JUDGMENT : Associate Justice Macready. Supreme Court. New South Wales. Equity Division. 29th September 2006

1 This is an application by the plaintiff to set aside a statutory demand under s 459G of the **Corporations Act** 2001 (Cth) for an amount of $20,315.61 being the amount of an adjudication determination made under the **Building and Construction Industry Security of Payment Act 1999 (NSW)** ("BACISOP Act") and interest.

2 The adjudication was made on 13 February 2006.

3 The plaintiff submits that the demand should be set aside because there are several formal defects in the demand and the affidavit in support. It also submits that the demand should be set aside on the basis of the following genuine disputes or off-setting claims:

(a) There is a plausible contention that the Adjudicator failed to correctly determine the existence of a construction contract, a "basic and essential fact" going to his jurisdiction which would lead to the determination being void and thus the demand having no foundation.

(b) There is a plausible contention that the plaintiff is entitled to recover monies payable on an interim basis under the Adjudication Determination because the defendant has no legally enforceable claim to those monies, absent the interim regime provided for in the BACISOP Act.

Background history

4 The plaintiff contracted with a third party in May 2005 to manage and coordinate demolition and fit out work at Parramatta. It engaged one head sub-contractor to do this work, Denicola Interiors Pty Limited ("Denicola Interiors") and a contract was made on 27 May 2005.

5 As the work progressed Denicola Interiors issued three tax invoices to the plaintiff, the first two of which were paid. On 19 July 2005 the plaintiff issued a further cheque for $44,123.60 payable to Denicola Interiors, intending to make the payment in respect of the third invoice. The plaintiff stopped the cheque on 21 July 2005 and on the following day it terminated the contract with Denicola Interiors. It alleges that there were substantial breaches by Denicola Interiors of its sub-contract, including not paying its sub-contractors.

6 One of the sub-contractors was the defendant who had a sub-contract dated 30 June 2005 to provide and install plasterboard on the site. That sub-contract plainly was between the defendant and Denicola Interiors.

7 On 28 July 2005 the defendant wrote to the plaintiff complaining about its contract with Denicola Interiors and said that the progress payments owed by Denicola Interiors to the defendant remained outstanding. On 1 August 2005 Mr Baxter of the defendant met Mr Nik Nguyen of the plaintiff and they had a discussion about the possibility of the defendant performing work for the plaintiff in the future.

8 In October 2005 the defendant made a payment claim on the plaintiff. That payment claim was disputed and plainly there was a denial of the existence of any construction contract between the plaintiff and the defendant. The correspondence suggested that the defendant might have a claim in quantum merit available. The plaintiff issued a payment schedule raising the matters and nothing further was done in respect of the October payment claim.

9 On 21 December 2005 there was a further payment claim under the BACISOP Act by the defendant, in the same terms as the October claim. The plaintiff responded in time with a fresh payment schedule, which once again raised the contentions that had earlier been advanced, in particular, that there was no construction contract and that the work had been paid for.

10 In due course there was an Adjudication Application and a Response and Mr Damien Michael, the Adjudicator, accepted his nomination on 30 January 2006.

11 After payment of fees the Determination was released on 1 March 2006 and appears to be dated 13 February 2006.

12 The various submissions clearly identified the dispute between the parties. The issue was stated by the Adjudicator in his Determination in the following terms:

> "*1.4 The principal question that therefore arises is whether [Premier] has brought this adjudication against the proper Respondent (CCD Group Pty Ltd) as it is in my view somewhat anomalous [sic] as to whether a construction contract in fact existed between the respective parties. This is, as the case law propounds, one of the fundamental conditions that are basic and essential to the founding of a valid determination.*"

13 Relying upon **Okaroo Pty Limited v Vos Construction and Joinery Pty Limited and Anor** [2005] NSWSC 45, the Adjudicator determined that: "*The only matter for consideration in deciding whether a contract or other arrangement is within the definition of construction contract is whether it is one under which one party undertakes to carry out construction work, or to supply related goods and services for another party.*"

14 Having determined this approach to the matter before him, the Adjudicator then found that:

(a) Considerations of privity of contract, and the terms and conditions of contract, were irrelevant to his task, it being apparent that CCD "stood to benefit from [Premier's] work as it did currently stand then" [sic], and the work carried out was ultimately for CCD's benefit;

(b) In any event, Premier was "reasonably entitled to assume that it had entered into an arrangement" with CCD; and

(c) Premier "believed that an agreement had been reached" with CCD, and that "payment for the accrued liability in respect of the work that [Premier] had done [for Denicola] was to be paid by [CCD]."

