IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2017 01308

IN THE MATTER of 289 Grange Road Developments Pty Ltd (ACN 604 659 047)

289 GRANGE ROAD DEVELOPMENTS PTY LTD (ACN 604 659 047) Plaintiff

v

DALLE PROJECTS PTY LTD (ACN 147 573 948) Defendant

- AND -

S CI 2017 01310

IN THE MATTER of 11 Mitchells Lane Developments Pty Ltd (ACN 604 931 919)

11 MITCHELLS LANE DEVELOPMENTS PTY LTD (ACN 604 931 919) Plaintiff

v

DALLE PROJECTS PTY LTD (ACN 147 573 948) Defendant

JUDGE:	RANDALL AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	30 May 2017
DATE OF JUDGMENT:	17 July 2017
CASE MAY BE CITED AS:	289 Grange Road Developments Pty Ltd & Anor v Dalle Projects Pty Ltd
MEDIUM NEUTRAL CITATION:	[2017] VSC 409

CORPORATIONS – *Corporations Act 2001* (Cth) – Statutory demand – Application pursuant to s 459G to set aside statutory demand – Building contracts – Payment claim – Payment certificate – Debt due and payable for the purposes of the statutory demand – Relevance of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether debt was required to be due and payable for the periods set out in s 459F or whether sufficient that due and payable at the date of service of statutory demand.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr B P Devanny	Hall Partners Solicitors
For the Defendant	Dr M Wolff	M&K Lawyers Group Pty Ltd

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HIS HONOUR:

The application

1 Each of these applications is pursuant to s 459G of the *Corporations Act 2001* (Cth) ('*Corporations Act*') to set aside separate statutory demands, each dated 15 March 2017. It is convenient to deliver the one judgment as the issues and factual background are similar, save for notable differences to which I will draw attention. Further, although each plaintiff is a different company, it is accepted by the parties that each plaintiff was incorporated for distinct projects. I will refer to each plaintiff collectively or individually in these reasons as 'the plaintiff'.

The statutory demand in the 289 Grange Road Developments Pty Ltd proceeding

2 The schedule to the statutory demand sets out the description of the debt and amount of debts as follows:

Payment claim certificate 1 dated 24/10/16	$111,593.02
Less amount paid	$80,000.00
Total for payment claim certificate 2:	$31,593.02
Payment claim certificate 2 dated 30/11/16	$61,380.99
Payment claim certificate 3 dated 10/12/16	$65,573.65
Interest accrued to 1/02/17	$11,423.47
Total debts:	**$169,971.13**

The statutory demand in the 11 Mitchells Lane Development Pty Ltd proceeding

3 The description and amount of the debt set out in the statutory demand is as follows:

Payment claim certificate 1 dated 20/12/16	$129,410.16
Interest accrued to 1/02/17	$3,880.75
Total debts	**$133,290.91**

Issues

Grange Road

4 The plaintiff submits that as the payment claim was revoked and replaced in March 2017 after service of the statutory demand, the amount sought in the statutory demand cannot constitute a debt within the meaning of s 16(2)(a)(i) of *Building and Construction Industry Security Payment Act 2002* (Vic) ('BCISP Act') which states that:

> **16. 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 party 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;
>
> …

5 The plaintiff also submits that a genuine dispute exists for the purposes of s 459 H of the *Corporations Act* because there are competing assessments by quantity surveyors and a lack of verification of contractor's payments. This latter submission was not pursued at the hearing. Further, it was contended that this is a commercial dispute which requires a detailed assessment of disputed facts.

Mitchells Lane

6 The plaintiff submits that the building contract is a major domestic building contract regulated by the BCISP Act. As there has been no adjudication under that Act, the plaintiff is free to dispute the amount claimed. The plaintiff submits that there are

competing assessments by quantity surveyors, a lack of verification of contractors' payments by way of statutory declaration in accordance with the contract and a factual dispute over the entitlement to include the latent conditions variation.

Background

7 On 8 August 2016 the parties entered into a building contract for the construction of a 17 apartment buildings over two floors plus a basement at Grange Road. Due to funding issues it was agreed that the defendant would carry out demolition work but no more. On 18 August 2016, the defendant was instructed to start demolition works.

8 On 14 September 2016 the defendant emailed the plaintiff requesting confirmation with respect to funding for the Grange Road project. A response was received on 15 September 2016 which advised funding was 'not far away'.

9 On 27 October 2016 the defendant issued the first payment claim with respect to the Grange Road project.

10 Sometime in late November 2016, the defendant signed the main contract for work at Mitchells Lane.

11 On 22 November 2016 the defendant sought the first payment with respect to Grange Road. By email dated 24 November 2016, after a further chase up, the response was 'working on this to get paid'.

12 On 1 December 2016 the defendant made a second payment claim with respect to Grange Road. Receipt of that request was confirmed on 2 December 2016.

13 Further emails chasing up payment were sent on 8 December, 9 December and 14 December 2016.

14 On 14 December 2016 the defendant issued payment claims dated 31 October 2016, 30 November 2016 and 31 December 2016 totalling $239,830.03.

