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

Not Restricted

S CI 2018 01037

B.S.B. MINING PTY LTD (ACN 132 203 108) Plaintiff

v

RANGER RESOURCES PTY LTD (ACN 603 852 213) Defendant

JUDGE:	RANDALL AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	11 April 2018 and supplementary submissions dated 20 April 2018
DATE OF JUDGMENT:	24 May 2018
CASE MAY BE CITED AS:	B.S.B. Mining Pty Ltd v Ranger Resources Pty Ltd
MEDIUM NEUTRAL CITATION:	[2018] VSC 263

CORPORATIONS LAW – Statutory demand – Application to set aside – *Corporations Act 2001* (Cth), s 459J(1)(b) – Some other reason – Proceedings in District Court of Queensland – Claim under guarantee – Plaintiff to this application not a party to the District Court proceeding – Abuse of process – Some other reason why the statutory demand ought to be set aside.

GENUINE DISPUTE – *Graywinter* principle – Was the 21 day affidavit an affidavit in support – Adjournment to augment.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr A Burnett	Roberts Gray Lawyers
For the Defendant	Ms R Zambelli	Oakley Thompson & Co

HIS HONOUR:

1 The plaintiff's originating process filed 22 March 2018 seeks to set aside the defendant's statutory demand dated 28 February 2018. The application was made pursuant to s 459G of the *Corporations Act 2001* (Cth) ('the Act').

2 The plaintiff's originating process was supported by an affidavit sworn by the director of the plaintiff, Mr Mark Brunner. The affidavit sets out an argument that the statutory demand ought to be set aside on the basis of some other reason under s 459J(1)(b) of the *Act* and that the plaintiff has an offsetting claim being the value of two gold nuggets in the sum of $2,000. The defendant quickly conceded that the offset ought to be allowed and the statutory demand rewritten to take that into account on the basis that the sum was *de minimis* and the cost of arguing about the same exceeded the amount of the offset. I will allow the offset.

3 During the course of argument, it also emerged that the plaintiff might be able to raise a 'genuine dispute' if the same could be verified by a supplementary affidavit. I requested the parties to file written submissions to assist me to determine if an adjournment ought to be permitted to allow the filing and service of a supplementary affidavit.

Some other reason

4 The schedule to the statutory demand identifies the debt as follows:

> On 27 November 2016 the Creditor and the Company entered into a Loan Agreement pursuant to which on 30 November 2016 the Creditor advanced the amount of $500,000 to the Company. In breach of clauses 2.3 and 3.1(a) of the Loan Agreement by 6 September 2017 the Company had failed to repay the amount of $500,000 due to be paid to the Creditor under the Loan Agreement. On about 23 or 24 November 2017, the Company made a part payment to the Creditor in the amount of $250,000, leaving a balance due and payable under the Loan Agreement of $250,000. In continued breach of clauses 2.3 and 3.1(a) of the Loan Agreement the Company has failed to make payments to the Creditor of the amount of $250,000.[1]

5 Prior to signing and serving the statutory demand dated 28 February 2018, the creditor filed a proceeding in the District Court of Queensland against Mr Brunner. That proceeding was filed on 11 December 2017. Mr Brunner is the sole defendant.[2]

6 The claim by the creditor against Mr Brunner relies upon payment pursuant to a guarantee.

---

1 Affidavit of Mark Jonathan Irving Brunner affirmed 22 March 2018, exhibit 'MJIB-1'.

2 Ibid Exhibit 'MJIB-2'.

Clause 9 of the Loan Agreement provided for Mr Brunner to unconditionally and irrevocably guarantee to the creditor the due payment of monies owed under the Loan Agreement. The statement of claim recites the Loan Agreement and its breach as a gateway to establishing liability under the guarantee. It is not a claim for debt under the Loan Agreement. The plaintiff is not a party. The payment of $250,000 on 24 November 2017 was acknowledged. The statement of claim sets out breach of the guarantee and claims the sum of $250,000 as a debt pursuant to the guarantee.

7 Paragraph 7 of the affidavit sworn by Mr Brunner sets out that the creditor 'is seeking to have the same dispute resolved in two separate proceedings.'

8 The plaintiff relied upon *Perlake Pty Ltd v Finance & Mortgage Corporations (NSW) Pty Ltd.*[3] In that application to set aside the statutory demand, the claim by the creditor against the plaintiff was for an alleged debt described in the schedule to the demand as follows: 'Fees for arranging finance'. Prior to the service of the statutory demand, the creditor had instituted proceedings in the local court of New South Wales against John Gray and Patricia Gray.

