The major document, dated 21 February 2008, was entitled "Letter Rogatory" which contained a Notice that it was "…[s]trictly Private and Confidential. Not for Public Use or Public Filing or Disclosure." Enclosed with the letter were a number of documents which included documents which were described variously as an "…Affidavit of KC Ivory in support of his Letter Rogatory", "...Return of your Various Correspondence dated 6 February 2008 and 8 February 2008" as well as photocopies of "…one page of 9th October 2006 …as filed with ASIC", "…the 25 October 2007 Notarial Certificate of Protest", the 26 October 2007 Notarial Certificate headed 'The Court of Faculties'. Also enclosed were a "Certificate of Mailing-COM01", copies of Statutory Declarations by J Nimmo and G Collinson, a copy of ABC TV 7.30 Report Transcripts of 9 October 2006, as well as a rejected document sent by Mallesons to Mr Ivory on 14 March 2008. Two medical certificates were included in a letter dated 7 March 2007.

[34] All of this material ("the forwarded material") was placed directly on the correspondence part of the Court file prior to the hearing without being filed or read.

[35] At the hearing, Counsel for Telstra objected to the formal filing of the forwarded material which had been sent by Mr Ivory. The basis of these objections was provided to Mr Ivory prior to the hearing.[9] The essence of the submission is that substantial sections of the material forwarded by Mr Ivory are "irrelevant and scandalous" and should not be filed.

> "**440 Scandal and oppression**
> If there is scandalous or oppressive matter in an affidavit, the court may order that—

[9] Affidavit of JA McDonnell, sworn 14 March 2008.

> (a) the affidavit be removed from the file; or
> (b) the affidavit be removed from the file and destroyed; or
> (c) the scandalous or oppressive matter in the affidavit be struck out."[10]

[36] Counsel for Telstra also objects to the filing of this material on a number of other grounds. First, the affidavit is not in the appropriate form and has not been filed. Second, the affidavit does not comply in other respects with the order of 5 November 2007. Third, that paragraphs (a) to (y) are "scandalous, assertion, and in the nature of a submission." Furthermore, it was submitted that:

> "…[e]ach paragraph begins with an observational opinion of Mr Ivory about his not having seen or been presented with material facts or evidence, which evidence or disprove a proposition which then follows. The paragraph then concludes with another opinion about his belief that there is no evidence to the contrary in existence. Each paragraph is objectionable in this form."

[37] Having now examined this material, I am satisfied that the material, apart from the medical certificates, is indeed either irrelevant or scandalous in nature and I consider that this material should not be formally filed in these proceedings.

[38] Counsel for Telstra also seeks an order that this material be sealed in an envelope and is not to be opened without an order of the Court. I consider that because this material is irrelevant or scandalous it should be sealed in an envelope and is not to be opened without an order of the Court.

[39] Other objections were made to the affidavits of Mr Ivory numbered one to 12, which had been filed previously, on the basis that many of the paragraphs were in fact hearsay, stated a conclusion, or were in the nature of submissions. These objections had also previously been provided to Mr Ivory at the hearing before Moynihan SJA on 21 February 2007.

[40] In relation to the 12 numbered affidavits of Mr Ivory which have been filed, I uphold the following objections which have been made by Counsel for Telstra. In relation to the first affidavit,[11] it is clear that paragraphs 23 to 27 and 29 to 32 are objectionable on the basis that they are variously irrelevant, and contain hearsay or opinion. Some paragraphs in fact contain material that is subject to "without prejudice" privilege. Exhibits 1, 7 and 8 are excluded on the basis of irrelevance and hearsay and exhibit 5 is excluded on the basis that it is irrelevant to these proceedings.

[41] In relation to affidavit number two,[12] paragraphs 1, 6, 7 and 16 are excluded because they swear the issue; paragraphs 8, 12, 13, 15, 16, 18 to 20, and 22 to 24 are excluded on the basis that they are irrelevant; paragraphs 9 to 14 are excluded on the basis that they are opinion. Paragraph 15 is hearsay, and paragraphs 21, 22, 24 are conclusions or opinions and so are excluded on those bases. Paragraphs 24(m) and (q) are an abuse of process and are excluded on this basis.

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10 Section 440 of the *Uniform Civil Procedure Rules* 1999 (Qld).
11 Affidavit of KC Ivory (no 1), filed 11 January 2007.
12 Affidavit of KC Ivory (no 2), filed 11 January 2007.

