JUDGMENT Associate Justice Macready. Supreme Court, New South Wales. Equity Division. 29th February 2007.

1 **His Honour**: These proceedings are to set aside three statutory demands served by the defendant on the plaintiffs on 27 September 2006 claiming a sum of $362,673.79. The demands relate to a certificate of judgment obtained in the District Court which followed upon the granting of a determination by an adjudicator under the **Building and Construction Industry Security of Payment Act** 1999 (NSW). The defendant was the contractor in respect of the construction of some units for the plaintiff companies.

The plaintiffs' claim

2 The plaintiffs claimed that there were offsetting claims which exceeded the amount due under the judgment in respect of the following areas:

"(a) the Plaintiffs have an offsetting claim for the sum certified by the Superintendent as owing to the Plaintiffs under the building contract on 13 June 2006 in the amount of $616,072.93;

(b) the Plaintiffs have an offsetting claim for restitution for defective and incomplete works on the basis set out in the payment schedule and payment certificate issued on 13 June 2006 and the adjudication response dated 6 July 2006;

(c) the Plaintiffs have an offsetting claim for the sum certified by the Superintendent as owing to the Plaintiffs under the building contract on 11 September 2006 in the amount of $628,426.76;

(d) the Plaintiffs have an offsetting claim for restitution for defective and incomplete works on the basis set out in the payment schedule and payment certificate issued on 11 September 2006;"

3 The plaintiffs have also claimed that there was a genuine dispute but this claim was properly abandoned during the course of the argument before me. The defendant says that all claims are ones, which were not foreshadowed in the affidavit filed within the time limited for the making of the application. In respect of those claims based upon the material in the various payment schedules it submitted that such claims have not been supported by evidence in this case.

Chronology

4 The defendant made a payment claim on the plaintiffs on the 26 May 2006 in the sum of $603,396.21. In its payment schedule of 13 June 2006 the plaintiff responded by saying that it owed nothing to the defendant and to do so it relied upon a certificate of the Superintendent that was also issued on 13 June 2006. In that certificate the Superintendent certified that the defendant owed the sum of $616,072.93 to the plaintiff.

5 On 23 August 2006 there was a determination by the adjudicator that the plaintiff owed the defendant the sum of $342,439.22. The defendant then registered that determination as a judgment in the District Court.

6 Thereafter another payment claim was made on 28 of August 2006 and on 11 September 2006 there was a further certificate of the Superintendent pursuant to the contract under which the defendant owed the plaintiff the sum of $628,426.76. In due course the same adjudicator determined on 9 November 2006 that the plaintiff owed the defendant $613,481.03.

Were the claims foreshadowed in the affidavit filed within time?

7 The affidavit sworn 17 October 2006, after dealing with formal notice, contained the following:

"6. On 11 October 2004, the Plaintiffs collectively trading as Jempac Waterfront **("Jempac")** entered into a building contract with the Defendant **("St Hillers")**. A copy of the Contract is annexed and marked "G".

7. Exhibited and marked "H" is a copy of the Payment Claim served by St Hillers dated 26 May 2006 for the sum of $603,396.21 (exclusive of GST).

8. Exhibited and marked "I" is a copy of the Payment Schedule served by Jempac and the Payment Certificate issued by the Superintendent dated 13 June 2006 in the sum of negative $560,066.30.

9. Exhibited and marked "J" is a copy of St Hillers' Adjudication Application dated 27 June 2006 (excluding a copy of the Payment Claim which is included as Exhibit H"

10. Exhibited and marked "K" is a copy of Jempac's Adjudication Response dated 6 July 2006 (excluding a copy of the Payment Schedule and Payment Certificate which are included as Exhibit "I").

11. Exhibited and marked "L" is a copy of Adjudication Determination dated 22 August 2006.

12. Exhibited and marked "M" is a copy of a letter from our solicitors Salim Lawyers dated 30 October 2006 requesting withdrawal of the Statutory Demands. This letter identifies other off-setting claims Jempac has against St Hillers which are not part of the Adjudication the subject of the judgment.

Dispute Resolution

13. The Plaintiffs have not issued, and the Plaintiffs have not received, from the Defendant a notice of dispute pursuant to clause 47.1 of the Contract or other notice of dispute in relation to the amount assessed in the in the (sic) Payment Certificate.

