TBK Beef Pty Ltd v Ark Mangoes Pty Ltd [2012] NTSC 44

PARTIES:	TBK BEEF PTY LTD
	v
	ARK MANGOES PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CORPORATIONS ACT
FILE NO:	No. 30 of 2012 (21214903)
DELIVERED:	19 JUNE 2012
HEARING DATES:	18 MAY 2012
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Corporations – Application to set aside a statutory demand – Requirements for a valid application – Application made by initiating process pursuant to Supreme Court Rules and not Corporations Law Rules – Whether application validly made – Requirements for service of an application to set aside a statutory demand – Whether application validly served – Whether the defect in use of the incorrect process is able to be dispensed with – Requirement of substantial compliance pursuant to rule 1.7 of the Corporations Law Rules – Whether there has been substantial compliance.

Supreme Court Rules r 2.02, 6.001, 45.04(1), 48.02, 48.04
Corporations Law Rules r 1.3, 1.7, 2.2, 2.4A
Corporations Act s 109X, 459C(2), 459E, 459G, 467A
Acts Interpretation Act (Cth) s 28A
Service and Execution of Process Act (Cth) s 16

David Grant & Co. Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265.

TQM Design & Construct Pty Ltd v KCL Developments & Anor (2011) 29 ACLC 11-003.
Benonyx Pty Ltd v Fetrona Pty Ltd [1999] NSWSC 1181.
Robowash Pty Ltd v Robowash Finance Pty Ltd [2000] WASCA 409.
LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd [2004] QSC 134.
Cooloola Dairies Pty Ltd v National Foods Milk Ltd & Ors [2004] QSC 308.
Chelring Pty Ltd v Coombs [2000] WASC 60.
Universal Trade Exchange Pty Ltd v Westpac Banking Corporation [2002] WASC 36.
Bache Business & Printing Services Pty Ltd v SA Hub Productions Pty Ltd [2009] SASC 369.
MacKay Computer Services Pty Ltd v Wi-Man Pty Ltd [2008] QSC 221.
Switz Pty Ltd v Glowbind Pty Ltd [2000] NSWSC 37.
Callite Pty Ltd v Adams & Ors [2001] NSWSC 52.
Bell Construction Services Pty Ltd v Form-Kwip Building Services Pty Ltd [2001] NSWSC 73.
Financial Solutions Australasia Pty Ltd v Predella Pty Ltd (2002) 167 FLR 106.
Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd (1999) 158 FLR 256.
Quitstar Pty Ltd v Cooline Pacific Pty Ltd (2002) 168 FLR 213.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Young
Defendant:	Mr Roper

Solicitors:

Plaintiff:	Michael Whelan & Associates
Defendant:	Jude Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

TBK Beef Pty Ltd v Ark Mangoes Pty Ltd [2012] NTSC 44
No. 30 of 2012 (21214903)

BETWEEN:

TBK Beef Pty Ltd
Plaintiff

AND:

Ark Mangoes Pty Ltd
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 19 June 2012)

[1] This is an application pursuant to section 459G of the *Corporations Act* ('the Act') to set aside a statutory demand. The Defendant has also filed a Summons seeking orders dismissing the Plaintiff's application.

[2] The Defendant asserts that the Plaintiff's application has not been validly made and that therefore the Court has no jurisdiction to hear the application.

[3] The basis of the jurisdiction issue is that the proceedings to set aside the Statutory Demand were commenced by Originating Motion pursuant to the *Supreme Court Rules* ('the SCR') in lieu of an Originating Process pursuant

to the *Corporations Law Rules*[1] ('the CLR'). The Defendant argues that the application does not satisfy the requirements of section 459G of the Act by reason of that procedural error. This is based on the use of the word *'must'* in rules 2.2(1) and 2.2(3) of the CLR which stipulate the requirement to use an Originating Process. The Defendant also argues that the application has not been validly made by reason of defective service.

[4] Section 459G of the Act provides as follows:-

> **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 21 days after the demand is so served.
>
> (3) An application is made in accordance with this section only if, within those 21 days:
>
> (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.

