SUPREME COURT OF QUEENSLAND

CITATION:	*SV Steel Supplies Pty Ltd v Palwizat* [2007] QSC 024
PARTIES:	**SV Steel Supplies Pty Ltd** (Applicant) **Palwizat** (Respondent)
FILE NO/S:	S33/07
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Townsville
DELIVERED ON:	9 February 2007
DELIVERED AT:	Townsville
HEARING DATE:	29 January 2007
JUDGES:	Cullinane J
ORDER:	**The application is dismissed with costs to be assessed.**
CATCHWORDS:	CORPORATIONS - APPLICATION TO SET ASIDE STATUTORY DEMAND. Where application to set aside statutory demand under s 459G of the *Corporations Act* – whether made within 21 days – where notice served at registered office when closed for more than 2 weeks – notice of closure on door - where applicant contends service was not affected on the registered office until the document was brought to the attention of the applicant – whether application is out of time. *Corporations Act* 2001 (Cth), s 459G, s 109X *Cornick Pty Ltd v Brainsmaster Corp* (1995) 60 FCR 565, cited *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265, cited *Deputy Commissioner of Taxation v Abberwood* (1990) 2ACSR 91,distinguished *Future Life Enterprises Pty Ltd* (1994) 33 NSWLR 559, followed *Golden Orchid v Comax* (1995) 58 FCR 113, followed *Quicksafe Freight Lines Pty Ltd v Shell Co of Australia Ltd* (1984) ACLR 161, distinguished *Re: Gasbourne* (1984) 8ACLR 18, distinguished

Re: Rustic Homes Pty Ltd (1988) 13A CLR 105, distinguished

COUNSEL: Mr Morzone for the Applicant

Mr A Moon for the Respondent

SOLICITORS: Boulton, Cleary & Kern for the Applicant

Connolly Suthers Lawyers for the Respondent

[1] These proceedings seeking to set aside a notice of statutory demand were instituted by an application filed on 16 January 2007.

[2] The respondent claims monies are owing to her as an employee of the company.

[3] Alexander Laurence Raeburn, a solicitor employed by the solicitors for the respondent deposes to the fact that at 3.57 p.m. on Friday 22 December 2006 at the offices of Price Waterhouse Coopers he affected service of a notice of statutory demand. The office was not open and this was done by placing the documents (which also included an affidavit of the respondent and a letter from the solicitors for the respondent to the applicant) under the door of the offices. The office is in fact the registered office of the applicant. The documents bear the date 22nd December 2006.

[4] There is an affidavit from the managing partner of the Townsville branch of Price Waterhouse Coopers, one Royland Roy Petersen to the effect that the office was closed for the Christmas-New Year period from 12 p.m. on 22 December 2006 until 8.30 a.m. on Monday 8 January 2007.

[5] A notice which is exhibit 1 to Mr Petersen's affidavit and which appeared on the door of the office stated that the office would be closed during the period I have just mentioned.

[6] There had been correspondence between the respondent's solicitors and the applicant's solicitors leading up to the 22 December.

[7] In a letter of the 19th December 2006 the solicitors for the respondent had set out certain matters based upon instructions from the respondent. The letter stated that it was the respondent's view that the dispute might be settled amicably. In the same letter the respondent had indicated she reserved the right to take enforcement proceedings against the applicant in respect of the monies which she claimed to be owing but had not referred to the possibility of serving a statutory demand under the *Corporations Law*.

[8] In a letter of 10 January 2007 the solicitors for the applicant wrote to the solicitors for the respondent complaining about, amongst other things, the service of the statutory demand over the Christmas period and without any notification to them. I will refer again to this letter a little later.

[9] The solicitors for the respondent replied by letter of 12 January 2007 denying any impropriety and pointing out that they had make it clear that the respondent intended to take action as foreshadowed by their letter of 19 December 2006.

[10] The question arises whether in the above circumstances the application to set aside the statutory demand is out of time.

[11] Section 459G provides as follows:

"(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 is served on the person who served the demand on the company."

