Federal Court of Australia

Sandys Swim Pty Ltd v Morgan [2022] FCA 1574

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| File number: | ACD 42 of 2022 |
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| Judgment of: | **SARAH C DERRINGTON J** |
|  |  |
| Date of judgment: | 23 December 2022 |
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| Catchwords: | **CORPORATIONS** – application to set aside a statutory demand pursuant to s 459G of the *Corporations Act 2001* (Cth) – whether application served within 21 days as required by s 459G – where statutory demand served by email and post – whether service effective by virtue of s 600G and ss 105A and B when email received |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 28A*Corporations Act 2001* (Cth), ss 9, 105A, 105B, 109X, 459E, 459G, 459H(1)(a) and (b), 459J, 600G*Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth)*Evidence Act 1995* (Cth), s 161*Federal Court of Australia Act 1976* (Cth), s 35A(5)*Federal Court Rules 2011* (Cth), r 1.34 |
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| Cases cited: | *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* [2005] ACTCA 3; 58 ATR 456*Bioaction Pty Ltd v Ogborne* [2022] FCA 436; 159 ACSR 173*David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; 184 CLR 265*In the matter of Black Tie Holdings Pty Ltd* [2022] NSWSC 781*Jin Xin Investment & Trade (Australia) Pty Ltd v ISC Property Pty Ltd* [2006] NSWSC 7; 24 ACLC 281*Kookaburra Educational Resources Pty Ltd v MacGear Limited Partnership trading as MacGear Australia* [2021] FCA 797*Mangraviti Pty Ltd, Joe v Lumley Finance Ltd* [2010] NSWSC 61*Martin v Commonwealth Bank of Australia* [2001] FCA 87*Mazukov v University of Tasmania* [2004] FCAFC 159 *Miletich v Murchie* [2012] FCA 1013; 297 ALR 566*Onebev v Encore Beverages* [2016] VSC 284; 50 VR 106*Solos Ltd v Aussie Hoops Pty Ltd* [2022] FCA 1022 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Australian Capital Territory |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 57 |
|  |  |
| Date of hearing: | 19 December 2022 |
|  |  |
| Counsel for the Applicant: | By its Director, Mr A S Brown |
|  |  |
| Counsel for the Respondent: | Mr C H Matthews |
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| Solicitor for the Respondent: | Gibbs Wright Litigation Lawyers |

ORDERS

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|  | ACD 42 of 2022 |
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| BETWEEN: | SANDYS SWIM PTY LTD ABN 73 641 260 451Applicant |
| AND: | LANCE MORGANRespondent |

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| order made by: | SARAH C DERRINGTON J |
| DATE OF ORDER: | 23 December 2022 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The parties provide written submissions, not exceeding three pages, on appropriate costs and other consequential orders, on or before 20 January 2023.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SARAH C DERRINGTON J

# Introduction

1. The Applicant seeks to set aside the respondent creditor’s statutory demand for payment dated 26 July 2022 (**the application**). A Registrar of this Court has refused the application. The matter comes before me on a hearing *de novo*: *Federal Court of Australia Act 1976* (Cth), s 35A(5); *Martin v Commonwealth Bank of Australia* [2001] FCA 87; *Mazukov v University of Tasmania* [2004] FCAFC 159.
2. By order of a Judge of this Court made on 9 December 2022, the Applicant was granted leave pursuant to r 1.34 of the *Federal Court Rules 2011* (Cth) to be represented by its director, who is not legally qualified, Mr Alex Brown. Mr Brown appeared on the hearing of this application and made oral and written submissions.
3. Three issues arise for determination.
4. Whether the Applicant failed to make and serve the application and supporting affidavit within 21 days after it was brought to the attention of the sole director, Mr Brown, such that the application fails to meet the statutory threshold in s 459G of the ***Corporations Act*** *2001* (Cth);
5. Whether there is a genuine dispute about the debt identified in the demand pursuant to s 459H(1)(a) of the *Corporations Act*.
6. Whether there is a genuine offsetting claim pursuant to s 459H(1)(b) of the *Corporations Act*.

