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

Not Restricted

S ECI 2019 00063

**IN THE MATTER** of NATIONWIDE PLANT HIRE PTY LTD (ACN 138 306 224)

NATIONWIDE PLANT HIRE PTY LTD (ACN 138 306 224) — Plaintiff

v

CASAL CORPORATE ADVISORY PTY LTD (ACN 623 293 890) — Defendant

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|---|---|
| JUDGE: | Randall AsJ |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 28 February 2019, and by supplementary submissions filed on 25 March 2019 and 18 April 2019 by the Defendant and Plaintiff, respectively |
| DATE OF JUDGMENT: | 30 October 2020 |
| CASE MAY BE CITED AS: | Nationwide Plant Hire Pty Ltd v Casal Corporate Advisory Pty Ltd |
| MEDIUM NEUTRAL CITATION: | [2020] VSC 688 |

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CORPORATIONS – Application to set aside a statutory demand pursuant to s 459G of the *Corporations Act 2001* (Cth) – Whether there is a genuine dispute as to the existence of the debt – The meaning of debt in s 459E of the *Corporations Act 2001* (Cth) – Whether a *quantum meruit* claim is a debt – Whether conduct constitutes an admission as to the existence of a debt – Whether there is promissory estoppel by way of a representation by silence – Whether there is a genuine dispute as to the quantum of the debt

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Plaintiff | Ms R Zambelli | Madgwicks |
| For the Defendant | Mr D Morgan | Nicholson Ryan Lawyers |

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HIS HONOUR:

1 This is an application by the plaintiff, Nationwide Plant Hire Pty Ltd ('Nationwide'), to set aside a statutory demand dated 19 December 2018 pursuant to s 459G of the *Corporations Act 2001* (Cth) ('the Act').

**The issues**

2 The plaintiff sought to set aside the statutory demand on the following alternative grounds:

(a) the alleged debts claimed in the statutory demand are not debts for the purposes of s 459E of the Act;

(b) there is a genuine dispute as to the quantum of the alleged debts pursuant to s 459H of the Act;

(c) there is an offsetting claim pursuant to s 459H of the Act; and

(d) there is some other reason to set aside the statutory demand pursuant to s 459J of the Act.

**Relevant statutory provisions**

3 Section 459E of the Act sets out:

> **Creditor may serve statutory demand on company**
>
> (1) A person may serve on a company a demand relating to:
>
> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
>
> (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
>
> …

4 Section 459H of the Act sets out:

> **Determination of application where there is a dispute or offsetting claim**
>
> (1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:

(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;

(b) that the company has an offsetting claim.

(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:

Admitted total - Offsetting total

where:

***admitted total*** means:

(a) the admitted amount of the debt; or

(b) the total of the respective admitted amounts of the debts;

as the case requires, to which the demand relates.

***offsetting total*** means:

(a) if the Court is satisfied that the company has only one offsetting claim—the amount of that claim; or

(b) if the Court is satisfied that the company has 2 or more offsetting claims—the total of the amounts of those claims; or

(c) otherwise—a nil amount.

(3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.

…

(5) In this section:

***admitted amount***, in relation to a debt, means:

(a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt—a nil amount; or

(b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt—so much of that amount as the Court is satisfied is not the subject of such a dispute; or

(c) otherwise—the amount of the debt.

***offsetting claim*** means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

***respondent*** means the person who served the demand on the company.

…

5 Section 459J of the Act sets out:

> **Setting aside demand on other grounds**
>
> (1) On an application under section 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.
>
> (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.

**Background**

6 The plaintiff is a plant hire company and the defendant is in the business of providing accounting and general commercial advice to businesses.

7 The parties had signed a terms of engagement letter ('Engagement Letter') dated 14 August 2018.

8 Page 2 of the Engagement Letter sets out the scope of work as follows:

> We have agreed to perform the following services on your behalf:
>
> 1. Preparation of annual financial statements, income tax returns and tax compliance as and when required;
>
> 2. General advice as and when required; and
>
> 3. Anything else that you direct us to do.

9 Page 3 of the Engagement Letter sets out the 'Fees and Billing Arrangements' as follows:

> Where possible, fees will be discussed with you prior to commencement of work. However, the nature of some work makes it difficult to estimate. We will issue invoices on a periodic basis.
>
> Full payment is due within 14 days from issue of invoice. If the amount payable on the invoice is not paid by 30 days of invoice, Casal Corporate reserves the right to charge interest at the prevailing bank overdraft rate.

> Where applicable under the law, Casal Corporate reserves the right to hold particular books and records of entities in the group until fees relevant to these books and records and any outstanding interest have been paid in full.
>
> …

10 Prior to the Engagement Letter, in a telephone call on or around 7 August 2018, Andrew Smith, the director of the defendant, informed Prasath Hapu, who was the financial controller for the group of which the plaintiff is part, that the defendant's rate would be approximately $3,000 per day.

11 On 14 August 2018, Mr Smith sent a tax invoice, Invoice No 118, via email to Mr Hapu for services to be rendered. This invoice was dated 14 August 2018 and sets out as follows:

> **Bill to:**
>
> Nationwide Concrete Pumping Victoria P/L
>
> …
>
> Services to be rendered as follows:

| **Date** | **Description** | **Amount** |
|---|---|---|
| 14.08.2018 | Compilation and review of Nationwide Plant Hire Trust | |
| 14.08.2018 | General advice and assistance | $15,000 |
| GST | | $1,500 |
| **Total** | | **$16,500** |

12 On 27 August 2018, an updated Invoice No 118 ('first invoice'), also dated 14 August 2018, was sent by Mr Smith via email to Mr Hapu, with Mason Roberts and Pamela Roberts, the director of the plaintiff and the chief financial officer of the plaintiff respectively, copied into the correspondence. This invoice sets out as follows:

> **Bill to:**
>
> Nationwide Plant Hire Pty Ltd ATF Nationwide Plant Hire Trust
>
> …
>
> Services to be rendered as follows:

| Date | Description | Amount |
|---|---|---|
| 14.08.2018 | Aggregation of group financials for Financing | |
| 14.08.2018 | Compilation and review of Nationwide Plant Hire Trust | |
| 14.08.2018 | General advice and assistance | $30,000 |
| GST | | $3,000 |
| **Total** | | **$33,000** |

13 In the covering email, Mr Smith wrote:

> Please find attached an updated invoice to Plant Hire Trust rather than Victoria.
>
> These are forward billed invoices due to the nature of the work (i.e. from 14 August 2018).
>
> I have increased the amount of the invoice, simply because there is more than I had previously expected.
>
> I'm happy to send a detailed account of time shortly, appreciating that the priority has been to get something out by today.

14 On 2 September 2018, Mr Smith sent Invoice No 123 ('second invoice'), dated 1 September 2018, via email to Mr Hapu, with Mr Roberts and Ms Roberts copied into the correspondence. The invoice sets out as follows:

> **Bill to:**
>
> Nationwide Plant Hire Pty Ltd ATF Nationwide Plant Hire Trust
>
> …
>
> Services to be rendered as follows:

| Date | Description | Amount |
|---|---|---|
| 01.09.2018 | Aggregation of group financials for financing purposes | $30,000 |
| | Other advice and assistance as required | |
| GST | | $3,000 |
| **Total** | | **$33,000** |

15 Mr Smith also attached a statement of account for time up until the date of the email ('first statement of account'), which sets out as follows:

> **As of 2 September 2018**
>
> - Various meetings and discusions with Nationwide Group and their external consultants
> - Review of superannuation issues
> - Review of director penalty issues
> - Work done in respect of reconstrucion of financial information for the Nationwide Group
>
> **14.5 days work @ $3,000 per day. $43,500 (exlc. GST)**

16 In the covering email, Mr Smith wrote: 'Can I ask that the 1st invoice be paid tomorrow in full. I'm keen not to let the account become too large. And there is significant further work required over the next few weeks.' The plaintiff did not respond to this.

17 On 4 October 2018, Mr Smith told Ms Roberts that he was concerned about being paid. The first payment of $5,000 was made on the following day.

18 In an email dated 11 October 2018, Mr Smith requested another payment that day and no response was provided by the plaintiff.

19 On 12 October 2018, Mr Smith sent invoice number INV-0159 ('third invoice'), dated 12 October 2018, via email to Ms Roberts and Mr Roberts, with Mr Hapu copied into the correspondence. The invoice sets out as follows:

> Nationwide Plant Hire Pty Ltd ATF Nationwide Plant Hire Trust
>
> …

| **Description** | **GST** | **Amount AUD** |
|---|---|---|
| SERVICES TO BE RENDERED AS FOLLOWS | | |
| Aggregation of group financials | 10% | 30,000.00 |
| Other advice and assistance as required | | 0.00 |
| | Subtotal | 30,000.00 |

| | |
|---|---|
| TOTAL GST 10% | 3,000.00 |
| **TOTAL AUD** | **33,000.00** |

20 Mr Smith also attached a statement of account to date ('second statement of account'), which sets out as follows:

> **As of 2 September 2018**
>
> – Various meetings and discusions with Nationwide Group and their external consultants
>
> – Review of superannuation issues
>
> – Review of director penalty issues
>
> – Work done in respect of reconstrucion of financial information for the Nationwide Group
>
> **14.5 days work @ $3,000 per day. $43,500 (excl. GST) $47,850 (incl. GST)**
>
> **As of 11 October 2018**
>
> – Set up of one family trust and 2 companies
>
> – Various discussions and meetings
>
> – Work done in respect of reconstruction of financial information for Nationwide Group for 30 June 2018 and 30 September 2018

| | | | | |
|---|---|---|---|---|
| **Trust and company set up** | **$4,500** | **(excl. GST)** | **$4,950** | **(incl. GST)** |
| **6 days work** | **$17,500** | **(excl. GST)** | **$19,250** | **(incl. GST)** |
| **Total** | **$65,500** | **(excl. GST)** | **$72,050** | **(incl. GST)** |
| less amount paid to date | -$4,545 | **(excl. GST)** | **-$5,000** | **(incl. GST)** |
| **Total owing on account** | **$60,955** | **(excl. GST)** | **$67,050** | **(incl. GST)** |

21 In the covering email, Mr Smith wrote:

> I have significant concerns about being paid. Payment was supposed to go through yesterday of $5k as we talked about last week. …
>
> My account is currently outstanding at $60,955 excluding GST or $67,050 including GST. I am about to spend more time getting you in shape for ScotPac next week over today, the weekend and early next week. Further time is required to get statutory financial statements up to date for Plant Hire.