15 On 16 December 2016, with respect to the Mitchells Lane project, the defendant sent

the following email transmission:

> Please note we have discovered contaminated fill on site whilst undertaking the demolition works today…
>
> The full extent is unknown at this stage, however we will monitor and report further.
>
> As this is a latent condition, unknown by either party, there will be costs associated with its removal and disposal. We shall advise further once the extent is known.

16 On 16 December 2016 the defendant sent through a schedule of costs associated with the contamination, soil removal and disposal. Later that day Rod, for the plaintiff, responded and copied Paul Riggs, the Director of the plaintiff, into the email as follows:

> Thanks for the update Pete.
>
> I am just keeping Paul in the loop as he is out and about…as we discussed, presently they are not sure of the extent of the contamination, but you will update us as more details come to hand.

17 On 20 December 2016, the defendant followed up on the latent conditions report as follows:

> I am not sure if anyone has gone through the remediation with you and the costs associated but I think you need to know that these costs aren't normally cheap.
>
> We had a project (a lot larger but still) that costed around $340k and the client crapped themselves as the dollars came through.
>
> Obviously yours won't cost anywhere near this but I have had clients have heart attacks before when they got the bill so I want you to be forewarned.
>
> Based off what I have seen I would think you would probably end up around $20-30k+.
>
> Let me know if you have any questions whatsoever for any of this.

18 On the same day Paul Riggs, responded:

> Understand Lincoln. Not much we can do about it!

19 On 28 December 2016 the defendant wrote to the plaintiff by email transmission as follows:

> Please see attached relevant documents relating to the variation costs associated with the removal and disposal of the in/ground (latent condition) contaminant.
>
> These costs will be added to our current claim for works as completed in December.

20 The first Mitchells Lane progress claim was dated 20 December 2016 and was provided to the plaintiff on 29 December 2016. The covering letter set out as follows:

> Please see attached revised Progress Claim I for the above project. This revision includes the in-ground contaminated works as per CV-001 as issued.
>
> When paying please ignore the previous claim as provided earlier by Lincoln.

21 On 29 December 2016 the defendant wrote to the plaintiff as follows:

> I have reviewed the payables for the end of December and we need to have claims one and two paid now.
>
> With these paid I can then wait until mid-Jan for the other two claims (PC-3 for Grange and PC-1 for Sunbury) to be paid.

22 The response on 30 December 2016 was:

> You were going to come back to me with a bare minimum figure as I have to pay it out of another company.
>
> I can't do the full amounts just yet so we need to work on what is achievable for both of us.
>
> I'm concerned that the costs so far for Mitchells with demolition and site scrape, are very high compared to what we managed ourselves on the other sites. It might be a good idea to stop works on both sites until we get this sorted out. I know you needed to keep your guys working and fully understand this but we need to be mindful of what we both can do at this stage. Having said the above, it would not be long before its all on track so we just need to be patient at this stage and get through it.

23 On 15 March 2017 each of the statutory demands were served.

24 On 16 March 2017 Trevor Main, the interim quantity surveyor, produced a report with respect to the value of the works at Grange Road.

25 On 21 March 2017 the statutory demands were received by the plaintiff. A further revised report was received by the plaintiff with respect to the Mitchells Lane project.

26 On 22 March 2017, the defendant emailed the plaintiff setting out as follows:

> With the above in mind I have cancelled out PC2 and PC3 from the system and re done PC1 to match the assessment and have obviously also included the delay costs in accordance with the contract and interest on overdue payments which is also due and payable.
>
> If this is now 'Claim I' then this claim now incorporates all of the relevant costs to date.

The contract

27 Each of the contracts is in the same standard form, namely AS4000-1997. Albeit, there was some argument about whether the contract fell within the *Domestic Building Contracts Act 1995* (Vic), for the purposes of these applications, I accept that there is an argument that each of the contracts do fall within the ambit of the *Domestic Building Contracts Act 1995* (Vic). I note that the contract itself refers to that Act and the definition of Domestic Building Work in s 3 of the *Domestic Building Contracts Act 1995* (Vic) means any work referred to in s 5 that is not excluded by reason of operation of s 6. Section 5(1)(a) applies the Act to the erection or construction of a home. However, I determine that nothing turns on the characterisation of the contracts in these applications.

28 Features of each contract include:

> ***Superintendent***
>
> > Means the person stated in Item 5 as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent Representative, includes a Superintendent Representative;
>
> 7. Service of notices
>
> > A notice (and other documents) shall be deemed to have been given and received:
> >
> > (a) if addressed or delivered to the relevant address in the Contract or last communicated in writing to the person giving the notice;
> >
> > …
>
> 25. Latent Conditions

…

25.2 Notification

The *Contractor*, upon becoming aware of a *latent condition* while carrying out *WUC* (Work Under the Contract), shall promptly, and where possible before the *latent condition* is disturbed, give the *Superintendent* written notice of the general nature thereof.

