Federal Court of Australia

Bioaction Pty Ltd v Ogborne, in the matter of Bioaction Pty Ltd [2022] FCA 436

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| File number: |  |
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| Judgment of: | **CHEESEMAN J** |
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| Date of judgment: | 26 April 2022 |
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| Catchwords: | **CORPORATIONS** – determination of a separate question pursuant to rule 30.01 of the *Federal Court Rules 2011* (Cth) – where substantive proceedings are an application to set aside a statutory demand pursuant to s 459G of the *Corporations Act 2001* (Cth) – whether the application to set aside a statutory demand was served within the 21 day period specified in s 459G – where application and supporting documents (**originating documents**) were sent by email to the defendant’s legal representative – where email contained originating documents as attachments in portable document format (**PDF**) – where email attaching the originating documents was sent on the last day of the statutory period provided by s 459G – where plaintiff relies on expert evidence as to the timing of receipt of the originating documents by the defendant’s legal representative – whether s 600G and the deeming provisions in ss 105A and 105B of the *Corporations Act 2001* (Cth) apply - whether rebuttable presumption in s 161 of the *Evidence Act 1995* (Cth) is displaced – whether the PDF versions of the originating documents were in complete and legible form – Held: Separate question, being “was the application for an order setting aside the statutory demand and the affidavit supporting the application filed and served within the 21 day statutory period specified in s.459G of the Corporations Act 2001?” answered “yes”  |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), ss 2B, 28A*Corporations Act 2001* (Cth), ss 9, 105A, 105B, 109X, 459E, 459G, 600G*Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth)*Electronic Transactions Act 1999* (Cth), s 14A*Evidence Act 1995* (Cth), s 161*Corporations Regulations 2001* (Cth), regs 1.0.03, 1.0.04, 1.0.05, Schs 1 and 2*Federal Court Rules 2011* (Cth), r 30.01  |
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| Cases cited: | *Caason Investments Pty Ltd v International Litigation Partners No 3 Ltd (NO 1662762)* [2021] VSC 487*Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378*Chen & Anor v Kornucopia Pty Ltd and Ors* [2019] VSC 756; 349 FLR 35*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; 282 FCR 1*David Grant & Co Pty Ltd v Westpac Banking Corp* [1995] HCA 43; 184 CLR 265*Deputy Commissioner of Taxation v ABW Design and Construction Pty Ltd* [2012] FCA 346; 203 FCR 70*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503*Greenmint Pty Ltd v O’Keeffe* [2015] VSC 326*Howship Holdings Pty Ltd v Leslie* [1996] NSWSC 314; 41 NSWLR 542*In the matter of World Square Realty Pty Ltd* [2013] NSWSC 307*Intelogent Pty Ltd v Onthego Group Pty Ltd* [2021] FCA 257*Jin Xie Investment & Trade (Australia) Pty Ltd v ISC Property Pty Ltd* [2006] NSWSC 7; 24 ACLC 281*Miletich v Murchie* [2012] FCA 1013; 297 ALR 566 *Newsnet Pty Ltd v Patching* [2011] NSWSC 690; 81 NSWLR 104*Players Pty Ltd v Interior Projects Pty Ltd* (1996) 133 FLR 265; 14 ACLC 918*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 15 ACLC 570*Seventh Cameo Nominees Ltd v Holdway Pty Ltd* (Supreme Court of Victoria 24 April 1998, unreported, Chernov J)*SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229; 2 QR 334*Sheraz Pty Ltd v Rumsley* [2019] FCA 493; 37 ACLC 19-018*SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362*The Site Foreman Pty Ltd v Brand* [2011] NSWSC 451; 81 NSWLR 96  |
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| Date of hearing: | 12 April 2022 |
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| Counsel for the Plaintiff:  | Mr S Golledge SC with Mr A Wilson |
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| Solicitor for the Plaintiff: | MSD Law |
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| Counsel for the Defendant:  | Mr A Ogborne |
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| Solicitor for the Defendant:  | CFC Lawyers  |

ORDERS

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|  | NSD 61 of 2022 |
| IN THE MATTER OF BIOACTION PTY LTD (ACN 136 514 817) |
| BETWEEN: | BIOACTION PTY LTD (ACN 136 514 817)Plaintiff |
| AND: | GORDON OGBORNEDefendant |

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| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 26 April 2022 |

THE COURT ORDERS THAT:

1. The separate question, the subject of Order 1 made pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) on 23 February 2022, as refined in submissions, that is:

 “Was the application for an order setting aside the statutory demand and the affidavit supporting the application filed and served within the 21 day statutory period specified in s.459G of the Corporations Act 2001?”

be answered “yes”.

1. The defendant pay the plaintiff’s costs of the hearing of the separate question.
2. The originating application filed 3 February 2022 be listed for case management before a Registrar of this Court on Wednesday, 4 May 2022 at 11:00 am or such other time as is ordered by the Registrar.
3. The parties have leave to apply to the Registrar.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

# INTRODUCTION

1. This is an application for the determination of a separate question pursuant to rule 30.01 of the *Federal Court* ***Rules*** *2011* (Cth). The question is directed to whether an application to set aside a statutory demand and the affidavit in support (together, the **originating documents**) were served within the 21 day period stipulated in s 459G of the ***Corporations Act*** *2001* (Cth).
2. The question is of significance for the parties because strict compliance with s 459G(2) and (3) of the Corporations Act is necessary to attract jurisdiction: ***David Grant*** *& Co Pty Ltd v Westpac Banking Corp* [1995] HCA 43; 184 CLR 265, 276 - 278 (Gummow J); ***Jin Xie*** *Investment & Trade (Australia) Pty Ltd v ISC Property Pty Ltd* [2006] NSWSC 7; 24 ACLC 281 at 283 [5] (Barrett J, as his Honour then was).

# CONCLUSION IN SUMMARY FORM

1. The question for determination was refined in the course of submissions and is as follows:

Was the application for an order setting aside the statutory demand and the affidavit supporting the application filed and served within the 21 day statutory period specified in s.459G of the Corporations Act 2001?