[5] As the argument involves a technical defect, the Court's general power to excuse such defects becomes relevant. In the context of applications pursuant to the Act, that power is contained in section 467A of the Act and rule 1.7 of the CLR, both of which are now set out:-

> **467A Effect of defect or irregularity on application under Part 5.4 or 5.4A**

[1] The *Corporation Law Rules* are harmonised and are in identical terms throughout all Australian jurisdictions.

An application under Part 5.4 or 5.4A must not be dismissed merely because of one or more of the following:

(a) in any case—a defect or irregularity in connection with the application;

(b) in the case of an application for a company to be wound up in insolvency—a defect in a statutory demand;

unless the Court is satisfied that substantial injustice has been caused that cannot otherwise be remedied (for example, by an adjournment or an order for costs).

1.7 Substantial compliance with forms

(1) It is sufficient compliance with these Rules in relation to a document that is required to be in accordance with a form in Schedule 1 if the document is substantially in accordance with the form required or has only such variations as the nature of the case requires.

(2) Omitted.

[6] Also relevant are rules 1.3 and 2.2 of the CLR which provide as follows:-

1.3 Application of these Rules and other rules of the Court

(1) Omitted.

(2) The rules in Chapter 1 of the *Supreme Court Rules* apply, to the extent that they are relevant and not inconsistent with these Rules:

(a) to a proceeding in the Court under the Corporations Act, or the ASIC Act, that is commenced on or after the commencement of these Rules; and

(b) to a proceeding in the Court under the Cross-Border Insolvency Act that is commenced on or after the commencement of Division 15A.

(3) Omitted.

2.2 Originating process and interlocutory process – Forms 2 and 3

(1) Unless these Rules otherwise provide, a person must make an application required or permitted by the Corporations Act to be made to the Court:

(a) if the application is not made in a proceeding already commenced in the Court – by filing an originating process; and

(b) in any other case, and whether interlocutory relief or final relief is claimed – by filing an interlocutory process.

(2) Omitted.

(3) An originating process must:

(a) be in accordance with Form 2; and

(b) state:

(i) each section of the Corporations Act or the ASIC Act, or each regulation of the Corporations Regulations, under which the proceeding is brought; and

(ii) the relief sought.

(4) Omitted.

[7] There are differences between an Originating Motion pursuant to the SCR and an Originating Process pursuant to the CLR. Relevantly, an Originating Motion does not contain the provision that exists in the Originating Process for insertion of details of the hearing date including time, place and before whom the application will be heard.

[8] The jurisdictional issue derives from the well known case of *David Grant & Co. Pty Ltd v Westpac Banking Corporation*[2] (‘*David Grant*’) where Gummow J said:-

> “Section 467A provides that an application under Pt 5.4 “must not be dismissed” merely because of “a defect or irregularity in connection with the application”, unless the court is satisfied that substantial injustice has been caused and this cannot otherwise be remedied. However s 467A cannot assist the applicants. If an application for an order setting aside a statutory demand has not been made within 21 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.” [3]

[9] Put succinctly, the Court’s power to excuse defects or irregularities can only arise once a valid application has been made.

[10] The issue in *David Grant* centred on whether the 21 day period referred to in section 459G could be extended. The High Court there held that the 21 day period was an essential precondition to the making of a valid application. Other cases confirm that there can be other preconditions.[4]

[11] I was referred to a number of authorities where the existence of certain types of defects led to a finding that the application was not a valid one for the purposes of section 459G of the Act. Those defects were:-

1. Omission of the court seal on the service copy of the application;

[2] (1995) 184 CLR 265
[3] (1995) 184 CLR 265 at 279
[4] See *TQM Design & Construct Pty Ltd v KCL Developments & Anor* (2011) 29 ACLC 11-003

