

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

Not Restricted

S ECI 2021 03672

IN THE MATTER of AMVILLE CONSTRUCTIONS PTY LTD
(ACN 609 475 149)

AMVILLE CONSTRUCTIONS PTY LTD
(ACN 609 475 149)

Plaintiff

v

L.S. BRICKLAYING (VIC) PTY LTD
(ACN 628 370 909)

Defendant

JUDGE: Hetyey AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 21 December 2021
DATE OF JUDGMENT: 17 February 2022
CASE MAY BE CITED AS: Re Amville Constructions Pty Ltd
MEDIUM NEUTRAL CITATION: [2022] VSC 65

CORPORATIONS – *Corporations Act 2001* (Cth) – Part 5.4 – Insolvency – Statutory demand – s 459G – Application to set aside demand – Domestic building project – s 459H – Whether genuine dispute about existence and/or amount of debt – Whether genuine dispute about identity of contracting party or whether another party responsible for payment – Whether genuine dispute with subcontractor entitled to payment for alleged defective and incomplete works – Whether offsetting claim – s 459J(1)(b) – Whether some other reason to set aside statutory demand – s 459H(4) – Statutory demand varied.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Bromley	Rigby Cooke Lawyers
For the Defendant	Ms A Carruthers	Level Playing Field Lawyers

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Introduction

- 1 By originating process dated 6 October 2021 and pursuant to ss 459G, 459H and 459J of the *Corporations Act 2001* (Cth) (**'the Act'**), Amville Constructions Pty Ltd (**'the plaintiff'** or **'Amville'**) seeks to set aside a statutory demand dated 15 September 2021 (**'the statutory demand'** or **'the demand'**) served by L.S. Bricklaying (Vic) Pty Ltd (**'the defendant'**).

Background

- 2 Amville is a registered builder. On or about 18 February 2020, it entered into a domestic building contract with Ms Shuxiang (Lily) Li (**'the building contract'**) pursuant to which Amville agreed to construct three two-storey units at 6 Grevillia Court, Glen Waverley, Victoria (**'the property'**). Ms Li is the registered proprietor of the property.
- 3 During the time Amville performed work at the property,¹ it was necessary for it to engage various subcontractors to carry out specific services, such as plumbing, electrical, and bricklaying work. Following a dispute between Amville and an original bricklayer, on or about 10 May 2021, Amville placed an online advertisement on the 'hipages' platform seeking urgent bricklaying works, with the materials to be provided by Amville. The defendant, which operates a bricklaying business and has advertised its services on hipages since early 2016, responded to the advertisement that same day and received the plaintiff's contact details via hipages. The defendant's director, Mr Lee Skinder, then called Mr Neville Duncanson, a director of Amville, to discuss the job. Mr Skinder and Mr Duncanson met at the property on 11 May 2021, however, there are differing accounts of what was discussed at that meeting and who else was present. It is uncontentious that the defendant performed bricklaying work at the site between 14 May 2021 and 20 May 2021.

¹ According to plaintiff's directors, Mr Zaravia and Mr Duncanson, the plaintiff performed work at the property between February 2020 until early July 2021. However, the owner of the property, Ms Li, has given evidence that the plaintiff performed works at the property from 24 April 2020 and suspended works on 28 May 2021. Ms Li's evidence on this point was not later contradicted by the plaintiff.

- 4 On 20 May 2021, the defendant rendered an invoice for the sum of \$11,176 (inclusive of GST) and emailed it to the plaintiff. Despite repeated communications sent by the defendant to the plaintiff about the status of the invoice, the invoice was not paid.
- 5 In June 2021, a dispute arose between Ms Li and Amville which resulted in Ms Li purporting to terminate the building contract on 5 July 2021.
- 6 On 15 September 2021, the defendant issued the statutory demand for the amount claimed in the invoice. As previously mentioned, the plaintiff commenced this application to set aside the demand on 6 October 2021.
- 7 Notwithstanding the relatively modest amount claimed in the statutory demand, the parties have filed a plethora of affidavit material in the proceeding. It must be said that some of that material has little, if any, probative value to the determination of the matter.
- 8 The plaintiff relies on the following material in support of its application: the affidavits and exhibits of Johnny Zaravia sworn on 6 October 2021 (**'the first Zaravia affidavit'**), 27 October 2021 and 7 December 2021; the affidavit of Rodrigo Omar Figueroa sworn 6 October 2021; the affidavits and exhibits of Neville Duncanson sworn 27 October 2021 (**'the first Duncanson affidavit'**) and 7 December 2021 (**'the second Duncanson affidavit'**); and the written submissions of the plaintiff filed 9 December 2021.
- 9 The defendant, in turn, relies on the following material in opposition to the application: the affidavit of service and exhibits of Tina Vo affirmed 14 October 2021(**'the Vo affidavit'**); the affidavit and exhibits of Lee Daniel Skinder affirmed 10 November 2021; the affidavit and exhibits of Shao-Ping Gangur affirmed 10 November 2021; the affidavit and exhibits of Shuxiang Li affirmed 10 November 2021; the affidavit and exhibits of Marianne My-An Phan affirmed 15 December 2021, and the written submissions of the defendant dated 17 December 2021.
- 10 During the course of the proceeding Amville changed the way in which it articulated the grounds in support of its application. It now seeks to set aside the statutory

