

FEDERAL COURT OF AUSTRALIA

Carter v Australian Securities & Investments Commission [2018] FCA 1064

File number: WAD 241 of 2018

Judge: COLVIN J

Date of judgment: 18 July 2018

Catchwords: **CORPORATIONS** - disqualification from managing corporations - s 206F of *Corporations Act 2001* (Cth) - whether notice of disqualification validly served by ASIC - meaning of requirement for notice to be served 'on the person' - where notice provided electronically to applicant's solicitor - where notice came to the actual attention of the applicant - notice validly served - application dismissed

Legislation: *Acts Interpretation Act 1901* (Cth) s 28A
Corporations Act 2001 (Cth) ss 5C, 206A, 206F
Electronic Transactions Act 1999 (Cth) s 9

Cases cited: *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31
Italiano v Carbone [2005] NSWCA 177
Spencer v Bamber [2012] NSWCA 274
Woodgate v Garard Pty Ltd [2010] NSWSC 508; (2010) 239 FLR 339

Date of hearing: 13 July 2018

Registry: Western Australia

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: General and Personal Insolvency

Category: Catchwords

Number of paragraphs: 37

Counsel for the Applicant: Mr S Penglis

Solicitor for the Applicant: CX Law

Counsel for the Respondent: Mr S Wright SC & Mr D Blader

Solicitor for the Respondent: Australian Securities & Investments Commission

ORDERS

WAD 241 of 2018

BETWEEN: **RODNEY CHARLES CARTER**
Applicant

AND: **AUSTRALIAN SECURITIES & INVESTMENTS**
COMMISSION
Respondent

JUDGE: **COLVIN J**

DATE OF ORDER: **18 JULY 2018**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs, to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1 Under s 206F of the *Corporations Act 2001* (Cth), the Australian Securities and Investments Commission (ASIC) has power to disqualify a person from managing corporations for up to five years in certain specified circumstances.

2 On 20 July 2017, a decision was made by ASIC to disqualify Mr Carter pursuant to s 206F(3) from managing corporations for four years. A notice of disqualification in prescribed form was signed on that date (**Notice**). It stated that Mr Carter was disqualified.

3 Section 206F(3) provides that if ASIC disqualifies a person from managing corporations under s 206F 'ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form'.

4 Under s 206F(4), the disqualification 'takes effect from the time when a notice [in the prescribed form] ... is served on the person'.

5 On 20 July 2018, ASIC sent an email to Mr Christensen, a partner of Gadens Lawyers which referred to the disqualification and said:

Please find enclosed a letter to you and a copy of the order and other documents (including my reasons for this decision) that are to be served on Mr Carter, for your reference.

6 There were two attachments to the email. The first was a letter to Mr Christensen from ASIC. The second was a letter from an officer of ASIC addressed to Mr Carter at Unit 1, 21 The Esplanade Mount Pleasant, WA 6153 enclosing the Notice, a copy of s 206F, the reasons for the decision to disqualify and an information sheet (together described by Mr Carter in his affidavit in support of the application as **Decision Related Documents**).

7 The letter to Mr Christensen said that the order would need to be served personally on his client and that Mr Christensen would be contacted to make suitable arrangements.

8 The letter addressed to Mr Carter (**Letter**) was signed by the delegate of ASIC who had made the decision to disqualify and said:

As delegate of the Australian Securities and Investments Commission, I have decided to disqualify you from managing corporations for four years.

I enclose by way of service, a Notice of Disqualification dated 20 July 2017. The

disqualification takes effect from the time the notice is served upon you. Enclosed for your information is an extract of s206A of the *Corporations Act 2001*.

I also enclose my reasons for decision.

You have certain rights in respect of this decision. Information on your rights is set out in the enclosed information sheet - "ASIC decisions -your rights".

9 Mr Carter's affidavit in support of the application states that his address is 1/21 The Esplanade, Mount Pleasant, WA. As to delivery of the Letter and the Notice, the affidavit says:

By 23 July 2017 Mr Christensen had sent a copy of the Decision Related Documents for my information.

10 Following a request from ASIC at the hearing, Mr Carter produced the email by which he had been sent the Decision Related Documents by Mr Christensen. It was a forwarding email without any comment from Mr Christensen. It did not state that the email was forwarded to Mr Carter by way of information. However, it did include the covering email originally sent by ASIC to Mr Christensen (referred to above) in which the Decision Related Documents were described by ASIC as documents 'to be served on Mr Carter, for your reference'. It included both attachments to the original email from ASIC to Mr Christensen.

11 On 30 and 31 July 2017, Mr Carter communicated with ASIC in terms that made it clear that he had received documents relating to the disqualification from Mr Christensen and was aware of the disqualification. In particular, on 30 July 2017, Mr Carter sent an email to ASIC stating 'I have received an email from the solicitor representing myself, in relation to these proceedings'. Later in the email he said 'I have accordingly resigned all Directorships to respect the orders'. On 31 July 2017, Mr Carter sent a further email to ASIC which began 'I have thoroughly read the documents sent'.

