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The Changing World and Service Problems in Bankruptcy.

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Introduction

In an age where financial transactions are conducted worldwide and mobility of citizens throughout the world is common, lawyers seeking to serve Bankruptcy Notices and Creditor's Petitions encounter many problems.

To assist lawyers in overcoming some of the service problems that are arising as a result of this changing world, a number of recent cases are considered that highlight a number of issues, including:

1. Whether a Bankruptcy Notice can be validly served by email on a debtor who is located outside Australia without leave of the Court, and if so, when the debtor will receive it. *American Express Australia Limited v Michaels* [2010] FMCA 103.
2. Validity of service when, unbeknown to the creditor, the debtor is outside Australia when the Bankruptcy Notice is served on the debtor in Australia. *Battenberg v Restom & Ors* (2005) 223 ALR 692; upheld by the Full Federal Court in *Battenberg v Restrom and Ors* (2006) 149 FCR 128 at 133; [2006] FCAFC 20.
3. Whether the failure to obtain the Court's leave can be excused when personal service of the Bankruptcy Notice has been effected outside Australia. *Envee Energy Pty Ltd (In Liquidation) v Stockford* [2007] FMCA 1426.
4. What can be done regarding service of documents when a debtor leaves or remains outside Australia with intent to defeat or delay creditors. When seeking an order for substituted service of a Creditor's Petition, there is no specific bankruptcy provision

¹ School of Law, Queensland University of Technology, Brisbane. This paper is a summary of some issues discussed in an article submitted for publication in a forthcoming edition of the *Insolvency Law Journal*. I would like to thank Associate Professor Colin Anderson, School of Law, QUT, for his comments on earlier drafts of this paper. For the purposes of the Australasian Law Teachers Association Conference 2010, New Zealand legislation and High Court Rules have been identified where appropriate however, the Australian judgments were based solely on Australian legislation and Federal Court of Australia rules.

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or rule dealing with service outside Australia. *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776; [2008] FMCA 7.

While the fact situation of every bankruptcy case will differ, recent decisions may assist lawyers in dealing effectively with bankruptcy matters in these times of transition. Lawyers can facilitate completion of the litigious process within the relevant legislative framework in order to satisfy their responsibility to clients and to the Court by paying attention to this case law.

Service of the Bankruptcy Notice²

The Bankruptcy Notice:

- Must be served within 6 months from the date on which the bankruptcy notice was issued or any further period that the Official Receiver allows.³
- The mode of service is provided by reg. 16.01 of the *Bankruptcy Regulations 1996* (Cth).⁴
- Service is effected in a number of ways including, “in the due course of post or business practice” when “sent by post, or by a courier service, to the person at his or her last-known address”.

Service of the Bankruptcy Notice by Email

American Express Australia Limited v Michaels:⁵

- Validity of service of a Bankruptcy Notice by email.
- Debtor no longer present in Australia.
- Service by email: reg. 16.01(1)(e) of *Bankruptcy Regulations 1996* (Cth).⁶
- Time and place of service was at issue.

a) *Time of Service of the Bankruptcy Notice*

- Regulation 16.01(2)(b) raises the presumption that the emailed bankruptcy notice was received by the debtor at the time “when the document is ... transmitted”.⁷

² Service of a Bankruptcy Notice was outlined by Stephen Mullette in his article “Secret Service”, (2008) 16 *Insolv LJ* 195, 198-99.

³ Reg. 4.02A *Bankruptcy Regulations 1996* (Cth). See also rule 24.9 of the High Court Rules provided in Schedule 2 of the *Judicature Act 1908* (NZ) reprinted as at 24 May 2010 – Bankruptcy Notice must be served within 1 month from the date of issue.

⁴ See also rule 6.1 of the High Court Rules provided in Schedule 2 of the *Judicature Act 1908* (NZ) reprinted as at 24 May 2010.

⁵ [2010] FMCA 103, [15] – [37].

⁶ Clifford J in *Asteron Life Limited v Franck* HC MAS CIV-2009-435-77 (24 April 2009) granted the creditor leave to serve the Bankruptcy Notice outside New Zealand by way of email alone. In *Axe Market Gardens Ltd v Axe & Anor* HC WN CIV-2008-485-002676 (16 March 2009) which was not a bankruptcy case, substituted service had been permitted by way of both email and Facebook. Likewise, the ACT Supreme Court in *MKM Capital Pty Ltd v Corbo & Poyser* (unreported, ACT Supreme Court, Master Harper, 12 December 2008) made an order for substituted service of a default judgment by way of a private message via Facebook.

⁷ *American Express Australia Limited v Michaels* [2010] FMCA 103, [20].