> Can you please pay $40,000 into my account today and confirm when this is done. I will need this to continue investing time into assisting you.

22 On the same day, Ms Roberts told Mr Smith that she was 'lacking cash and would pay what she could', and she made a second payment of $5,000 that day.

23 The third payment of $5,000 and the fourth payment of $4,500 were received on 22 October 2018 and 26 October 2018, respectively.

24 In an email dated 30 October 2018, Mr Smith reminded Ms Roberts to make payment on the outstanding account, and no response was provided.

25 In an email dated 31 October 2018, Mr Smith again requested payment and wrote that he understood that Ms Roberts was 'under extreme pressure here'. In a reply email on the same day, Ms Roberts informed Mr Smith that the plaintiff was 'under enormous pressure and things [were] very tight' and that she was 'expecting funds in over the next couple of days. A progress payment will be made to [Mr Smith] as promised'. A fifth payment of $5,000 was received on 7 November 2018.

26 In an email dated 9 November 2018, to which there was no response, Mr Smith informed Ms Roberts that:

> … I understand that you do not have the cash to settle this account or that the prospects of having the cash to settle this or anything in the short term is going to be very low. As indicated I want to support you even despite this. And to date have bent over backwards to assist.
>
> **To that end I need to ask that you provide some level of security to protect myself for this amount and work done going forward.** … (emphasis in original)

27 On 19 November 2018, Mr Smith sent invoice number INV-0600 ('fourth invoice'), dated 25 October 2018, via email to Ms Roberts and Mr Roberts, with Mr Hapu copied into the correspondence. The invoice sets out as follows:

> Nationwide Plant Hire Pty Ltd ATF Nationwide Plant Hire Trust
>
> …

| Description | GST | Amount AUD |
|---|---|---|
| Forward billing invoice | | 0.00 |
| Per Statement of Account Detail | 10% | 12,000.00 |
| | Subtotal | 12,000.00 |
| | TOTAL GST 10% | 1,200.00 |
| | **TOTAL AUD** | **13,200.00** |

28 In the covering email, Mr Smith also attached a statement of account ('third statement of account'), which included the entries in the second statement of account and also had the following additional entries:

**As of 26 October 2018**

- Set up of one family trust and 2 companies
- Various discussions and meetings
- Work done in respect of reconstruction of financial information for Nationwide Group for 30 June 2018 and 30 September 2018
- Compilation of Statutory Accounts for Nationwide Plant Hire Pty Ltd

| | | | | |
|---|---|---|---|---|
| **Trust and company set up** | **$4,500** | **(excl. GST)** | **$4,950** | **(incl. GST)** |
| **11 days work** | **$32,000** | **(excl. GST)** | **$35,200** | **(incl. GST)** |
| **Total** | **$102,000** | **(excl. GST)** | **$112,200** | **(incl. GST)** |
| less amount paid to date | -$22,273 | **(excl. GST)** | **-$24,500** | **(incl. GST)** |
| **Total owing on account** | **$79,727** | **(excl. GST)** | **$87,700** | **(incl. GST)** |

29 The total amount in this statement of account includes the amount of the second statement of account. The total amount of the four invoices is $112,200 including GST.

30 Between 19 November 2018 and 18 December 2018, Mr Smith further expressed concerns about payment to the plaintiff and requested payments to be made. During this period, two payments were made: the sixth payment of $5,000 was made on 30 November 2018, and the seventh and final payment of $2,500 was received on 12 December 2018.

31 In an email dated 17 December 2018, Mr Toh, the financial controller of the plaintiff, wrote the following to Mr Smith:

> Your summary invoice statement for $112,200 GST inclusive lacks details as to scope of work completed and accomplished to date.
>
> I would appreciate If [sic] you could kindly provide this information in detail by writing back to us.

32 In a reply email on the same day, Mr Smith did not provide such information and wrote:

> You've had some time to ask me for further detail which I am generally happy to provide. But to be honest I see this as a stalling tactic. The work has been done, the time spent, the discussions and meetings had and the advice given. The rates with which I charge are extremely reasonable in light of the complexity and risk surrounding the engagement and advice required. …
>
> Please let me know how you want to proceed by the end of the day, with a firm view on payment. I am happy to negotiate this as long as cash is coming today/prior to Christmas.
>
> To be clear, I have repeatedly tried to engage in regards to fees and payments whilst still assisting Nationwide with its requests and meetings. To be asking for this detail now is a little ridiculous and insulting particularly when both Prasath [Mr Hapu] and Pam [Ms Roberts] (especially Prasath) have had discussions with me re invoices and have not raised concerns. …

33 On the next day on 18 December 2018, Mr Toh sent an email to Mr Smith, in which he wrote:

> I quickly ran through with Pam yesterday on the work you have done.
>
> Given the enormity of other works that Pam needs to do this week for wages and entitlements, it's unlikely you would get a resolution to make much headway into your account.
>
> However there would be a resolution for this impasse with debtor financing in place in the new year.

34 In a reply email to Mr Toh on the same day, Mr Smith wrote:

> There needs to be a payment coming prior to Christmas — i.e. today/tomorrow. It needs to be reasonable. i.e. half of the amount owing.
>
> Sincerely I don't want to do this. But I will instruct my lawyer to issue a letter of demand today if I can't get this resolve or at least some effort made.

35 After Mr Smith informed Mr Toh on 19 December 2018 that a statutory demand was being drawn up, Mr Toh sent a reply email to Mr Smith on the same day in which he wrote:

> We dispute the total invoice been charged for the work undertaken by you.
>
> Those charges are exorbitant and do not reflect the one off special project work that Nationwide has assigned you to work on.
>
> Payment to date for $31,000 is to be acknowledged as full and final settlement of your account.

36 In summary, the plaintiff has made seven part payments with respect to the four invoices to a total of $32,000:

(a) the first payment of $5,000 was made on 5 October 2018;

(b) the second payment of $5,000 was received on 12 October 2018;

(c) the third payment of $5,000 was received on 22 October 2018;

(d) the fourth payment of $4,500 was received on 26 October 2018;

(e) the fifth payment of $5,000 was received on 7 November 2018;

(f) the sixth payment of $5,000 was made on 30 November 2018; and

(g) the seventh and final payment of $2,500 was received on 12 December 2018.

37 The defendant served a statutory demand, dated 19 December 2018, on the plaintiff for the balance of the four invoices, being $80,200. The schedule to the statutory demand sets out as follows:

| **Description of the debt** | | **Amount of the debt** |
|---|---|---|
| Amount owing by the company to the creditor pursuant to the following invoices for accounting and related services: | | |
| 14/8/2018 | Tax Invoice 118 | $33,000.00 |
| 1/9/2018 | Tax Invoice 123 | $33,000.00 |
| 12/10/2018 | Tax Invoice 0159 | $33,000.00 |

| | | |
|---|---|---|
| 25/10/2018 | Tax Invoice 0600 | $13,200.00 |
| | Less part payment of $32,000.00 | |
| | **Total** | **$80,200.00** |

**Debts for the purposes of s 459E of the *Corporations Act 2001* (Cth)**

38 The plaintiff contends that the debts claimed in the statutory demand are not debts for the purposes of s 459E of the Act. The main issues for determination are:

(a) whether or not the provision of invoices in itself creates debts, either pursuant to the Engagement Letter or as *quantum meruit* claims; and

(b) whether the course of conduct of making part payments and/or the request for time or an instalment program constitutes an admission that there are debts.

39 On these issues, other than with respect to *quantum meruit*, supplementary submissions were also filed by the defendant on 25 March 2019 and by the plaintiff on 18 April 2019 pursuant to my direction.

40 For the purposes of this application, if there is a genuine dispute in relation to the existence of the debts claimed in the statutory demand, the statutory demand must be set aside under s 459H of the Act.

**Genuine dispute**

41 The law in relation to a genuine dispute is well established. In determining whether there is a genuine dispute, I am not required to 'embark upon any extended inquiry'[1] nor to 'attempt to weigh the merits of that dispute'.[2] I am only required to 'conclude that there is a dispute and that it is a genuine dispute',[3] which 'connotes a plausible contention requiring investigation'.[4] The dispute must be 'bona fide and truly exist in fact and … the grounds for alleging the existence of a dispute [must] be real and not

1 *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290, 295 (Hayne J).
2 Ibid.
3 Ibid.
4 *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787 (McLelland CJ in Eq).

spurious, hypothetical, illusory or misconceived'.[5]

42 A genuine dispute will only not be found when the contention raised is 'so devoid of plausibility that no further investigation was required'.[6]

**Creation of debts by the provision of an invoice**

43 The Engagement Letter signed by the parties contain the following clauses in its 'Fees and Billing Arrangements' section ('Fees and Billing clauses'):

> Where possible fees will be discussed with you prior to commencement of work. However, the nature of some work makes it difficult to estimate. We will issue invoices on a periodic basis.
>
> Full payment is due within 14 days from issue of invoice. If the amount payable on the invoice is not paid by 30 days of invoice, Casal Corporate reserves the right to charge interest at the prevailing bank overdraft rate. Where applicable under the law, Casal Corporate reserves the right to hold particular books and records of entities in the group until fees relevant to these books and records and any outstanding interest have been paid in full.

***The plaintiff's position***

44 The plaintiff contends that the debts claimed in the statutory demand are unsupported by the Engagement Letter or any other agreement between the parties; hence, they are unliquidated claims for payment requiring a 'process of valuation or assessment or the application of some standard of measurement'.[7]

45 The plaintiff contends that the Fees and Billing clauses provide for the consequences of failure to pay within 14 days and state the difficulty of estimating the costs of some work. The plaintiff contends that the invoices are nothing more than estimates of future work. The plaintiff contends that the defendant has not identified a basis for asserting that an invoice as to future work can constitute a debt that is due and payable for the purposes of s 459E. The plaintiff contends that the Fees and Billing clauses do not:

> state that a debt for the full amount of invoices for future work will be due and payable within 14 days of the invoice *without any opportunity for challenge* or *that*

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5 *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)* [2015] VSCA 330, [49] (Kyrou, Ferguson and Kaye JJA).

6 *Ligon 158 Pty Ltd v Huber* (2016) 117 ACSR 495, 508 [73].