15 The Adjudicator then concluded:

"*4.8 I am therefore satisfied on [Premier's] evidence that an agreement was entered between the parties at the time that they met on site in August 2005. In my view, an agreement was reasonably inferred by the parties conduct which I consider was capable of being construed as a construction contract and/or arrangement within the meaning of the Act.*"

16 On 6 March 2006 the plaintiff's solicitors notified the defendant that their view was that the Determination was void and that they would apply to set aside any judgment based on the Determination.

17 On 30 March 2006 the plaintiff was served with a statutory demand and there was further correspondence seeking that the statutory demand be withdrawn. The statutory demand was not withdrawn and these proceedings were commenced in time. No certificate of judgment has been obtained in respect of the Adjudication Determination.

Formal Defects

18 I will first deal with the formal defects. In the affidavit in support of the application, the following defects were identified in the demand.

(a) It does not state the amount of the alleged indebtedness in paragraph 1 of the demand;

(b) The date of the verifying affidavit of Mr Sam Jeloudev is not identified in paragraph 2 of the demand;

(c) and the 'Schedule" referred to in paragraph 1 of the demand is not, in fact, included as a schedule to the demand.

19 A perusal of the demand indicates that the first two matters are correct and that the schedule to the demand seems to be attached as the third page, the second page being the affidavit. In the affidavit and the schedule the same amounts are claimed for the amount due under the adjudication and the interest. However, the totals are different in each. It would be plain from a reading of the sub-totals what was the correct total, namely, $20,315.61. No substantial injustice was identified in respect of those defects and it seems to me that there is no substantial injustice arising from the defects. The nature of the claim and the amount being claimed is clear from a consideration of the three pages. I would not set aside the demand based upon these matters.

20 There was also raised a defect in the affidavit. In the present case an affidavit was required because the claim was not a claim based upon a judgment debt. The affidavit was thus an integral part of the demand process. The omission from the affidavit is the paragraph which states: "*I believe that there is no genuine dispute about the existence or amount of the debt/any of the debts.*"

21 An affidavit suffering from similar and other defects to the one in question here were dealt with in ***Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd; Olan Mills Studio Pty Ltd v Kodak (Australasia) Pty Ltd*** (1996) 20 ACSR 746. Bryson J made the following comments: (at pp 758-759)

> "*I see a clear distinction between a defect in a demand as a ground for setting aside the demand, and a defect in an affidavit purportedly verifying the demand as a ground for setting aside the demand. An affidavit which is incorrect has a different and higher order of importance to a demand which is incorrect. There are some deficiencies in procedure which the court should not allow to be successful, whether or not they have any high practical significance in terms of justice between the parties in the instant case. Echoing expressions of Senior Master Mahony in* ***Scandon*** *at 668, it seems to me that the opportunity ought to exist for the court to register clearly and appropriately the importance of the requirement of verification of demands. I cannot see the requirement of verification, and the responsibilities in relation to it which fall both on the officer swearing the verification and on the creditor as no more than another form to fill in, errors in which the debtor can have put right on application to the Court. .....*
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> *In my view the dominant consideration is the need to ensure the purity of the manner in which creditors follow statutory procedures which are preliminary to litigation and for which verification is required by law. I do not find it possible to see deficiencies of the kinds which exist in these affidavits as something which can be disregarded. It is not enough that a responsible officer should support a Statutory Demand by oath or affirmation; the exercise must be carried out in a responsible way, and regard must be paid, with a strictness appropriate for verification, to the need to review the available information and observe whether what is being verified conforms to the information in the creditor's own hands. If there had been a conscientious review of Kodak's own records, the affidavits made in this case could not have been made. In my opinion I should not allow this. I should not allow it whether or not there are genuine offsetting claims.*
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> *As I am of the view that the plaintiffs are entitled to succeed on the grounds which I have set out, irrespective of whether or not there is an offsetting claim which is a genuine claim, I do not propose to take the matter further or to give counsel an opportunity to address on whether or not there is a genuine offsetting claim.*

22 There are other examples such as ***Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd*** (1998) 29 ACSR 11 where his Honour Mr Justice Austin, on the omission of a similar paragraph, pointed out the need for the deponent at the time the demand was issued, to have considered whether there was a genuine dispute about the debt. It is, in my view, irrelevant that after the event someone else might have thought about it and then have purported to swear to the fact that he thought there was no genuine dispute.

