SUPREME COURT OF QUEENSLAND

CITATION:	*The Charan Group Pty Ltd v Kaur* [2011] QSC 71
PARTIES:	**THE CHARAN GROUP PTY LTD** ACN 119 209 782 (applicant) **v** **HARSWEEN KAUR** (respondent)
FILE NO/S:	SC No 2362 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	4 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2011
JUDGE:	Chief Justice
ORDER:	**1. That the application be dismissed; and** **2. That the applicant pay the respondent's costs of and incidental to the application to be assessed on the indemnity basis.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – PROCEDURAL REQUIREMENTS – SERVICE OF APPLICATION – where applicant mailed application to set aside demand to respondent's solicitors' GPO box one day before the end of the prescribed 21 day period for service – where application arrived one day after the prescribed 21 day period for service – whether due service was established CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – COSTS – whether there was a fundamental deficiency in the mounting of the application such that costs should be ordered on an indemnity basis *Acts Interpretation Act* 1901(Cth), s 29(1) *Australian Postal Corporation (Performance Standards) Regulations* 1998 (Cth), r 6(2) *Corporations Act* 2001(Cth), s 459G(2), s 459G(3) *Uniform Civil Procedure Rules* 1999 (Qld), r 112(1)(d) *Entech-Renewable Energy Solutions Pty Ltd v Polytek-Wernes Engineering SDN BHD* [2010] WASC 354, cited

Scope Data Systems Pty Ltd v Goman (as representative of the partnership B D O Nelson Parkhill) (2007) 70 NSWLR 278; [2007] NSWSC 278, followed

COUNSEL: H L Alexander for the applicant
J M Nott (solicitor) for the respondent

SOLICITORS: Alexander Law for the applicant
Praegaer Ellem Solicitors for the respondent

[1] **CHIEF JUSTICE**: On 22 March 2011 the applicant filed an application for an order setting aside a statutory demand dated 28 February 2011 and served on the applicant on 3 March 2011.

[2] Supporting the application was an affidavit by R A Charan, a director of the applicant. He exhibited the demand, in the amount of $75,108.80, which nominated, as the creditor's address for service, the address of the respondent Ms Kaur's solicitors, at "Level 12 Central Plaza One, 345 Queen Street, Brisbane".

[3] In that affidavit Mr Charan swears that his company sold foodstuffs "on behalf of Talwinder Dhillon", having received them "on consignment", and accounting to the consignor progressively upon the sale of the goods. Mr Charan did not say that his company had no other relevant dealings which could relate to the respondent's claim, and in particular, did not swear that he had no dealings at all with the respondent. The applicant's counsel, Mr Alexander, submitted that the tenor of the affidavit nevertheless implied that this was the only possible applicable transaction, and that it was had with Mr Dhillon and not Ms Kaur.

[4] But obviously struck with the sparsity of that affidavit material, Mr Alexander sought to supplement it at the hearing, by means of a further affidavit by Mr Charan sworn on the day of the hearing. Mr Nott for the respondent opposed any grant of leave.

[5] The further affidavit deals more comprehensively with the situation, with these statements:

> "Nothing was said to me by Mr Talwinder Dhillon or anyone else to suggest that Mr Talwinder Dhillon acted as an agent for anyone else. As far as I know, neither I nor anyone else on behalf of my company has ever directly or indirectly entered into any contact or agreement with Harsween Kaur for the import, sale or supply of food stuffs or anything else or ever bought any goods from Harsween Kaur. …The terms of the arrangement with Mr Talwinder Dhillon were verbally agreed between him and me acting on behalf of my company in or about March 2010 and in accordance with that arrangement food stuffs were sold upon consignment which basically meant that …the rice and mustard oil were imported from India to my company's premises, where it was stored in my warehouse. I would then sell them for him to the wholesale restaurant market and paid Mr Talwinder Dhillon as and when sold and collected. Mr Talwinder Dhillon was responsible for selling the goods within the local retail market using his cashbook making the sale and collecting the funds…To this very date I have not received any invoices for the

> import, supply or sale of any food stuffs or for anything else due to be paid to either Mr Talwinder Dhillon or Harsween Kaur by my company. All import documents were in the name of Talwinder Dhillon…I have not been provided with any dockets for delivery of any goods to my company."

[6] I may not have regard to that further affidavit if it raises a new ground of challenge not disclosed by the affidavit filed with the application. Mr Nott submitted that the first affidavit was "fundamentally insufficient" (*Entech-Renewable Energy Solutions Pty Ltd v Polytek-Wernes Engineering SDN BHD* [2010] WASC 354, para 21), so that it could not be supplemented by the second affidavit.

