IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

No. S ECI 2014 000102

FAÇADE TREATMENT ENGINEERING LIMITED Plaintiff

v

BROOKFIELD MULTIPLEX CONSTRUCTIONS PTY LTD Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	10-11 FEBRUARY 2015
DATE OF JUDGMENT:	24 FEBRUARY 2015
CASE MAY BE CITED AS:	FAÇADE TREATMENT ENGINEERING v BROOKFIELD MULTIPLEX
MEDIUM NEUTRAL CITATION:	[2015] VSC 41

BUILDING AND CONSTRUCTION LAW – *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'BCISP Act') - Payment claim - Whether respondent's response a valid payment schedule under s 15 of the BCISP Act – Requirements of s 15 of the BCISP Act - Claimant company seeks judgment under s 16 of the BCISP Act – Judgment not entered where a valid payment schedule submitted within time.

CONSTITUTIONAL LAW – Claimant company in liquidation - Respondent company has potential cross-claims and set-off defences against claimant company – s 109 of the *Constitution Act* (Cth) - Inconsistency of State legislation (s 16 of the *Building and Construction Industry Security of Payment Act 2002* (Vic)) with a law of the Commonwealth (s 553C of the *Corporations Act*) – Commonwealth legislation prevails – Entry of judgment pursuant to s 16 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) precluded.

CORPORATIONS LAW – Set-off provisions for insolvent companies under s 553C – Whether notice of insolvency precludes set-off under s 553C(2) – Relevant time that creditor must have such notice.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr I Upjohn SC with Mr B Mason of Counsel	Aiken Partners
For the Defendant	Mr MG Roberts QC with Mr L Connolly of Counsel	Norton Rose Fulbright

HIS HONOUR:

Background

Introduction

1 By a sub-contract dated 7 September 2011 (the 'Sub-contract') the Plaintiff, Façade Treatment Engineering Pty Ltd (In Liq) ('Façade'), became a sub-contractor of the Defendant, Brookfield Multiplex Constructions Pty Ltd ('Multiplex'), for a building project known as the Upper West Side Redevelopment – Stage 1, on the site of the former City West Power Station in Lonsdale Street, Melbourne. The Sub-contract involved the design, supply and installation of façade and curtain wall works on the building being constructed on the site.

2 In this proceeding, Façade seeks to recover from Multiplex the total sum of $1,193,469.20 (inclusive of GST) by entry of a judgment in its favour pursuant to s 16(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'BCISP Act'). This sum comprises:

(a) $600,187.50 (inclusive of GST), specified in Payment Claim No 18, which was issued to the Defendant on 23 August 2012 in the amount of $1,198,343.30 (inclusive of GST), and in respect of which a part payment of $598,155.80 was received; and

(b) $593,281.70 (inclusive of GST), specified in Payment Claim No 19, which was issued to the Defendant on 27 September 2012. The sum of $296,640.85 was due on 14 October 2012 and the sum of $296,640.85 was due on 30 October 2012. No part of Payment Claim No 19 has been paid.

Chronology

3 A chronology of critical events reveals the following:

4 On 7 September 2011, the Sub-contract between Façade and Multiplex was entered into. The total amount payable by Multiplex to Façade under the Sub-contract for performance of the specified works was $12,250,000 plus GST.

5 On 23 August 2012, Façade submitted a payment claim numbered 0018, dated 23 August 2012, for the sum of $1,089,403 (plus GST) to the Defendant ('Payment Claim No 18'). Payment Claim No 18 complied with the requirements of a valid payment claim under s 14 of the BCISP Act.

6 On 14 September 2012, the Defendant paid $598,155.80 (including GST) to Façade towards Payment Claim No 18. The Defendant did not pay the balance of Payment Claim No 18 to Façade, and served no payment schedule pursuant to s 15 of the BCISP Act.

7 On 27 September 2012, Façade submitted payment claim 0019 dated 27 September 2012 in the sum of $539,347 (plus GST) to the Defendant ('Payment Claim No 19'). Payment Claim No 19 complied with the requirements of a valid payment claim under s 14 of the BCISP Act. No part of Payment Claim No 19 was paid.

8 On 5 October 2012, the Defendant sent an email to the Plaintiff responding to Payment Claim No 19 advising it that it considered Payment Claim No 19 to be invalid on the grounds specified in the email. Multiplex contends in this proceeding that this document satisfies the requirements of a Payment Schedule pursuant to s 15 of the BCISP Act.

9 Also on 5 October 2012, Multiplex served on Façade a show cause notice pursuant to Clause 44 of the Sub-contract.

10 On 10 October 2012, Multiplex delivered a notice to Façade taking the works to be carried out under the Sub-contract out of its hands.

11 On 23 October 2012, the former solicitors for Façade advised Multiplex that Façade regarded the conduct of Multiplex as a repudiation, and purported to determine the Sub-contract with immediate effect.

12 On 13 November 2012, Multiplex replied denying that it had repudiated the Sub-contract and asserted that it was still on foot.

13 On 6 February 2013, Façade was ordered by Associate Justice Efthim to be wound up in insolvency under the provisions of the *Corporations Act 2001* (the '*Corporations Act*') and was placed into liquidation. Mr John Potts was appointed liquidator for the purposes of the winding up by Court order made on that date.

14 The present proceeding was issued on 26 September 2014. Façade claims the sum of $1,193,469.20 (including GST) and seeks judgment for this amount, together with interest and costs.

Issues for Determination

15 There are three principal issues for determination:

(a) Whether the 5 October 2012 email set by the Defendant to the Plaintiff responding to Payment Claim No 19 (advising it that it considered Payment Claim No 19 to be invalid on the grounds specified in the email) satisfied the requirements of a Payment Schedule pursuant to s 15 of the BCISP Act;

(b) Given the winding up of the Plaintiff on 6 February 2013 on the ground of insolvency, and given the outstanding claims of the Defendant against the Plaintiff, whether the Plaintiff's claim to judgment under s 16 of the BCISP Act fails because Part 3 of the BCISP Act, including s 16, are invalid to the extent that the Victorian provisions are inconsistent with the operation of s 553C of the *Corporations Act* pursuant to s 109 of the *Australian Constitution* (the '*Constitution*'), or because the BCISP Act has no application to a company such as Façade, which, by reason of its insolvency and consequent winding up, is no longer a 'going concern'; and

(c) Whether, in the event that a judgement is able to be entered against the Defendant, in all the circumstances, a stay of execution should be ordered on appropriate terms.