23 In ***B & M Quality Constructions Pty Ltd v Buyrite Steel Pty Ltd Supplies*** (1994) 13 ACLC 88 McLelland CJ in Equity had to consider an affidavit sworn by a commercial agent on behalf of the plaintiff, which also omitted the

statement that there was no genuine dispute. His Honour addressed these two matters in the following terms: (at pp 90-91)

"In my opinion the departure from the relevant rule in respect of the affidavit accompanying the statutory demand is a matter of substance. The requirement of that rule, as to the identity of the person making the affidavit accompanying the statutory declaration, is designed to serve the public interest as well as to protect the company against unwarranted demands, by endeavouring to ensure, within practical limits, that the person who must put his or her oath or solemn affirmation to the relevant matters (and thereby risk a conviction for perjury if a knowingly false statement is made) is the person associated with the creditor who is most likely to have direct knowledge of those matters. It is important in this regard to bear in mind that the relevant matters include not only a belief as to the existence and amount of the debt, but also a belief as to the absence of any genuine dispute about the existence or amount of the debt. The express requirement in the rule that the person making the affidavit depose to his or her belief that there is no genuine dispute is a significant mechanism for filtering out cases where there is in fact such a dispute, so as to prevent such cases from reaching the court on such an application as the present, with a consequent waste of time and resources. This mechanism would be substantially weakened unless a person likely to have personal knowledge of the existence of a dispute if there is one makes the affidavit. A statement of a belief that there is no genuine dispute based solely on hearsay is unlikely to have anything like the same degree of reliability. I therefore do not regard what has occurred in the present case as a merely technical breach of the rules. It goes to the heart of what Pt 80A r 15 was intended to achieve."

24 His Honour then proceeded to set aside the demand.

25 It can be seen that this was a strong case in that the person making the affidavit would not know whether or not there was a dispute. However, the point remains that His Honour indicated that the statement is a significant mechanism for filtering out cases where a dispute has arisen.

26 I have set aside a demand in ***Beta Trading Company Pty Ltd v Specialised Laminators (No 1) Pty Ltd*** (1996) 15 ACLC 270 where the relevant paragraph was omitted and the person in question would have had appropriate knowledge. I also relied on the failure to provide an appropriate address for service in the demand.

27 In other cases, such as ***Re Mabrouk Pty Ltd*** (9 February 1996), I have held that it would be appropriate to set aside a notice where the omission of the statement was intentional, as the person making the affidavit was well aware that there was a genuine dispute.

28 In the present case there is a long history of letters between the solicitors, in respect of both the first and second payment claims and the result of the final Adjudication, which indicated the nature of the dispute. In these circumstances it seems to me that, subject to the matter which I will next deal with, the omission is important and as it is such a critical matter to the process as has been pointed out in the cases to which I have referred, I would normally set the demand aside on this ground.

29 The matter which has also been raised in this respect is whether or not the point can now be raised because it was not raised in the affidavit filed within time.

30 A recent discussion of the extensive case law in this area and its development is that of Austin J in ***POS Media v B Family*** [2003] NSWSC 147. There His Honour said:

"26 The principle asserted by the defendant is that the plaintiff cannot succeed on the 'no debt' ground, because that ground was not set out in Mr Patkin's affidavit of 9 December 2002, and cannot be characterised as an extension of the grounds set out in that affidavit.

27 The principle is said to arise out of s 459G, which states:

'459G (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.'

28 In ***David Grant & Co Pty Ltd v Westpac Banking Corporation*** (1995) 184 CLR 265 the High Court of Australia held that an application to set aside a statutory demand is to be made within 21 days of service of the demand, and not at some time thereafter, and that to treat s 1322 as authorising the Court to extend the 21 day period would be to deprive the word 'only' in s 459(2) of effect (per Gummow J at 276). The David Grant case implied that the plaintiff must file and serve, within the 21 day period, not only the application but also an affidavit falling within the description of 'an affidavit supporting the application'; in assessing whether these requirements have been satisfied, the Court is not to have regard to any supplementary affidavit filed and served by the plaintiff at a later time.

29 Section 459G does not prescribe the content of the application. That is left to the Rules of Court, which are now substantially uniform. The application is made by an originating process, which according to R 2.2 of the Corporations Rules of the various Courts, and the associated Form 2, must set out the relief sought and the

sections of the Corporations Act under which the proceeding is brought, but need not plead the grounds upon which the relief is sought. The defendant's interest in knowing the plaintiff's claim is catered for by the general rules of Court regarding particulars, and the Court's power to order that the matter proceed by pleadings or points of claim in an appropriate case.

