

SUPREME COURT OF QUEENSLAND

CITATION: *Forza Finance Pty Ltd v Vergepoint Sales and Management Pty Ltd* [2010] QSC 46

PARTIES: **FORZA FINANCE PTY LTD**
ACN 120 944 587
(applicant)
v
VERGEPOINT SALES AND MANAGEMENT PTY LTD
ACN 123 383 540
(respondent)

FILE NO: BS13499 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 24 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 19 January 2010

JUDGE: Daubney J

ORDER: **1. I determine that the applicant validly filed and served the application to set aside the statutory demand and supporting affidavit within the time limited by s 459G of the *Corporations Act*.**

2. I will hear the parties as to further directions and as to costs.

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – PROCEDURAL REQUIREMENTS – SERVICE OF APPLICATION – where statutory demand issued on behalf of the respondent and an affidavit supporting that demand were served on the applicant – where service was effected by registered post to the registered office of the applicant under a covering letter from the respondent’s solicitors – where respondent’s solicitors’ letterhead contained details of that firm’s street address, postal address, telephone and facsimile numbers, email address and website – where a copy of any application to set aside the demand was to be served in accordance with s 459G *Corporations Act* – where applicant’s solicitor sent copies of the applicant’s filed application to set aside the statutory demand and supporting

affidavit by facsimile transmission to the respondent's solicitor – where there is no suggestion that the facsimile was not received by the respondent's solicitors – whether this fax transmission was effective service within the time limit prescribed by s 459G *Corporations Act* – whether the applicant failed to file and serve a valid application to set aside the statutory demand and supporting affidavit within the time limited by s 459G *Corporations Act*

Corporations Act 2001 (Cth) s 109X, s 459G

Corporations Regulations 2001 (Cth)

Uniform Civil Procedure Rules 1999 (Qld) r 17, r 29, r112, r 122, r 140

Australian Underwriting Agencies Pty Ltd v QBE Insurance Ltd (1999) 17 ACLC 22, cited

C & E Pty Ltd v Corrigan [2006] 2 Qd R 399, cited

Howship Holdings Pty Ltd v Leslie (No 1) (1996) 41 NSWLR 542, distinguished

Millerview Constructions Pty Ltd v Palmer Plumbing Pty Ltd [2008] QSC 3, distinguished

Re WB Sharp Constructions Pty Ltd (2001) 162 FLR 280, applied

Rocheseter v Lader (1997) 143 ALR 648, cited

COUNSEL: MD Evans for the applicant
BJ Lambert solicitor for the respondent

SOLICITORS: Irish Bentley Lawyers for the applicant
Birch & Co for the respondent

- [1] On 9 November 2009, a statutory demand issued on behalf of the respondent and an affidavit supporting that demand were served on the applicant. Service was effected by registered post to the registered office of the applicant, and the statutory demand and supporting affidavit were under a covering letter from the respondent's solicitors which stated:

“Dear Sir/Madam

STATUTORY DEMAND

VERGEPOINT SALES AND MANAGEMENT PTY LTD (A.C.N. 120 944 587) DEBT DUE FROM FORZA FINANCE PTY LTD (A.C.N. 123 383 540)

FORZA FINANCE DEPOSIT GUARANTEE NUMBER 71428DIC

We act for Vergepoint Sales & Management Pty ltd in respect of the above matter and now enclose the following by way of service:

1. Statutory Demand; and
2. Affidavit of Wei-Cheng Lu sworn on 5 November 2009.”

- [2] The respondent's solicitors' letterhead contained details of that firm's street address, postal address, telephone and facsimile numbers, email address and website.

- [3] Given that date of service of the statutory demand, a copy of any application to set aside the demand, and of the affidavit supporting that application, needed to be “served on the person who served the demand on” the applicant by 30 November 2009 – *Corporations Act*, s 459G.
- [4] The statutory demand was in the form specified in the *Corporations Regulations* 2001, Schedule 2 (Form 509H), and stated, inter alia, as follows:
- “6. The address of the creditor for service of copies of any application and affidavits is care of Messrs Birch & Co, Solicitors and Migration Agents, Suite 11, 2012 Logan Road, Upper Mt Gravatt in the State of Queensland.”
- [5] On 30 November 2009, at about 4.15 pm, the applicant’s solicitor sent copies of the applicant’s filed application to set aside the statutory demand and supporting affidavit by facsimile transmission to the respondent’s solicitor. The copies of those court documents were transmitted under cover of a letter from the applicant’s solicitor in the following terms:

“Birch & Co Solicitors
PO Box 6089
UPPER MT GRAVATT QLD 4122

By facsimile: (07) 3343 5502

Dear Colleagues

OUR CLIENT: FORZA FINANCE PTY LTD
YOUR CLIENT: VERGEPOINT SALES AND MANAGEMENT PTY LTD

Pursuant to Rule 122 *Uniform Civil Procedure Rules 1999*, we enclose by way of service:

1. Originating Application; and
2. Affidavit in support of Matthew Edward Thomas.

| | |
|---|---|
| Sender’s name and address: | Irish Bentley Lawyers 39 Leopard Street Kangaroo Point Qld 4169 |
| Name of person to be served: | Birch & Co, as solicitors for Vergepoint Sales and Management Pty Ltd |
| The date and time of facsimile transmission: | 30 November 2009 at 4.15 pm |
| Total number of pages of transmission: | 41 (including this page) |
| Telephone number from which document is transmitted: | (07) 3891 2033 |
| Name and telephone number of person to contact if there is a problem with the transmission: | Rhett Kipps (07) 3891 3333 |

We look forward to hearing from you.

