

# SUPREME COURT OF QUEENSLAND

CITATION: *UV Natural (International) Pty Ltd v Gifford* [2007] QSC 119

PARTIES: **UV NATURAL (INTERNATIONAL) PTY LTD**  
(applicant)  
V  
**WARICK RAYMOND GIFFORD**  
(respondent)

FILE NO/S: BS3080 of 2007

DIVISION: Trial Division

PROCEEDING: Application to set aside notice of statutory demand

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 29 May 2007

DELIVERED AT: Brisbane

HEARING DATE: 15 May 2007

JUDGE: Moynihan J

ORDER: **1. Statutory demand served upon the applicant by the respondent be set aside.**  
**2. No order as to costs.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENT – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENERAL DISPUTE AS TO INDEBTEDNESS – where statutory demand made for payment pursuant to a loan agreement - whether there is a genuine dispute between the parties as to the existence or amount of the debt.

*Corporations Act 2001* (Cth) s 459A, s 459E(2)(e), s 459G  
*Mandarin International Developments Pty Ltd v Growth Corp (Aust) Pty Ltd* (1998) 143 FLR 408, considered.  
*Re Morris Catering (Aust) Pty Ltd* (1933) 11 ACSR 601, considered.  
*Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd* [2002] NSWSC 411, considered.

COUNSEL: KF Boulton for the applicant.  
JF Curran for the respondent.

SOLICITORS: Delaney & Delaney for the applicant.  
Burns Law for the respondent.

- [1] This is an application pursuant to s 459G of the *Corporations Act 2001* (Cth) to set aside a statutory demand on the basis of a genuine dispute about the debt the subject of that notice.
- [2] The *respondent* is a former director and chief financial officer of the applicant. On 21 March 2007 he served a notice of statutory demand pursuant to s 459E(2)(e) of the *Corporations Act* on the applicant for a total amount of \$130,000 made up of \$100,000 for a loan to the company of 11 March 2005 and a loan of \$30,000 on 1 March 2006.
- [3] The operation of s 459A of the *Corporations Act* is the subject of considerable judicial consideration and exposition. The considerations relevant to this application are those canvassed by Thomas J in the oft cited case of *Re Morris Catering (Aust) Pty Ltd*.<sup>1</sup>
- [4] It is there stated that the specified limits of the court's examination is directed to the ascertainment of whether there is a 'genuine dispute' in the context of a 'genuine claim'. His Honour stated that:<sup>2</sup>

[i]t is often possible to discern the spurious to identify mere bluster or assertion. But beyond a perception of a genuineness (or lack of it), the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another. The essential task is relatively simple -- to identify the genuine level of claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).

- [5] In *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd*<sup>3</sup> Barrett J noted that a company challenging a statutory demand:<sup>4</sup>

will fail in that task only if it is found that its challenge is so devoid of substance that no further investigation is warranted. Once the company shows that even one issue is of sufficient cogency to be arguable a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing conditions. If it sees any factor that on a rational ground indicates an arguable case ... it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.

- [6] Where issues of credit enter into consideration the court's task is particularly constrained; *Mandarin International Developments Pty Ltd v Growth Corp (Aust) Pty Ltd*.<sup>5</sup>
- [7] This matter arises in the context a company, Grape Escape International Pty Ltd, being trustee of the All Natural Unit Trust which owns the intellectual property generated by the *applicant*.

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<sup>1</sup> (1993) 11 ACSR 601.

<sup>2</sup> *Ibid*, 605.

<sup>3</sup> [2002] NSWSC 411.

<sup>4</sup> *Ibid*, 23.

<sup>5</sup> (1998) 143 FLR 408.

- [8] It is not in dispute that Shirley Jan Livesay (*Livesay*) a director of the *applicant* on 11 March 2005 signed a document described as a loan agreement whereby the *respondent* agreed to lend \$100,000 to the company on an interest only loan with the capital to be repaid by 30 July 2005 with security by way of a floating charge.
- [9] *Livesay* says she regularly signed what the *respondent* asked her to without considering the document and she did so in this case. I do not think this helps the *applicant's* case.
- [10] The dispute relied on may be summarised in this way. The *respondent* was at the relevant time in a de facto relationship with a woman named Lyn Leong (*Leong*) which subsequently broke up. In correspondence from her solicitors *Leong* asserts that she and the *respondent* borrowed \$100,000 secured over property which she owned.
- [11] *Leong* contends that she is entitled to the repaid loan money and that the *respondent* had refused to execute an authority that the money be paid to her. In a letter from her solicitor *Leong* says in effect she does not want the money back and that it can stay with the *applicant*.
- [12] There is an entry on the company's books acknowledging the loan by the *respondent* and an agreement between the *respondent* and Leong acknowledging an advance in joint names.
- [13] *Livesay* also confirmed that she signed a loan agreement on 1 March 2006 for \$30,000, relied on in the statutory demand, at the request of the *respondent*. It appears that the loan refers to the capitalisation of moneys owed to the *respondent* for directors' fees.
- [14] The remuneration of directors is dealt with by a shareholders agreement<sup>6</sup> apparently entered into around about 1 July 2004. This provided for a director's remuneration package of \$66,000 per year in the form of salary, motor vehicle allowance and a stipend.
- [15] The loan agreement has a notation by the *respondent* 'contract unpaid conversion'. Clause 77 of the company's constitution provides that directors' remuneration is determined by the *applicant's* annual general meeting.
- [16] It is contended for the *applicant* that it appears that the \$30,000 is based on invoices for management services allegedly rendered by the *respondent* to the UV Natural Trust evidenced by a number of invoices.<sup>7</sup>
- [17] They are not for salary and allowances but management services. It is contended by the applicants that neither the applicant nor the trust engaged the *respondent* to provide the services and there is no evidence of agreement and it is not clear in what capacity he provided them.
- [18] The criticism forcefully made by the *respondent's* counsel in support of the contention that there were genuine loans and criticising *Livesay's* accounts of events are not without merit.

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<sup>6</sup> See Exhibit P to the affidavit of Justin Livesay sworn 11 April 2007 – court file document 3.

<sup>7</sup> See Exhibit R to the affidavit of Justin Livesay sworn 11 April 2007 – court file document 3

- [19] These are however contested factual issues, resolving them involves embarking on balancing conflicting accounts and resolving them. In those circumstances it is difficult to say there is a lack of a perception of genuineness c.f. *Re Morris Catering (Aust) Pty Ltd.*<sup>8</sup>
- [20] That being so the notice of statutory demand should be set aside on the basis that there is a genuine dispute.

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<sup>8</sup> (1993) 11 AC SR 601.