Relevant Provisions of the BCISP Act

16 Section 15 of the BCISP Act provides a facility for a respondent (in this case, Multiplex) to a payment claim made under the BCISP Act (in this case, Façade), to make a reply to the claim. If a respondent fails to provide a payment schedule to the claimant within the prescribed time, the respondent becomes liable to pay the claimed amount to the claimant. It is this provision which is relied upon by Façade in seeking for found its entitlement to judgment.

17 Section 15 of the BCISP Act is in the following terms:

> **Payment schedules**
>
> (1) A person on whom a payment claim is served (the *respondent*) may reply to the claim by providing a payment schedule to the claimant.
>
> (2) A payment schedule—
>
> (a) must identify the payment claim to which it relates; and
>
> (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*); and
>
> (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
>
> (d) must be in the relevant prescribed form (if any); and
>
> (e) must contain the prescribed information (if any).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
>
> (4) If—
>
> (a) a claimant serves a payment claim on a respondent; and
>
> (b) the respondent does not provide a payment schedule to the claimant—
>
> (i) within the time required by the relevant construction contract; or
>
> (ii) within 10 business days after the payment claim is served;
>
> whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

18 Section 16 of the BCISP Act then provides for the consequences of not paying a claimant where no payment schedule has been provided. The section applies where the respondent becomes liable to pay the claimed amount to the claimant under s 15(4) of the BCISP Act as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

19 In this case the claimant, Façade, seeks to exercise its claimed entitlement under s 16(2)(a)(i) of the BCISP Act to recover the unpaid portion of the claimed amount from the respondent, Multiplex, as a debt due to it, and seeks a judgment in this Court to enforce the recovery.

20 As is made clear in s 3(4) of the BCISP Act, it is designed to operate in a framework in which the rights and liabilities it creates exist alongside, and without prejudice to, the contracting parties' underlying contractual rights, liabilities and entitlements which arise under the relevant construction contract.

21 Important in the present case is s 16(4)(b)(ii) of the BCISP Act, which provides that the respondent is not, in the recovery proceedings, entitled to bring any cross-claim against the claimant or to raise any defence in relation to matters arising under the construction contract. This provision, in combination with s 47 of the BCISP Act, which provides a facility to preserve any entitlements arising under a construction contract for later litigation and to bring into account any amount paid to a party for the purposes of the BCISP Act, provides the critical mechanism under the BCISP Act in support of the 'pay now, argue later' regime. This regime, in turn, is the central element in advancing the purpose and object of the BCISP Act under ss 1 and 3.

22 Section 16 of the BCISP Act is in the following terms:

Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant —

(a) may —

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention —

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt —

(a) judgment in favour of the claimant is not to be given unless the court is satisfied —

(i) of the existence of the circumstances referred to in subsection (1); and

(ii) that the claimed amount does not include any excluded amount; and

(b) the respondent is not, in those proceedings, entitled —

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

5 October Email – Whether a Payment Schedule?

23 It is common ground that Multiplex did not serve a valid payment schedule in respect of Payment Claim No 18.

24 As to Payment Claim No 19, Façade contends that the failure of Multiplex to satisfy the requirements of s 15 of the BCISP Act by providing a valid payment schedule within the lime limited by the section, means that it cannot avoid liability for the unpaid amounts specified in Payment Claim No 19.

25 Multiplex contends that it issued a valid payment schedule in response to Payment Claim No 19 for a nil amount within the time limited by s 15(4)(b) of the BCISP Act. It relies upon an email dated 5 October 2012 sent by Mr Ryan Treweek, Contract Administrator, on behalf of Multiplex.

26 A Payment schedule which satisfies the requirements of s 15 of the BCISP Act does not have to be in any particular form. Although s 15(2)(d) of the BCISP Act provides a facility for a payment schedule delivered under the BCISP Act to be 'in the relevant prescribed form(if any)' and s 15(2)(e) of the BCISP Act provides a facility for a payment schedule delivered under the BCISP Act to 'contain the prescribed information (if any)', the Victorian Building Authority established under the *Building Act 1993*, although it is charged with the responsibility under s 47A(a) of the BCISP Act to 'keep under regular review the administration and effectiveness of this Act and the regulations', has not taken the step of prescribing any forms either for use in making payment claims under s 14(2)(a) and (b) or for use in providing payment schedules under s 15(2)(d) and (e). Had there been such a prescribed form in existence, no doubt the present issue in the proceeding would not have arisen and the parties would have been saved the costs of litigating the matter. This situation has not escaped the earlier attention of this Court. In *Gantley Pty Ltd v Phoenix International Group Pty Ltd*,[1] the Court, after noting the absence of any prescribed form for the making of payment claims under s 14 of the BCISP Act, and noting the initiatives of the Victorian Civil Contractors Federation and the New Zealand

[1] [2010] VSC 106 [139], ('*Gantley*').

Subcontractors Federation Inc in developing payment claim forms for use under the security of payment legislation,[2] said:

> If one or other or a combination of these forms, or an appropriate adaptation thereof, had been used by the claimant in this case, it may well have averted the cost, expense and delay associated with the prosecution of Ground 1 and the claimant's exposure to the allegation of invalidity of its payment claims and the subsequent adjudications upon them, at least on this ground.

27 A similar initiative could also readily be taken in Victoria to develop forms for payment schedules under s 15 of the BCISP Act. In the absence of such a facility, the Court is compelled to construe the Multiplex email dated 5 October 2012, in the light of the arguments advanced by the parties, to determine whether it satisfies the requirements of s 15.