1. For the reasons that follow, the question is answered “yes”.

# PROCEDURAL BACKGROUND

1. By originating process filed on 3 February 2022, the plaintiff, **Bioaction** Pty Ltd, seeks an order setting aside the **statutory demand** pursuant to s 459G of the Corporations Act dated 12 January 2022 served by the defendant, Gordon Ogborne. Mr Ogborne appears conditionally to oppose the application. He contends that the Court does not have jurisdiction because the originating documents were not served within the 21 statutory period provided for in s 459G.
2. If it is determined that the application was not served within the statutory period, then the resolution of the separate question will finally determine the outcome of the proceedings. Proceeding by way of determination of a separate question facilitates the just resolution of the matters in dispute between the parties as quickly, inexpensively and efficiently as possible.

# FACTS

1. Bioaction is a company that specialises in the design, manufacturing and installation of systems to eliminate or mitigate odorous, hazardous and corrosive gases. Mr Ogborne was Bioaction’s Chief Financial Officer / Chief Operating Officer in the period from December 2019 until November 2021, when he was made redundant by Bioaction.
2. Following Mr Ogborne being made redundant a dispute arose between him and Bioaction as to his entitlements as a result of the cessation of his employment. It is not disputed that a payment was made by Bioaction to Mr Ogborne, the dispute is as to whether Mr Ogborne is entitled to any additional sum.
3. On 13 January 2022, Mr Ogborne served the statutory demand on Bioaction seeking payment of the amount of $240,688.31, to which Mr Ogborne contends he is entitled as unpaid salary, unpaid superannuation, unpaid salary in lieu of termination, unpaid annual leave and unpaid redundancy pursuant to the employment contract entered into by Mr Ogborne and Bioaction on 25 November 2020. The statutory demand was in the prescribed form and included paragraph 6 as follows:

The address of the creditor for service of copies of any application and affidavit is CFC Lawyers, Level 1, Oro House, 39 Bay Street, Double Bay NSW 2028.

The statutory demand did not give any email address for service.

1. It is common ground that service was effected by delivery of a copy of originating documents to the registered office of Bioaction on 13 January 2022.
2. It is common ground that the last day of the 21 day statutory period was 3 February 2022.
3. Mr Ogborne is represented by Cerena Fu of CFC Lawyers. Bioaction is represented in the present proceedings by Darrin Mitchell of MSD Law. Bioaction was represented by Karen Ansen of Karen Ansen Consulting in relation to the employment dispute with Mr Ogborne. As noted above, the statutory demand was served on Bioaction in the context of the employment dispute.
4. There were email communications exchanged between the legal representatives of Mr Ogborne and Bioaction in relation to the statutory demand in the period from 21 December 2021 to 3 February 2022. Email communications were sent by the legal representatives of Bioaction to CFC Lawyers using the work email address of Ms Fu and the general email address for CFC Lawyers, which address is included on the firm’s stationery. I will refer to these email addresses respectively as Ms Fu’s CFC email address and the CFC general email address. Ms Fu sent emails to Bioaction’s legal representatives from her CFC email address. In those email communications, Ms Fu sent letters as attachments, using the firm’s stationery which included the CFC general email address in the letterhead.
5. CFC Lawyers is a registered business name of CFC Legal Pty Ltd. The registered office of CFC Legal Pty Ltd is "C/- CFC Lawyers 'Oro House' Level 1 39 Bay Street Double Bay NSW 2028". The principal place of business of CFC Lawyers recorded in an ASIC search and a Business Name extract is Level 1 39 Bay Street Double Bay NSW 2028.
6. By email sent at 4:40 pm on 1 February 2022, Mr Mitchell informed Ms Fu that his firm had been instructed to act on behalf of Bioaction and sought information as to the date of service of the statutory demand.
7. A number of things occurred on 3 February 2022, the last day of the statutory period.
8. First, after sending an email to Mr Mitchell at 2:47 pm confirming that the originating documents were served on 13 January 2022, Ms Fu turned her computer off and left the office. She did not access her email from any device until she returned to the office the next day. Ms Fu is the sole lawyer employed by CFC Lawyers and the only person with a password to log into her computer to obtain access to emails sent to her email address or the CFC general email address.
9. Secondly, at 3:11 pm on 3 February 2022, Bioaction submitted the originating documents to the Court’s electronic portal for filing.
10. Thirdly, at 4:07 pm, Mr Mitchell sent an unsealed copy of the originating documents to Ms Fu by email addressed to her CFC email address and copied to the CFC general email address. I note that Bioaction does not contend that service of the originating documents was effected by email delivery of the unsealed documents.
11. Fourthly, at 4:35pm, Mr Mitchell received an email from the Court advising that the originating documents lodged had been accepted and processed and were available for download.
12. Fifthly, at 4:48 pm, Mr Mitchell sent an email attaching a letter and sealed PDF copies of the originating documents to Ms Fu’s CFC email address and copied to the CFC general email address (the **Mitchell email**). As a matter of inference, I find that the PDF attachments to the Mitchell email were capable of being opened in legible form from the time they were delivered to the server connected to Ms Fu’s CFC email address and the CFC general email address. I draw this inference based on the fact that Ms Fu was able to open the Mitchell email (including the PDF attachments) on the next occasion when she accessed her email mailbox. I note that it is by this email (attaching sealed copies of the originating documents) that Bioaction contends that service for the purpose of s 459G was effected.
13. Finally, I infer that the Mitchell email was capable of being retrieved from the mailbox associated with Ms Fu’s CFC email address and the CFC general email address within approximately eleven seconds of the email being sent by Mr Mitchell. I draw this inference based on the evidence of Blare Peter Sutton, an expert in the field of information technology, who provided a report in the proceedings at the request of Bioaction and who was
cross-examined by counsel for Mr Ogborne. Mr Sutton was not challenged in
cross-examination as to his opinion that the Mitchell email was capable of being retrieved within eleven seconds of being sent by Mr Mitchell. The issue explored in the cross-examination of Mr Sutton was not when the Mitchell email was received but rather the form in which the attachments to the Mitchell email, being the originating documents, were in prior to being opened. Counsel for Mr Ogborne established the following facts in his cross-examination of Mr Sutton. First, that the originating documents that were sent as email attachments were in portable document format (**PDF**). Second, PDF is generally comprised of elements which include American Standard Code for Information Interchange (**ASCII**) and binary content or code. Third, a PDF is an electronic data file created for the purpose, *inter alia*, of enabling electronic transmission of the document. Fourth, when a PDF document is sent by email from one server to another it remains in electronic form. Fifth, in order to open a PDF in legible form, from a human perspective, it is necessary to open it with a computer application for example, Adobe Acrobat Reader. In this way a PDF is something that records information from which images and/or writing may be produced with the aid of another thing. Sixth, depending on the form of access one has to an email server it may be possible to display, read or access the content of a PDF in legible form without downloading it (and the email to which it is attached from the server).
14. On the following day, at 11:59 am on 4 February 2022, Ms Fu emailed confirming receipt of Mr Mitchell’s emails of 4:07 pm and 4:48 pm respectively but informed Mr Mitchell that she did not have instructions to accept service of the originating documents by email. Further, that as the originating documents were not received at her offices within the statutory period, Mr Ogborne would act on the basis that Bioaction had not made a valid application to set aside the statutory demand in accordance with s 459G of the Corporations Act.
15. Later on 4 February 2022, Mr Mitchell delivered copies of the originating documents to Ms Fu.
16. At 4:13 pm that afternoon, Ms Fu first sent an email to Mr Ogborne attaching copies of the originating documents. Until that time, Mr Ogborne had not received copies of the originating documents nor had the originating documents in any way come to his attention.
17. It is against this background that the separate question falls to be determined.