9 Master McLaughlin noted:

> The proceedings have their origin in the desire of a Mr and Mrs Stig to purchase a house property in the Blue Mountains. They required finance for that purpose and consulted with Mr Neil Macdonald, who is a director of the defendant company. The defendant company apparently is in the business of arranging finance secured by mortgage for the purchasers of real property.
>
> Mr and Mrs Stig, as it is asserted by Mrs Stig, on the advice of Mr Macdonald decided that they would purchase the property in the name of a company and, for that purpose, the plaintiff company Perlake Pty Ltd was incorporated. The directors of that company were not Mr and Mrs Stig personally, but the mother and step-father of Mr Stig, being John Charles Gray and Patricia Dawn Gray.[4]

10 The local court proceedings against John Gray and Patricia Gray claimed that:

> The plaintiff's claim is for moneys payable by the defendant to the plaintiff for work done by the plaintiff as agent for the defendant in making application for and being successful in its securing of an offer of a loan to the defendant and for commission and reward due from the defendant to the plaintiff in respect thereof…[5]

11 Counsel for the creditor conceded that the subject matter of the claim in the NSW local court

---

3 (1997) 15 ACLC 76.
4 Ibid [77].
5 Ibid [80].

was identical to the subject matter of the statutory demand.

12 Master McLaughlin had already called into question the validity of the affidavit accompanying the statutory demand in circumstances where he was not satisfied that the deponent could have verified the demand and, in particular, deposed that there was no genuine dispute. Once it was accepted that the amount claimed against Mr and Mrs Gray was the same as the amount claimed by the company in the statutory demand, Master McLaughlin said as follows:

> In those circumstances I do not see how that deponent can possibly have been in a position to state that to the best of her knowledge and belief there was no genuine dispute about the existence of the debt.
>
> The defendant company itself must be taken to have considered that there was a dispute about the existence of a debt to it in this amount by Perlake Pty Limited when it had sued two directors of that company in their personal capacity for that very amount.[6]

13 Master McLaughlin concluded:

> Further, I consider that the service of the statutory demand upon the company for the same alleged debt in respect to which the alleged creditor has instituted and has maintained on foot a claim against two private individuals evidences not merely an abuse of process but also some other reason why the demand should be set aside within the provisions of section 459J(1).[7]

14 Notwithstanding, the plaintiff's submission, I conclude that *Perlake* is distinguishable from the current circumstances. The proceeding relying upon the guarantee is a distinct claim properly brought against Mr Brunner alone. The debtor is not a necessary party to the action on the guarantee. The reference to the Loan Agreement in the statement of claim is a step to establish that the rights under the guarantee have arisen. It is not referred to as a means of establishing a disputed debt.

15 *In the matter of Modern Wholesale Jewellery Pty Ltd*[8] Black J said:

> In my view, the decision in *Perlake Pty Ltd v Finance & Mortgage Corp (NSW) Pty Ltd* above may be distinguished, in some respects, from the present case since it involved the issue of a creditor's statutory demand on a company for the same debt that was claimed in other proceedings against individuals and, as Ward J subsequently observed in *King Furniture Australia Pty Ltd v Higgs* [2011] NSWSC 375, involved inconsistent claims and court proceedings there instituted before (rather

---

6 Ibid.
7 Ibid.
8 [2017] NSWSC 236.

> than, in the case of the First Modern Demand, shortly after) a creditor's statutory demand was issued. In this case, while the First Modern Demand was issued to Modern and claims are also made against individuals in the District Court proceedings, there is no necessary inconsistency between the claim against Modern and the claim against those individuals where WYI seeks to rely on guarantees alleged to have been given by Modern and those individuals.[9]

16 In *Modern Wholesale Jewellery Pty Ltd,* the creditor claimed against Modern, Global Austral Pty Ltd (another recipient of a statutory demand) and five individuals. The claim against Modern was in debt. The claim against the five individuals was pursuant to the guarantee of that debt.

17 Black J referred to earlier decisions in which the existence of parallel proceedings, including the issue of creditor's statutory demand had been treated as involving abuse of process.