28 The email, dated 5 October 2012, may be found attached as Schedule 1 to this judgment.

29 The courts have recognised that the requirements of the security of payments legislation, including s 15 of the BCISP Act, should not be approached in an overly technical manner. For example, in *Protectavale v K2K Pty Ltd*[3] Finklestein J held:[4]

> As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner; *Multiplex Constructions* [2003] NSWSC 1140 [76] ('[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves'); *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 [20] ('The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint').

30 In *Multiplex Constructions Pty Ltd v Luikens and Anor*,[5] Palmer J set out the approach that the court should take in considering whether documents purporting to be

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2 *Gantley* [2010] VSC 106 [133]–[139].
3 [2008] FCA 1248 ('*Protectavale*').
4 *Protectavale* [2008] FCA 1248 [11].
5 [2003] NSWSC 1140 ('*Multiplex Constructions*').

payment claims or payment schedules complied with the relevant mandatory requirements of the security of payments legislation. His Honour noted that:[6]

> A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.
>
> A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.
>
> Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

31 In *Barclay Mowlem v Tesrol Walsh Bay*,[7] McDougall J considered whether a letter dated 18 May 2004 (the '18 May letter') provided by the respondent was sufficient to be a payment schedule under s 14 of the NSW *Building and Construction Industry Security of Payment Act 1999* (the 'NSW Act'), which was the equivalent to, and for present purposes materially the same as, s 15 of the Victorian BCISP Act.

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6 *Multiplex Constructions* [2003] NSWSC 1140 [76]-[78].

7 [2004] NSWSC 1232 ('*Barclay Mowlem*').

32 The 18 May letter, omitting formal parts, read as follows in relation to a Progress Claim No 13 purported to have been made by the claimant under the NSW Act:

> Further to ongoing communications between us concerning Progress Claim No 13 and the EOT claim it is apparent that the Parties are in Dispute under Clause [sic] 30 and 40. Pursuant to clause 25A of the building Agreement it is considered appropriate that we refer the matter to the Independent Certifier nominated in the Agreement for an assessment and determination of the matters detailed below.
>
> **Progress Claim No 13 – Issue of Variations not Agreed**
>
> Variation Numbers 59, 63, 68, 69, 74, 84, 95, 103, 104, 105, 105A, 106, 112, 114, 116, 118, 121, 123, 125, 127, 129, 131, and 132 are in dispute with the Principal and Superintendent [sic] view being that these Variations formed part of the Contractors [sic] Design & Construct Risk, and that the proper procedures for lodgement and assessment of Variations have not been followed and that as such payment by the Principal of these Variation Claim [sic] made up to Progress Claim No 13 and in any future claims is not required.
>
> **EOT And Associated Costs Claim and Liquidated Damages**
>
> It is the view of the Principal and the Superintendent that the Claim made is invalid for the reasons detailed in their correspondence to the Contractor dated 12 May 2004 pursuant to Clause 33.2 and Clause 35.5 of the Agreement. An assessment by the Independent Certifier is required, in the first instance, to identify if the EOT and associated costs claim submitted by the Contractor has been made in accordance with the Agreement. Should the Independent Certifier determine that the claim has been lodged in accordance with the Agreement an assessment on the detail of the Claim should be undertaken.
>
> It is the view of the Superintendent and Principal that Liquidated Damages in the amount of $145,000 are due and payable by the Contractor. The Independent Certifier is to assess the liability of the Contractor for payment of Liquidated Damages.
>
> We will deliver over the course of the next two days copies of all correspondence and associated information to the nominated Independent Certifier being Mr Peter Hammond of Napier and Blakeley at 309 Kent Street, Sydney.

33 Having heard argument in *Barclay Mowlem*, McDougall J proceeded:[8]

> I remain of the view that what Palmer J said in *Multiplex* indicates the approach that should be taken in dealing with the first issue. It is consistent with the evident intention of the legislature, that entitlement to progress payments should be resolved expeditiously, that this be done with a minimum of formality and expense.

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8 *Barclay Mowlem* [2004] NSWSC 1232 [13].

34 Façade submitted that the email of 5 October could not be a payment schedule for the purposes of s 15 of the BCISP Act, for these reasons:

(a) First, on its face the email did not purport to operate as a payment schedule, but rather, on an objective reading, worked to achieve the opposite. It asserted that Façade could not 'reasonably consider the submitted Progress Claim 19 as valid'. It then set out reasons for taking this position relating to the alleged invalidity. In taking this position, Multiplex was indicating that it was not serving a payment schedule. If it did not regard a valid payment claim as having been submitted by Façade under s 14 of the BCISP Act, then it cannot have regarded its entitlement under s 15 of the BCISP Act to serve a payment schedule as having been triggered. This is reinforced by what Mr Treweek further stated in his email 'Upon FTE remedy of the above and attached Brookfield Multiplex will be in a position to issue FTE with a payment schedule'.

(b) Second, the email did not satisfy the requirements for a valid payment schedule prescribed by s 15(2)(b) of the BCISP Act. The Defendant's email did not indicate the amount of the payment, if any, it proposed to make, whether that was a positive money sum or zero. The position adopted by Multiplex in the 5 October email was essentially an assertion that Façade had not provided any valid payment claim. It did not go beyond this position. That is not the same as taking a position that Façade would not be paid any sum at all (a zero sum), or would be paid less than Façade claimed by a specified amount, in the event that the claim as submitted was a valid payment claim.

35 However, having considered the authorities of *Protectavale*, *Multiplex Constructions*, and *Barclay Mowlem* referred to above, I conclude that the email of 5 October does satisfy the requirements of s 15 of the BCISP Act.

36 In the first place, I think that it is clear from a plain reading of the 5 October email, when read as a whole, that Multiplex did not propose to pay anything to Façade in

respect of Payment Claim No 19. In other words, Multiplex proposed to pay nothing to Façade in respect of the payment claim.