If required by the *Superintendent* promptly after receiving that notice, the *Contractor* shall, as soon as practicable, give the *Superintendent* a written statement of:

(a) …

(b) the additional *work*, resources, time and cost which the *Contractor* estimates to be necessary to deal with the *latent condition*; and

(c) …

25.3 Deemed Variation

The effect of the *latent condition* shall be a deemed *variation*, priced having no regard to additional cost incurred more than 28 days before the date on which the *Contractor* gave the notice required by the first paragraph of sub-clause 25.2 but so as to include the *Contractor's* other cost for each compliance with sub-clause 25.2.

…

37.2 Certificates

The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:

(a) A progress certificate evidencing the Superintendent's opinion of the monies due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and

(b) A certificate evidencing the Superintendent's assessment of retention monies and monies due from the Contractor to the Principal pursuant to the Contractor.

…

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with sub-clause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates for within 21 days after the Superintendent

receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention monies and setting off such of the certificate in paragraph (b) as the Principal elects to set off. [emphasis added] …

…

38. Payment of workers and sub-contractors

38.1 Workers and Sub-contractors

The Contractor shall give in respect of a progress claim, documentary evidence of the payment of monies due and payable to:

(a) workers of the Contractor and of the Sub-contractor; and

(b) Sub-contractors,

in respect of WUC the subject of that claim.

…

38.2 Withholding payment

Subject to the next paragraph, the Principal may withhold monies certified due and payable in respect of the progress claim until the Contractor complies with sub-clause 38.1.

…

29 The respective plaintiffs did not appoint a superintendent. The relevant progress claims were provided directly to the principal. The 14 days elapsed so the progress claim was deemed to be a progress certificate. Within the further seven days, the principal was required to pay the amount specified in the deemed progress certificate. In *Kingston Building (Australia) Pty Ltd v Dial D Pty Ltd As Trustee for the Smith Street Unit Trust*,[1] it was held when dealing with a similar contractual provision:

> Once a progress claim was made, the Superintendent had 14 calendar days, after receipt of the progress claim, to issue a progress certificate**.** If the Superintendent did not issue a progress certificate in that time, the progress claim was "deemed to be the relevant progress certificate" (see cl 37.2 [3]).
>
> In that event, the proprietor was obliged to pay the Builder the amount of the progress claim within 21 days of receipt by the Superintendent of the progress claim.3

1 [2013] NSWSC 173.

30 In *Kane Constructions v Sopov*,[2] Warren CJ affirmed the long standing authority 'that a principal under a building contract is bound to pay upon the terms of a properly issued certificate' and that this principle applies even if the amounts are incorrectly representative of the ultimate amounts owing between the respective parties.[3]

31 Her Honour held that even though progress claims and payment certificates might be regarded as 'provisional in nature,' courts have long regarded 'strict compliance as to the payment of progress certificates as fundamental to the interests of legal stability in construction contracts.'[4] Whilst this case did not specifically consider the wording of Clause 37.2 of a 4000 – 1997 Standard Contract, it did consider a similar provision of a s 2124 – 1992 Standard Form Building Contract, which provided that:

> within 28 days of receipt by the superintendent of a payment claim, or within 14 days of issue by the superintendent of a payment certificate (whichever was the earlier), the owner was to pay the builder, or the builder was to pay the owner as the case may be, an amount not less than the amount shown in the certificate as due.[5]

32 Therefore, this case provides persuasive guidance that a progress certificate is due and payable after the relevant time elapses.[6] The long standing principle to which Warren CJ refers can be traced to the case of *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* ('*Algons*'),[7] which provides a concise summary of the relevant law.[8] In particular, the court in *Algons* considered the case of *Triden Contractors Pty Ltd v Belvista Pty Ltd*,[9] which concerned a dispute in relation to the payment of progress certificates. His Honour concluded that 'the amount of the certificate became due and payable on presentation of the certificate and that payment had to

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2 [2005] VSC 237.
3 Ibid [754].
4 Ibid [754].
5 *Kane Constructions v Sopov* [2005] VSC 237, [735].
6 There are other cases that consider the same provisions and have interpreted in a similar way: see, eg, *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd and Anor* [2008] NSWCA 279 at [10].
7 (1997) 14 BCL 215.
8 Williams JA in *Daysea Pty Ltd v Watpac Aus Pty Ltd* [2001] QCA 49 said that the reasoning in *Algons* as to the need for strict compliance was compelling. Williams JA noted (at [18]) that the significance of such a clause was that "progress payments are critical to the survival of the contractor and to the completion of the project".
9 (1987) 3 BCL 203.

be made "within" the seven day period.'[10]

33 Accordingly, each of the amounts claimed by the defendant were due and payable at the end of that period and constituted a debt within the meaning of s 459E at the date of the service of the statutory demand.

34 The plaintiff argued that as a Superintendent had not been appointed, the provisions of the contract could not be relied upon to transform the progress claim into debts.