## Chronology of relevant events

1. On or about 24 September 2021, the Applicant commenced proceedings in the District Court of Queensland against Mr Morgan claiming, *inter alia*, damages for alleged breaches of an informal lease.
2. The Applicant also has proceedings on foot in the Queensland Civil and Administrative Tribunal against Mr Morgan for the payment of money for services which were commenced on 5 September 2022. These proceedings are said to be relevant to the genuine offsetting claim (Affidavit of Alex Brown 04.10.22 [4] and Annexure ASB80).
3. On 9 June 2022, Dearden DCJ dismissed the Applicant’s summary judgment application in relation to its claim in the District Court and ordered, *inter alia*, that the Applicant pay Mr Morgan’s costs of two applications brought by the Applicant, and Mr Morgan’s successful application for security for costs.
4. On 7 July 2022, the Applicant filed and served an appeal from the decision of Dearden DCJ (CA 7968/22).
5. On 21 July 2022, Barlow QC DCJ had before him five applications brought by the Applicant. Judge Barlow QC dismissed three, adjourned one, and partially dismissed the fifth. His Honour ordered that Mr Brown pay jointly and severally Mr Morgan’s cost of each application heard and determined on that day, fixed in the sum of $12,455 plus GST. It is that amount that is the subject of the statutory demand.
6. On 16 August 2022, the Applicant filed an appeal from the orders of Barlow QC DCJ (CA9733/22).
7. The Applicant has not complied with the timetabling orders in relation to the two appeals which were ordered by the Court of Appeal to be heard together.
8. On 26 July 2022, Mr Morgan served a statutory demand on the applicant seeking payment of the unpaid costs order made by Barlow QC DCJ in the sum of $13,700.05 comprised of the fixed costs of $12, 255 plus GST.
9. On 17 August 2022, Mr Morgan filed and served an application to wind up the Applicant.
10. On 19 August 2022, the Applicant filed the current application to set aside the statutory demand pursuant to s 459G of the *Corporations Act* on the basis that there is a genuine dispute and a genuine offsetting claim between the parties. The application and supporting affidavit were also served on 19 August 2022 (Affidavit of Alex Brown 25.08.22 [4]-[5] and Annexures ASB9 and ASB10).

# Was the application served within time?

1. The primary issue to be resolved is whether 21 days had elapsed from the date the demand was served, 26 July 2022, and the date when the application to set aside the statutory demand was filed and served, 19 August 2022. Mr Morgan contends that the Applicant was obliged by s 459G(2) of the *Corporations Act* to file and serve its application by 16 August 2022 and, consequently, the Court does not have jurisdiction to determine the application.
2. The gravamen of the Applicant’s complaint is that Mr Morgan must be held to what is described as his “chosen method of service”, being “Pursuant to section 109X of the *Corporations Act 2001 (Cth)*” because the covering letter from Gibbs Wright Litigation Lawyers enclosing the statutory demand nowhere states that there is “service by email” (Applicant’s submissions 24.20.22 [2]-[4]). The Applicant contends no “fair notice” was given that service could occur by any method other than by “leaving it at, or posting it to, the company’s registered office” as stipulated in s 109X(1)(a) of the *Corporations Act* (Applicant’s submissions 30.11.22 [12]-[16]).
3. Further, the Applicant claims to have followed the instructions of the Federal Court’s registry staff contained in two emails dated 17 August 2022 sent at 11.47am and 18 August 2022 sent at 8.20am, both of which said, “the last date for filing your application is 22 August 2022” (Affidavit of Alex Brown 06.09.22 [3] and ASB20; Affidavit of Alex Brown 14.10.22 [3]; Affidavit of Alex Brown 30.11.22 [4] and ASB 104). It is relevant to observe that although both emails refer to previous correspondence from Mr Brown relevant to those responses, that correspondence is not exhibited. Consequently, no inference can be drawn, as Mr Brown invited the Court to do (Applicant’s submissions 30.11.22 [3]), that the registry staffs’ “instructions” were based on those staff having read the supporting affidavit of Mr Brown dated 16 August 2022 or having independently formed a view as to when service of the statutory demand had in fact been effected.
4. The covering letter from Gibbs Wright Litigation Lawyers enclosing the statutory demand (Affidavit of Alex Brown 16.08.22, Annexure ASB1), states in bold under the salutation:

**By email and express post:** **sandys.swim.school@gmail.com**

1. It then sets out that, “pursuant to section 109X of the *Corporations Act*…., we **enclose** by way of service…” the Creditor’s Statutory Demand and the Order of Barlow DCJ.
2. The Applicant’s contention that he was “misled” by the terms of this letter that only one particular form of service had been chosen by Mr Morgan and that Mr Morgan should be held to that mode of service for the purposes of reckoning the 21 day period required by s 459G of the *Corporations Act* cannot be accepted. The text of the letter is clear. In any event, as is discussed below, the effect of the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) which took effect from 16 December 2020 (the **2020 Reforms**) is that service pursuant to s 109X of the Corporations Act will, in certain circumstances, necessarily embrace service by electronic communication.

## When was service of the statutory demand effected?

1. The determination of the date which service of the statutory demand was effected requires penetration of the usual labyrinthine provisions of the *Corporations Act*. Until that date is determined, it is not possible to ascertain whether or not the application was “made within the statutory period after the demand is so served” as required by s 459G(2) of the *Corporations Act*.
2. Section 459G of the *Corporations Act* provides:

**459G Company may apply**

(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 the statutory period after the demand is so served.

(3) An application is made in accordance with this section only if, within that period:

(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, are served on the person who served the demand on the company.

1. It is first necessary to establish whether a statutory demand is a “document” such that it engages the provisions of the *Corporations Act* relating to service of documents.
2. Section 9 of the *Corporations Act* defines *"statutory demand"*:

***statutory demand*** means:

(a) a document that is, or purports to be, a demand served under section 459E; or

(b) such a document as varied by an order under subsection 459H(4).

1. Section 9 also defines “*statutory period”*:

***statutory period*** means:

(a) if a period longer than 21 days is prescribed —the prescribed period; or

(b) otherwise—21 days.

1. Section 109X of the *Corporations Act* provides for the service of documents.

**109X  Service of documents**

(1) 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; or

(b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or

…

(2) For the purposes of any law, a document may be served on a director or company secretary by leaving it at, or posting it to, the alternative address notified to ASIC under subsection 5H(2), 117(2), 205B(1) or (4) or 601BC(2). However, this only applies to service on the director or company secretary:

(a) in their capacity as a director or company secretary; or

(b) for the purposes of a proceeding in respect of conduct they engaged in as a director or company secretary.

(3) Subsections (1) and (2) do not apply to a process, order or document that may be served under section 9 of the *Service and Execution of Process Act 1992*.

…

(7) This section applies to provisions of a law dealing with service whether it uses the expression “serve” or uses any other similar expression such as “give” or “send”.

1. Section 28A of the *Acts Interpretation Act 1901* (Cth) (***Acts Interpretation Act*)** makes provision for the service of documents and states as follows:

**28A Service of documents**

(1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression “serve”, “give” or “send” or any other expression is used, then the document may be served:

(a) on a natural person:

(i) by delivering it to the person personally; or

(ii) by leaving it at, or by sending it by pre‑paid post to, the address of the place of residence or business of the person last known to the person serving the document; or

(b) on a body corporate—by leaving it at, or sending it by pre‑paid post to, the head office, a registered office or a principal office of the body corporate.

Note:    The *Electronic Transactions Act 1999* deals with giving information in writing by means of an electronic communication.

(2) Nothing in subsection (1):

(a) affects the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorises the service of a document otherwise than as provided in that subsection; or

(b) affects the power of a court to authorise service of a document otherwise than as provided in that subsection.