# RELEVANT LAW

1. In order to decide the separate question it is necessary to interpret and apply federal legislation and uniform national legislation. I note that in the absence of binding authority to the contrary, judges at first instance and intermediate appeal courts should follow a decision of an intermediate appellate court in another Australian jurisdiction on the interpretation of federal legislation and uniform national legislation unless convinced the decision is plainly wrong: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at 151 – 152 [135] (the Court) and the authorities cited at [33.330] of Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd edition, 2020) (**Herzfeld and Prince**).
2. In the present context, there is no binding authority on the applicable legislation in its current form. Indeed, the parties were unable to identify any authority which had applied the legislation in its current form, noting that significant amendments were introduced which took effect in December 2020.

## Statutory demand

1. Section 459E is situated in Chapter 5 (External Administration), Part 5.4, Division 2 (Statutory demand) of the Corporations Act and provides for the service on a company of a demand for payment of a debt.
2. The statutory demand must comply with the requirements of s 459E(2), which include that the demand must be in the prescribed form: s 459E(2)(e) of the Corporations Act; regs 1.0.03, 1.0.04, 1.0.05 and Schedule 1 of the ***Corporations Regulations*** *2001* (Cth). The prescribed form is form 509H: see Volume 5, Schedule 2 of the Corporations Regulations.
3. Paragraph 6 of Form 509H is as follows:

The address of the creditor for service of copies of any application and affidavit is (insert the address for service of the documents in the State or Territory in which the demand is served on the company, being, if solicitors are acting for the creditor, the address of the solicitors).

## Application to set aside a statutory demand

1. Section 459G is situated in Chapter 5 (External Administration), Part 5.4, Division 3 (Application to set aside a statutory demand) of the Corporations Act.
2. Section 459G provides:

**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.

### Service

1. The burden of proof lies with the party upon which the demands were served to establish that service was effected in a manner satisfying s 459G: *Jin Xie* at 283 [6] (Barrett J).
2. The 21 day time limit for service imposed by s 459G(2) and (3) is strict and immutable: *David Grant* at 278 (Gummow J); *Jin Xie* at 283 [5] (Barrett J).
3. Section 459G does not define what constitutes service. The term is not defined in s 9 of the Corporations Act.
4. The meaning of service in the context of s 459G was considered by Young J (as his Honour then was) in ***Howship Holdings*** *Pty Ltd v Leslie* [1996] NSWSC 314; 41 NSWLR 542 at 544 as follows:

Section 459G itself does not deal with what is service. The ordinary meaning of “service” is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains the document are usually immaterial…

1. 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).
2. 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: ***Newsnet*** *Pty Ltd v Patching* [2011] NSWSC 690; 81 NSWLR 104at 112 – 113 [30] (White J, as his Honour then was); ***Seventh Cameo Nominees*** *Ltd v Holdway Pty Ltd* (Supreme Court of Victoria 24 April 1998, unreported, Chernov J); ***SGR Pastoral*** *Pty Ltd v Christensen* [2019] QSC 229; 2 QR 334at [23] (Bowskill J, as her Honour, the Chief Justice then was). In *SGR Pastoral*, Bowskill J rejected a submission advanced by the creditor that personal service of the s 459G application on the creditors’ nominated agent is required, describing the submission (at [19]) as both counter-intuitive and inconsistent with authority, including *Newsnet*,***Rochester Communications*** *Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648; 15 ACLC 570 and *In the matter of* ***World Square Realty*** *Pty Ltd* [2013] NSWSC 307.
3. Notwithstanding that the s 459G application is an originating process of the Court to which formal rules of service otherwise apply, personal service is not required:***Players*** *Pty Ltd v Interior Projects Pty Ltd* (1996) 133 FLR 265; 14 ACLC 918 at 922 - 923 (Lander J); *SGR Pastoral* at [18] (Bowskill J). As the statutory demand must nominate a place at which any s 459G application may be served on the creditor, the service requirement of the section is met when the documents are served to that address: *Players* at 921 (Lander J); approved in *Rochester Communications* at 589 (Beaumont J) and 599 - 600 (Moore J);*SGR Pastoral* at [17], [21] (Bowskill J); *Newsnet* at 111 – 113 [23] - [30] (White J, as his Honour then was); *World Square Realty* at [16] (Brereton J, as his Honour then was); ***The Site Foreman*** *Pty Ltd v Brand* [2011] NSWSC 451; 81 NSWLR 96 at 102 [26] (Barrett J, as his Honour then was).

