SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner for Fair Trading v TLC Consulting Services Pty Ltd & Ors* [2011] QSC 374
PARTIES:	**DAVID KENNETH FORD in his capacity as Commissioner for Fair Trading pursuant to s 19 of the *Fair Trading Act* 1989 (Qld)** (applicant) v **TLC CONSULTING SERVICES PTY LTD ACN 072 791 005** (first respondent) and **ZIVKO DIMITRIJEVSKI** (second respondent) and **HELEN ANGELA DIMITRIJEVSKI** (third respondent) and **DEIDRE MAREA WILSON** (fourth respondent) and **LEE ANDREW LAKE** (fifth respondent)
FILE NO:	2829 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2011
JUDGE:	Philippides J
ORDER:	**1. The method of service, referred to in the affidavits of Gemma Leigh Denton and David Lyndsay Webb filed by leave on 18 October 2011, of the application and the supporting affidavit of John Laurence Prior both filed on 10 October 2011, be treated as good and effective service for the purposes of paragraph 3 of the order of the Court made on 5 October 2011.** **2. The applicant is granted leave *nunc pro tunc* to proceed further in this proceeding against the third**

respondent notwithstanding that the third respondent became bankrupt on 10 June 2010.

3. **The applicant's costs of and incidental to the application for leave be reserved.**

4. **The third respondent be imprisoned for a period of six months, the first four months to be served in any event. The balance will be suspended for a period of three years on the condition that if she breaches the terms in para 1 of the order of this Court made on 30 April 2003, the suspension shall cease and the third respondent will, if a judge so directs, serve all or such part as the judge directs of the remainder of the two month period not served.**

5. **A warrant for the third respondent's committal to prison for the period of four months be issued forthwith.**

6. **The third respondent pay the applicant's costs of and incidental to this proceeding, including reserved costs, on an indemnity basis since the filing of the application on 24 December 2009.**

CATCHWORDS: CONTEMPT – Breach of court order – Power of court to punish – where contemnor is bankrupt – where corporate entity used to circumvent court order – where prolonged deliberate breach – imprisonment – suspended sentence

PROCEDURE – SUPREME COURT PROCEDURE – service of material – whether personal service effected – whether service can be declared to be effectual

PROCEDURE – SUPREME COURT PROCEDURE – where respondent is bankrupt – where leave sought to proceed – where leave sought *nunc pro tunc*

Penalties and Sentences Act 1992
Uniform Civil Procedure Rules 1999; r 72; r 106; r 371; r 930

Ainsworth v Redd (1990) 19 NSWLR 78; considered
ASIC v 1st State Home Loans P/L & Anor [2002] QSC 55; cited
Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98; considered
Australian and New Zealand Banking Group v Rostkier & Anor (unreported, Victorian Supreme Court, Batt J, 2 June 1994); considered
Australian Competition and Consumer Commission v Contact Plus Group Pty Ltd (*in liq) (No 2)* (2006) 232 ALR 364; cited
Australian Competition and Consumer Commission v Levi (No 3) [2008] FCA 1586; considered

Australian Competition and Consumer Commission v World Netsafe Pty Ltd (2003) 133 FCR 279; considered
Australian Prudential Regulation Authority v Siminton (No 11) [2007] FCA 1815; cited
Australian Securities and Investments Commission v Reid (No 2) [2006] FCA 700, cited
Bovis Lend Lease Pty Ltd v Construction Forestry Mining and Energy Union (No 2) [2009] FCA 650; cited
Bridgewater & Ors v Leahy & Ors [1997] QCA 36
Bydand Holdings Pty Ltd v Pineland Property Holdings Pty Ltd & Ors [2009] NSWSC 959; cited
City Hall Albury Wodonga Pty Ltd & Ors v Chicago Investments Pty Ltd & Ors [2006] QSC 31; cited
Deckers Outdoor Corporation Inc v Farley (No 8) [2010] FCA 657; cited
Evenco Pty Ltd v Amalgamated Society of Carpenters, Joiners, Bricklayers and Plasterers of Australasia Union of Employees (Qld) [1999] QSC 77; cited
Foots v Southern Cross Mine Management Pty Ltd [2007] 234 CLR 52, considered
Lawindi v Elkateb (2001) 187 ALR 479; considered
Hafele Australia Pty Ltd & Anor v Maggbury Pty Ltd & Anor [2000] QCA 397; cited
Hughes v Australian Competition and Consumer Commission [2004] FCAFC 319; cited
Jin Xin Investment and Trade (Australia) Pty Ltd v Isc Property Pty Ltd [2006] NSWSC 7; considered
Lade & Co Pty Ltd v Slack [2006] 2 Qd R 531; cited
Louis Vuitton Malletier SA v Design Elegance Pty Ltd (2006) 149 FCR 494; cited
Madeira v Roggette Pty Ltd [1990] 2 Qd R 357; cited
Major v Australian Sports Commission [2001] QSC 320; considered
McIntyre v Perkes (1988) 15 NSWLR 417; cited
Metcash Trading Ltd v Bunn (No 6) [2009] FCA 266
Primelife Corporation Ltd v Andrejic [2003] VSC 106; considered
Re Ambrose (Trustee), in the matter of Athanasas (Bankrupt) (No 2) [2008] FCA 1016; cited
Re Hudson; Ex parte G E Crane and Sons Ltd (1990) 25 FCR 318; considered
Toben v Jones [2009] FCAFC 104; cited

COUNSEL: D Fraser QC with E Morzone for the applicant
No appearance for the third respondent

SOLICITORS: Crown Law for the applicant
No appearance for the third respondent

The applications

[1] On 11 August 2011, the third respondent, Helen Dimitrijevski, who I shall refer to as the respondent, was found guilty of contempt of court in having breached the order of Atkinson J dated 30 April 2003.