7 *Vimblue Pty Ltd v Toweel* [2009] NSWSC 494, [16] (Barrett J) ('*Vimblue*'). The plaintiff also referred to Barrett J's observations of *Stephenson v Weir* (1879) 4 LR Ir 369, 372.

> *a consequence of non-payment of an invoiced amount would be the issuance of a statutory demand*. (emphasis in original)

46 The plaintiff also contends that while parties are free to agree to their own contractual terms, any ambiguity in the construction of the clause 'Full payment is due within 14 days from issue of invoice' should be construed against the defendant in accordance with the *contra proferentum* rule,[8] and any breach of such clause only amounts to a claim for damages for breach of the Engagement Letter and not a debt for the purposes of a statutory demand.[9]

47 Further, the plaintiff contends that the Engagement Letter does not provide for the objective ascertainment of the amounts claimed in the invoices. The plaintiff relies on the authorities with respect to liquidated sums as reviewed by myself in *Meales Concrete Pumping Pty Ltd v Probuild Constructions (Aust) Pty Ltd* ('*Meales v Probuild*').[10] The plaintiff contends that the invoices contain amounts that are lump sums and that have a daily rate; however, the Engagement Letter does not contain references to such and the invoices are not capable of ascertainment by any objective measure.

48 Further, the plaintiff submits that if an amount stated in the invoice cannot be a debt if the invoice was disproportionate to the work performed or unconnected to the Engagement Letter, as the defendant acknowledged, then it requires the Court to perform an assessment of the reasonableness of the amount claimed, which is beyond the jurisdiction of the Court in a statutory demand proceeding.

49 I took it that the plaintiff also contends in the alternative that the amounts claimed by the defendant are claims of *quantum meruit* for work performed as there are no terms in the Engagement Letter or otherwise that imposes an obligation on the plaintiff to pay a fixed sum of money. The plaintiff contends that the quantum of such a claim is to be assessed in a separate proceeding in circumstances where the Engagement Letter

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8 This rule means that the words of the document are construed against the party who has prepared it: see *The Western Australian Bank v The Royal Insurance Co* (1908) 5 CLR 533, 559, 574, cited in *Johnson v American Home Assurance Co* (1998) 192 CLR 266, 274–5 (Kirby J).

9 See, eg, *Timberland v Abercrombie* [2012] NSWSC 379, [31] (Macready AsJ); *CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd* (2003) 47 ACSR 100, 103 [15] (Barrett J).

10 (2015) 302 FLR 393 ('*Meales v Probuild*').

does not provide a mechanism for the calculation of any amount payable.

***The defendant's position***

50 In oral submissions, the defendant contends that it is not a *quantum meruit* claim and that there is a contract in writing to which parties have agreed. The defendant contends that the contract set forth a mechanism where one party issues an invoice and the other party pays the invoice within 14 days.

51 In the defendant's supplementary submissions, the defendant contends that the Fees and Billing clauses are distinguished from contracts where there is provision for the doing of work and its payment but no mechanism for the creation of an obligation to pay a fixed sum, and from contracts where there is provision for the sending of an invoice but no provision for its payment. The defendant contends that in the former contract, the amount payable for the work is unliquidated until its value is determined;[11] and in the latter contract, the invoices only record a claim and no debt is created because there is no obligation to pay the sum in the invoice.[12]

52 The defendant contends that the Fees and Billing clauses give the defendant the right to issue an invoice and in doing so, a prima facie debt is created for the amount stated in the invoice. As the defendant can charge interest on the amount in the invoice upon the failure of plaintiff to pay the invoice within 14 days, the defendant contends that the plaintiff has an obligation to pay the amount stated in the invoice and the debt is a liquidated amount. The defendant contends that amounts claimed in the statutory demand are debts and are liquidated, and are the fixed sums set out in the four invoices, less the amounts received.

53 In oral submissions, the defendant contends that in the clauses, there are no obligations to state anything in particular on the invoice or to provide a statement of account. The defendant contends that the clauses do not give the plaintiff the right to not pay an invoice if it is not accompanied by detailed narrations or by a statement of account. Further, the defendant contends that the standards referred to by the plaintiff

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11 *Vimblue* (n 7).

12 *Core Toughened Pty Ltd v LISEC Australia Pty Ltd* [2015] VSC 534, [18] ('*Core Toughened v LISEC Australia*').

(with respect to the basis of fees) are only recommended and do not require particular levels of detail to be set out like the Legal Profession Act. In any event, I find that the applicability of the standards is a matter to be investigated.

54 However, the defendant accepts that a debt created by the invoice can be disputed if the amount of the invoice was so disproportionate as to the value of the work performed or unconnected to the Engagement Letter such that it was not an invoice for the purposes of its provisions. The defendant contends that if the invoice were successfully challenged, the debt would not exist. However, the defendant contends that in this proceeding, the dispute is not genuine.

55 In oral submissions, the defendant contends that, in the alternative if it is a *quantum meruit* claim, the amounts claimed are liquidated amounts because the value of the work is ascertained by the sending of the invoices which are required to be paid within 14 days, the acceptance of the invoices and the plaintiff beginning to make payments.

***Consideration***

56 In *Meales v Probuild*,[13] I discussed the meaning of 'debt' for the purposes of s 459E of the Act and the relevant authorities.[14]

57 The *Corporations Act 2001* (Cth) does not define the term 'debt', and, in the context of the Act, 'debt' has been held to have its common law meaning. In *HL Diagnostics Pty Ltd v Psycadian Ltd*,[15] Master Newnes (as his Honour then was) held:

> There is no definition of 'debt' in the *Corporations Act*, but there is authority for the proposition that the term bears its common law meaning: ***Commonwealth Bank of Australia v Butterell*** (1994) 35 NSWLR 64. It is clear that at common law a debt is distinct from a liability in damages or some other unliquidated obligation: ***Commonwealth Bank of Australia v Butterell*** (supra), ***Jelin Pty Ltd v Johnson*** (1987) 5 ACLC 463. The essence of a debt at common law is an obligation of one person to pay a certain, or liquidated, sum to another: ***Young v Queensland Trustees Ltd*** (1956) 99 CLR 560 at 567. That is, the characteristic of a debt is that it is a liquidated sum of money which is immediately payable or which, by reason of a present obligation, will become payable in the future: ***In Re European Life Assurance Society*** (1869) LR 9 Eq 122 at 127; ***Webb v Stenton*** (1883) 11 QBD 518 at 526; ***Re Australia and New Zealand Savings Bank***

13 *Meales v Probuild* (n 10).
14 Ibid 401–4 [30]–[40].
15 [2005] WASC 234.

> ***Ltd*** [1972] VR 690 at 692. In ***Rothwells Ltd v Nommack (No 100) Pty Ltd*** (1990) 2 Qd R 85 (at 86) McPherson J described a debt, for the purposes of a statutory demand, as a liquidated sum in money presently due, owing and payable by one person, called the debtor, to another person called the creditor.
>
> In ***Hawkins v Bank of China*** (1992) 26 NSWLR 562, in considering the meaning of the word 'debt' in s 556 of the Corporations Law, Gleeson CJ observed (at 572) that the word 'debt' is not a word of precise and inflexible denotation and, wherever it appeared in s 556, it ought to be applied in a practical and commonsense fashion, consistent with the context and the statutory purpose. That observation appears to me, with respect, to be equally applicable to s 459E of the *Corporations Act*.[16]

58 Furthermore, a debt for the purposes of s 459E is a liquidated sum, as opposed to a liquidated claim or liquidated demand. In *Vimblue Pty Ltd v Toweel* ('*Vimblue*'),[17] Barrett J distinguished between these terms:

> A 'debt', for present purposes, is 'a liquidated sum in money presently due, owing and payable by one person, called the debtor, to another person, called the creditor'. These are words of McPherson J in *Rothwells Ltd v Nommack (No 100) Pty Ltd* [1990] 2 Qd R 85 at 86. That was a case concerning a statutory demand under earlier but analogous provisions.
>
> It may be noted that McPherson J referred to a 'liquidated sum', not a 'liquidated demand'. The nature of a 'liquidated sum' was explained by Knox CJ and Starke J in *Spain v Union Steamship Co of New Zealand Ltd* [1923] HCA 21; (1923) 32 CLR 138 at 142 by quoting from the then current edition of Odgers on Pleading:
>
> > Whenever the amount to which the plaintiff is entitled … can be ascertained by calculation or fixed by any scale of charges or positive data it is … liquidated.
>
> There was reference in *Spain*'s case to *Stephenson v Weir* (1879) 4 LR Ir 369. It was held in that case that a common count claim for work done was a 'liquidated demand'. Palles CB said at 372:
>
> > [D]emands for work and labour on a quantum meruit, or for goods sold, although the price was not fixed by contract, are clearly 'liquidated demands'; … when the value of the work or the goods as the case may be, is ascertained, that value determines and therefore liquidates the claim.
>
> This statement identifies the distinction between 'liquidated claim' or 'liquidated demand' and 'liquidated sum'. A process of valuation or assessment or the application of some standard of measurement is necessary to cause the latter to emerge from or be distilled from the former.
>
> The process by which a claim is translated into a right to a liquidated sum was described by Cohen J in *Re Ahearn; Ex parte Palmer* (1906) 6 SR (NSW) 576, a

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16 Ibid [27]–[28].

17 *Vimblue* (n 7).

case concerning an unliquidated claim. His Honour said at 577:

> For failure to meet his contracts he was liable in damages, and, so long as it rested in damages, the liability was not a liquidated sum; before it could become so, it would have to be assessed either under the Stock Exchange rules, or by the ordinary tribunals, or by agreement between the parties, for the parties may meet and agree upon an amount which one shall be deemed to owe the other. There is no special virtue in having the amount assessed by a Court or a domestic tribunal, for an assessment between the parties is equally efficacious for the purpose of constituting the amount a liquidated sum.[18]

59 In *Timberland v Abercrombie*,[19] Macready AsJ applied the reasoning of Barrett J in *Vimblue* and held that the amount of $75,000 in that case, which was fixed by a clause in the contract, was a '"liquidated sum" and not a "liquidated claim" or "liquidated demand" since there [was] a mechanism to determine the amount'.[20]

60 Therefore, where a contract or agreement between parties provides for a mechanism to calculate or ascertain a specific amount that is due and payable, that amount is a liquidated sum and is a debt for the purposes of s 459E of the Act.[21] Where a contract or agreement does not provide such a mechanism, an amount claimed under the contract will only constitute a liquidated claim or liquidated demand and will not constitute a debt for the purposes of s 459E of the Act.