12 Thereafter, ASIC proceeded on the basis that Mr Carter had been served in accordance with s 206F(3) and that the disqualification took effect from 31 July 2017.

Competing contentions of the parties

13 Mr Carter does not dispute that he received, prior to 31 July 2017, notification of the disqualification in the form of a copy of the Notice and was aware of its terms. Rather, his claim is that, on a proper construction of s 206F(3) and in the events which have occurred he has not been served as required by s 206F(3) and therefore the disqualification has not yet taken effect. He seeks a declaration that the decision dated 20 July 2017 to disqualify him is yet to take effect.

14 ASIC claims that service has been effected because Mr Carter has received the Notice and it has come to his actual attention. As s 206F(3) does not specify how service must take place, there is service if a person in fact receives actual notice. Mr Carter had actual notice, at least from 31 July 2017. Therefore, ASIC says the disqualification has taken effect.

15 Mr Carter claims that what s 206F(3) requires is not simply notification of the fact of the disqualification or information to the effect that a decision has been made and the disqualification has occurred, but the actual service of a notice in the prescribed form by an act on the part of ASIC. He says that ASIC has not effected service of that kind. Therefore, the disqualification has not commenced.

16 Although Mr Carter accepts that the Notice was provided to Mr Christensen, he says that it was provided 'for your reference' (namely, for the reference of Mr Christensen) and not by way of any form of service. He describes the provision of the Letter and Notice to him by Mr Christensen as being for his information.

17 He points to the serious consequences that flow from a disqualification as reasons why there must be demonstrated to have been service by an act of ASIC.

Decision

18 For the following reasons, I have formed the view that there has been service of the kind required by s 206F(3). Therefore, ASIC is entitled to proceed on the basis that Mr Carter has been disqualified from managing corporations under s 206F. It follows that the application should be dismissed.

Proper construction of s 206F(3)

19 Section 206F(3) requires notice in the prescribed form to be served 'on the person'. It is expressed in mandatory terms. I accept that establishing the date from which the disqualification takes effect is a significant matter because s 206A(1) provides that a person who is disqualified from managing corporations commits an offence if, in effect, they act in substantial disregard of the disqualification. The offence is one of strict liability: s 206A(1A). The strict liability nature of the offence means that it is not open to a disqualified person to prove a lack of knowledge by way of defence.

20 Importantly, the notice to be served is one advising the person of the disqualification. Until that occurs the disqualification does not commence. It is not enough that the person comes to

know of the disqualification in an informal or indirect way. Rather, the disqualification must be formally notified by ASIC in a manner that satisfies the legislative language.

21 Section 206F(3) uses the expression 'serve ... on the person'. It is a requirement for personal service. There is considerable support for the view that a requirement for personal service is met if the document in question comes to the actual attention of the person required to be served: *Italiano v Carbone* [2005] NSWCA 177 at [56]-[62]; *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31 at [57]; *Spencer v Bamber* [2012] NSWCA 274 at [200]-[212]; and *Woodgate v Garard Pty Ltd* [2010] NSWSC 508; (2010) 239 FLR 339 at [44].

22 The express requirement for a notice 'advising' the relevant person of the disqualification supports the conclusion that if the disqualification comes to the actual attention of that person then there has been service on that person of notice advising them of the disqualification.

23 The manifest purpose of these provisions, in the context of s 206A, is that the disqualification does not commence unless and until there is no real doubt as to knowledge on the part of the person of the disqualification by ASIC. On that basis, it is appropriate to impose an offence of strict liability if the person acts in a manner that is a substantial breach of the disqualification because the disqualification cannot start until there has been notification by ASIC.

24 The provision as to service also provides clarity as to the operative date on which the person ceases to be a director. This is a further reason why the commencement of the disqualification should be established in a formal way. When the disqualification takes effect the person ceases to be a director by operation of s 206A(2). There should be no real doubt as to whether third parties are entitled to deal with a person on the basis that they are a director.

25 Finally, there may be reasons why ASIC determines that the disqualification should not occur with immediate effect. For example, there may be a need to make arrangements for the supervision of the affairs of particular corporations before there is disqualification. The terms of s 206F(3) mean that if a decision to disqualify is made then it will not take effect unless and until ASIC itself takes steps to serve the notice.

26 These are all considerations that distinguish service under s 206F(3) from other cases where the courts have held that proof of actual notice is sufficient to satisfy a requirement for service even if personal service has not been effected. Accordingly, I accept the submission that s 206F(3) requires that the service of the notice be effected by ASIC. It is not enough that the

disqualification becomes known to the relevant person in some indirect way without the involvement of ASIC.