35 It is a well-established legal maxim that no person can take advantage of their own wrong.[11] The House of Lords in *Alghussein Establishment v Eton College*,[12] was faced with a question of contractual construction, whereby a literal construction of the relevant provision in a lease would have led to 'an absurd result' that a contractor who failed to complete a development without fault could not call for a lease, whereas a contractor who wilfully defaulted could do so. The House of Lords held that 'a party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.'[13] This case has been widely applied and cited in Australia and can generally be used to support the proposition that a party cannot take advantage of its own failures or breaches.[14]

36 The High Court of Australia has also discussed these principles and by reference to Lord Atchison's reasoning in *New Zealand Shipping Co. Ltd. v Societe des Ateliers et Chantiers de France* (1919) AC 1 held that:

> But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel

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10 *Triden Contractors Pty Ltd v Belvista Pty Ltd* (1987) 3 BCL 203, 211.

11 See, eg, *New Zealand Shipping Co. Ltd. v Societe des Ateliers et Chantiers de France* (1919) AC 1; *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989)16 NSWLR 130 at 147; *Mitchell v Pattern Holdings Pty Ltd* [2002] NSWCA 212.

12 [1988] 1 WLR 587.

13 Ibid [273].

14 See, eg, *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989)16 NSWLR 130 at 147; *Mitchell v Pattern Holdings Pty Ltd* [2002] NSWCA 212. Specifically, the Victorian Supreme Court has cited this case in *Perpetual Nominees Ltd v Rytelle Pty Ltd (No 4)* [2013] VSC 9; *North East Solution Pty Ltd v Masters Home Improvement Australia Pty Ltd* [2016] VSC 1.

> the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.[15]

37 This area of law is uncontroversial and the principle is widely established. A more recent adaption of these principles has led to the formulation of the 'prevention principle' which states that 'a party cannot insist on the performance of a contractual obligation by the other party if it itself is the cause of the other party's non-performance.'[16] The maxim has been rephrased in certain cases so that it 'only applies to the extent of undoing the advantage gained by the wrongdoer and not the extent of taking away a right previously possessed.'[17]

38 In relation to the facts of the case, Clause 20 of the contract states that

> 'the ***Principal shall ensure*** that at all times there is a Superintendent…' [emphasis added]. Furthermore, a superintendent is defined within the Contract as 'a person stated in Item 5 or other person from time to time ***appointed in writing by the Principal*** to be the Superintendent.' [emphasis added].

39 It is clear that the appointment of a superintendent was the responsibility of the plaintiff. There has also been some judicial recognition of the relationship of principal and superintendent as principal/agent,[18] although this has not always been recognised as a principal/agent relationship in the strict sense.[19]

40 Therefore, it is arguable that the failure by the plaintiff to appoint a superintendent (as agent), means that the responsibility reverts to the plaintiff. Given that the progress claims were provided directly to the plaintiff, in lieu of the agent, should not mean that the contractual provisions cannot be relied upon, as the plaintiff submits. As the appointment of the superintendent was the responsibility of the

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15 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 441 citing *New Zealand Shipping Co. Ltd. v Societe des Ateliers et Chantiers de France* (1919) AC 1.

16 See, eg, *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)* (2012) 287 ALR 360; *Meridien AB Pty Ltd v Jackson* [2013] QCA 121 at [20]–[27], citing *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72.

17 See *Ruthol Pty Ltd v Tricon (Aust) Pty Ltd* [2005] 12 BPR 98, 225.

18 See, eg, *Penni Corporation v Commonwealth of Australia* (1969) 2 NSWLR 530; *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211.

19 See, eg, *Walton v Illawarra* [2011] NSWSC 1188.

plaintiff, this argument fails due to the fact that the plaintiff would be taking advantage of its own failure pursuant to the contract, in accordance with the principles outlined above.

41 The consequence of the failure to appoint the Superintendent was that the claims were provided directly to the plaintiff, which acknowledged receipt. I am not satisfied that there is any genuine dispute raised with respect to this point.

42 The plaintiff submitted that the defendant did not take advantage of the BCISP Act by seeking an adjudication or obtaining a judgment pursuant to that Act. However, relevantly, section 3(4) of the BCISP Act provides that the 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.

43 There is nothing outlined in either Act that specifies that an action under one Act will preclude an action pursuant to the other. To the contrary, the BCISP Act expresses states that an action pursuant to it will not exclude or limit other actions. Additionally, it has been held that actions pursuant to a contract and to the BCISP Act exist concurrently.[20]

44 Further, the New South Wales Supreme Court has recognised that it is not possible for 'the terms of a Commonwealth Act, the *Corporations Act 2001* (Cth), to be construed, or limited, by reference to the intention implicit in a State Act.'[21] Accordingly, there is no impediment to the service of a statutory demand without first having embarked upon the regime under the BCISP Act.

45 Insofar it is relevant, s 12 of that Act provides that a progress payment under a construction contract becomes due and payable on the date specified in the contract. However, I determine that the BCISP Act is not relevant to determination if the amount set out in each statutory demand is due and payable. Whether the amounts

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20 See, eg, *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 at [18]-[22].