[12] It is clear that there is no power on the part of the court to extend the time for the making of such an application. See *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265.

[13] Given the contents of its solicitor's letter dated 10th January 2007 it is fair to assume that the applicant received the notice sometime, about or shortly after 8 January 2007.

[14] Section 109X of the *Corporations Law* provides as follows:

"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;"

[15] The applicant does not suggest that the document was not served at the registered office.

[16] Rather it contends that the service should not be regarded as sufficient in the circumstances since it is clear that the service did not bring the document to the attention of the applicant until some time about the 8 January or shortly thereafter.

[17] Alternatively it was contended that the respondent's actions constituted an abuse of process such as to warrant the setting aside of the service. Reliance in this regard was placed upon the letter of the respondent dated 19 December 2006 to the effect that the respondent reserved the right to commence proceedings to recover monies due to her. Reliance was also placed upon the placing of the documents under the door at a time when the office was closed and would be, according to the notice on the door of the office, for some time.

[18] Particular reliance was placed upon the judgment of Von Doussa J in *Re: Rustic Homes Pty Ltd* (1988) 13A CLR 105.

[19] That was a case in which a summons for the winding up of the company under legislation which was the predecessor of the Corporations Law was sent to the

company's registered office. The company had had no connection with this address for some time and the summons was returned unclaimed.

[20] Von Doussa J said in the course of his judgment at page 2:

> *"In construing s 528 is to be remembered that it is a fundamental principle of law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend:* Halsburys' Laws of England, *4th ed, vol 37, para 145. That principle applies equally to a company as to an individual. Notwithstanding the practical utility which may flow from a very wide construction of s 528(1) in favour of parties required to serve documents on a company, in my opinion the sub-section should not be construed so as to deem one of the modes of service permitted by it to be good service where the facts before the tribunal show that the document has probably not come to the attention of the company. It is a permissive provision, and not one which, by its terms, deems a mode of service to be sufficient service in all circumstances. The terms of s 528 are to be contrasted with the statutory provisions considered in* Alexander v Stokes & Holdings (Sales) Pty Ltd *[1975] VR 843 and* Kirkman v Frost *(1978) 20 SASR 192. It may be that some other statutory provision deems one of the specified modes of service to be sufficient service, but s 528(1), standing alone, does not do so. Where the information before the court shows that the mode of service adopted probably did not bring the document to the attention of the company, in the absence of some other statutory provision which deems the service to be sufficient, the appropriate course is for the court to insist on due service in some other way, for example, under s 528(4), or under an order for substituted service.* Re Otway Coal Co Ltd, *(1953) VLR at 563, is an example of such a case."*

[21] The applicant also referred to the judgment of Waddell J in *Deputy Commissioner of Taxation v Abberwood* (1990) 2ACSR 91 in which he expressed a similar view to that of Von Doussa J in *Re: Rustic Homes Pty Ltd.*

[22] That was a case in which proceedings had been instituted against a company by the Deputy Commissioner of Taxation. The statement of claim was served at what was shown in the register as the registered office of the company. This was the office of the company's accountants who had in fact previously practised there but had changed location almost two years previously. The register had not however been changed. The statement of claim was returned to the Deputy Commissioner's office by the current occupants of the address.

[23] Waddell CJ departing somewhat from what he had said in an earlier judgment in *Quicksafe Freight Lines Pty Ltd v Shell Co of Australia Ltd* (1984) ACLR 161 said after referring to *Re: Rustic Homes Pty Ltd* and *Re: Gasbourne* (1984) 8ACLR 18 said at pages 94 and 95:

> *"I respectfully agree with what is said in both these decisions. If* Re: Gasbourne *had been cited to me in the* Quicksafe *case then I would not have stated the position as broadly as I did.*

> *In these circumstances it should be concluded that the judgment was irregularly obtained. Indeed, it could be said, although I think the court has not been pressed to say so, that it was an abuse of process for the plaintiff to sign judgment in default of an appearance when it was known in its office that the statement of claim had not and could not have come to the attention of the defendant."*