## Electronic communication

1. In 2020, the Corporations Act was amended by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) with effect from 16 December 2020 (the **2020 Reforms**). The 2020 Reforms expanded the scope for electronic communication of documents required or permitted to be given under Chapter 5 (External Administration). The reforms are facultative not mandatory.
2. Prior to the 2020 Reforms, there was a divergence in the authorities as to whether service by electronic means was effective for the purpose of s 459G of the Corporations Act in circumstances where an address for electronic service of the creditor had not been nominated in the statutory demand or otherwise consented to. The divergence in the authorities is illustrated by reference to two principle cases.
3. First, as illustrative of the line of authority that service by electronic means is not permissible where an electronic address is not specified in the statutory demand itself, is the decision of Jagot J in ***Opensoft*** *Australia Pty Ltd v Miller Street Pty Ltd* [2011] FCA 653, subsequently applied in ***Sheraz*** *Pty Ltd v Rumsley* [2019] FCA 493; 37 ACLC 19-018 at 578 [29] – [30] (Banks-Smith J). It appears that the decisions in *Players* at 921 (Lander J); *Rochester Communications* at 589 (Beaumont J) and 599 - 600 (Moore J) and *Seventh Cameo Nominees* at 3 – 5 (Chernov J) were not drawn to the Court’s attention in *Opensoft* or *Sheraz*.
4. In *Opensoft*, the address for service nominated in the statutory demand was TW Agency, at a street address in Sydney. Relevantly, on the last day of the statutory period, sealed copies of the documents, as filed, were served by email on first, Mr Daoud, the principal of TW Agency, and second, on a director of the creditor. Mr Daoud received and read the email on that day. The director of the creditor did not. It was held that service in this way was ineffective, because the statutory demand specified the address for service as the physical address of TW Agency, and not any electronic address for service, and “it is not the place of TW Agency or Mr Daoud as its principal to accept service by means other than those specified in the statutory demand itself”: *Opensoft* at [54].
5. The second line of authority is best illustrated by the decision of White J in *Newsnet*, with which Bowskill J agreed in *SGR Pastoral* at [27]. After referring to the decision in *Opensoft*, White J said (emphasis added):

38 Unless there is something to distinguish service by email from service by facsimile, I do not think that [Opensoft] can be reconciled with that of Chernov J in Seventh Cameo Nominees. **If the electronic copy of the application and supporting affidavit reached the office of TW Agency at the address specified in the statutory demand in a form that was complete and legible, in my view the copy would have been served at that address. I do not see why it would matter that the document was in electronic, and not paper, form. It would still be a copy of the application and supporting affidavit**. **There may be issues as to whether and when an email actually reaches the place for service**. Austin J discussed this question in *Austar Finance v Campbell* [[2007] NSWSC 1493; (2007) 215 FLR 464] (at [48]). It is not necessary to express a view as to whether an email which is opened from a computer at the address for service without being printed is received at the address at which the computer is located. That will depend on the evidence. It may be that the user accesses the document stored remotely through his or her computer. **If, however, the email were printed at the address for service, or if it were received in electronic form at the address for service, in my view a copy of the application and supporting affidavit would have been served at that address**.

39 Jagot J [in Opensoft] accepted the submission for the defendant that it was not the place of TW Agency to accept service by means other than those specified in the statutory demand itself. No doubt that is right, in the sense that service would have to be effected at the address for service, namely the specified place of business of TW Agency. But the creditor is required by the form of statutory demand to specify a place for service. In my view **a creditor is not entitled to limit the ways in which an application to set aside the statutory demand and supporting affidavit can be delivered to the address for service.** **Provided the documents reach the relevant place in complete and legible form, service is effective**.

…

41 I do not understand why it would be necessary for the purpose of effective service under s 459G(3)(b) that the document be actually received by the person to be served. **Service at the address for service, that is, service to a place, is effective if made within time, whether or not the document is received by a person.** For this reason I do not accept that service by facsimile can only be effective as informal service and only becomes effective when the document is brought to the attention of a responsible officer (compare *Woodgate v Garard Pty Ltd* [[2010] NSWSC 508; (2010) 78 ACSR 468] (at [44](v))). Nor do I accept that service at an address for service specified in the statutory demand can only be made in accordance with one of the ways prescribed by s 109X of the *Corporations Act* (Cth) (in the case of service on a company), r 10.21 of the *Uniform Civil Procedure Rules* or s 28A of the *Acts Interpretation Act* (Cth). Those provisions are facultative, not exclusive.

This line of authority has been applied in subsequent decisions including *Greenmint Pty Ltd v O’Keeffe* [2015] VSC 326 at [16] – [18] (Gardiner AsJ); *Chen & Anor v Kornucopia Pty Ltd and Ors* [2019] VSC 756; 349 FLR 35 at 64 [94] (Sifris J); *Caason Investments Pty Ltd v International Litigation Partners No 3 Ltd (NO 1662762)* [2021] VSC 487 at [35] (Gardiner AsJ).

1. In determining whether electronic communication is a permissible means of service of s 459G originating documents, it is necessary to consider the amendments effected by the 2020 Reforms. As noted above, the 2020 Reforms introduced facilitative provisions which expanded the scope for electronic communication of documents required or permitted to be given under Chapter 5 (External Administration). The evidentiary issues identified in *Newsne*t in respect of determining the time when, and the place where, an email is received are also addressed by deeming provisions introduced by those amendments.
2. Section 600G of the Corporations Act concerns the electronic communication of documents. Section 600G is situated in Chapter 5, Part 5.9, Division 3 (Provisions applying to various kinds of external administration). Section 600G was amended as part of the 2020 Reforms.
3. Section 600G relevantly provides:

**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. 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 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. Section 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. The new definition mirrors the definition of “document” in the Acts Interpretation Act: s 2B of the Acts Interpretation Act. It extends to information that is not in paper or material form.
2. 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.
3. A related aspect of the 2020 Reforms was the introduction of ss 105A and 105B of the CorporationsAct which establish statutory presumptions in respect of the time when and the place where electronic communication are sent and received. These provisions are situated in Chapter 1, Division 8 - Miscellaneous Interpretation Rules of the Corporations Act.
4. 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.

1. Section 105B relevantly provides:

**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 591 [100] (Gray J).
2. The parties were not able to identify any cases in which ss 600G, 105A and 105B have been considered.