2. Omission of details of a return date on the service copy of the application;

3. Omission of four pages from the annexures in the service copy of an affidavit.

[12] In *Benonyx Pty Ltd v Fetrona Pty Ltd*[5] (‘*Benonyx*’) Santow J dealt with the issue as to whether the service of a copy of an application to set aside a statutory demand which omitted the return date fatally contravened section 459G of the Act by that fact alone. His Honour considered the omission of the return date to be an important factor because that omission meant that the party served did not have proper notice, within the 21 day period specified in section 459G, of when attendance was required to answer the application. It was not considered sufficient to give notice of the hearing date after the 21 day period had elapsed. His Honour said:-

> “….how can the party who is served have received proper notice of the proceedings for which attendance is required within the twenty-one days when that party is not told of the important fact of the return date for the application to set aside the statutory demand till after the twenty-one days.
>
> Had the copy been served in advance of the filing of the identical application but with a notation of the return date written thereon in some fashion, assuming that that information could be obtained in advance of filing, I might have concluded that the Plaintiff had done what it needed to do to conform to s 459G of the *Corporations Law* – on the basis that there is no magic in the order of the events which have to take place within the twenty-one days, though the argument is still open that the Defendant needs to know for certain it has been filed and not simply rely on an anticipated return date that turns out

[5] [1999] NSWSC 1181

> to be correct. But regrettably not even that occurred. That is not altered by the fact that the Defendant was appraised of the return date later, since that was some six days after the twenty-one days and that is too late."[6]

[13] As I read that, the requirement is to give proper notice, within the 21 day period, of the return date of the application. That does not appear simply to turn on the provision in the Originating Process under the CLR for the insertion of a return date. In the current proceedings and in the context of the use of the wrong process, the requirement of proper notice would have been achieved had the Plaintiff also filed and served a Summons on Originating Motion pursuant to rule 45.04(1) of the SCR ('Summons on Originating Motion') which is discussed in more detail below.

[14] *Robowash Pty Ltd v Robowash Finance Pty Ltd*[7] ('*Robowash*') was the case where the service copy of the supporting affidavit omitted four pages of annexures which were contained in the original of that affidavit filed at court. It was held that as a result, the strict requirements of section 459G(3) of the Act were not complied with and that rendered the application to set aside the statutory demand invalid. In consequence, and consistent with *David Grant,* the defect was incapable of being cured.

[15] In *LJAW Enterprises Pty Ltd v RJK Enterprises Pty Ltd*[8] ('*LJAW Enterprises*'), there were multiple procedural concerns but relevantly to the current proceedings, an unsealed copy of the application which did not bear

[6] [1999] NSWSC 1181 at paras 6-7.
[7] [2000] WASCA 409
[8] [2004] QSC 134

a return date or a court file number was served within the 21 day period. A proper copy was subsequently served. The court followed *Benonyx*. The omission of the return date for the application was considered to be an omission of a matter of substance. The court confirmed that notice of the return date had to be given within the 21 day period and the omission of a return date rendered the application non-compliant with the requirements of the Act. It was observed that the circumstances of the case rendered it almost impossible to serve a full copy within the 21 day period. Nonetheless the court was of the view that hardship was irrelevant bearing in mind the legislative scheme which is discussed below.

[16] In *Cooloola Dairies Pty Ltd v National Foods Milk Ltd & Ors*[9] the defect consisted of the omission of the application number, the date of hearing and the affixing of the court seal on the copy of the documents served within the 21 day period. A further copy which addressed those faults was served, but outside of the 21 day period. The court considered *Robowash, Benonyx* and *LJAW Enterprises* amongst others and came to a similar conclusion. Specifically the court agreed that the copy of the application required to be served must show that an application has been filed, by containing an action number and the court seal, and also when the respondent is required to attend to answer the application.

[9] [2004] QSC 308

[17] These authorities have been followed in a number of other cases.[10]

[18] I was also referred to *MacKay Computer Services Pty Ltd v Wi-Man Pty Ltd*[11] (‘*MacKay*’). In that case the application was made, similar to the current proceedings, utilising the form of process under the general rules of that jurisdiction as opposed to the process required by the CLR. Again it was argued that the use of the word *‘must’* in rules 2.1 and 2.2 of the CLR meant there was no discretion in the court to permit some other form of process to be used. Consequently, it was argued that the failure to use the CLR process was not simply a defect in form but meant that there was no valid application afoot pursuant to section 459G.

