
CREDIT ISSUES

WOODGATE & CO.
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INSOLVENCY UPDATE

Address for service

In *Forza Finance Pty Ltd v Vergepoint Sales and Management Pty Ltd* the Supreme Court of Queensland dealt with the correct address for the service of an Application to set aside a statutory demand.

A creditor had served a statutory demand by registered mail, together with a covering letter from its solicitor which provided details of a facsimile number in the letterhead, along with its street and postal addresses. The statutory demand specified the solicitor's street address for service of any Application to set aside the statutory demand, under Section 459G of the *Corporations Act*.

The debtor company sent a copy of the Application to set aside the demand by facsimile and later sent a copy by post. The creditor argued that the Application could not be made because the Application was not received at the specified address within time.

The Court held that:

- there was ample authority that service of an Application to set aside a statutory demand could be

effected by facsimile but this was subject to the particular rules of the relevant Court;

- there was nothing in the Corporations Rules (QLD) requiring personal service of the Application and the Uniform Civil Procedure Rules ("UCPR") specifically allowed service by facsimile;
- it was not at issue that the facsimile was received by the creditor's solicitor;
- the question was therefore whether the UCPR allowed service by facsimile only if the facsimile number was included in the address specified for service in the statutory demand; and,
- in Queensland the application of the UCPR meant that it was open to the debtor company to serve its Application by facsimile to the solicitor's office, even though a facsimile number had not been specified in the statutory demand.

The creditor was unsuccessful.

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Forged or forgotten?

A mortgagor appealed against a summary judgement that allowed a lender to take possession of her home. She argued that she had not signed the mortgage and that her claimed signature must therefore be a forgery, possibly committed by a neighbour whose debt the mortgage purportedly secured.

In cross-examination she accepted that she had signed some documents but did not know if one of them was the mortgage at issue. However, the Court's task was complicated by the fact that the mortgagor had early onset dementia and so it was possible that she had signed the mortgage but had forgotten.

The lender argued that it did not matter whether the signature was a forgery because the *Real Property Act (NSW)* granted unchallengeable title to a registered mortgage. The mortgagor accepted that registration of the mortgage created indefeasibility, but argued that registration did not of itself validate all the terms and conditions of the registered instrument.

In *Lawteal Finance v Chrapacz* the Supreme Court of New South Wales held that:

- expert evidence established that the mortgagor suffered from dementia which had markedly reduced her memory and significantly undermined her ability to make an informed decision. This left her highly vulnerable to exploitation for a considerable period of time;
- there was a real possibility that the mortgagor was the victim of deception and may have signed

the mortgage in circumstances that would entitle her to relief under to the *Consumer Claims Act (NSW)*;

- given the potential loss of the mortgagor's home, the special circumstances of the case warranted a full examination of the transaction; and,
- although the lender would be prejudiced by a further delay, that prejudice was far outweighed by the potential prejudice to the mortgagor.

The summary judgement was set aside.

Lien on log books?

In *Yeend v Anglberger* the District Court of South Australia considered an injunction to require the return of two helicopter log books.

The log books had been retained under a claimed lien, under Section 41 of the *Workers' Liens Act (SA)*, by a service provider, which conducted service and maintenance work on the helicopters, so as to secure unpaid maintenance debts of approximately \$228,000.

The owner of the helicopters disputed the amount of the debts and explained that without the log books the helicopters would soon be grounded.

The owner argued that since the service provider had undertaken the work on the helicopters and not on the log books, that it was unable to retain the log books under a possessory lien. The owner also argued that the return of the two helicopters meant that the service provider had surrendered any

claim to a lien, which it could otherwise claim.

The service provider claimed that the log books were an integral part of the helicopters upon which the work had been performed and so a lien could be claimed.

The Court held that:

- the service provider could not provide any authority to support its argument that entries in the log books amounted to work done to improve the helicopters or enhance their value and so the owner's prospects of success on that issue were sufficient to Order the return of the log books;
- return of the log books significantly limited the damages for which the service provider might be liable, if the owner was successful and would significantly increase the owner's ability to pay their judgment debt, if it was not. Therefore, it was in the interests of all parties that the log books be returned so the helicopters should continue to fly pending determination;
- ordinarily an award of damages would protect the service provider from any losses arising out of the unavailability of the log books to the owner if it was ultimately successful. However, in this case damages would not be an adequate remedy if the service provider's concerns about the current and future solvency of the owner proved correct; and,
- it was appropriate to protect the service provider's security by requiring the owner to pay an amount equal to the claimed debt

into the Court, before the log books were returned.

Administrator appointed by non-director?

When an Administrator discovered that the sole director who had purported to appoint him was an undischarged bankrupt and therefore disqualified from acting as a director under Section 206B(3) of the *Corporations Act*, he asked the Federal Court of Australia to determine whether his appointment was valid.

The Administrator had conducted a conflict check and also a search of the ASCOT database maintained by the Australian Securities and Investments Commission which confirmed that the director was the sole director of the company. However, this search was done on the day following the passing of the resolution, which appointed the Administrator.

The Administrator told the Court that he did not normally undertake a search of the National Personal Insolvency Index ("NPII") to check whether directors were undischarged bankrupts and that he had never known of any other insolvency practitioner to undertake such checks.

In *Calabretta v Redpen Developments Pty Limited* the Court held that:

- the director ceased to be a director of the Defendant on becoming bankrupt and so he could not have validly appointed an Administrator. As a consequence, the purported appointment was invalid;
- a retrospective validation would result in an earlier relation-back

day, potentially broadening the scope for recovery of insolvent transactions, and would also provide the Administrator with a statutory right of indemnity for his expenses and remuneration.

- although such an indemnity would be theoretical given the apparent absence of assets, the Administrator had carried out substantial work and incurred costs, including Administrator's

remuneration, in the not unreasonable belief at the time that his appointment as Administrator was valid, so it was appropriate to validate his appointment; and,

- the provisional view of the Court was that the Administrator should bear the costs of the Application personally, because it would have been avoided by an a search of the NPII.

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