14. I respectfully request that this honourable Court make the orders sought in the Originating Process filed in these proceedings."

8 Paragraph 12 makes reference to a particular matter identified in a document in the four lever arch files of material which were exhibited to the affidavit. That letter was written by solicitors for the plaintiffs to the solicitors for the defendant. After formal matters and a reference to there being a genuine dispute and offsetting claim the letter of 30 October 2006 went on to say:

"2. Your client is well aware that our clients dispute the amount claimed in the Statutory Demand. There have been numerous meetings and correspondence passing between the parties in relation to the amount claimed in the Statutory Demand. In that regard, we refer you to numerous correspondence from our clients (or sent on behalf of our clients by the Superintendent) setting out our clients' concerns and set-off claims including without limitation the correspondence referred to in the payment certificate dated 11 September 2006.

3. Under the payment certificate dated 11 September 2006 issued by the Superintendent, your client owes our clients the amount $628,426.76 (inclusive of GST). From the payment certificate and related correspondence, it is clear that our clients have substantial claims against your client for, inter alia, defective and incomplete works and Liquidated Damages as a result of your client failing to perform its obligations under the building Contract.

4. Our clients' rights and remedies are not limited to those set out in the payment certificate. We refer you to the provisions of the Contract including clauses 35.6 and 69. In addition to our clients' rights under the payment certificate, our clients are entitled to pursue their common law rights against your client which include (without limitation):

(1) damages (in addition to our clients' claim for Liquidated Damages) suffered or incurred by our clients as a result of your client's late completion of the Works. Those damages include our clients' holding costs (which includes the inability to use the equity in the project), difficulties in settling 'off the plan' sales, loss of potential sales and the resulting loss of commercial opportunities to our clients;

(2) damages for defective and non-complying works and for costs associated with the rectification of those works; and

5. Therefore our clients' off-setting claim is substantially in excess of the $363,673.79 being the amount your client has demanded. Our clients' claim is estimated to be in excess of $1 M for losses suffered by our clients as a result of your client's defective and incomplete works and delay in completing the Works. That estimate does not include all damages suffered including damages resulting from loss of potential sales. Our clients reserve their rights entirely including claiming all their loss and damage against your client."

9 The contract was exhibited to the affidavit, as were the relevant payment claims and the certificate issued by the Superintendent in June 2006. The Superintendent's certificate issued on 11 September 2006 was not included in the four volumes of material exhibited to the affidavit but was tendered before me subject to a claim for relevance in respect of the time of its service. In the plaintiffs' submission paragraph 12 of the affidavit and the correspondence to which it referred clearly set out an area of controversy and thus the certificate could be tendered in order to amplify the offsetting claim that was identified in the affidavit filed within time.

10 As I indicated in ***CCD Group Pty Ltd v Premier Drywall Pty Ltd*** [2006] NSWSC 1012 a recent discussion of the extensive case law in this area and its development is that of Austin J in ***POS Media Online v B Family Pty Ltd*** [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?"*

11 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."*

12 This, as I said before, seems to have been an acceptance of the view put forward by Santow J in ***Callite***. In ***Hansmar Investments Pty Ltd v Perpetual Trustee Company Ltd*** [2007] NSWSC 103, White J returned to the debate in these terms:

*"26 However, whilst I hesitate to differ from any observations of Barrett J, I respectfully consider that the test enunciated in **Process Machinery Australia Pty Ltd v ACN 057 260 950 Pty** Ltd at [22] and repeated in **Elm Financial Services Pty Ltd v MacDougal** at [7] that the ground of challenge must be raised expressly or by necessary inference, is stated too strictly. The **Graywinter** principle is based upon an implication from the requirement in s 459G that an application to set aside a statutory demand be accompanied by an " affidavit supporting the application " which must be filed and served within 21 days after service of the demand. The implication is now firmly established. However, in my view, the implication is no more than that the grounds of the application to set aside the demand must be raised by the supporting affidavit.*

*27 Exceptionally in this area of the law, an affidavit under s 459G may read like a pleading (**Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund** at 459). Thus, a supporting affidavit may raise a ground of dispute in a form which is inadmissible to prove the facts giving rise to the dispute, and those facts may be proved in a later affidavit filed and served outside the 21-day period. However, there is no requirement in s 459G that the supporting affidavit read like a pleading.*

28 The implication is now firmly established that the grounds for applying to set aside a statutory demand must be raised in the supporting affidavit, so that a ground which is not so raised cannot be relied upon. It is one thing to draw that implication from the requirement that an application be accompanied by a supporting affidavit. It is quite another to imply from the requirement that there be a supporting affidavit anything as to the precision with which such a ground must be expressed, other than that it be raised. Whether it is raised expressly, by necessary inference, or by a reasonably available inference, provided it is raised, in my view the requirements of s 459G are satisfied.

