



## Summary of Judgment

### *In the Matter of Kornucopia Pty Ltd (No 1) [2019] VSC 756*

19 November 2019

The Hon. Justice Sifris is presiding over a winding up application made in relation to three companies, Kornucopia Pty Ltd (**Kornucopia**), Efektiv Pty Ltd (**Efektiv**) and Avant-Garde Ventures Pty Ltd (**AGV**) (collectively, the **Companies**). The Companies raised a number of preliminary issues, pertaining to service of three creditor's statutory demands and procedural defects in connection with the applications, which came on for hearing before his Honour on 12 and 13 November 2019.

Justice Sifris found the Companies had been served with each of the statutory demands, and that the procedural defects contended were inconsequential in nature. His Honour set down the trial of the winding up applications for hearing commencing on 11 December 2019.

### **Background**

Kornucopia is the tenant of an apartment owned by Jeffrey Chen (**Chen**) and located in Docklands, Victoria. The Companies appear to be in the business of leasing apartments in the Southbank or Docklands areas from landlords, like Chen, and then subletting or licensing those apartments to others. Many landlords, including Chen, have not been paid and have commenced proceedings against the Companies in the Victorian Civil and Administrative Tribunal. The Companies have been and are engaged in substantial litigation in multiple jurisdictions within Victoria. Madgwicks Lawyers (**Madgwicks**) are a firm of solicitors which had previously been retained by Efektiv and AGV, having ceased acting in April 2019. They contend that invoices they issued on Efektiv and AGV, pertaining to services rendered, have also not been paid.

On 15 May 2019, Chen issued a creditor's statutory demand on Kornucopia, with respect to rental arrears, which was sent by ordinary post to the registered office of the Companies, in Southbank, Victoria. On 6 June 2019, Madgwicks issued a creditor's statutory demand on Efektiv and AGV, with respect to their unpaid invoices, which was sent by priority post, to the Companies' registered office. The Companies contended that the three statutory demands were not delivered to the registered office, and therefore, that they had not been effectively served. This should have, it was submitted, resulted in a dismissal of the winding up application.

### **Determination**

Justice Sifris found that each of the Companies had been served with the relevant statutory demand. His Honour found that it was improbable that they were not delivered to the registered office. Rather, it was more probable that they were delivered, and then either mislaid, or did not come to the attention of the Companies.

The Companies gave evidence that mail could be received, either by it having been slid under the door to the office, or by a member of staff signing for it and receiving it personally from the postal officer. Many other documents, including documents in relation to this proceeding were received in this manner. There was then, simply no explanation why these documents were not delivered. Supporting the argument that they were mislaid was that the Companies were busy, engaged in other aspects of the business, and in substantial litigation. The mail procedures which the Companies had in place also were not 'infallible'. Various documents which had been delivered came to the attention of the relevant member of staff, while others were said not to have been received. His Honour considered that the arrangements were not efficacious in bringing mail to the attention of the relevant officer of the Companies.

Furthermore, in the case of Kornucopia and Efektiv, the envelopes containing the statutory demands were not returned to the plaintiffs. The Companies' submission that they were not delivered would have required Australia Post to have failed to deliver three separate documents, and in the case of those two, failed to have returned them to the plaintiffs. This was, in his Honour's view, improbable.

In the AGV proceeding, the envelope containing the statutory demand was returned to Madgwicks and marked 'rts' (presumably meaning Return to Sender). His Honour observed however, that the evidence was consistent with the statutory demand having been delivered to the registered office, and then promptly returned to Madgwicks by someone within the organisation. In all three cases, there had been effective service by post. His Honour went on to consider that if the documents were not delivered, then, in the case of Efektiv and AGV, the statutory demands had been emailed to the directors of those companies. This also constituted effective service.

Kornucopia further raised a number of issues which, it contended, meant that Chen's application did not meet the requirements of s 459Q of the *Corporations Act 2001* (Cth). His Honour referred to and applied s 467A of the Act, providing that a winding up application must not be dismissed merely because of a defect, provided there is no substantial injustice in not dismissing the application. Justice Sifris remarked that the defects were of 'an inconsequential nature' and it was desirable to 'get on with the real substance of the applications.'

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**NOTE:** This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.