[42] Paragraphs 6, 8 to 14, 21(b) to 21(d), 23(b) to 23(e), 23(h), 24, 26 and 27 of affidavit number three[13] are excluded as they are irrelevant. On the basis they are submissions, paragraphs 6, 7, 14, 15 to 20, 21(a) to 21(q), 23(a), (d) and (e) and 25 to 27 are excluded. Further, paragraphs 6, 8, 10, 21(a) and (b), 23(a), (d) to (h), 24, 26 and 27 are struck out because they are scandalous. Paragraphs 1, 5, 23(h) and 25 are excluded because they swear the issue. Paragraph 21(l) is excluded because it is hearsay.

[43] In relation to affidavit number four,[14] paragraphs 1, 10 and 12 are excluded because they are submissions. Paragraphs 2 to 6, exhibits "KCI-1", "KCI-2", "KCI-3", 10 and 12 are scandalous and paragraphs 2 to 6, 8, 9 and 11 are irrelevant and are therefore excluded.

[44] Paragraph 1 (page 1) of affidavit number five[15] is excluded on the grounds that it is swearing the issue as well as being a submission. Paragraphs 1 (page 2), 3 to 15 and 19 to 22 are struck out because they are scandalous and paragraphs 2, 3 to 15, 19 to 22, 23 to 15, and exhibit "KCI-4" are excluded on the basis that they are irrelevant.

[45] The paragraphs in affidavit number six[16] that are excluded on the grounds of irrelevance are paragraphs 8 to 20, 22 to 24, 27 to 29, 30 (introduction), 30(a) to (d), 31 to 36 and exhibits "KCI-1", "KCI-2", "KCI-3", and "KCI-4". The paragraphs excluded on the basis that they are an abuse of process are 29(a), 30 (introduction), 30(c), (d), and 36. Paragraphs 1 (page 1 for the first three lines and ending "on me" and commencing "and its purported originating applications"), 1 (page 2), 2, 4 to 7, 9 to 17, 21 to 24, 27(d), 29(a), 30(b), 36 to 38, 40 and 41 are excluded because they are submissions. Paragraph 8, the remainder of paragraphs 25 and 26 (events on 18 February 2005) are excluded because the statement is subject to a claim of without prejudice privilege. The first seven lines of paragraph 25 are excluded as the facts on which the conclusion is based are not set out.

[46] In relation to affidavit number seven[17] the paragraphs excluded on the basis that they are submissions include 3(f), (g), 5 to 10(d) to (g), (l), (n), 11 to 14, 11 (to second bullet point), 48 to 51 (except (h), 52, 53, 58 to 61, 62(a), 66, 67, 69, 75, and 76. Paragraphs 11, 32 ("Forging and Uttering"), 48 to 51, 54 to 61, 62(a), 66, 67, 69, and 70 to 86 are excluded because they are irrelevant. Further, paragraphs 2, 3(d), 51(f), 66, and 68 are conclusions and are therefore excluded. Paragraphs 2 and 3(d) are assertions and 51(m) is speculative and these paragraphs are also excluded on these bases.

[47] Paragraphs 1 to 5, 7 to 20, 26, 29, 30 and 35 in affidavit number eight[18] are excluded because they are either conclusions or comments and are not evidence. Paragraphs 1 to 3, 5, 6, 8, 9, 11 to 13, 15 to 19, 21, 31 to 33 and exhibit "KCI-5" are all excluded because they are irrelevant. Paragraphs 26 and 27 (last seven words on page 13 to the end of the paragraph) are excluded because they are an abuse of process. Those paragraphs struck out on the grounds of being scandalous are 4, 7,

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13 Affidavit of KC Ivory (no 3), filed 15 February 2007.
14 Affidavit of KC Ivory (no 4), filed 15 February 2007.
15 Affidavit of KC Ivory (no 5), filed 15 February 2007.
16 Affidavit of KC Ivory (no 6), filed 15 February 2007.
17 Affidavit of KC Ivory (no 7), filed 15 February 2007.
18 Affidavit of KC Ivory (no 8), filed 15 February 2007.

14 to 19 and 34. Further, paragraphs 1, 7, 10 to 20, 22, and 23 are excluded because they are submissions.