[2] The applicant seeks an order in terms of the application filed 10 October 2011 for leave to proceed *nunc pro tunc*, notwithstanding the bankruptcy of the respondent. In addition, orders are sought as to the penalty to be imposed for the contempt of court adjudged against the respondent.

Chronology

[3] As outlined more fully in the judgment delivered on 11 August 2011, the respondent failed to appear at the hearing of the contempt charge which was initially listed to commence on 17 March 2011. However, during the course of the hearing it became apparent that the respondent had been admitted to the Tweed Heads Hospital for psychiatric assessment and care and the matter was accordingly adjourned to 21 March 2011. The respondent did appear on 21 March 2011 and orders were then made adjourning the hearing of the contempt application to 20 July 2011. There was no appearance by the respondent on 20 July 2011 and the hearing as to whether the respondent was guilty of contempt proceeded in the respondent's absence.

[4] On 11 August 2011, upon judgment being delivered finding the contempt proved, orders were made adjourning the hearing of the application in respect of penalty to 3 October 2011 and directing the respondent to attend the Supreme Court at Brisbane on that date. It was also ordered that the applicant serve the respondent with the reasons for judgment and a sealed copy of the order of 11 August by forwarding the same to the address for service given by the respondent on 21 March 2011.

[5] The respondent did not appear on 3 October 2011, notwithstanding being served as required by the order of 11 August 2011. Submissions were heard on 3 and 4 October 2011 and additionally on 5 October 2011 when the applicant foreshadowed the filing of an application for leave *nunc pro tunc*.

[6] On 5 October 2011, it was ordered that the hearing as to the penalty to be imposed for the respondent's contempt be adjourned to 18 October 2011. It was also ordered that the applicant serve the application for leave to proceed pursuant to r 72 *Uniform Civil Procedure Rules* (*UCPR*) personally. In addition, it was ordered that the following material be served personally: the reasons for judgment delivered 11 August 2011, a sealed copy of the order of 11 August 2011, the applicant's submissions as to penalty and a sealed copy of the order of 5 October 2011. Of the material, only the application for leave to proceed *nunc pro tunc*, the submissions as to penalty and the order of 5 October 2011 had not previously been served under the order of 11 August 2011. It should be noted that the documents in question were required to be served personally out of an abundance of caution. There was no requirement of personal service arising out of the *UCPR*.

Service on the respondent

[7] The steps taken to effect service upon the respondent were set out in the affidavit evidence of Mr Webb, Ms Denton and Mr Prior. It was submitted by the applicant that the Court would be satisfied that the documents, in respect of which personal service was ordered, had been personally served, or alternatively, otherwise effectively brought to the attention of the respondent.

[8] The affidavit evidence of Ms Denton and Mr Webb is that they attended 10002 The Boulevard, Royal Pines on Tuesday 11 October 2011, in order to conduct surveillance duties on the respondent and to serve her with various documents.

[9] Ms Denton and Mr Webb observed the respondent (who they identified from having previously served documents on her in March 2011) standing inside the lit premises through the back window. At about 7.38 pm, Ms Denton proceeded to the front door and knocked on it, but received no response.

[10] Ms Denton returned to the back of the property to talk to Mr Webb. At about 7.45 pm, Ms Denton returned to the front door and again knocked loudly on it. This time a female's voice responded. Mr Webb observed the respondent leaving the lounge at the back of the premises and approach the front door of the property. Ms Denton identified herself and addressed the person inside as Helen and said she had some documents to serve on her.

[11] Mr Webb had also come to the front door by this time. Mr Webb proceeded to shout the following things, to which he received no response:

> "Helen it's the Office of Fair Trading. We've observed you inside your dwelling and identified you as Helen Dimitrijevski."
>
> "We've got documents here for you. So please open the door so we can hand them to you. We have identified that you are within the residence."
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> "I've seen you behind the door so I know you're actually there so what we'll do is if you fail to open the door we will leave the documents here and that will be deemed as service as I have identified you in the dwelling, I observed you answer the door and come to the door."
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> "So Helen I suggest you open the door and we'll hand you the documents otherwise we'll just leave them here and you'll still be deemed to be served."
>
> "Helen we're from the Office of Fair Trading."
>
> "Ok Helen Dimitrijevski, what we will be doing is leaving the documents here. We've identified that you're actually within the dwelling. So we're going to leave the documents at the doorstep for you to look at. What we've got is a sealed copy from Justice Philippides. The documents will be here at the door for you, they're at your direct entrance. We'll also leave a copy in your letterbox."

[12] Mr Webb proceeded to leave a copy of the documents at the front door and Ms Denton placed a copy in the letterbox which was located on the fence near the front door area of the property. At about 8.18 pm Mr Webb telephoned the mobile of Zivko Dimitrijevski, the husband of the respondent, and left a message on the voicemail that he had "just served documents on Helen at your house" and that he had also left a copy of the documents in the mailbox.

[13] Additionally, on 13 October 2011, Mr Prior caused a copy of the documents to be sent to PO Box 7142 Gold Coast Mail Centre, Bundall Queensland 4127 and also emailed to jimdim67@yahoo.com.au. These were the addresses which the respondent provided for service when she attended court on 21 March 2011.