*29 In **POS Media v B Family Pty Ltd** (2003) 21 ACLC 533, Austin J observed that the observations of Barrett J in **Process Machinery Australia Pty Ltd v ACN 057 260 590 Pty Ltd** at [21] and [22] arguably took the*

observations of Sundberg J in ***Graywinter*** *further than they were taken by the Court of Appeal of the Supreme Court of Western Australia in* ***Energy Equity Corporation v Sinedie Pty Ltd*** *(2001) 166 FLR 179, and might be inconsistent with* ***Callite Pty Ltd v Adams*** *[2001] NSWSC 52.*

30 In ***POS Media v B Family Pty Ltd*** *, it was arguable that the debt demanded in the statutory demand was not owed because no debt for the price payable on the transfer of shares arose until the shares were transferred. However, this ground of challenge to the statutory demand had not been raised in any way in the supporting affidavit. The agreement under which the alleged debt arose was not annexed to the supporting affidavit. Austin J said that it was unclear whether it would have been open to the plaintiff to have relied upon that ground if the affidavit had annexed the agreement without articulating the argument. His Honour observed that it might be argued that the ground was obvious on the face of the document.*

31 Such a mode of reasoning would be consistent with ***Callite Pty Ltd v Adams*** *. There, a solicitor served a statutory demand demanding payment of an amount of unpaid legal costs. One of the grounds of challenge to the demand was that the solicitor had failed to make the disclosure required by s 175 of the Legal Profession Act 1987 (NSW). Santow J (as his Honour then was) held that this ground of challenge was not available because no facts were deposed to from which one could infer that there was no fee disclosure and no costs agreement. However, the affidavit did depose to the receipt of accounts and those accounts were annexed. Santow J held (at [10]) that a perusal of the accounts showed that they lacked the prescribed statutory content as required by s 192 of the Legal Profession Act and Regulation 22A of the Legal Profession Regulations 1994. Section 192 of the Act precluded any action being taken for recovery of costs until 30 days had passed after the provision of a bill of costs which complied with the Act. Santow J held (at [12]) that the legal consequences which flowed from the form in which the accounts were rendered were not required to be pleaded in the affidavit. His Honour set aside the statutory demand on the basis that public policy precluded a statutory demand being used to bypass the safeguards of the Legal Profession Act .*

32 I doubt that it could be said that in ***Callite Pty Ltd v Adams*** *it was a necessary inference from the affidavit that this ground of challenge was raised. However, it was an available inference, so that it could fairly be said that the ground was raised in the supporting affidavit.*

33 Having regard to the diversity of reasoning in these cases as to the precision with which a ground of challenge must be delineated in the supporting affidavit, I do not consider that comity requires me to follow the observations in ***Process Machinery Australia Pty Ltd v ACN 057 260 590 Pty Ltd*** ***at*** *[21]-[22] that a supporting affidavit must clearly delineate the grounds of challenge to a statutory demand expressly or by necessary implication.*

34 If I was wrong in my conclusion expressed during argument that the grounds of challenge were raised by necessary inference, I am nonetheless of the view that the grounds of challenge were available to the plaintiff. They arise from the terms of the supporting affidavit and documents annexed to it. In my respectful opinion, it is not necessary for the applicant to expressly articulate the grounds in the affidavit, or to do so by necessary inference, as distinct from available inference. In my respectful view, all that can be implied from the requirement in s 459G that there be an affidavit filed and served within 21 days supporting the application is that the grounds of challenge must be raised in that affidavit. As Parker J said in ***Financial Solutions Australasia Pty Ltd v Predella Pty Ltd*** *(2002) 167 FLR 106; 20 ACLC 1,286 (at [34]): "The statutory yardstick remains that the affidavit should support the application. The precise nature of the application may well influence what this requires." "*

