IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2015 05750

IN THE MATTER of COMPLETE EQUIPMENT SOLUTIONS PTY LTD (ACN 161 660 260)

COMPLETE EQUIPMENT SOLUTIONS PTY LTD (ACN 161 660 260) — Plaintiff

v

TESAB ENGINEERING LIMITED (A COMPANY REGISTERED IN THE UNITED KINGDOM, COMPANY NO. NI026214) — Defendant

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JUDGE:	RANDALL AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	2 and 16 December 2015
DATE OF JUDGMENT:	18 May 2016
CASE MAY BE CITED AS:	Complete Equipment Solutions Pty Ltd v Tesab Engineering Limited (A Company Registered in the United Kingdom, Company No. NI026214)
MEDIUM NEUTRAL CITATION:	[2016] VSC 253

CORPORATIONS – *Corporations Act 2001* (Cth) – Company not registered in Australia – Statutory demand – s 459G Application – Address for service in Victoria designated in paragraph 6 of statutory demand – Failure to serve at that address – Material transmitted by facsimile and email to solicitors for the creditor in Queensland – *Service and Execution of Process Act 1992* (Cth) – Whether served within 21 day period or at all.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Didone, solicitor	Lake Street Lawyers
For the Defendant	Mr R Zambelli with Mr Adam Khan, solicitor	ClarkeKann Lawyers

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 The plaintiff filed an originating process on 9 November 2015 making application pursuant to s 459G of the *Corporations Act 2001* (Cth) to set aside a statutory demand dated 14 October 2015. The originating process was supported by the affidavit of Darin Compt sworn 6 November 2015 but not filed until 9 November 2015. That affidavit set out with respect to receipt of the statutory demand as follows:

> [4] CES [Complete Equipment Solutions] Received:
>
> 4.1 A Statutory Demand dated 14 October 2015 …
>
> 4.2 Affidavit of Donald David Smyth sworn 14 October 2015 …

2 From the onset I observe that reference to the receipt of a statutory demand without specifying the actual date of receipt is unsatisfactory. Section 459G(3) provides that:

> 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.

3 The 21 day affidavit does not specify the date of receipt. Accordingly, the Court cannot ascertain if its jurisdiction to hear an application under s 459G is agitated. However, in this particular instance the shortcoming in the plaintiff's material was remedied by the affidavit in response affirmed by Adam Saleem Khan on 15 December 2015. Mr Khan provided material which demonstrated that the letter enclosing the statutory demand and accompanying affidavit, each dated 14 October 2015 was delivered to the plaintiff's registered office at 9.16am on 19 October 2015.[1] Accordingly, the last day for compliance with the provisions of s 459G was 9 November 2015.

4 The sole issue in this application is whether or not the s 459G application and the supporting affidavit were served within the time or at all as specified in s 459G.

5 On 16 October 2015 the solicitors acting for the defendant were ClarkeKann Lawyers.

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1 Exhibit ASK-2.

ClarkeKann Lawyers has offices in Brisbane and Sydney. The letter accompanying the statutory demand demonstrates that a letter enclosing the statutory demand and the affidavit supporting the same emanated from the Brisbane office.

6 Paragraph 1 of the statutory demand sets out as follows:

> The Company owes Tesab Engineering Limited (a Company registered in the United Kingdom, Company No. NI026214) … of Unit 9, Gortrush Industrial Estate, Omagh, County Tyrone … Northern Ireland ('Creditor') the amount of $154,000.00, being the amount of the debt described in the Schedule.

7 Paragraph 6 sets out the address for service:

> c/- Oakley Thompson & Co
> Level 17
> 459 Collins Street
> Melbourne, VIC 3000

8 The insertion of Oakley Thompson & Co as the address for service overcomes issues with respect to service upon a foreign company at its registered office and overcomes issues about service interstate.