[19] I was provided with a *pro forma* of the actual initiating process used in that case. It is telling to note that, unlike the Originating Motion prescribed by the SCR, that process had provision for the insertion of a return date for the hearing of the application. The issue the court had to consider there was whether the form used failed to meet the requirement made essential by the Act.

[20] In the end the court concluded that the prescriptive words used in the CLR did not mean that a departure from the use of prescribed forms rendered the proceedings a nullity. McMeekin J commented that it would be surprising if a failure to include inconsequential matters rendered an application a nullity

[10] *Chelringe Pty Ltd v Coons* [2000] WASC 60, *Universal Trade Exchange Pty Ltd v Westpac Banking Corporation* [2002] WASC 36, *Bache Business & Printing Services Pty Ltd v SA Hub Productions Pty Ltd* [2009] SASC 369.
[11] [2008] QSC 221.

given the dire consequences of non-compliance with section 459G of the Act. However the court there was considering the issue in the context of an application for costs and it is clear that the court was not referred to, nor did it consider, the authorities referred to in these reasons.

[21] In any case I consider that there is a basis for distinguishing *MacKay*. The actual process used in that case, although not being the form prescribed by the CLR, nonetheless had provision for the specification of the return date for the application. Accordingly despite the use of the wrong process, it contained the return date which was held to be an important matter of substance in *Benonyx* and in *LJAW Enterprises*. The Originating Motion utilised in the current proceedings does not.

[22] Mr Young submitted that there was no prejudice through the use of an Originating Motion as a hearing date was set in the normal course. That is not truly reflective of the position. Absent the filing of a Summons on Originating Motion, a date is not allocated by the Court. In the current case the matter was only listed for hearing due to the issue of the Defendant's Summons. Had the Defendant's Summons not been issued, the first mention of the matter would only have occurred through the initial directions hearing process in rule 48.04 and then only if an order pursuant to rule 48.02(2) was made.

[23] The authorities refer to, and rely on the legislative scheme behind Part 5.4 of the Act. Those authorities highlight that an integral part of the scheme is

the requirement for decisive and quick action and the timely disposition of the matter. They also acknowledge the hardship that can result to a debtor company. Hardship could also result to a creditor by reason of a plaintiff's default. Section 459C(2)(a) provides that the presumption of insolvency flowing from a debtor company's failure to comply with a statutory demand can only be relied upon on an application for the winding of the debtor company if that is done within a period of three months from the failure to comply. That three month period cannot be extended. *TQM Design & Construct Pty Ltd v KCL Developments & Anor*[12] ('*TQM*') acknowledges this concern. To put that into context for the purposes of the current proceedings, given the relatively short period involved, it is conceivable that had Defendant not issued its Summons, the three month period would have elapsed before the matter was determined by the Court.

[24] The legislative scheme was discussed in *TQM* and also in *Switz Pty Ltd v Glowbind Pty Ltd*[13] ('*Switz*'). In the former case, Spigelman CJ said:-

> "The statutory demand regime under the Act constitutes a carefully formulated series of interlocked steps which have substantial consequences and the objects of which require precise compliance for their attainment. On occasions this may give rise to anomalies, or at least an inability on the part of one party to take advantage of the benefits for which the statute provides, as has happened in the present case."[14]

[25] His Honour then cited a comment of Gummow J to similar effect in *David Grant* where he said:-

[12] (2011) 29 ACLC 11-003
[13] [2000] NSWSC 37
[14] (2011) 29 ACLC 11-003 at para 29

> "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."[15]

[26] His Honour then referred to and relied on his observations in *Switz* where he said:-