demand on the following alternative bases:

- (a) there is a genuine dispute under s 459H(1)(a) of the Act about the existence of the debt the subject of the demand because Amville was not responsible for payment of the defendant's invoice. Instead, it was the responsibility of the owner of the property, Ms Li, to make the payment;
- (b) there is a genuine dispute about the parties to the relevant subcontract for the provision of the bricklaying at the property. It is said that any contract was between Amville and Mr Skinder but not the defendant itself;
- (c) there is a genuine dispute about the amount claimed by the defendant in the statutory demand. The defendant has overcharged for work performed at the site and did not attend for the number of hours claimed on the relevant invoice. Further, the defendant is not entitled to payment in circumstances where the work is defective and incomplete;
- (d) Amville has an offsetting claim against the defendant pursuant to s 459H(1)(b) of the Act in respect of the alleged defective and incomplete work;² and
- (e) the statutory demand should be set aside for 'some other reason' under s 459J(1)(b) of the Act because it was accompanied by a covering letter which also made an improper demand for payment of legal costs.³

Statutory provisions and legal principles

11 Section 459G of the *Corporations Act* states:

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

² This offsetting claim was only clearly articulated at the final hearing of the matter. A separate offsetting claim was originally articulated in the first Zaravia affidavit and filed in support of the plaintiff's s 459G application to the effect that if the defendant was found to be a party to a subcontract with the plaintiff (which is denied) then the plaintiff is entitled to claim its loss and damage arising from the termination of the subcontract as a result of the defendant's alleged repudiation. This offsetting claim was not referred to in the plaintiff's written submissions and, at the hearing, the plaintiff confirmed it was no longer pursued.

³ A further argument about abuse of process and a purported collateral purpose which was set out in the first Zaravia affidavit was not developed in the plaintiff's written submissions and was formally abandoned at the hearing.

- (2) An application may only be made within the statutory period⁴ after the demand is so served.
- (3) An application is made in accordance with this section only if, within that period:
 - (a) an affidavit supporting the application is filed with the Court; and
 - (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

12 Section 459H(1) of the *Corporations Act* provides:

- (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.⁵

Where a company applies to set aside a statutory demand under s 459H of the Act, the Court must calculate the ‘substantiated amount’ of the demand in accordance with the formula prescribed in s 459H(2). Section 459H(3) provides that where the substantiated amount is less than the statutory minimum, the Court must set the demand aside.

13 The following well-established statements of principle define what constitutes a genuine dispute for the purpose of s 459H(1) of the Act:

- (a) for a dispute to be ‘genuine’ it must be ‘bona fide and truly exist in fact’;⁶
- (b) ‘the grounds for alleging the existence of a dispute ... [must be] real and not

⁴ The term ‘statutory period’ is defined in s 9 of the *Corporations Act 2001* (Cth) as: ‘(a) if a period longer than 21 days is prescribed--the prescribed period; or (b) otherwise--21 days’.

⁵ An ‘offsetting claim’ is defined in s 459H(5) to be 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)’.