13 There then is a clear dispute as to the formulation of the appropriate test. Having regard to my conclusions on the September certificate it is not necessary to express a concluded view on this matter. However, it may be that if a purposive approach was taken to the construction of the section the need to alert the defendant to the nature of the claim is of importance. The defendant has to consider whether it will contest the proceedings and if it chooses to contest the proceedings what evidence it should call. The purpose of the section is to ensure that the plaintiffs file their application in a timely fashion but, more importantly, to ensure that the defendant has the information necessary to effectively exercise the choice that it has on how to proceed.

14 If the appropriate test was whether the area of controversy is delineated by necessary inference, it seems to me that in respect of the September certificate the terms of paragraph 12 and the letter are sufficiently clear to show that an offsetting claim was relied upon in respect of the certificate. The tendering of the certificate during the course of the hearing was nothing more than supplementing an area of controversy that had been identified in the affidavit filed in time.

15 In respect of the June certificate there is no indication in the affidavit that this was to be relied upon as founding an offsetting claim. The certificate was not even referred to in the affidavit and it is found as an annexure to the payment schedule. One would have to go through the whole of the four folders in order to speculate that this might be a matter which would be raised. However, on the test now propounded the certificate is in evidence along with the contract and accordingly could be relied upon to set up an offsetting claim.

16 In regard to the submission that an offsetting claim is demonstrated by the material included in the payment schedule and the adjudication response this is in the same situation. However, that material was only admitted on the basis that they were allegations contained in documents forwarded and not evidence of the facts set out in the material. As is plain the affidavit does not descend into verifying the truth of those allegations and on this ground I would not normally be satisfied that there is a genuine offsetting claim as there is no evidence verifying the claim. However in ***John Holland Construction and Engineering v Kilpatrick Green Pty Ltd*** (1994) ACL C 716, Young J

held in an appeal from my decision that where the evidence showed conflicting assertions in correspondence that this would normally be sufficient. He said:

"*With great respect, I would differ from this approach. There may be cases, and indeed it may be the majority of cases, where the court will look not only to an assertion of a dispute, but some sort of material short of proof which backs up the claim that is made that the amount is disputed. It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt.*

On the other hand, if proof of a claim was required then one would be doing the very thing that one is not to do, and that is to try this sort of dispute in the Companies Court. What more than assertion is required is something that may differ from case to case. In ***Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)*** *(1994) 13 ACSR 787 ; 12 ACLC 490 I indicated that so long as the claim is not fictitious or merely colourable and is genuinely believed to exist one can ordinarily take that as sufficient. That is something more than mere assertion. Even if the proposition in Jesseron (No 2) goes too far, as Mr Hutley submits, it would seem to me that in a sizeable construction case, where the contemporaneous correspondence between the parties shows that there is a disputing of the figures, then one can say, without looking at the figures, or without looking at the evidence that backs up the figures, that there is a genuine dispute between the company and the respondent about the amount of the debt. A similar thing can be said about any offsetting claim.*

*Thus, in the instant case it seems to me that the way in which the learned master should have approached the case was to say that so far as the claim was concerned there was a genuine dispute disclosed on the correspondence and in the evidence between the appellant and the respondent about the amount of the debt. The master would then have to see under s 459**h**(5) and s 459**h**(2) what was the ``admitted total" and to do that one would have to find the amount that the court was satisfied is not the subject of such a dispute.*

It would seem to me that in the present case, where the proprietor has asserted that a particular amount only is the value of the work, and that amount is put forward by the contractor to the sub-contractor, then even if there is nothing before the court to show how the amount is made up, there is a genuine dispute between the contractor and the sub-contractor as to the amount of all sums over and above that admitted value of the work."

17 These views were expressed prior to the introduction of the **Building and Construction Industry Security of Payment Act** 1999 (NSW). That Act has had a substantial impact on the way in which progress claims are dealt with between contractors and their proprietors. Invariably the claims are well supported by statutory declarations and even expert advice as has occurred in this case. This is normally done in order to persuade the adjudicator of the merits of the case being presented. Thus one often has contractors and proprietors putting forward real evidence in their claims.

