

# FOLEY'S | LIST

## ARE YOU BEING SERVED?

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# Are you being served?

Proving delivery and the time of delivery are both critical when serving documents. If a company disputes delivery, it can be difficult to defeat the allegation without evidence of actual receipt.

BY BRENTON DEVANNY

## SNAPSHOT

- Serving documents by post on a company requires reliance on two presumptions of service; delivery and timing.
- Recent decisions have considered what constitutes evidence sufficient to rebut the presumptions.
- These decisions serve as a warning for creditors relying on presumptions to prove service of documents.

Creditors serving documents on a company have the option, pursuant to s109X of the *Corporations Act 2001*, of posting them to that company's registered office.

## Service by post

Pursuant to s29(1) of the *Acts Interpretation Act 1901*<sup>1</sup> a prepaid article, properly addressed and posted as a letter is, unless the contrary is proved, deemed served at the time at which the letter would be delivered in the ordinary course of post.

In the leading decision of *Fancourt v Mercantile Credits (Fancourt)*,<sup>2</sup> in interpreting analogous legislation, the High Court held unanimously that provided delivery is not disproved, proof of non-receipt does not displace the result that delivery is deemed to have been effected at the time at which it would have taken place in the ordinary course of post.<sup>3</sup>

The vast majority of decisions disputing service of documents on a company involve applications to set aside a creditor's statutory demands. Such an application must be filed and served within 21 days of service of the demand, and that time limit cannot be extended.<sup>4</sup> This makes proving both delivery and the time of delivery critical.

## Presumption as to timing

Section 160 of the *Evidence Act*<sup>5</sup> presumes (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address is received at that address on the fourth working day after having been posted.

To dispute timing, a company requires either evidence of delivery at a particular time (such as to make the presumption as to timing redundant) or evidence of non-delivery.

## Rebutting the presumption of timing

In *Scope Data Systems Pty Ltd v Goman (Scope Data)*<sup>6</sup> the debtor company had all mail addressed to its registered office diverted to a post office box. In determining when a document was deemed served, White J gave the following guidance:

“If the evidence establishes the time at which the article is delivered to the postal address, then that is the time at which service is taken to be effected. If the evidence does not establish the time at which delivery was effected, then, unless the contrary is proved, delivery is deemed to have been effected in the ordinary course of post. What that is is a question of fact to be proved by evidence. In the absence of evidence on the topic, and in the absence of any presumption, there will be no proof that the article was delivered at a particular time. If it is established that the article was not delivered in the ordinary course of post, but the evidence does not establish when it was delivered, then again there will be no evidence as to the time of delivery. In either case, s160 of the . . . *Evidence Act* . . . affords a presumption as to when the article is to be taken to have been delivered. The presumption may assist in proving when delivery was made in the ordinary course of post. If the evidence shows that the article was not delivered in the ordinary course of post, the presumption may assist in proof of when the document was delivered.”<sup>7</sup>

His Honour considered a number of previous authorities doubting if the s160 presumption applied, and subsequently rejected them.

In *Renegade Rigging v Hanlon Nominees*<sup>8</sup> Ferguson J (as her Honour then was) followed White J’s reasoning as to the interaction between s160 and s29 as to the presumption of time of service of a posted article, as did Foster J in *Gusdote v Ashley*<sup>9</sup> and *Chen v The College of Building Ltd*.<sup>10</sup> In effect, those decisions suggest that s160 makes it unnecessary to adduce evidence about what constitutes the ordinary course of post under s29 unless the creditor seeks to prove the item was delivered sooner.

## An example of complications arises where the intended recipient has mail diversion facilities in place.

There was also some support for this suggestion in Buss JA’s decision in *Healy v Deputy Commissioner of Taxation*.<sup>11</sup> However, the majority in that case doubted (in obiter) if the presumption could establish what constitutes delivery in the ordinary course of post, as opposed to assisting in identifying the time of delivery of an article where the evidence shows it was not delivered in the ordinary course of post.

An example of complications arises where the intended recipient has mail diversion facilities in place. White J in *Scope Data* held that evidence of diversion to a post office box was sufficient to rebut the s160 presumption, and the time of collection from the post office box (as proved) was the date of service.