> "The purpose of the longstanding statutory demand procedure is to minimise the transaction costs which the law imposes on creditors seeking to enforce debts. The threat of winding up is often effective to ensure that a recalcitrant debtor does not seek to exploit the delays and costs that legal disputation may impose on commercial transactions. That threat is rendered ineffective to the degree to which such delays and costs are permitted to intrude into the statutory procedure itself.
>
> The 1992 reforms which introduced the new Pt 5.4 were designed to minimise the delay and attendant legal costs which were a common feature of the battle of tactics in insolvency practice under the pre-existing scheme.
>
> The position may be otherwise if the necessity to make the payment causes an otherwise solvent company to be subjected to the costs and disadvantages of a process of winding up. There is a public interest in avoiding that consequence. On the other hand, if the company is not solvent, because the disputed debt is indeed owing, there is a public interest in commencing the processes of the winding up sooner rather than later. These are offsetting public interests. The legislature has adopted a particular scheme which causes the balance to be drawn in a specific way. The circumstance that commercial injustices may, on some occasions, be caused to the debtor company by the operation of that scheme may be offset by the commercial injustices that the continued operation of an insolvent company may cause to existing and, if permitted, increased or future creditors of such a company."[16]

[15] (1995) 184 CLR 265 at 279
[16] [2000] NSWSC 37 at paras 46, 47 and 50.

[27] Mr Young attempted to distinguish the current case with an argument based on the cases of *Callite Pty Ltd v Adams & Ors*[17] (‘*Callite*’) and *Bell Construction Services Pty Ltd v Form-Kwip Building Services Pty Ltd*.[18] Both cases relevantly dealt with a deficiency in the affidavit in support of an application to set aside a statutory demand. At that time the CLR required the affidavit to annex a current ASIC search of the debtor company and that did not occur. In the latter case, *Robowash* was distinguished on the basis that it dealt with the situation where there was a difference between the affidavit filed and the affidavit served. In the extant proceedings neither the affidavit filed nor the affidavit served contained the search required by the CLR. Santow J considered that sufficient to distinguish *Robowash*. He went on to conclude that the company search was not material to the matters required to be established by the affidavit. His Honour considered that the purpose of the affidavit supporting the application was to satisfy the court that there was a genuine dispute. He observed, obviously correctly, that the company search had no bearing on that issue.

[28] These cases are therefore concerned with the sufficiency of the affidavit in terms of evidence as opposed to procedural matters. Accepting for the moment the suggested distinction of *Robowash* by Santow J in *Callite*, the other authorities can only be reconciled if *Callite* and *Financial Services* are confined to defects in the affidavit.

[17] [2001] NSWSC 52.
[18] [2001] NSWSC 73

[29] Mr Young also relied on *Financial Solutions Australasia Pty Ltd v Predella Pty Ltd*[19] ('*Financial Services*'). That case also concerned the sufficiency of the supporting affidavit and the failure to annex a copy of the company search. In that case, after discussing the distinction between an error which amounts to an irregularity and one going to jurisdiction, Anderson J said:-

> "It is necessary to draw a distinction between the jurisdictional requirement of s 459G(3) and compliance with the procedural rules of this Court. The rules relevantly seek to facilitate the operation inter alia of s 459G(3), but they can never expand or modify its jurisdictional requirement."[20]

[30] Mr Young submitted that as section 459G does not require a return date and only requires a valid application, the use of the process in the current case should be looked at as being merely a procedural defect which can be remedied pursuant to either rule 1.7 of the CLR or section 467A of the Act.

[31] It is true that section 459G of the Act does not stipulate the requirement of a return date but I am not convinced that is determinative. The section does not require the affixing of a seal or the insertion of an action number either but the cases have said that both are essential as indicating that a valid application has been filed. Mr Young's submission does not have regard to the imperatives of the legislative scheme. Essential to that is a timely disposition of any application to set aside a statutory demand. Given the Plaintiff's failure to issue a Summons on Originating Motion there is no

[19] (2002) 167 FLR 106
[20] (2002) 167 FLR 106 at para 41

certain process in place to fix a return date and that runs counter to the imperative of the timely disposition of the Plaintiff's application.