9 ClarkeKann Lawyers have neither been nominated as the address for service of the s 459G application, nor did that firm or any member or employee thereof offer to accept service of documents on behalf of the defendant.[2]

10 Mr Didone, at 3:44pm Australian Eastern Standard Time ('AEST') in Queensland being 4:44pm Australian Eastern Daylight Time ('AEDT') in Victoria on 9 November 2015, transmitted an email transmission to Adam Khan of ClarkeKann Lawyers. That email transmission set out relevantly:

> Please find attached by way of further service, sealed Form 2 application, SEPA notice, affidavit or Darin Compt in support.[3]

11 The transmission of 9 November 2015 at 3.46pm AEST appears to be part of an email chain as the print page includes an email from Mr Khan to Mr Didone of 9 November 2015 at 9:42am. The subject referred to is:

> RE: Tesab Engineering Pty Ltd and Complete Equipment Solutions …

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2 Paragraph 5 of Khan's affidavit.
3 Exhibit ASK-3 to Khan's affidavit.

12 The letter attached to that email was not submitted. However, I infer that any practitioner dealing with ClarkeKann Lawyers on 9 November 2015 was entitled to consider that ClarkeKann Lawyers were the practitioners retained by the defendant in relation to the dispute.

13 On the same day at 3:46pm AEST (4:46pm AEDT) the plaintiff's practitioner sent a facsimile transmission to ClarkeKann Lawyers which attached the originating process, a SEPA notice and the affidavit of Darin Compt. The facsimile was transmitted purportedly pursuant to rule 6.7 of Ch 1 of the *Supreme Court (General Civil Procedure) Rules 2015*.

14 Apart from telephoning David McGuiness of Oakley Thompson & Co (the address for service) on 1 December 2015, ClarkeKann Lawyers did not respond to the transmissions from the plaintiff's solicitors each dated 9 November 2015.

Questions for consideration

15 Can service of the application to set aside the statutory demand be effected upon an interstate solicitor in circumstances where an address for service has been specified in Victoria? If yes, were the facsimile or email transmissions an acceptable mode of service of the application to set aside the statutory demand?

The plaintiff's position

16 The plaintiff's position is that:

(a) The originating process and affidavit in support were served upon the defendant pursuant to the provisions of the *Service and Execution of Process Act 1992* (Cth) ('SEPA') within the 21 day period as ClarkeKann Lawyers, as the defendant's solicitors in Australia, were a 'responsible officer'.

(b) It must be assumed that the documents provided to ClarkeKann Lawyers were brought to the attention of the (Irish) directors prior to the expiration of the 21 days UK time and that by the failure of Mr Khan to specify if he transmitted the documents prior to the expiration of 21 days (UK time) entitled me to draw a *Jones v Dunkel*[4] inference adverse to the defendant. I decline to draw the inference. The plaintiff has

[4] [1959] HCA 8; (1959) 101 CLR 298.

not adduced any evidence about re-transmission or notification which the defendant might be required to or expected to contradict. Secondly, in the absence of such evidence the onus remains upon the plaintiff to demonstrate jurisdiction.

17 In *Woodgate v Garard Pty Ltd*,[5] Palmer J summarised the principles with respect to the 'effective informal service rule' which was supported by the authority at [44]. I will not set out all the principles save as to what is included at (v) to (vii):

> (v) there is no special exception to the 'effective informal service rule' in the case of service by email or facsimile — the question remains whether that mode of service actually brought the document to the attention of a responsible officer: (authorities omitted).
>
> (vi) where a document, not served in a prescribed mode, comes to the actual attention of the sole director of a company it will be presumed, unless a strong case to the contrary is shown, that director is the responsible officer and that service is good: *Emhill*,[6] at [28]; *Polstar*,[7] at [24].
>
> (vii) a party invoking the effective and formal service rule bears the onus of proving the time at which the document came to the actual attention of a responsible officer of the company and, in the view of the serious consequences which may attend, the Court will not lightly draw inferences or make assumptions as to the time of service: *Howship*,[8] at 547C; ACSR445.