### Could the statutory demand be served by email?

1. The question which arises from the combination of the provisions of s 109X of the *Corporations Act* and s 28A of the *Acts Interpretation Act* is whether service of a statutory demand by email satisfies those provisions.
2. Recently, in ***Bioaction*** *Pty Ltd v Ogborne* [2022] FCA 436; 159 ACSR 173, Cheeseman J, when dealing with an application under s 459G to set aside a statutory demand, made the following observations in respect of service under the *Corporations Act*:

38 Provisions which provide for a mode of service of documents on natural persons (s 28A of the ***Acts Interpretation Act*** *1901* (Cth)) and companies (s 28A of the Acts Interpretation Act and s 109X of the Corporations Act) are facultative not mandatory. In respect of s 28A of the Acts Interpretation Act see *Deputy Commissioner of Taxation v ABW Design and Construction Pty Ltd* [2012] FCA 346; 203 FCR 70 at 76 [20] (Logan J). In respect of s 109X of the Corporations Act see *Intelogent Pty Ltd v Onthego Group Pty Ltd* [2021] FCA 257 at [33] - [38] and the authorities cited therein (Farrell J).

39 Other means of service may be adopted, and if those other means result in the documents arriving at the nominated address within the statutory period then valid service will have been effected. What is critical is the result which is achieved by the plaintiff’s efforts, not the manner by which that result has been achieved (citations omitted) …

1. Relevantly, two important aspects of the 2020 Reforms are reflected in s 600G and in ss 105A and B. The latter establish statutory presumptions in respect of the time when, and the place, where electronic communications are sent and received.
2. Section 600G provides, relevantly:

**600G Electronic communication of documents**

(1) … this section applies to any document that is:

(a) required or permitted to be given to a person (the ***recipient***); or

…

under:

(c) this Chapter; or

…

*Giving a document*

(2) The document may be given to the recipient by means of an electronic communication.

(3) The document may be given by giving the recipient (by means of an electronic communication or otherwise) sufficient information to allow the recipient to access the document electronically.

(4) However, an electronic communication or electronic access may only be used if, at the time the electronic communication is used or information about the electronic access is given:

(a) it is reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference; and

(b) there is a nominated electronic address in relation to the recipient.

1. Section 105A provides:

**105A When is an electronic communication *sent* and *received***

(1) This section applies in relation to an electronic communication unless otherwise agreed between the originator and the addressee of the electronic communication.

(2) An electronic communication is ***sent***:

(a) when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator; or

(b) if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator—when the electronic communication is received by the addressee.

Note:    Paragraph (b) would apply to a case where the parties exchange electronic communications through the same information system.

(3) Subsection (2) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been sent under section 105B.

(4) **An electronic communication is *received* when the electronic communication becomes capable of being retrieved by the addressee at the addressee’s nominated electronic address.**

(5) **It is to be assumed that an electronic communication is capable of being retrieved by the addressee when it reaches the addressee’s nominated electronic address.**

(6) Subsection (4) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 105B.

(Emphasis added)

1. Section 105B provides, relevantly:

**105B Place where an electronic communication is sent or received**

(1) This section applies in relation to an electronic communication unless otherwise agreed between the originator and the addressee of the electronic communication.

…

(3) An electronic communication is taken to have been received:

(a) if the originator is a company or registered scheme and the addressee is a member of the company or registered scheme—at the address of the addressee as contained on the register of members of the company or registered scheme at the time the communication is received; and

(b) if the addressee has a registered office and paragraph (a) does not apply—at the registered office of the addressee; and

(ba) if the addressee has a principal place of business in Australia and neither paragraph (a) nor (b) applies—the address of the addressee’s principal place of business in Australia; and

(c) otherwise:

(i) at the most recent physical address nominated by the addressee to the originator; or

(ii) if the addressee has not nominated a physical address as mentioned in subparagraph (i)—at the addressee’s usual residential address in Australia.

