

Effective Service of Bankruptcy Notices on Solicitors

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The recent decision of *Mulherin v Quinn Villages Pty Ltd* [2012] FMCA 1063 (19 October 2012) provides a warning to creditors when serving bankruptcy notices on solicitors of debtors by fax pursuant to regulation 16.01(e) of the *Bankruptcy Regulations 1996* (Cth) ('Regulations').

Who does this impact?

Creditors

What action should be taken?

If service of a bankruptcy notice is sought to be effected pursuant to reg 16.01(1)(e) of the Regulations on the debtor's solicitors because the bankruptcy notice cannot otherwise be given, sent or served on the debtor personally, written confirmation from the debtor's solicitors that they accepted service on behalf of the debtor and have instructions to do so should be obtained prior to service of the bankruptcy notice.

In the absence of such confirmation, service should not be effected by fax pursuant to reg 16.01(e)(i) on the debtor's solicitors. Service may be effected, instead, by email to the debtor's solicitor pursuant to regs 16.01(e)(ii), (a), (b) or (c) if there is a history of the debtor's solicitor acting for the debtor.

Facts

The respondent creditor, Quinn Villages Pty Ltd, obtained judgment against the applicant debtor, Henry Mulherin, in the Supreme Court of Queensland on 21 April 2009 in the sum of \$980,830.28 (inclusive of interest and costs) ('**judgment debt**'). To enforce the judgment debt, the creditor issued a bankruptcy notice against the debtor on 7 August 2009 which was deemed served on 30 June 2010 in accordance with an order for substituted service made on 5 May 2010 ('**first bankruptcy notice**').

The debtor applied unsuccessfully to have the first bankruptcy notice set aside on the following grounds:

- it did not comply with the requirements of section 41(2) of the Bankruptcy Act 1966 (Cth) ('Act') or the form prescribed by reg 4.02 of the Regulations
- the creditor lacked locus standi and does not come within the prescribed requirements of section 41(1) of the Act
- in the alternative, the judgment relied upon by the creditor has been stayed as a consequence of the appointment of a receiver and manager
- in the further alternative, the creditor, having elected to proceed with execution by appointing the receiver and manager, is estopped from pursuing the bankruptcy of the debtor.

Thereafter, the debtor appealed the dismissal of his set aside application which was also unsuccessful. In the meantime, the first bankruptcy notice lapsed.

The creditor issued a new bankruptcy notice on 8 June 2012 ('**second bankruptcy notice**') which it purported to serve on the debtor by fax to the debtor's solicitors, Irish Bentley Lawyers, pursuant to reg 16.01(1)(e)(ii) on 25 July 2012. The debtor's solicitors had acted on the debtor's behalf since about the hearing of the defendant's application to set aside the first bankruptcy notice in August 2010.

On 10 August 2012, the debtor's solicitors informed the creditor's solicitors, as they had previously on 26 June 2012, that, inter alia, service of the second bankruptcy notice had not been effected as they did not hold instructions to accept service.

The debtor subsequently applied to the Court to have the second bankruptcy notice set aside for want of service pursuant to reg 16.01. He also sought to set it aside as a result of an alleged defect in form pursuant to section 41(2) of the Act and reg 4.02 of the Regulations because the address contained in it was not the debtor's last known address.

Main Issue in Case

The Court was required to consider whether service of the second bankruptcy notice upon the

debtor's solicitor by facsimile pursuant to reg 16.01(1)(e) of the Regulations in circumstances where the debtor's solicitor had no instructions to accept service was valid service of the second bankruptcy notice.

Legislation

Reg 16.01(1)(e) of the Regulations permits service of a Bankruptcy Notice (or any other document required or permitted to be served by the Act or Regulations) on a person, unless a contrary intention appears:

- (e) ... by facsimile transmission or another mode of electronic transmission:
 - (i) to a facility maintained by the person for receipt of electronically transmitted documents; or
 - (ii) in such a manner (for example, by electronic mail) that the documents should, in the ordinary course of events, be received by the person.

Section 41(2) of the Act stipulates that a bankruptcy notice must be in accordance with the form prescribed by the Regulations. Reg 4.02(1) of the Regulations prescribes Form 1 as being the correct form and reg 4.02(2) requires the bankruptcy notice to follow Form 1 in respect of its format.

Debtor's submissions

Service

The debtor contended that, as a matter of proper construction of reg 16.01(1)(e), service of the second bankruptcy notice had not been effected on the debtor because regs 16.01(1)(e)(i) and (ii) of the Regulations are expressed separately. That is, the insertion of the word 'or' twice in the provision suggests, arguably, that the first part of the sentence could apply expressly to reg 16.01(1)(e)(i) and the second part of the sentence to reg 16.01(1)(e)(ii). Thus, faxes are dealt with by reg 16.01(1)(e)(i) and emails or other modes of electronic transmissions are dealt with by reg 16.01(1)(e)(ii).

Based on this interpretation, to satisfy reg 16.01(1)(e)(i), the debtor submitted that the fax must be sent to a 'facility' maintained by the debtor for receipt of electronically transmitted documents which, commonly, would be the dedicated fax machine at the receiving end. It was only then that the sending by fax would be brought to the debtor's attention in the ordinary course. In this instance, as the fax had been sent to the debtor's solicitor (and a 'facility' maintained by the debtor's solicitor) rather than the debtor himself, this requirement was not met.

