SUPREME COURT OF QUEENSLAND

CITATION:	*Forza Finance Pty Ltd v Vergepoint Sales and Management Pty Ltd* [2010] QSC 155
PARTIES:	**FORZA FINANCE PTY LTD** ACN 120 944 587 (applicant) **v** **VERGEPOINT SALES AND MANAGEMENT PTY LTD** ACN 123 383 540 (respondent)
FILE NO/S:	SC 13499 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2010
JUDGE:	Margaret Wilson J
ORDER:	**1. that the statutory demand be set aside;** **2. that the respondent pay the applicant's costs of and incidental to the application, including reserved costs, other than the costs of and incidental to the application which was heard on 13 January 2010 to amend the originating application.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where applicant company, Forza Finance Pty Ltd, brings an application to set aside a statutory demand served on 9 November 2009 – where statutory demand was for $50,020, being the amount payable pursuant to a deposit guarantee given by the applicant – where respondent company, Vergepoint Sales and Management Pty Ltd, is a developer of home units and is developing a complex on the Gold Coast – where persons named Dichiera and Brown entered into a contract to

purchase apartment A101 (proposed lot 2201) off the plan – where the deposit was provided by way of a guarantee from the applicant – where in accordance with s 213 of the *Body Corporate and Community Management Act* 1997 (Qld), the respondent gave a disclosure statement which included a plan (plan D) showing the position of the lot in question and its private courtyard having an area of 81 square metres – where on 15 June 2009 the respondent made a further disclosure statement to which were annexed amended plans – where on the amended plan D, the courtyard had an area of 89 square metres and there was a more detailed plan of level 2 which showed there was to be a toilet on the other side of that part of the wall of lot 1201 which adjoined the courtyard of lot 2201 – where by letter dated 26 June 2009, the purchasers' solicitors wrote to the respondent's solicitors purporting to terminate the contract asserting that the change in the further disclosure statement materially prejudiced their clients, requesting return of the deposit and any interest which had been earned on it – where pursuant to s 459H of the *Corporations Act* 2001 (Cth), a statutory demand will be set aside where there is a genuine dispute between the applicant company and the respondent – whether there is a genuine dispute about the circumstances of the termination of the contract – whether there is a genuine dispute within the meaning of s 459H – whether statutory demand should be set aside

Body Corporate and Community Management Act 1997 (Qld), s 213, s 214
Corporations Act 2001 (Cth), s 459G, s 459H

Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785, referred to

COUNSEL: V G Brennan for the applicant.
B J D Lambert (solicitor) for the respondent.

SOLICITORS: Irish Bentley for the applicant.
Birch & Co. for the respondent.

HER HONOUR: This is an application to set aside a statutory demand which was served on 9 November 2009. The application was filed on 30 November 2009. It was subsequently amended to include an application for declaratory and injunctive relief, but in the upshot the additional forms of relief were not pursued. The applicant pursued only its application under section 459G of the Corporations Act.

The statutory demand was for $50,020, being the amount payable pursuant to a deposit guarantee given by the company Forza Finance Pty Ltd.

The respondent, Vergepoint Sales and Management Pty Ltd, is a developer of home units. It is developing a complex on the Gold Coast to be known as Central Apartments. Persons named Dichiera and Brown entered into a contract to purchase apartment A101 (proposed lot 2201) off the plan. The deposit was provided by way of a guarantee from the applicant, Forza Finance Pty Ltd.

In accordance with section 213 of the Body Corporate and Community Management Act 1997, the respondent Vergepoint gave a disclosure statement. It included a plan (plan D) showing the position of the lot in question and its private courtyard having an area of 81 square metres.

On 15 June 2009, the respondent Vergepoint made a further disclosure statement to which were annexed amended plans. On the amended plan D, the courtyard had an area of 89 square metres. The north-east corner of the courtyard adjoined the wall of apartment 1201 which it had not previously done. There was also a more detailed plan of level 2. That showed that there was to be a toilet on the other side of that part of the wall of lot 1201 which adjoined the courtyard of lot 2201.

By letter dated 26 June 2009, the purchasers' solicitors wrote to the respondent Vergepoint's solicitors purporting to terminate the contract. They asserted that the change in the further disclosure statement materially prejudiced their clients: "The issue of particular concern to them is that the exclusive use of courtyard E 2201 abuts the wall of proposed lot 1201." They requested return of the deposit and any interest which had been earned on it.

Under section 459H of the Corporations Act, a statutory demand will be set aside where there is a genuine dispute between the company (Forza Finance Pty Ltd) and the respondent (Vergepoint Sales and Management Pty Ltd).

The applicable principles were summarised by McLelland CJ in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 at pages 787 to 788:

"It is, however, necessary to consider the meaning of the expression 'genuine dispute' where it occurs in section 450H. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the 'serious question to be tried' criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the Court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be' not having 'sufficient prima facie plausibility to merit further investigation as to [its] truth' (cf Eng, Mee Yong v Letchumanan [1980] AC 331 at 341), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence': cf South Australia v Wall (1980) 24 SASR 189 at 194.