21 *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 at [20].

are due and payable is determined by reference to the contract.

46 Division 2 of the BCISP Act sets out a regime for the adjudication of disputes. That regime has no application to the provisions of the *Corporations Act 2001* (Cth). Therefore, the cases to which I was referred to in argument which dealt with the characterisation of an adjudication or Judgment under the BCISP Act are not germane to my determination.

47 Section 10A of the Act sets out what amount can be included in a progress payment claim. The first category of variation claimable is where there is consensus as to the requirement for the work and that the doing of the work constitutes a variation to the contract.

48 The plaintiffs drew my attention to s 10B which excluded classes of amounts claimable. Section 10B(2)(b) includes as an excluded amount, any amount (**other than a claimable variation**) claimed under the construction contract for compensation due to the happening of an event including any amount relating to:

(i) latent conditions; and

…

49 I conclude that the extra amount claimed in the progress claim with respect to Mitchells Lane was not excluded by operation of that section even if it is applicable. Firstly, the contract itself deemed it to be a variation. Secondly, the amount was included in the progress claim and accepted by the plaintiff. The provisions of clause 37.2 became operative.

Mitchells Lane

50 The plaintiff in each of these applications submitted that:

> this is a commercial dispute between a builder and a developer that requires detailed assessment of disputed facts. … To determine what the obligations are arising under the contract requires more than mere contractual interpretation, but involves resolving contractual disputes, including investigating issues of credit.

51 In John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd[22] Young J said:

> It may be that I am doing a disservice to this Court in approaching the matter in this mathematical way. It may be that it is far more appropriate in the instant sort of case for the court to just take a broad brush approach. Thus the court might just say that because this is not a debt collecting court, where there is a construction case of this nature, the demand should be set aside under s 459J(1)(b) whenever it can be seen from the correspondence that there are honestly held views on either side which have brought a dispute between the parties. Thus, the matter can be dealt with in the ordinary way in which construction disputes are dealt with without the time and expense that is involved in running this sort of litigation ahead of that dispute. If I were to do that in the instant case, I would come to the same result.[23]

52 This is not such a case. There is a plethora of correspondence passing between the parties. Even after service of the statutory demand there was not one dispute raised in relation to the amount due. A quantity surveyor was appointed but that was not until about February 2017. Further, it can be distilled from the correspondence that the quantity surveyor was appointed by each of the plaintiffs to facilitate the obtaining of finance rather than to focus upon the claims by the defendant. In each proceeding, the plaintiff has filed a quantity surveyor's payment certificate. In relation to the Grange Road project, the payment certificate was produced on 16 March 2017, presumably in the capacity as 'Superintendent,' rather than as quantity surveyor as such.

53 The quantity surveyor provided a revised payment certificate on 21 March 2017 with respect to Grange Road which adjusted the figures more favourably to the defendant. However, I have not referred to either amount in either payment certificate, as the same was not provided within the time referred to in the contract to effect an adjustment of what was due and payable.

54 In relation to Mitchells Lane, the quantity surveyor purported to provide a progress certificate on 23 March 2017. Again, this document has no bearing as the time for its provision had well expired.

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22 (1994) 14 ACSR 250.

23 Ibid 254.

55 To various requests for payment, which I will not set out individually, the responses on behalf of the respective plaintiffs were as follows:

- 24 November 2016: 'Wasn't in the office yesterday and just arrived in so working on all three.'
- 28 November 2016: 'Still working on this to get it paid. Will be in touch.'
- 9 December 2016: 'Hopefully sorted out early next week.'
- 14 December 2016: 'Should have it done by next week mate. Been crazy trying to settle Aitken St at Sunbury which is all set now.'
- 30 December 2016:

  > You were going to come back to me with a bare minimum figure as I have to pay it out of another company.
  >
  > I can't do the full amounts just yet so we need to work on what is achievable for both of us.
  >
  > I am concerned that the costs so far for Mitchells with demolition and site scrape, are very high compared to what we managed ourselves on the other sites.
  >
  > It might be a good idea to stop works on both sites until we get this sorted out.
  >
  > I know you needed to keep your guys working and fully understand this but we need to be mindful of what we both can do at this stage.
  >
  > Having said the above, it will not be long before its all on track so we just need to be patient at this stage and get through it.

- 5 January 2017:

  > I have paid $40k. Maximum limit on my account apparently!
  >
  > Again my apologies for the delay.
  >
  > At least this will help.
  >
  > I am taking off for three days as I have been in the office almost every day.
  >
  > Chat next week!

- 10 January 2017:

  > I am still trying to finalise with the financiers and my accountant. I understand your situation and want to rectify it ASAP which I am confident we will.

- 12 January 2017: 'It won't be until I settle the final townhouse at Aitken St which is expected late next week mate.'

- 12 January 2017: 'Will keep you informed accordingly.'

- 19 January 2017: 'I am still working on it mate!'