[48] In relation to affidavit number nine,[19] paragraphs 1 (the first sentence on page one and pages five and six), 2 to 4 (on page five), 6, 7, 12(f), (f), 18, 19 (pages 13 to 18), 20, 23, and 24 are submissions and are excluded. The first paragraph (the first sentence on page one) as well as paragraphs 1 (pages five and six), 2 to 4 (on page five), 6, and 7 are all conclusions. Further, 7(a) and (b) and paragraph 25(i) are scandalous and paragraphs 12(e), and (f), 20, 25, 26 and 30 to 55 are irrelevant and so are excluded. Exhibit "KCI-1" is excluded on the basis that it is hearsay.

[49] The first paragraph (first sentence) in affidavit number ten[20] is excluded on the grounds that it is a submission and it swears the issue as to whether there has been service.

[50] The first (first sentence) and third paragraphs of affidavit number eleven[21] are excluded because they are submissions. The first and fifth ("…[s]he immediately accepted it on behalf of the acceptors") paragraphs are also excluded because they are conclusions and paragraph 5 is irrelevant.

[51] In relation to affidavit twelve[22] paragraphs 2, 3 and exhibits "KCI-1" and "KCI-2" are excluded on the basis that they are irrelevant. Paragraph 4 is a conclusion and therefore excluded, as are the first and second paragraphs (last three lines on page three as to the acceptance on behalf of Telstra) and exhibit "KCI-1" (to the extent that the exhibit purports to say Mrs Coonan accepted the Bill of Exchange).

[52] The thirteenth affidavit[23] was contained within the "Letter Rogatory" of Mr Ivory dated 21 February 2008 which I have already excluded[24] and accordingly I do not need to deal with it further.

[53] Since the hearing on the 14 March 2008 I have received further material directly from Mr Ivory with a direction that the documents be directed to "...Her Honour …while sitting … within her private chambers." This material has been placed, unopened, on the correspondence part of the file. I consider that all of the subsequent correspondence on both files should be sealed and not opened without an order of a Judge.

[54] Counsel for Telstra sought to rely on documents 2 and 3 on BS 10536/06, which had been sealed previously by order of Fryberg J on 14 December 2006, and leave was given by me for these sealed documents to be opened.

The substance of Mr Ivory's applications

[55] Given the volume of material which has been supplied, much of which is irrelevant and inadmissible, it has been difficult to ascertain the real arguments which Mr Ivory seeks to pursue. In this regard, I gratefully adopt the analysis of Counsel for Telstra and will address each of the major grounds which have been identified

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19 Affidavit of KC Ivory (no 9), filed 15 February 2008.
20 Affidavit of KC Ivory (no 10), filed 15 February 2008.
21 Affidavit of KC Ivory (no 11), filed 15 February 2008.
22 Affidavit of KC Ivory (no 12), filed 15 February 2008.
23 Affidavit of KC Ivory (no 13), filed 21 February 2008.
24 Par [36].

by Counsel as the basis of Mr Ivory's application. The first and most substantial ground that Mr Ivory relies on is that he was not validly served with the application to set aside the statutory demand. Failure to serve the application to set aside the statutory demand and the affidavits in support within the required period would in fact have been fatal to Telstra's application to set aside the statutory demand.

Service

[56] Mr Ivory's evidence is that he was interstate and was not at his address for service on the occasions that Telstra's process servers left the documents there. Mr Ivory therefore alleges that the application to set aside the statutory demand and supporting affidavits were not served within 21 days after the statutory demand was served as required for there to be a valid application pursuant to s 459G of the *Corporations Act*:[25]

> "**459G Company may apply**
>
> (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
>
> (2) An application may only be made within 21 days after the demand is so served.
>
> (3) An application is made in accordance with this section only if, within those 21 days:
>
> (a) an affidavit supporting the application is filed with the Court; and
>
> (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."

[57] Telstra has not relied on personal service. The method adopted by Telstra was to leave the application and affidavit at the address nominated for service noted on the statutory demand within the 21 day period. The affidavit material clearly establishes that at 5.20 pm on 4 December 2006 process servers left, at the Parkinson, Queensland address for service stated in the statutory demand, a number of documents including Originating Application numbers 10542/06 and 10536/06, together with the first affidavits of Mr McDonnell and Mr Field.[26] The affidavit material further indicates that the process server, Ms Keir, attempted to serve Mr Ivory personally later that evening at 8.40 pm, and the next day at 6.40 am but was unsuccessful.[27] Further, on 5 December 2006 at 1.30 pm the Originating Application number 10536/06 and the two affidavits were served by a different process server, Mr Heydt, who again left them at the address for service.