30 In the absence of authority, one might have thought that an affidavit would 'support' such an application if it deposed to facts that would (alone or together with other evidence) justify the grant of some such relief as the application sought, once the plaintiff articulated (at the hearing, if not earlier) the reasoning by which those facts would warrant that relief. One would not expect the supporting affidavit to supply the intermediate reasoning, in the nature of a pleading. Assertions in an affidavit in the nature of submissions are normally held inadmissible, if challenged.

31 However, the law has taken rather a different course. In ***Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund*** (1996) 70 FCR 452, Sundberg J was dealing with an application to set aside a statutory demand on the basis that there was a genuine dispute as the existence of the debt. Perhaps influenced by a supplementary Federal Court Rule in force at the time, he said (at 459): *'In a s 459H(1)(a) case, the affidavit must in my view disclose facts showing there is a genuine dispute between the parties. A mere assertion that there is a genuine dispute is not enough. Nor is a bare claim that the debt is disputed sufficient. It follows from the fact that the affidavit need not go into evidence, which is the customary function of affidavit, that it may read like a pleading.'*

32 Those observations have been taken up and applied frequently in first instance decisions - for example, **Zenaust Imports Pty Ltd v Olympic Chemicals Works Co Ltd** (1998) 28 ACSR 465; **Z-Tek Computers Pty Ltd v Aus Linx International Pty Ltd** (1997) 15 ACLC 1233; **SMEC International Pty Ltd v CEMS Engineering Inc** (2001) 38 ACSR 595. In the Zenaust case, however, Santow J added (at 469) the qualification that an affidavit in support of a notice to set aside a statutory demand could not fairly be expected to rise higher than the level of articulation of the claimed debt in the statutory demand.

33 These cases dealt with the minimum content requirements for the affidavit in support of the application. A corollary of their reasoning is that if the affidavit discloses certain grounds only, the plaintiff should be limited to those grounds at the hearing. That proposition was accepted in **D & S Group of Companies Pty Ltd v O'Connor Investments Pty Ltd** (1997) 15 ACLC 1794, where Perry J remarked (at 1798), in respect of an affidavit filed on behalf of the plaintiff well after the expiration of the period of 21 days, 'in so far as it raises any ground offered in support of the application not identified in the affidavit ... filed within time, [it] could not be taken into account in determining the application'. The same point was accepted by Mandie J in **Missay Pty Ltd v Seventh Cameo Nominees Pty Ltd (in liq)** [2000] VSC 397.

34 Those decisions should be compared with Callite Pty Ltd v Adams [2001] NSWSC 52. In that case the statutory demand was by solicitors who sought to recover in respect of fees charged for legal work. At the hearing the plaintiff (the client) wanted to assert that there was a genuine dispute because the defendant (the solicitor) had not complied with mandatory requirements of the Legal Profession Act 1987 (NSW). The affidavit supporting the client's application to set aside the statutory demand annexed the relevant invoices but did not assert the ultimate facts that would allow the legal conclusion to be drawn that there had been no proper fee disclosure as required by the Legal Profession Act. However, it was evident on the face of the invoices that they did not comply with the requirements of that Act in various ways. Santow J held that it was unnecessary for the affidavit to point out explicitly that omissions had occurred, since it was self-evident from a perusal of the annexed accounts that they lacked certain mandatory inclusions. He concluded (at [12]) that : *'the legal consequences which follow are not required to be pleaded in such an affidavit'.*

35 We now have the benefit of three decisions by an intermediate appellate court. The Full Court of the Supreme Court of Western Australia has followed Sundberg J's observations and their corollary in ***Meadowfield Pty Ltd v Gold Coast Holdings Pty Ltd (in liq***) [2001] WASCA 360; ***Energy Equity Corporation Ltd v Sinedie Pty Ltd*** (2001) 166 FLR 179 and ***Financial Solutions Australasia Pty Ltd v Predella Pty Ltd*** (2002) 167 FLR 106. However, the Financial Solutions case has reduced the Graywinter 'principle' to a more fact-specific inquiry.