⁶ *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452, 464 (Northrop, Merkel and Goldberg JJ) (*‘Spencer Constructions’*), cited with approval by the Victorian Supreme Court of Appeal in *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)* [2015] VSCA 330 [49] (Kyrou, Ferguson and Kaye JJA) (*‘Malec’*).

spurious, hypothetical, illusory or misconceived’;⁷

- (c) the dispute must have a ‘sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile... Something “between mere assertion and the proof that would be necessary in a court of law” may suffice’;⁸
- (d) a genuine dispute may involve a ‘plausible contention requiring investigation’ and raising the same sort of considerations as the ‘serious question to be tried’ test that applies in the case of interlocutory injunctions;⁹
- (e) the Court should not uncritically accept statements about an alleged genuine dispute which are ‘equivocal, lacking in precision, inconsistent with undisputed contemporary documents ... or inherently improbable ...’;¹⁰
- (f) if the dispute appears to be something ‘merely created or constructed in response to the pressure represented by the service of the statutory demand’, then it is not advanced in good faith and will not be regarded as genuine;¹¹ and
- (g) whilst the underlying nature of the dispute about the existence of a debt ‘must be exposed’, the Court will not deal with the merits and nothing of substance will be decided.¹²

14 The above principles apply equally in the case of an application to set aside a statutory

⁷ *Spencer Constructions* 464, cited with approval by the Victorian Supreme Court of Appeal in *Malec* [49] (Kyrou, Ferguson and Kaye JJA).

⁸ *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* (2008) 66 ACSR 67, 79 [71] (Dodds-Streeton JA) (*‘TR Administration’*); *Malec* [49] (Kyrou, Ferguson and Kaye JJA).

⁹ *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601, 608 [31] (Beazley P, Meagher and Gleeson JJA) (*‘Britten-Norman’*); *Malec* [48] (Kyrou, Ferguson and Kaye JJA).

¹⁰ *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787 (McClelland CJ in Eq), cited with approval by the Victorian Supreme Court of Appeal in *TR Administration* 78 [64] (Dodds-Streeton JJA) and *Malec* [50] (Kyrou, Ferguson and Kaye JJA).

¹¹ *Creata (Aust) Pty Ltd v Faull* (2017) 125 ACSR 212, 224 [47] (Barrett AJA, with Gleeson and White JJA agreeing). See also *JJMMR Pty Ltd v LG International Corp* [2003] QCA 519 [18] (McPherson JA) where the same point was made in respect of an offsetting claim.

¹² *Quadrant Constructions Pty Ltd v HSBC Bank Australia Ltd* [2004] FCA 111 [4] (Finkelstein J). See also *Malec* [48] (Kyrou, Ferguson and Kaye JJA).

demand on the basis of an offsetting claim.¹³ In the case of an offsetting claim, the following additional principles also apply:

- (a) a genuine offsetting claim ‘means a claim on a cause of action advanced in good faith, for an amount claimed in good faith’.¹⁴ In this context, ‘good faith’ means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful;¹⁵
- (b) there must be some evidence to indicate the nature of the offsetting claim and the way in which it is calculated, including any loss which is said to arise;¹⁶
- (c) however, it is not necessary to particularise the offsetting claim to the last ‘dollar and cent’.¹⁷ The evidence need only be sufficient for the Court to make an estimate of the amount of the offsetting claim,¹⁸ which must be capable of being quantified in monetary terms.¹⁹

15 Section 459J of the *Corporations Act* is in the following terms:

- (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

¹³ See the discussion of the relevant principles by the Victorian Court of Appeal in the context of both genuine disputes and offsetting claims in *TR Administration* 79 [71] (Dodds-Streeton JA) and *Malec* [47]-[50] (Kyrou, Ferguson and Kaye JJA). See also *Britten-Norman* 609 [36] and 615 [70] (Beazley P, Meagher and Gleeson JJA) where the New South Wales Court of Appeal discussed the evidentiary threshold in establishing either a genuine dispute or offsetting claim under s 459H.

¹⁴ *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743 [18] (Palmer J) (*‘Macleay Nominees’*). See also *Edge Technology Pty Ltd v Lite-On Technology Corporation* (2000) 34 ACSR 301, 306-7 [29] (Santow J).

¹⁵ *Macleay Nominees* [18] (Palmer J).

¹⁶ *Ibid*; *Broke Hills Estate Pty Ltd v Oakvale Wines Pty Ltd* [2005] NSWSC 638 [30]-[31] (Gzell J); *Mayaman Developments Pty Ltd v TQ Constructions Pty Ltd* [2009] QSC 144 [22]-[23] (Daubney J).

¹⁷ *Elm Financial Services Pty Ltd v MacDougal* [2004] NSWSC 560 [19] (Barrett J).

¹⁸ *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 [90], (Pullin JA, with Newnes and Murphy JJA agreeing).