- 13 February 2017:

  > My interim QS is Trevor Main. The QS for the financier will be Napiers. I am waiting for them to come back to me.
  >
  > …

- 13 February 2017:

  > I am trying to get some short term funding in place as noted in my email last week. The main financier will be the 4-5 weeks but once in place the full amount of the contract is placed in an account and ready to go.
  >
  > Then the project can go as fast as possible with no more issues as we currently have.
  >
  > I am still waiting for my interim QS to come back to me.

- 13 February 2017:

  > A QS has now been instructed by the financier. We are definitely proceeding with both projects but clearly we need to sort out the payments before we do anything further.
  >
  > As soon as the QS has finalised the first report we can proceed. The finance will change over and move ahead on a normal basis in the next 4-5 weeks. …

- 16 February 2017: 'QS has everything and is working on it as we speak. Back to me soon and then I will get you a payment.'

- 23 February 2017:

  > The $80,000 I have paid is to go towards Grange Rd Developments only.

> When the finance is fully in place I will need this money back. I am still waiting on the QS to come back to me. I have to go overseas tonight and back on Tuesday.
>
> We will work out funds then.

- 28 February 2017:

> Just to clarify that we are still working on the short term funder but this is not an easy process. The main funding is also progressing well with the initial val coming in above our estimate sales figures. I have been in China with the large modular building company for the past four days as well as settling up a major fund with a contact in Hong Kong.
>
> I am expecting the initial, interim QS report tomorrow or Thursday at the latest. I also have the other project selling in a couple of weeks. This is where the next lot of funds are coming from. I will continue to keep you updated accordingly.

56 Those responses are consistent with nothing other than funding being unavailable to each of the plaintiffs. Further, the interim QS (Superintendent) was only engaged for the purposes of securing funding.

57 I note that the plaintiffs' counsel withdrew the submission that there had been a failure to provide the necessary details of sub-contractors and employees and the attendant declaration. On that basis I find that there is no genuine dispute in relation to the Mitchells Lane project.

Grange Road

58 The issues for Grange Road are somewhat different. The plaintiff submitted that the payment claims, the subject of the demand, had been revoked and accordingly cannot constitute a debt within the meaning of s 16(2)(a)(i) of the BCISP Act. It was further submitted that the deeming provisions of that Act did not apply in this case as a result of revocation of the payment claims.

59 As previously discussed, the BCISP Act does not have any application to my determination of whether or not there is a debt due and payable. The contractual agreement between the parties expressly states that a progress claim will become a

payment certificate in the circumstances provided for by the contract.

60 On 22 March 2017 (after service of the relevant statutory demand), the defendant responded to a revised QS Report dated 21 March 2017. That transmission set out as follows:

> For starters he has assessed the three claims as Claim I and taken no consideration of the claim submitted and approved by you back in October, November and December 2016 so I now need to delete everything and start again.
>
> Additionally, when we previously spoke I advised that I was trying to avoid applying delay costs as per the contract by simply issuing the bare minimum on prelims so you could save face in front of your funder. This is obviously not an option now as he has not taken on board any of the information I provided about the start-up works required for the demolition and design etc.
>
> Finally, when I asked Damien yesterday about the interest on overdue payments, he advised that he doesn't have anything to do with interest and was just asked to assess the claims.
>
> With the above in mind I have **cancelled out PC2 and PC3 from the system and redone PC1** to match the assessment and have obviously also included the delay costs in accordance with the contract and interest on the overdue payments which is also due and payable.
>
> If this is now 'Claim I' then this claim now incorporates all of the relevant costs to date.
>
> If you have the contingency in our [sic] facility I would obviously suggest you call on it for the additional costs.
>
> [Emphasis added]

61 A revised 'Claim I' was attached to that email and provided to the plaintiff for the Grange Road project and the interim QS (Superintendent).

62 Counsel for the defendant submitted as follows:

- The payment claims had as at 14 January 2017 already became payment certificates that were due and payable on 21 January 2017.
- The revised payment claim attached to the email transmission of 22 March 2017 was clearly only intended as a demonstration what the payment claims would look like if they were revised in accordance with the plaintiffs' wishes – most notably that they would result in a higher amount payable by the

plaintiff. Counsel relied upon the language of the email transmission and, in particular, the use of the words 'if this is now "Claim I" then …' It was submitted that such language clearly indicates that it was only intended as an example of what the claim would look like if it were reissued. Further had the preliminaries been removed and the extension of time interest been applied—the result would actually be worse for the plaintiff.

- The document was unsigned and as such clearly a draft document only.
- Even if it constituted a revised payment claim (which was not conceded) then by virtue of clause 37.2 of the contract:

  (i) it became due and payable by the plaintiff on 10 April 2017;

  (ii) such payment certificate would then be for the sum of $204,848.09 a sum that exceeded the claim set out in the statutory demand by $34,876.96. In those circumstances, the sum under the statutory demand was still undisputed in existence and amount.