Yours faithfully”

- [6] The fax to the respondent’s solicitors (including the cover page) comprised 41 pages. The applicant has put into evidence before me a facsimile transmission report which confirms that this 41 page fax was transmitted to the respondent’s solicitors’ facsimile number between 4.23 pm and 4.28 pm on 30 November 2009.
- [7] It has not been suggested by the respondent that this 41 page fax was not received by the respondent’s solicitors at about that time on 30 November 2009. Rather, the respondent contends that this fax transmission was ineffective service, that service of copies of these documents did not occur until they were received by post on 2 December 2009, and that the Court has no jurisdiction to entertain the application to set aside the statutory demand because it was served outside the 21 days period prescribed by s 459G. A failure to comply with the time limit imposed by s 459G(2) has long been held to be fatal to such an application.
- [8] On 23 December 2009, it was ordered by M Wilson J that there be a determination of the issue of whether the applicant failed to file and serve a valid application to set aside the statutory demand and supporting affidavit within the time limited by s 459G of the *Corporations Act*. That is the issue with which I am now concerned.
- [9] The respondent advanced four bases for its contention that the facsimile on 30 November 2009 was not effective service:
- (a) The application failed to identify the person on whom it was intended to be served;
 - (b) The documents were not served at the address for service nominated in the statutory demand;
 - (c) The documents were not served in accordance with s 109X of the *Corporations Act*;
 - (d) The documents were not served in accordance with s 459G because they were not served on the creditor, nor was there evidence that the documents actually came to the notice of the creditor.
- [10] Before dealing with these arguments in turn, some general observations are warranted.
- [11] There is ample authority for the proposition that service of an application to set aside a statutory demand and the requisite supporting affidavit may validly be effected by facsimile transmission, depending on the particular circumstances of the case and also having regard to the particular rules of court of the jurisdiction within which service is sought to be effected. So, for example, in *Australian Underwriting Agencies Pty Ltd v QBE Insurance Ltd* (1999) 17 ACLC 22, Merkel J held that service of the application and supporting affidavit by facsimile in that case was effective because the address for service in paragraph 6 of the statutory demand expressly indicated that service could be effected at that address by facsimile transmission, and that this was therefore service in accordance with the directions as to service given by the creditor in the prescribed form.

- [12] In *Re WB Sharp Constructions Pty Ltd* (2001) 162 FLR 280, Jones J, when considering whether service of an application to set aside a statutory demand could be effected by facsimile, made the cogent point that once an application to set aside a statutory demand is issued in the court, it is then the rules of court relating to service of such documents which are to be applied. As his Honour noted, the *Corporations (Qld) Rules* 1993 (contained in Schedule 1A to the *Uniform Civil Procedure Rules*)¹ do not make any special rule relating to the service of such an application. The *Uniform Civil Procedure Rules* do, however, allow for service by facsimile as a mode of service. In particular, *UCPR* r 112 provides:

“112 How ordinary service is performed

- (1) If these rules do not require personal service of a document, the following are ways by which the document may be served on the person to be served –

...

- (f) if the solicitor for the person has -

- (i) an exchange box at a document exchange – leaving the document in the exchange box or another exchange box available for documents to be transferred to the solicitor’s exchange box; or
- (ii) a fax – faxing the document to the solicitor; or
- (iii) an email address – emailing the document to the solicitor;

- (g) an electronic means prescribed by practice direction.”

- [13] There is nothing in the *Corporations Proceedings Rules* which requires personal service of the application to set aside the statutory demand. Indeed, the statutory demand in the present case, as already noted, specified the respondent’s solicitors’ office as the address for service of copies of any application and affidavit on the creditor. True it is that this paragraph did not specify a facsimile number as part of the address for service, and this is potentially a point of distinction of the present case from that considered by Merkel J in *Australian Underwriting Agencies Pty Ltd v QBE Insurance Ltd* (supra). *UCPR* r 112 does not, however, specifically require that the solicitor have given such prior notice of the solicitor’s fax number. Rather, r 112(1)(f)(ii) relevantly provides that one of the ways by which a document may be served is “if the solicitor for the person has ... a fax – faxing the document to the solicitor”. Ordinarily in litigation conducted under the *Uniform Civil Procedure Rules*, the facsimile number relevant for ordinary service will be disclosed by a solicitor in compliance with the contact detail requirements imposed by r 17(b) (in respect of originating process), r 29(4) (relating to notices of address for service of a respondent to an application) and r 140 (relating to a notice of intention to defend in respect of a proceeding commenced by claim). In the normal course of litigation conducted under the *Uniform Civil Procedure Rules*, service under r 112(1)(f) would be able to be effected because the relevant solicitor would, by operation of the rules just mentioned, have given the solicitor’s facsimile number details. In the