36 The ***Meadowfield*** case applied Sundberg J's observations about the 'minimum requirements' for the affidavit without adding anything of general application. In the ***Energy Equity*** case, the question was whether the plaintiff could seek to establish at the hearing that it had an offsetting claim in negligence in relation to a particular contract, when all that had been relevantly said in the affidavit filed within time was that there were 'a string of off-setting claims'. After examining the authorities Wallwork J (with whom Steytler J and Olsson A-UJ agreed) concluded (at 185, in a passage described in the Financial Solutions case as an obiter dictum): *'In my view it now seems to be accepted that an affidavit filed outside the 21-day period which raises a new ground or grounds to set aside a statutory demand (as opposed to an affidavit which expands on grounds in an earlier affidavit which has satisfied the threshold test) cannot be used in an application of this nature.'*

37 In the Financial Solutions case, the plaintiff contended at the hearing that there was a genuine dispute as to the existence of the debt claimed in the statutory demand, for two reasons. First, the plaintiff said that the defendant claimed as assignee under a deed of assignment which mistakenly identified the deeds of loan to which the assignment related, and secondly, the plaintiff said that the defendant was not a permitted assignee under the terms of the deeds. The affidavit supporting the application said only that the plaintiff had not sighted the deed of assignment and genuinely believed that the assignment might be void and ineffective,

and was seeking discovery of the documents referred to in the statutory demand in order to establish whether the defendant had a legally enforceable claim against it.

38 Applying the observations of Sundberg J in ***Graywinter ,*** and also the views of Young J in John ***Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd*** (1994) 12 ACLC 716, Parker J (with whom Anderson and Scott JJ agreed) held (at 115) that the material facts on which the plaintiff intended to rely to show a genuine dispute were sufficiently, 'though less than ideally', set out in the affidavit and its annexures. He observed, applying the views of Young J in the John Holland case, that the affidavit went beyond mere assertion. As to Sundberg J's observations, he said that they were apt to the circumstances with which Sundberg J was concerned, but: *'there is reason to hesitate and hold back from acceptance of the apparent effect of the submission for Financial Solutions that the concluding paragraph of the passages cited earlier from Sundberg J's reasons in Graywinter reveal a settled and universal principle, which must be satisfied by an affidavit before it can be accepted as 'supporting the application' within the meaning of s459G(3)(a) and as satisfying the jurisdictional requirement being considered. The statutory yardstick remains that the affidavit should support the application. The precise nature of the application may well influence what this requires.'*

39 Barrett J of this Court carefully reviewed the case law in ***Process Machinery Australia Pty Ltd v ACN*** 057 260 590 Pty Ltd [2002] NSWSC 45, although his judgment was delivered before the Financial Solutions decision. Barrett J's conclusions were as follows:

'[21] It is thus reasonably clear that the relevant concept of "raising" or "identifying" a particular ground involves some verbal delineation of that ground in the s 459G(3)(a) affidavit. If a debt of $10,000 were claimed as one year's interest under a contract providing for interest at the rate of 9% per annum on a principal sum of $100,000, it would not, in my opinion, be sufficient for the affidavit to annex the loan agreement and say no more. It would have to refer at least to the connection between the contract and the debt claimed and put in issue the calculation of interest - even if it merely said, "The debt does not accord with the annexed contract".

[22] The real point is that the application and affidavit filed and served within the 21 day period must fairly alert the claimant to the nature of the case the company will seek to make in resisting the statutory demand. The content of the application and affidavit must convey, even if it be by necessary inference, a clear delineation of the area of controversy so that it is identifiable with one or more of the grounds made available by s 459H and s 459J. That process of delineation may not be extended after the end of the 21 day period, although it is open to the plaintiff to supplement the initial affidavit by way of additional evidence relevant to the area of controversy identified within the period.'

40 With respect, these observations are a logical application of the principle enunciated in ***Energy Equity***. However, they might arguably take Sundberg J's observations in Graywinter further than the Financial Solutions case would now take them, and be inconsistent with the decision in **Callite.** If it was unnecessary for the supporting affidavit in ***Callite*** to do anything more than annex the solicitor's invoices, on the face of which there were non-compliances with the Legal Profession Act, why would it be necessary for the supporting affidavit in Barrett J's hypothetical example to do anything more than annex the loan agreement showing a different rate of interest from the one claimed?"

31 In ***Tokich Holdings Pty Limited v Sheraton Constructions (NSW) Pty Limited (In liquidation)*** [2004] NSWSC 527 His Honour Justice White referred to the debate and concluded as follows: (at para 56) *"It will be sufficient if the area of controversy is clearly delineated by necessary inference so that it is identifiable as one or more of the grounds made available by s 459H and s 459J."*

32 This seems to have been an acceptance of the view put forward by Santow J in **Callite.** In the present case it is obvious on the face of the affidavit filed within time that there is non-compliance in respect of the affidavit in support of the statutory demand. In these circumstances it seems to me that the point is available to be raised, as the affidavit in support of the demand was part of the material served with the affidavit filed within time and as it is a matter of law was available to be appreciated by anyone considering that material.