- According to the *Graywinter* principle, the dispute must be raised in some form within the affidavit that is filed and served within the 21 days. The failure means that the application must fail. This last point is without merit in this particular application as the revision of the payment claim was eluded to in paragraph 11 of the 21 day affidavit in relation to Grange Road.

63 In *Olympic Holdings Pty Ltd v Interwest Investments Pty Ltd* ('*Olympic*'),[24] Master Sanderson dealt with a statutory demand based upon a progress claim where pursuant to the relevant contract upon certification, the amount of the claim became due and payable by the applicant to the respondent. The statutory demand was dated 13 January 1998 and the application to set aside was made 2 February 1998. The contract contained a similar requirement as to the provision of a statutory declaration setting out payments to subcontractors. That issue before me was not pursued by counsel, understandably given that the evidence demonstrated that it was provided.

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24 (1998) 16 ACLC 1242.

64 In *Olympic*, which was heard on 18 March, 5 May and 18 May 1998 the statutory declaration was not provided until 24 March 1998. The applicant conceded that after 29 January 1998, by failure to provide the statutory declaration as requested by the respondent on 27 January 1998, the amount of the debt, while due, was not owing until after 29 January 1998.

65 The Master referred to s 459F(1) which sets out when a company is taken to fail to comply with statutory demand. Although the Master was considering the *Corporations Law 1989* (Cth), the forerunner to s 459F of the Act is in substantially the same terms namely as follows:

> If, as at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period.

66 The Master referred to s 459F(2) which sets out the period for compliance with a statutory demand:

> **459F When company taken to fail to comply with statutory demand**
>
> …
>
> (2) The period for compliance with a statutory demand is:
>
> (a) if the company applies in accordance with section 459G for an order setting aside the demand:
>
> (i) if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand—the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or
>
> (ii) otherwise—the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of; or
>
> (b) otherwise—21 days after the demand is served.

67 Master Sanderson noted:

> Neither of these two sections says anything about the need for the debt to be due and owing during the time for compliance with the statutory demand. Counsel for the respondent picked up on this point in his argument. He said,

> correctly, that the debt the subject of the demand was due and owing when the demand was made. After the service of the request for the statutory declaration, the debt was owing but not due. It did not become due until the statutory declaration was provided. …
>
> The question raised by this application can be put in a number of different ways. Is it necessary for the debt on which the statutory demand is based to be due and owing during the entire time for compliance with the demand under s 459F? Or, alternatively, if during the time for compliance with the statutory demand the debt falls away, does the statutory demand fall with it, the demand being rekindled when the debt again arises?[25]

68 Master Sanderson did not set aside the debt on the basis of a bona fide dispute but did so on the basis of s 459J which provides:

> (1) On application under s 459G the Court may by order set aside the demand if it is satisfied that:
>
> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
>
> (b) there is some other reason why the demand should be set aside.

69 Master Sanderson identified that the defect in the demand was occasioned by the hiatus caused by the failure of the respondent to supply the statutory declaration:

> That meant during the period for compliance with the statutory demand (as extended by s 459F(2)) the debt was not payable. The legislative scheme of the statutory demand procedure seems to me to anticipate that the debt will be due and payable during the entire time of the period available for compliance. The fact that it is due but not payable seems to me to mean that if the statutory demand were not set aside there would be substantial injustice to the applicant. In my view, this substantial injustice arises simply from the fact that the applicant did not have the benefit of the full period for compliance. It is not necessary for the applicant to show that it has suffered particular injustice.

70 The Master then concluded that if he were wrong about the application of s 459J(1)(a) then he would invoke the 'some other reason' referred to in sub-para (b).

71 *Olympic* has been referred to in a number of cases without criticism. I will not depart from that judgment. The plaintiffs' position is even stronger with respect to the Grange Road statutory demand as it is clearly reasonably arguable that upon withdrawing payment claims PC1, PC2 and PC3 on 22 March 2017, the payment

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25 *Olympic Holdings Pty Ltd v Interwest Investments Pty Ltd* [1998] WASC 25 (18 May 1998) 10.

certificate upon which the statutory demand was based consequently ceased to operate or have force or effect. This is not a case of a hiatus. It is a case of the debt upon which the statutory demand was based was, in effect, withdrawn. A new debt, founded upon the new Claim I, might have crystallised once the procedures under the contract were complied with. That new debt could not have crystallised until after the initial time for compliance with the statutory demand had lapsed. The new debt might be used as the basis for a new statutory demand but not in the statutory demand before the court. The regime under Part 5.4 of the Corporations Act does not permit the substitution of a new debt in place of an old or withdrawn debt. I note that Bryson J in *Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* sets out that:

> …in the context of the statutory demand and what it required it is obvious that the references to debts do not relate to debts which exist in the present but do not to fall due for payment until a future time. The inclusion with debts which were due of a claim for payment of debts which at the date of the statutory demand had not fallen due is in my opinion a defect in the demand within the general meaning of "defect."[26]