1. Section 161 of the *Evidence Act 1995* (Cth) also creates a rebuttable presumption whereby an electronic communication of which a record is tendered was sent or made in the form shown in the record, was sent or made by a person appearing from the record to have sent it, was sent or made on the day and at the time it appears to have been sent, and was received at the destination to which it appears to have been sent at the time the sending of the communication concluded as shown in the record: *Miletich v Murchie* [2012] FCA 1013; 297 ALR 566 at [100]; *Bioaction* at [55].
2. As Cheeseman J explained (*Bioaction* at [49]; see also *In the matter of Black Tie Holdings Pty Ltd* [2022] NSWSC 781), at the same time as s 600G was amended the definitions of “document”, “electronic communication” and “nominated electronic address” in s 9 of Chapter 1, Part 1.2 (Interpretation) of the *Corporations Act* were also amended:

**Dictionary**

Unless the contrary intention appears:

…

***document*** means any record of information, and includes:

…

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; …

***electronic communication*** means:

(a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or

(b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

***nominated electronic address***, in relation to the addressee of an electronic communication, means:

(a) the most recent electronic address nominated by the addressee to the originator of the electronic communication as the electronic address for receiving electronic communications; or

(b) if:

(i) the addressee has nominated an electronic address as mentioned in paragraph (a) and the originator knows, or there are reasonable grounds to believe, that the address is not a current electronic address for the addressee; or

(ii) the addressee has not nominated an electronic address as mentioned in paragraph (a);

an electronic address that the originator believes on reasonable grounds to be a current electronic address for the addressee for receiving electronic communications.

1. Further, as Cheeseman J observed (*Bioaction* at [50]), s 600G applies to any document (very broadly defined in s 9) that is required or permitted to be given to a person under Chapter 5 of the *Corporations Act*. That necessarily includes a statutory demand that is permitted to be given by s 459E, which is contained within Chapter 5, Part 5.4, Division 2 of the *Corporations Act*.
2. In the present circumstances, subject to the answer to the question posed next, the statutory demand could be served by email.

### Was the email received at the Applicant’s nominated electronic address?

1. The effect of s 600G was described by Cheeseman J in this way (*Bioaction* at [51]):

51 Section 600G authorises a document to be given to the recipient by means of an electronic communication (as newly defined in s 9). The giving of the document by electronic communication may be achieved by giving the recipient sufficient information to allow the recipient to access the document electronically: s 600G(3). However, electronic communication may only be used if, at the time, it is reasonable to expect the document would be readily accessible so as to be usable for subsequent reference and there is a nominated electronic address (as defined) in relation to the recipient. The definition of nominated electronic address extends to cover the situation where the addressee has not in fact nominated such an address. In that case, the nominated electronic address will be an electronic address which the originator believes on reasonable grounds is a current electronic address for the addressee for receiving electronic communications, even though the addressee has not nominated that address, or indeed, any address.