37 As to whether a proposal to pay 'nothing' or 'nil' or 'zero' in a response to a payment claim is 'an amount' for the purposes of s 15(2)(b), in the context of the BCISP Act, I am of the view that it is. I find myself in agreement with the further observations of McDougall J in *Barclay Mowlem* to the following effect:[9]

> There is a question as to whether "nothing" or "nil" or "zero" is "an amount" for the purposes of s 14(2)(b). In the context of the Act, and regardless of mathematical and philosophical considerations, I think that it is. That is because a respondent who proposes to pay nothing is clearly proposing to pay less than the claimed amount …
>
> … A practical approach would include within "the amount" the concept of a nil payment. Some support for this is, I think, obtained from the words "(if any)" that followed the word "amount" in s 14(2)(b).

38 In these circumstances, as s 15(3) of the BCISP Act makes clear, the respondent is required to tell the claimant why a nil payment is proposed, for the purpose, inter alia, of enabling the claimant to decide whether to take the matter to adjudication. In this case, Multiplex achieved this by claiming in its email that the Payment Claim No 19 was invalid, and setting out the reasons for the claimed invalidity. As McDougall J said further in *Barclay Mowlem*[10] in relation to the mirror provision found in s 14(3) of the NSW Act: 'The subsection is not concerned with the adequacy or sufficiency of those reasons'.

39 For these reasons, and putting to one side for the moment the defence to this proceeding founded upon s 109 of the *Constitution*, Façade is not entitled to judgment in respect of its Payment Claim No 19, because there was a valid payment schedule in place.

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9 [2004] NSWSC 1232 [15].

10 [2004] NSWSC 1232 [26].

The Constitutional Question

Purpose and Object of the BCISP Act

40 In large part, Façade advanced its case on the constitutional question, on the basis of a 'beneficial' construction of the BCISP Act, against the back-drop of its purpose and object.

41 The purpose and object of the BCISP Act is well defined, both in the legislative provisions found in the BCISP Act itself, being ss 1 and 3, as explained further in the case law.

42 Section 1 of the BCISP Act provides:

> **Purpose**
>
> The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

43 Section 3 of the BCISP Act provides:

> **Object of Act**
>
> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
>
> (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
>
> (a) the making of a payment claim by the person claiming payment; and
>
> (b) the provision of a payment schedule by the person by whom the payment is payable; and
>
> (c) the referral of any disputed claim to an adjudicator for determination; and
>
> (d) the payment of the amount of the progress payment determined by the adjudicator; and
>
> (e) the recovery of the progress payment in the event of a failure to pay.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

44 In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,[11] this Court observed:[12]

> The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which complements the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.[13]

45 The Court in *Hickory Developments* also noted that the principle behind the BCISP Act is that respondent to payment claims for progress payments 'should pay now and argue later'.[14] The BCISP Act puts a claimant in a 'privileged position in the sense that it acquires rights that go beyond its contractual rights'. It does not deny respondents an opportunity to pursue cross-claims, but they cannot do so in the proceedings for the claim for the progress payment.[15]

46 This position was reinforced by this Court in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)*[16] where it was observed:[17]

> … I take into account that the main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. To advance that purpose, the Act sets up a unique form of adjudication of disputes over the amount due for a claimed progress payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided in separate

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11 [2009] VSC 156 ('*Hickory Developments*').

12 *Hickory Developments* [2009] VSC 156 [2].

13 See, eg, *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No. 2)* (2009) 26 VR 172 [2]; *Gantley* [2010] VSC 106 [19]; *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 [119].

14 *Hickory Developments* [2009] VSC 156 [44].

15 See, eg, *Gantley* [2010] VSC 106 [30]; *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* (2011) 32 VR 247 [27]; *Mackie Pty Ltd v Counahan* [2013] VSC 694 [44].

16 (2009) 26 VR 172 ('*Grocon Constructors*').

17 *Grocon Constructors* (2009) 26 VR 172 [110]-[111].

> proceedings, either by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.
>
> For this reason the Act preserves the right of a claimant or a respondent to commence proceedings under the relevant construction contract, including proceedings in a court, arbitration proceedings or other dispute resolution process: s 47(2). Further, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the Act in any order which is made: s 47(3)(a); and may make appropriate orders for the restitution of any amount paid under the Act on the interim basis provided for: s 47(3)(b). Thus no res judicata or issue estoppel is created by reason of an adjudicator's determination.

47 The Plaintiff also relied on the proposition that the BCISP Act therefore alters the allocation of insolvency risk between contracting parties. Reference was made to *Chase Oyster Bar v Hamo Industries Pty Ltd*,[18] and *RJ Neller Building Pty Ltd v Ainsworth*.[19] In *Chase Oyster Bar*, McDougall J sitting with the Court of Appeal (NSW), by reference to the observations of Keane JA (as His Honour then was) in *Neller Building*, echoed the central object of the legislation in the following passage:[20]

> The *Security of Payment Act* [NSW] operates to alter, in a fundamental way, the incidence of the risk of insolvency during the life of a construction contract. As Keane JA said, of the not dissimilar Queensland statute, the 2004 (Qld), in *RJ Neller Building P/L v Ainsworth* the statute "seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's ... inability to repay could be expected to eventuate". It followed, his Honour said, that the risk of inability to repay, in the event of successful action by the other party. [Citations omitted]

48 In *Neller Building*, Keane JA noted in relation to the equivalent Queensland statute that 'the builder might ultimately be required to refund the cash in circumstances where the builder's inability to repay could be expected to eventuate.'[21] It followed from this that that the legislature had 'assigned to the owner' the 'risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner'.[22]

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18 [2010] NSWCA 190 [207], ('*Chase Oyster Bar*').
19 [2008] QCA 397, ('*Neller Building*').
20 Cited in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor* [2013] VSC 535 [95].
21 *Neller Building* [2008] QCA 397 [40].
22 *Neller Building* [2008] QCA 397 [40].

49 These views were endorsed by the New South Wales Court of Appeal in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*.[23] They were also taken into account by this Court in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd*.[24]

50 However, none of these cases dealt with the position where a claimant company had become insolvent was being wound up, attracting the operation of s 553C of the *Corporations Act*.