18 In these circumstances there is perhaps even more force in accepting His Honour's suggestion that where there are genuinely held assertions on either side there is either a genuine dispute or an offsetting claim. What is troubling about it is that the court is acting on mere assertion which is not been verified in any way in the course of the proceedings before the Court. The present case is an example of that problem because the affidavit as I have said does not descend into verifying in any way the material in the payment schedule and adjudication response.

19 Before deciding the case on this basis I will consider the offsetting claim in respect of the Superintendent's certificate of September. There was tendered, as indicated in the chronology, a further determination of the adjudicator. That includes the amount included in his June determination so the offsetting claim based upon the Superintendent's certificate exceeds the amount found due by the adjudicator.

20 It was submitted that the claim to be contractually entitled to the amount in the certificate was nothing more than an interim claim pending a final determination of the parties' ultimate entitlements of the conclusion of the dispute resolution process under the contract. That process has not occurred in this case. Even though parts of clauses 42 and 47 of the contract which deal with progress claims and dispute resolution make it clear that that the amount is on an interim basis this does not detract from the force of the obligation to make payment.

21 The relevant provisions of clause 42.1 are as follows:

"Within 14 days of receipt of a claim for payment, the Superintendent shall assess the claim and shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the Superintendent's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, within 28 days of receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier,… the Principal ***shall pay…*** *to the Contractor or the Contractor* ***shall pay*** *to the Principal, as the case may be, an amount not less than the amount shown in the certificate as due to the Contractor or to the Principal as the case may be, (or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim). A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under clause 47 or as*

otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided under clause 42.6."

22 The other term is clause 47.1 which is in these terms:-
"*If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning*
(a) a direction given by the Superintendent, or
(b) a claim:
(i) in tort;
(ii) under statute
(iii) or in restitution based on unjust enrichment; or
(iv) or rectification or frustration,
then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the contract and, subject to Clause 44, the Contractor shall continue with the work under the contract and the Principal and the Contractor shall continue to comply with clause 42.1."

23 The plaintiffs relied upon ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*** (1997) 14 BCL 215. The case was one where the sub-contractor brought a motion for summary judgment and the contractor endeavoured to raise a defence by way of equitable set off. The issue for His Honour, Rolfe J, was whether, on a proper construction of the contract, the contractor was bound to pay the amount of the progress claim without recourse to the equitable set off, on the basis that the amount was now due and payable. His Honour found that the contractor was bound to pay the amount without regard to any other claim or set off. The contract before His Honour was in similar terms to that with which I am concerned.

24 In a later unreported decision of His Honour in a case between the same parties on 14 October 1997 he set out the commercial justification for the strict approach he had adopted. His Honour said. At page 7 he said: *"As appears from my earlier reasons the effect of a payment certificate is to require the recipient to pay the amount stated. Failure to do so can lead to summary judgment and there is no right to dispute the amount payable until the dispute resolution procedures are activated. Accordingly, the recipient of the certificate is required to pay money during the course of the contract which, at the end of the day, it may be found it does not owe. The requirement to pay money may lead to financial difficulties for the payer, just as the failure to receive money during the course of the contract may cause financial difficulties to the payee. Also the payee may not be able, at the end of the day, to refund any overpayment. Considerations such as these lead me to the conclusion that a certificate must comply strictly with clause 42.1 if it is to have the consequences specified."*

25 There has been no activation of the dispute resolution procedures and it seems to me that the amount as certified by the Superintendent is due and payable under the terms of clause 42 of the contract. Accordingly, there is an appropriate offsetting claim and the demands should be set aside. In these circumstances I will not deal with the question of whether an offsetting claim is also established by the material contained in the payment schedule and the adjudication response.

26 Accordingly, the orders I make are:
1. I set aside the demand dated 26 September 2006 made by the defendant on Jem Number Two Pty Ltd.
2. I set aside the demand dated 26 September 2006 on Pacifico Number Two Pty Ltd.
3. I set aside the demand dated 26 September 2006 on Pyorest Pty Ltd.
4. Subject to submissions I order the defendant to pay the plaintiffs' costs.

Mr A. Vincent for plaintiffs instructed by Salim Lawyers
Mr M. Aldridge SC for defendant instructed by Colin Biggers and Paisley