¹⁹ *Chase Manhattan Bank Australia Ltd v Osety Pty Ltd* (1995) 17 ACSR 128, 135 [30] (Lindgren J); *Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* (2006) 94 SASR 269, 284-5 [45] (Debelle J, with Besanko and Layton JJ agreeing); *No 96 Factory Bargains Pty Ltd v Kershel Pty Ltd* [2003] NSWSC 146 [27] (Barrett J).

statutory demand merely because of a defect.

- 16 Whilst the hurdle for establishing a genuine dispute or genuine offsetting claim is a relatively low one, an applicant must nevertheless satisfy the Court that such a dispute or offsetting claim exists on the balance of probabilities.²⁰ An applicant will fail to set aside a demand if its contentions are so devoid of substance that no further investigation is warranted.²¹

Genuine dispute grounds

- 17 It is convenient to firstly deal with the genuine dispute grounds raised by the plaintiff in support of its application.

Responsibility for paying defendant

- 18 Most of the plaintiff's material, and the hearing itself, was devoted to addressing the contention that it was Ms Li, as owner of the property, and not the plaintiff, who was liable to pay the debt claimed by the defendant. For the reasons set out below, I am unpersuaded by that argument.
- 19 *First*, taken as a whole, Amville's evidence regarding the circumstances and terms of this alleged arrangement is equivocal, lacking in precision and contradictory. In the first Duncanson affidavit, Mr Duncanson says that on or about 11 May 2021, he had a conversation at the property with both Ms Li as owner and Mr Skinder on behalf of the defendant, during which conversation 'Mr Skinder was told that the [o]wner would be responsible for payment for the works performed [by the defendant] pursuant to the [s]ubcontract, as she had already done with respect to the previous bricklayer and other trades.' Mr Duncanson says he 'used words to the effect that the [o]wner would be responsible for payment to Mr Skinder and Mr Skinder used words to the effect that he understood and agreed.' Critically, the first Duncanson affidavit does not detail Ms Li's alleged acceptance of that arrangement, despite the fact she is

²⁰ See Farid Assaf, *Assaf's Winding Up in Insolvency* (3rd ed, Lexis Nexis, 2021) ('*Assaf's Winding Up in Insolvency*') [6.25] citing *Re Speedy Loans Pty Ltd* [2014] VSC 273 [17] (Gardiner AsJ); *Moyall Investments Services Pty Ltd v White* (1993) 12 ACSR 320, 324 (Ryan J); *Southern Canola Producers Pty Ltd v Painter Griffith & Associates* (1997) 15 ACLC 956 (Santow J) and *Sterling Estates (SA) Pty Ltd v Bradley* (2000) 34 ACSR 177 [16] (Hamilton J).

²¹ *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd* [2002] NSWSC 411 [23] (Barrett J).

said to have been privy to the alleged conversation.

20 As owner of the property, Ms Li has given unequivocal evidence that she never had a conversation with Mr Duncanson and Mr Skinder in which it was agreed she would be responsible for payment of the defendant's invoice. It was only in the second Duncanson affidavit, in response to this evidence, that Mr Duncanson deposed to having a separate conversation with Ms Li (with no mention of Mr Skinder being in attendance) in which it was expressly agreed she would make payment to the defendant. Following this conversation, it is alleged that Mr Duncanson told Mr Skinder, in the presence of Ms Li, that Ms Li would be responsible for payment, and that Mr Skinder said words that he understood and agreed. Again, there is no evidence of Ms Li confirming the correctness of that arrangement in the presence of representatives of both the plaintiff and the defendant. It is also unclear why Mr Duncanson did not mention the alleged separate conversation with Ms Li in his earlier affidavit. This important omission undermines the genuineness of the dispute now sought to be raised.

21 Mr Duncanson's revised account is also contradicted by his own evidence in the second Duncanson affidavit. He says that on or about 18 or 19 May 2021, Mr Skinder approached him at the property and told him he was concerned he would not be paid and therefore he required payment for works to date. Mr Duncanson says he told Mr Skinder that he was entitled to payment only upon completion of the work. He goes on to say that:

Purely to keep the job moving I forwarded Mr Skinder's invoice to the Owner. I maintained at all times that Mr Skinder was entitled to be paid only upon completion of the works. However, if the Owner happened to be willing to pay the invoice at this time, this would keep Mr Skinder performing the works.

