It Serves You Right?

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By Stephen Mullette a Principal of Matthews Folbigg, in our Insolvency, Restructuring and Debt Recovery Group

More evidence of the risk of serving documents by post can be found in the decision of Justice Black in the Supreme Court of NSW in the matter of *Shaolin Temple Foundation (Australia) Ltd* [2016] NSWSC 804. This was a dispute about whether or not a creditor's statutory demand had expired prior to the filing of the application to set it aside.

Failing to file an application within 21 days of service of a creditor's statutory demand is fatal to the Court's jurisdiction to set it aside. In this case, the demand was served by post, and there was competing evidence arising from a mail tracking system and the records of Australia Post, compared with the system of mail collection of the debtor and specific evidence of an employee of the debtor as to when the demand arrived.

The evidence was extensively tested, and there was cross-examination of the employee at some length regarding her recollections. The debtor's mail collection system itself came under some scrutiny. Justice Black found that "[I]*t may or not be that it is surprising that the firm chooses to collect the mail twice a day, if it is delivered only once a day by Australia Post*"(!) Nevertheless, since the employee's evidence was accepted, the late arrival of the errant demand was proved, and the Court was therefore satisfied the application had been filed in time. Given "the lateness of the hour" when judgment was delivered, the court stood over the question of directions in relation to the application to set aside the demand, together with any argument over costs.

The real question is in relation to the original decision by the creditor to serve the documents by post. For the price of a process server, the creditor could have obtained far greater certainty regarding when the demand was served, and avoided a significant amount of costs, including potential adverse costs involving senior counsel for the debtor.

Read the case here(link is external)

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au