[58] The affidavit material establishes that the Parkinson address is the place of business of the respondent companies, as well as the residence of Mr Ivory. Counsel for Telstra submits this address was the last known address of the place of residence or business of Mr Ivory and the respondent company.[28] There is no evidence

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25 See also *David Grant & Co Pty Ltd v Westpac* (1995) 184 CLR 265.

26 Affidavits of Service of CT Keir, filed 14 December 2006.

27 Affidavits of Service of CT Keir, filed 14 December 2006.

28 Affidavits of Service of WC Heydt, filed 14 December 2006.

contradicting Ms Keir or Mr Heydt's evidence as to service[29] and there is also photographic evidence of the documents left at the residence.

[59] Mr Ivory's evidence reveals that he was interstate on the occasions the process servers left the documents at the address for service.[30] Mr Ivory therefore contends that he was not served personally and therefore, was not served at all.[31] It is clear that this argument cannot succeed because personal service is not required. Leaving the documents at the address nominated for service noted on the statutory demand is sufficient service for the purposes of a statutory demand.[32] There is no requirement under the *Corporations Act* that a person must be served personally with an application to set aside a statutory demand. Section 109X(1) of the *Corporations Act* provides that:

> **"109X Service of documents**
>
> (1) For the purposes of any law, a document may be served on a company by:
>
> (a) leaving it at, or posting it to, the company's registered office; or
>
> (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or…"

[60] Furthermore, the document may be served on a natural person by leaving it at the address of the place of residence or business of the person last known to the person serving the document pursuant to s 28A(1) of the *Acts Interpretation Act* 1901:[33]

> "**28A Service of documents**
>
> (1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression "serve", "give" or "send" or any other expression is used, then, unless the contrary intention appears, the document may be served:
>
> (a) on a natural person:
>
> (i) by delivering it to the person personally; or
>
> (ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or
>
> (b) on a body corporate—by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate."

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29 Exhibits "JAM-1", "JAM-2" to the affidavit of JA McDonnell (no 3), filed 14 December 2006.

30 Affidavit of KC Ivory (no 3), filed 15 February 2007, pars 24(a) to (e); Affidavit of KC Ivory (no 7), filed, 15 February 2007, pars 64, 65, 51(h); Affidavit of KC Ivory (no 8), filed 15 February 2007, par 13; Affidavit of KC Ivory (no 1), filed 11 January 2007, par 28.

31 Affidavit of KC Ivory (no 3), filed 15 February 2007, par 22; Affidavit of KC Ivory (no 6), filed 15 February 2007, par 2 (last six lines); Affidavit of KC Ivory (no 7), filed 15 February 2007, pars 2-4.

32 *The Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 23 ACSR 380, 413; *Australian Underwriting Agencies Pty Ltd v QBE Insurance Ltd* [1999] FCA 568.

33 *Quitstar Pty Ltd v Cooline PacificPty Ltd* (2002) 168 FLR 213, 215-216.

[61] Accordingly, actual receipt of the material by Mr Ivory was not necessary[34] and service in these circumstances was not required to be personal. Therefore, Telstra satisfied the requirements for service in s 109X(1) of the *Corporations Act* and s 28A(1) of the *Acts Interpretation Act*. Further, Telstra satisfied the requirements of s 459G of the *Corporations Act* by serving the application and affidavits within the requisite period.

[62] Accordingly, the first aspect of the application by Mr Ivory must fail.

[63] Turning then to the other grounds raised by Mr Ivory to set aside the orders of 14 December 2006.

The application to set aside the orders of 14 December 2006 in relation to the corporate respondents, the "Solar Mesh Entities"

[64] None of the corporate respondents apply to set aside the orders of 14 December 2006 by Fryberg J. Mr Ivory does not have standing to apply to set aside the orders made in BS 10542/06. Consequently, that application must fail as none of the parties to that proceeding apply to set aside the orders.

[65] Similarly, in BS 10536/06, the corporate respondents have not applied to set aside the orders and as against the corporate respondents those orders must also stand. Mr Ivory can only have the order set aside insofar as it relates to the monetary amount of the demand served by him which is unable to actually be ascertained on the current state of the material before me.