61 In this proceeding, the provision of the invoices and their subsequent payment are provided for in the Engagement Letter. However, the Engagement Letter does not provide a mechanism to determine the amounts claimed in the invoices. Instead, it states '[w]here possible fees will be discussed with you prior to commencement of work. However, the nature of some work makes it difficult to estimate'. In the absence of a clear rate or fixed sum for the calculation of the amounts in the invoices, it cannot be said that the mere provision of the invoices gives rise to liquidated sums that are capable of constituting debts for the purposes of s 459E of the Act. Contrary to the defendant's submissions, the Engagement Letter does not provide a mechanism

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18 Ibid [13]–[17].

19 *Timberland v Abercrombie* (n 9).

20 Ibid [35].

21 See also *Meales v Probuild* (n 10) 405 [42]–[43], 406 [47]; *AMI Australia Holdings Pty Ltd v PHD Networks Pty Ltd* [2011] NSWSC 161, [62] ('*AMI Australia Holdings v PHD Networks*').

for the ascertainment of the amounts claimed in the invoices. Instead, it only provides for a mechanism of payment, namely that the invoices must be paid within 14 days of being issued. In and of itself, the issuance of the invoices pursuant to the Engagement Letter does not give rise to debts for the purposes of s 459E.

62 There is also the issue of whether there has been an agreement as to the amounts stated in the invoices, as the ascertainment of an amount claimed can be determined by an agreement between the parties.[22] In *AMI Australia Holdings Pty Ltd v PHD Networks Pty Ltd*,[23] Macready AsJ held that there was an agreement between the parties in which the amount of the debt could be determined and therefore the debt was a liquidated sum.[24] In that case, although there was no evidence with respect to the processes used to place orders for services or their agreed rates, there was a repayment plan in which the amount was fixed and the affidavit of the director of the plaintiff admitted that the amount was owed. In this proceeding, there was no agreed repayment plan and Ms Roberts' affidavits do not admit that the amounts in the invoices were owed. In the absence of such, the only possible agreement that could arise is with respect to the daily rate of approximately $3,000.

63 The plaintiff, via Mr Hapu, was informed of the approximate daily rate prior to the date of the Engagement Letter; however, the Engagement Letter did not specify such a rate. While the invoices do not provide a mechanism by which to calculate the amounts claimed in the invoices, reference can be made to the accompanying statements of account. In the first statement of account, for work as of 2 September 2018, the daily rate was $3,000 (excluding GST). For work as of 11 October 2018 and as of 26 October 2018 in the subsequent statements of account, no daily rate was provided; however, it can be worked out to be $2,916.67 and $2,909.09, respectively (excluding GST). As the daily rate fluctuated in the statements of account and was not in the Engagement Letter, I cannot conclude that the approximate daily rate of $3,000 was a term of agreement between the parties.

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22 *Re Ahearn* (1906) 6 SR (NSW) 576, 577, quoted in *Vimblue* (n 7) [17].
23 *AMI Australia Holdings v PHD Networks* (n 21).
24 Ibid [61]–[62].

64 With respect to the lump sum amounts for the trust and company set up, which were stated as $4,950 (including GST) in the statements of account for work both as of 11 October 2018 and as of 26 October 2018, there is no mechanism by which to calculate or determine the lump sum amounts. No evidence was adduced as to whether the amounts had been agreed.

65 Accordingly, I find that whether the plaintiff and defendant had agreed to the daily rate of approximately $3,000 or the lump sum amounts for the trust and company set up is a matter to be further investigated.

66 Alternatively, the invoices may give rise to *quantum meruit* claims. A *quantum meruit* claim does not arise from a contract, but arises where 'there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable'.[25] A *quantum meruit* claim is a claim for reasonable remuneration for work done.

67 In *Vimblue*,[26] Barrett J held that the distinction between a liquidated sum and a liquidated claim also applies to a *quantum meruit* claim:

> The same reasoning applies to a liquidated claim upon a *quantum meruit* for work done. In the Irish case to which I have referred, Palles CB held that an action for debt is maintainable upon such a claim, adding at 373:
>
> > When it was said that an action of debt would lie only for a sum certain, it was sufficient that the sum should be capable of being ascertained by a jury by positive *data*, and not merely measured by opinion or conjecture. In the present case, for instance, when the value of the work was ascertained, the sum to be recovered became definite, and the case would not be like one of assault in which there were not any certain *data* to fix the amount of damages.
>
> The words of particular importance in this passage are, 'when the value of the work was ascertained, the sum to be recovered became definite'. 'Definite', in the context, is synonymous with 'liquidated'
>
> If a mechanic spends half an hour repairing my car and there is no agreement between us as to the amount he will charge and I will pay, his subsequent claim for $1 million may be regarded as a liquidated claim. But no liquidated sum is thereby owing, due and payable by me to him. His entitlement is to be paid a reasonable sum upon a *quantum meruit*. Until the value of the work is ascertained and in the absence of some process that fixes what is reasonable according to what Palles CB called 'positive data', as distinct from 'opinion or

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25 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256 (Deane J).

26 *Vimblue* (n 7).

> conjecture', the liquidated claim does not mature into an entitlement to a liquidated sum.[27]

68 Hence, in *Vimblue*, Barrett J held that a *quantum meruit* claim will only be a debt when a reasonable value of the work has been ascertained and therefore the claim would be a liquidated sum.

69 However, I note that the term 'liquidated sum' has not always been used in earlier authorities to describe a 'debt' with respect to *quantum meruit* claims, but that a 'liquidated demand' has been considered to be a 'debt'.

70 For this reason, *Vimblue* is potentially inconsistent with the earlier authority of *The Roy Morgan Research Centre Pty Ltd v Wilson Market Research Pty Ltd (No 2)* ('*Roy Morgan (No 2)*'),[28] in which Santow J held that the common money count in that case was a 'debt or liquidated demand'.[29] Santow J did not refer to a 'liquidated sum', but instead treated a 'liquidated demand' as a 'debt'. Santow J referred to *Alexander v Ajax Insurance Co Ltd*:[30]

> It is clear enough that such a common money count is for a debt or liquidated demand. The history applicable to such counts is conveniently collected in *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 445; ALR 1077 per Sholl J. Sholl J delineates the history of the phrase. He concluded that in 1852 any of the following categories of claim would have been for a debt or liquidated demand:
>
> (a) for which the action of debt would lie;
>
> (b) for which an indebitatius (or common) count would lie — including those cases formally covered by the quantum meruit or quantum valebat counts, notwithstanding that the only agreement implied between the parties in such cases was for payment at a 'reasonable' rate;
>
> (c) for which covenant of special assumpsit, would lie, provided that the claim was for a specific amount not involving in the calculation thereof elements the selection whereof was dependent on the opinion of a jury.
>
> Sholl J concludes:

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27 Ibid [18]–[20] (emphasis in original).
28 (1996) 20 ACSR 170 ('*Roy Morgan (No 2)*').
29 Ibid 174.
30 [1956] VLR 436.

> In my opinion, subject to any specific inclusions or exclusions which the decisions of the courts may have made since 1852 to or from the area so delimited (as the case may be), that is still the meaning of the relevant expressions which have been carried down since that date into what are now Orders III, XIII, XIV and XXVII [of the Rules of the Victorian Supreme court].[31]

71 This potential inconsistency between the authorities was observed by Jackson J in *Australian Communication Exchange Ltd v Pilot Partners Pty Ltd*:[32]

> There is also a potential question whether the entitlement to payment of a reasonable amount under an oral contract to perform services can constitute a debt that is due and payable that is not the subject of a genuine dispute if challenged by the alleged debtor. In *The Roy Morgan Research Centre Pty Ltd v Wilson Market Research Pty Ltd (No 2)*, Santow J held that such a claim on a 'common money count for work done' was a 'liquidated claim' and one for a 'debt or liquidated demand' that established the claimant as a creditor. On the other hand, in *Vimblue Pty Ltd v Toweel trading as Carpenters Core Building*, Barrett J held that where there was no agreed method of calculation and had been no determination of a reasonable reward for the work done there was a genuine dispute as to the existence or amount of the alleged debt in the statutory demand. Neither of these cases was referred to by the parties in argument in the present case, so it would not be appropriate to explore the reasoning on which they were based further, beyond observing that they are potentially inconsistent.

72 However, in *Roy Morgan (No 2)*, Santow J also referred to the ascertainment of the claim with respect to whether the amount is liquidated:

> *Odgers on Pleading and Practice*, 5th ed at 41 states that 'whenever the amount to which the plaintiff is entitled … can be ascertained by calculation or fixed by any scale of charges or other positive data, it is … liquidated'. That proposition was approved by Knox CJ and Starke J of the High court [sic] in *Spain v Union Steamship Co of NZ Ltd* (1923) 32 CLR 138. While *Ritchie* comments that this does no more than state a very general proposition and that numerous cases have referred to the difficulty of ascertaining the true meaning of the phrase 'debt or liquidated demand', I am satisfied that the presently foreshadowed claim is no less an example of the liquidated claim than the earlier cited cases concerning quantum meruit claims.[33]

73 In light of this, it is apparent that Santow J did not distinguish between a 'liquidated claim' or 'liquidated demand' and a 'liquidated sum', but accepted that the amount claimed is 'liquidated' when it has been ascertained. Santow J did not use the terminology as distinguished by Barrett J, but, in effect, reached the same conclusion

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31 *Roy Morgan (No 2)* (n 28) 174.

32 [2017] QSC 176, [30] (citations omitted).

33 *Roy Morgan (No 2)* (n 28) 174.

— that the amount claimed is a debt if it can be ascertained by calculation or is fixed. Using Barrett J's terminology in *Vimblue*, it is a 'liquidated sum' and not just a 'liquidated demand'. Understood in this way, *Vimblue* and *Roy Morgan (No 2)* can, therefore, be read together and are not inconsistent.

74 In *Roy Morgan (No 2)*, the plaintiff provided evidence of the 'substantiation, calculation and costing of work allegedly done',[34] which, at the stage of the proceeding, was not disputed by the defendant. Santow J held that the plaintiff's claim for work done was a common money count for work done and that it was a debt or liquidated demand.[35] Therefore, it can be inferred that Santow J accepted that the amount claimed by the plaintiff has been ascertained such that it can constitute a debt.