But it does mean that, except in such an extreme case, a Court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute. In Mibor Investments Pty Ltd v Commonwealth Bank of Australia (1993) 11 ACSR 362 (at 366-7) Hayne J said, after referring to the state of the law prior to the enactment of Div 3 of Pt 5.4 of the Corporations Law, and

the terms of Div 3:

'These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.'

In Re Morris Catering (Aust) Pty Ltd (1993) 11 ACSR 601 at 605 Thomas J said:

'There is little doubt that Div 3...prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a 'genuine dispute' and whether there is a 'genuine claim'.

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the 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 a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).'"

Here there are two matters raised by the company Forza Finance about which its counsel submits there is a genuine dispute.

To explain the first of these it is necessary to look at the guarantee. The applicant undertook to make payment of a deposit guarantee upon receipt of certain documents from the respondent Vergepoint. The guarantee went on to provide that it should remain in force until (relevantly) the contract was rescinded or terminated in circumstances entitling the purchasers to a refund of the deposit in accordance with the contract.

The respondent Vergepoint contends that it satisfied the requirements of the guarantee by a letter dated 31 August 2009 addressed to the applicant company Forza Finance Pty Limited and the enclosures. The applicant concedes that had it received that letter and enclosures, the respondent would have complied with its obligation under the guarantee. However, it contends that it was necessary for it to receive the correspondence and that it has not been proved to have done so.

The respondent Vergepoint relied on two affidavits by a postal officer, Ms Laing (documents 7 and 18 on the Court file). She was cross-examined.

The correspondence was sent by registered post to the applicant at a post office box at East Brisbane. Ms Laing, who operates the post office, deposed to the procedures for collection of registered post and to the contents of a record kept by the post office with respect to delivery of such items. The applicant relied upon the affidavit evidence of Mr Matthew Edward Thomas, a compliance officer in its employ.

There is some mystery concerning whether this letter and its enclosures were received. Ms Laing deposed that it is the practice of the post office to require persons collecting registered postal articles to sign a registered post book to on confirm delivery. The relevant registered post book indicates that it was collected on 16 September 2009.

In oral evidence the practice was expanded upon a little. It seems that a red ticket would have been placed in the post box, then someone having the key would have retrieved that red ticket, and then someone would have presented the red ticket to an employee of the post office in order to receive the item. The person presenting the red ticket would have had to sign for the item.

Mr Thomas has deposed that he was the only person with the key and that he did not receive the item. He has deposed to making inquiries of staff, servants and agents and none of them telling him that he or she had collected the item.

The signature of the person who collected the item is indecipherable. According to Ms Laing it was someone she recognised as having a post office box at the post office and someone who had a business card of Forza Finance Pty Limited.

As I say, there is some mystery about this. But I do not think it is necessary to resolve it, because I am satisfied that the other matter relied upon by counsel for the applicant does raise a genuine dispute as to the debt.

It arises in this way. Under section 214 of the Body Corporate and Community Management Act, where there is a change or variation such that the information in a disclosure statement is no longer accurate, it is necessary for the vendor to serve a further statement. That was done in this case. The section goes on to provide that the purchaser may terminate the contract if he or she would be materially prejudiced if compelled to complete given the extent to which the disclosure statement has become inaccurate.

Ms Brown, one of the purchasers, has sworn an affidavit and been cross-examined. She referred to changes to the plans as having fundamentally altered the unique properties of the unit, including the views, breeze and natural light. She deposed to the changes being detrimental to the value of the

unit. Upon cross-examination it became clear that her principal concern was that the courtyard now adjoined the toilet on the new plan.

The solicitor for the respondent Vergepoint argued that this was not a matter of material prejudice - that, in fact, the area of the courtyard had been increased. On the one hand there is an increase in area; on the other hand there is at least an arguable decrease in the amenity of the courtyard. I have no reason to doubt that Ms Brown is genuine in the concerns she expresses and I consider that there is a genuine dispute about whether this amounts to material prejudice within the meaning of the Body Corporate and Community Management Act.

Under clause 2.4(b) of the contract for the sale of the unit, the purchaser is entitled to receive the deposit if the contract is terminated without his or her default. In the circumstances there is a genuine dispute about the circumstances of the termination of the contract. That is sufficient, in my view, to amount to a genuine dispute within the meaning of section 459H of the Corporations Act. Accordingly, the statutory demand should be set aside.

Mr Brennan?

MR BRENNAN: We seek our costs, including reserved costs, your Honour.

MR LAMBERT: No objection, your Honour, except with respect to

the hearing in respect of the proposed amendments to the originating application, because your Honour has found that issue has never been proceeded with so we submit that no costs ought to be ordered in that respect.

...

HER HONOUR: I think the fair resolution of the costs question is that the applicant should receive the costs of and incidental to the application, including reserved costs, other than the costs of and incidental to the application to amend the originating application which was heard on 13 January 2010