Setting aside perfected orders

[66] Mr Ivory applies for orders that the orders obtained by Telstra on 14 December 2006, setting aside the statutory demand, be set side. It is clear that there are very limited grounds on which perfected orders may be set aside because of the importance of the finality of litigation. The majority of the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid*[35] stated that:

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud."

[67] Further, Gibbs J in *Gamser v Nominal Defendant*[36] said that:

> "It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation. However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand."

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34 *Allianz Australian Workers' Compensation (NSW) Ltd v Woodfast Joinery (Aust) Pty Ltd* (2003) NSWSC 587; *The Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 23 ACSR 380.

35 *D'Orta- Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17.

36 (1977) 136 CLR 145, 154.

[68] Rules 16, 667(2)(a) and (b), 668 of the *UCPR* set out when the court may set aside an order. The Supreme Court has inherent jurisdiction to set aside such orders if the grounds are made out.[37] Rule 16 provides:

> "**16 Setting aside originating process**
>
> The court may—
>
> (a) declare that a proceeding for which an originating process has been issued has not, for want of jurisdiction, been properly started; or
>
> (b) declare that an originating process has not been properly served; or
>
> (c) set aside an order for service of an originating process; or
>
> (d) set aside an order extending the period for service of an originating process; or
>
> (e) set aside an originating process; or
>
> (f) set aside service of an originating process; or
>
> (g) stay a proceeding; or
>
> (h) set aside or amend an order made under rule 127; or
>
> (i) make another order the court considers appropriate."

[69] In its submissions, Telstra referred to the Butterworths commentary of r 16 of the *UCPR* which states that:[38]

> "Failure to comply with the UCPR is an irregularity and does not render it a nullity (r 371)…When considering whether to exercise a power under [r 16] the court will of course be guided by r 5 and so applications made which allege minor technical faults in the…drafting of originating process are unlikely to be favourably received by the court."

[70] Telstra submits that a failure to serve the application and affidavits as required by s 459G of the *Corporations Act* would be the only potential ground for setting the orders of Fryberg J aside. Further discussion of this issue is unnecessary as I have concluded in paragraph 61 that service was satisfactory in the circumstances.

Rule 667 *UCPR*

[71] The court also has discretion pursuant to the provisions of r 667(2)(a) of the *UCPR* to set aside the orders on the basis that Mr Ivory was absent when the orders were obtained or if the order was obtained by fraud:

> "…**667 Setting aside**
>
> (1) ….
>
> (2) The court may set aside an order at any time if—
>
> (a) the order was made in the absence of a party; or
>
> (b) the order was obtained by fraud."

[72] It is clear that the orders of 14 December 2006 were obtained in Mr Ivory's absence, although it is equally clear that he had been validly served and actually knew that the applications were returnable on that date given the affidavit material.

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37 *Taylor v Taylor* (1979) 143 CLR 1; *Wentworth v Rogers (No. 5)* (1986) 6 NSWLR 534; *Boughen v Abel* (1978) 1 Qd R 138.

38 Butterworths, *Civil Procedure Queensland*, vol 1 (service 32, May 2008) [16.1].

[73] The decisions in *Sproule v Long*[39] and *Wilkinson v Wilkinson*[40] clearly establish that the power to set aside an order is discretionary. The discretion should not be exercised, however, if there is no real question to be tried as it would be futile to do so. In *Taylor v Taylor*[41] Gibbs J stated that an order made in the absence of a party should be set aside "…assuming there is a real question to be tried." Having considered Telstra's submissions in support of the orders obtained on 14 December 2006 and Mr Ivory's material in support of his application to set aside those orders, I do not consider that in the circumstances of this case there is a real question to be tried. There were clearly grounds upon which the statutory demand was liable to be set aside and these grounds are apparent from paragraph 5 of these reasons.

[74] Turning then to the question as to whether the order can be set side on the basis it was obtained by fraud, it is clear that in this regard Mr Ivory bears the onus of proof.

[75] It must be proved that there are fresh facts since the making of the orders on 14 December 2006[42] and these fresh facts must establish that the judgment was procured by the fraud of the party that obtained the order.[43] The newly discovered facts must establish that there is a reasonable probability that the action will succeed as it is not permissible to allege fraud in the hope of discovering it as the case progresses. Without such evidence a proceeding to set aside the orders based on fraud is an abuse of process and should be struck out.[44]

[76] Further, the fraud must have had a material effect upon the outcome of the proceedings; the fraud must be "directly material".[45] Proof of misconduct that falls short of fraud is not enough to set aside an order.