# THE PARTIES’ SUBMISSIONS

## Bioaction’s submissions

1. Bioaction accepts that it has the onus of establishing service in accordance with s 459G(2) and (3) so as to attract jurisdiction.
2. Bioaction contends that the originating documents were served by midnight on 3 February 2022, being the last day of the 21 day statutory period, and that, as a result, the separate question should be answered “yes”. The consequence is that it has validly invoked the jurisdiction of the Court pursuant to s 459G of the Corporations Act.
3. Bioaction submits that:
4. In order to enliven the jurisdiction conferred by s 459G the originating documents must be served within the 21 day statutory period on the person who served the demand;
5. A statutory demand must be in the form prescribed, that is Form 509H, which at paragraph 6 requires the creditor to nominate an address for service of the originating documents under s 459G. Where solicitors are acting for the creditor, the creditor must nominate the address of the solicitors;
6. Notwithstanding that the s 459G application is an originating process of the Court to which formal rules of service will otherwise apply, personal service is not required;
7. The statutory demand nominated the office address of CFC Lawyers as the place where any s 459G application may be served and the service requirement of s 459G was met when the documents are delivered to that address;
8. In the context of s 459G(3) service of electronic copies by facsimile or email is, at the level of principle, permissible: *Newsnet* at 115 [39]; *SGR Pastoral* at [27];
9. In any event, service by electronic communication is confirmed by the terms of s 600G of the Act, s 459G being a provision within Chapter 5 which is expressly referred to in s 600G (1);
10. Consent of the recipient to delivery by electronic communication is not a pre-requisite to valid service of originating documents under s 459G and cannot be asserted by the defendant so as to restrict the manner in which a plaintiff may comply with the requirements of s 459G(3): see *Newsnet* at 115 [39];
11. Section 600G of the Corporations Act permits the giving of notice by email where the creditor/recipient has first nominated an email address for receipt of such notices. However it does not state that such notice as given without such nomination is ineffective. It is permissive, not restrictive, and includes deeming provisions as to service if met: *Gollant, in the matter of OT Markets Pty Ltd (in liquidation)* [2020] FCA 207 at [33] (Beach J).
12. Delivery by electronic communication pursuant to s 600G is permissible if at the time the electronic communication is used it is reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference and there is a nominated electronic address in relation to the recipient;
13. The Mitchell email was capable of being retrieved, in readable form, from the email mail boxes associated with Ms Fu’s CFC email address and the CFC general email address on the CFC email server (**CFC Server**) within about eleven seconds of 4:48 pm on 3 February 2022 (i.e. the time it was sent). It is open to the Court to infer that the originating documents were sent in a readable form in circumstances where Ms Fu did not raise any difficulties in accessing and opening the attachments to the Mitchell email;
14. The transmission of the Mitchell email resulted in the originating documents being received at the creditor’s address for service nominated in the statutory demand shortly before 5 pm on 3 February 2022;
15. Proof of the time and place of receipt of the Mitchell email is facilitated by application of the statutory presumptions in ss 105A and 105B of the Corporations Actand by s 161 of the Evidence Act;
16. The "effective informal service rule" is irrelevant because formal service has occurred. It follows that the requirement that the documents actually come to the attention of the recipient, which is critical to the effective informal service rule, does not apply.

## Mr Ogborne’s submissions

1. Mr Ogborne contends that that the separate question should be answered “no” because:
2. Personal service of the originating documents is required by reason of the application of the *Federal Court (Corporations) Rules 2000 (Cth)* (**Corporations Rules**) or the Rules;
3. Section 600G of the Corporations Act applies to documents that are required to be *given* under Chapter 5 of the Corporations Act but does not apply to documents that are required to be *served* under s 459G. Mr Ogborne argues that the distinction is deliberate and intended by the legislature to enliven the requirements of service under the applicable laws and rules of the Court;
4. Even if the deeming provision in ss 105A and 105B of the Corporations Act and s 161 of the Evidence Act apply, the originating documents were not *served* by merely being *delivered* to the address nominated in the statutory demand;
5. The meaning of “serve” and “service” in the context of s 459G extend beyond mere delivery and contemplate a result that enables the document to be read and dealt with;
6. A document sent as a PDF data file attached to an email message is not served at a nominated address for the purposes of s 459G until it has been converted from (illegible) electronic data by being accessed on the receiver’s computer with the use of a PDF reader application (like Acrobat Reader) and rendered into a complete and legible version of the document on a screen of a computer at the nominated address or printed as a hardcopy into a complete and legible copy of the document on a printer at the nominated address;
7. On the facts of this case, accepting that the Mitchell email was likely received by the CFC Server approximately eleven seconds after it was sent, because Ms Fu’s computer was off at that time, it was not in fact delivered to Ms Fu’s computer (or to her office) before 4 February 2022, being after the end of the statutory period;
8. Even if, which is not accepted, ss 105A and 105B of the Corporations Act or s 161 of the Evidence Act apply to establish that the Mitchell email was received at the office of CFC Lawyers within the statutory timeframe, it is still the case that the mere receipt of that electronic communication did not constitute service as the documents were not received in legible form. Accordingly, if these provisions apply, all that would be established is that the (illegible) electronic communication had been received, not that copies of the originating documents had been received in complete and legible form;
9. The originating documents were not converted into a legible form at the address nominated in the statutory demand until Ms Fu accessed her email and opened the Mitchell email on 4 February 2022;
10. Bioaction therefore failed to serve the application and supporting affidavit at the address nominated in the statutory demand within the statutory period required by s 459G of the Corporations Act; and
11. Mr Ogborne agreed that the effective informal service rule has no application to the present case.
12. Mr Ogborne submits that if the separate question is answered “no” the proceedings should be dismissed with costs.