[32] In the end the issue is whether the use of the initiating process in the SCR as opposed to the CLR is a procedural defect only and not a jurisdictional issue. Mr Young argues the former and relies on the return date being set by the Court in the usual way, the absence of a stipulation in section 459G of the Act that a return date to be specified and distinguishing the contrary authorities on the basis that they dealt with the use of the correct CLR form but containing omissions in the content required by that form in the service copy.

[33] My reading of the authorities is that they are to the effect that the omitted information is necessary in its own right and not only because it is specified in the prescribed form. The cases have concluded that a return date is an important matter of substance despite that section 459G of the Act itself does not require that. That interpretation is based on the legislative scheme and because of the need for timely disposition of an application to set aside a statutory demand. The need to give proper notice is an integral part of that. That is clear from *Benonyx* and *LJAW Enterprises*. With that in mind, the use of an incorrect form which does not provide for the insertion of a return date cannot be considered to comply with the essential requirement of giving notice within the 21 day period.

[34] Mr Young's argument is less tenable in the current proceedings in any event due to the Plaintiff's failure to contemporaneously issue a Summons on Originating Motion. I think that Mr Young's submission would have greater force had a Summons on Originating Motion also had been filed and served. That latter document specifies a return date for the hearing of the application and before who the application is to be heard. Rule 45.04(1) of the SCR requires the application to be made by Summons and provides that the relief sought in an Originating Motion can only be given on that Summons. Therefore it was required to have been filed and that is relevant also to the question of the extent of compliance for the purposes of determining whether any available dispensation for non compliance should be given.

[35] For these reasons I am of the view that the Plaintiff has not made a valid application pursuant to section 459G of the Act. Although that renders it unnecessary for me to consider the second part of the challenge to jurisdiction based on service concerns, for completeness I will make some comments concerning that.

[36] The Act requires service of a copy of the application and a supporting affidavit within the 21 day period.[21] The 21 day period cannot be extended per *David Grant* and that applies both in respect of the filing of the application as well as the service of the application.

[21] See section 459G(3)

[37] The Originating Motion was filed on the last available day and service was effected at 6:44pm on the same day by leaving the documents in an office door at the premises at the address for service referred to in the statutory demand.

[38] The complaint of the Defendant is that there is no evidence to establish that the documents served were brought to the attention of the Defendant within the 21 day period based on service apparently being effected after hours. Additionally the Defendant submits that as the Plaintiff has issued an Originating Motion pursuant to the SCR, personal service is required by the SCR.[22]

[39] Mr Roper referred me to the case of *Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd*[23] (‘*Marlan*’). In that case it was correctly pointed out that section 459G is silent as to the mode and place of service upon the creditor. It was noted that reliance could be had upon the modes of service authorised by section 109X of the Act and section 28A of the *Acts Interpretation Act 1901 (Cth)* (‘the AIA’). I note that both allow for service by leaving documents, in the case of the former, at the company’s registered office, and in the case of the latter, at the *“…head office, a registered office, or a principal office...*”. Reference was also made to the mode of service provided for in the form of statutory demand prescribed

[22] See rule 6.02(1)
[23] (1999) 158 FLR 256

pursuant to section 459E(2)(e) of the Act which relates to service of the documents at a nominated address for service.

[40] The Defendant's submission is that notwithstanding the availability of various modes of service as described above, the requirement in the SCR for personal service of the Originating Motion means that wherever service is effected it must be personal. However that ignores the obvious exception of section 109X of the Act. Mr Roper submits service can occur at any of the specified addresses but it must occur personally. He argues this submission is supported by *Marlan* but I do not agree. That case was mostly concerned with interstate service and whether there was also the requirement to comply with section 16 of the *Service and Execution of Process Act (Cth)*. The comments regarding the need for personal service were made in light of that. I do not read that case as meaning that the other recognised modes of service are excluded.