51 The mechanisms in the BCISP Act designed to achieve its purpose and object were summarised by Young CJ in Equity in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd*[25] in the following passages, which apply equally in Victoria:[26]

> The evident purpose of the BCISP Act is to address what Parliament perceived to be a mischief in subcontractors not being able to achieve proper cash flow because payments apparently due to them were withheld by the head contractor or proprietor.
>
> The scheme that the Act embraced was that under a construction contract, persons whom I will call subcontractors (the Act actually covers a wider class) would provide a claim for a progress payment in the proper manner, and that that should be paid in accordance with the contract, or if there was no provision, within 10 business days after the claim was served. However, the person on whom it was served might reply by providing a payment schedule in the proper form which was to include the reasons for non-payment. The subcontractor may then apply for adjudication.
>
> The adjudicator is not a professional lawyer and it is now recognised that any such adjudication may well provide some rough justice, if it provides any justice.
>
> However, the scheme of the Act is that the adjudicator issues his or her certificate, the respondent has a very limited time to pay up and if he or she does not, then the adjudication certificate may be filed as a judgment for debt in the District Court, or sometimes the Local Court, and the subcontractor is entitled to execute on that judgment.
>
> However, it is recognised that even though there may be execution under the judgment, in a very real sense the judgment is a provisional judgment which may be set aside in due course after all the contractual claims have been properly considered.
>
> The purpose of the Act is to enable the subcontractor to have access to actual monies whilst those disputes are being considered …

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23 [2011] NSWCA 399 [6] ('*Cardinal*').
24 [2013] VSC 535 [95], [99].
25 [2004] NSWSC 1230, ('*Brodyn*').
26 *Brodyn* [2004] NSWSC 1230 [11]–[17].

> … virtually nothing in the Act affects any right that a party to a construction contract may have under the contract or may have, apart from the Act, in respect of anything done or omitted to be done under the contract nor does the Act affect any civil proceedings arising under the contract. In such proceedings, a court or tribunal must allow for any amount paid to a party to the contract under the BCISP Act and make such orders as it considers appropriate for restitution if that be required.

The Constitutional Question Defined

52 In relation to the application of s 109 of the *Constitution*, the Defendant on 4 February 2015 gave notice to the State and Commonwealth Attorney Generals that this proceeding involves a matter under the Constitution or involving its interpretation within the meaning of s 78B of the *Judiciary Act 1903* (Cth).

53 The Defendant, Multiplex, in summary alleges that a constitutional issue arises in the following circumstances.

54 This proceeding involves a claim made by the Plaintiff, Façade (being a company in liquidation), that it is entitled to summary judgment on account of two payment claims it alleges it submitted under the BCISP Act (which is an act of the State of Victoria) notwithstanding that the Defendant maintains that it is entitled to substantial counterclaims the effect of which is to entirely extinguish any entitlement on the part of the Plaintiff and leave a substantial amount due to the Defendant.

55 The Defendant says, that if the Plaintiff has any entitlement to a judgment under s 16 of the Victorian BCISP Act, whether in relation to Payment Claim No 18, or 19, or both, (which is denied), the Defendant in any event is entitled to set off any such entitlement against its claims under the underlying building contract, which is the Sub-contract, pursuant to s 553C of the *Corporations Act* (which is an act of the Commonwealth of Australia).

56 Section 553C of the *Corporations Act* provides:

> **Insolvent companies--mutual credit and set-off**
>
> (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due from the one party is to be set off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

57 Section 109 of the *Constitution* provides:

> **Inconsistency of laws**
>
> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

58 The Defendant says that:

(a) the provisions of Part 3 of the BCISP Act, including in particular s 16, do not apply to companies which are in liquidation and are in the process of being wound up by reason of insolvency because the provisions of s 553C of the *Corporations Act* otherwise provide an exhaustive regime which regulates the rights and obligations of parties in such circumstances; and

(b) in those circumstances the operation of the provisions of Part 3 of the BCISP Act, including s 16, is inconsistent with the operation of s 553C of the *Corporations Act* and for this reason the provisions of Part 3 of the BCISP Act, including s 16, are invalid to the extent of any such inconsistency pursuant to s 109 of the *Constitution*.

59 The question is whether s 16(4)(b) of the BCISP Act, which on its face expressly prohibits the Defendant in this proceeding from bringing any cross-claim or raising any defence in relation to matters arising under the parties' Sub-contract, finds itself relevantly inconsistent with the statutory regime established by s 553C of the *Corporations Act* in the specific circumstance where Façade, as the claimant company, had become insolvent was being wound up.

Section 553C of the Corporations Act

60 Section 553C of the *Corporations Act* allows set-off of opposing claims that 'exist or are inchoate at the time of the commencement of the winding up'; in the usual case, this will be the date of the order.[27] The provision recognises that where a party is in liquidation, it would be unjust to allow the liquidator to insist on receiving 100 cents in the dollar on the one hand whilst at the same time requiring a company's debtor be content with joining the pool of creditors and receiving a lesser amount.[28]

61 In *Brodyn,* Young CJ in Equity noted that s 553C 'applies where there are mutual credits, mutual debts or other mutual dealings'. His Honour further noted that the inclusion of 'mutual dealings' covers the situation where one party has a damages claim for breach of contract entered into before the administration. In such a case, as His Honour observed, 'the claim arises out of a prior dealing between the parties'.[29]

62 There is no need for a party to have lodged a proof of debt in order for s 553C of the *Corporations Act* to apply.[30]

63 In *Gye v McIntrye,*[31] the High Court considered the object of this class of legislation (s 86 of the *Bankruptcy Act 1996* (Cth) (the '*Bankruptcy Act*') a predecessor provision of s 553C of the *Corporations Act* in similar terms) and noted that it was established by authority that a provision such as s 86 of the BCISP Act should be given 'the widest possible scope':[32]

> It has often been pointed out that the object of set-off in bankruptcy is, in the words of Parke B in *Forster v Wilson* (1843) 12 M & W 191, 204; 152 ER 1165, 1171, "to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate". Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in bankruptcy could insist upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the

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27 H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) [27.450].