[7] Notwithstanding its sparsity, the first affidavit should be read as implicitly advancing the arrangement with Mr Dhillon as being the only dealing which could be relevant, implicitly thereby excluding any contractual relationship with Ms Kaur. In those circumstances, the basic point having been made in that first affidavit, the second could be regarded as an exercise in permissible supplementation, and therefore receivable.

[8] I am satisfied that the affidavits, read together, would be sufficient to establish a genuine dispute about the existence of the requisite debt.

[9] But the applicant faces an anterior obstacle which I have concluded is insuperable on the material before me.

[10] Notwithstanding the designation in the notice of demand of the respondent's solicitors' actual office address as the respondent's address for service, the applicant chose to post the application and the supporting (first) affidavit to the respondent's solicitors' GPO box address. The unchallenged evidence of the respondent's solicitors' staff member, Ms Allman, is that the application and affidavit arrived in that post office box no earlier than 25 March 2011. The 21 day period prescribed by s 459G(2) and (3) of the *Corporations Act* 2001, for service of those documents, expired on 24 March 2011. The documents arrived in the mail box a day late, on 25 March 2011.

[11] Rule 112(1)(d) of the *Uniform Civil Procedure Rules* permitted service by "posting…to the relevant address". I was addressed on the basis that s 29(1) of the *Acts Interpretation Act* 1901 (Cth) applied, meaning that service in such circumstances is effected "at the time at which the letter would be delivered in the ordinary course of post".

[12] Mr Alexander referred me to Ex 1, which I was told was downloaded from the Australia Post website, referring to a delivery date of "next business day" applicable between Brisbane and its suburbs. (I was told that these documents were posted from the post code 4017, which is Sandgate). I was also referred to regulation 6(2) of the *Australian Postal Corporation (Performance Standards) Regulations* 1998, which relevantly provides that Australia Post "must deliver at least 94 per cent of all reserved services letters" by the next business day after posting (this is on the assumption that Sandgate is within the Brisbane "metropolitan" area of which there was no evidence).

[13] I adopt the same approach to this as was adopted by White J in the Supreme Court of New South Wales in *Scope Data Systems Pty Ltd v Goman (as representative of the partnership B D O Nelson Parkhill)* [2007] NSWSC 278, para 21:

> "There was no evidence from any employee of Australia Post as to when a document posted in the central business district of Sydney would, in the ordinary course of post, be delivered to a post office box at the Manly post office. The defendant tendered, without objection, material from the Australia Post website which showed that the 'delivery timetable' for ordinary post within Australia was that if a document were lodged for delivery within the metropolitan area of a capital city of a State, then the delivery day within the same State was the next business day after lodgement. However, I accept the submission of Mr Orlov, who appeared for the plaintiff, that evidence of Australia Post's timetable for the delivery of mail did not establish when mail could be expected to be delivered in the ordinary course of post. There was no evidence as to how frequently, if at all, the timetable was complied with. In the absence of such evidence, a timetable for the delivery of mail might be a statement of aspiration, as much as an indicator of the likely time by which mail is delivered. Regulation 6 of the *Australian Postal Corporation (Performance Standards) Regulations 1998* (Cth) specifies a performance standard for Australia Post that 94% of letters lodged with Australia Post for delivery within the metropolitan area of the capital city of lodgement be delivered the next business day. However, there was no evidence as to whether this performance standard was met. The evidence did not establish when, according to the ordinary course of post, the letter posted on 25 September 2006 would be delivered to the post office box at Manly."

[14] Due service has not been established. As I observed during the argument, the solicitor for the applicant took a considerable risk in posting the documents just the day before the 21 day period was due to expire, especially knowing that service could have been effected personally at the respondent's solicitors' Brisbane office, in a context where it is well-established that there must be strict compliance with the technical legislative requirements in this area.

[15] I accordingly order that the application be dismissed, and that the applicant pay the respondent's costs of and incidental to the application.

[16] By letter dated 29 March 2011, the respondent's solicitors pointed out to the applicant's solicitors the problem with service, and that if the application were to fail, the respondent would seek costs on the indemnity basis. With that letter, the respondent's solicitors included a date stamped copy of the applicant's solicitors' relevant letter. Notwithstanding the comprehensive evidence as to receipt of the material came in Ms Allman's affidavit filed by leave at the hearing, I consider that an award of indemnity costs is warranted, because of what should have been regarded as a fundamental deficiency in the way the application was mounted, which was drawn to the attention of the respondent at a time when the application could have been withdrawn and costs limited.

[17] There will therefore be an order that the costs be assessed on the indemnity basis.