75 Further, in *Edwards v Australian Securities and Investments Commission* ('*Edwards v ASIC*'),[36] Macfarlan JA, with Spigelman CJ and Campbell JA agreeing, held that there was no significant difference between a 'debt' and a 'liquidated demand', and that a *quantum meruit* claim can be a 'debt' for the purposes of s 588G of the Act. His Honour held that:

> There is a wealth of authority for the proposition that a claim for the reasonable value of work done, enforceable by a quantum meruit action, is a 'debt or liquidated demand' for the purposes of court rules conferring procedural advantages on persons suing for debts or making demands for liquidated amounts. There is no present significance in any difference that may exist between the concepts of 'debt' and 'liquidated demand'. The concepts are substantially the same and case authority indicating that a quantum meruit claim of the nature which is in question in the present case is a 'debt or liquidated demand' may be taken as authority that such a claim is a 'debt' for the purposes of s 588G of the Act.
>
> Relevant authority includes the following.
>
> In *Spain v Union Steamship Company of New Zealand Ltd* (1923) 32 CLR 138; 29 ALR 311; [1923] HCA 21 (*Spain*) it was held that an action by the captain of a ship against the owner to recover the reasonable expenses incurred by the captain in relation to a hearing before a Court of Marine Inquiry into the cause of the wreck of the ship, was a claim for a 'debt or liquidated demand', with the consequence that the captain was entitled to issue a default summons pursuant to s 64 of the District Court Act 1912. Knox CJ and Starke J described the defendant's contention that the claim was not for a debt or liquidated

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34 Ibid 172.
35 Ibid 173–4.
36 (2009) 264 ALR 723 ('*Edwards v ASIC*').

> demand because the plaintiff's right was to cover 'reasonable expenses' and 'not a sum certain or any liquidated amount' as untenable: at CLR 142; ALR 312. Isaacs and Rich JJ were of the same view and referred to the plaintiff being entitled 'to a sum payable *instanter* before action and in law ascertained' (at CLR 145; ALR 313) and to the plaintiff's right being one 'to instant payment of the reasonable sum': (at CLR 154; ALR 317).
>
> In *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538; [1964] ALR 822; [1963] HCA 55, the High Court held that a claim to recover compensation for compulsory acquisition of land was an action to recover a 'debt'. McTiernan, Taylor and Windeyer JJ rejected the proposition that the claim was not an action for debt because it was 'not an action for a sum certain' but rather, involved an assessment of compensation: at CLR 543; ALR 825–6. In support they cited *Spain*, *Segur v Franklin* (1934) 34 SR (NSW) 67 (*Segur*) and *Lagos v Grunwaldt* [1910] 1 KB 41.
>
> In *Segur*, a claim for fees due for acting as an arbitrator was held to be an action for 'a debt or liquidated demand'. In *Lagos*, a claim by a solicitor for professional charges and disbursements was held to be a liquidated demand.
>
> In *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520; 182 ALR 321; [2001] HCA 53, the plurality judgment referred to: 'debts' capable of being set-off under the Statutes of Set-Off as including 'claims in quantum meruit and quantum valebat where goods had been sold or services were performed without the agreement of a price and the claims were disputed on grounds which could easily be resolved in the litigation': at [30].
>
> In *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; 69 ALR 577; [1987] HCA 5, the High Court held that an action by a builder upon a quantum meruit for the value of work done and materials supplied under an oral, unenforceable building contract was a claim in debt: see particularly per Deane J at CLR 250–7; ALR 600–7.
>
> In my view it is clear, in light of this authority, that a liability in quantum meruit to pay to a plaintiff reasonable remuneration for work done at the request of the defendant is a 'debt' within the meaning of s 588G of the Act.[37]

76 However, for a *quantum meruit* claim to be a 'liquidated demand' or 'debt', Macfarlan JA included the requirement of reasonableness in the amount claimed. As reasonableness requires an assessment of the value of the work done, if an amount claimed is reasonable, then the value of the work has been ascertained. Therefore, in the terminology of Barrett J in *Vimblue*, this definition of a 'debt' or 'liquidated demand' is effectively a 'liquidated sum'.

77 Macfarlan JA in *Edwards v ASIC* did not refer to the decision of Barrett J in *Vimblue*, which was decided earlier in the same year. For this reason, it is possible that the

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[37] Ibid 739–40 [81]–[88].

distinction between 'liquidated demand' and 'liquidated sum' in *Vimblue* was not brought to his Honour's attention.

78 Counsel for the plaintiff submitted that the meaning of 'debt' in s 588G of the Act is different to the meaning in s 459E as 'debt' has a wide interpretation in s 588G. However, as I find that that the definition of 'debt' in *Edwards v ASIC* can be read consistently with the meaning in *Vimblue*, it is not necessary to decide on this point.

79 Despite finding that a 'liquidated demand' in *Roy Morgan (No 2)* and *Edwards v ASIC* can constitute a 'liquidated sum' within the meaning of *Vimblue*, for consistency with later authority,[38] which applied *Vimblue*, I will use the terms as they are distinguished by Barrett J.

80 In this proceeding, the first three invoices were forward-looking and were issued prior to services being rendered. Accordingly, they were not *quantum meruit* claims upon issue. However, by the issuance of the fourth invoice, all works had been performed and the amounts claimed in each invoice can constitute *quantum meruit* claims upon which the reasonable value of work performed must be objectively ascertained in order to be liquidated sums or debts.

81 As discussed in paragraphs 61, 63 and 64 hereof, neither the Engagement Letter nor the invoices provide a mechanism by which to calculate the amounts claimed in the invoices. While the statements of account provide some insight into the amounts claimed, the daily rates in each period fluctuated. Further, lump sum amounts were included in the statements of account for the trust and company set up. No other evidence has been adduced as to the reasonableness of the amount claimed.

82 In *Edwards v ASIC*, Macfarlan JA held that the debt arising from a *quantum meruit* claim in that case was incurred as the work was done each day, and the certificates produced were evidence as to value of the work done.[39] The certificates were produced by a third party to certify the progress claims. However, in this proceeding, there was no

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38 See *Timberland v Abercrombie* (n 9) [33]–[35]; *AMI Australia Holdings v PHD Networks* (n 21) [60]–[62].

39 *Edwards v ASIC* (n 36) 749–50 [143]–[146].

other quantification of the value of the work done by the defendant.

83 Counsel for the defendant contends that the value of work has been ascertained as the invoices were sent, accepted by the plaintiff and part payments had been made. While an agreement between the parties can ascertain the value of the work done,[40] as discussed in paragraphs 62 to 65 hereof, whether the approximate daily rate of $3,000 and whether the lump sum amounts for the trust and company set up were agreed upon by the parties are matters to be investigated.

84 In any event, I find that if the amounts claimed in the statutory demand are *quantum meruit* claims, there is a genuine dispute as to the existence of the debts because the reasonableness of their values has not been ascertained. Further, I refer to the observation in paragraph 53. In the absence of any applicable standards or taxation regime such as imposed upon legal practitioners, there is no available mechanism to consider if the defendant's work is appropriate or required the number of days specified.

85 In the alternative, the defendant contends that they are debts for the purposes of s 459E through the plaintiff's course of conduct.

**Creation of debts through the plaintiff's course of conduct**

86 In a telephone call on or around 7 August 2018, Mr Smith informed Mr Hapu that the defendant's rate would be approximately $3,000 per day. Upon being issued the tax invoices, the plaintiff made part payments with respect to them and required more time to pay the invoices. The issue here is whether this course of conduct constitutes an admission by the plaintiff that there are debts that are due and payable owed by it to the defendant.

***The defendant's position***

87 The defendant contends that the plaintiff's conduct gave rise to a promissory estoppel such that the plaintiff is estopped from denying the existence of the debts because the plaintiff represented that it would pay the invoices in full and the defendant relied on

40 *Re Ahearn* (n 22) 577, quoted in *Vimblue* (n 7) [17]. See also *AMI Australia Holdings v PHD Networks* (n 21) [61]–[62].

that representation to continue providing services. The defendant contends that the plaintiff did not manifest any intention of disputing the invoices until long after the last invoice was issued. The defendant contends that:

> If … Ms Roberts was 'shocked' after receiving the First Invoice, it was incumbent on her to raise the issue of fees with the Defendant and, if it could not be resolved, to instruct it to cease working. That she did not do so, first, casts serious doubt on the veracity of the statement and, secondly, constitutes a representation that the Invoices would be paid. The Defendant relied on that representation and continued to work for the Plaintiff.

88 The defendant contends that the plaintiff was aware of the rate charged by the defendant and that the statement of account as of 2 September 2018 identified that the daily rate was $3,000. Counsel for the defendant contends that the statement of account sent on 12 October 2018 contained a calculation error whereby the correct total is $18,000. However, counsel for the defendant conceded that no explanation was given as to why the further 11 days' work in the third statement of account was calculated to a total of $32,000. In any event, counsel for the defendant contends that the discount did not prejudice the plaintiff and as the plaintiff did not object to the rate, it represented that it had accepted this rate.

89 The defendant relied upon *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* ('*Empirnall*').[41] In that case, a developer had refused to enter into a written contract with an architect; however, the architect performed the services pursuant to the contract and sent invoices, which were paid. The defendant referred to McHugh JA, Samuels JA agreeing, in *Empirnall*, where his Honour held that:

> [W]here an offeree with a reasonable opportunity to reject the offer of goods or services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer, it is open to the tribunal of fact to hold that the offer was accepted according to its terms.[42]

90 Even though *Empirnall* was not an estoppel case, the defendant contends that it demonstrates that if a party accepts work by failing to object to invoices for that work and instead pays the invoices, then it may constitute a representation by silence that

41 (1988) 14 NSWLR 523 ('*Empirnall*').
42 Ibid 535 (McHugh JA).

amounts to an acceptance under contract law. The defendant contends that it must also be sufficient to form the basis of an estoppel.

***The plaintiff's position***

91 The plaintiff contends that the defendant's submissions with respect to the alleged representation by silence do not rise above bare assertions as the defendant did not particularise the plaintiff's alleged representation that it would pay the invoices 'in full'. The plaintiff contends that on Mr Smith's evidence, Ms Roberts had only said that 'she was lacking cash and would pay what she could'.

92 The plaintiff contends that the defendant relies upon the part payments as amounting to a representation by silence that it accepted that all forward-billed invoices would be paid in full without questioning the basis of the charges and the work subsequently said to have been performed. The plaintiff contends that the defendant's position contradicts the defendant's original offer to provide details of the work allegedly performed and Mr Smith's refusal to provide the details shortly prior to the service of the statutory demand.