28 H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) [27.450].

29 *Brodyn* [2004] NSWSC 1230, [77]. See *Booth v Hutchinson* (1872) LR 15 Eq 30; *Mersey Steel & Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434.

30 See *GM & AM Pearce and Co Pty Ltd v R.G.M Australia Pty Ltd* [1998] 4 VR 888 [899], adopting the approach enunciated by the High Court in *Gye v McIntyre* (1991) 171 CLR 609.

31 *Gye v McIntyre* (1991) 171 CLR 609 ('*Gye*').

32 *Gye* (1991) 171 CLR 609, 619.

> bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar on the whole of the debt owed by the bankrupt to him. It was to prevent such injustice that the "mutual credits" and "mutual debts", and later "mutual dealings", provisions were introduced into bankruptcy legislation (see, eg, *Re Daintrey; Ex parte Mant* [1900] 1 QB 546, 572–3; *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd* (1982) 150 CLR 85, 95; 40 ALR 399). To the extent necessary to achieve that legislative purpose of "substantial justice" to the parties, it is established by authority that a provision such as s 86 of the Act should be given "the widest possible scope" (see, eg, per Mason J, *Day & Dent Constructions* (CLR 108) quoting Lord Esher MR in *Eberle's Hotels & Restaurant Co Ltd v Jonas* (1887) 18 QBD 459, 465).

64 In *Gye*, the High Court went on to consider how s 86 of the *Bankruptcy Act* was to work in the following passage:[33]

> In the context of s 86, the word "mutual" conveys the notion of reciprocity rather than that of correspondence. It does not mean "identical" or "the same". So understood, there are three aspects of the section's requirement of mutuality. The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the parties which must be considered (see, eg, *Hiley*, at 497). The third requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable for the purposes of set-off under the section. That means that they must ultimately sound in money.
>
> The requirement that the credits, the debts or the claims arising from other dealings be commensurable does not mean they must be vested, liquidated or enforceable at the decisive date, that is to say, at the time of the sequestration order or special resolution accepting the composition. Provided they exist as contingent at that date and are of a kind which will ultimately mature into pecuniary demands susceptible of set-off, the requirement of the section may be satisfied in relation to them. In so far as "dealings" are concerned, Dixon J pointed out in *Hiley* (497):
>
> > "It is enough that at the commencement of the winding up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up."

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33 *Gye* (1991) 171 CLR 609, 623-4.

65 The approach enunciated by the High Court in *Gye* in relation to s 86 of the *Bankruptcy Act* was followed by the Victorian Court of Appeal in *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd*[34] in relation to the application of s 553C of the *Corporations Act.*

The Claims of the Defendant, Multiplex

66 The Defendant, Multiplex, maintains it has significant counterclaims against the Plaintiff, Façade, in connection with the alleged failure on the part of the Plaintiff to comply with the terms of the Sub-contract. In particular, Multiplex alleges that Façade is liable to it under a proposed counterclaim in respect of:

(a) The additional (direct and indirect) costs to complete the work the subject of the Sub-contract in an amount of $1,848,658; and

(b) Liquidated damages in the amount of $52,870 per day being the rate specified in the Sub-contract. Multiplex submits that by applying the daily rate through to the *Date for Practical Completion*, an assessment of an entitlement to liquidated damages in a sum quantified at $10,309,650 is produced.

67 A detailed substantiation of the quantum of the Defendant's foreshadowed counterclaim is contained in the affidavit material filed on behalf of Multiplex.

68 To this allegation, the Plaintiff Façade submits that there is no bona fide counterclaim of the kind now relied upon by Multiplex in this proceeding presently on foot, and the delay for some years in instituting any such claim, and the failure to provide any undertaking to institute any, points to there not being any such claim which is *bona fide* or which is likely to be pressed.

69 However, the Defendant Multiplex is still well within time to commence any such counterclaim, and given the volume and nature of the material before me, I am satisfied that it has potential claims of the kind alleged in this proceeding, and that it intends to advance them when advised to do so.

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34 *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* [1998] 4 VR 888, 899.

Analysis of the Constitutional Issue

70 At the time the Plaintiff went into liquidation on 6 February 2013, by virtue of the Defendant's Counterclaim, the quantum of which is likely to well exceed the Plaintiff's entitlement to any judgment under the BCISP Act in respect of Payment Claim 19 ($600,187.50), the question is whether s 553C of the *Corporations Act* came into effect to deprive the Plaintiff of any right to prosecute the claims the subject of this Proceeding?

71 There is a conflict between the provisions of the *Corporations Act* (in particular s 553C and the provisions of the BCISP Act). In the present case, the potential conflict arises in respect of s 16(4) of the BCISP Act, which provides:

> 16(4) If the claimant commences proceedings under subsection 2(a)(i) [being a claim to recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant, in any court of competent jurisdiction] to recover the unpaid portion of the claimed amount from the respondent as a debt -
>
> (b) the respondent is not, in those proceedings, entitled -
>
> (i) to bring any cross-claim against the claimant; or
>
> (ii) to raise any defence in relation to matters arising under the construction contract.

72 The prohibition against raising a cross-claim in s 16(4) of the BCISP Act potentially conflicts with express right of set-off enshrined within s 553C of the *Corporations Act*. The Defendant says that because its counterclaim exceeds the claim of the company Façade to judgment under s 16(2) of the BCISP Act, the company's claim was automatically extinguished by s 553C of the *Corporations Act*, and it cannot rely upon s 16(4) of the BCISP Act.

73 As to the general application of s 109 of the *Constitution*, in the unanimous judgment of the High Court in *Telstra v Worthing*[35] it was held:

> In *Victoria v Commonwealth*, Dixon J stated two propositions which are presently material. The first was ((1937) 58 CLR 618, 630):
>
> > *"When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid."*

35 *Telstra v Worthing* (1999) 197 CLR 61, 76-7.

