SUPREME COURT OF QUEENSLAND

CITATION:	*WEC P/L v Cypriot Community of Qld Inc* [2002] QCA 506
PARTIES:	**WEC PTY LTD** ACN 075 896 589 (applicant/appellant) **CYPRIOT COMMUNITY OF QUEENSLAND INC** (respondent)
FILE NO/S:	Appeal No 2929 of 2002 SC No 2277 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2002
JUDGES:	McMurdo P, Cullinane and Holmes JJ Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – WHERE CONFLICT OF EVIDENCE - where application to set aside a statutory demand issued under s 459G of the *Corporations Act* 2001 (Qld) – where applicant contended there was an offsetting claim against the respondent exceeding the amount of the statutory demand – where applicant further contended parties had agreed to forgive outstanding rent because of offsetting claim –where respondent denied agreement – where primary judge found lack of evidence supporting agreement and lack of particularity in affidavit supporting offsetting claim – whether genuine dispute between parties – where appeal dismissed *Corporations Act* 2001 (Qld), s 459G, s 459H
COUNSEL:	P J Davis for the appellant A M Hoare for the respondent

SOLICITORS: Luke Comino Solicitors for the appellant
Tavoularis & Company for the respondent

[1] **McMURDO P:** This is an appeal from a decision of the Chief Justice on 19 March 2002 refusing an application to set aside a statutory demand issued under s 459G *Corporations Act* 2001 (Qld) for non-payment of $89,199.47 rent under a registered lease.

[2] The appellant asks that the appeal be allowed but no longer seeks an order setting aside the statutory demand. This is because the demand is now stale, the respondent not having applied to wind up the appellant within three months of its issue. Both parties agree that the appeal should proceed because of the potential of an argument in a future application as to estoppel, which may arise from his Honour's findings.

[3] It is common ground that the appellant leased from the respondent premises which it refurbished so that they contained chattels owned by the appellant. The appellant sub-leased part of the premises, a gaming room with gambling machines, back to the respondent in return for a portion of the profits. The respondent contended the appellant owed rental of $89,199.47 under the lease, terminated the lease and served a demand under s 459G *Corporations Act* 2001 (Qld) for the outstanding rental.

[4] Mr Louis Toumbas, the sole director of the appellant at the time of the application, deposed as follows. The appellant was not indebted to the respondent in any amount because of an offsetting claim which exceeded the amount of the statutory demand. He spent $782,204.02 on works to and fitting out the gaming room. Initially the parties agreed to share the profits of gaming 25/75. This agreement was varied two years later in September 2000 when the parties orally agreed in the premises' board room that the respondent would repay the balance then still owing for the improvements to the gaming room (by then $752,000) to the appellant as a debt due and owing to it, in return for receiving all the profits from gaming. Mr Louis Toumbas, Mr Yanardasis and Mr Damjonoski were present on behalf of the appellant and Messrs Nick Toumbas, Jim Georgiou and Emmanuel Kallinicos were present on behalf of the respondent. In October 2000, the appellant's accountant faxed to the respondent's accountant a schedule of the plant and equipment in the gaming room and the relevant repayment schedule. In March 2001 the companies entered into negotiations to try to settle all disputes between them. The parties orally agreed that the respondent, subject to finance, would assume liability for the appellant's business and leased fixtures and fittings and in return the appellant would forgive the $752,000 then still owing by the respondent to the appellant. Mr Louis Toumbas would, after vacating the premises on 30 July 2001, stay on to assist the respondent in running the business. The respondent did not obtain finance and final agreement was not reached. The appellant vacated the premises on 30 July 2001 and removed what fixtures and fittings it could, leaving others. Within two weeks the respondent re-leased the premises to another who used the appellant's remaining fixtures and fittings. Mr Louis Toumbas estimated these as valued at $250,000 and elsewhere in his affidavit at $350,000. The appellant continues to make lease payments on these items. Mr Louis Toumbas claimed the respondent was indebted to the appellant for $752,000 against which lease payments of $14,000 could be set off or that the respondent wrongfully detained the appellant's chattels with an estimated value of $350,000.

[5] Affidavits from Messrs Nicholas Toumbas, Georgiou and Kallinicos were filed on behalf of the respondent denying any oral agreement at the meeting in September 2000. An affidavit from Mr Angeli, the president of the respondent, deposed the respondent has not received any demand from the appellant for repayment of $752,000.

[6] In refusing the application, the learned primary judge, in his brief ex tempore reasons, referred to the lack of particularity in Mr Toumbas' affidavit and the absence of any evidence that the sum of $752,000 or any lesser amount was ever demanded from the respondent; in the light of affidavit material filed, which denied that any such agreement had been made in September 2000, his Honour was not satisfied to the requisite degree that the appellant had a genuine offsetting claim. His Honour observed that the appellant did not establish any agreement that the appellant would be compensated by the respondent for the chattels left behind by the appellant and later used by the new tenant; this was not conversion; his Honour queried why the appellant should not rather look to the new tenant for compensation.

[7] The appellant contends that the sworn evidence from Mr Louis Toumbas that such an agreement was made, was sufficiently particular, providing the date and place of the meeting and the names of those present. None of the deponents were cross examined. Mr Louis Toumbas' claim is supported by the respondent's failure to attempt to recover rent from the appellant until April 2001 and by the respondent's accountant, Mr Kallinicos' evidence that he received the appellant's schedule of gaming room plant and equipment and relevant repayment schedule; that facsimile is dated 19 October 2000, shortly after the September 2000 meeting.