[77] I consider that Mr Ivory fails to meet the criteria to have the orders set aside based on the allegation of fraud as he makes bare allegations of misconduct unsupported by admissible evidence At best, Mr Ivory's allegations relate to matters which occurred long ago in relation to another matter previously litigated between the parties. They would have had no material effect on the making of the order on 14 December 2006.

Matters arising after order

[78] Furthermore, the requirements for setting aside the order pursuant to r 668 *UCPR* are not made out by Mr Ivory.

> **"668** (1) This rule applies if—
>
> (a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or

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39 [2000] QSC 232.

40 [1963] P 1.

41 143 CLR 1, 9.

42 *Boughen v Abel* (1987) 1 Qd R 138, 141-143; *Wentworth v Rogers (No. 5)* (1986) 6 NSWLR 534, 538.

43 *Wentworth v Rogers (No. 5)* (1986) 6 NSWLR 534, 539.

44 *Boughen v Abel* (1987) 1 Qd R 138 at 139-140, 146; *The Ampthill Peerage Case* [1977] AC 547, 591C-G.

45 *Monroe Schneider Associates Inc v No. 1 Raberem Pty Ltd (No. 2)* (1992) 37 FCR 234, 241-242; *Wentworth v Rogers (No. 5)* (1986) 6 NSWLR 534, 539A-D; *Rodgers v ANZ* (2005) QSC 365.

(b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.

(2) On application by the person mentioned in subrule (1), the court may stay enforcement of the order against the person or give other appropriate relief.

(3) Without limiting subrule (2), the court may do one or more of the following—

(a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;
(b) set aside or vary the order;
(c) make an order directing entry of satisfaction of the judgment to be made."

[79] Mr Ivory has not provided evidence of fresh facts since the making of the order on 14 December 2006.

[80] Mr Ivory's application to have the orders set aside based on the broad allegation of fraud is therefore dismissed.

Board resolution

[81] Mr Ivory also asserts that the Originating Applications may be set aside on the ground that Telstra lacked the authority to commence proceedings.

[82] I do not consider there is any merit in Mr Ivory's argument in this regard. Telstra clearly had an interest and standing to commence the proceedings and the affidavit material indicates that Ms Laver, General Counsel in Dispute Resolutions for Telstra, had authority to instruct external solicitors to apply to set aside the statutory demand given that it was part of her ordinary duties to issue such instructions. In any event, even if the in-house lawyer employed by Telstra who instructed Mallesons was not authorised to do so, this would not render the proceedings, or the orders, a nullity.[46]

[83] There is no requirement for there to have been a resolution of the Board of Directors of Telstra to apply to set aside the statutory demand. Telstra is a large company and its functions are necessarily restricted by its size.[47] Rogers CJ in *AWA Ltd v Daniels trading as Deloitte Haskins & Sells* [48] stated that:

> "…many companies today are too big to be supervised and administered by a board of directors except in relation to matters of high policy. The true oversight of the activities of such companies resides with the corporate bureaucracy. Senior management and, in the case of mammoth corporations, even persons lower down the corporate ladder exercise substantial control over the activities of

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46 See *Stone v ACE-IRM Insurance Broking Pty Ltd* (2004) 1 Qd R 173 at [21], [22].

47 Harold Ford, R Austin and I Ramsay, *Ford's Principles of Corporation Law*, (11th ed, 2003), 205-207; *AWA Ltd v Daniels trading as Deloitte Haskins & Sells* (1992) 7 ACSR 759, 832-3.

48 (1992) 7 ACSR 759.

> such corporations involving important decisions and much money. It is something of an anachronism to expect non-executive directors, meeting once a month, to contribute anything much more than decisions on questions of policy and, in the case of really large corporations, only major policy. This necessarily means that, in the execution of policy, senior management is in the true sense of the word exercising the powers of decision and of management which in less complex days used to be reserved for the board of directors."

[84] Moreover, some executives below Board level can have implied actual authority from the usual authority attached to their office.[49] In *AWA*, Rogers CJ stated that "…[i]mplied authority is conferred to do whatever is necessarily, or normally, incidental to an activity expressly authorised."