27 Therefore, if it is the case that ASIC by its act brought the Notice to the actual attention of Mr Carter then the statutory requirement for the commencement of the disqualification has been met.

Application of s 206F(3) to this case

28 The question remains whether, on the facts in this case, the requirement for service by ASIC has been satisfied.

29 ASIC delivered to Mr Christensen by means of an electronic communication, the Letter (from ASIC addressed to Mr Carter personally and signed by the ASIC delegate who made the decision to disqualify) and the Notice.

30 Mr Christensen then forwarded to Mr Carter a copy of the Letter and the Notice. The covering email said that the Notice was 'to be served on Mr Carter'. Therefore, when Mr Carter received the forwarded Letter and Notice he knew from the terms of the email from ASIC to Mr Christensen and from the terms of the Letter that ASIC was taking steps to serve him with the Notice.

31 In those circumstances, when he read the Notice it was personally served. Completion of service by ASIC bringing the document to the actual attention of Mr Carter required it to know that fact. Put another way, service by ASIC could not be effected without ASIC knowing that the required steps had been taken. So, once ASIC knew that Mr Carter had read the Notice in the context of having received the Letter, notice of disqualification in the prescribed form was served on Mr Carter personally by ASIC for the purposes of s 206F(3).

32 This is not a case where the notice was simply provided by ASIC to Mr Christensen who then forwarded it to his client by way of communication between solicitor and client in a manner that might be said not to involve any act by ASIC in effecting service. Nor is it a case where Mr Carter became aware of the fact of the disqualification, but never received the notice.

33 Rather, the communication by Mr Christensen to Mr Carter of a copy of the Letter (being a signed letter addressed to him personally from ASIC and which stated that the Notice was enclosed by way of service) as well as a copy of the Notice followed by his communication with ASIC completed service by ASIC on Mr Carter. The attempt by Mr Carter in his affidavit

to characterise the provision of the Letter to him by Mr Christensen as being for the information of Mr Carter does not alter its character as a communication by ASIC addressed to Mr Carter. The information in the forwarded email communicated to Mr Carter included both the Letter addressed to him and the Notice.

34 It is true that ASIC initially communicated with Mr Christensen in a manner that may have indicated that service on Mr Carter was to be arranged. The letter to Mr Christensen was to that effect. However, that did not mean that personal service could not be effected by the delivery of the Notice to Mr Carter personally in the manner that occurred. The way in which Mr Carter received the Letter and the Notice would not have left any real doubt that those communications were by ASIC to him personally. Contrary to the characterisation by Mr Carter in his affidavit that the Decision Related Documents had been sent to him for his information, there was no suggestion from Mr Christensen that he was forwarding the Letter and the Notice to Mr Carter by way of information only. The email from ASIC to Mr Christensen (forwarded to Mr Carter) said only that the Decision Related Documents 'are to be served on Mr Carter, for your reference'. That communication was not sufficient to denude the Letter (signed for ASIC and addressed to Mr Carter) of its character as a communication to him by ASIC when he received it. His contemporaneous communications with ASIC on 30 and 31 July 2017 show that was the manner in which he treated the Letter and the Notice. Therefore, upon receiving and reading the Letter and Notice and the communication of that fact to ASIC, Mr Carter had been served by ASIC with notice of the disqualification.

35 The above conclusion does not depend upon any particular authority on the part of Mr Christensen to receive communications. It depends upon the receipt of the Letter by Mr Carter and the communication to ASIC on 31 July 2017 in unequivocal terms that he had thoroughly read the documents (which included the Letter and the Notice).

Possible application of the *Acts Interpretation Act*

36 Given the views I have reached, it is not necessary to decide whether there was service under the provisions of s 28A of the *Acts Interpretation Act 1901* (Cth). An historical version of that Act applies to the *Corporations Act* as at 1 January 2005 by operation of s 5C of the *Corporations Act*. Relevantly, s 28A provides that for the purposes of any Act that requires a document 'to be served on a person', the document may be served on a natural person by delivering it to the person personally. The only evidence of delivery in this case is the

forwarding to Mr Carter by Mr Christensen's email of the Letter and the Notice. Delivery by electronic means may not be delivery for the purposes of that provision unless there has been consent to such delivery by the person being served. As to the requirement for consent; see s 9 *Electronic Transactions Act 1999* (Cth). In s 28A, the term delivery is used to describe a form of service that is different to leaving the document at or sending it by pre-paid post to the last known address of the person. In my view it requires physical delivery, not electronic delivery. Accordingly, even assuming that s 28A applies on the basis that there is no contrary intention appearing in s 206F(3), I would not have held that there has been service by operation of s 28A.

Conclusion

37 Mr Carter has failed to demonstrate a basis for the declaratory relief sought. The application should be dismissed with costs.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin.

Associate:



Dated: 18 July 2018