22 This evidence undermines Amville's contention that Ms Li had expressed prior agreement to pay the defendant.

23 *Secondly*, the contemporaneous written record simply does not support Amville's contention that there is a genuine dispute about whether it was the plaintiff or Ms Li who was to pay the defendant for its bricklaying works. Although Amville places

much reliance on an email from Mr Duncanson to Ms Li and her project manager Mr Jim Hu, dated 21 May 2022 requesting that Ms Li pay the defendant, the response from Mr Hu later that day is non-committal and simply acknowledges receipt of the defendant's claim. Mr Hu also takes the opportunity to remind Mr Duncanson to remit payment to a number of other contractors in circumstances where Ms Li had already provided Amville with the necessary funds to do so. In any event, as already set out, Mr Duncanson has explained that he sent the defendant's invoice to Ms Li '[p]urely to keep the job moving' and that if Ms Li 'happened to be willing to pay the invoice' it would enable the continuation of the bricklaying works.

24 Further, Amville's contention that it was agreed Ms Li would pay the defendant is entirely at odds with a series of text messages sent and received by the directors of Amville. At 2:36pm on 20 May 2021, Mr Duncanson sent Mr Skinder a text message telling him to direct the defendant's invoice to 'Amville Constuctions, Job 6 grevillia crt Glen Waverley Amvilleconstructions@gmail.com'. Mr Skinder did so around 3:47pm that same day. At the same time, he sent Mr Duncanson a text message notifying him that the invoice had been sent and requesting remittance. Mr Duncanson simply responded with an '👉' emoji showing the index finger and thumb touching to make an open circle which, in this context, I take to mean 'ok'. It constitutes an affirmative response. On 22 May 2021, Mr Skinder sent Mr Duncanson a text message to follow up on payment. Mr Duncanson responded by stating the defendant would get paid the next day. After following up with Mr Duncanson on 27 May 2021, Mr Skinder was referred to Mr Hu, Ms Li's project manager. Mr Hu advised Mr Skinder that Ms Li had made the relevant progress payment to Amville, which meant it should be in a position to pay the defendant.

25 By early June 2021, Mr Skinder was contacting Amville's other director, Mr Zaravia for payment. On 1 June 2021, Mr Skinder informed Mr Zaravia by text message that he had spoken to Mr Hu, who was 'not happy' and requested that Mr Zaravia call Mr Skinder. Mr Zaravia responded by relevantly saying '[i]t's none of his business the agreement you and I come up with. I'm really getting fed up with his bullshit'.

Mr Skinder responded by saying that if payment was not made straight away, Amville would not be able to receive its lock-up payment. As Mr Zaravia explains, the brickwork had to be completed before a lock-up stage could be finalised and payment made to Amville by Ms Li. He interpreted Mr Skinder's text to be a threat to not complete any further brickwork until payment was made, knowing it would disentitle Amville from the lock-up payment.

- 26 On 1 June 2021, Mr Zaravia sent a text to Mr Hu seeking a confirmation that a renderer would be paid by Ms Li, failing which the work would need to be postponed. Importantly, Mr Zaravia said that he had already spoken to Mr Skinder and 'told him [Amville] was responsible for his current bill'. Whilst Mr Zaravia says he sent this message to Mr Hu in frustration because tradespersons were not getting paid by the owner, the text message certainly suggests Amville had accepted responsibility to pay the defendant. Importantly, Mr Zaravia forwarded his text message on to Mr Skinder.
- 27 According to Mr Skinder's chronology, on 6 June 2021, he again telephoned Mr Zaravia chasing payment and was threatened by Mr Zaravia with words to the effect of: 'come to the job site and I'll beat your head in'. Mr Zaravia denies using these words and says that in fact Mr Skinder threatened to visit him and Mr Duncanson at their respective homes. On or around 7 June 2021, Mr Skinder again followed up Mr Zaravia for payment of the defendant's invoice by way of text message. Mr Zaravia responded by seeking to reassure Mr Skinder that the defendant's invoice would be paid by either Amville or by Mr Hu on behalf of Ms Li.
- 28 In none of the above text messages, did either of Amville's directors refer to any prior agreement between the defendant, Amville and Ms Li to the effect that Ms Li would be responsible for payment of the defendant.
- 29 *Thirdly*, Mr Skinder deposes that neither Ms Li nor her project manager, Mr Hu, spoke to him about engaging the defendant to perform the works, or about paying the defendant directly for the works.

