SUPREME COURT OF QUEENSLAND

CITATION:	*LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd* [2004] QSC 134
PARTIES:	**LJAW ENTERPRISES PTY LTD** (ACN 104 573 935) (applicant) **v** **RJK ENTERPRISES PTY LTD** (ACN 055 443 466) (respondent)
FILE NO/S:	SC 2157 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application – Set Aside Statutory Demand
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2004
JUDGE:	Holmes J
ORDER:	**1. I dismiss the application to set aside the statutory demand dated 11 February 2004, and decline to make any declaration.** **2. Subject to contrary submission, the respondent should have its costs of the application.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR "SOME OTHER REASON" – where unsealed copy of the application to set aside statutory demand, bearing no return date or file number, was faxed to the respondent's solicitors after 5pm on the last day for service – whether this constitutes a valid application to set aside statutory demand as required under s 459G(3) of the *Corporations Act* 2001(Cth) CORPORATIONS - WINDING UP –WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – WHAT CONSTITUTES DEMAND – GENERALLY – where the affidavit accompanying the statutory demand was not signed on every page and thus did not comply with the rules, as required by s 459E(3)(b) – whether the statutory demand was valid

Corporations Act 2001 (Cth), s 9, s 459G, 459E(3)
Corporations Law Rules , r 1.3, r 1.7, r 1.9, r 2.6, r 5.2
Uniform Civil Procedure Rules 1999 (Qld), r 103, r 431, r 432, r 436

Benonyx Pty Ltd v Fetrona Pty Ltd [1999] NSWSC 181, followed
Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd (1995) 129 ALR 308, followed
Chelring Pty Ltd v Coombs [2000] WASC 60, followed
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265, followed
Delta Beta Pty Ltd v Everhard Vissers (1996) 20 ACSR 583, followed
Elite Motor Campers Australia v Leisureport Pty Ltd (1996) 22 ACSR 235, followed
Hamilhall Pty Ltd (in liq) v A T Phillips (1994) 54 FCR 173 at 175, considered
Howship Holdings Pty Ltd v Leslie & Anor (No 2) (1996) 41 NSWLR 542, followed
In the matter of Seventh Cameo Nominees Pty Ltd; Seventh Cameo Nominees Pty Ltd v Holdway Pty Ltd (unreported, Chernov J , Supreme Court of Victoria, 5305 of 1998; 24 April 1998), followed
Robowash Pty Ltd v Robowash Finance Pty Ltd (2000) 158 FLR 338, considered
Rosefarms Pty Ltd v Stourhead Pty Ltd (2000)155 FLR 24, followed
Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 76 FCR 452, applied
Universal Trade Exchange Pty Ltd v Westpac Banking Corporation (2002) 20 ACLC 1302, followed

COUNSEL: P J Dunning for the applicant
P R Franco for the respondent

SOLICITORS: McCarthy Duric Ryan Neil for the applicant
McCarthy Holz Berger for the respondent

[1] This application to set aside a statutory demand pursuant to s 459G of the *Corporations Act* 1999 (Cth) turns on a number of procedural points. On the one hand, the applicant argued that the statutory demand was not effective, because the affidavit accompanying it was not signed on every page and thus did not comply with the rules, as required by s 459E(3)(b) of the Act. On the other, the respondent invited me to dismiss the application on the basis that it had not, as 459G(2) required, been made within 21 days after it was served. That was so because the requirements of s 459G(3), which prescribes how an application is made, had not been met: a copy of the application and a copy of the supporting affidavit had not been served on the respondent within 21 days.

[2] What had happened was that an unsealed copy of the application, bearing no return date or file number, was faxed to the respondent's solicitors after 5pm on Friday 5 March 2004, the last day for service. Mr Franco, for the respondent, argued that service of an unsealed copy of the application would not suffice, relying for that proposition on a number of first instance decisions: *Benonyx Pty Ltd v Fetrona Pty Ltd*,[1] *Chelring Pty Ltd v Coombs*,[2] and *Universal Trade Exchange Pty Ltd v Westpac Banking Corporation*.[3] In addition, he contended, sending by facsimile was not a proper form of service, and service after 4 pm was, by virtue of r 103 of the *Uniform Civil Procedure Rules* 1999, service the following day.

[3] The question of whether the application to set aside was properly made is, obviously enough, the one which requires immediate determination. If an application within the meaning of s 459G(3) has not been made within the mandated 21 days of the demand, there is no application before me.[4]

[4] In *Benonyx*, the copy of the application served lacked the return date. That was not, Santow J concluded, adequate service, notwithstanding that the defendant was apprised of the return date some six days after the end of the 21 day period. The point of service was to give the party served proper notice of the proceedings for which his attendance was required; and that had not been achieved within the requisite 21 days.

