

## Setting aside statutory demands – the requirement to serve a “copy” of the application

29 September 2015

Karin Ottesen

### Introduction

1. Under s 459G of the *Corporations Act 2001* (Cth), an application by a company to a Court to set aside a statutory demand served on it must be made within 21 days after the demand is served. For an application to be made in accordance with s 459G, two things must occur within those 21 days:
  - an affidavit supporting the application must be filed with the Court pursuant to s 459G(3)(a); and
  - a copy of the application and a copy of the supporting affidavit must be served on the person who served the statutory demand pursuant to s 459G(3)(b).
2. There is no power to extend the prescribed time period so if there is a failure to do what is required within the 21 day period, the Court will have no jurisdiction to set aside the statutory demand.<sup>1</sup>
3. The failure to do what is required within the 21 day period need not be a failure of the company itself but may arise from the mistakes or defaults of a third party. An example of this can be seen in the recent case of *Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd* (“**Adhesive Pro**”)<sup>2</sup> where, as a result of delay by the registry staff within the Court in processing the company’s application and supporting affidavits and providing sealed copies of these documents, none of the documents served within the 21 days had a signature of the Registrar, proceeding number or any Court seal, stamp or other mark that indicated that the documents had been accepted by the Court. However, the service copy of the application did include a return date, inserted by the company’s solicitor, which was the correct return date.
4. Mossop AsJ of the Supreme Court of the Australian Capital Territory acknowledged the unfortunate circumstances faced by the company and criticised the Court’s administrative processes but nevertheless held, relying on a long line of authority, that the service copy of the application was not a “copy” of the application for the purposes of s 459G(3)(b) and that, accordingly, the Court had no jurisdiction to deal with the substance of the application.
5. This paper briefly discusses the relevant provisions of the *Corporations Act* and the decision in *Adhesive Pro*.

---

<sup>1</sup> See *David Grant & Co Pty Limited v Westpac Banking Corporation* [1995] HCA 43; (1995) 184 CLR 265.

<sup>2</sup> [2015] ACTSC 288.

## Relevant provisions

6. Under s 459G(1), a company may apply to the Court for an order setting aside a statutory demand served on the company. Under s 459G(2), the application can only be made within 21 days after the demand is served. Subsection (3) of s 459G then relevantly provides as follows:

*“(3) An application is made in accordance with this section only if, within those 21 days:*

*...*

*(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.”*

## Adhesive Pro

### *Background*

7. The statutory demand was served on the plaintiff on 7 August 2015. Therefore the 21 day period expired at the end of 28 August 2015.
8. A solicitor acting for the plaintiff attended the registry of the A.C.T. Supreme Court on 27 August 2015 (day 20) and filed the originating application and supporting affidavits. After he was informed that he could collect sealed copies of the documents in a few days, he sought to obtain the sealed copies on that day, explaining that he needed to serve them on that day in order to comply with the requirements of the *Corporations Act*.
9. The registry staff was unable to provide the sealed copies on that day because the application required processing and approval before this could be done and the registry was “really busy at the moment”.<sup>3</sup>
10. Copies of the originating application and affidavits were served on the defendant on 27 August 2015 (day 20) but those copies had no signature of the Registrar, proceeding number or any Court seal, stamp or other mark that indicated that they had been filed or that proceedings had been commenced but the copy of the application did bear a return date. That return date had been inserted by the solicitors for the plaintiff on the basis of their understanding of the Court’s practice. As it turned out, the inserted return date was the return date later fixed by the registry.
11. The originating application and affidavits were only processed by the registry staff on 31 August 2015 (day 24) and made available to the solicitors for the plaintiff on that day. On that day, sealed and stamped copies of the originating application and

---

<sup>3</sup> Above, n 2, at [6].

affidavits were sent by email to the solicitors for the defendant and, on 2 September 2015 (day 26), were served on the defendant's registered office.

12. The originating application on the Court file was stamped as "lodged" and "filed" on 27 August 2015 i.e. on day 20.

#### *Preliminary question*

13. The preliminary question for Mossop AsJ of the A.C.T. Supreme Court was whether the documents that had been served within the 21 day period satisfied the statutory requirement in s 459G(3)(b) that a copy of the application and a copy of the affidavit in support be served, so that the Court had jurisdiction to consider the substance of the plaintiff's application.<sup>4</sup>

