



Sciacca v Tzvetkoff and BT Projects

19 July 2009

Widely reported Gen-Y internet tycoon Daniel Tzvetkoff (**Tzvetkoff**), is being sued by former co-director Salvatore Sciacca (**Sciacca**) according to a claim filed in the Supreme Court in Brisbane on 7 July 2009. Tzvetkoff made headlines earlier this year for his \$A28 million dollar real estate purchase from Tony Smith, founder of Breakfree, and his investment in the nightclub, Zuri, located in Brisbane's Fortitude Valley.

The allegations

The allegations contained in the Statement of Claim made by Sciacca against Tzvetkoff and BT Projects include:

- that money from BT Projects was "diverted ... without authorisation";
- that Tzvetkoff recorded entries or directed inaccurate entries to be made to the financial records and books of the company that were not accurate;
- that Tzvetkoff concealed the inaccurate entries from Sciacca;
- that Tzvetkoff artificially inflated the books of BT Projects;
- that Tzvetkoff engaged in "misleading and deceptive conduct" by claiming the accounts were accurate and that the profits were bigger than independent accountants have since established;
- that Sciacca was shown false financial figures that prompted him to sign off on company expenditure and loans;
- that Sciacca was misled into giving a repayment guarantee to a BT Projects client;
- Mr Sciacca is seeking \$90 million (USD) in damages from Mr Tzvetkoff personally and BT Projects for future loss of profit.

As at 17 July 2009, neither Tzvetkoff or BT Projects has been required to file a defence.

Basis of allegations under statute

The allegations made by Sciacca against Tzvetkoff and BT Projects raise a number of potential legal issues, particularly in relation to the duties owed by directors. From the information available, it appears that the allegations against Tzvetkoff and BT Projects purport to be based on the provisions of the *Corporations Act* (Cth) 2001 (**the Act**) as follows:

- breach of directors duty to exercise powers in good faith and for a proper purpose - s181(1) of the Act;
- breach of duty not to improperly use position to gain an advantage or cause detriment to the Company - s182 of the Act;
- breach of duty not to use information for personal advantage - s183 of the Act; and
- misleading and deceptive conduct under the provisions of the *Trade Practices Act 1974* (Cth).

These are of course mere allegations made by the Plaintiff and at this stage no evidence has been adduced or put before the Court by either side. We will await with interest to see how it all unfolds in the weeks and months ahead.

Statement of general corporate law issues

Shareholders Agreements and Constitutions

A Shareholders Agreement is a document which provides, amongst other things, how a company will be owned and managed. Subject to the provisions of any Shareholders Agreements that parties enter into, a Director acting outside their authority may be in breach of the provisions contained in such an agreement. Another aspect of directors' obligations is the duty to act in accordance with the corporate constitution.

Criminal liability

Criminal liability may result under section 184(1)(a) &(b) of the Act if it is established that a Director breached their duty and was intentionally dishonest.

The importance of good corporate governance

Given the current economic climate and the global financial crisis, it is important that directors adopt best practice corporate governance to avoid legal actions for insolvent trading or a breach of director's duties.

Issues for directors' consideration

Directors should consider:

- their fiduciary duties (a legal relationship of confidence or trust between two or more people) owed to other directors and the Company;
- their statutory obligations pursuant to the Act;
- the importance of maintaining detailed company records, which may later assist directors justify and defend their position if any decision is scrutinised by a court or creditors;
- obtaining appropriate advice and information in order to make informed decisions; and
- disclosing all information to the Company about any potential or conceived conflicts of interest.

Should you wish to discuss the implications of director's duties and how these duties may affect your business, or alternatively how to implement best practice corporate governance, please contact Malcolm Burrows or Mark Harley.

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Other articles that are available in Rostron Carlyle's Corporate Law series include:

- Formal requirements for minutes of Directors' Meetings;
- Strict compliance with the Corporations Act required for Minutes to be evidentiary (Lessons from *Australian Securities and Investments Commission v Macdonald* (No 11) [2009] NSWSC 287);
- Introduction to Shareholders Agreements;
- Statutory directors duties - an introduction.

"The information contained in this article is general in nature and cannot be regarded as anything more than general comment. Readers of this article should not act on the basis of this comment without consulting one of Rostron Carlyle's legal practitioners who will consider their particular circumstances".

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