

# MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Shipping Container Rental Pty Ltd v Land & Anor* [2023] QMC 10

PARTIES: Shipping Container Rental Pty Ltd (Applicant)  
v  
Mathew Land (Respondent)  
&  
Johnathan Balkin (Respondent)

FILE NO/S: 0051738/22

DIVISION: Magistrates Courts

PROCEEDING: Application (Without oral hearing)

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 27/06/2023

DELIVERED AT: Brisbane

HEARING DATE: 27/06/2023 (On the papers)

MAGISTRATE: Pinder

ORDER: 1. Application dismissed  
2. No order as to costs

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SERVICE – IN LIEU OF PERSONAL SERVICE – SUBSTITUTED AND INFORMAL SERVICE – Where there is an application for substituted service – Where the applicant elected to have the application heard on the papers – Where evidence is inadmissible – Where impracticality of personal service on demonstrated in any event

LEGISLATION: *Uniform Civil Procedure Rules 1999* rr 116(2), 295, 430(2)

CASES: *NAB v Garner* [2022] QDC 221  
*Foxe v Brown* (1984) 58 ALR 542  
*Miscamble v Phillips & Hoeflich (No 2)* [1936] St R Qd 272

SOLICITORS: Miller Sockhill Lawyers for first Defendant

### Reasons for Decision

- [1] The applicant plaintiff seeks a substituted service order pursuant to Rule 116 of the *Uniform Civil Procedure Rules* (UCPR).
- [2] The applicant seeks to proceed *ex parte*, that is without the application being served, which is obviously understandable in light of the relief sought.
- [3] The application seeks a decision without oral hearing pursuant to r. 489.
- [4] The applicant has complied with the requirements of r. 490 UCPR including attaching a notice in the approved form and accompanying the application with a draft order and written submissions in support.

### Substituted Service

- [5] The application is pursuant to r. 116 UCPR which provides:
  - (1) If, for any reason, it is impracticable to serve a document in a way required under this chapter, the court may make an order substituting another way of serving the document.
  - (2) The court may, in the order, specify the steps to be taken, instead of service, for bringing the document to the attention of the person to be served.
  - (3) The court may, in the order, specify that the document is to be taken to have been served on the happening of a specified event or at the end of a specified time.
  - (4) The court may make an order under this rule even though the person to be served is not in Queensland or was not in Queensland when the proceeding started.
- [6] The threshold question is that the applicant demonstrate that it is impractical to personally serve the proceedings on the defendant.
- [7] That test has been described in these terms – “furthermore the question is not whether reasonable effort has been shown by the plaintiff over a particular period but whether at the date on which the application for substituted service is made the plaintiff, using reasonable effort, is unable to serve the defendant personally.”<sup>1</sup>
- [8] Once the threshold question is established, the courts discretion under r. 116(2) is enlivened. The discretion must be informed by the purpose of substituted service which is to bring the proceedings to the attention of the other parties. Substituted service is not a way to meet the formal requirements of service without affecting actual notice of the proceedings. If a party cannot be found, or if no reliable form of communication of the documents to the defendant is established, then the proceedings cannot progress.<sup>2</sup>
- [9] There must be a high degree of probability proved on the evidence that the

<sup>1</sup> *Foxe v Brown* (1984) 58 ALR 542 at 547

<sup>2</sup> *NAB v Garner* (2022) QDC 221, Porter KC DCJ

proceedings will come to the attention of the other party by the method of service ordered.

- [10] “It is not proper to substitute service of process in a court of law when there is no belief that the service will bring the proceedings to the knowledge of the person in question or any person representing his interest.”<sup>3</sup>

### **The Applicant’s Evidence**

- [11] The applicant has filed and relies upon the following affidavit:
- R M Gallacher filed 03/05/23
- [12] The affidavit of Ms Gallacher purports to rely on evidence in this substituted service application which has been given on an information and belief basis (that is evidence comprising admissible hearsay evidence from the deponent).
- [13] The affidavit also purports to annex an “ Affidavit of enquiries “ of P J Wheeldon .
- [14] This is not an affidavit , properly filed in the proceedings and does not comply with the requirements of r 431 .Further , neither of the Affidavits provide any basis for the assertion as to the contact email or mobile telephone number for the defendant by counter claim
- [15] R. 430(2) UCPR permits such evidence to be adduced but only if certain requirements pursuant to the rule are met.
- [16] R. 430 provides as follows:
- (1) Except if these rules provide otherwise, an affidavit must be confined to the evidence the signatory for the affidavit could give if giving evidence orally.
  - (2) However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the signatory for the affidavit states the sources of the information and the grounds for the belief.
- [17] The requirements of the rule are:
- i. The source of the statement must be able to give admissible original evidence of the fact asserted.
  - ii. The deponent must sufficiently identify the source of the statement.
  - iii. The deponent must state their belief in the statement.
- [18] In respect of the affidavit of Ms Gallacher key parts of the evidence relied upon on this application are inadmissible including upon the basis that:
- The deponent fails to properly identify the source of much of his/her evidence.
  - Either because the source is not properly identified or even allowing for identity of the source, the evidence appears to be hearsay from that source.

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<sup>3</sup> *Miscamble v Phillips and Hoeflich (No 2)* [1936] St R Qd 272

**Disposition**

- [19] There is no admissible evidence in the affidavits relied upon by the applicant to satisfy the threshold condition, that is that the applicant can demonstrate that it is impracticable to personally serve the proceedings on the defendant.
- [20] The application for substituted service must therefore fail and is dismissed.

Magistrate Pinder

27/06/23