18 In this context 'responsible officer' is a person charged with or authorised to deal with the application on behalf of the creditor. Usually such person is a sole director or a director with appropriate authority. However, there is no reason why the categories of 'responsible officer' cannot be expanded when appropriate. This is not one of those instances. Although it is inescapable that ClarkeKann Lawyers were retained in the dispute, such retainer did not extend to dealing with the statutory demand issues. ClarkeKann Lawyers could not have dealt with the issues raised in the application without instructions from the creditor. It could not have unilaterally defended this application. Further, for the reasons referred to by Newnes M[9] the specification of an address for service other than at the offices of ClarkeKann Lawyers negated the concept that the firm would be a 'responsible officer' for dealing with the issues in the application to set aside the statutory demand.

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5 [2010] NSWSC 508.
6 *Emhill Pty Ltd v Bonsoc Pty Ltd* (2004) 50 ACSR 305;[2004] VSC 322.
7 *Polstar Pty Ltd v Agnew* (2007) 208 FLR 226; (2007) 25 ACLC 293; [2007] NSWSC 114.
8 *Howship Holdings Pty Ltd v Leslie (No. 2)* (1996) 41 NSWLR 542.
9 See *Environmental Forest Farms Management Ltd v Primary Securities Ltd* [2003] WASC 349 (27 November, 12 December 2003) [14]–[16].

19 The analysis by Palmer J was picked up by Gardiner AsJ in the matter of *Greenmint Pty Ltd*.[10] His Honour was referred to *Opensoft Australia Pty Limited v Miller Street Pty Limited*.[11] In *Opensoft*, Jagot J had said at [53]–[55] the following:

> [53] The difficulty with the plaintiff's submissions, as the defendant has pointed out, is that s 459G(3)(b) of the Corporations Act requires a copy of the application and supporting affidavit to be "served on the person who served the demand on the company". The person who served the demand on the plaintiff in this case is the defendant, Miller Street, of which Mr Tayles is the sole director.
>
> [54] As noted above, the statutory demand specified that the address of the creditor for service of copies of any application and affidavit was TW Agency, 251 Elizabeth Street, Sydney, New South Wales 2000. The creditor did not specify any electronic address for service. Furthermore, this is not a case in which Mr Tayles as director of the creditor received himself an email attaching copies of the documents as filed. Indeed, on the evidence available, Mr Tayles has never received copies of the documents as filed. As the defendant submitted, in the context of this statutory scheme, 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. Even if TW Agency were authorised to do so, I do not see how the dealings between Mr Daoud and Mr Price could be seen to constitute any form of acceptance of service by email for the purposes of s 459G(3)(b) of the Corporations Act.
>
> [55] The situation might have been different if Mr Tayles himself had received an email at the address for service specified in the statutory demand, opened the email, and read the attachments – thereby having brought to his actual attention the application and supporting affidavit as filed. However, that is not what occurred. Despite the efforts to which Mr Price went on 11 May 2011, I cannot see how what was done constituted compliance with s 459G(3)(b). I do not consider that anything in the relationship between the Corporations Act and the *Federal Court (Corporations) Rules* can lead to a different conclusion.

20 Gardiner AsJ disagreed with her Honour's view and noted that it seemed at odds with the views expressed by Palmer J in *Woodgate*[12] and Austin J in *Austar Finance Group Pty Ltd v Campbell*,[13] which were both referred to in her Honour's reasons. Gardiner AsJ adopted the approach of Austin J in *Austar* in which it had been demonstrated that documents electronically transmitted (at least the document sent by facsimile transmission) had actually been received in a readable form by the recipient, who in that context, were the solicitors for the creditor at the physical address identified in the address for service in the demand. Gardiner AsJ at [16] went on to say:

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10 *Greenmint Pty Ltd v Mark O'Keeffe* [2015] VSC 326, 14.
11 [2011] FCA 653.
12 [2010] NSWSC 508.
13 (2007) 215 FLR 464.

