

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Gowinta Farms Pty Ltd* [2012] QSC 423

PARTIES: **BLUECOVE PTY LTD**  
**ACN 010 824 923**  
(applicant)  
v  
**GOWINTA FARMS PTY LTD (IN LIQ)**  
**ACN 010 242 869**  
(respondent)

FILE NO/S: BS 11627 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 December 2012 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 18 December 2012

JUDGE: Daubney J

ORDERS: **1. The statutory demand dated 15 November 2012 served by the respondent on the applicant on or about 16 November 2012 be set aside.**

**2. The respondent, Gowinta Farms Pty Ltd (in liquidation), and Robert Boyce Moodie and Andrew James Barnden pay the applicant's costs of and incidental to the application to the assessed on an indemnity basis.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP AND INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – OFFSETTING AND OTHER LIKE CLAIMS – GENERALLY – where statutory demand issued by the liquidators – where s 459H Corporations Act application to set aside statutory demand – where dispute about quantum of debt – where offsetting claims exceed sum claimed under statutory demand – whether statutory demand should be set aside.

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDERS FOR COSTS ON INDEMNITY BASIS – where company is insolvent and under liquidators' control – where there is ongoing trading

	between parties – where liquidator serves notice of statutory demand – whether costs should be assessed on indemnity basis.	1
	<i>Corporations Act 2001 (Cth), s 459</i>	
	<i>Belar Pty Ltd(in liq) v Mahaffey [2000] 1 Qd R 477, applied.</i>	
COUNSEL:	F G Forde for the applicant	10
	Z A Casagrand ( <i>sol</i> ) for the respondent	
SOLICITORS:	Robert Bax and Associates for the applicant	
	Results Legal for Wyndham PRM Commercial for the respondent	
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HIS HONOUR: This application concerns a statutory demand that was issued by the liquidators of the respondent, Gowinta Farms Pty Ltd (in liq), against the applicant, Blueco Pty Ltd. The demand sought payment of the sum of \$289,205.36. The applicant now applies, pursuant to section 459H of the Corporations Act, for an order setting aside the statutory demand. It is notable that, despite the present application having been served on the respondents, no material whatsoever has been filed on behalf of the respondents to join issue or contradict any of the matters deposed to in the affidavit in support of the present application to set aside the statutory demand.

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The material satisfies me that there is a genuine dispute as to the debt claimed under the statutory demand, and in particular there is a genuine dispute as to the quantum of that debt. As I have said, the matters relied on in the affidavit of Mr Alroe, which speak to the past practices on a running account between the parties, have not been in any way contradicted by the respondent, and I am satisfied of the genuineness of the dispute that has been raised in that regard.

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For the applicant material has also been put before me, which genuinely raises offsetting claims of approximately \$320,000. That clearly is an amount well in excess of the sum claimed under the statutory demand. It is genuinely advanced in the evidence for the existence of the offsetting claims, as referred to in the presently uncontradicted evidence of

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Mr Alroe. In all the circumstances, it is therefore clearly appropriate for there to be an order that the statutory demand be set aside.

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It is also appropriate for there to be an order that the respondent pay the applicant's cost of and incidental to the application. The only question is whether I should order those costs to be assessed on the indemnity basis. Counsel for the applicant pointed me to what might neutrally be described as an unfortunate sequence of events.

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The only precursor to the issuing of the statutory demand was a phone call by one of the liquidator's employees to Mr Alroe of the applicant on 9 November 2012, when the employee, Mr Gunson, told Mr Alroe to the effect that the applicant owed the respondent approximately \$289,000 and asked when the applicant was going to pay it.

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Mr Alroe's uncontroverted evidence is as follows: "I said to [Mr Gunson] that the money is not owed and started to list a number of expenses they owed me. I said that they owed me for the plants, the demountables, and the truck.

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Paul Gunson then interrupted me and said that they were not responsible for those expenses, and the conversation ended.

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At no time thereafter did the respondent send me a letter of demand or a warning that they were intending to send a

statutory demand. The next I heard from the liquidators was the service of the statutory demand."

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The evidence of Mr Alroe also indicates a course of dealing between the applicant and the respondent liquidators, which includes matters such as the liquidators asking the applicant, effectively, to advance the sum of \$2 million to enable the liquidators to continue to operate the business of the respondent. The material also goes to the ongoing trading circumstances between the applicant and the respondent.

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It seems highly unusual, in those circumstances, for the liquidator to have so peremptorily dismissed the concerns raised by Mr Alroe as to the alleged level of indebtedness, and it was frankly an act of highhandedness for the liquidators then simply to issue the statutory demand, which in turn necessitated the bringing of the present application.

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Had the liquidators properly explored the issues which Mr Alroe sought to raise with Mr Gunson there is no doubt in my mind that precisely the matters which have been put before the Court today as warranting the setting aside of the statutory demand would have been able to have been put before the liquidators and if a negotiated outcome could not have been reached then an appropriate form of debt collection could have been undertaken by the liquidators, if they were so advised.

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As I have said, however, none of that happened; the liquidators simply proceeded to issue the statutory demand. On the application to set aside a statutory demand being filed the liquidators then have, effectively, done nothing to respond to it.

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In all those circumstances it seems to me appropriate to order that the respondents pay the applicant's costs of an incidental to the application, to be assessed on the indemnity basis.

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HIS HONOUR: Application has been made for the costs order to extend not just to the respondent company, but also to the liquidators of the respondent company. Again, the situation is not assisted by the fact that no material has been put before me by or on behalf of the liquidators, and the town agent who has appeared before me to assist me has not, in any way, been aided in his efforts before me by the lack of material.

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I am satisfied that in this case it is appropriate to make an order for costs against the liquidators. In that regard I have regard to the observations by the Court of Appeal in Belar Pty Ltd (in liq) v. Mahaffey [2000] 1 Qd R 477, at 491, in which the Court noted that when an insolvent company under the control of a liquidator is unsuccessful in liquidation against another party a simple order for costs against the

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company would carry a considerable risk that the costs would not be recovered. A fortiori in a case such as the present, where the conduct of the liquidators in issuing the statutory demand compelled the bringing of the present application.

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I am satisfied that it is appropriate for the costs order to issue both against the company in liquidation and against the liquidators of that company.

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There will therefore be an order in terms of the draft, that I now initial and place with the papers.

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