[5] In *Chelring v Coombs*, a copy of a properly completed application to set aside a statutory demand was shown to a staff member of the respondent's solicitors; but an incomplete copy, together with the supporting affidavit, was left with her. The copies served did not bear the seal of the Supreme Court, did not have the action number endorsed on it and did not bear the date and time for hearing of the application. Master Sanderson followed the decision of Santow J in *Benonyx*, concluding that the "copy" of the application required by s 459G(3)(b) had to include any important information, which in turn included the return date of the application and the date upon which the application was filed. Without those pieces of information, he said, a respondent would be put at a disadvantage: the filing date was needed so that the respondent could be sure that there had been compliance with the statutory requirements, and the return date was needed so that the respondent knew when it was required to appear.

[6] *Universal Trade Exchange* was another decision of Master Sanderson. In that case the application served on the respondent lacked the return date, although there was no suggestion that the respondent suffered any resulting prejudice. Master Sanderson concluded that to comply with the requirements of the section it was necessary that the copy of the application be endorsed with a return date. Since it had not been, the plaintiff's application was incompetent.

[7] Mr Franco also referred to *Robowash Pty Ltd v Robowash Finance Pty Ltd*,[5] an appellate decision, but one not directly on point. In *Robowash* (a decision of the Full Court of the Supreme Court of Western Australia) the applicant had served its application, but an annexure to its supporting affidavit lacked four pages. Kennedy

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1 [1999] NSWSC 181.
2 [2000] WASC 60.
3 (2002) 20 ACLC 1302.
4 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at p279.
5 (2000) 158 FLR 338.

J, with whom the other members of the court agreed, reviewed a number of decisions indicating a strict approach to the notion of what constituted a "copy". He concluded that substantial compliance with the requirement for service of a copy of the affidavit and its annexures would not suffice. Since he was satisfied that the service copy of the affidavit and its annexure was deficient, the application to set aside the statutory demand was not valid. The court made a declaration to that effect.

[8] Mr Dunning, for the applicant, argued that s 459G(3) should not be construed so as to require an exact copy of the original. The intention of the provision was to ensure promptness. The first instance decisions relied on by the respondent introduced an inappropriate gloss on the words in sub-section (3) so as to read them as if they required a "copy of the filed material" or a "copy of the sealed application". That could present difficulties in practice; for example, in the Federal Court, documents were not immediately stamped and copies returned. But there was nothing in the provision to require an exact copy of the original. The *Robowash* decision, which was the only appellate decision relied on, concerned a document which was not in fact a copy at all.

[9] I can see no reason not to adopt the reasoning of Santow J in *Benonyx*. It is not necessary for me to embark on any attempt at delineation of what is required to constitute a "copy" for the purposes of s 459G(3). It is patent here that the documents served failed to reflect the original application in a matter of substance: it did not contain the return date for the application. It is not to the point that the requirement that the copy served reflect the original, at least to that extent, may cause hardship. Indeed, precisely that result occurred in *Elite Motor Campers Australia v LeisurePort Pty Ltd*:[6] delay by the court registry in filing a document, presumably the application, prevented the service of an application to set aside the statutory demand within 21 days. That was, observed Spender J, a regrettable circumstance, but it could not "prevail over the absolute nature of the requirements of s 459G of the Corporations Law".[7] I conclude that a copy of the application was not served within 21 days of service of the demand, so that no application to set it aside has been made within the meaning of s 459G (2).

[10] Although it is not strictly necessary in light of that conclusion, I will touch briefly on the other arguments advanced by Mr Franco. It was a matter of agreement that the facsimile copies of the application and affidavit were received by the respondent, and I would not, therefore, have thought there was much in Mr Franco's objection to the form of service;[8] but the actual time of service is problematic. Mr Franco is correct, in my view, in his submission that r 103 of the *Uniform Civil Procedure Rules*, being relevant and not inconsistent with the *Corporations Law Rules*,[9] applies to service. Rule 103 provides:

> "If a document is served on a person after 4pm, the document is taken to have been served on the next day."

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6 (1996) 22 ACSR 235.

7 At p236.

8 See *Howship Holdings Pty Ltd v Leslie & Anor* (No 2) (1996) 41 NSWLR 542; *Rosefarms Pty Ltd v Stourhead Pty Ltd* (2000)155 FLR 24; and *In the matter of Seventh Cameo Nominees Pty Ltd; Seventh Cameo Nominees Pty Ltd v Holdway Pty Ltd* (unreported, Chernov J , Supreme Court of Victoria, 5305 of 1998; 24 April 1998).

9 Rule 1.3(2) of the *Corporations Law Rules* has the effect of applying the *Uniform Civil Procedure Rules* to that extent.