> Or, adopting the formulation of Palmer J in *Woodgate*, Greenmint has proved to the Court's satisfaction that the documents actually came to the attention of Mr O'Keeffe's solicitors who were expressly authorised by Mr O'Keeffe to "deal directly and responsibly" with the document, or documents of that nature by reason of those solicitors being identified as being the address for service and the demand.

21 Gardiner AsJ also relied upon *Seventh Cameo Nominees Pty Ltd v Holdway Pty Ltd.*[14] In *Cameo*, Chernov J said:

> In my opinion, for the reasons given below, there has been proper service of the relevant documents on the respondent. Here, the statutory demand which is in the prescribed form was issued in accordance with s 459E. It provides, as I have said earlier, that the address of the creditor for service was to be the address of the solicitors. I agree with Lander J in *Players Pty Ltd v Interior Projects* (1996) 20 ACSR 189, that the combination of s 459E, the prescribed form of statutory demand under it, and s 459G shows that the legislation contemplates that the application under s 459G(3) may be served on the creditor at the address shown on the statutory demand. A like conclusion was reached by Young J in *Houseship Holdings Pty Ltd* …
>
> In my view, it is sufficient for the purposes of s 459G(3) if copies of the application and affidavit are served at the relevant address, that being the address nominated by the giver of the statutory notice. Thus, service may be effected if copies of the relevant documents are left at the nominated address. In a sense, how they come to be left there is irrelevant (see Young J in *Houseship Holdings* …) for instance, the copy documents may be left by someone attending at the address in question and leaving them there. If that had occurred in this case, then in my view, proper service would have been effected of the relevant documents. The same object is achieved if the copies arrive at the address as a result of being sent by way of a facsimile transmission. What is required by s 459G(3) is that the respondent should receive copies of the relevant documents at the address nominated by it. Once that has occurred, the requirement of s 459G(3) as to service of the relevant documents is satisfied. I agree with Lander J that the saving provisions of ss 109X and 220 of the Corporations Law do not mean that service of the application must be in accordance with the Supreme Court Rules.
>
> …
>
> It is not the object of the legislation and rules governing service to allow a respondent who has the relevant application in his or her hands within a prescribed time, to avoid meeting a case brought against him or her, by recourse to technical arguments as to service…

22 There is a preponderance of authority, which obliges the Court to deal with applications on their merits rather than the technicalities. However, this is a case where I am constrained to determine that the application has not been served within the 21 day period. I am constrained to follow authority to that effect.

***Service and Execution of Process Act 1992* (Cth)**

23 The statutory demand nominated a Victorian address for service of copies of any application

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14 [1998] VSC 5305 (24 April 1998).

and an affidavit. The defendant neither has a registered address in Australia, nor does any of its directors reside in Australia. Accordingly, the place for service of the creditor in Australia is specified in the statutory demand. Appropriately, as the debtor (the plaintiff) has its registered office in Victoria, the address for service of the application and supporting affidavit is also specified as in Victoria.

24 Notwithstanding the specification of the Victorian address, the plaintiff chose to serve the documents at the Queensland office of ClarkeKann Lawyers. The provisions of the *SEPA Act* were invoked.

25 The defendant is not a company incorporated or to be taken to be incorporated under the *Corporations Act 2001* (Cth). Accordingly, it does not fall within the definition of 'company' set out in s 3 of the *SEPA Act*.

26 Section 3 of the *SEPA Act* defines 'company' to mean:

> … a company incorporated, or taken to be incorporated, under the *Corporations Act 2001*.

27 Section 3 of the *SEPA Act* defines 'registered body' as having:

> …the same meaning as it has in section 601CX of the *Corporations Act 2001*.