The use of the Express Post system, as considered in *Re Futre Developments Pty Ltd (Futre)*,<sup>12</sup> may assist in establishing when an item is delivered. The system involves Australia Post recording the time when an item is delivered via a tracking number. In *Futre*, Robb J found on the balance of probabilities that the relevant demand was delivered to the recipient’s registered office when the Express Post tracking system indicated that delivery had been effected. However, as the system does not record the place of delivery, establishing the time of delivery of an item may not establish service of the item if the recipient company has mail diversion facilities in place (as in *Scope Data*).<sup>13</sup>

## Rebutting the presumption of delivery

While *Fancourt* establishes that evidence of non-receipt of a document by a company’s officers cannot displace the s29 presumption of delivery of the document to the company, this does not mean that all evidence of receipt is irrelevant.

In *Scope Data*, White J stated that “whilst there is a difference between the delivery of a postal article to a place and its receipt by a person . . . there is no distinction between delivery of an article to a specified address, that is, to a place, and its receipt at that address”.<sup>14</sup> Therefore, evidence of non-receipt at the registered office may constitute evidence sufficient to rebut the presumption of delivery.

In *Deputy Commissioner of Taxation v Starpicket*<sup>15</sup> Greenwood J heard that the registered office of the company, in outback Queensland, never received mail. His Honour found that this displaced the presumption of service and proved non-delivery.



In *Deputy Commissioner of Taxation v Manta's on the Beach*<sup>16</sup> Logan J heard that the director of the company and her estranged husband both deposed to not receiving the statutory demand at the registered office (their residential address).

His Honour found on the evidence of a system as to the receipt of mail at their residential address that the document was not received at the registered office and thus not delivered.

In *Panimo Nominees v Vasiliki Lobsters*<sup>17</sup>

Gardiner AsJ considered that the company only needed to raise sufficient evidence to rebut the presumption, not prove a negative. His Honour found on evidence of an accounting firm operating as the company's registered office that not only were documents not received at the registered office but on the balance of probabilities, the documents were not delivered to them.<sup>18</sup>

### Actual knowledge of non-delivery

Despite reliance on presumptions of service, actual knowledge that the company does not occupy the address served (despite it being its registered office) may also disprove delivery.

In *von Risefer v Manfreight International*<sup>19</sup>, a case involving alleged personal service, Ashley JA (with Beach AJA agreeing) considered that it was important that a party wishing to serve a document on a company be able to rely upon

**... the Court found that a process server leaving documents at the registered office did not positively establish service.**

details of the company's registered office in records maintained by ASIC. His Honour approved the following statement in *FP Leonard Advertising v KD Travel Services*:<sup>20</sup>

"... the evident legislative intent ... to provide an official public address for service would be defeated if a company could flout its obligations by simply failing to notify any change of that office. A resourceful and dishonest company could thus easily avoid service of documents and escape unwanted litigation by simply, 'decamping' from the registered office without leaving a trail".<sup>21</sup>

However, the Court found that a process server leaving documents at the registered office did not positively establish service given that the office

was then a bank branch, albeit located at the former address of the company's accountant.<sup>22</sup>

In *Dumey v Deakin University*<sup>23</sup> McMillan J suggested that the presumption as to delivery may be rebutted (albeit "is only rebutted") if the relevant item is returned to the sender unopened.

While there are persuasive arguments against a company being able to avoid service of any documents on it by either not maintaining or failing to notify ASIC of a change to its own registered office,<sup>24</sup> this is balanced against the company's right to have fair notice of proceedings against it.<sup>25</sup> Given this, reliance on a statutory presumption of service in circumstances where a creditor knows the company does not have fair notice of the demand may constitute an abuse of process.<sup>26</sup>

### Evidence insufficient to disprove delivery

Where a creditor does not have actual knowledge of non-delivery, Barrett J in *Partners of Piper Alderman v Sharjade*<sup>27</sup> refused to accept that the presumption of service was rebutted by evidence of non-receipt (while highlighting the undesirability of a company having the directors' residential address as a company's registered office). His Honour said that:

"A company's registered office must be at some defined and readily accessible place consisting of, or being within, a building. The specification of the address of the registered office must be such as to accommodate the possibility recognised in s109X(1)(a) of the *Corporations Act* that documents will be served by posting them to the registered office. Implicit in the statutory scheme ... is an expectation that there will be in place at the registered office a system for the safe and secure reception of documents delivered by post".<sup>28</sup>

His Honour highlighted that s29 in effect imposes on the intended recipient responsibility for ensuring that the document does not go astray after delivery to the postal address.<sup>29</sup> His Honour considered evidence of non-receipt by the directors insufficient to rebut the presumption that the article was in fact delivered to the registered office.<sup>30</sup>

In *Deputy Commissioner of Taxation v Revolve*<sup>31</sup> Jacobson J heard that the registered office was an abandoned building in the process of demolition. His Honour held that the company was required to have a registered office that is capable of being accessed, and considered the demand served as the evidence was only as to the impossibility of receipt (as opposed to delivery).

In *Watson Road Moss Vale Developments Pty Ltd*<sup>32</sup> Black J found that evidence of document handling procedures of the accountants at the registered

office (expressed in a general nature) that indicated non-receipt did not positively rebut the presumption of service.

## A warning for creditors

Creditors serving documents by post need to be aware that a company may attempt to dispute delivery. There is a practical difficulty in defeating such an allegation without actual evidence of delivery.

As discussed in *Futre*, sending items by Express Post may assist in proving delivery by searching a tracking number. However, mail diversion may prevent this tracking system proving the time of delivery (or delivery at all).

Where possible, particularly where timing of service is critical (such as a creditor's statutory demand), physically leaving documents at the registered office may be preferable.<sup>33</sup> If the company has decamped from or abandoned its registered office, the creditor can bring the matter to the attention of the court and/or ASIC. ■

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1. See s5C of the *Corporations Act 2001* (Cth).
2. (1983) 154 CLR 87.
3. Note 2 above, at 96-7.
4. *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265; *Grant Samuel Corporate Finance Ltd v Fletcher* [2015] HCA 8 at [22].
5. *Evidence Act 1995* (Cth), *Evidence Act 2008* (Vic) is in similar terms.
6. (2007) 70 NSWLR 176.
7. Note 6 above, at [38].
8. [2010] VSC 385.
9. (2011) 193 FCR 227.
10. [2015] ACTSC 19 at [28] per Penfold J.
11. [2015] WASCA 44.
12. [2014] NSWSC 1712.
13. Note also *Giustginiano Nominees Pty Ltd v Redan Pty Ltd* [1999] WASC 95 at [5]; if a card is left at an unattended registered office by Registered Post in lieu of delivery, not only is timing rebutted, delivery is disproved.
14. Note 6 above, at [49].
15. [2012] FCA 1196; note *Thomas v Johnson* (1979) ANZ Conv R160 found the opposite on similar facts.
16. [2012] FCA 17.
17. [2011] VSC 321.
18. Note 17 above, at [18] to [19].
19. (2009) 25 VR 366.
20. (1993) 12 ACSR 136.
21. Note 20 above, at 138 per Santow J.
22. Note 19 above.
23. [2014] VSC 577 at [47].
24. Note 19 above; *Deputy Commissioner of Taxation v Contract Synergies Administration Pty Ltd* [2011] FCA 743.
25. Cf *CGU Workers' Compensation (Victoria) Ltd v Carousel Bar Pty Ltd* (1999) 151 FLR 270; [1999] VSC 227 at [73]-[77].
26. *Re Gasbourne Pty Ltd* (1984) 8 ACLR 618; *DCT v Abberwood Pty Ltd* (1990) 2 ACSR 91; *Re Future Life Enterprises Pty Ltd* (1994) 33 NSWLR 559; *CGU Workers Compensation* above.
27. [2011] NSWSC 6.
28. Note 27 above, at [18].
29. Note 27 above, [15] citing *Deputy Commissioner of Taxation v Meredith* (2007) NSWCA 354.
30. Note 27 above, [16].
31. [2012] FCA 555.
32. [2013] NSWSC 783.
33. Although care must be taken to prove delivery, see *In the matter of Carbon and Energy Reductions Pty Ltd* [2014] NSWSC 923.



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