

SUPREME COURT OF QUEENSLAND

CITATION: *Kabra Plant Hire P/L v Total Earth Works (Qld) P/L* [2005] QSC 254

PARTIES: **KABRA PLANT HIRE PTY LTD ACN 081 436 428**
(applicant)
v
TOTAL EARTH WORKS (QLD) PTY LTD) ACN 085 413 574
(respondent)

FILE NO: 7039 of 2005

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 13 September 2005

DELIVERED AT: Brisbane

HEARING DATE: 9 September 2005

JUDGE: Douglas J

ORDER: **Application dismissed. Further submissions sought as to costs.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP BY COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR DEFECT OR SOME OTHER REASON – where respondent sought to have application to set aside a statutory demand dismissed for failure to comply with s 459G of the *Corporations Act* 2001 – where respondent claimed that no supporting affidavits had been served on them with the originating application – whether affidavits had been served

Corporations Act 2001 (Cth)

Complete Windscreen Service Nominees Pty Ltd v Nielsen & Moller Windcreens Pty Ltd (1995) 121 FLR 178, followed
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265, followed

COUNSEL: Mr Hackett for the applicant
Mr Coulsen for the respondent

SOLICITORS: Baker Johnson Lawyers for the applicant
Quinn & Scattini for the respondent

- [1] **DOUGLAS J:** This is an originating application to set aside a statutory demand. The issue to be resolved is whether, on 23 August 2005, Michael Knox served the originating application at the office of Quinn & Scattini, the solicitors for the respondent, or whether he served that document with two supporting affidavits. If the originating application alone was served then it must be dismissed, subject to an argument to which I shall return. This follows from the terms of s. 459G of the *Corporations Act 2001* (Cth), which provides that, when a company applies to a Court for an order setting aside a statutory demand, an application may only be made within 21 days after the demand is served. Such an application is made in accordance with the section only if in those 21 days a copy of the application and a copy of the supporting affidavit are served on the person who served the demand on the company. In other words the failure to serve the affidavits with the application would be fatal; see *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 and *Complete Windscreen Service Nominees Pty Ltd v Nielsen & Moller Windscreens Pty Ltd* (1995) 121 FLR 178.
- [2] Mr Knox has sworn that he served copies of each of three documents, the originating application and the affidavits of Steven James Johnson and Michael Gaiter, sworn on 23 August 2005 and 22 August 2005 respectively. Ms Roach, a receptionist employed by Quinn & Scattini, says that only the originating application was served. This was drawn to the attention of the applicant's solicitors, Baker Johnson Lawyers, on 29 August 2005.
- [3] Mr Moore was the solicitor at Quinn & Scattini handling the matter. He says that at about 4.15 pm on Tuesday 23 August 2005 he received an internal call from Ms Roach asking whether his firm had instructions to accept service in the "Total Earth Works matter". He confirmed to her that the firm had those instructions and about two or three minutes later went to look for the served documents and was given only the originating application. He said to Ms Roach: "Is that it? There are no affidavits?" and was told by her that that was all that was delivered.
- [4] Mr Knox had a document called an outside work or clerk's memo which was signed by Ms Roach and should have recorded the documents he took with him to serve. It has been lost. He also kept a "run sheet" or "work register" on his computer to record what he had done. He has produced that document. It refers only to the originating application and service of it. Mr Coulsen, for the respondent, also drew attention to para. 16 of the affidavit sworn 9 September 2005, where Mr Knox said that in his first attempt to produce an affidavit of service he referred to serving a claim and statement of claim. That error was drawn to his attention by an employee of the applicant's solicitors and he later corrected it to refer to his service of an originating application, not referring to its accompanying affidavits. Mr Coulsen's submission was that the evidence of the work register, which became exhibit 1, and of para. 16 of Mr Knox's affidavit should be accepted as supporting the conclusion that all he had served was the originating application.

- [5] The evidence of the work register is, I agree, important contemporaneous evidence suggesting that all that was served was the originating application. Mr Coulsen also submitted that Mr Knox's reliability as a witness was doubtful because he was rushed at the time and had admittedly made a mistake in respect of the documents he served when he first attempted to produce an affidavit of service by describing them as a claim and statement of claim. There is some strength in that submission also.
- [6] Somebody is mistaken about what happened. Although Ms Roach struck me as a more confident and reliable witness than Mr Knox, it does not seem to me to be an issue which is readily able to be resolved merely by assessing the witnesses' demeanour.
- [7] In my view, on an assessment of all the evidence, the probabilities are that the two affidavits were not served by Mr Knox. What persuades me of this, apart from the submissions of Mr Coulsen to which I have already referred, is that there was only a limited time between the attempt at service by Mr Knox and the observation by Mr Moore that there were no affidavits with the document he received from Ms Roach. He made that observation a matter of two or three minutes after he had spoken to Ms Roach and was told by her of the proposed service. Ms Roach's evidence was that her usual practice was to put documents that had been served on a raised reception counter in front of her. Mr Moore believed that she handed them to him from behind the counter. In either case there seems to have been no significant occasion for any document to have been lost or misplaced during the interval before she received the material from Mr Knox and gave it to Mr Moore. There was no suggestion made to Ms Roach that she handed any documents of the description of the affidavits back to Mr Knox nor was there an opportunity to lose them or any significant probability that they could have been lost during that period. Mr Moore's question about the absence of the affidavits should have prompted a search for them if they had been served. They have not been found at Quinn & Scattini's premises since then.
- [8] Ms Roach may have spoken of "documents" to Mr Moore when telling him of the proposed service by Mr Knox, as pointed out by Mr Hackett for the applicant, but that does not seem to me to affect my conclusion. If she did use the plural form of the word it may have been merely a loose usage. That Mr Knox had filed the affidavits in the Supreme Court shortly before he attended at Quinn & Scattini may suggest that it was probable that he served them, but, on balance, it seems to me that the evidence to which I have already referred leads to the contrary conclusion, with the result that the applicant has not established that it served the affidavits with the originating application.
- [9] Mr Hackett also referred to a concession by Mr Coulsen that a genuine dispute existed between the parties as entitling his client to relief on the basis that, if that concession had been made, there was no need to establish it by affidavits in support of the originating application. It seems to me to be clear, however, that Mr Coulsen made that concession only in the context that, if I found that the affidavits had been served by Mr Knox, then his client would not resist the application to set aside the statutory demand; T.2 ll.23-25, 46-48, T.3 ll.55-58, T.30-31. In those circumstances, because of my conclusion that the affidavits did not accompany the originating application, I cannot set aside the statutory demand.

- [10] Accordingly the originating application should be dismissed. I shall hear the parties as to costs.