[24] In *Re: Gasbourne* (supra) Nicholson J (speaking of a similar situation) said at page 668:

> *"In my opinion it is incumbent upon a person who wishes to obtain a judgment against a company in circumstances such as these to disclose the real situation concerning the company to the court and to obtain such directions as the court thinks appropriate as to the proper mode of service."*

[25] None of the above cases involved service of a statutory demand under the *Corporations Law.*

[26] On the other hand in *Future Life Enterprises Pty Ltd* (1994) 33 NSWLR 559 McLelland CJ took a different view. That was a case in which a statutory demand was left at the office of a firm of accountants which was the registered office of the company. The accountants wrote to the claimant pointing out that they had had no contact with officers of the company for many years and that all mail sent to the address had subsequently been returned unclaimed. McLelland CJ said at page 564:

> *"With great respect it is difficult to reconcile what was said in* Re: Rustic Home Pty Ltd *with the clear and unequivocal words of s. 220(1)* or with the approach adopted by the High Court to the construction of a provision as to the service of documents by post in the *Acts Interpretation* Act 1954 (Qld) in *Fancourt v Mercantile Credits* Ltd (1983) 154 CLR 87, particularly at 95-97. The questions of the construction and effect of s 220(1) together with s 109Y of the *Corporations* Law (which deals with service by post) was examined in considerable detail by Santow J (with those judgment I respectfully agree subject to a minor qualification noted below) in *F P Leonard Advertising Pty Ltd v KD Travel Service Pty Ltd* (1993) 12 ACSR 136; 11 ACLC 1,203. His Honour expressed his conclusion, so far as presently relevant (at 139; 1205) as follows:
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> > *"But what is the effect…of coming to know* after *postal delivery that the company, no longer resides at the registered office address? …One line of authority, based on a doctrine of 'fair notice', would suggest that in cases where there is knowledge that the address is 'false' or 'non-existent' then service will not be effective:* Re Gasbourne Pty Ltd *(1984)8 ACLR 618; 2 ACLC 103. This has been formulated in different ways including not being 'misled' by a register:* Re Otway Coal *[1953] VLR 557 at 563. And that it would be an abuse of process to allow judgment in cases, where the [plaintiff] knew that the statement of claim had not come to the attention of the defendant:* Deputy Commissioner of Taxation v Abberwood Pty Ltd *(1990) 2 ACSR 91; 8 ACLC 528.*

> *But* Abberwood *can be distinguished. There the [plaintiff] had independent contact with the directors of the company. Yet the [plaintiff] told them nothing of the process sent to the registered office and later returned by a subsequent occupant with the notification that the company was no longer at that address. This was held to be an abuse of process. That, in my judgment, should be the proper basis for such an exception to the statutory requirement. Abuse of process underlies the notion of lack of 'fair notice'. Here, contrary to the facts in Abberwood, such opportunity for indirect contact was diligently pursued by the plaintiff. There was 'fair notice' - if that be required - and clearly no abuse of process. There is therefore no basis for failing to give full force to the clear words of the two sections of the Corporations Law in deeming service to have occurred."*
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> *The qualification is that an abuse of process in the circumstances postulated by His Honour is not strictly speaking an "exception" to the provisions of s 220(1) (which would suggest that there has been no effective service) but rather constitutes an over-riding ground for refusing relief notwithstanding that there has been effective service. This is really implicit in what His Honour says."*

[27] This approach was followed by Sheppard J in *Golden Orchid v Comax* (1995) 58 FCR 113. He said at page 117:

> *The authorities in this area are numerous. In the view I take of the matter it is sufficient to refer principally to the decision of McLelland CJ in Eq in* Re Future Life Enterprises Pty Ltd *(1994) 33 NSWLR 559. There a statutory demand was left at the registered office of the debtor company which was the office of a firm of accountants. In fact the accountants had had no contact with the company for several years. Mail for the company passed on by the accountants to an address they had been given for the company had been returned unclaimed. His Honour held (at 565) that the service was good because it was effected in conformity with the provisions of s 220 of the Law.*
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> *There were some matters dealt with in the judgment including the significance, if any, to be attached to the fact that the creditor was advised by the accountants that they had had no contact with the company for several years. The question was whether there was an abuse of process. In the course of his treatment of this question, McLelland CJ in Eq referred to the decision of von Doussa J (when a Judge of the Supreme Court of south Australia) in* Re: Rustic Homes Pty Ltd *(1988) 49 SASR 41. His Honour took a different view from that taken by von Doussa J. Here there can be no question of any abuse of process. It was not suggested that there was. The documents did in fact come to the attention of Mr Lee albeit that some two weeks had passed between the time they were served and the time they reached him. I do not need to express a view upon the question upon which the two Judges differed and I do not."*

[28] In none of the cases was an order made postponing the date of service as the applicant seeks here to the date upon which the document actually came to the notice of the company by its directors.

[29] At times the applicant wavered between seeking an order that there was no valid service of the notice and an order that service was to be deemed to be effected only from when the documents came to the notice of the applicant.

[30] There is no requirement that service be effected for the purposes of section 109X(1)(a) during office hours or which requires any particular steps to be taken to bring it to the notice of any person in the office. See *Cornick Pty Ltd v Brainsmaster Corp* (1995) 60 FCR 565.

[31] Although in the end result I do not think it matters in this case which of the two approaches reflected in the above cases is correct, I am inclined to think that the approach of McClelland CJ and Santow J is the preferred one. The legislation expressly authorises service in the way effected here and no support for the qualification of fair notice is to be found in its terms. Service may be disregarded however where the court is satisfied that the creditor's actions amount to an abuse of process. This, as was pointed out, by McClelland CJ constitutes an overriding ground for refusing relief notwithstanding that there has been effective service.

[32] This is not a case however in which notice did not come to the applicant. It did come to its notice though somewhat belatedly but still within sufficient time to institute proceedings under s.459G. It may be that the reason no application was made within time was because a belief was entertained that it was possible to treat service as having been effected no earlier than 28th December 2006 "in the ordinary course of the mail." See Exhibit PJH8 to the affidavit of Mr Hicks, the applicant's solicitor. I should also add that Mr Small, a director of the applicant, seems to have had the mistaken belief that the notice was received in the mail at the registered office on 8th January 2007.

[33] Many factors may impinge upon the recipient of a statutory demand receiving the benefit of the full 21 days within which to act under s.459G. These might include weekends, Easter and other holiday periods, or absence from the office of the only person who has any knowledge of or involvement in or connection with the matter. Offices of the kind involved here may close for periods for a variety of reasons.

[34] Moreover, closure of the office to the public does not necessarily mean that the office is entirely unattended during such a period. Although there is no evidence what the position was here it would not be surprising if during such periods communications in the form of facsimile transmissions and email were received on an ongoing basis.

[35] There is nothing in the evidence which would justify a conclusion that the solicitor for the respondent embarked upon a course intended to deny the applicant knowledge of the giving of a statutory demand either entirely or until a date which would make it impossible for the applicant to take action under s.459G.

[36] There can be no doubt that the notice has been served in accordance with s.109X of the *Corporations Law*. Nor can there be any doubt that the notice came to the company's notice although some significant time after the service was effected in

accordance with s.109X. Nor in my view is there anything in what the respondent did in giving the notice nor in her dealings with the applicant which could support a claim that service of the statutory notice in the way and at the time that it was effected constitutes an abuse of process.

[37] This may be an example of the harshness with which the scheme for which Part 5.4 of the *Corporations Law* provides can operate in some circumstances in the absence of any power to extend, the time specified in s 459G. See Gummow J in *David Grant & Co Pty Ltd v Westpac Banking Corp* (supra) at p. 279

[38] The application is therefore out of time and there cannot be any extension of the statutory period.

[39] The application is dismissed with costs to be assessed.