30 *Fourthly*, as conceded by the plaintiff's counsel, evidence that Ms Li had made payments to other tradespersons who worked on the project would be inadmissible in proving the existence of any agreement under which she was responsible for paying the defendant. Given the operation of the parole evidence rule, this extrinsic evidence could not be used as an aid of construction of such an agreement. Nor would payment by Ms Li of other tradespersons evince an intention by her to be bound by a specific agreement to pay the defendant. I do not accept the plaintiff's submission that the evidence of other payments by Ms Li lends weight to the genuineness of the alleged dispute. At best, it is tangential and should be considered in the context of evidence given by Ms Li that she organised for direct payment of a number of specific contractors following specific requests by Mr Zaravia of the plaintiff as a favour to assist with the plaintiff's cashflow and to enable the faster completion of the project. For example, by text message from Mr Zaravia to Mr Hu on 20 November 2020, Mr Zaravia requested that Ms Li pay the roof plumber, scaffolder and roof tilers as a favour. In any event, I note that the invoices directly paid by Ms Li total just over \$55,000. By contrast, the contract between Amville and Ms Li had a total contract price of \$845,000. In other words, the payments by Ms Li of other contractors constitute a fraction of the overall project costs. No great significance should be attached to this evidence.

Contracting party

31 As already noted, Amville contends that any contract was between Amville and Mr Skinder but not with the defendant itself. In this regard, Mr Duncanson says that at no time did Mr Skinder advise of the existence of the defendant or that he would be entering into a subcontract under an incorporated entity. Mr Duncanson says that the first time he became aware of the existence of the defendant was upon receipt of its invoice on or about 20 May 2021. He also says the first time he became aware of the defendant's hipages profile was when it was annexed to Mr Skinder's affidavit.

32 It is clear that a dispute about a contracting party or debtor/creditor relationship may

constitute a genuine dispute for the purpose of s 459H(1) of the Act.²² It is not the Court's task to express a view on the ultimate question of the identity of the contracting party, but rather to consider only the question of whether there is a genuine dispute.²³ The question of construction involved in determining which person or entity is party to an arrangement, is properly a matter for a trial on the merits.²⁴ However, a plaintiff in an application under s 459G of the Act still has the onus of establishing the existence of a genuine dispute about the correct contracting party on the balance of probabilities. Were it otherwise, an applicant could succeed in setting aside a statutory demand simply by asserting, in the absence of, or contrary to, objective evidence, that there was no contract as between it and the named defendant but that there was instead an agreement between the plaintiff and another party.

33 In my view, the suggestion that there is a genuine dispute about whether Amville's contract was with the defendant or Mr Skinder is spurious and not a plausible contention requiring investigation. Aside from Amville's bare assertions, there is no objective evidence before the Court consistent with the proposition that Amville had a subcontract with Mr Skinder personally and not with the defendant.²⁵ Nor is there evidence of any prior discussions between the parties which raised the question as to who was the correct contracting party.²⁶ This is not a case where the ultimate resolution of the issue as to the identity of the contracting parties is finely balanced on the evidence.²⁷

34 It is entirely unremarkable that a tradesperson like Mr Skinder would operate through a corporate entity. As the defendant's sole director and shareholder, he is its public face. The defendant's hipages profile is clearly in the defendant's name and simply refers to Mr Skinder as a contact person. It was through the hipages platform that the

²² See *Re Heron Park Pty Ltd* [2008] VSC 248 [48]-[53] (Robson J) ('*Heron Park*').

²³ *C Tina Pty Ltd v Warners Electroplating Pty Ltd* [2019] VSC 66 [61] (Gardiner AsJ) ('*C Tina*') citing *Spacorp Australia Pty Ltd v Myer Stores Ltd* [2001] VSCA 89 [3]-[4] (Brooking and Charles JJA).

²⁴ *Re Warrego Energy EP469 Pty Ltd* [2020] NSWSC 980 [25] (Black J).

²⁵ Cf the position in a number of other cases such as *Heron Park*; *Parkview v Powderlys* [2001] NSWSC 908; *Cameron Stockbrokers Pty Ltd v GBST Holdings Pty Ltd* [2003] NSWSC 174.

²⁶ Cf the position in *Fina v Hills* [2003] NSWSC 961.