#### *Parties' submissions*

14. The defendant submitted that the authorities required that there had to be some evidence on the documents that were served within the 21 day period of acceptance by the Court of the documents commencing the proceedings in order that they be a "copy" for the purposes of s 459G(3)(b) and that, as there was no evidence of such acceptance, s 459G(3)(b) had not been complied with and the Court had no jurisdiction.<sup>5</sup>
15. The plaintiff sought to rely on the provisions of the *Court Procedures Rules 2006* (ACT) ("**Rules**") dealing with filing, sealing and stamping of documents. Those provisions make no distinction between "lodging" and "filing" a document but rather distinguish between actual filing and being recorded as filed as a result of not being rejected by the Registrar.<sup>6</sup> Thus, the Rules provide that a document is filed when it is, relevantly, delivered to the registry personally. In that case, the Registrar may record the filing of the document and, if appropriate, seal or stamp it, or may reject the document. If the document is rejected, it is taken not to have been filed. If the document is recorded as filed, the Registrar must return any copies of the document filed with the document for sealing or stamping. The date of filing is the date that the document was delivered to the registry and must be written on the filed document. In the case of an originating process which is recorded as filed, the original and filed copies must be sealed and endorsed with a distinguishing number or other unique identifier given to the proceeding as well as with the filing date.
16. The plaintiff submitted that, in circumstances where the Rules made no distinction between lodging and filing a document, it was sufficient that the copy of the originating process that was served within the 21 day period correctly identified the return date for the application and that there was no requirement that the service copy of the application include the proceedings number, any seal of the Court or any

---

<sup>4</sup> Above, n 2, at [4].

<sup>5</sup> Above, n 2, at [22].

<sup>6</sup> Above, n 2, at [20].

other marking that would indicate that the document was a copy of a document that had been filed in the Court.<sup>7</sup>

### *Authorities*

17. Mossop AsJ reviewed the authorities which had considered the question of what was required for a document to be a “copy” for the purposes of s 459G(3)(b).<sup>8</sup>

18. In particular, his Honour referred to the following cases:

- *Cooloola Dairys Pty Ltd v National Foods Milk Ltd (“Cooloola”)*,<sup>9</sup> where Chesterman J had stated that the authorities had established that the copy of the application which was required to be served needed to show the return date for the hearing of the application, the action number and the seal of the Court;
- *Bluechip Development Corporation (Cairns) Pty Ltd v PNP Realty Pty Ltd (“Bluechip”)*,<sup>10</sup> where Master Harper had approved Chesterman J’s statement in *Cooloola*;
- *Craneford Nominees Pty Ltd v VGC Co-Operative Ltd (“Craneford”)*,<sup>11</sup> where Stanley J, dealing with a service copy of an application which had omitted the signature of the Registrar and the filing date, both of which had appeared on the application that had been filed in the Court, had said to the following effect:
  - The purpose of the requirement in s 459G(3)(b) for service of a copy of the application and the supporting affidavit on the person who served the statutory demand is to ensure that that person has proper notice that proceedings have been commenced by the company, the basis upon which the company asserts that a genuine dispute exists in relation to the debt which constitutes the basis of the statutory demand, and the date upon which those proceedings are to be heard by the Court.
  - This does not mean that the copy of the application required to be served pursuant to s 459G(3)(b) has to be in all respects an exact copy of the application filed in the Court. To construe the provision in that way is unnecessary for the purposes of fulfilling the underlying purpose and policy of the *Corporations Act*, can frustrate the operation of the Act, and will, in some circumstances, prove unworkable because a party cannot know precisely every mark or notation that might be made on a document filed in Court by the registry staff.

<sup>7</sup> Above, n 2, at [23].

<sup>8</sup> Above, n 2, at [24]-[43].

<sup>9</sup> [2004] QSC 308; [2005] 1 Qd R 12 at [34]-[35].

<sup>10</sup> [2009] ACTSC 33 at [7].

<sup>11</sup> [2012] SASC 74; (2012) 262 FLR 283 at [18]-[21].

- An analysis of the authorities demonstrates that a document will satisfy the definition of a “copy of the application” where:
  - the copy document reflects the form of the originating process accepted by the Court within the 21 day period;
  - the copy document evidences the fact of the Court’s acceptance, and hence, the fact that proceedings have been commenced, by some mark, whether that mark is the seal of the Court, the Registrar’s signature, or some other authenticating mark such as the Court stamp or action number; and
  - the copy document records the important fact of the return date of the application.

In *Craneford*, Stanley J had noted that the action number and the Supreme Court “Received” stamp both appeared on the service copy of the application and said that these marks, even in the absence of the Court’s seal or the Registrar’s signature, evidenced the authenticity of the document as a copy of the application accepted by the Court for filing. Accordingly, the document satisfied s 459G(3)(b).