[85] Dal Pont[50], citing Lord Denning's decision in *Hely-Hutchinson v Brayhead Ltd*,[51] states that: [52]

> "[t]he law is that when a board of directors appoint one of their number to be managing director…[t]hey thereby impliedly authorise him to do all such things as fall within the usual scope of that office."

[86] Telstra submits that the position of director of a company, who is impliedly authorised to do things that fall within the usual scope of that office, is analogous to the position of General Counsel Dispute Resolutions who has implied authority to issue instructions to defend or apply to set aside a disputed claim for debt against Telstra.[53]

[87] To determine the usual scope of the implied authority conferred on the office in question is an enquiry of fact. Factors to be taken into account in determining this question include the size of the company, the nature of the commercial undertakings, and the role and responsibilities of the office holder.[54]

[88] Mr Ivory has not submitted any evidence to suggest that Ms Lander lacked the requisite authority to apply to set aside the statutory demand.

[89] In a situation such as this it would be an unreasonably onerous requirement for Telstra's Board of Directors to have to pass a resolution on the issue of applying to set aside the statutory demand. In fact, it is reasonable to expect a matter such as this to be delegated to someone in Ms Lander's position. It follows that Ms Lander was acting well within the scope of her office of General Counsel Dispute Resolutions and there is no question that she had the authority to instruct external solicitors to apply to have the statutory demand set aside.

Signing of the Originating Applications

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49 Harold Ford, R Austin and I Ramsay, *Ford's Principles of Corporation Law*, (11th ed, 2003), 664; *AWA Ltd v Daniels trading as Deloitte Haskins & Sells* (1992) 7 ACSR 759, 861.

50 Gino Evan Dal Pont, *Law of Agency*, (2001).

51 [1968] 1 QB 549, 583.

52 Gino Evan Dal Pont, *Law of Agency*, (2001) 200.

53 *Capper's Pty Ltd v L & M Newman Pty Ltd* [1960] NSWR 143, 145-6; Gino Evan Dal Pont, *Law of Agency*, (2001) 200.

54 Gino Evan Dal Pont, *Law of Agency*, (2001) 200.

[90] Mr Ivory also contends that because the solicitor who signed the applications to set aside the statutory demand signed in the name of the firm, and not in his own name, the proceedings are nullified or may be set aside.

[91] I am not satisfied that there has been any error or irregularity. It is common practice for documents to be signed by solicitors in the name of a firm. Signing in the name of the firm is "signing by a solicitor". Furthermore, the affidavit of Mark Darian-Smith states that the solicitor who signed the application is authorised to sign in the firm name.[55]

[92] Even if it was proved that there was a failure to comply with the rules regarding the signing of the application it is, nevertheless, an error of a formal kind capable of amendment, if necessary, pursuant to r 371 *UCPR*. This rule reads:

> "**371 Effect of failure to comply with rules**
>
> (1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity."

[93] Accordingly, this ground of Mr Ivory's applications must fail.

Conclusion

[94] Accordingly, the applications in BS 10536/06 and BS 10542/06 to set aside the orders made on 14 December 2006 are dismissed.

Setting aside all outstanding costs orders

[95] Mr Ivory has not, therefore, been successful in the applications to set aside the orders of Fryberg J on 14 December 2006. Accordingly, his application to set aside the costs order made against him on that date fails.

[96] Mr Ivory is also seeking to have other costs orders in other proceedings set aside. Mr Ivory has not, however, set out the basis upon which these other orders can be set aside or identified these other costs orders. I can see no basis upon which such orders should be made.

Other matters

[97] Telstra relied on the further affidavits of Mr Field and Mr McDonnell at the hearing to set aside the statutory demand despite the fact they were not filed and served with the Originating Application. Telstra submits they were entitled to do so.[56]

[98] The Originating Application was served on Mr Ivory on 4 December 2006 at 5.20 pm, together with the affidavit of David Graham Shelton Field sworn 4 December 2006, and the affidavit of Justin Anthony McDonnell sworn 4 December 2006.[57] There is no requirement under s 459G of the *Corporations Act* that the *further* affidavits of Mr Field and Mr McDonnell are to be filed and served with the Originating Application. In *Louisbridge* Ryan J states:[58]

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55 Sworn and filed 8 February 2008.

56 *Re Louisbridge Pty Ltd* (1994) 2 Qd R 144; *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452.

57 Affidavit of service of CT Keir, filed 14 December 2006.

58 *Re Louisbridge Pty Ltd* (1994) 2 Qd R 144, 145.