²⁷ Cf the position in *C Tina*.

defendant was apprised of the work required by Amville and how contact between the parties was facilitated. Whether Mr Duncanson took the time to look at the defendant's profile is beside the point. Mr Skinder also gives uncontroverted evidence that four people performed work at the property on behalf of the defendant (himself, two other bricklayers, and a labourer) which counts against the notion that Mr Skinder had contracted as a sole proprietor. Tellingly, neither Mr Duncanson, nor anyone else from Amville, queried the contracting party at the time the defendant's invoice was sent on 20 May 2021 or at any time prior to the issuing of the statutory demand. Further, the point was not taken in a letter sent by Amville's solicitors to the defendant's solicitors on 4 October 2021, following service of the statutory demand. The first time it was ostensibly raised was in the first Zaravia affidavit sworn on 6 October 2021. The contention that there is a genuine dispute about the identity of the party with whom Amville contracted appears to have been merely created or constructed in response to the pressure arising from service of the demand. It is not a contention which appears to be advanced in good faith.

Hours worked

- 35 Amville submits there is a genuine dispute about the amount claimed by the defendant in its statutory demand because the defendant has overcharged for work performed at the site and did not attend for the number of hours claimed on the relevant invoice. In the first Duncanson affidavit, Mr Duncanson deposes that whilst the defendant's invoice claims there were workers on site for nine hours a day, based upon his observations he believes that Mr Skinder and his workers were not on site for nine hours on at least two days in question. This contention is lacking in precision and does not rise above mere assertion. Mr Duncanson does not specify which days were not worked for the full nine hours or what were the actual number of hours worked on those days. Further, on the defendant's evidence, Mr Duncanson was only on site for no more than 20 minutes a day and, by Mr Duncanson's later admission in

the second Duncanson affidavit, he was only present for approximately one hour at a time.

Alleged defective and incomplete brickwork

- 36 The defendant also asserts there is a genuine dispute about whether the defendant is entitled to payment in circumstances where its work is allegedly defective and incomplete. Mr Duncanson deposes that 25% of the work agreed to be completed was not completed and that the works that were completed are defective. Whilst Mr Skinder gave evidence it was agreed with Mr Duncanson that the defendant would invoice weekly and was entitled to suspend all further bricklaying works until full payment of any outstanding invoice was made, Mr Duncanson disputes those terms and says it was agreed that an invoice would only be rendered upon completion of the job.
- 37 The plaintiff also places reliance upon a building inspection report dated 9 August 2021 commissioned by Ms Li in the context of her dispute with the plaintiff (**'the building inspection report'**).²⁸ The report catalogues a litany of defective works in respect of the buildings which were to be constructed at the property by Amville. The defective building works identified by Ms Li's building inspector include: defective brickwork on the front entry brick pier of unit 1; defective brickwork flashing on top of windows; misaligned brick parapets on units 1 and 2; improper installation of sisalation of the brick veneer wall in the dining room of one unit; incorrect brickwork installation of a bedroom wall for one unit; and incomplete brick window sills and a failure to clean the brickwork of excess mortar on all units. A schedule of the costs of rectification of the defective and incomplete works prepared by the same building inspector and dated 17 August 2021 (**'the rectification costs schedule'**) suggests the total cost to complete and remediate the brickwork amounts to \$11,375.²⁹

²⁸ Exhibit JZ-2 to affidavit of Johnny Zaravia sworn 7 December 2021, 65.

²⁹ Exhibit JZ-2 to affidavit of Johnny Zaravia sworn 7 December 2021, 134-5.

38 There are a number of difficulties with this aspect of the plaintiff's application. The brickwork said to be defective or incomplete was only specifically identified at the hearing of the matter and not in the affidavit material filed by the plaintiff. Amville's evidence is also complicated by the fact that it engaged other bricklayers to perform works at the property. Mr Skinder has given uncontradicted evidence that when he first attended at the property, 75% of the brickwork was already complete, although the back unit had the most incomplete bricklaying and the parapets were also unfinished. He also gave uncontroverted evidence that Mr Duncanson had told him the plaintiff had engaged another bricklayer to undertake works at the property since Mr Skinder first attended on 11 May 2021. It seems, therefore, there were at least three bricklayers engaged to perform works on the property (including the first bricklayer with whom the plaintiff had a dispute). The plaintiff makes no attempt to identify which defective or incomplete brickwork should be attributed to the defendant as opposed to the other bricklayers. Further, there is no evidence before the Court to suggest that the plaintiff raised any concerns about the quality and extent of the work undertaken by the defendant prior to or following the issuing of its invoice or before service of the statutory demand. Nor is there any contemporaneous evidence to suggest the plaintiff ever insisted on the defendant's representatives attending the property to complete outstanding work prior to paying its outstanding invoice.