28 Section 601CX sets out a regime for service of documents on a registered body.

29 Most of the authorities deal with service under the *SEPA Act* upon a company which is incorporated pursuant to the *Corporations Act 2001* (Cth). That is not germane to this instance. Section 15 of the *SEPA Act* provides as follows:

> **Initiating process may be served in any part of Australia**
>
> (1) An initiating process issued in a State may be served in another State.
>
> …
>
> (3) Service on a company or a registered body must be effected in accordance with section 9.
>
> (4) Service on any other body corporate must be effected in accordance with section 10.
>
> …

30 There is nothing before me to suggest that the supply leading to the service of the statutory demand was anything but an isolated transaction. Accordingly, there is no requirement that the Irish company be registered in Australia.[15] The provisions of s 10 of *SEPA* govern service.

31 Section 10 is in the following terms:

> **Service on other bodies corporate**
>
> (1) Service of a process, order or document under this Act may be served on a body corporate that is not a company or a registered body in accordance with this section.
>
> (2) If a law of the State in which service is to be effected provides that service may be effected on the body corporate at a particular place, service may be effected by:
>
> (a) leaving the process, order or document at that place; or
>
> (b) sending the process, order or document to that place by post.
>
> (3) If a law of the State in which service is to be effected does not provide that service may be effected on the body corporate at a particular place, service may be effected by:
>
> (a) leaving the process, order or document at the head office, a registered office or the principal place of business of the body corporate; or
>
> (b) by sending the process, order or document to that office or that place of business by post.
>
> (4) Without limiting the operation of this section, if the process, order or document is not an initiating process or subpoena, service may be effected at the address for service of the body corporate in the proceedings concerned in accordance with any applicable rules of court.

32 Queensland is the 'state' for the purposes of s 10. The *Queensland Uniform Civil Procedure Rules* (1999) deal with various facets relating to service. Rule 107 provides that any document required to be served personally on a corporation must be served in the way provided for the service of documents under the *Corporations Act 2001* (Cth) or another applicable law. Schedule 1 to the *Queensland Acts Interpretations Act 1954* sets out that corporation includes 'a body politic or corporate'. It follows that s 10 of *SEPA* is invoked in relation to the Irish company which is not registered in Australia. Accordingly, the provisions become somewhat circuitous.

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15 There is a useful analysis of the criteria applicable to determine whether registration is required set out in *Halsbury's Laws of Australia* at [120–2070].

33 Rule 117 also recognises informal service if a copy of the document came into the possession of the person to be served and:

> (b) The Court is satisfied on evidence before it that the document came into the persons possession on or before a particular date;

34 I cannot be satisfied that the Irish creditor obtained or was even notified of the proceeding before the expiration of the 21 day period. Accordingly, rule 117 does not have any application.

35 The Rules also provide for acceptance of service (r 115), service upon an agent (r 118) and service under a contract (r 119). None of those provisions are applicable to this proceeding.

36 Rule 115 in relation to service by a solicitor requires that such a solicitor makes a notation on a copy of the document to the effect that the solicitor accepts service for the party. That has not occurred here.

37 Rule 118 permits service on a principal living outside Queensland if such principal had entered into a contract in Queensland through an agent living or carrying on business in Queensland. That service must be effected with leave of the Court. In any event, the substratum allowing such service has not been made out and leave has not been obtained.

38 Rule 119 permits service upon a person or at a place in Queensland or elsewhere by agreement. Again, this has no application to this proceeding as the only place, even if an agreement could be construed, was not the place at which the documents were served [the address for service specified in the statutory demand].

39 Unlike s 9 of the *SEPA Act,* which contains an express provision that s 109X(1) & (2) and s 601CX does not apply to a process, order or document which may be served, s 10 of the *SEPA Act,* is silent. Accordingly, it is arguable that in addition to what is set out in s 10 of the *SEPA Act*, service could also have been effected upon the defendant by delivering a copy of the material to a director of the defendant. That was not done in any event.