# CONSIDERATION

1. There is no real dispute about the facts relevant to the separate question.
2. The authorities referred to by the parties are of assistance only in so far as they illuminate the statutory regime in its present iteration. The starting, and finishing, point must be the text of the relevant provisions in the context of the legislative scheme. The relevant principles which inform the task of statutory construction require consideration of the text, context and purpose: see, in particular, s 15AA of the Acts Interpretation Act; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at 519 [39] (the Court); *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at 389 – 39 [25] – [26] (French CJ and Hayne J); *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ)*; Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; 282 FCR 1 at 5 [4] (Allsop CJ).
3. Section 459G(3) of the Corporations Act requires that within 21 days a copy of the application and supporting affidavit must be filed with the Court and served on the person who served the demand on the company. Here, the person who served the statutory demand on Bioaction was Mr Ogborne, the creditor.
4. The statutory demand specified that Mr Ogborne’s address for service of copies of any application and affidavit was CFC Lawyers, Level 1, Oro House, 39 Bay Street, Double Bay NSW 2028. That the address of his lawyers was provided as Mr Ogborne’s address for service was required by s 459E(2)(e) of the Corporations Act and Form 509H which expressly stipulates that if solicitors are acting for the creditor, the address of the solicitors must be given as the address of the creditor for service.
5. The requirement in s 459G(3)(b) to serve the documents “on the person who served the demand” is met where the documents are served at the address for service specified in the statutory demand: see [39] - [40] above. In *World Square Realty* at [16], Brereton J said:

…The only purpose for providing for an address for service is to identify a place at which a s 459G demand could be served. In *Zipvac Australia Pty Limited v James* [2011] NSWSC 392, Barrett J stated, albeit obiter, that the service of the originating process and supporting affidavit at the address specified for service on the statutory demand must be regarded as good service, even if it was the address of the creditor's solicitor and not the creditor itself [see also *Newsnet Pty Limited v Patching* [2011] NSWSC 690; *The Site Foreman Pty Limited v Brand* [2011] NSWSC 451; *Woodgate v Garard Pty Limited* [2010] NSWSC 508].

1. Personal service of the s 459G originating documents on the creditor or the creditor’s nominated agent (as nominated in paragraph 6 of the statutory demand) is not required for the purposes of s 459G(2) and (3): see [40] above.
2. Mr Ogborne maintained a submission that personal service is required by reason of the application of the Corporation Rules and the Rules because the s 459G application is an originating process of the Court. Mr Ogborne’s written submission was as follows (footnotes omitted):

17. By rule 2.2 of the [Corporations Rules], an application permitted to be made by the Act must be made to the Federal Court by filing an originating process. The [Rules] apply to a proceeding commenced under the Act to the extent that they are relevant and not inconsistent with the Corporations Rules. Rule 2.7(1) of the Corporations Rules requires the plaintiff to serve a copy of the originating process and any supporting affidavit on each defendant. Rule 8.06 of the [Rules] requires an applicant to serve a copy of the originating application personally on each respondent. Rule 10.01 of the [Rules] provides that a document that is to be served personally on an individual must be served by leaving the document with that individual. The Court Rules make two limited provisions for an originating application to be served on an individual other than personally. Rule 10.22 provides that a lawyer may accept service if the lawyer has such authority and endorses a note on a copy of the document that the lawyer accepts service of the document for the respondent. Rule 10.28 provides that, if a respondent has agreed that an originating application may be served in a way or place mentioned in the agreement, then the application may be served in accordance with the agreement. There is no suggestion that either of these rules apply. As a result, the Application was not served in accordance with the Corporations Rules or the [Rules].

18. The rules as to service of documents that are not required to be served personally are contained in Division 10.3 of the [Rules]. Rule 10.31 provides that a document that is not required to be served personally may be served electronically if the person has filed a notice authorising service by electronic communication or may be served at a party’s lawyer’s email address if the party is represented by a lawyer who has filed a notice of address for service that conforms with rule 11.01. As at 3 February 2022, prior to any service of the originating application, neither the Defendant nor his solicitor had filed any notice of address for service. Hence, there can be no suggestion that the [Rules] authorised service of the Application by email.

1. The difficulty with this submission is that it is contrary to binding authority, namely *Rochester Communications* at 589 (Beaumont J) and 599 - 600 (Moore J) which approved Lander J’s conclusion in *Players* at 921 that notwithstanding that the s 459G application is an originating process of the Court, the court rules do not apply and therefore personal service on a creditor who is a natural person is not required. Where, as here, the statutory demand nominated a place at which any s 459G application may be served, the requirements of the section were met when the documents are delivered to and received at that address: *Players* at 921 (Lander J); *Howship Holdings* at 544 - 545 (Young J); *SGR Pastoral* at [17], [21] (Bowskill J); *Newsnet* at 111 – 113 [23]-[30] (White J); *World Square Realty* at [16] - [17] (Brereton J); *The Site Foreman* at [26] (Barrett J).
2. In any event, Mr Ogborne appeared to accept that “recent first instance decisions tend to the view that the requirement in s 459G(3)(b) to serve the application and supporting affidavit “on the person who served the demand”” will be met where those documents are served at the address for service specified in the statutory demand. In this context, counsel for Mr Ogborne, focussed on email as the means by which the documents were, to use a neutral word, delivered to the nominated address and submitted:

…Mere receipt of the (illegible) electronic communication at the nominated address does not constitute service of the document at the nominated address. In the case of a document that has been scanned and converted into a PDF data file, which data file has been attached to an email message, the document is not served at a nominated address for the purposes of s 459G merely by the (illegible) electronic communication being received and stored on a remote server or downloaded from the server to a computer at the nominated address. The electronic data sent with the email cannot be read. A document sent as a PDF data file attached to an email message is not served at a nominated address for the purposes of s 459G until it has been converted from (illegible) electronic data by being accessed on the receiver’s computer with the use of a PDF reader application (like Acrobat Reader) and rendered into a complete and legible version of the document on a screen of a computer at the nominated address or printed as a hardcopy into a complete and legible copy of the document on a printer at the nominated address. In general terms, a PDF data file will be converted and rendered into a complete and legible version of the document on the screen of a computer on being opened from an email application.