93 The plaintiff also contends that the defendant's submission that the plaintiff is estopped from denying the existence of a debt does not elevate the defendant's claim from a right to payment for a liquidated claim to a right to payment of a liquidated sum capable of supporting a statutory demand, which requires some positive data to ascertain the amount. The plaintiff referred to *Vimblue* and *Stephenson v Weir*.[43] The plaintiff contends that an asserted daily rate of $3,000 and lump sum amounts without reference to specific work performed or corresponding times or dates do not suffice as to the ascertainment of the amounts claimed.

94 I took it that, in oral submissions, the plaintiff contends that the part payments ought not to be treated as an admission because there needs to be a debt for the purpose of s 459E. The plaintiff contended that 'the invoices themselves do not constitute a

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43 *Vimblue* (n 7); *Stephenson v Weir* (n 7) 372.

liquidated sum as each merely records the claim made rather than constituting the claim made'.[44]

95 Further, the plaintiff contends that Ms Roberts had manifested an intention to dispute the invoices as Ms Roberts had deposed that she was shocked at the amounts claimed in the first and second invoices. The plaintiff contends that Ms Roberts had raised a challenge to the invoices via Mr Stephen Dixon, a trusted intermediary, and had understood that Mr Dixon had articulated the plaintiff's shock and concern with respect to the fees to Mr Smith. The plaintiff contends that Ms Roberts was told that Mr Smith's response was that '[he] wasn't impressed that his fees were being questioned'.

***Consideration***

96 An admission of a debt can constitute a finding that there is a debt for the purposes of s 459E of the Act. For example, in the context of whether there was a debtor and creditor relationship between the trustee and the beneficiaries, Foster J held in *Gusdote Pty Ltd v Ashley*[45] that the financial statements made it clear that the trust distributions had been made and there was a creditor/debtor relationship between the trustee and the beneficiaries.[46] His Honour referred to *Chianti Pty Ltd v Leume Pty Ltd*,[47] in which Buss JA said:

> In the present case, I am of the opinion that the financial statements of the SJRF Trust and the evidence of Stephen Frederick Ryan … when considered in the context of the relevant factual and legal background including cl 3.5 of the SJRF Trust deed and the resolutions, constitute admissions by the appellant that the distributed amounts were owing by the appellant to the respondent, for the purposes of the principle referred to in Gummow J's reasons in *Roxborough* (at [67]). The latest financial statements before Judge Eaton, namely, those for the year ended 30 June 2003, described the distributed amounts as an 'Unpaid Beneficiary Entitlement'. When that description is read with cl 3.5, the resolutions and Stephen Frederick Ryan's evidence, the proper conclusion is that the appellant's admission was of an obligation to pay on demand. Although it is unnecessary to determine this point, my examination of *Edwards v Lowndes* and the other cases in the line of authority referred to in Meagher, Gummow & Lehane's, *Equity Doctrines & Remedies* (4th ed, 2002) [1-215] and Gummow J's reasons in *Roxborough* (at [67]), does not indicate that it is

44 *Core Toughened v LISEC Australia* (n 12) [18].
45 (2011) 193 FCR 227 ('*Gusdote v Ashley*').
46 Ibid 256 [130].
47 (2007) 35 WAR 488.

> essential, for there to be a binding admission in relation to an amount owing by a trustee to a beneficiary, that the relevant amount is held as, or represented by, cash at bank or some other monetary sum when the alleged admission is made.[48]

97 Foster J also held that the trustee was estopped from denying that the income was distributed to the beneficiaries where the trustee had lodged its own tax returns to that effect and the beneficiaries had included that income in their own income tax returns at the instigation of the director of the trustee company.[49]

98 I take it that the defendant in this proceeding contends that there is an admission of the alleged debts by the plaintiff by way of promissory estoppel.

99 Promissory estoppel is a form of equitable estoppel. While the defendant does not refer to a specific test for the elements of promissory estoppel, a formulation of the test is elucidated by Brennan J in *Walton Stores (Interstate) Ltd v Maher* ('*Walton Stores*').[50] His Honour held that:

> In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.[51]

100 For a representation to found an estoppel, it must be clear and unambiguous.[52] With respect to a representation by silence, Brennan J observed that:

> Silence will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected … What would make it inequitable to depart from such an assumption or expectation? Knowledge that the assumption or expectation could be fulfilled only by a

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48 Ibid 514–15 [77], quoted in *Gusdote v Ashley* (n 45) 256 [127].
49 *Gusdote Pty Ltd v Ashley* (n 45) 254 [119].
50 (1988) 164 CLR 387 ('*Walton Stores*').
51 Ibid 428–9.
52 *Legione v Hateley* (1983) 152 CLR 406, 435–7 (Mason and Deane JJ); *Olga Investments Pty Ltd v Citipower Ltd* [1998] 3 VR 485, 499 (Charles JA).

> transfer of the property of the person who stays silent, or by a diminution of his rights or an increase in his obligations. A person who knows or intends that the other should conduct his affairs on such an assumption or expectation has two options: to warn the other that he denies the correctness of the assumption or expectation when he knows that the other may suffer detriment by so conducting his affairs should the assumption or expectation go unfulfilled, or to act so as to avoid any detriment which the other may suffer in reliance on the assumption or expectation. It is unconscionable to refrain from making the denial and then to leave the other to bear whatever detriment is occasioned by non-fulfilment of the assumption or expectation.[53]

101 I note that while it is the plaintiff who generally has the onus to show that there is a genuine dispute to set aside a statutory demand, with respect to this issue, the defendant has the onus to show that the plaintiff's conduct gave rise to an estoppel, as it is claiming the estoppel.

102 In *Westpac Banking Corporation v Kurobe Holdings Pty Ltd* ('*Westpac v Kurobe*'),[54] Pembroke J held that an equitable estoppel arose from a representation by silence. In that case, the defendant was found to have induced or encouraged the plaintiff to assume, and maintain the assumption, that a notice of exercise of option was valid through its conduct and the course of dealing between the parties. The plaintiff did not conform with the instructions of the director of the defendant in the exercise of the option as the plaintiff had addressed the notice to the incorrect company, being the defendant's agent. However, the defendant did not raise the issue of non-conformity with the plaintiff but had acknowledged the notice of exercise of option. The plaintiff's assumption was made due to the commercial context and the course of dealing between the parties. The course of dealing included that the plaintiff had addressed a previous notice of exercise of option to the defendant's agent, which had been accepted and acted upon, and correspondence during the preceding years, which included a letter sent by the defendant's agent to the plaintiff's agent inviting the exercise of the option.

103 Further, the director of the defendant had instructed its agent that any further communications from the plaintiff and its agent should be referred to him. When an officer of the plaintiff's agent sent an email to the defendant's agent stating that the

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53 *Walton Stores* (n 50) 428 (citations omitted).

54 [2010] NSWSC 537 ('*Westpac v Kurobe*').

plaintiff's agent had exercised the option, no response was provided. Pembroke J found: that the director of the defendant knew that the notice of exercise of option had been received from the plaintiff's agent on behalf of the plaintiff; that he knew that the plaintiff and its agent assumed the notice of exercise of option was valid; that, for a time, he assumed the notice was valid except for the way it was addressed; that from that time, he understood that there was a possibility that the notice was not valid; and that he appreciated that if the plaintiff and its agent had been informed about the potential problem, it would have been rectified. Accordingly, Pembroke J held that the defendant's conduct, which included deliberate silence, had caused and induced the plaintiff's assumption.

104 In this proceeding, the defendant contends that the plaintiff had not manifested an intention to dispute the invoices and the amounts stated therein until long after the last invoice had been issued, thereby representing that it would pay the invoices in full. The defendant issued four invoices to the plaintiff and the plaintiff made seven part payments totalling $32,000. The defendant contends that the last invoice was issued on 19 November 2018 and the plaintiff did not dispute the invoices until 19 December 2018. The defendant contends that it had raised concerns with respect to payment; for example, in the 12 October 2018 email in which Mr Smith wrote that he had 'significant concerns about being paid'.

105 The plaintiff contends that Ms Roberts had deposed that she had expressed shock at the amounts stated in the invoices and that she had understood that Mr Dixon had raised the issue with Mr Smith. However, in the absence of corroborative evidence, such as evidence from Mr Dixon, I am not satisfied that such concerns had been raised with Mr Smith.[55]

106 I find that in these circumstances, there is a possibility that the plaintiff's silence with respect to the amounts stated in the invoices, together with the plaintiff's part payments, could give rise to a representation by the plaintiff that the invoices would be paid in full. The plaintiff had the opportunity from the first invoice issued in

55 See further discussion with respect to Mr Dixon at paragraphs 143 to 145 hereof.

August 2018 until the last invoice issued in November 2018 to dispute the amounts stated in the invoices; however, it did not do so. Instead, the plaintiff made part payments when it could, including in response to requests for payment by the defendant. By not raising a dispute as to the invoices and making part payments, the plaintiff acknowledged receipt of the invoices.

107 At a meeting on 4 October 2018, Mr Smith said to Ms Roberts that he was concerned about being paid, and the following day, the first payment was made. In response to Mr Smith's request for payment, in an email to Mr Smith dated 31 October 2018, Ms Roberts agreed that the plaintiff was 'under enormous pressure and things [were] very tight' and wrote that she was 'expecting funds in over the next couple of days' and that a 'progress payment will be made to [the defendant] as promised'. A part payment was received on 7 November 2018. On 30 November 2018, Mr Smith again requested payment and the plaintiff made a part payment of $5,000 in response. On 12 December 2018, via SMS, Mr Smith requested payment, and a part payment was made in response. In response to communications with Mr Smith with respect to payment prior to Christmas in 2018, on 18 December 2018, Mr Toh, of the plaintiff, sent an email to Mr Smith, in which he stated '… it's unlikely you would get a resolution to make much headway into your account … there would be a resolution for this impasse with debtor financing in place in the new year'. This course of conduct of the plaintiff does not show that the plaintiff would only pay what it could as opposed to paying the invoices in full, but indicates that the plaintiff acknowledges the amounts in the invoices had to be paid and that the plaintiff was at the time unable to pay the amounts in full.