- Time when an email is “transmitted” discussed.⁸
- Service was effected on the day on which the email, that had a copy of the Bankruptcy Notice attached, was sent.⁹
- Section 14 of the *Electronic Transactions Act 1999* (Cth) defines:
 - the time and place of dispatch; and
 - time of receipt of electronic communications.¹⁰
- The same conclusion would be reached¹¹ despite uncertainties with the definition of “information system”¹² and the identification of the relevant “system” which is “designated” and “entered” for the purposes of s 14(3).¹³

Smith FM, found that the “information system” included the email facility used when irretrievably dispatching the document electronically, this satisfying the statutory presumption of service in the ordinary course of post.¹⁴ Therefore, there was no need to establish actual receipt of the email by the debtor.¹⁵

b) Place of Service of the Bankruptcy Notice

- The Bankruptcy Notice must be “served on the debtor in Australia or, by leave of the Court, elsewhere”¹⁶.
- His Honour was reluctant to find that the Bankruptcy Notice was in fact served “elsewhere” than Australia without leave under s 40(1)(g) of the *Bankruptcy Act 1966* (Cth) (“the Act”).¹⁷
- His Honour accepted the submission that s 14(6)(a) of the *Electronic Transactions Act 1999* (Cth) would apply to deem the debtor’s “only place of business” to be one of his places of business in Sydney which has a “closer relationship to the underlying transaction”.¹⁸

His Honour stated that if he were wrong in finding that the bankruptcy notice is deemed to have been served on the debtor in Australia, “then the point would not necessarily give rise to invalidity of the bankruptcy notice or the dismissal of the petition” as this “is able to be cured by applying s.306(1) of the Bankruptcy Act, or by granting leave *nunc pro tunc*”.¹⁹ Accordingly, his Honour found that there had been no defect in relation to service of the bankruptcy notice so valid service of the bankruptcy notice had been established by AMEX.²⁰

⁸ Ibid [21].

⁹ Ibid [25].

¹⁰ Ibid [22] and [26]-[28].

¹¹ Ibid [26].

¹² *Electronic Transactions Act 1999* (Cth), Section 5 defines “information system” as “a system for generating, sending, receiving, storing or otherwise processing electronic communications.

¹³ *American Express Australia Limited v Michaels* [2010] FMCA 103, [27].

¹⁴ Ibid [28].

¹⁵ Ibid [30].

¹⁶ Section 40(1)(g) of *Bankruptcy Act 1966* (Cth). See also s 17(1) *Insolvency Act 2006* (NZ).

¹⁷ *American Express Australia Limited v Michaels* [2010] FMCA 103, [31].

¹⁸ Ibid [34].

¹⁹ Ibid [36]. See also s 418 *Insolvency Act 2006* (NZ).

²⁰ Ibid [37].

The case provides some encouraging support for the use of modern modes of communication in this digital age.

Service of the Bankruptcy Notice When Debtor is Outside Australia

A Bankruptcy Notice is not an initiating process so personal service is not required.

Battenberg v Restom & Ors:²¹

- Order for substituted service of a Bankruptcy Notice.
- The Bankruptcy Notice was served in compliance with the order but the debtor, unbeknown to the creditor, was absent from Australia on the date of service.
- Service of the Bankruptcy Notice was valid.²²
- Decision was upheld by the Full Federal Court.²³

Battenberg v Restrom & Ors:²⁴

- The Federal Magistrates Court has jurisdiction to make an order for substituted service of a bankruptcy notice in appropriate circumstances.²⁵
- The Federal Magistrates Court has jurisdiction to grant leave to serve a bankruptcy notice outside of Australia pursuant to s 40(1)(g) of the Act.²⁶

Amex v Michaels and *Battenberg v Restrom* dealt with service in Australia of the Bankruptcy Notice on a debtor who was outside Australia, but this is different from service of the Bankruptcy Notice outside Australia.

Service of the Bankruptcy Notice Outside Australia

Of concern regarding service of the Bankruptcy Notice is when the creditor seeks to serve it outside Australia. One of the main issues regarding such service centres on the requirements found in s 40(1)(g) of the Act²⁷ which appears to require that a Bankruptcy Notice served on a debtor elsewhere, that is, other than in Australia, be served “by leave of the Court”.

Envee Energy Pty Ltd (In Liquidation) v Stockford:²⁸

- Should the creditor’s failure to obtain leave to serve the Bankruptcy Notice outside of Australia be excused?
- This question was “not subject to direct authority”.²⁹
- The creditor relied upon s 306(1) of the Act.³⁰

²¹ (2005) 223 ALR 692.