1. Where personal service is not required, the means by which documents are served at a nominated address is immaterial, provided they arrive there: *SGR Pastoral* at [23] and the authorities cited therein.
2. With respect to service by email, after a comprehensive survey of the authorities, Bowskill J in *SGR Pastoral* concluded (footnotes omitted):

[37] In the case of service by email, in my view, what must be shown is that the electronic copy of the application and supporting affidavit was received, in a complete and legible form, at the address for service, within the prescribed time. That is, that the email was sent to an email address that belongs to the nominated agent for service …; that the email attaching the documents to be served actually arrived at the email address; and that the email and attached documents were capable of being opened and read (even if they were not opened and read until later).

[38] In this regard, I agree with and adopt White J’s approach in *Newsnet*. To the extent that Austin J in *Austar Finance* is to be understood as articulating a requirement that service by email is not effective until the email is actually opened and the documents are read, I disagree and prefer the approach of White J, which is consistent with the general principles as to service, including as discussed by McMurdo J in *Conveyor & General Engineering Pty Ltd v Basetec Services*, that actual service does not require the recipient to read the document. However, as McMurdo J said, “it does require something in the nature of a receipt of the document”.

[39] This is also consistent with the well-established principle, in the case of service by non-electronic means, that if hard copies of the documents are left at the nominated place for service on a particular day, even if that was by sliding an envelope containing the documents under a closed door (and even if that was after office hours), that would be effective service on the day of delivery.

[40] I can see no reason why the position should be any different, in the case of electronic copies of the documents received either by facsimile transmission or email.

1. I agree. In so doing, I am conscious that a different view was taken in the decisions of single judges of this Court referred to in [43] above but in circumstances where it does not appear that the Court was taken to the decision of the Full Court in *Rochester Communications.* In the circumstances of the present case, I do not think it is necessary to resolve the difference between the *Newsnet* and *Opensoft* lines of authority as to whether, as a matter of principle, electronic communication is permissible as a means of serving at the address nominated by the creditor for service for the purpose of s 459G in circumstances where an address for electronic communication is not expressly nominated. In my view, the same conclusion as reached by Bowskill J in *SGR Pastoral*, is now dictated by the amendments to relevant provisions made by the 2020 Reforms.
2. First, s 600G of the Corporations Act applies to any document that is required or permitted to be given to a person (the recipient) under Chapter 5 of the Corporations Act. Such documents may be given to the recipient by means of an electronic communication.
3. Section 459G is situated in Chapter 5. The word “document” is defined in s 9 of the Corporations Act. The PDF copies of the originating application and supporting affidavit are both documents. They are required or permitted to be served in the statutory period specified in s 459G in order to attract the jurisdiction of the Court. Prima facie, a document served under s 459G is a document that is required or permitted to be given to a person, namely the creditor, under Chapter 5 of the Corporations Act.
4. Mr Ogborne advances a submission that s 600G does not apply to s 459G because even though s 459G is in Chapter 5, to require a document to be *given* is different to requiring a document to be *served* under Chapter 5. I do not accept that submission for the following reasons.
5. Starting with the text, the Corporations Act does not define the word “serve”. In the Macquarie Dictionary (online at 25 April 2022) ‘serve’ (def 28) is defined to include:

a. to make legal delivery of (a process or writ).

b. to present (a person) with a writ.

1. For the purpose of s 459G, service in the sense of legal delivery requires that the documents arrive at the nominated address within the statutory period: see [39] - [40], and [72] above. The plaintiff is required or permitted to give the documents to the creditor at the nominated address by reason of ss 459E(2)(d) and 459G(2) and (3), provisions which are found in Chapter 5 of the Corporations Act. I see no reason to exclude from the use of the more general word “given” the more particular meaning of the word “served” when what is comprehended for service in s 459G is the giving or delivery of a document at a designated address. On a plain reading of the text, the originating documents under s 459G are documents that satisfy the description of being required or permitted to be given to a person under Chapter 5.
2. Secondly, it is instructive to have regard to the legislative history, cognisant of the limitations on the use of such history: see Herzfeld and Prince at [8.240].
3. The immediate previous iteration of s 600G, which was in force from 23 June 2020 to 15 December 2020, expressly stipulated that the section applied only to a “notice, or other document” given or sent under specified provisions within Chapter 5 of the Corporations Act, of which s 459G was not one:

**600G Electronic methods of giving or sending certain notices etc.**

(1) This section applies if a person (the notifier) is authorised or required to give or send a notice, or other document, to a person (the recipient) under any of the following provisions:

(aa) paragraph 436DA(3)(a);

(a) paragraph 436E(3)(a);

(f) subsection 450A(3);

(g) paragraph 450B(a);

(h) paragraph 450C(b);

(i) paragraph 450D(b);

(l) paragraph 497(1)(a);

(m) paragraph 506A(2)(b);

(p) paragraph 568A(1)(b);

(s) subsection 579J(1);

(t) subsection 579J(2);

(u) subsection 579K(1);

(v) subsection 579K(2);

(w) subsection 579K(3);

(x) subsection 579K(4);

(y) a provision of Schedule 2 or the Insolvency Practice Rules.

1. Further, in the previous version of s 600G, the giving or sending by electronic method was only available where the recipient consented. “Document” was not defined in this version of the Corporations Act. “Notice” was defined in s 9 to include a circular or an advertisement.
2. The 2020 Reforms introduced a broad definition of document in s 9, which as noted above, was consistent with that in s 2B of the Acts Interpretation Act extending to information that is not in paper or material form.
3. The changes effected by the 2020 Reforms extended the operation of s 600G to any document (as broadly defined) that is required or permitted to be given to a person (the recipient) under Chapter 5 of the Corporations Act. Bioaction submits, and I accept, that the scope of the section has been expanded to capture an application made under s 459G.
4. That the intent of the 2020 Reforms was to enable electronic communication for the purpose of Chapter 5 *inter alia* is evident from the Explanatory Memorandum:

**Summary of new law**

5.2 Schedule 4 allows electronic communication to be used to give a document under the external administration provisions in Chapter 5 of the Corporations Act, the Insolvency Practice Schedule, Chapter 5 of the Corporations Regulations, the Insolvency Practice Rules or any other instrument made under Chapter 5.