40 The plaintiff was left with the choices of serving the company in Ireland or serving at the address nominated in the statutory demand. It did neither.

41 Theoretically that is the end of the matter. However, for completeness I refer to the cases set out hereafter.

42 In *Energy Conservation Systems Pty Ltd v Downer EDI Engineering Electrical Pty Ltd*,[16] Barrett J was dealing with an application under s 459G. The statutory demand was served at the plaintiff's registered office in Victoria. The statutory demand stated in its paragraph 6 is an address of the defendant for service of any s 459G application and affidavit. The address given was an address in Melbourne. The plaintiff as in this application did not serve the s 459G application at the addressed specified in Melbourne. It said it faxed them and later sent them by post to a Brisbane address. The defendant was a 'company' incorporated under the *Corporations Act 2001* (Cth).

43 At [5] Barrett J said:

> It is not disputed by the defendant that that address was one at which it could be reached, in that it is the address of solicitors who act for the defendant. However, those solicitors had no instructions to accept service and, importantly, their office was not the registered office of the defendant under the *Corporations Act*.

44 Barrett J considered the provisions of s 15 and s 9 of the *SEPA Act*. Putting aside the discussion with respect to s 15 and s 9, I note that Barrett J also referred to *Elan Copra Trading Pty Ltd v JK International Pty Ltd*,[17] ('Elan Copra') which adopted a similar analysis to Byrne J in *Re Marlan Financial Services Pty Ltd; Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd*,[18] where Byrne J concluded at paragraph [24]:

> [S]ervice interstate of an application made in accordance with s 459G must comply with the requirements of the Service and Execution of Process Act including its notice requirements. If it does not, it is ineffective. …

45 The Full Court in *Elan Copra* also considered whether there could be an agreement between the parties as to mode of service different from that prescribed by the *SEPA Act* or whether a party could waive the formalities of the Act.

46 At [29] in *Elan Copra*, White J considered an argument whether the provisions with respect to proof of service in s 11(4) of the *SEPA Act*:

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16 [2008] NSWSC 1139.
17 [2005] SASC 501.
18 [1999] VSC 435.

> …may enlarge the places at which service may be effected so as to include an address for service of the company, whether that place be the registered office of the company or not. Section 11(4) provides:
>
> > Service of a process, order or document under this Act by post on a company, a registered body or any other body corporate is taken to have been proved only if the following are proved:
> >
> > (a) it was sent by pre-paid post to an address for service on the company, registered body or other body corporate under section 9 or 10;
> >
> > (ab) it was addressed to the company, registered body or other body corporate, or, if the address for service is the office of a solicitor, to that solicitor;
> >
> > (b) the day on which it was posted.
>
> The argument is that s 11(4) contemplates that service may be effected on a company at an address for service and, in particular, at the office of a solicitor. I doubt that that argument is sound. In my opinion, s 11(4) is to be construed by reading it distributively, ie, as applying where appropriate to the means of service provided for in ss 9 and 10 for service on companies, registered bodies and body corporates other than companies. As already noted, SEPA has prescribed a larger number of places at which a body corporate which is not a company may be served than it has in the case of either companies or registered bodies. Further, many companies have their registered office at the office of a firm of solicitors. Section 11(4)(ab) provides that that in that case, the document must be addressed to the solicitor, rather than to the company itself. ... However, it is unnecessary to express a final view about s 11(4) as, even if it does permit service on a company at an address for service at a solicitor's office (which is not also its registered office) my opinion is that the appellant is still unable to prove effective service in this case.[19]
>
> [30] There are at least three respects in which the delivery of the application on 29 April 2005 in this case was not effective service in accordance with the requirements of SEPA.
>
> (1) The delivery of documents was to the office of Ebsworth & Ebsworth and not to the registered office of the respondent as required by SEPA s 9;
>
> (2) The delivery was by way of facsimile transmission, whereas ss 9 and 15(3) require service of an initiating process on a company to be effected by –
>
> …

47 In this instance the email transmission and facsimile transmissions were sent to ClarkeKann Lawyers which was not the defendant's registered office. Accordingly, it did not qualify as any address for service as specified in s 10 of the *SEPA Act*.