²² *Battenberg v Restom and Ors* (2005) 223 ALR 692.

²³ *Battenberg v Restrom and Ors* (2006) 149 FCR 128; [2006]; FCAFC 20.

²⁴ *Ibid*.

²⁵ *Ibid* [12].

²⁶ *Ibid*. See also s 17(3) *Insolvency Act 2006* (NZ).

²⁷ See also s 17(3) *Insolvency Act 2006* (NZ).

²⁸ [2007] FMCA 1426.

²⁹ *Envee Energy Pty Ltd (In Liquidation) v Stockford* [2007] FMCA 1426, [6].

- Traditionally, a strict view of the need for proper service of a Bankruptcy Notice.³¹
- More recently, reg. 16.01 of the *Bankruptcy Regulations 1996* applies to the method of service of Bankruptcy Notices.³²
- Service of a Bankruptcy Notice can be dealt with under s 306(1) of the Act: *Emanuele v Australian Securities Commission*³³ and *Johnstone v Vintage Developments Pty Ltd*.³⁴
- Defect or irregularity - whether a formal defect or irregularity: *Adams & Lambert*.³⁵
- The Bankruptcy Notice had been served personally on the debtor out of Australia.
- Purpose of service under the Act is to bring the Bankruptcy Notice to the attention of the debtor so as to allow the debtor sufficient time to satisfy the debt.³⁶
- Failure to obtain an order for leave to serve a bankruptcy notice out of Australia prior to its actual service was an irregularity within the ambit of s 306(1) of the Act.
- Order should be made *nunc pro tunc* that leave to effect such service be granted.³⁷

Valid service of the Bankruptcy Notice starts the countdown towards the filing of a Creditor's Petition and ultimately a sequestration order. Personal service of the Creditor's Petition encounters its own difficulties.

Creditor's Petitions

At the hearing of the Creditor's Petition and in satisfaction of the requirements of s 52(1) of the Act, the Court will require, amongst other things, proof of service of the Creditor's Petition.

Service of the Creditor's Petition

- Must be served personally on the debtor pursuant to Order 7 Rule 1 of the *Federal Court Rules* ("FC Rules").³⁸
- A number of problems might arise in relation to personal service of the Creditor's Petition.

³⁰ Section 306(1) Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless the court before which the objection on that ground is made is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.

³¹ *Envee Energy Pty Ltd (In Liquidation) v Stockford* [2007] FMCA 1426, [13].

³² Ibid [14]. *T & S Recoveries Pty Ltd v Skalkos* went on appeal to the Full Court which dismissed the appeal: *Skalkos v T & S Recoveries Pty Ltd* [2004] FCAFC 321.

³³ (1997) 188 CLR 114.

³⁴ [2006] FCAFC 171.

³⁵ (2006) 80 ALJR 679.

³⁶ *Envee Energy Pty Ltd (In Liquidation) v Stockford* [2007] FMCA 1426, [23].

³⁷ Ibid [24].

³⁸ See also rules 6.1 and 24.16 of the High Court Rules provided in Schedule 2 of the *Judicature Act 1908* (NZ) reprinted as at 24 May 2010.

Official Receiver for the Bankruptcy District (WA) v Amaro:³⁹

- First process server:
 1. Knocks on the door of the debtor's residence on six occasions but no one answers.
- Second process server:
 2. Knocks on the door of the debtor's residence on five occasions but no one answers.
 3. On the sixth attendance, knocks at the door and is greeted by a relative of the debtor who confirms the debtor lives there but is momentarily absent.
 4. The relative agrees to call the process server to arrange a time for service then does not.
 5. Further ten attempts to elicit a response upon attendance at the debtor's residence were unsuccessful, despite many signs of life including clothing and towels on the clothes line, electric power consumed and process server's card previously wedged into a lock on the side gate had been removed.⁴⁰
- In these circumstances, creditors will often seek an order for substituted service.
- Such an order, under s 309(2) of the Act⁴¹ or O 7 r 9(1) of the *FC Rules*,⁴² has been found by the Court to be discretionary but not to be exercised lightly.⁴³

Service of the Creditor's Petition Outside Australia.

Battenberg v Restrom and Ors:⁴⁴

- The Full Federal Court applied *Re Mendonca: ex parte Commissioner of Taxation (Re Mendonca)*.⁴⁵
- In *Re Mendonca* the creditor was seeking an order for service of the Creditor's Petition outside Australia.
- "It is not made a condition of jurisdiction that the debtor should be an Australian national or domiciled in Australia. The Court has jurisdiction if, at the time when the act of bankruptcy was committed, the debtor was connected with Australia in one of the ways mentioned in s 43(1)(b)."⁴⁶
- Neither the Act nor rules make any express provision permitting service outside the jurisdiction.⁴⁷

³⁹ (2009) 109 ALD 577; [2009] FMCA 567.