1. Thus, the 2020 Reforms remove the requirement for the consent of the recipient as a condition of serving a document by electronic communication.
2. It is tolerably clear that the statutory demand was served by two methods:
	1. By email to sandys.swim.school@gmail.com (Applicant’s email address) at 4pm on 26 July 2022 for which a delivery receipt was received by Mr Morgan’s solicitors (Affidavit of Melany Karen Dowse 09.09.22 [11] and [12] and Annexure MKD10); and
	2. By express post to the Applicant’s registered office being Unit 1506, 108 Margaret Street, Brisbane sent on 26 July 2022.
3. The Applicant does not deny that service of the statutory demand was effective when he collected it from his mailbox on 30 July 2022 (Affidavit of Alex Brown 16.08.22 [3]). Annexures ASB3 and 4 to that affidavit evidence an express post envelope (with a tracking number ending in 30999) and delivery receipt for an item with the same tracking number indicating it was delivered on 29 July at 2.59pm.
4. Further, the Applicant does not deny that the statutory demand was received at the Applicant’s email address on 26 July 2022. He says he did not see the email (Affidavit of Alex Brown 14.10.22 [6]). Proof of effective service does not require that there be proof that the documents were actually accessed or reviewed or even came to the attention of the addressee or anyone else: *Corporations Act*, s 105A; *Bioaction* at [95]). Section 105A(4) and (5) of the *Corporations Act* deems the electronic communication to have been received when it reaches the addressee’s nominated electronic address.
5. The Applicant’s reliance on *Kookaburra Educational Resources Pty Ltd v MacGear Limited Partnership trading as MacGear Australia* [2021] FCA 797 at [57] was misconceived, that case being concerned with the question of informal service under the *Service and Execution of Process Act 1992* (Cth). Similarly, no assistance can be gained from *Solos Ltd v Aussie Hoops Pty Ltd* [2022] FCA 1022. There was no issue relating to electronic service; the question to be determined was whether there was sufficient evidence to rebut the presumption that the statutory demand was delivered “in the ordinary course of post”.
6. Mr Morgan does not contend that, for the purposes of the statutory demand, the Applicant had expressly nominated the Applicant’s email address. Mr Morgan does contend that he believed on reasonable grounds that the Applicant’s email address was a current electronic address for the Applicant for receiving electronic communications (*Corporations Act*, ss 9 and 600G(4)(b)).
7. Mr Morgan relies on the following email correspondence as sufficient to establish that his belief that the Applicant’s email address was a current electronic address for the Applicant for receiving documents was reasonable:
* 13 December 2021 – service by the Applicant of a Further Amended Statement of Claim on Mr Morgan’s solicitors listing the Applicant’s email address as that for service (Affidavit of Melany Karen Dowse 09.09.22 [3] and Annexure MKD1)
* 4 January 2022 – service of Reply by Applicant on Mr Morgan’s solicitors from the Applicant’s email address (Affidavit of Melany Karen Dowse 09.09.22 [4] and Annexure MKD2)
* 1 March 2022 – service by Mr Morgan’s solicitors on the Applicant of an application for security for costs to the Applicant’s email address and a response from the Applicant from the same email address on the same day (Affidavit of Melany Karen Dowse 09.09.22 [5] and Annexure MKD3)
* 27 June 2022 – letter from Mr Morgan’s solicitors to the Applicant’s email address requesting documents and a response from the Applicant from the same email address the following day (Affidavit of Melany Karen Dowse 09.09.22 [6] and Annexure MKD4)
* 3 July 2022 – service by the Applicant on Mr Morgan with two applications filed in the District Court of Queensland from the Applicant’s email address (Affidavit of Melany Karen Dowse 09.09.22 [7] and Annexure MKD5)
* 7 July 2022 – service by the Applicant on Mr Morgan’s solicitors with a further application filed in the District Court of Queensland from the Applicant’s email address (Affidavit of Melany Karen Dowse 09.09.22 [8] and Annexure MKD6)
* 18 July 2022 – service by the Applicant on Mr Morgan’s solicitors with an application filed in the District Court of Queensland from the Applicant’s email address (Affidavit of Melany Karen Dowse 09.09.22 [9] and Annexure MKD7).
1. Further, the originating application filed in these proceedings by the Applicant on 19 August 2022 contains the Applicant’s email address, as do the other documents filed by the Applicant in these proceedings. Indeed, the Applicant served the originating application and the supporting affidavit on Mr Morgan’s solicitors from the Applicant’s email address (Affidavit of Alex Brown 25.08.22, Annexures ASB9 and ASB 10). No other email address for the Applicant appears in the documents.
2. In the circumstances, I am satisfied that Mr Morgan has discharged his onus and that he believed on reasonable grounds that the Applicant’s email address was a nominated electronic address for the Applicant for receiving electronic communications.
3. Consequently, service of the statutory demand on the Applicant was effected on 26 July 2022 because of the operation of s 600G and the definition of “nominated electronic address” in s 9 of the *Corporations Act*. Pursuant to s 105A of that Act, the statutory demand is deemed to have been received by the Applicant on 26 July 2022. Any application to set aside the statutory demand was required to be filed by 16 August 2022.
4. The burden of proof lies on the Applicant to establish that service of the application to set aside the statutory demand, and the supporting affidavit, was effected in a manner satisfying s 459G, viz, that they were filed and served within 21 days: *Jin Xin Investment & Trade (Australia) Pty Ltd v ISC Property Pty Ltd* [2006] NSWSC 7; 24 ACLC 281 at [6].
5. The Applicant has not discharged that burden.