…

1. Another expansive aspect of the 2020 Reforms was to remove the requirement for consent of the recipient as a condition of electronic communication under s 600G. In lieu thereof, two conditions were introduced which must be satisfied before a document can be given electronically. First, there must be a nominated electronic address. “Nominated electronic address” is defined to include in the situation where the addressee has not nominated an electronic address, an electronic address that the originator believes on reasonable grounds to be a current electronic address for the addressee for receiving electronic communications: s 9 of the Corporations Act. Secondly, a document can only be provided electronically if it is reasonable to expect, at the time the electronic communication is used, that the document would be readily accessible so as to be useable for subsequent reference and there is a nominated electronic address in relation to the recipient. The Explanatory Memorandum said:

5.16 The person providing the document does not need to satisfy the other conditions in section 9 of the [*Electronic Transactions Act 1999* (Cth)]. Those conditions require the recipient to consent to the use of electronic means and comply with any requirements of the Commonwealth agency that is receiving the information. These conditions were not included as they would have imposed high regulatory costs on industry and been significantly more restrictive than the relief provided by the Determination.

1. Thirdly, Mr Ogborne’s submission proceeds upon the premise that the requirement in s 459(3)(b) that an application must be “served” (as opposed to “given”) is deliberate and plainly intended to enliven the requirements of service under applicable laws and rules of court. I reject that submission on the basis that it is contrary to authority, particularly that of the majority in *Rochester Communications*: see [40] above. Electronic communication under s 600G is facilitative not mandatory. Other means of service including those under the rules of court and facilitative provisions in other laws, such as s109X of the Corporations Act and s 28A of the Acts Interpretation Act, are available.
2. Finally, Mr Ogborne submits that no authority is given to support Bioaction’s contention that s 600G should be construed to apply to service of an application under s 459G. That is so, but s 600G only came into effect in mid-December 2020, and neither party has located any decision in which s 600G as currently in force has been considered.
3. If I am wrong as to the application of s 600G to a document served under s 459G of the Corporations Act, then based on the authorities summarised at [39]-[40] above, I would have found that service by electronic communication was permissible.
4. Further, I would have been satisfied that even if s 600G did not apply to service under s 459G, the Mitchell email was nevertheless an electronic communication within the meaning of that term as defined in s 9 made for the purpose of effecting service under s 459G and accordingly, ss 105A and 105B apply to facilitate proof of when and where that email was received. In this regard I note that ss 105A and 105B are of general application and are situated in Chapter 1, Division 8 - Miscellaneous Interpretation Rules of the Corporations Act. I do not accept the submission that was advanced by Mr Ogborne that an email communication by which service is effected under s 459G is not an email communication that is “sent” and relevantly, “received”.
5. Next, I turn to whether service was validly effected within time and at the nominated place by means of the Mitchell email. That is primarily a question of fact but the forensic exercise in establishing the time and place where the Mitchell email attaching PDF copies of the originating documents was received is assisted by the operation of the deeming provisions introduced by ss 105A and 105B of the Corporations Act. Sections 105A and 105B apply in relation to an electronic communication unless otherwise agreed between the originator and the addressee of the communication.
6. The rebuttable presumption in s 161 of the Evidence Act may similarly be available to establish the destination where and time at which the Mitchell email was received.
7. It is convenient to again extract the relevant operative deeming provisions that Bioaction relies on in respect of the Mitchell email, s 105A(4)-(6) provide:

(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.

1. The relevant nominated electronic address is that of Ms Fu’s CFC email address and/or the CFC general email address. That is so, even though those addresses had not been nominated as an electronic address at which electronic communications could be received. That is because both are electronic addresses that Mr Mitchell acting for Bioaction believed on reasonable grounds to be a current electronic address for CFC Lawyers for receiving electronic communications. The reasonable grounds for Mr Mitchell’s belief in that regard is established by the following evidence. Mr Ogborne has been represented from the beginning of the dispute by Ms Fu of CFC Lawyers. Bioaction is represented in the present proceedings by Mr Mitchell of MSD Law and was represented by another solicitor at an earlier point in time. The legal representatives of Bioaction and Mr Ogborne communicated with each other by email including in relation to the statutory demand in the period from 21 December 2021 to 3 February 2022. In those email communications, the legal representatives of Bioaction sent emails to CFC Lawyers using the Ms Fu’s CFC email address and the CFC general email address. Ms Fu sent emails to Bioaction’s legal representatives from her CFC email address. In those email communications, Ms Fu sent letters as attachments, using the firm’s stationery which included the CFC general email address.
2. The Mitchell email was capable of being retrieved from the CFC Server connected to Ms Fu’s CFC email address and the CFC general email address shortly after it was sent (that is, within the statutory period). That the nominated email addresses were supported by an external server is irrelevant: s 105A(6).The Mitchell email and the PDF copies of the originating documents were capable of being opened in legible and complete form from this time.
3. 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. What matters is that they could have been had the addressee sought to do so: see Bowskill J in *SGR Pastoral* extracted above at [72]. The position is made clear by s 105A which does not impose any requirement for the electronic communication to have come to the notice of the recipient, focussing rather on the time it becomes capable of being retrieved. Section 105A is closely based on s 14A of the ***Electronic Transactions Act*** *1999* (Cth). However, an exception is that unlike s 14A of the Electronic Transactions Act, s 105A does not require the addressee to have become aware of the electronic communication.
4. The place where the Mitchell email was received by the CFC general mail address and Ms Fu’s CFC email address respectively is deemed by s 105B(3)(b) and (c)(i) respectively to be the address of CFC Lawyers, which is the same address as is nominated in the statutory demand for service on Mr Ogborne: see [9] and [14] above.
5. Having regard to the deeming of the time and place of receipt of the Mitchell email by operation of ss 105A and 105B, it is not necessary to determine whether the rebuttable presumptions that arise under s 161 of the Evidence Act apply in the circumstances of this case are displaced by Ms Fu’s unchallenged evidence that she did not see, access or open the email at the relevant address until after the end of the statutory period.

# CONCLUSION

1. For the reasons given above, I find that the application for an order setting aside the statutory demand and the affidavit supporting were filed and served within the 21 day statutory period specified in s 459G of the Corporations Act. Accordingly, the separate question is answered “yes”.

|  |
| --- |
| I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 26 April 2022