The second, which followed immediately in the same passage, was:

> *"Moreover, if it appears from the terms, the nature or the subject matter of a federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent."*

The second proposition may apply in a given case where the first does not, yet, contrary to the approach taken in the Court of Appeal, if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.

74 As to the consequence of applying s 109 of the *Constitution*, as observed in D Pearce, R Geddes *Statutory Interpretation in Australia*[36] the 'effect of this provision is not to repeal the state law. The state law is taken to only be superseded pro tem and it revives if the Commonwealth law with which it is inconsistent is itself repealed'.[37]

75 It was on this basis that the Defendant submitted that in the context of claims made by companies which are in liquidation, the provisions of the BCISP Act (in particular s 16(4)), are inconsistent with the provisions of the *Corporations Act* (in particular s 553C), and are accordingly rendered invalid.

76 The potential conflict between the provisions of the *Corporations Act* and the Security of Payments legislation has been considered previously by the Courts.

77 In *Brodyn,* Young CJ in Equity observed a similar conflict[38] and resolved it in the following fashion: First, by applying s 109 of the *Constitution* with the effect that, given the inconsistency which arose in the case before his Honour of similar import to the present case, the Commonwealth Act, being s 553C of the *Corporations Act*, prevails over the State Security of Payments legislation.[39]

78 In taking this approach in *Brodyn* Young CJ in Equity cited with approval the decision in *Demir Pty Ltd v Graf Plumbing Pty Ltd*,[40] where Campbell J said that if a

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36 D Pearce, R Geddes '*Statutory Interpretation in Australia*' (Lexis Nexis Butterworths, 8th ed, 2014).
37 D Pearce, R Geddes '*Statutory Interpretation in Australia*' (Lexis Nexis Butterworths, 8th ed, 2014) [7.18].
38 *Brodyn* [2004] NSWSC 1230, [82].
39 *Brodyn* [2004] NSWSC 1230, [83].
40 [2004] NSWSC 553.

person obtains a judgment under the applicable Security of Payments legislation and-

> the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the *Corporations Act* to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Division 3 of Part 5.4 of the *Corporations Act* set out a regime whereby a statutory demand is set aside *whenever* there is an offsetting claim as defined.

79 To my mind, both propositions explained by the High Court in *Telstra v Worthing*[41] have application to the present case.

80 For a company in liquidation to enter a judgment for a monetary entitlement claimed under s 16(2)(a)(i) of the Victorian BCISP Act without taking into account any cross-claim or defence by way of set off, as provided for in s 16(4(b) of the BCISP Act, would fly directly in the face of the scheme established by s 553C of the *Corporations Act*.

81 The BCISP Act, being a state law, if applied to the facts, would alter, impair or detract from the operation of the *Corporations Act*, a law of the Commonwealth Parliament. The further consequence is that there would be a conflict in the application of the legislative provisions between the scheme set out in the BCISP Act on the one hand, as provided for in s 16(2)(a)(i) and s 16(4)(b), and the scheme set out in s 553C of the *Corporations Act*. In both circumstances, State Act must yield to the provisions of the *Corporations Act*.

82 Further, the entry of a judgment for a monetary entitlement claimed under s 16(2)(a)(i) of the BCISP Act would itself give rise to the inconsistency. It is not open to avert this consequence by the device of imposing a stay on the judgment.

83 Accordingly, to the extent that the provisions of the BCISP Act are inconsistent with the provisions of the *Corporations Act*, those provisions to the extent of the

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41 *Telstra v Worthing* (1999) 197 CLR 61, 76-7.

inconsistency are determined to be invalid. On this basis, no judgment should be entered under s 16(2) of the BCISP Act in favour of the Plaintiff.

84 The position may change in the event that the Defendant evinces an intention not to proceed with its foreshadowed counterclaims, either expressly, or by letting further and inordinate time pass without taking steps to prosecute these claims. In this event, it would be open to the Plaintiff to seek appropriate declaratory relief before proceeding to enter judgment under s 16 of the BCISP Act.

85 The conclusion I have come to on the constitutional issue is this: A company to which s 553C of the *Corporations Act 2001* applies, subject to s 553C(2), is precluded from entering any judgment pursuant to s 16(2)(a)(i) of the BCISP Act in respect of the debt due to it under that Act, and is further precluded from relying on s 16(4)(b) as a bar to a respondent under the BCISP Act from bringing any cross-claim against the company or raising any defence by way of set-off in relation to matters arising under the relevant construction contract.

86 Having dealt with the matter in this way, there is no need for me to consider the second and alternative limb of the reasoning of Young CJ in Equity in *Brodyn* to the effect that, in construing the security of payments legislation, it manifests an intention to operate only when the head contractor and the subcontractor are going concerns, and should be so construed.[42]

Application of s 553C(2) of the *Corporations Act*

87 It remains to consider the application, if any, of s 553C(2) of the *Corporations Act 2001*. The question raised by the subsection is whether Multiplex is precluded from relying on s 553C(1) because of its knowledge of Façade's insolvency.

88 Façade submitted that Multiplex was not entitled to claim the benefit of a set-off under s 553C(1) because, at the time of receiving credit from Façade, Multiplex had

[42] *Brodyn* [2004] NSWSC 1230 [85]-[87].

notice of the fact of its insolvency. In so doing, Façade relied upon s 553C(2)of the *Corporations Act 2001*.

89 Façade relied on a body of evidence which demonstrated that, as at February 2012 and thereafter, Multiplex had knowledge of facts which evidenced the insolvency of Façade.

90 It submitted further that the relevant date for the operation of s 553C(2) was the time when Multiplex became liable under the BCISP Act to pay the progress payments pursuant to Payment Claims 18 and 19, and failed to pay them within 10 days of the respective due dates for payment under those payment claims, namely 23 August 2012 and 27 September 2012.[43]

91 Multiplex, however, submitted that the relevant date for the purposes of s 553C(2) was the date of entry into the Sub-contract, being 7 September 2011. As at that date, it was contended, the payment obligations under Clause 42 of the Sub-contract commenced.

