Details, details, details – they matter

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Checking the details are correct is vitally important for all practitioners. Not doing could land your client, and you in hot water.

This month we take a look at another recent case from the South Australian Supreme Court which contains important Risk Management lessons. The case – *Monsere Pty Ltd v RDM Nominees Pty Ltd [2019] SASC 126* – shows the critical importance of taking care to ensure that all details are correct and the potentially serious consequences of not doing so.

The defendant (*RDM*) sent a Statutory Demand to the plaintiff (*Monsere*) on 19 March 2019 in relation to a debt RDM claimed was owed by Monsere. Monsere asserted that there was a genuine dispute and an off-setting claim in relation to the debt claimed by RDM. Monsere instructed its solicitors to make an application pursuant to s.459G of the *Corporations Act 2001 (Cth)* for the Statutory Demand to be set aside. Such an application must be made within 21 days of the service of the Statutory Demand, otherwise the company to which the Demand is directed will be deemed to be insolvent.

The Corporations Rules 2003 (SA) provide that an application to set aside a Statutory Demand "*must be in accordance with Form 2*". Form 2 is used for a number of different types of applicants and contains a number of parts. One part (Part B) provided for the details of the return date of the application to be filled in and another part (Part C) was a section to be completed if the originating process was seeking an order that the company be wound up in insolvency on the ground that the company had failed to comply with a Statutory Demand.

The Court noted that it was common for the wording under Part C to be deleted if it was not applicable. Part C – which contained spaces for the insertion of the details of the service of the Statutory Demand (i.e. something which had already occurred) – was not applicable in this instance because the relief sought was to set aside a Statutory Demand and not wind-up a company.

Upon filing of a Form 2 the Registrar must fix a time, date and place for hearing and endorse those details on the document at Part B. What occurred in this case is that on 5 April 2019 (four days before the 21 day period expired) the solicitor for Monsere attended at the Registry himself to file the set-aside application. The Registry Staff filled in the date, time and place of the hearing at Part C of the Form 2, not at Part B. The solicitor did not notice that the Registry Staff had written the return date ("30 April 2019 at 2:15pm") in the wrong part of the document and did not check that the document was correctly filled out. After attending at the Registry Monsere's solicitor served the documents himself on RDM's solicitor.

RDM then disputed that an application to set aside the Statutory Demand had been filed because the application did not comply with Form 2 and s.459G by reason of the fact that it did not bear the return date at Part B. RDM said that because the matter was not one to which Part C applied, the date written in Part C could not be read as the return date for the hearing, and that strict compliance was required.

Monsere submitted that in the circumstances of this matter, where Part C of the Form was not engaged, and where the date at Part C was a future date, it should have been obvious to RDM that the Registry had made a mistake and that the date in Part C was actually the return date. Monsere submitted that there was therefore substantial and sufficient compliance with the requirements of the Act.

Judge Bochner examined a number of the authorities on s.459G, although she acknowledged that none of them specifically related to a situation where the date was on the wrong section of the Form. It was clear from previous cases that it was fatal to the validity of the application if no return date at all appeared on the document, whether or not it was fault of the applicant – see for example *Bache Business and Printing Services Pty Ltd v SA Hub Productions [2009] SASC 369* and *Cooloola Dairys Pty Ltd v National Foods Milk Ltd [2004] 211 ALR 293*.

Judge Bochner concluded that:

> *"It was not for the defendant [RDM] to attempt to ascertain the true meaning of Part C; the time and date for the hearing must be evident on the face of the document, without requiring the defendant to make any assumptions. In my view, this case cannot be distinguished from Cooloola Dairies, despite the factual differences both cases required the defendant to guess, make an assumption or take some other step to ensure that it was aware of the hearing date for the application".*

Monsere's application to set aside the Statutory Demand was therefore dismissed thereby exposing Monsere to being wound up. It is understood that Monsere may be appealing this decision. Even if an appeal is lodged and is successful it is abundantly clear that it would have been better for Monsere and its solicitor had the proper details of the return date been checked and the document corrected before service on RDM.

Much of what practitioners do depends greatly on getting the details correct. This case shows that not doing so can cause significant problems. In cases where the solicitor is not primarily responsible for the error the "*buck*" will often stop with the solicitor. **Even when things are busy (perhaps especially when things are busy) stop, take a moment to check and double-check that you have the details correct.**