33 Accordingly, I would set aside the demand.

34 However, in case a different view is taken I will deal with the other aspect of the matter.

Genuine dispute as to whether the Adjudicator failed to correctly determine the existence of a construction contract

35 As I have indicated, it was suggested that there was a genuine dispute as there was a plausible contention that the Adjudicator failed to correctly determine the existence of a construction contract, which was a basic and essential fact going to his jurisdiction.

36 I had the benefit of having a number of submissions in respect of the principles to be applied and I think probably the most useful summation is that given by McLelland CJ in Equity in ***Eyota Pty Limited v Hanave Pty Limited*** (1994) 12 ACLC 669.

37 At page 671 His Honour made the following comments in respect of the expression "genuine dispute":

"It is, however, necessary to consider the meaning of the expression 'genuine dispute' where it occurs in s.459H. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the 'serious question to be tried' criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as

*giving rise to a genuine dispute, 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' not having 'sufficient prima facie plausibility to merit further investigation as to [its] truth' (cf **Eng Mee Yong v Letchumanan** [1980] AC 331 at 341), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence' (cf **South Australia v Wall** (1980) 24 SASR 189 at 194).*

*But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute. In **Mibor Investments** (at 366-7) Hayne J said, after referring to the state of the law prior to the enactment of Div 3 of Pt 5.4 of the Corporations Law, and to the terms of Div 3:*

'These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.'

In **Re Morris Catering (Aust) Pty Limited** (1993) 11 ACSR 601 at 605 Thomas J said:

'There is little doubt that Div 3 prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is 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. The essential task is relatively simply - to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).'

I respectfully agree with those statements."

38 There are a number of basic provisions of the BACISOP Act and decisions on the meaning of "construction contract" which need to be noted. They are referred to in the plaintiff's submissions and I will incorporate them with some modifications in this judgment.

39 Section 7 of the BACISOP Act sets out its application, which is that it applies to "any construction contract, whether written or oral, or partly written and partly oral..."

40 Section 4 of the BACISOP Act provides, inter alia: "Construction contract" means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party."

41 The existence of a "construction contract", as defined, is a "basic and essential requirement", "laid down for the existence of an adjudicator's determination...": ***Brodyn Pty Limited t/as Time Cost and Quality v Davenport*** (2004) 61 NSWLR 421; [2004] NSWCA 394 (at [53])

42 In ***Fifty Property Investments Pty Limited v Barry J O'Mara and Anor*** [2006] NSWSC 428 Brereton J reviewed the requirements for review of a decision maker's determination of jurisdictional facts, in the same context as that before the Court in this proceeding. His Honour stated:

> ***"[21]*** *Where the existence of an essential preliminary precondition to jurisdiction is a question of objective fact (as distinct from where it depends on the tribunal having a state of satisfaction or opinion), it is for the reviewing court to determine, on the evidence before it, whether or not the fact exists, and evidence of the existence or non-existence of the fact is admissible in the reviewing court [**R v Blakeley**, 91–92; **R v Ludeke; Ex parte Queensland Electricity Commission** (1985) 159 CLR 178 at 183–184; **DMW v CGW** (1982) 151 CLR 491 at 510; **Timbarra Protection Coalition Inc v Ross Mining NL**], although courts exercise some restraint in interfering with findings with respect to the jurisdictional fact and do so only if satisfied that the decision maker's finding of the jurisdictional fact is wrong [**Parisienne Basket Shoes Pty Ltd v Whyte Queensland v Wyvill** (1989) 25 FCR 512 ; 90 ALR 611 at 618, (Pincus J)].*
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> ***[22]*** *The extent to which the reviewing court gives weight to the view of the facts taken by the decision maker in determining whether a jurisdictional fact exists varies with the circumstances [**R v Blakeley**, 92–93; **Sankey v Whitlam** [1977] 1 NSWLR 333 at 347; **R v Ludeke; R v Williams, Ex parte Australian Building Construction Employees' and Builders' Labourers' Federation** (1982) 153 CLR 402 at 411], relevant factors including the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions, and the extent to which its decisions are supported by disclosed processes of reasoning [**Minister of Immigration and Multicultural Affairs v Eshetu** (1999) 197 CLR 611 (Gummow J)]. The principle that weight may be given to the tribunal's view of the relevant jurisdictional fact applies more where the tribunal's expertise especially equips it to provide an answer, and less where the jurisdictional fact is an expression which is a matter of ordinary usage [**R v Williams, Ex parte Australian Building Construction Employees' and Builders' Labourers' FederationQueensland v Wyvill**].*