#### *Consideration of the authorities*

19. Mossop AsJ observed that numerous authorities<sup>12</sup> had found that the return date was essential in order that the application served on the defendant be a “copy” of the application made to the Court. However, his Honour agreed with the reasoning of Stanley J in *Craneford* that, in addition to the return date, the document had also to bear “some evidence that it has been accepted by the Court.”<sup>13</sup>
20. His Honour noted that the Rules (including the approved form) provided for the originating process to bear a proceedings number, the Registrar’s signature, the Court seal and a marking indicating when it was filed, but his Honour found it unnecessary to decide whether all of these were required in addition to the return date because the application only had the return date on it and none of the other markings as it had never been recorded by the Registrar as having been filed. Therefore, his Honour said that he did not need to resolve the difference that existed between *Cooloola* and *Craneford* as to whether the Court seal and proceedings number were also essential or just some mark to evidence the fact of the Court’s acceptance and that proceedings had been commenced.<sup>14</sup>

<sup>12</sup> Above, n 2, at [45]. See *Benonyx Pty Ltd v Fetrona Pty Ltd* [1999] NSWSC 1181; *Chelring Pty Ltd v Coombs* [2000] WASC 60; *Australian Foods Company Pty Ltd v O’Donnell* [2002] WASC 129; *Universal Trade Exchange Pty Ltd v Westpac Banking Corporation* [2002] WASC 36; (2002) 20 ACLC 1302; *LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd* [2004] QSC 134; *Cooloola*, above n 9; *Accommodation West Pty Ltd v Innis* [2009] WASC 337; *Bache Business & Printing Services Pty Ltd v SA Hub Productions Pty Ltd* [2009] SASC 369; *Opensoft Australia Pty Ltd v Miller Street Pty Ltd* [2011] FCA 653; *Craneford*, above n 11.

<sup>13</sup> Above, n 2, at [45].

<sup>14</sup> Above, n 2, at [45]-[47].

21. However, his Honour did indicate that, had it been necessary to decide this issue, he would probably have adopted the *Craneford* approach even though this approach could leave room for argument about precisely what marks or combination of marks were sufficient. His Honour added that he regarded the approving reference to the decision in *Cooloola* by Master Harper in *Bluechip* as *obiter*.<sup>15</sup>
22. His Honour noted that in *Benonyx Pty Ltd v Fetrona Pty Ltd*,<sup>16</sup> a case in which the service copy of the application had been found not to be in accordance with s 459G(3)(b) because it omitted the return date, Santow J had indicated that he might have found that the company had done what was required to comply with this provision if a copy of the application had been served in advance of the filing of the identical application with a return date inserted on it because the return date had been able to be obtained in advance from the Court.<sup>17</sup>
23. Mossop AsJ, however, said that, in the light of subsequent authority, it was not open for him to hold that an application bearing a correct return date, inserted by the plaintiff's solicitor but without any evidence of filing recorded by the registry on it, was a "copy" for the purposes of s 459G(3)(b).<sup>18</sup>
24. His Honour acknowledged the "unfortunate circumstances faced by the plaintiff" which had arisen "as a result of defective administrative processes adopted in the registry of the Court."<sup>19</sup> His Honour said that these administrative processes:
- "do not reasonably accommodate the need for the Court to promptly record the filing of documents and provide sealed or stamped service copies of the documents so filed to a plaintiff so that the plaintiff may serve the application and affidavit in support within the inflexible period set by the Corporations Act".*<sup>20</sup>
25. His Honour also said that the result of the case was "in some respects an unsatisfactory one" because the delay by the registry staff had resulted in the plaintiff losing its right to contest the validity of the statutory demand. Nevertheless, his Honour found that permitting the plaintiff's application to proceed would be inconsistent with the requirements of the *Corporations Act*.<sup>21</sup>

---

<sup>15</sup> Above, n 2, at [48].

<sup>16</sup> [1999] NSWSC 1181 at [7].

<sup>17</sup> Above, n 2, at [26]; [49].

<sup>18</sup> Above, n 2, at [49].

<sup>19</sup> Above, n 2, at [1].

<sup>20</sup> Above, n 2, at [2].

<sup>21</sup> Above, n 2, at [50].

### *Conclusion*

26. Accordingly, his Honour concluded that the Court did not have jurisdiction to deal with the substance of the application and dismissed the proceedings.<sup>22</sup>

### **Final note**

27. In the course of his judgment, Mossop AsJ said that companies commonly sought to commence proceedings to set aside a statutory demand close to the end of the 21 day period.<sup>23</sup>

28. However, a company intending to bring proceedings to set aside a statutory demand would be wise not to leave the commencement of the proceedings to close to the end of that period given that a failure to comply with the strict requirements of s 459G may have substantial adverse consequences for it.

K Ottesen

29 September 2015

### **Copyright**

© This paper is subject to copyright which is retained by the author. Apart from any use as permitted under applicable copyright law, this paper may be reproduced in whole or in part for study or training purposes, subject to the inclusion of an acknowledgment of the source. Reproduction for commercial use or sale requires prior written permission from the author.

### **Disclaimer**

This paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive and is not to be relied upon as legal advice. Readers should obtain their own legal advice.

---

<sup>22</sup> Above, n 2, at [51].

<sup>23</sup> Above, n 2, at [1].