39 Notwithstanding these obvious deficiencies, on the basis of the objective evidence contained within the building inspection report and rectification costs schedule, I am satisfied that the plaintiff has belatedly, but *barely*, cleared the evidentiary hurdle in establishing the existence of a genuine dispute that the defendant is not entitled to payment for a *portion* of the alleged defective and incomplete brickwork. The information now identified by the plaintiff gives the dispute a *prima facie* plausibility and a sufficient factual basis to be something more than mere assertion. It is not implausible that some of the identified defects in the brickwork are attributable to the defendant. However, given the number of bricklayers who were engaged by the plaintiff and the fact that 75% of the brickwork had been completed

by the time the defendant commenced work, it is inherently improbable that responsibility for *all* the defective and incomplete brickwork itemised in the building inspection report and rectification costs schedule will fall at the feet of the defendant. Doing the best I can with the information before the Court, I am prepared to proceed on the basis that there is a genuine dispute in relation to **\$3,080** of the amount claimed in the defendant's invoice and the statutory demand. This sum represents the cost of rectifying the parapets (\$315 according to the rectification costs schedule) and 25% of the remaining \$11,060 for rectification and completion of the brickwork. Noting that the statutory demand is for the sum of \$11,176, the 'substantiated amount' for the purposes of ss 459H(2) and (5) of the Act is **\$8,096** and the statutory demand is varied under s 459H(4) accordingly.

Whether offsetting claim for defective and incomplete work

40 Given my finding that there is a genuine dispute in respect of the defendant's entitlement to payment for a portion of the alleged defective and incomplete brickwork, it is unnecessary to deal with the offsetting claim now sought to be advanced in respect of those same matters. This offsetting claim was raised in the alternative. Had I been required, I would have ultimately found, for the same reasons discussed above, that the plaintiff has barely succeeded in demonstrating the existence of a genuine offsetting claim for the amount of \$3,080. However, I repeat my comments in relation to the deficiencies in the evidence in support of the offsetting claim and the way in which it was advanced. I also note that this offsetting claim was only formulated at the final hearing of the matter itself. These are all matters that may be relevant to the Court's disposition on costs.

Whether statutory demand should be set aside for 'some other reason' under s 459J(1)(b)

41 Finally, I come to the plaintiff's last contention that the statutory demand should be set aside for 'some other reason' under s 459J(1)(b) of the Act because it was accompanied by a covering letter which made an improper demand for payment of legal costs. The plaintiff submits that:

- (a) demands for payment of legal costs should not be made unless there is a

contractual right for those payments; and

- (b) demands made without a contractual basis constitute a breach of rule 34 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* which stipulates that a lawyer must not in any communication mislead another person or make any statement which grossly exceeds the legitimate exertion of their client's rights.

42 I accept the defendant's submission that the plaintiff is prevented from raising this ground because it was not identified expressly, or by reasonable inference, in the s 459G affidavit filed in support of the application within the statutory period, being the first Zaravia affidavit.³⁰ The relevant letter was neither referred to nor annexed to the first Zaravia affidavit. The letter itself is contained in an exhibit to the Vo affidavit filed by the defendant. The first time an argument about the letter was raised by the plaintiff was in its written submissions dated 8 December 2021.

Conclusion

43 By reason of the above matters, the statutory demand will be varied by substituting the sum of **\$8,096** for the sum of \$11,176. There will be an accompanying declaration that the demand had effect, as so varied, from when the demand was served on the plaintiff. The demand has been varied on the basis there is a genuine dispute the defendant is not entitled to payment relating to a portion of the defective and incomplete brickwork (or because there is an offsetting claim arising from the same matters). The plaintiff's remaining grounds have failed. I will hear the parties on the formulation of the necessary orders, including the question of costs.

³⁰ See *Sceam Construction Pty Ltd v Clyne* [2021] VSCA 270 [38], [42].

CERTIFICATE

I certify that this and the 17 preceding pages are a true copy of the reasons for judgment of Hetyey AsJ of the Supreme Court of Victoria delivered on 17 February 2022.

DATED this seventeenth day of February 2022.



Associate