Requirements for service

[14] Rule 106 *UCPR*, which provides how personal service is to be performed states:

> "(1) To serve a document personally, the person serving it must give the document, or a copy of the document, to the person intended to be served.
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> (2) However, if the person does not accept the document, or copy, the party serving it may serve it by putting it down in the person's presence and telling him or her what it is.
>
> (3) It is not necessary to show to the person served the original of the document."

[15] As senior counsel for the applicant submitted, in common with other corresponding regimes, r 106(2) *UCPR* provides a practical alternative to meet the situation where the first mode of personal service cannot be effected. The applicant submitted that on either approach, the Court would be satisfied from the evidence of Ms Denton and Mr Webb that personal service was effected.

[16] Senior counsel for the applicant referred to a number of authorities in relation to what is required for personal service in respect of the two modes outlined in r 106 *UCPR*.

[17] Reference was made to *Primelife Corporation Ltd v Andrejic*[1] where Nettle J considered the question of what is required for personal service in respect of the cognate Victorian rule. His Honour stated:

> "[23] I turn to the question of whether what was done constituted good service. Rule 6.03 of the Rules of Court provides that personal service may be effected by leaving a copy of the subject document with the person to be served or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document. Authority establishes that not a great deal is required in order to 'tell the person the nature of the document'. It is certainly not necessary to explain in any detail or even to identify in any detail what is said in the document. Indeed it is enough that the process server hand to the defendant a document which is clear on its face and not contained in an envelope.
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> [24] … Batt J in *Australian and New Zealand Banking Group Limited v Rostkier* … dealt with the inter-relationship between the

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1 [2003] VSC 106.

two methods of service which are provided for in Rule 6.03 and a number of authorities, including in particular the decision of the New South Wales Court of Appeal in *Ainsworth v Redd*. His Honour concluded that the availability of the second method is conditioned upon the person proposed to be served actively refusing in some fashion to accept what is attempted to be served. As his Honour put it:

> 'Accordingly, when an issue is raised as to whether personal service has been effected in accordance with r 3 the first question which needs to be answered is whether or not the proposed recipient declined to accept the document. If he did then it is incumbent upon the person seeking to establish that service was effected to show that there had been compliance with the second mode of service described in r 3. …'." (footnotes omitted)

[18] In that case, Nettle J was unable to be satisfied that the documents were served in accordance with the first of the methods provided for in r 6.03. His Honour was satisfied, however, that they were served in accordance with the second method of service provided for in r 6.03. His Honour found that the uncontradicted evidence that the person intended to be served walked away and refused to take the documents when asked to do so proved that there was a non-acceptance of the documents. The other requirements of the second method of service were satisfied by the actions of the person serving the documents saying that he had documents for service, holding the documents out uncovered, launching them into the path of the person to be served, so that he walked over them, and proclaiming "you are served".

[19] In *Australian and New Zealand Banking Group Ltd v Rostkier & Anor*,[2] Batt J observed as follows:

> "In the present case, there is, in my view, no evidence that Mr Hayblum declined to accept the documents. (Closing the garage door is not such a declining, for it had been activated before Mr Bookman entered the garage.) Further, whilst it is not shown that he *did* accept them, it is on the other hand *not shown* that he *failed* to accept them. The absence of evidence as to the immediate reaction of Mr Hayblum arises from the fact that, as Mr Bookman stated and I accept, because the garage door was closing upon him he tossed the writs at or towards the feet of the person getting out of the car, at the same time saying the words set out earlier, and immediately withdrew from the garage. Mr Hayblum of course denied that he was in the garage at the time and, consistently with that, gave no evidence of accepting or rejecting or failing to accept the documents. Accordingly, subject to one qualification, the question whether r6.03(1) was satisfied falls to be decided by reference to the absence of evidence and the onus of proof, which lies upon Mr Hayblum as the applicant in two applications being heard de novo. …
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> The qualification that I refer to is that, for the reasons I have already given, and as I have already indicated, I would, if necessary, be prepared to infer on the balance of probabilities, and in the absence of evidence on the point by Mr Hayblum, that he picked up the writs

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2 (Unreported, Supreme Court of Victoria, Batt J, 2 June 1994).

> in the floor of the garage on 12 February 1993. This seems to me more likely than that he picked them up on some later date."

[20] In *Re Hudson; Ex parte G E Crane and Sons Ltd*[3] Pincus J, dealing with the position under the *Bankruptcy Act* and Rules in respect of the requirement that there be personal service of the Bankruptcy Notice, made mention of *Graczyk v Graczyk* [1955] ALR (CN) 1077 observing that in that case:

> "… personal service was held to have occurred in circumstances which are somewhat similar to the present, with the difference that instead of fixing the notice to the door, the process server pushed it under the closed door. What was done here seems to me about as effective, as a practical matter. In the *Graczyk* case, the person served had to go to slightly less trouble to obtain the document, namely stooping, whereas in this case the debtor, who was, it appears, behind the front door, would have had to open it to remove the document from the door. But it does not seem to me that that difference is sufficient to warrant the conclusion that the service here was other than personal. The document was left near the debtor and the debtor had access to it, which was impeded only by his own front door, which he could have opened, and for all one knows did open, to get the document. The conclusion at which I have arrived is that there was personal service, as Mr Walker submitted."