I do not think that r 1.9 of the *Corporations Law Rules*, (relied on by Mr Dunning) contains anything that would assist the applicant, nor anything which contradicts the requirement in r 103 of the *Uniform Civil Procedure Rules*; it deals with calculation of time and is simply silent on the question of the hours within which service may occur. Here it is not in dispute that the documents were not served until after 5pm; the effect of r 103 is to deem service to have taken place on the following day, outside the 21 day period. That is an additional basis for concluding that no application to set aside the demand within the meaning of s459G(2) was made within time.

[11] Mr Dunning submitted that if I were to reach that conclusion, I should in any event consider making a declaration to the effect that the statutory demand was invalid. That was because it was not accompanied by an affidavit which, as required by s 459E(3)(b), complied "with the rules". ("Rules", by virtue of the definition in the dictionary in s 9 of the *Corporations Act*, means the rules of the Federal Court or a State or Territory Supreme Court, as the case may require.)

[12] A number of the *Corporations Law Rules* concern affidavits. Rule 2.6 provides:

> "An affidavit must be in a form that complies with -
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> (a) the rules of the court; or
> (b) the rules of the Supreme Court of the State (if any) or Territory (if any) where the affidavit was sworn or affirmed; or
> (c) the rules of the Federal Court of Australia. "

More specifically, r 5.2 is as follows:

> "For the purposes of section 459E (3) of the Law, the affidavit accompanying a statutory demand relating to a debt, or debts, owed by a company must –
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> (a) be in form 7 and state the matters mentioned in that form; and
> (b) be made by the creditor or by a person with the authority of the creditor or creditors; and
> (c) not state a proceeding number, or refer to a court proceeding, in any heading or title to the affidavit."

[13] Mr Franco relied on r 1.7 which says:

> "It is sufficient compliance with these rules in relation to a document that is required to be in accordance with a form if the document is substantially in accordance with the form required or has only such variations as the nature of the case requires."

[14] But Mr Dunning submitted that, by virtue of r 1.3(2), in order to ascertain what constituted an affidavit in the first instance, it was necessary to have recourse to the *Uniform Civil Procedure Rules.* Rule 431 prescribes the form of an affidavit. Rule 432 is headed "swearing or affirming affidavit", and sub-rule 1 makes this requirement:

> "the person making an affidavit and the person taking the affidavit must sign each page of the affidavit".

Rule 436 permits filing of and reliance, with leave, on an affidavit, notwithstanding an irregularity in form; but Mr Dunning submitted that this was more than a mere defect in form; the document was not an affidavit at all.

[15] As to the effect of that nullity, Mr Dunning relied on this obiter statement by Branson J in *Hamilhall (in liq) v AT Phillips Pty Ltd*:[10]

> "In my view the more likely position is that a statutory demand which is not accompanied by an affidavit which complies with s 459E(3) has not been served as required by s 459E. On this approach a statutory demand which when served is not accompanied by such an affidavit will not support a presumption of insolvency".

[16] That statement was qualified somewhat by Branson J in a later decision, *Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd*[11] where her Honour said:

> "It may be, as I suggested in *Hamilhall Pty Ltd (in liq) v AT Phillips* (1994) 15 ACSR 247, that were a statutory demand purportedly to be served without being accompanied by any affidavit, or accompanied by an affidavit which failed in a substantial way to meet the requirement of s 459E(3), the service of the demand might be held to be defective"[12] (underlining added).

[17] The view that service of a demand with an affidavit which fails "in a substantial way" to meet the requirements of s 459E(3) constitutes a defect in service rather than in the demand itself was endorsed by Nicholson J in *Delta Beta Pty Ltd v Everhard Vissers.*[13] But I do not think that approach assists the applicant here. If there were a defect in service, it might warrant an application to set aside for "some other reason" (in terms of s 459J(1)(b)), but it would hardly justify a declaration that the demand itself was not valid.

[18] More fundamentally, I would not regard the failure to sign each page of the affidavit as rendering it without effect. Rule 371(1) of the *Uniform Civil Procedure Rules* provides that:

> "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."

As to the effect of such an irregularity, one must look to s 459J. It is a code for dealing with defects in demands and in affidavits; and such defects cannot "result in invalidity save and except as provided in s 459J (1)": *Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd.*[14] That leaves little room for the making of a declaration of the kind sought here, independent of any application to set aside.

[19] I dismiss the application to set aside the statutory demand dated 11 February 2004, and decline to make any declaration. Subject to contrary submission, the respondent should have its costs of the application.

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10 (1994) 54 FCR 173 at 175.
11 (1995) 129 ALR 308.
12 At p317.
13 (1996) 20 ACSR 583 at 589.
14 (1997) 76 FCR 452 at 458.