> ***[23]*** *Although the qualifications and experience in the construction industry of the adjudicators appointed under the Act would give them specialist skills in determining technical construction issues, I do not think they have any claim to superior expertise, nor any position of advantage, in determining whether or not a construction contract was made. As will become apparent in this case, it is also relevant that the adjudicator's reasoning cannot be said to be supported by disclosed processes of reasoning.*"

43 In **Okaroo**, Okaroo as a developer, entered into a contract with a third party (Consolidated) for the supply and installation of joinery. Vos was subcontracted by Consolidated to provide those services, though on terms that Okaroo would make direct progress payment to Vos. Okaroo, while not a party to that contract, was aware of its terms, paid a substantial deposit to Vos before commencement of work, and made further substantial progress payments to Vos, in accordance with its contract with Consolidated. Vos issued payment claims upon Okaroo, when Consolidated was placed into liquidation.

44 An adjudication under the BACISOP Act determined that a "construction contract" – as defined in the Act – had come into existence, and Okaroo was ordered to pay the amount of Vos' payment claim. Okaroo sought a declaration that the adjudication determination was void, there being no "construction contract" in existence between the parties. This critical definition of "construction contract" was therefore considered by Nicholas J, who stated:

> "**[39]** A construction contract under s 4 is established by proof of the existence of a contract or other arrangement under which construction work is carried out by one party for another. The Act does not define "contract" or "arrangement".
>
> **[40]** "Arrangement" is a word without precise meaning. It appears in many statutory contexts and has been given meaning in those contexts in many cases. For the purposes of this case I find assistance in the following statements:
>
> ... the word "arrangement" is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons — a plan arranged between them which may not be enforceable at law. (***Newton v Federal Commissioner of Taxation*** (1958) 98 CLR 1 at p 7). The expression 'arrangement or understanding' in ss 45(2) and 45A requires that at least one party assume an obligation or give an assurance or undertaking that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough. (***Australian Competition and Consumer Commission v CC (New South Wales) Pty Ltd*** *(*No 8*)* (1999) 165 ALR 468 per Lindgren J at p 469).
>
> (See also, ***Legal & General Assurance v Stock*** [1993] 49 IR 464 at pp 480–481; ***State Bank of NSW v Grover*** (1996) 64 IR 451 at pp 456–457).
>
> **[41]** With regard to the authorities, and to its context in the Act, in my opinion the term "arrangement" in the definition is a wide one, and encompasses transactions or relationships which are not legally enforceable agreements. The distinction in the definition between "a contract" and "other arrangement" is intended by the legislature to be one of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between these relationships I understand the legislature intends that "contract" is to be given its common law meaning and that "arrangement" means a transaction or relationship which is not enforceable at law as a contract would be. Accordingly I reject the submission for Okaroo that the term "arrangement" should be understood to mean an agreement which is tantamount to a contract enforceable at law.
>
> **[42]** In deciding whether a contract or other arrangement is within the definition of construction contract the only matter for consideration is whether it is one under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. There is no other requirement or qualification which is expressly or by implication included in the definition which must be satisfied. It may be safely assumed that had the legislature intended any additional requirement or qualification it would have included it in the definition. (Contrast, for example, s 22(2)(b) whereby the adjudicator is, in terms, directed to consider the provisions of the construction contract from which the application arose in determining an adjudication application)."

45 The reason why there was said to be a construction contract were articulated by the Adjudicator in these terms:

> "4.4 I consider, as has correctly been determined by case law that the only matter for consideration in deciding whether a contract or other arrangement is within the definition of construction contract is whether it is one under which one party undertakes to carry out construction work, or to supply related goods and services for another party.
>
> 4.5 In my view, the privity of contract between the Claimant and Denicola is irrelevant as are the terms and conditions contained therein. It is in my view apparent that the Respondent stood to benefit from the Claimant's work as it did currently stand then (due to circumstances of the termination and Denicola's non pursuit of outstanding monies from the Respondent) and that the work carried out by the Claimant was ultimately for the Respondent's benefit.
>
> 4.6 If I am wrong in this view, I nevertheless consider that the Claimant, as it has submitted, was reasonably entitled to assume that it had entered into an arrangement, albeit oral, with the Respondent when it met on

site in August 2005. The contract between Denicola and the Respondent had been terminated; the Respondent had commenced arranging the completion of the work and had offered the Claimant whether it would be interested in completing its unfinished work.