[21] As to the second mode of service, reference was also made to *Lawindi v Elkateb*,[4] where Stone J referred to the requirements of the corresponding part of the Federal Court rule, having found that the respondent had refused to accept service:

> "[11] … In those circumstances, O 7 r 2(2) applies:
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> > 'If a person refuses to accept service of a document, personal service may be effected on him by putting the document down in his presence and telling him the nature of it.'
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> [12] I do not need to decide whether the document was placed on the respondent's lap or thrown at him. In either event, the document could be said to have been 'put down in his presence'. As noted by Patteson J in the Court of King's Bench in *Thomson v Pheney* (1832) 1 Dowling's Practice Cases 441 at 443, '[i]f the deponent had informed the defendant of the nature of the process, and thrown it down, that would do.' This comment was approved by Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation (NSW)*; (1988) 19 FCR 347 at 360, where he states
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> > 'If the debtor were refusing to take such actual corporal possession of the process, but the process server informed the debtor of the nature of the process and left it before or near the debtor so that the debtor had unimpeded and immediate access to the documents, that, in my view, should, in general, be sufficient to comply with [a provision in the Bankruptcy Rules requiring personal service].'

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3 (1990) 25 FCR 318, 320.

4 (2001) 187 ALR 479, 483.

> [13] The question then is whether the respondent was informed of the nature of the document. Order 7 r 2(2) states that the person served must be informed of the nature of the document. Although the word 'nature' may be somewhat vague, it is clear that the rule is not very demanding; *Re Roberts, ex parte Evans* (Hill J, 25 August 1989, unreported), *Re Rosenberg; ex parte Westpac Banking Corporation* (Spender J, 21 July 1993, unreported), *Rogerson v Tchia* (1995) 123 FLR 126. Further, the person served need not be informed of the 'nature' of the document orally; *Rogerson v Tchia* (above). Thus if the 'nature' of the document is clear on its face and the document is not placed in an envelope or otherwise concealed, r 2(2) will be satisfied. …
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> [14] I should also note that, whichever account is adopted, it is likely that the respondent would have been able to deduce the nature of the document served from his past dealings with the applicant in this Court, including contested proceedings regarding the bankruptcy notice. Thus, the conversation took place in a context where there was some element of assumed knowledge between the parties. In *Taylor v Marmaras* [1954] VicLawRp 66; [1954] VLR 476; it was decided that, where the person served knew the nature of the document from past history in relation to a matter, service would be valid despite the fact that the nature of the document was not clearly stated by the process server."

[22] It was submitted that the court would be satisfied that copies of the documents were "given" to the respondent within the meaning of r 106(1). It was submitted that, on the evidence, the respondent did not refuse to accept service. Rather she did not facilitate entry into her premises and the documents were given to her in two ways; firstly by her attention being directed to them and they being left at the entry to the unit; and secondly by a further copy being left in her mailbox and her attention being drawn to that circumstance as well. The applicant contended, that the fact that the respondent, who was identified as being in the premises, failed to open the door when requested to do so, did not mean that she had not accepted the documents in question, but rather that she simply had "chosen to remain on the other side of the door". In making that submission reliance was placed on *Australian and New Zealand Banking Group Ltd v Rostkier & Anor,*[5] but that case concerned a different factual situation and is not of assistance. In my view, the evidence here indicates that the respondent did not accept service.

[23] Moreover, the decisions referred to by the applicant, such as *Jin Xin Investment and Trade (Australia) Pty Ltd v Isc Property Pty Ltd*,[6] *Ainsworth v Redd*[7] and *Australian and New Zealand Banking Group Ltd v Rostkier & Anor*,[8] are of limited assistance in respect of the issue of whether personal service was effected in accordance with the first mode of service in r 106(1) *UCPR*, because the rules under consideration in those cases permitted, in respect of the first mode of personal service, service to be

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5 (Unreported, Supreme Court of Victoria, Batt J, 2 June 1994).
6 [2006] NSWSC 7.
7 (1990) 19 NSWLR 78.
8 (Unreported, Supreme Court of Victoria, Batt J, 2 June 1994).

effected by "leaving" a document with the person intended to be served.[9] The same may be said of *Primelife Corporation Ltd v Andrejic.*[10] Similarly, *Re Hudson; Ex parte G E Crane and Sons Ltd*[11] concerned rules which required "delivery" to the intended recipient. However, the requirements under the *UCPR* in respect of the first mode of personal service are that the document must be "given" to the person in question. In my view, it has not been shown in the present case that personal service was effected in accordance with r 106(1) *UCPR.*

[24] Since the respondent did not accept service, the question arises as to whether personal service was effected for the purposes of r 106(2) *UCPR*. In that case the documents to be served are required to be put down in the presence of the person to be served and that person is to be told what they are. Given that the documents were placed outside the premises in which the respondent was identified as being present, and that little was said as to what the documents were, it is questionable whether service was effected for the purposes of r 106(2) and, on balance, I am not satisfied that personal service has been effected in accordance with r 106(2).

[25] Senior counsel for the applicant pointed to the power in r 371 *UCPR* to declare a step taken to be effectual, notwithstanding failure to comply with the *UCPR* provisions. The applicant made an application for a declaration under that rule that, notwithstanding any non compliance with the rules for personal service, service of the documents be deemed to have been effectual. Reference was made to *Major v Australian Sports Commission.*[12] In that case it was common ground that the originating process was not served personally in accordance with either rr 106(1) or (2) of the *UCPR,* in circumstances where the documents to be served were left outside the premises in which the defendant was present. An order was sought regularising the service. Mullins J discussed the position where personal service had not been effected, but the Court was satisfied the process had come to the attention of the party, observing:

> "[25] Service of a document when personal service is required means that service of that document is an irregularity rather than a nullity: r 371(1) of the *UCPR.* It is then a question of whether the court should exercise any of the powers under r 371(2) of the *UCPR.* Relevantly, the court can declare a step taken to be ineffectual or declare the step taken to be effectual.
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> [26] Having regard to the attempt made to serve the fifth defendant on the evening of 19 April 2001 by having him identify himself as the person in the legal document and the fact that the document did come to the attention of the fifth defendant relatively early the following morning when he became aware of the commencement of the proceedings, it is an appropriate case to exercise the discretion to declare the service to be effectual. In the circumstances to do otherwise would be unduly technical, when the fifth defendant has not been prejudiced by the contents of the writ coming to his attention on the morning of 20 April 2001, rather than on the evening of 19 April 2001, if the process server had carried through with

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9 Thus in *Ainsworth v Redd* (1990) 19 NSWLR 78, 85-87, Kirby ACJ observed of the rule there in question had been altered so that there was no longer a requirement that the document be actually "handed" to the person concerned, it was enough that copy of the document be left with that person.

10 [2003] VSC 106.

11 (1990) 25 FCR 318.

12 [2001] QSC 320.

> personal service on the fifth defendant, when he was in the presence of the fifth defendant.
> [27] Even though there is no written application on behalf of the plaintiffs seeking relief under r 371(2) of the *UCPR*, the making of the order follows from refusing to make the order sought by the fifth defendant that service of the writ on him was not proper."

[26] Senior counsel, in seeking a declaration under r 371 *UCPR*, submitted that the process required is such as to ensure that the respondent has notice of the proceedings and that most of the authorities were concerned with service of the initiating process and not with the position, as here, where the respondent, who knows she is a party to the proceedings, fails to comply with the rules of Court and provide an address for service or to make herself readily amenable to service of further documents. Thus, in *Ainsworth v Redd*,[13] Kirby ACJ, in discussing the purpose of the rules as to service relevant there, said:

> "The relevant object is to ensure that originating process in the form of a document will come to the notice of the person named as a party so that any later default in defending his or her position (for example, by entering an appearance and being represented before the Court) is fairly to be attributed to a decision of that person. The obligation of personal service thereby removes the risk that the jurisdiction of the Court over the person named will be asserted, conclusions reached and orders made, without a proper initial opportunity being given to the person named to appear and defend the proceedings: cf *Hope v Hope* (1854) 4 De GM& G 328; 43 ER 534."

[27] Likewise, in *Jin Xin Investment and Trade (Australia) Pty Ltd v Isc Property Pty Ltd*,[14] Barrett J in discussing the underlying purpose of service in respect of the rules there under consideration, cited Lord Cranworth LC's comments in *Hope v Hope* (1854) DeG M & G 328 at p.342 [1854] EngR 468, (43 ER 534 at pp.539-40) that:

> "The object of all service of course is only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required."

[28] It must be borne in mind that in this case there was no requirement imposed by any provision of the UCPR for personal service, rather that course was ordered out on an abundance of caution. Importantly, in the present case, the further process of service undertaken by Mr Prior was the process which was authorised by this Court as the means by which substituted service upon the respondent could be effected. Moreover, the respondent was clearly aware of the present proceedings, having attended on 21 March 2011 and having since been served with material at the postal and email addresses she provided, which process was authorised by the Court.

[29] In the circumstances, I am satisfied that the documents were brought to the respondent's notice such that, notwithstanding that there has been non compliance

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13 (1990) 19 NSWLR 78, 85.
14 [2006] NSWSC 7, [26].

with the requirements for personal service under r 106, service should be taken to be effectual for the purpose of the orders made on 5 October 2011.

[30] Accordingly, I declare the method of service referred to in the affidavits of Ms Denton and Mr Webb be treated as good and effective service for the purposes of the order made on 5 October 2011.

Leave to Proceed *Nunc Pro Tunc*

[31] The respondent was made bankrupt on 10 June 2010.[15] This was not discovered by the applicant until after the adjudication of the respondent's contempt. Apparently the search conducted of the respondent was made using her full name and revealed no result. However, when a further search was conducted using only the respondent's first and last names, the circumstance of her bankruptcy was revealed.[16]

[32] Under the *UCPR,* provision is made by r 72 for leave to proceed to be granted against an individual who has been made bankrupt.

[33] The respondent's bankruptcy occurred after the proceeding to have her dealt with for contempt was filed (on 24 December 2009) but before the adjudication. The applicant pointed out that at no time during the pendency of that application, notwithstanding that the respondent was for some time represented by solicitors, was any advice given by those solicitors or the respondent to the applicant that the respondent had been made bankrupt.[17]

[34] The application was served upon the respondent's trustees[18] but they have no interest in the matter.[19] Of course, the application was also served on the respondent and, as already stated, such service is declared to be effectual. The non-appearance of the respondent means that no submissions have been made in opposition to the application.

[35] In submitting that leave to proceed should be given *nunc pro tunc*, the applicant referred by analogy to the decision in *Bridgewater & Ors v Leahy & Ors*[20] where a provision of the *Succession Act* 1981 requiring an order granting leave to be obtained prior to the bringing of an action was considered. It was there held by Fitzgerald P (at 6) that, if it was appropriate to make an order granting leave, such leave could be granted *nunc pro tunc* – the purpose of the provision necessitating leave being the orderly and efficient administration of the estate.

[36] I note that any costs order that is made against the respondent does not constitute a provable debt: *Foots v Southern Cross Mine Management Pty Ltd*.[21] Accordingly, as the application does not seek relief in relation to a provable debt of the respondent, there is no requirement under the *Bankruptcy Act* for leave to be

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15 Affidavit of John Prior filed 10 October 2011, Court document number 173, Exhibit JLP-3.