[8] The appellant also contends that his Honour erred in dismissing Mr Louis Toumbas' claim of conversion by querying why the new tenant should not compensate the appellant rather than the respondent. Mr Louis Toumbas deposed that the respondent leased to the new tenant the premises complete with fixtures and fittings including some leased by the appellant. This constituted evidence that the respondent had possession of the appellant's chattels and had dealt with them in a manner inconsistent with the proprietary interests of the appellant, converting them.

[9] Section 459H *Corporations Act* 2001 (Qld) provides that:

> "(1) … where, on an application under s 459G, the Court is satisfied of either or both of the following:
>
> (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
>
> (b) that the company has an offsetting claim.
>
> (2) The court must calculate the substantiated amount of the demand in accordance with the formula …" then set out.

[10] The question for a court determining whether a statutory demand should be set aside under s 459H *Corporations* Act 2001 (Qld) is whether it is satisfied that there is a genuine dispute between the applicant company and the respondent about the

existence or amount of the debt to which the notice relates. The court is not expected to attempt to weigh or resolve the merits of any such genuine dispute.[1]

[11] On the other hand, a mere assertion of an oral agreement deposed to in an affidavit will not necessarily suffice to set aside a statutory demand. Something beyond implausible assertion is required from an applicant to demonstrate the genuineness of its claim. A genuine dispute is one that really exists in fact and is not spurious, hypothetical, illusory or misconceived.[2] It was not necessary for the court to be satisfied that the agreement deposed to by Mr Louis Toumbas was reached but merely the existence of a genuine dispute as to the demand because of the matters raised in Mr Louis Toumbas' affidavit, the only material relied upon by the appellant.

[12] An oral agreement by its very nature will depend on assertion. In assessing the genuineness of the dispute raised in Mr Louis Toumbas' affidavit it is necessary to examine all the material before the primary judge. His Honour correctly observed that the appellant made no prior claim from the respondent for any of the amount it now claims.

[13] In addition, Mr Louis Toumbas' assertions about the agreement reached at the September 2000 meeting were not supported by any material from others he said were present at the meeting on behalf of the appellant. The appellant did not provide any explanation as to why there was no supporting material from these witnesses.

[14] Mr Kallinicos deposed that the information about the gaming room plant and equipment and the relevant repayment schedules was sent to him, not as a result of the September 2000 meeting, but because of an earlier meeting with Mr Yanardasis so that the appellant's financial accounts could be audited. This material did not therefore offer any convincing support for Mr Louis Toumbas' evidence as to the September meeting.

[15] Two other pieces of evidence threw doubt on the genuineness of Mr Louis Toumbas' contentions. The first is a letter sent by the appellant's solicitors to its creditors a year later on 11 September 2001 in the following terms:

> "We are writing to all trade creditors of WEC Pty Ltd which has, since December 1998 operated a restaurant and function room from the above address.
>
> WEC Pty Ltd leased the premises from the Cypriot Community of Queensland and over the past twelve fell well behind in rental payments leaving it in default under the terms of the lease. The Cypriot Community has now terminated the lease and accordingly, WEC Pty Ltd ceased its operations on 31st July 2001. We understand that the Community has now leased the premises to another party.
>
> WEC Pty Ltd is effectively insolvent with debts of approximately $830,000.00 made up as follows:-

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1 *Mibor Investments v CBA* (1993) 11 ACSR 362, 366; *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACLC 669, 672.

2 *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 24 ACSR 353, 363-365.

> Financiers - $725,000.00
> Australian Tax Office - $37,140.00
> Superannuation - $12,641.00
> Trade creditors - $55,097.00.
>
> The assets of the company are approximately $6,000.00 in cash. There are no other assets. A large proportion of the money owed to the financiers was expended on renovations and refurbishment of the building owned and is therefore irrecoverable.
>
> … "

[16] Had there been an oral agreement in September 2000 as deposed by Mr Louis Toumbas, it is remarkable that the letter made no reference to it or to the respondent's resulting debt to the appellant of $752,000. The appellant's material provided no explanation for this omission.

[17] The second piece of evidence which throws further doubt on the genuineness of any dispute between the parties is the appellant's notice of dispute under the *Retail Shop Leases Act* 1994 (Qld) dated 15 October 2001 in which Mr Louis Toumbas, representing the appellant, set out in detail the matters of dispute between the parties. Although raising many associated matters, he did not mention any oral agreement in September 2000 or $752,000 debt owing to the appellant from the respondent. Again, the appellant's material provides no explanation for this omission.

[18] Mr Toumbas' evidence as to the oral agreement was disputed by three witnesses for the respondent. It was not supported by other witnesses said to be present on behalf of the appellant when the agreement was made and no explanation was given for the absence of those witnesses. The appellant has never demanded repayment of the now disputed $752,000 and the letter of 11 September 2001 and the subsequent notice of dispute made no mention of it. There is no independent support for Mr Louis Toumbas' assertion. On this material, the learned primary judge was entitled to determine that the appellant had not established a genuine dispute between the parties because of Mr Louis Toumbas' assertion of an oral agreement. Under the lease, fixtures and fittings not removed by the appellant became the property of the lessor[3] and all structural improvements also became the property of the lessor[4] The appellant did not establish a genuine dispute based on the respondent's conversion of the appellant's chattels. His Honour was entitled to determine the appellant had not established a genuine dispute as to the subject and amount of the statutory demand.

[19] I would dismiss the appeal with costs to be assessed.

[20] **CULLINANE J:** I have read the reasons of the President in this matter and agree with them and the order proposed.

[21] **HOLMES J:** I agree with the reasons for judgment of McMurdo P and with the order she proposes.

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3 Clause 1(g).
4 Clauses 4(e) and 12.