¹ Now the *Corporations Proceedings Rules*.

context of an application to set aside a statutory demand, however, I do not think that r 112(1)(f)(ii) ought be read as being limited to authorising service by facsimile on a solicitor only in cases where the solicitor's facsimile number is included in the nominated address for service on the creditor in the statutory demand. Rule 112(1)(f)(ii) does not require anything more than that, as a matter of fact, the solicitor have a fax. To construe r 112(1)(f)(ii) as applicable only in cases where the solicitor's facsimile number was mentioned in the details of the address for service in paragraph 6 of the statutory demand would operate to detract from the right to apply to set aside the statutory demand.²

- [14] It is also, in my respectful view, clear that once a creditor nominates an address in the statutory demand for service of copies of any application and affidavit, then the creditor must be taken as accepting that service of such an application and supporting affidavit at that address will constitute good and sufficient service. In *Howship Holdings Pty Ltd v Leslie (No 1)* (1996) 41 NSWLR 542, Young J said, at 544:

“The Corporations Law does not indicate where the summons [to set aside the statutory demand] is to be served. Section 459E of the Law prescribes various matters that must be contained in the statutory demand, but nowhere do these include an address for service. The prescribed Form 509H, however, does contain in par 6 a direction to insert the address of the creditor. There is no suggestion that doing so was beyond the power of the regulation-making authority. Indeed, it assists in the ordinary working out of the Act.

Where a statute or regulation prescribes the giving of an address for service, that address for service is an address at which a summons dealing with the statutory notice can be served. This is clear from Form 509H itself, but the general law would be to the same effect: see *Re Drinkwater* (1929) 46 WN (NSW) 202 decided in connection with an address for service on a *Real Property Act* caveat.”

(I note that the final proposition stated by his Honour was doubted in *Rochester v Lader* (1997) 143 ALR 648, per Whitlam J at 673-674).

- [15] The judgment of Young J in *Howship Holdings Pty Ltd* also seems to be the genesis for one of the submissions made on behalf of the respondent in the present case, namely that there is no evidence that the documents sent by facsimile were actually brought to the notice of the creditor. In fact, however, the matter being dealt with by Young J in *Howship Holdings Pty Ltd* concerned a case in which, as his Honour applied the law in New South Wales, Young J considered that it was necessary for there to be personal service of an application to set aside a statutory demand. His Honour therefore asked, at 545:

“Accordingly, one gets back to the ordinary principle, has there been personal service, that is has the document come to the notice of the respondent?”

- [16] The situation in Queensland, by virtue of the application of the *Uniform Civil Procedure Rules*, is different. The respondent, by nominating his solicitors' office in paragraph 6 of the statutory demand, has given the address for service. Rule 112

² Compare *C & E Pty Ltd v Corrigan* [2006] 2 Qd R 399, per Keane JA, (with whom Williams JA and Muir J agreed) at [28].

provides that service may be effected on that address by facsimile transmission. I do not understand the judgment of M Wilson J in *Millerview Constructions Pty Ltd v Palmer Plumbing Pty Ltd* [2008] QSC 3 to elevate the question of when the documents come to the notice of the creditor to a prescriptive requirement. But in any event, *Millerview Constructions Pty Ltd* is completely distinguishable from the present situation because on no view had the complete material been transmitted by facsimile to the solicitor's office in that case.

- [17] Turning then to deal with the respondent's objections:
- (a) The application to set aside the statutory demand was in the form provided for by Rule 2.2 of the *Corporations Proceedings Rules*. It specifically nominates the respondent as the person intended to be served. *UCPR* r 122 requires that a document served by fax must include a cover page stating specified information. I am satisfied that the cover page, which I have mentioned above, satisfies the requirements of that rule.
 - (b) Contrary to the respondent's submissions, I consider that the documents were served at the address for service nominated in the statutory demand, namely the office of the respondent's solicitors, and that such service was effected by facsimile transmission.
 - (c) True it is that the documents were not served in accordance with s 109X of the *Corporations Act*. But that section is facultative, not prescriptive, and does not prevent service by other authorised modes.
 - (d) In the circumstances of this case, there was no necessity for it to be proved that the documents actually came to the notice of the creditor. When a creditor nominates a professional adviser's office as the address for service on a Form 509H, it cannot be the case that a person applying to set aside the statutory demand must prove not only that they served the documents at the place specified, but that the professional adviser brought those documents to the creditor's attention.
- [18] Accordingly, I answer the issue by determining that the applicant validly filed and served the application to set aside the statutory demand and supporting affidavit within the time limited by s 459G of the *Corporations Act*.
- [19] I will hear the parties as to further directions and as to costs.