16 Affidavit of John Prior filed 10 October 2011, Court document number 173, paragraphs 2 and 3, Exhibit JLP-1 and Exhibit JLP-2.

17 Affidavit of John Prior filed 10 October 2011, Court document number 173, paragraph 6.

18 Affidavit of Remo Bacchiell sworn 14 October 2010 filed by leave.

19 Affidavit of John Prior filed 10 October 2011, Court document 173, paragraph 8 and Exhibit JLP-6.

20 (Unreported, Queensland Supreme Court of Appeal, Macrossan CJ, Fitzgerald P and Davies JA, 14 March 1997); [1997] QCA 36.

21 [2007] 234 CLR 52, 66 [36], 76 [67].

obtained from the Federal Magistrates Court exercising bankruptcy jurisdiction: see s 58(3) *Bankruptcy Act* 1966.

[37] I consider that the case is a proper one for the grant of leave *nunc pro tunc.* The contempt application is clearly of importance and the applicant is not at fault and has not been dilatory in failing to obtain leave earlier. Moreover, the present proceeding does not impact on the disposition of the respondent's estate as sequestered.

[38] I grant leave to the applicant *nunc pro tunc* to proceed further in this proceeding against the respondent, notwithstanding that the respondent became bankrupt on 10 June 2010.

Considerations relevant to penalty

[39] By r 930(2) *UCPR*, the court may punish an individual who has committed a contempt by making an order that may be made under the *Penalties and Sentences Act* 1992. By r 930(4), the court may make an order for punishment on conditions, including, for example, a suspension of punishment during good behaviour, with or without the respondent giving security satisfactory to the court.

[40] The underlying rationale for the exercise of the contempt power is the necessity to uphold and protect the effective administration of justice, as was observed in *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*[22] by Gibbs CJ, Mason, Wilson and Deane JJ:

> "Although the primary purpose in committing a defendant who disobeys an injunction is to enforce the injunction for the benefit of the plaintiff, another purpose is to protect the effective administration of justice by demonstrating that the court's orders will be enforced. As the authors of *Borrie and Lowe's Law of Contempt*, 2nd ed (1983) say at p 3:
>
> > 'If a course lacked the means to enforce its orders, if its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.'"

[41] Reference was made by the applicant to *Australian Competition and Consumer Commission v World Netsafe Pty Ltd*[23] where Spender J stated:

> "Considerations which are relevant in deciding what is the appropriate penalty include:
>
> (a) The relative seriousness of the contempt, which is determined by the extent to which the contemnor appreciated that a contempt was being committed: *Australian Competition and Consumer Commission v Info4PC.com Pty Ltd* (2002) 121 FCR 24 at [144].
>
> (b) Whether the contemnor subjectively intended to disobey the order: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 at 218; *Australian Competition and Consumer Commission v Hughes* [2001] ATPR 41-807 at [20], and *Info4PCCom.*

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22 (1986) 161 CLR 98, 107.

23 (2003) 133 FCR 279, 283 [16].

(c) The importance of bringing home to the contemnor the seriousness of the contempt: *Hughes* at [24]; *Info4PCCom* at [139].
(d) Whether the contemnor has offered any explanation or apology for his conduct: *Gallagher v Durack* (1983) 152 CLR 238, per Gibbs CJ, Mason, Wilson and Brennan JJ at 245.
(e) An acknowledgment by the contemnor that a contempt was committed may be a mitigating factor: *Matthews* at [25] and [29].”

[42] Reference was also made to Federal Court authorities, such as *Louis Vuitton Malletier SA v Design Elegance Pty Ltd*[24] and *Metcash Trading Ltd v Bunn (No 6)*,[25] which outline that, in deciding the appropriate penalty, a court should consider:

(a) the contemnor’s personal circumstances;
(b) the nature and circumstances of the contempt;
(c) the effect of the contempt on the administration of justice;
(d) the contemnor’s culpability;
(e) the need to deter the contemnor and others from repeating contempt; and
(f) the absence of any prior conviction for contempt.

[43] The nature of the intent, if any, with which the person breached an order or undertaking will be relevant to penalty: *ASIC v 1st State Home Loans P/L & Anor.*[26] It has been held that where a contemnor has admitted the contempt, genuine contrition and a full and ample apology may reduce a penalty, although where the charges are contested, the absence of an apology does not carry any significant weight in the sentencing process: *Bovis Lend Lease Pty Ltd v Construction Forestry Mining and Energy Union (No 2).*[27]

[44] In a number of cases, the approach has been taken that where the contemnor is bankrupt a fine would be inappropriate or inadequate.[28] Thus, in *City Hall Albury Wodonga Pty Ltd & Ors v Chicago Investments Pty Ltd & Ors*,[29] a punishment of imprisonment was imposed for a deliberate breach of undertakings to the court by the creation of false documents included in disclosure as genuine documents, in circumstances where a fine could not be imposed due to the bankruptcy of the individual.

Submissions as to penalty

[45] In addition to the submissions as to penalty already provided and served on the respondent, further submissions were made.

[46] The applicant submitted that the respondent’s contempt must be viewed as serious, “being the product of a contrived stratagem designed to enable her to circumvent the substance of undertakings she had previously given to the Court”. Moreover, she extracted large sums of money in persisting with activities in the same arena as the

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24 (2006) 149 FCR 494.
25 [2009] FCA 266.
26 [2002] QSC 55, [4].
27 [2009] FCA 650, [43].
28 *Australian Competition and Consumer Commission v Levi (No 3)* [2008] FCA 1586, [54]-[78].
29 [2006] QSC 31; see also *Lade & Co Pty Ltd v Slack* [2006] 2 Qd R 531.

conduct which led to the order of 2003 being made and which had the same characteristics as that for which she had already been required to disgorge $433,611.

