
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

Service by post

In *Scope Data Systems Pty Ltd v Goman* the Supreme Court of New South Wales was asked to consider an apparent anomaly in the rules governing the postal service of a creditor's statutory demand under Section 459E of the *Corporations Act (Cth)*. This issue would determine whether or not an application to set aside a statutory demand was made within 21 days of the date of service of that demand, pursuant to Section 459G.

Section 109X of the *Corporations Act* allows for service by post. Section 29 of the *Acts Interpretation Act (Cth)* which applies to the *Corporations Act* provides that service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

However, Section 160 of the *Evidence Act (Cth)* and the *Evidence Act (NSW)* provide that it is presumed, unless evidence sufficient to doubt the presumption is adduced, that a postal

article sent by prepaid post addressed to a person at a specified address in Australia or in an External Territory was received at that address on the fourth working day after having been posted.

A statutory demand was mailed to the registered office of a company, which was the office of the company's external accountants. By arrangement between the accounting firm and Australia Post, all mail addressed to its street address was placed into its post office box. The creditor was not a party to that arrangement.

The post office box was cleared by the accountant, who telephoned a director of the debtor company to advise him of the statutory demand and then posted the demand to the company.

The Court held that:

- the relevant provision of the *Evidence Act (NSW)* was not displaced by the provisions of *Corporations Act* and *Acts Interpretation Act*;
- the presumption created by the *Evidence Act* did not address the situation where a letter addressed to a street address was diverted;

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- if the actual time of service is proved, that is the time of the service. If the evidence does not establish the time at which delivery was effected, then unless the contrary is proved, delivery is deemed to be effected in the ordinary course of the post;
- delivery to the post office box could not be equated with delivery to the registered office;
- a person who relies on the post as a means of service takes the risk that the document will not be delivered in the ordinary course of post; and,
- in this case service was not effected until the statutory demand was taken by the accountant to his office, which was the registered office of the company.

The later date of service meant that the application to set aside the statutory demand was made within time. The Court also amended the quantum of the creditor's statutory demand.

The most reliable way of serving a creditor's statutory demand is by way of personal service on the registered office of the debtor company.

Marshalling

If a creditor has the benefit of security over two or more properties and another creditor has a second ranking security over only one of those two properties, then the order in which the first creditor realises its security may affect the amount of the security available to the second creditor.

The equitable doctrine of marshalling protects the second creditor from prejudice by subrogating the second creditor to the rights of the first in

relation to the single-charged security.

In *ACN 077 991 890 Pty Limited v National Australia Bank Limited* a single-security creditor asked the Supreme Court of New South Wales to apply the doctrine of marshalling.

The debtor company granted the Bank a fixed and floating charge over its assets and undertaking as security for an advance by the Bank to the company of \$380,000 and a guarantee by the Bank of the liabilities of the Defendant directors. Subsequently, the debtor company granted the Plaintiff a second ranking fixed and floating charge over its assets and undertaking. The Plaintiff's loan to the debtor company was further secured by guarantees from the directors and by a mortgage created over a property owned by the directors. The debt to the Plaintiff arose from the sale of the Plaintiff's business jointly to the debtor company and the directors.

The Bank's debts were paid following the appointment of Receivers to the debtor company. The directors' guarantees were extinguished when the Bank realised its security. The company was subsequently wound up.

The application was defended by the directors of the company. The directors argued that the company had a superior claim to subrogation as a guarantor that had paid the debt of principal debtors.

The Court held that:

- the company, through its Liquidator, had not asserted any claim to subrogation and the Defendants could not rely on the unasserted rights of another party;

- as the company was also a debtor to the Bank in its own capacity as well as a guarantor, it was appropriate for the Bank to recover first against the company to recover the debt owing by that company to the Bank; and,
- the assets of the company and the directors were such that it was sensible that they should be sold together. It could hardly be said to be unfair for the Bank to then use the surplus proceeds of sale to satisfy the debts which the company had guaranteed.

The single-security creditor was entitled to the benefits of marshalling.

Lease or no lease?

In *Sweeney v Johnston* the Supreme Court of Queensland considered the validity of a purported lease.

Six months after she became bankrupt and when she learnt of the proposed sale of her property, the bankrupt operator of a boarding house advised her Trustees in Bankruptcy that the property had been leased to her son, some nine months prior to her bankruptcy.

The son had applied to be an accredited service provider and had corresponded with the Queensland Office of Fair Trading about operating the boarding house.

However, in correspondence with the Office of Fair Trading the bankrupt had advised them that she operated the boarding house. Notwithstanding that she was not registered to do so.

When she listed the property for sale with real estate agents, she had not advised them of the lease and had explained the proposed sale due to her

wish to retire. The sale did not proceed.

The Court held that:

- the son's letters to the Office of Fair Trading had been prepared by the bankrupt. Her son was informed in a general way only of what was done in his name;
- the bankrupt had not lodged income tax returns or paid income tax for some 20 years. She had been convicted of social security fraud. Further, she had given false evidence in relation to her bankruptcy and some of her evidence was improbable.
- aspects of the versions of events given by the bankrupt and her son were quite improbable. Further, the son was under his bankrupt mother's influence;
- despite a number of requests, the bankrupt had not provided a copy of the lease to the Trustees in Bankruptcy;
- the lease was not entered into or signed prior to the bankruptcy; and,
- the son's failure to observe the terms of the lease meant that even if it had ever existed, it had been abandoned, as had any right to possession he may have once had.

The Court held that no lease was entered into by the bankrupt and her son.

Farm debt mediation

In September 2003 four members of a family borrowed \$655,000, providing their family farm as security.

By January 2004 the loan was in arrears. Recovery action led to compulsory mediation under the *Farm Debt Mediation Act (NSW) ('FDMA')* in early 2005, at which the lender agreed to support the borrowers' application for an interest rate subsidy grant.

By July 2005 the loan was again in arrears and the lender obtained a certificate from the Rural Assistance Authority to the effect that the *FDMA* no longer applied to the mortgage.

In *Hargraves Secured Investments Ltd v Ryan* the borrowers challenged the validity of the July 2005 certificate. The Plaintiffs argued that the lender was in breach of the *FDMA* and claimed damages said to arise through the lender's purported failure to assist an application for further interest rate subsidies.

The Supreme Court of New South Wales held that:

- the Plaintiffs' claim that the lender's actions had blocked interest subsidy grants was without foundation. The lender had provided a lender's certificate.

However the application for assistance was unsuccessful;

- the unprofitability and lack of long term commercial viability were the main reasons why assistance was rejected and the suggestion that failure was due to the lender's action was unsupported and without merit;
- despite the Plaintiffs' assertion, the terms of the lenders certificate did not guarantee the lender's support for 12 months irrespective of default. There was no contravention of the *Trade Practices Act (Cth)*; and,
- the Plaintiffs were clearly in default. No payment by the borrower had been made since September 2004 and they had not taken steps to sell the property, as required by the April 2005 mediation.

The Plaintiffs were unsuccessful.

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