## What are the consequences of the Registry communications?

1. The Applicant disputed the proposition that the 21 day time limit for service imposed by s 459G(2) and (3) is strict and immutable: ***David Grant*** *& Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; 184 CLR 265at 278.
2. The Applicant contends that in circumstances where it followed the advice of Registry staff that the last day to file the application to set aside the statutory demand was 22 August 2022, it should not be penalised for following that advice. The difficulty with this submission is that, by the time the Applicant lodged the application and supporting affidavit at 9:58:48pm on 18 August 2022, the time for compliance with s 459G had already passed. Any advice given by Registry staff, even assuming it to have had the character for which the Applicant contended (which has not been established) was by this time irrelevant.
3. The Applicant relied on a decision of Palmer J in ***Mangraviti*** *Pty Ltd, Joe v Lumley Finance Ltd* [2010] NSWSC 61 in which the statutory demand was set aside on the basis of s 459J(1)(b) of the *Corporations Act*, namely that “because of a defect in the demand, substantial injustice will be caused unless the demand is set aside”. In that case, the statutory demand had been served on a vacant office and the solicitors must have suspected that the demand had not come to the attention of the plaintiff by the time the limitation period expired. Justice Palmer held that such circumstances attracted the principle of lack of fair notice. The circumstances of that case differ from the present. First, the Applicant did not rely on s 459J(1)(b) to set aside the demand; it relied expressly on ss 459H(1)(a) and (b). Secondly, no defect in the demand has been alleged and nor could there be in light of the statutory framework which now pertains as to the manner in which service may be effected. Thirdly, Palmer J was apparently not referred to the decision of the High Court in *David Grant*, which was of course binding on him. In that case, the point was made pellucid by Gummow J at 276-7:

In providing that an application to the court for an order setting aside a statutory demand “may only” be made within the twenty-one day period there specified and that an application is made in accordance with s 459G only if, within those twenty-one days, a supporting affidavit is filed and a copy thereof and of the applications are served, sub-ss (2) and (3) of s 459 G attach a limitation or condition upon the authority of the court to set aside the demand.

1. Further, at 279, Gummow J held:

If an application for an order setting aside a statutory demand has not been made within twenty-one days after service of the demand, there is no application under Pt 5.4 before the court. Therefore, there is no question of such an application being dismissed because of a defect or irregularity in connection with it.

…

No doubt, in some circumstances, the new Pt 5.4 may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with perceived defects in the pre-existing procedure in relation to notices of demand.

1. *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* [2005] ACTCA 3; 58 ATR 456, to which the Applicant also referred, was similarly concerned with an application pursuant to s 459J(1)(b). The Court of Appeal held that what was contemplated by the section is “conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice”. Nothing in the present case could be said to attract those descriptors.
2. Likewise, the Applicant’s reliance on *Onebev v Encore Beverages* [2016] VSC 284; 50 VR 106 is of no assistance in circumstances where the construction of the *Acts Interpretation Act* in the context of the Court’s Registry being closed on Easter Tuesday was in issue.

# Disposition

1. The Applicant has not established that the application was filed and served within the 21 day period required by s 459G of the *Corporations Act*. Consequently, this Court has no jurisdiction to entertain the application and it must be dismissed.
2. In light of this conclusion, it is not necessary to consider the grounds relied on to set aside the statutory demand, being whether there exists a genuine dispute or a genuine offsetting claim.

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| I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Sarah C Derrington. |

Associate:

Dated: 23 December 2022