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19 *Re Marlan Financial Services Pty Ltd; Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd* [1999] VSC 435, 29.

48 In *Elan Copra* White J also considered whether it was open to the parties to agree on a manner of service other than in accordance with the provisions of *SEPA*. White J rejected an argument that an 'offer' by the defendant that service could be effected on its solicitors in Sydney. The offer was said to have been founded in clause 6 of the statutory demand which specified that address for service. The argument was rejected as White J could not determine that there was a concluded agreement in conventional contract terms from those circumstances. The rejection also noted that the provision of the documents at the Sydney office was 'a matter of courtesy' rather than service.

49 White J also considered whether the subsequent statement by Ebsworth & Ebsworth that it had instructions to accept service also constituted a waiver. White J said at [35]:[20]

> … If the time for effective service had expired, any waiver by the respondent would have to be a waiver of its right to defend the s 459G application on the ground that the jurisdiction of the court under s 459G had not been invoked. The availability of a waiver of that kind (absent actual submission to the jurisdiction of the court) is doubtful. It is not open to the parties to waive a statutory condition necessary for the exercise of a court's jurisdiction.

50 In the same way, the defendant's appearance by ClarkeKann Lawyers to argue jurisdiction cannot be treated as a submission to the jurisdiction of the Court and thus regularising service given that the 21 day period is immutable and not open to variation by consent of the parties.

51 *In the matter of 8D Pty Ltd*,[21] Black J recognised that:

> …The principle of informal service, at least so far as statutory demands and applications to set them aside, is of course well established where no question of service interstate arises: *Woodgate v Gerard Pty Ltd* [2010] NSWSC 508; (2010) 78 ACSR 468.[22]

52 Black J canvassed authorities such as *Marlan* and *Elan Copra* and concurred with the observation that both s 9(1) (with respect to a company) and s 15(3) of *SEPA* were mandatory. Section 9 of *SEPA* precluded service other than at the registered office in accordance with the other means specified in s 9.

53 In *Re Marlan Financial Services Pty Ltd; Marlan Financial Services Pty Ltd v New England*

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20 *Re Marlan Financial Services Pty Ltd; Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd* [1999] VSC 435, 29.

21 [2013] NSWSC 1297, 7.

22 Ibid, 7.

Agricultural Traders Pty Ltd,[23] at [30] Byrne J said:

> [30] By the filing of an appearance a defendant submits to the jurisdiction of the court and waives any patent irregularity in its process or in the service of the process: … Moreover, waiver will cure an irregularity in interstate service arising out of a non-compliance with the [SEPA], being a failure to attach the statutory notice to a writ: …
>
> [31] In Highfield Woods Pty Ltd v Bayview Crane Hire Pty Ltd (1996) 19 ACSR 429, the Senior Master of this Court held that the filing of a notice of address for service after the expiry of the 21 day period did not have the effect of overcoming a failure to achieve service in compliance with the [SEPA]. In that case the process was delivered to the address given in cl. 6 of the demand within the 21 day period but it did not comply with s. 16 of the [SEPA]. The Senior Master held that the service was therefore ineffective and that the application before him to set aside the demand was not an application made in accordance with s. 459G. He held that for this reason the jurisdiction of the court was not enlivened by s. 459G and that it could not be enlivened by the waiver implicit in the filing of a notice of address for service.
>
> [32] It was submitted that I am not bound by this decision and that I should decline to follow it. Let me say immediately that this decision which has stood for over three years is that of a very experienced Master in this area of law. I am therefore very reluctant to depart from it, particularly in a matter of procedure.
>
> …
>
> [34] … I think that in a case such as the present, the non-compliance with the [SEPA] notice requirements cannot be treated in this way as a mere irregularity which would render the service voidable. The statute decrees it to be not effective. To my mind, the analysis of s. 459G made by the High Court in David Grant… when applied to the facts of this case, leads inescapably to the conclusion set out in Highfield … and for the reasons given in that case by the Senior Master. Effective service within time is a pre-condition to the jurisdiction of the court under s. 459G. The entry of appearance outside the 21 day period cannot confer jurisdiction retrospectively where none exists.
>
> [35] In any event, under Ch. 1, R. 6.02(2), where a defendant to originating process files an unconditional appearance, the process is taken to have been served personally on the appearing defendant on the date on which the appearance is filed or on such earlier date as may be proved. In this case, of course, the date of the entry of appearance was outside the 21 day period so that the problem of late service is not cured under this rule.