92 The annexure to the Sub-contract provided in item 35 that times under the contract for payment claims pursuant to Clause 42.1 were:

(a) The 25th day of each month including work done, or to be done, to the last day of the month; and

(b) Within 30 days after the date of the Certificate of Main Contract Practical Completion.

93 Clause 42.1 also provided that claims for payment were to be for the value of work carried out, or to be carried out, by the Subcontractor in the performance of the Sub-contract to the last day of the relevant month.

[43] See BCISP Act s 15(4).

94 As observed by Sifris J in *Grapecorp Management Pty Ltd (in liq) v Grape Exchange Management Euston Pty Ltd* ,[44]

> In *Old Style Confections Pty Ltd v Microbyte Investments Pty Ltd (in liq)*,[45] the liquidators also contended that *Old Style* could not have the benefit of set-off against post-liquidation fees because it had notice of Microbyte's insolvency. Hayne J dismissed that contention:[46]
>
> > The third point put forward on behalf of the liquidators, namely that old (sic) Style had notice of the company's insolvency before 6 June 1994 when the first payment fell due after the liquidation, assumes that each instalment of licence fee arises from a fresh dealing in the sense that at each date for the payment of an instalment due under the licence agreement Microbyte in some way gives credit to Old Style. While it may be accepted that as soon as Microbyte had provisional liquidators appointed, Old Style new that Microbyte was insolvent, I do not accept that there was a giving or allowing of credit by Microbyte to Old Style after commencement of the liquidation. In this case, the transactions which constituted the giving and receiving of credit for the mutual dealings, both occurred before liquidation.

95 As further observed by Sifris J in *Grapecorp Management*:[47]

> According to Goode,[48] the relevant time for assessing notice of insolvency 'is not when the debt became payable, but when the obligation which arose from it was incurred.' [49] This is usually the date of the underlying antecedent pre-liquidation contract that underpins the contingency.

96 Further, in *JLF Bakeries Pty Ltd (in liquidation) v Baker's Delight Holdings Ltd*. White J referred to *Old Style* and held that the relevant date for notice of insolvency under s 553C(2) of the *Corporations Act* in that case, was the date of the underlying franchise agreement. His Honour White J also referred with approval (and to similar effect) to the decision of Hodgson J (as his Honour then was) in *Shirlaw v Lewis*.[50]

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[44] (2012) 265 FLR 33, ('*Grapecorp Management*').
[45] [1995] 2 VR 457.
[46] [1995] 2 VR 457, 464.
[47] *Grapecorp Management* (2012) 265 FLR 33, 50.
[48] R Goode, *Principles of Corporate Insolvency Law* (2011, 4th ed) 9-31.
[49] See *Grapecorp Management* (2012) 265 FLR 33, 50.
[50] (1993) 10 ACSR 288.

97 In the present case, each entitlement to a monthly payment claim under the Sub-contract does not arise from a fresh dealing in a manner which way gives credit to Multiplex. The obligation to make monthly payments arises from the underlying Sub-contract itself, being Clause 42 in combination with the Schedule to the Sub-contract.

98 Accordingly, in my opinion, properly applying the authorities I have referred to, points to any notice or knowledge of Façade's insolvency on the part of Multiplex being considered as at the date the Sub-contract was executed, which was 7 September 2011.

99 There is no suggestion that Façade manifested any signs of insolvency at a date earlier than February 2012 or that any such signs came to the attention of Multiplex.

100 Accordingly, s 553(2) of the *Corporations Act* does not operate to preclude the set-off proposed to be advanced by Multiplex.

Conclusion and Orders

101 In the light of my findings, there is no judgment to be entered in favour of the Plaintiff.

102 Consequently, there is no basis upon which to consider the need for a stay on any judgment.

103 The Plaintiff's proceeding should be dismissed with costs.

SCHEDULE 1

Email dated 5 October 2012 from R Treweek to W Liew:

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Upper West Side

Brookfield Multiplex Constructions Pty Ltd
Level 22, 135 King Street

Sydney
2000 Australia
Ph +61 2 93222000

Builders Advice - Subcontractor

BMPXC-BAS-008799

To:	Mr Wiliam Liew - Facade Treatment Engineering Pty Ltd
Cc:	Mr Evan Byrne - Brookfield Multiplex Constructions Pty Ltd
	Mr Graham Jolly - Brookfield Multiplex Constructions Pty Ltd
	Mr Isaac Tavilla - Brookfield Multiplex Constructions Pty Ltd
	Mr Andrew Batt - Facade Treatment Engineering Pty Ltd
	Mr Jeremy Lim - Facade Treatment Engineering Pty Ltd
	Ms Joyee Lim - Facade Treatment Engineering Pty Ltd
From:	Mr Ryan Treweek - Brookfield Multiplex Constructions Pty Ltd
Sent:	Friday, Oct 05, 2012 1:47 PM EST
Attribute(s) 1:	Stage 1
Status:	N/A
Subject:	**Re: Progress Claim 19**

William,

We advise that we cannot reasonably consider the submitted Progress Claim 19 as valid on the following grounds;

- Pursuant to Subcontract Clause 42.1A (a) - BMC has reason to believe that the submitted Statutory Declaration is inaccurate with regard to item 3, please resubmit.
- BMC is unable to ascertain the extent to which items being claimed are for materials that are unfixed, including details of security provided if required under the Subcontract - values attached to certain items would suggest that they do include amounts for unfixed materials.

We also note the requirements for payment claims requested in the attached correspondence of 18th September (attached) and the subject of RCTI #26 have yet to be provided by FTE and as such Progress Claim 18 remains invalid.

Upon FTE remedy of the above and attached Brookfield Multiplex will be in a position to issue FTE with a payment schedule.

Regards,

Ryan Treweek
Contract Administrator
Brookfield Multiplex Constructions Pty Ltd

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