In relation to reg 16.01(1)(e)(ii) which specifically refers to 'electronic mail', the debtor maintained that it contemplates service by email only. Unlike faxes, email may be accessed from any machine or device which is connected to the internet. As such, practically, sending an email is not restricted to a particular facility for the email to be received by the debtor in the ordinary course. Nevertheless, on the available evidence, no email enclosing the bankruptcy notice had been sent to the debtor that would have been received by him in the ordinary course.

Form

The debtor also submitted that the second bankruptcy notice did not comply with the form required by section 41(2) of the Act and reg 4.02 of the Regulations because the address detailed in it was not the last known address of the debtor and so it was defective and should be set aside.

Creditor's submissions

On the contrary, the creditor contended that the Court should adopt a less rigid interpretation of reg 16.01(1)(e) and read the first sentence of reg 16.01(1)(e) together with reg 16.01(1)(e)(i) or (ii) equally as the case requires. That is, in the context of its purported service of the second bankruptcy notice by fax, the second bankruptcy notice could be served by fax in such manner that it should, in the ordinary course of events, be received by the debtor.

Judgment

Service

The Federal Magistrates Court held that a purposeful approach which gives reg 16.01(e) meaning and worth should be adopted and agreed with the debtor's submissions that the application of each part of the first sentence of reg 16.01(e), split by the 'or', expressly applies to regs 16.01(e)(i) and (ii) respectively. Thus, regs 16.01(e)(i) and (ii) should effectively be read as follows:

- (i) sent by facsimile transmission to a facility maintained by the person for receipt of electronically transmitted documents
- (ii) sent by another mode of electronic transmission in such a manner (for example, by electronic mail) that the document should, in the ordinary course of events, be received by the person.

On this basis, the Court declared that service of the second bankruptcy notice by fax on 25 July 2012 on the debtor's solicitors was invalid and had not been effected as required by reg 16(e)(i) because it was sent to a facility maintained by a person other than the debtor.

In addition, whilst the Court found that the creditor had not sent an email to the debtor's solicitor that would have been received by him in the ordinary course, had such an email been sent, the Court indicated that it would have deemed this valid service pursuant to reg 16.01(e)(ii) because of the history of the debtor's solicitor acting for the debtor and the likelihood of it being received by the debtor. The debtor's solicitor was on the record at all times at first instance, on appeal and in the current application. At no time did the debtor's solicitors cease to act or seek to withdraw despite the dismissal of the appeal and the expiration of the first bankruptcy notice.

The Court further commented that, given the history and relationship between the debtor and his solicitors, the bankruptcy notice could validly have been served upon the debtor via his solicitors pursuant to other provisions of reg 16.01 (as opposed to reg 16.01(e)) which do not require personal service but service at a place or address which is the last known address of the debtor or at

which the debtor has an established connection.

In the circumstances, the Court declined to set aside the second bankruptcy notice on the basis that the judgment debt remained outstanding, no act of bankruptcy in accordance with section 40(1)(g) of the Act had been committed and the issue of another bankruptcy notice would result in further cost to the creditors and perhaps, ultimately, to the estate.

Form

The Court declined to set aside the second bankruptcy notice because of the alleged irregularity in form relating to the debtor's address. The Court stated that whilst the form of a bankruptcy notice is prescribed by the Act and Regulations, the information contained therein is not subject to any such prescriptions. Accordingly, whilst a creditor is required to complete the form, the information to be inserted is not prescribed. Hence, the form simply requires the insertion of an address. It does not necessarily and strictly need to be the debtor's last known address.

In the Court's view, the relevance of the debtor's address or last known address is limited to establishing jurisdiction. In the case of the last known address, its relevance is establishing service especially if service is purported to be effected in accordance with reg 16.01. Therefore, the Court did not agree that the form of the second bankruptcy notice was irregular or that the address constituted a defect or irregularity.

The Court adjourned the application for three months.

Conclusion

Given the wording of reg 16.01(e), the Court's interpretation of it and its practical effect is perhaps unsurprising. The implications of the Court's decision is that, whilst a debtor's solicitors could conceivably be the last known contact for a debtor or the only means by which a bankruptcy notice could be brought to the attention of the debtor, the bankruptcy notice cannot be served on a debtor's solicitors by fax pursuant to reg 16.01(e)(i) unless

the solicitors agree or have instructions to accept service. Instead, service can and will need to be effected by other means on the debtor through the debtor's solicitors including post, courier service or email to the debtor's solicitors pursuant to reg 16.01.

In the unlikely event that there are no other means to serve the bankruptcy notice other than by fax to the debtor's solicitors, creditors should apply to the Court for an order for substituted service of the bankruptcy notice on the debtor by fax to the debtor's solicitors.

With respect to the address of the debtor, it is helpful to note that the address to be inserted in a bankruptcy notice need not necessarily be the debtor's last known address. As is all too frequently the case, the last known address of the debtor may no longer be the debtor's current address and investigations may then be required to locate the debtor's new whereabouts. In this situation, it is beneficial not to have to issue a new bankruptcy notice to update the debtor's address, thereby saving time and cost for the creditor.

For more information, please contact:



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