108 Despite this, there is also a possibility that there was no representation by the plaintiff to pay the invoices in full given the plaintiff's lack of response when Mr Smith requested payment or security at the following times:

(a) when Mr Smith requested that the plaintiff pay the first invoice 'tomorrow in full' in an email dated 2 September 2018;

(b) when Mr Smith requested another payment on 11 October 2018 in an email dated that day;

(c) when Mr Smith requested the plaintiff to make payment on the outstanding account in an email dated 30 October 2018;

(d) when Mr Smith asked the plaintiff to provide some level of security in an email dated 9 November 2018;

(e) when Mr Smith requested payment for the first three invoices in the email dated 19 November 2018 and when Mr Smith sent a follow up email on 27 November 2018; and

(f) when Mr Smith sent a SMS message to Ms Roberts on 14 December 2018 requesting payment that day.

109 This lack of representation is further reinforced by Mr Smith's own evidence, in which he deposes that, on 1 October 2018, he had a call with Mr Hapu, who informed him that Ms Roberts 'had a history of not paying and because [Mr Smith's] initial work was used in an unsuccessful financing attempt, she had no intention of paying [him]'. Therefore, at the very least, by 1 October 2018, the defendant became aware that the amounts in the invoices may not be paid in full despite subsequent part payments. However, the defendant issued two invoices after that date. Further, Mr Smith deposed that on 31 October 2018, in a call with Mr Hapu, Mr Smith advised Mr Hapu that he was 'concerned that [he] might do the work and not be paid for it'. The fourth invoice was then issued on 19 November 2018.

110 Unlike in *Westpac v Kurobe*,[56] there was no previous course of dealing that gave rise to the assumption that the invoices would be paid in full. The plaintiff had not paid the invoices in full prior to the issue of subsequent invoices, despite the Engagement Letter requiring payment within 14 days of the issuance of the invoices. The first invoice was issued on 27 August 2018; however, the first part payment was only made

56 *Westpac v Kurobe* (n 54).

on 5 October 2018. I note that the first and second invoices were issued within 14 days of each other.

111 The defendant relied upon *Empirnall*[57] in support of a promissory estoppel. In *Empirnall*, at first instance, the trial judge held that an oral contract was entered into by the parties, which included a term as to a price for the work performed. The appeal for that decision was abandoned by the time the appeal was called. However, the respondent (cross-appellant) pressed on with the cross-appeal and contended that the agreement was instead governed by a written contract. The amount of the debt was not in issue; however, a clause of the written contract allowed a charge over land for the amount owed. Although the appellant (cross-respondent) had not executed the written contract, the Court held that the appellant (cross-respondent) had accepted the written contract. McHugh JA held that '[t]he ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted'.[58] Further, McHugh JA observed that '[t]he case is not so much one of acceptance by silence as one of taking the benefit of an offer with knowledge of its terms and knowledge of the offeror's reliance on payment being made in return for his work'.[59]

112 The difficulty with relying upon *Empirnall* is that the case relates to the acceptance of an offer in the form of a written contract. In this proceeding, it is not in dispute as to whether the Engagement Letter had been accepted. The dispute instead relates to whether a debt arises from an agreement in which there is no fixed price or a mechanism as to the calculation of the amounts claimed in the invoices. A reasonable bystander may regard the plaintiff's conduct as having accepted the amounts in the invoices as required to be paid because the plaintiff did not raise a dispute with the defendant as to the amounts stated in the invoices after each invoice was issued. However, in circumstances where the amounts in the invoices could not be ascertained by reference to an objective standard, it is equally likely that a reasonable

57 *Empirnall* (n 41).
58 Ibid 535.
59 Ibid 536.

bystander may not regard that such amounts had been accepted by the plaintiff when the plaintiff has not paid the amounts in full.

113 Accordingly, I find that the issue of whether there was a representation by silence capable of supporting a promissory estoppel is a matter that should be further investigated and, in this proceeding, I cannot conclude that there has been an admission of a debt by the plaintiff. Therefore, there remains a genuine dispute.

114 Further, even if there was a representation by silence that the plaintiff would pay the invoices in full, I cannot conclude that the other elements of promissory estoppel are made out in the absence of cross-examination.

115 With respect to whether the representation had been induced by the plaintiff or whether the defendant had relied upon the representation, I cannot conclude that these elements have been made out. While the plaintiff had acknowledged the invoices by making part payments and the defendant had continued to provide services to the plaintiff, the first part payment was made weeks after the first invoice was to be paid pursuant to the Engagement Letter and the invoice was not paid in full. The invoices had not been paid in full prior to the issue of subsequent invoices. The defendant had deposed that he had been informed that the invoices may not be paid, as discussed in paragraph 109 hereof, and the plaintiff did not make payments after each request by the defendant and did not reply to some of the requests.

116 In Mr Smith's email to the plaintiff on 19 November 2018 to which there was no response, Mr Smith had written, 'My expectation is that all invoices currently due (being the 1st 3) will be paid this week … in the absence of this being ignored I can only assume you have not intention to pay'. Although this email was provided after the work was completed, it was hardly evocative of reliance by the defendant.

117 In the same way, I cannot conclude that the plaintiff knew that the defendant would assume the representation that the invoices would be made in full and would rely on that representation in circumstances where only part payments had been made and there was no response to some requests for payment.

118 Although, if there was a representation induced by the plaintiff which the defendant relied upon, then the defendant may be found to have acted to its detriment upon reliance on the representation as it continued to provide services to the plaintiff, and the plaintiff did not prevent such detriment by failing to pay the invoices in full.

119 I find that there is a genuine dispute as to whether all the elements of promissory estoppel are made out.

120 Accordingly, I am satisfied that there is a genuine dispute as to the existence of the debts that are the subject of the statutory demand because the following matters require further investigation:

(a) whether the daily rate of approximately $3,000 and whether the lump sum amounts are terms of the agreement such that the value of the amounts in the invoices claimed can be ascertained pursuant to the Engagement Letter;

(b) whether the value of the amounts claimed in the invoices are reasonable in accordance with *quantum meruit* claims; and

(c) whether all the elements of promissory estoppel can be made out, including whether the plaintiff's conduct gave rise to a representation by silence.

121 Therefore, the statutory demand should be set aside under s 459H of the Act.

122 In light of my conclusion at paragraph 120 hereof, it is not necessary to determine the other grounds raised in the application to set aside the statutory demand; however, I will discuss the other grounds briefly.

**Genuine dispute as to the quantum of the debts claimed**

123 If I am wrong and there are debts that may be the foundation of a statutory demand or, by reason of the conduct of the plaintiff, the plaintiff is estopped from denying that there are debts which may be the foundation of the statutory demand, the next issue is whether there is a genuine dispute as to the quantum of the debts claimed.

**The plaintiff's position**

124 The plaintiff contends that its part payments to the defendant totalling $32,000 are full payment for the work performed by Mr Smith.

125 The plaintiff contends that the evidence filed in this proceeding shows that the plaintiff had raised a dispute with respect to the tax invoices prior to the service of the statutory demand. The plaintiff contends that Ms Roberts was shocked at the amount of the first invoice issued on 27 August 2018 being $33,000. The plaintiff contends that Ms Roberts was also shocked upon receipt of the second invoice for the amount of $33,000 on or about 3 September 2018. The plaintiff contends that Ms Roberts raised the issue with Mr Dixon on the same day and Mr Dixon sounded surprised and he said, 'This is ridiculous. This is crazy… Leave it to me and I will take it up with him [Mr Smith]'. The plaintiff contends that Ms Roberts did so on the understanding that Mr Dixon was articulating the plaintiff's shock and concern at the fees to the defendant.

126 The plaintiff contends that Ms Roberts was assured by Mr Dixon that he had raised her concerns with Mr Smith. Ms Roberts deposed that '[o]n or about November 2018 Mr Dixon informed me and I believe that he raised my concerns with Mr Smith and that Mr Smith wasn't impressed that his fees were being questioned'. Ms Roberts also deposed that on or about 4 December 2018, Mr Dixon said to '[l]eave it with [him]' to press on with her concerns with Mr Smith. The plaintiff contends that on 17 December 2018, Ms Roberts requested Mr Toh to forward the defendant's invoices to Mr Dixon for the purpose of his discussions with Mr Smith.

127 The plaintiff contends that Ms Roberts trusted that Mr Dixon was the person best placed to convey the plaintiff's shock and concern at the fees as Mr Dixon and Mr Smith had a positive working relationship and were former colleagues. The plaintiff contends that, on that basis, Ms Roberts responded to Mr Dixon's emails and text messages with respect to payment with holding messages 'to keep him at bay' until Mr Dixon had progressed her concerns. On 19 December 2018, Ms Roberts sent

an email to Mr Dixon to inquire as to 'the state of [his] progress in [his] discussion with [Mr Smith]'.

128 The plaintiff contends that Mr Smith stated that he was 'happy to send a detailed account of time' in an email on 27 August 2018; however, when Mr Toh requested details on 17 December 2018, Mr Smith refused to do so.

129 The plaintiff contends that, on 19 December 2018, Mr Smith deposed in the affidavit in support of the statutory demand that there was no genuine dispute over the alleged debts claimed. The plaintiff contends that at that time and to date, Mr Smith had not provided any useful details of the amounts charged by the defendant, such as the date of the work performed, the amount of time spent and corresponding details of the work undertaken.

130 The plaintiff further contends that there are objective standards provided by the Accounting Professional & Ethical Standard Board ('APES') that apply as the Engagement Letter states that work performed by the defendant will be in accordance with 'applicable standards, rules, regulations and legislation'. The plaintiff contends that the APES states that the following should be included in the terms of engagement:

> *Fees and billing arrangements*: Reference to the basis of fees (e.g. time based billing, fixed price contracts, contingent fee arrangements or other similar agreement). Details of agreed upon billing schedules should also be included.[60]

**The defendant's position**

131 The gravamen of the defendant's submissions is that the plaintiff did not dispute the invoices in correspondence over a number of months. The defendant contends that the dispute was manufactured in response to the threat of a statutory demand being issued. I note that while the defendant framed this argument as pertaining to the issue of whether there is a genuine dispute with respect to the existence of the debts, I find that the submissions are better framed as with respect to the quantum of the alleged debts.

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60 Accounting Professional & Ethical Standards Board, *APES 305 Terms of Engagement* (at March 2013) cl 4.8.