[47] The applicant argued that it should be concluded that the respondent was "a cynical exploiter of vulnerable persons for her own financial advantage". It was contended that having already been the subject of proceedings from the Office of Fair Trading which resulted in serious consequences for her, the respondent has revealed herself to be a devious, dishonest, repeat offender who systematically flouted the authority of this Court for her own personal advantage. It was submitted that the circumstances of this case required a term of imprisonment to be imposed and that the respondent's bankruptcy further indicated that this was not an appropriate case in which the contempt of the respondent could be addressed by a financial penalty.

[48] Having regard to the nature and circumstances of the contempt, and the need to deter others from disobeying court orders, the applicant submitted that a term of eight months imprisonment should be imposed (with consideration being given to suspending two months of the term for a period of three years) to deter the respondent from again breaching the order of 2003.

Comparatives

[49] Several cases of the Federal Court were cited as providing a comparative guide as to the appropriate term of imprisonment. Of course, a review of punishments imposed in other cases is of limited assistance, as each case depends on the Court's assessment of the facts before it: *Australian Competition and Consumer Commission v Levi (No 3).*[30]

[50] Reference was made to *Hughes v Australian Competition and Consumer Commission,*[31] where the trial judge imposed a sentence of imprisonment of six months, two months of which were to be served immediately, with the balance of four months suspended, subject to compliance with injunctions. On appeal, the Full Court varied the orders, so that the balance of the sentence was suspended for a period of two years, French, Emmett and Dowsett JJ commenting that "it is rarely, if ever, that an order should be made suspending the whole or part of a term of imprisonment for an indefinite period".

[51] Reference was also made to *Australian Securities and Investments Commission v Reid (No 2),*[32] where a term of imprisonment of nine months was imposed, the respondent having already spent some two to three months in gaol. The contemnor was held to have contravened an order and acted in breach of an undertaking by involving himself in the management of two corporations in circumstances where he had twice before been found guilty of contempt and ordered to be imprisoned.

[52] In *Australian Prudential Regulation Authority v Siminton (No 11),*[33] a term of imprisonment for four months was imposed for failure to pay a fine of $50,000 imposed by the Full Court of the Federal Court (in substitution for an order of imprisonment for 10 weeks). The offence was regarded as serious and involved a deliberate and wilful disobedience of the court's order by a contemnor who was an

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30 [2008] FCA 1586, [97].
31 [2004] FCAFC 319, [56].
32 [2006] FCA 700.
33 [2007] FCA 1815.

undischarged bankrupt and who failed to accept any responsibility for his conduct or to express remorse or contrition.

[53] In *Re Ambrose (Trustee), in the matter of Athanasas (Bankrupt) (No 2)*,[34] a term of imprisonment of three months was imposed on a bankrupt who pleaded guilty to two charges of contempt. The term of imprisonment, which was not suspended for any period, was imposed for failure to comply with statutory obligations to produce documents and failure to comply with an undertaking given to the Court. The breach was described as deliberately wilful and contumacious and continued over nearly a year. In determining that a fine would be inappropriate, given that the contemnor was a bankrupt, Lander J said at [64]:

> "Notwithstanding that imprisonment is a sentence of last resort, it seems to me, having regard to the conduct of Mr Athanasas over a very long period since the matter first came before the Registrar and since he first informed the Registrar he would comply with the summons, a sentence of imprisonment is necessary."

[54] In *Toben v Jones*,[35] a term of imprisonment of three months imposed in respect of a contumelious disregard, on 24 occasions between December 2007 and June 2008, of court orders and an undertaking, was affirmed on appeal.

[55] Reliance was also placed on *Australian Competition and Consumer Commission v Levi (No 3)*.[36] There a term of imprisonment of 10 months was imposed, with four months required to be served and the balance suspended subject to compliance with specified conditions for five years. The contemnor, who had between December 2005 and December 2007 breached court orders restraining him from offering businesses for sale without first satisfying certain conditions, made a belated guilty plea and also an apology. In committing the contempt, the respondent not only deliberately breached the court's orders, but undertook "the conduct with a clear (and successful) view to making a profit from unsuspecting members of the public" in the very manner which the court order sought to prevent. The court noted at [144]:

> "[The respondent's] acts were deliberate. The acts and omissions were not accidental. The conduct concerned was repeated, serious and flagrant and [the respondent] gained substantial financial benefits as a result of the repeated contempts. In addition to this, the complainants who were the subject of the behaviour constituting the contempts have suffered loss of funds, loss of assets, frustration and wasted time as a result of [the respondent's] contemptuous conduct. He has shown little remorse for his contempt. His late pleas of guilty came only when it was clear that the ACCC was pressing for a substantial period of imprisonment. [The respondent] has a significant record for similar conduct in the past for which he has also been punished."

Determination

[56] The applicant submitted that the respondent was cognisant of the seriousness of her conduct and that, with that knowledge, she deliberately set about breaching the

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34 [2008] FCA 1016.
35 [2009] FCAFC 104, [46]
36 [2008] FCA 1586.

terms of the order of the Court. In that regard, the applicant referred to the primary submissions made as to the knowledge of the respondent of the terms of the consent order, including her admissions to third parties. I accept that submission.