54 As it transpired, ClarkeKann Lawyers did not file a formal appearance. I have treated the appearance on this application without objection as an appearance in the proceeding. Given the observations of Byrne J, such appearance cannot retrospectively confer jurisdiction.

55 In *Environmental Forests Farm Management Ltd v Primary Securities Ltd*,[24] Newnes M

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23 [1999] VSC 435.

24 [2003] WASC 247.

observed:

> [8] It seems clear that the plaintiff had intended to serve both the defendant, at its address for service, and the solicitors, with the application to set aside this statutory demand, but by error served two copies of the application on the defendant's solicitors and none on the defendant at its registered office. …

56 The plaintiff had argued that service had been effected by service on the solicitors. At [14] Newnes M states:

> [14] It is provided in s 459G that an application and affidavit under that section must be served "on the person who served the demand on the company". The "person who served the demand" is not the process server who delivers it or the solicitor who signed it, but it is the creditor … As no method of service is prescribed, any mode of service that is recognised as effective service on a corporation will be sufficient. Where an address for service is specified, service may be effected at that address. Even if service is not effected at the registered office or an address for service, it will normally be sufficient to show actual receipt of the documents by the person to be served, however that is effected: *Howship Holdings* ….
>
> [15] I do not consider that in the present case service on the solicitors was good service on the defendant. The demand was clear in its terms. It specified an address for service of any application and affidavit under s 459G. There was nothing to suggest that the defendant had authorised, or that it led the plaintiff to believe that it had authorised, the solicitors to accept service on the defendant's behalf. The statutory demand was not signed by the solicitors, but by a director on behalf of the defendant. The address for service specified in it was not the address of the solicitors, but was the defendant's address. It is true that the statutory demand was enclosed with a letter from the solicitors to the plaintiff, but nothing in that letter indicated that service other than at the address for service would be sufficient. The specification of the plaintiff's address as the address for service was, in my view, inconsistent with any implied, ostensible or apparent authority of the solicitors to accept service on behalf of the defendant.

57 I am not bound to follow Newnes M decision but I do not depart from the Masters' reasoning in relation to the specification of an address for service negating the concept that service upon the solicitors who posted the demand would be sufficient.

58 In this proceeding I note the following:

(a) The s 459G application was not served upon the defendant;

(b) The s 459G application was not served in accordance with *SEPA*;

(c) The s 459G application was not served at the address specified in clause 6 of the statutory demand;

(d) The specification of an address for service negated the concept that service upon the solicitors would be sufficient service;

(e) I am not satisfied that the concept of informal service is applicable as I am not satisfied (the onus being on the plaintiff) that the material was brought to the defendant's attention within the 21 day period in any event.

59 Accordingly, I have no alternative but to dismiss the proceeding for lack of jurisdiction. However, if a winding up application is to be prosecuted I note that I, and I assume any other Court, would be sympathetic to entertaining an s 459S application if all the other criteria are met.

60 Orders are as follows:

1. The proceeding be dismissed;

2. The plaintiff pay the defendant's costs including reserved costs on a standard basis.