72 It has also been held by the Federal Court of Australia in *ANZ Banking Group Ltd v Kamlock Pty Ltd ('Kamlock')*[27] that due to the serious consequences of non-compliance with a notice, a company is afforded the benefit of a 3 week compliance period for 'obvious policy' reasons:

> Because of the serious consequences of non-compliance with the notice, the company is given 3 weeks to pay before s 460(2)(a) operates to deem the company insolvent, even though legally the debt is immediately due and payable. If the applicant's contention were correct, a creditor could serve a demand which included a demand for a substantial amount not yet due but which was to fall due sometime within the 3 week period. The creditor could then rely on non-payment of such an amount to deem the company insolvent, even though the company might have only had a few days between the time the amount actually fell due and the end of the 3 week period.[28]

73 After the mechanism set out in the contract is complied with, the revised payment claim could not constitute a debt due at the time of service of the statutory demand.

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26 (1996) 20 ACSR 746 at 750.

27 (1993) 10 ACSR 458. Although this case concerns the provisions previous to the *Corporations Act 2001* (Cth), the policy reasons are still valid: see also, *Main Camp Tea Tree Oil Limited v Australian Rural Group Limited* [2002] NSWSC 219 at [23].

28 *ANZ Banking Group Ltd v Kamlock Pty Ltd* (1993) 10 ACSR 458, 460.

Further, as there was a 21 day period to crystallise as a debt, it never became due during the first 21 days for compliance with the statutory demand. Having regard to *Olympic* and *Kamlock* it is irrelevant if the amount became due by the date of the hearing.

74 Although there is some force to the defendant's submissions referred to in paragraph 62, the Court's role is not to determine the argument but to identify whether a genuine dispute exists.

75 In *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liquidation),*[29] the Court of Appeal summarised the principles to set aside statutory demands as follows:

> 47. The terms of s 459H of the Corporations Act and the authorities make clear that, on an application to set aside a statutory demand, the applicant is required only to establish a genuine dispute or offsetting claim. The applicant is required to evidence the assertions relevant to the alleged dispute or offsetting claim only to the extent necessary for that primary task. It is not necessary for the applicant to advance a fully evidenced claim. Therefore, the task faced by an applicant is by no means at all a difficult or demanding one.
>
> 49. In determining such an application, it is not necessary or appropriate for a court to engage in an in-depth examination or determination of the merits of the alleged dispute. This is because an application alleging a genuine dispute or offsetting claim is akin to one for an interlocutory injunction and requires the applicant to establish that there is a 'plausible contention requiring investigation' of the existence of either a dispute as to the debt or an offsetting claim. It is therefore 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. Further, the determination of the 'ultimate question' of the existence of the debt at a substantive hearing should not be compromised.
>
> 49. The court is required to determine whether the dispute or offsetting claim is 'genuine'. It has been said that the criterion of a 'genuine' dispute requires that the dispute be bona fide and truly exist in fact and that the grounds for alleging the existence of a dispute be real and not spurious, hypothetical, illusory or misconceived. It has also been observed that the dispute or offsetting claim should have a sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion. It must also have sufficient factual particularity to exclude the merely fanciful or futile. A rigorous curial approach is essential to the effective operation of the statutory scheme.

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29 [2015] VSCA 330.

> 50. The court is not required to accept uncritically 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, as it may not have sufficient prima facie plausibility to merit further investigation as to its truth. The court is also not required to accept uncritically a patently feeble legal argument or an assertion of facts unsupported by evidence, although this should not be read as suggesting that the applicant must formally or comprehensively evidence the basis of its dispute or off-setting claim. Except in such extreme cases, the court should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on by the applicant to set aside a statutory demand.
>
> 51. *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd* involved a demand for payment of a debt alleged to be due under a contract for the supply of goods. The applicant relied on four matters, each of which had the potential to affect the respondent's entitlement to be paid the entire amount of the debt. Barrett J held that all four matters were sufficiently plausible to raise a genuine dispute. He relevantly stated:
>
> > The [applicant] will fail in [the] task [of establishing a genuine dispute] only if … the contentions upon which it seeks to rely … are so devoid of substance that no further investigation is warranted. Once the [applicant] shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the [applicant], it must find that a genuine dispute exists, even where any case apparently available to be advanced against the [applicant] seems stronger.
>
> [citations omitted]

76 Even though the plaintiff did not dispute liability to pay in the transmissions passing between the plaintiff and the defendant, I determine that there is an issue to be investigated about whether or not the debt upon which the Grange Road statutory demand was based was no longer due or payable prior to the expiration of the time for compliance with the statutory demand.

77 I canvased with the parties the question of costs in the event that I determine to set aside one of the statutory demands but not the other. It was agreed that there should be no order as to costs.

78 The orders of the Court will be:

In S CI 2017 01308: Grange Road

1. The statutory demand dated 15 March 2017 is set aside.

2. There be no order as to costs.

In S CI 2017 01310: Mitchells Lane

1. The originating process filed 3 April 2017 is dismissed.

2. There is no order as to costs.