[57] I am satisfied that an ongoing, deliberate, and systemic contempt was committed by the respondent. Moreover, the very evil, which the order was designed to avoid, occurred as a result of the sustained conduct of the respondent carried on over a lengthy period in breach of the Court's order. I also accept, as contended, that the consumers of the services, which the respondent was bound not to engage in providing, suffered financial detriment to the financial advantage of the respondent. The respondent exhibited a disregard of their circumstances and interests while advancing her own. The details of the breaches are outlined in the judgment of 11 August 2011.

[58] Furthermore, it was submitted that the response of the respondent to the present proceedings included obfuscation and actions designed to delay the expeditious resolution of the serious contempt alleged against her; her response also delayed and hindered the administration of justice. It may be accepted that the failure of the respondent to attend proceedings has resulted in delay and added expense to the applicant.

[59] The applicant submitted that the evidence pointed strongly to the absence of contrition. No plea or apology has been offered to the Court. Nor has the Court had the benefit of hearing from the respondent as to matters relevant to mitigation.

[60] It was submitted that the personal circumstances of the respondent are largely unremarkable. She is a married woman with two children and has apparently had the support of a family network, including her husband. It was submitted that the evidence indicates that she enjoys an apparently affluent lifestyle, residing in a townhouse at the Royal Pines Resort currently rented at $700 per week.[37]

[61] It was submitted that the absence of any plea in mitigation must be taken to be the choice of the respondent and that it should be concluded that she is unable to advance any mitigating circumstances beyond the circumstances already revealed. The applicant contended that the psychiatric issues raised in the course of the proceedings, on examination, did not give rise to any mitigating circumstances. It was submitted that no basis for accepting the respondent as a reliable historian in terms of any diagnosis of depression could be sustained. To the contrary, it was said that the available evidence revealed her attendance upon medical practitioners and the giving of histories to them was part of her attempt to avoid addressing her serious contempt; the sending of correspondence to the Court by medical practitioners was plainly at her behest. I am not able, on the material before the Court, reach a concluded view in respect of that proposition. I also note that while some scant material was provided as to the respondent's psychiatric condition at an early stage of the hearing, given that no further material is available on that matter, I am unable to make any determination as to the impact of any psychiatric issues on the respondent's conduct.

[62] I find that the respondent acted over a prolonged period deliberately circumventing, through the use of a corporate entity, the Court's orders made for the protection of

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37 Affidavit of Gemma Leigh Denton filed 4 October 2011 Court Document 177, Exhibit GLD-1.

the public. The respondent did so in circumstances where financial detriment was suffered by a number of unsuspecting individuals to the benefit of the company set up by the respondent's endeavours. The purpose of the punishment imposed is to vindicate the authority of the Court by punishing her and to have regard to considerations of general and personal deterrence. A fine would clearly be inadequate, given the seriousness of the contempt and the fact that the respondent is bankrupt. Bearing in mind that a term of imprisonment should only be imposed as a last resort, it is nonetheless warranted in the circumstances of the present case.

[63] In making submissions as to the term of imprisonment that should be imposed, the applicant placed primary reliance by way of comparative on *Australian Competition and Consumer Commission v Levi (No 3)*.[38] However, senior counsel did recognise in argument that that case was a more serious one that the present case. A significant factor in the penalty imposed in that case was that the conduct giving rise to the contempt involved actions that were similar to previous conduct by the contemnor which had resulted in his being convicted and sentenced to imprisonment. I note that in this case that factor is not present. Moreover, in *Levi* it was observed that the contemnor continued the contravening conduct well after the contempt proceedings were brought.

Order

[64] Taking into account the features of this case, in particular those which call for a penalty reflecting both general and personal deterrence, I order that the respondent be imprisoned for a period of six months, the first four months to be served in any event. The balance will be suspended for a period of three years on the condition that, if she breaches the terms of para 1 of the order of this Court made on 30 April 2003, the suspension shall cease and the respondent will, if a judge so directs, serve all or such part as the judge directs of the remainder of the two month period not served. The operational period of three years ensures that there is an appropriately lengthy period which operates to ensure that the respondent is deterred from any further breach of the order of 2003.

[65] I order that a warrant for the respondent's committal to prison for the period of four months be issued forthwith.

Costs

[66] The applicant sought an order that the costs of and incidental to the application including reserved costs be paid by the respondent on an indemnity basis. It was submitted that the Court has a discretion[39] as to the making of an order for payment of the costs incurred by the applicant in upholding the orders of this Court[40] which, in this case, have a major element of protecting the public.[41] In support of his submission, the applicant pointed out that he had no pecuniary interest of his own to serve[42] but was acting in aid of orders which themselves were for the protection of

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38 [2008] FCA 1586.

39 *McIntyre v Perkes* (1988) 15 NSWLR 417, 436.

40 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 110.

41 *Australian Securities and Investments Commission v Reid (No 2)* [2006] FCA 700, [46] and [47].

42 *Deckers Outdoor Corporation Inc v Farley (No 8)* [2010] FCA 657, [62].

the public.[43] I accept that the respondent's conduct makes an order as sought by the applicant appropriate.

[67] I order that the respondent pay the applicant's costs of and incidental to this proceeding including reserved costs on an indemnity basis since the filing of the application on 24 December 2009.

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43 *Bydand Holdings Pty Ltd v Pineland Property Holdings Pty Ltd & Ors* [2009] NSWSC 959, [15]-[17]; see also *Madeira v Roggette Pty Ltd* [1990] 2 Qd R 357 and *Evenco Pty Ltd v Amalgamated Society of Carpenters, Joiners, Bricklayers and Plasterers of Australasia Union of Employees (Qld)* [1999] QSC 77.