132 The defendant contends that for a period of around two months in which there was regular correspondence from Mr Smith to Ms Roberts seeking payment, Mr Smith frequently acknowledged the serious financial difficulties the plaintiff was under. The defendant contends that Ms Roberts never denied that the plaintiff had financial troubles but had sometimes confirmed it. The defendant contends that prior to 19 December 2018, the plaintiff's response never suggested that the amounts were not owed or would not be paid in full.

133 The defendant contends that there is nothing wrong with Mr Toh requesting detailed information of work done in an email on 17 December 2018. However, it is reasonable for Mr Smith to reply by email on the same day saying that it was a 'stalling tactic' because Mr Smith had frequently asked to be paid and no response was given or small payments were made. In the same email, Mr Smith wrote that the concerns with respect to the invoices had not been raised by Ms Roberts or Mr Hapu.

134 The defendant contends it was only after Mr Smith said that he was having a statutory demand drawn up on 19 December 2018 that the plaintiff raised a dispute. Mr Toh's email on 19 December 2018 set out as follows:

> We dispute the total invoice been charged for the work undertaken by you.
>
> Those charges are exorbitant and do not reflect the one off special project work that Nationwide has assigned you to work on.
>
> Payment to date for $31,000 is to be acknowledged as full and final settlement of your account.

135 In oral submissions, counsel for the defendant contends that there is no suggestion as to where the number of $31,000 came from.

136 In oral submissions, counsel for the defendant contends that there is no evidence in communications from Mr Smith to Ms Roberts that there has been a conversation between Mr Dixon and Mr Smith with respect to a genuine dispute about the invoices.

**Consideration**

137 I find that the crux of the issue is whether the plaintiff had raised a dispute, with respect to the amounts in the invoices, with the defendant via Mr Dixon.

138 Ms Roberts had deposed that she was shocked at the amounts of $33,000 in the first and second invoices upon their receipt, and that Mr Hapu also expressed surprised at the amount in the first invoice. Ms Roberts deposed that when she told Mr Dixon of the second invoice, he sounded surprised and said that he would take it up with Mr Smith. Accordingly, Ms Roberts deposed that she believed Mr Dixon would communicate the plaintiff's concerns about the invoice.

139 Ms Robert's evidence about Mr Dixon is hearsay evidence. While hearsay evidence is generally inadmissible, such evidence can be admissible in interlocutory applications. In *Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd (No 3)*,[61] the Court of Appeal noted:

> Counsel for PG submitted that Mr Farrelly's evidence was hearsay, and that Mr Farrelly had not given any evidence that the particular invoices were associated with rectification work undertaken. On this appeal, the parties proceeded on the basis, supported by authority, that the proceedings below were interlocutory. That approach is followed at first instance in this jurisdiction. Hearsay evidence is admissible where an affidavit 'is made for the purposes of interlocutory proceedings'.[62]

140 In *Aussie Hoist Property Pty Ltd v Mulqueen* ('*Aussie Hoist*'),[63] Griffiths J said:

> In *Tokich*,[64] White J held at [21] that evidence which may be inadmissible as hearsay or opinion to establish a fact relevant to indebtedness would not on that account be inadmissible to establish a fact relevant to whether there was a genuine dispute about indebtedness (citing McClelland J in *Geoffrey W Hill & Associates v King* (1992) 27 NSWLR 228 at 230).
>
> Justice White added at [22] that, although a mere assertion that a debt is denied is insufficient, evidence in the form of conclusions as to primary facts which would be inadmissible as proof of the relevant facts under either ss 76 or 135 of the *Evidence Act* may be admissible as evidence that there is a dispute as to the existence or amount of the debt, and as to whether that dispute is genuine (citing Young J in *John Holland Construction & Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250 at 253). Importantly, at [25], White J acknowledged that whether evidence is sufficient to establish a genuine dispute is a different question from whether the evidence is admissible for that purpose.
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> The distinction drawn by White J in *Tokich* was approved by the Court of Appeal in *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd*

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61 (2014) 46 WAR 483.
62 Ibid 503 [73] (citations omitted).
63 [2018] FCA 1493 ('*Aussie Hoist*').
64 *Tokich Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Ltd (in liq)* (2004) 185 FLR 130.

> [2013] NSWCA 344; 85 NSWLR 601. Their Honours stated at [37] that in a proceeding for the purposes of setting aside a statutory demand, the hearsay rule will not apply with the same strictness as is required in a fully contested hearing of a principal dispute and hearsay may be admissible provided that evidence of the source of the hearsay is adduced.[65]

141 The exception to the hearsay rule in interlocutory proceedings is also provided for in s 75 of the *Evidence Act 2008* (Vic), which sets out as follows: '[i]n an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source'.[66]

142 Therefore, in interlocutory applications such as this, hearsay evidence is admissible where evidence of the source is also adduced. In any event, based on the observations of Griffiths J in *Aussie Hoist*, assertions which may not constitute admissible evidence as to fact may still be received with respect to the question of whether a genuine dispute has been established.

143 In this proceeding, the plaintiff did not adduce evidence from Mr Dixon. Nor did the plaintiff adduce evidence as to whether Mr Dixon had in fact communicated such concerns to Mr Smith. Instead, the main evidence the plaintiff relies upon is that Ms Roberts believed that Mr Dixon had raised the concerns with Mr Smith through oral communications between herself and Mr Dixon. In particular, Ms Roberts had deposed that Mr Dixon had informed her that 'he had raised [her] concerns with Mr Smith and that Mr Smith wasn't impressed that his fees were being questioned'. Further, Ms Roberts had sent an email to Mr Dixon on 19 December asking him about 'the state of [his] progress in [his] discussion with [Mr Smith]'. In the absence of evidence from Mr Dixon, I am unable to ascertain what items claimed by the defendant are excessive or what is an appropriate amount contended by the plaintiff.

144 As the defendant had submitted, there is no evidence in the correspondence between Ms Roberts and Mr Smith with respect to any conversation between Mr Dixon and

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65 *Aussie Hoist* (n 63) [49]–[51].

66 See also *Evidence Act 1995* (Cth) s 75.

Mr Smith in relation to any concerns the plaintiff had about the amounts in the invoices.

145 Accordingly, I find that the plaintiff's contentions do not rise above mere assertions. Such contentions are inconsistent with contemporaneous documents in which neither Ms Roberts nor Mr Smith referred to conversations with Mr Dixon. I do not find that the dispute contended by the plaintiff is bona fide and genuine, and I do not find that it requires further investigation.

146 Further, I am not satisfied that Mr Smith's refusal to provide details of the work done in an email sent on 17 December 2018 is indicative of a genuine dispute. Mr Toh's request for further information was sent on 17 December 2018, approximately one month after the last invoice was issued, and, after receiving Mr Smith's refusal to provide details and speaking to Ms Roberts, in an email on 18 December 2018, Mr Toh did not dispute the amounts in the invoices but informed Mr Smith that:

> I quickly ran through with [Ms Roberts] yesterday on the work you have done.
>
> Given the enormity of other works that [Ms Roberts] needs to do this week for wages and entitlements, it's unlikely you would get a resolution to make much headway into your account.
>
> However there would be a resolution for this impasse with debtor financing in place in the new year.

147 In a reply email on the same day, Mr Smith informed Mr Toh that he would be instructing his lawyer to serve a letter of demand if the payment was not resolved, and on the next day, Mr Smith sent an email to Mr Toh informing him that a statutory demand was being drawn up. It was only after this email that Mr Toh claimed that the plaintiff disputed the amounts in the invoices and that such amounts were exorbitant. Accordingly, I find that such assertions in Mr Toh's email on 19 December 2018 do not rise above mere assertions.

148 For the reasons stated in paragraphs 143 to 147 hereof, I would not have been satisfied that there was a genuine dispute as to the quantum of the amounts claimed if I had found that there was no genuine dispute as to the existence of the debts claimed.

**Offsetting claim**

149 The plaintiff contends that it had an offsetting claim against the defendant. However, as conceded by counsel for the plaintiff in oral submissions, the plaintiff has not adduced evidence as to the assessment of an offsetting claim and therefore is unable to establish its onus. Accordingly, this ground fails.

**Some other reason**

150 The plaintiff contended that the statutory demand should be set aside for some other reason under s 459J of the Act because:

(a) the statutory demand was defective as it purported to rely on non-existent debts;

(b) the statutory demand was served as a debt recovery process; and

(c) the defendant refused to provide details of work performed.

151 As the first and third contentions have been dealt with under the issues of whether there is a genuine dispute as to the existence of a debt and as to the quantum of the debt, respectively, they will not be dealt with again here.

152 The plaintiff contends that it was inappropriate for the defendant to seek payment when it refused to give details about the work or how it was calculated and when it knew that there was a dispute given that Mr Toh had requested details of the work on 17 December 2018. The plaintiff referred to Austin J in *Equipped Constructions Pty Ltd v Form Architects Pty Ltd*,[67] in which his Honour said:

> The proper procedure for determining entitlement to an amount claimed but genuinely disputed is to take proceedings for recovery of the alleged debt, where defences may be raised and a decision may be made by the court.[68]

153 Further, the plaintiff contends that the defendant's solicitors had instructed that the statutory demand would not be withdrawn and that if the sums demanded were not paid by 13 January 2019, then proceedings to wind up would be commenced.

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67 [2006] NSWSC 500.
68 Ibid [24].

154 I find that the statutory demand was not served for the improper purpose of debt recovery. I am not satisfied that the defendant was aware that there was a genuine dispute as to the quantum of the debts claimed, namely because the alleged dispute was only raised after Mr Smith had mentioned that a statutory demand was being drawn up. Further, there was evidence that suggested that the plaintiff was insolvent because it had difficulties paying the invoices and only made part payments.

155 Accordingly, this ground fails.

**Conclusion**

156 Despite finding that the second, third and fourth grounds to set aside the statutory demand fail, I am satisfied that there is a genuine dispute as to the existence of the debts. Therefore, the statutory demand dated 19 December 2018 and served on the plaintiff will be set aside under s 459H.

**Orders**

1 The statutory demand dated 19 December 2018 and served on the plaintiff be set aside pursuant to s 459H of the *Corporations Act 2001* (Cth).

2 The defendant pay the plaintiff's costs, including reserved costs, on a standard basis.

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**CERTIFICATE**

I certify that this and the 44 preceding pages are a true copy of the reasons for judgment of Randall AsJ of the Supreme Court of Victoria delivered on 30 October 2020.

DATED this thirtieth day of October 2020.

.....
Associate

SUPREME COURT VICTORIA ASSOCIATE TO AN ASSOCIATE JUDGE