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## Setting Aside Statutory Demands: No Second Chances

### Check What You Serve!

**T-D Joint Venture Pty Ltd v CTC Marine Projects Limited<sup>1</sup>**

*By Steven Thomas, Howard Zelling Chambers*

Practitioners who act in relation to statutory demands for debt under Part 5.4 of the Corporations Act would be well aware of the strict requirement to file and serve any application to set aside or vary the demand within 21 days of service of the demand. Sub-sections 459G (2) & (3) make clear that application is made in accordance with Section 459G only if within those 21 days the application and a copy of the supporting affidavit are served on the person who served the demand.

If no valid application is made to set aside the demand, then the company on whom it is served is presumed, for the purposes of subsequent winding up proceedings, to be insolvent.

The High Court has made clear in *David Grant & Co Pty Ltd v Westpac Banking Corporation*<sup>2</sup> that the time limit set out in Section 459G is strict and no extension can be granted, even by the operation of the saving provision of Section 1322.

### The facts

T-D Joint Venture Pty Ltd was served with a statutory demand by CTC. It applied within 21 days to set it aside. The application and what was understood to be a copy of the supporting affidavit were served on CTC also within the 21 day limit. It came to light subsequently that the service copy of the affidavit was missing one page. CTC applied for dismissal of the application to set aside the demand.

### The decision of Master Sanderson

The Master noted that in *David Grant*, Gummow J, who delivered the judgment of the High Court, made it plain<sup>3</sup> that strict compliance with section 459G is a jurisdictional requirement and thus the Court has no discretion in relation to those requirements. The Act requires that an "exact" copy of the affidavit be served with an "exact" copy of the application. If that is not done, then there is no jurisdiction to hear the application.

<sup>1</sup> [2009] WASC 385, WA Supreme Court, Master Sanderson

<sup>2</sup> (1995) 184 CLR 265

<sup>3</sup> (1995) 184 CLR 265 at 277



The Master considered the competing judicial opinion on this issue, and in particular the case of *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd*<sup>4</sup>, a decision of the Full Court of the Supreme Court of Western Australia, where the failure to serve various pages of the exhibits to the affidavit, which were known to both parties, was not considered fatal to the application.

Ultimately, the Master was of the view, in strictly following *Robowash Pty Ltd v Robowash Finance Pty Ltd*<sup>5</sup>, that the failure to serve page 4 of the affidavit was fatal to the application as the jurisdiction to entertain the application was not enlivened.

The application to set aside the demand was dismissed. In doing so, the Master acknowledged the extraordinary injustice suffered by T-D Joint Venture as a result of the Court's decision.

### Implications for practitioners

This case highlights the importance to practitioners of checking the results of even the most basic of administrative tasks such as photocopying court documents for service.

This is particularly so in circumstances where there is no margin for error as in under the regime in Section 459G. Practitioners are advised to not only ensure that documents "as served" are the same as the document "as filed", but that service of such documents takes place strictly within the 21 day period. A properly drafted statutory demand will include a reference to an address for service of any application to set the demand aside.

It may be inconvenient, but it is strongly advisable to physically serve the application and affidavit (after they have been checked for consistency with the document as filed) personally at the address given. Do not rely on the post. Do not rely on couriers.

If it is possible that you will arrive there after hours, then ensure that you have a roll of strong gaffer tape with you so that the envelope containing the documents can be affixed to the front door of the address for service. Take a photo of the fact of that affixing with your mobile phone.

All of this will minimise the risk of a claim against you for failure to properly serve the application which may result in your client losing the opportunity to contest a statutory demand with all the implications of that.

**For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.**

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4 [2001] WASCA 299; (2002) 20 ACLC 352  
5 [2000] WASCA 409; (2000) 158 FLR 338