⁴⁰ *Official Receiver for the Bankruptcy District (WA) v Amaro* (2009) 109 ALD 557; [2009] FMCA 567, [10] – [12].

⁴¹ See also s 442(2)(d) *Insolvency Act 2006* (NZ) that provides authority for the rules under the *Judicature Act 1908* (NZ) to deal with service of documents under the Act. See rule 6.1(2) of the High Court Rules provided in Schedule 2 of the *Judicature Act 1908* (NZ) reprinted as at 24 May 2010.

⁴² See also rule 6.8 of the High Court Rules provided in Schedule 2 of the *Judicature Act 1908* (NZ) reprinted as at 24 May 2010.

⁴³ *Ibid* [26].

⁴⁴ *Battenberg v Restrom and Ors* (2006) 149 FCR 128 at 133-134; [2006] FCAFC 20, [18]-[20].

⁴⁵ (1969) 15 FLR 256.

⁴⁶ *Re Mendonca: ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 260.

⁴⁷ *Ibid* 261.

- The Court has “ample power to order service outside the jurisdiction” and if the debtor has absconded from Australia, the Court will normally order service of the Creditor’s Petition on the debtor out of the jurisdiction.⁴⁸
- “A method of substituted service will not be allowed which will not in all reasonable probability be effective to bring knowledge of the proceedings to the debtor”.⁴⁹
- The Creditor’s Petition together with the other necessary documents was ordered to be served on the debtor by ordinary prepaid airmail post to an address in Portugal. Service was to be deemed effective after 6 weeks from the date of posting, provided the documents were not returned unclaimed through the post.⁵⁰

Deputy Commissioner of Taxation v Barnes:⁵¹

- Debtors with Australian Taxation Office debts of approximately \$7.492m.
- Left Australia to, in the view of the creditor, defeat or delay creditors, that being an act of bankruptcy.⁵²
- The creditor sought an order permitting service of the Creditor’s Petition on the debtors out of Australia.
- Must first consider whether a sequestration order could be granted.⁵³
- No specific bankruptcy provision or rule dealing with service outside the jurisdiction but s 309(2) of the Act and Order 8 of the *FC Rules* can be used.⁵⁴
- Matter of discretion as to whether the Court utilizes the provisions of Order 8 or s 309(2) of the Act.⁵⁵
- Debtors were outside Australia and were refusing to provide contact details or authority for their accountants to meet with the creditor, so abnormal difficulty in serving the debtors.⁵⁶
- Service on solicitors acting for the debtors and postal service on the debtors at a property in Yorkshire, England, as well as at a post office box used by them in Perth, WA.⁵⁷
- Lucev FM was satisfied that this would draw the Creditor’s Petition to the attention of the debtors.⁵⁸

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ (2008) 70 ATR 776; [2008] FMCA 7.

⁵² *DCT v Barnes* (2008) 70 ATR 776; [2008] FMCA 7 [2]. This is an act of bankruptcy pursuant to s 40(1)(c) of the Act. See also ss 20 and 21 *Insolvency Act 2006* (NZ).

⁵³ Section 44(1) of the Act. See also s 13 *Insolvency Act 2006* (NZ).

⁵⁴ *DCT v Barnes* (2008) 70 ATR 776; [2008] FMCA 7, [69].

⁵⁵ Ibid [69].

⁵⁶ Ibid [72].

⁵⁷ Ibid [74].

⁵⁸ Ibid [75].

Conclusion

Recent judicial decisions may assist lawyers in dealing effectively with bankruptcy matters in these times of transition, despite the differing fact situation of every bankruptcy case. Constant change in the physical and digital worlds can create problems with serving Bankruptcy Notices and Creditor's Petitions and this applies pressure on lawyers when seeking to assist the Courts in achieving just and expeditious outcomes. Modern modes of communication⁵⁹ might be an effective way to validly serve the bankruptcy documents so the legislative framework should recognise this. As lawyers seek to satisfy their responsibility to clients and to the Court, challenges in this changing world should foster innovation.

⁵⁹ For example, email, Short Message Service (SMS) also known as texting on mobile phones, Twitter, Facebook, LinkedIn, Skype and Blackberry. In *Axe Market Gardens Ltd v Axe & Anor* HC WN CIV-2008-485-002676 (16 March 2009), Gendall AJ granted the creditor leave to serve a Bankruptcy Notice by email and Facebook.