[41] Mr Roper also relied on *Quitstar Pty Ltd v Cooline Pacific Pty Ltd.*[24] There Barrett J, after considering the various service options available as described above said that he did not consider that the specification of an address for service in the statutory demand amounted to the only permitted place of service. He went on to say that even if that were the case then it could not confine the mode of service as distinct from the place of service. His Honour went on the say:-

[24] (2002) 168 FLR 213

> "…it cannot be contemplated that the creditor may, by the paragraph six specification (referring to the address for service specified in the statutory demand), exclude one of the modes of service made generally available by section 28A (referring to the Commonwealth Acts Interpretation Act) being the mode which involves leaving the documents at an address, as distinct from posting them to that address."[25]

[42] In my view that is not inconsistent with valid service being effected by leaving it at the nominated address without the need for personal service.

[43] It was conceded that the address where the application to set aside the statutory demand was left is the Defendant's principal place of business pursuant to the Act. Section 28A(1)(b) of the AIA however refers to a *'principal office'* but that term is not defined in the AIA. That term does not have a corresponding term in the Act and *'principal place of business'* is the closest term in the Act. This was not argued before me save for a passing reference so I have not had the benefit of argument on this issue. However the term must have some meaning. The available evidence is to the effect that the relevant premises are the Defendant's only place of business. All things considered and in the absence of anything to indicate the contrary, it is difficult to conclude other than that a principal office under the AIA at least includes a principal place of business under the Act.

[44] The SCR,[26] as well as the AIA and section 109X of the Act, permit service by *'leaving it at'* various nominated addresses. Therefore Mr Roper's submission that personal service pursuant to the SCR is always required for

[25] (2002) 168 FLR 213 at p 216
[26] Rule 6.001 of the SCR acknowledges that service in accordance with section 109X of the Act is sufficient compliance with the service requirements in the SCR.

an initiating process cannot be correct. If it were correct then the effect of this would be to rule out modes of service available under other legislation which are made available by very clear and specific language and acknowledged to be an effective method of service by the SCR.

[45] Therefore as service was effected at the address for service stipulated in the statutory demand, and as that address was a principal office of the Defendant within the meaning of section 28A(1)(b) of the AIA in any case, service was sufficiently effected.

[46] Given my finding that the Plaintiff has not made a valid application, the issue of whether a dispensation should be given to the Plaintiff to excuse the failure to use the proper initiating process is also rendered academic.[27] Notwithstanding that, I will again make some brief comments about that.

[47] Historically courts have been generous in granting such dispensations. Courts are more concerned with matters of substance than form and have consistently avoided determination of legal rights based on technicalities. I think different considerations must necessarily apply to dispensations in respect of applications to set aside a statutory demand given the legislative scheme. The cases demonstrate that, relying on the imperatives of the legislative scheme, strict compliance with the requirements for a valid application are imposed notwithstanding that hardship may result.

[27] See paras 9 above.

[48] Although the SCR generally provide for relief against the requirement for strict compliance with the SCR[28] that does not apply by reason of the operation of the Act in conjunction with rule 1.3 of the CLR. In turn, rule 1.7(1) of the CLR gives the Court discretion to excuse non-compliance provided there has been substantial compliance.

[49] Relevant to determining the extent of compliance is the extent of the required information that is contained in the process as utilised. Even leaving aside arguments as to whether the requirement to specify a return date is critical *per se* or only because they are specified in the form of Originating Process prescribed by the CLR, the return date is an important detail and its absence is an important factor for the purposes of determining whether there has been substantial compliance.

[50] Relying again on the legislative scheme, the absence of a return date coupled with the failure of the Plaintiff to issue a Summons on Originating Motion bears heavily on the assessment of the extent of compliance.

[51] I am of the view that there has not been substantial compliance for the purposes of rule 1.7 of the CLR. In terms of section 467A of the Act it is self evidently the case that a substantial injustice will occur if relief is given, i.e., the denial to the Defendant of the benefit of the conflicting interest favouring defendants in legislative scheme as discussed by

[28] SCR 2.02

Spigelman CJ in *Switz.*[29] Moreover that injustice is of a type which cannot be cured either by an adjournment, costs or by some other order way given its fundamental nature. For those reasons I would not have granted any dispensations in any event.

[52] The Plaintiff's application is therefore dismissed. I will hear the parties as to costs and any other ancillary orders.

[29] See para 26