4.7 In my view the Claimant believed that an agreement had been reached with the Respondent and that payment for accrued liability in respect of the work that the Claimant had done was to be paid by the Respondent. In my view, this is supported by the fact that the Respondent stopped payments to Denicola. The Respondent clearly envisaged at that time that it may enter into a separate agreement with the Claimant insofar as the remaining work was concerned.

4.8 I am therefore satisfied on the Claimant's evidence that an agreement was entered between the parties at the time they met on the site in August 2005. In my view, an agreement was reasonably inferred by the parties' conduct which I consider was capable of being construed as a construction contract and/or an arrangement within the meaning of the Act.

4.9 I therefore determine that an arrangement did exist between the Claimant and the Respondent whereby the Claimant did undertake to carry out construction work and/or supply related goods and services for the Respondent being also evidenced by the annexed drawings to the adjudication application whereby those drawings on their face state that they are the property of the Respondent.

46 One basis seems to be that under 4.5 the Adjudicator thought that the work carried out by the claimant was ultimately for the respondent's benefit. Although this might be so, there does not seem to be any articulation of how that led to an arrangement within the definition of "construction contract". The alternative view expressed in paragraph 4.6, that the claimant was entitled to assume that it had entered into an arrangement, does not seem to have any factual basis to support it. At the time of the meeting, the work the subject of the claim pressed by Premier, had been completed. The Adjudicator expressly acknowledged as is apparent from 4.7, that the statements of the plaintiff's project manager were directed towards completion of unfinished work. There is no consideration by the Adjudicator of how such a conversation could give rise to an undertaking to carry out construction work that had already been performed.

47 The factual circumstances provide no similar factual background to the case of **Okaroo** as the parties' arrangements were kept strictly between the relevant persons until after the conclusion of the relevant work. In these circumstances it seems to me that there would be a real basis for setting aside the Determination and on this basis there is a genuine dispute.

Is there an off-setting claim to recover the monies?

48 It is plain from the structure of the BACISOP Act that a payment under the interim regime under the Act does not affect ultimate recovery of final amounts due between the parties based upon their legal rights. Section 32 of the Act is in the following terms:

"*32 Effect of Part on civil proceedings*

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings."

49 It is plain from the comments of Nicholas J to which I have referred above in **Okaroo,** that the right to recover interim payments under the BACISOP Act does not depend upon a contractual basis alone.

50 In ***Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd*** (2003) 202 ALR 680 I held that a party served with a statutory demand, founded upon an adjudication determination, was not precluded from raising an off-setting claim under section 459G of the **Corporations Act**.

51 That decision has been followed in ***Greenaways Australia Pty Ltd v CBC Management Pty Ltd*** [2004] NSWSC 1186 and ***Demir Pty Ltd v Graf Plumbing Pty Ltd*** [2004] NSWSC 553.

52 In ***Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd*** [2005] NSWSC 559 White J concluded at paragraphs 11 - 12:

"11 Part 3 of the Building and Construction Industry Security of Payment Act provides a summary procedure for determining what payments should be made on an interim basis, but it does not preclude the right of the parties to a building contract to have their rights and liabilities under that contract determined in accordance with the usual civil procedures. Thus, s32(2) and (3) of that Act provide, inter alia, for restitution to be ordered by a court or tribunal hearing the matter arising under a construction contract, of any amount paid in accordance with Pt 3 of that Act.

12 It follows that whilst a party against whom a certificate requiring it to pay money has been issued, and against whom a judgment is entered in accordance with Pt 3 of that Act, is undoubtedly indebted to the other party to the contract who has obtained the certificate, nonetheless, if such a person has a genuine claim that it is not, in truth, indebted for the amount certified, it can maintain that claim as an offsetting claim under s 459H(1)(b) of the Corporations Act: see ***Max Cooper & Sons (Builders) Pty Ltd v M & E Booth Pty Ltd*** (2003) NSWSC 929; ***Demir Pty Limited v Graf Plumbing Pty Limited*** (2004) NSWSC 553; ***Greenaways Australia Pty Ltd v CBC Management Pty Ltd*** (2004) NSWSC 1186; and ***Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd*** (2005) NSWSC 284."

53 It seems to me that the right which the plaintiff has under s 32 to claim restitution, would enable it to recover back the sums for which it was not indebted in proceedings for determining the amount due under s 32.

54 In these circumstances there is also an off-setting claim.

55 The orders I make are as follows:

1. The statutory demand dated 25 March 2006 served by the defendant upon the plaintiff be set aside.
2. The defendant to pay the plaintiff's costs.

Mr JM White for plaintiff instructed by Kemp Strang
Mr L Ellison SC for defendant instructed by David Pain & Co