> "I do not think that [s 459G] means that supporting affidavits may not be filed after the 21 day period, provided that an affidavit is filed and served within the 21 day period which supports the application by providing grounds for concluding that there is a genuine dispute between the company and the creditor about the existence or amount of a debt to which the demand relates, or that the company has an offsetting claim."

[99] I consider, therefore, that at the hearing on the 14 December 2006 Telstra was entitled to rely on the further affidavit of David Graham Shelton Field sworn 12 December 2006, and the affidavit of Justin Anthony McDonnell sworn 13 December 2006.

[100] Mr Ivory has raised many other matters in his voluminous material and I have endeavoured to deal with the substantive and relevant grounds for setting aside the order of 14 December 2006. Other issues raised by Mr Ivory which I consider do not relate to the current proceedings have not been addressed in these reasons.

[101] I also consider that documents 7, 8, 11, 12, 13, 14, 15, and 16 on BS 10542/06 are scandalous and should be sealed.

[102] I consider that documents 17, 19, 20, 21, 22, 23 24, 25, and 26 on BS 10536/06 are scandalous and should be sealed.

[103] The affidavit of Mr McDonnell sworn on 14 March 2008 should also be sealed, and I also consider that documents 2 and 3 on BS 10536/06 which were previously sealed by order of Fryberg J on 14 December 2006 should be resealed.

[104] Mr Ivory has also continually sought to have a trial by jury. Orders were, however, made at the directions hearing on 5 November 2007 that the matter would be heard on 14 March 2008 without a jury.

Costs

[105] Counsel for Telstra sought an order that Mr Ivory pay the costs of Telstra of and incidental to the application, including any reserved costs, on the indemnity basis. The basis of this submission was that Mr Ivory's applications were hopeless from the start and that this case, therefore, clearly falls within the category of cases where an order for indemnity costs is appropriate.

[106] In *Colgate Palmolive v Cussons Pty Ltd*[59] Sheppard J set out the relevant principles in relation to the award of indemnity costs as follows:

> "…the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131 at 152); evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davis J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp* (supra)); the making of allegations which ought

[59] (1993) 46 FCR 225, 233-234.

> never to have been made or the undue prolongation of a case by groundless contentions (Davis J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson* (1987) 10 NSWLR 525, *Maitland Hospital v Fisher (No.2)* (1992) 27 NSWLR 721 at 724 (Court of Appeal), *Crisp v Keng* (unreported, court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in *EMI Records* (supra))…"

[107] I consider that Mr Ivory has made allegations which ought never have been made and has also unduly prolonged the case by groundless contentions. Given the history of this matter and Mr Ivory's failure to comply with the orders of the Court on 5 November 2007, costs should be awarded against Mr Ivory on the indemnity basis in respect of both applications. Not only have volumes of material been forwarded which are irrelevant but they are in direct contravention of the orders made on 5 November 2007 as they do not relate to issues arising solely in these proceedings as required by that order. Furthermore, they also contain material of a scandalous nature.

Orders

1. The evidence in application BS 10542/06 is received as evidence in application BS 10536/06 and the evidence in application BS 10536/06 is received as evidence in BS 10542/06.

2. The applications filed on 11 January 2007 in BS 10542/06 and BS 10536/06 are dismissed.

3. Mr Ivory is to pay the costs of Telstra in BS 10542/06 and 10536/06 of and incidental to the applications, including any reserved costs on an indemnity basis.

4. The material forwarded to the Court in both applications by Mr Ivory on 21 February 2008 and all other correspondence on both files is to be sealed in an envelope and marked "Not to be opened without an Order of a Judge of the Supreme Court of Queensland".

5. Documents 7, 8, 11, 12, 13, 14, 15, and 16 on BS 10542/06 are scandalous and should be sealed in an envelope and marked "Not to be opened without an Order of a Judge of the Supreme Court of Queensland".

6. Documents 17, 19, 20, 21, 22, 23, 24, 25, and 26 on BS 10536/06 are scandalous and should be sealed in an envelope and marked "Not to be opened without an Order of a Judge of the Supreme Court of Queensland".

7. The affidavit of Mr McDonnell sworn on 14 March 2008 should also be sealed and I also consider that documents 2 and 3 on BS 10536/06, which were previously sealed by order of Fryberg J on 14 December 2006, should be re-sealed.