18 Black J then referred to the decision of Barrett J in *Re Zarzar Pty Ltd.*[10] At [22] Barrett J said:

> While there is no explicit rule precluding parallel resort by a creditor to both the statutory demand procedure and debt recovery proceedings, the reality is that it is an abuse of the statutory demand process to continue to press and rely on a demand while at the same time suing for the relevant debt or debts. This is because the two procedures have different objectives. The aim in serving a statutory demand is not to recover the debt (although eliciting payment may become a welcome by-product) but to obtain the benefit of a presumption of insolvency through non-compliance with the demand. The aim of recovery proceedings, by contrast, is to compel payment and obtain monetary satisfaction. The same reasoning holds good, in my view, when the alleged indebtedness is asserted by the putative creditor by way of set-off defence in proceedings commenced by the alleged debtor. Again, the putative creditor abandons its stance of waiting for the expiration of a statutory period in order to obtain a presumption of insolvency (or, as an alternative, to obtain voluntary payment by the debtor in the meantime) in favour of positive assertion of the right to be paid as a means of obtaining recovery by way of reduction of a liability.

19 In *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd,*[11] Barrett J noted that:

> Section 459J(1)(b) creates a remedial jurisdiction. The Court of Appeal of the Australian Capital Territory said this of the provision in *Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation* (2005) 157 ACTR 22 at [27]:
>
> What is contemplated by s 459J(1)(b) is a discretion of broad compass which extends to conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice: *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302 at 317 to 318.[12]

---

9 Ibid [27].
10 [2017] NSWSC 93.
11 [2007] NSWSC 1143.
12 Ibid [28].

20 I determine that:

(a) Service of a statutory demand is appropriate if there be no genuine dispute.

(b) The District Court proceeding was a necessary and appropriate proceeding to recover pursuant to the guarantee. In the District Court proceeding, the creditor does not seek to litigate whether the plaintiff is indebted to it. The relevance of the Loan Agreement is that it is a step in establishing liability under the guarantee.

(c) The plaintiff is not a party to the District Court proceeding.

(d) The service of the statutory demand after the filing of the District Court proceeding does not constitute an abuse of process.

(e) Mr Brunner had not sought to join the plaintiff to agitate and seek relief against the creditor with respect to the Loan Agreement. Accordingly, *Zarzar* and *Modern Wholesale Jewellery Pty Ltd* are distinguishable. In any event, it cannot be said that the creditor has abandoned the opportunity to obtain a presumption of insolvency.

(f) The creditors' conduct in pursuing a remedy against the guarantee and seeking to obtain the presumption that the plaintiff is insolvent cannot be described as unreasonable, an abuse of process or as giving rise to a substantial injustice.

Graywinter Principles

21 With respect to the Queensland proceeding, Mr Brunner, in his affidavit made 22 March 2018, sets out:

> I have instructed my solicitors to brief counsel and expect to file a defence to the claim by 2 April 2018.

22 Mr Burnett of counsel for the plaintiff was very cautious and very proper in how he put his submissions on behalf of the plaintiff with respect to whether or not the plaintiff ought to be permitted to file a further affidavit concerning the defence filed in the District Court. Both in

submissions and in the further outline of submissions requested by me, Mr Burnett properly conceded that:

> As Mr Brunner had yet to receive advice from his Queensland counsel, he deposed to the existence of the parallel proceeding, exhibited the District Court claim, and foreshadowed that he had instructed his solicitors to brief counsel. Mr Brunner further deposed that he expected to file a defence. Mr Brunner's expectation and the existence of the parallel proceeding is a "plausible contention requiring further investigation". Additionally, the Court can readily find "an issue deserving of a hearing" as the exhibited pleading raises liability for the loan as an issue for the District Court to determine. [13]

23 Mr Burnett's written submissions continued:

> The Court should also have regard to the defendant's premature assertion that there was no genuine dispute. This is surprising given it was made before the time to file a defence in the District Court proceeding. The defendant's pleading raised liability for the loan in its pleading. Until a defence was filed or time to file expired, it remained, and subject to the Court having regard to the defence, remains an issue to be determined. The proper course for the defendant would have been to wait until it knew whether Mr Brunner joined issue with its claim. …[14]

24 During the course of submissions it became apparent that Mr Burnett had a copy of the defence with him although he did not seek to tender the same. Over objection from the creditor's counsel, I sought that the defence be handed up to me so that I could determine whether or not it would be an arid exercise to permit an adjournment. In any event, s 157 of the *Evidence Act 1995* (Cth) (or s 157 of the *Evidence Act 2008* (Vic)), permits me to have regard to a document which purports to be a copy of a document lodged with an Australian Court and purports to be sealed by that Court and signed by a registrar. The copy of the defence bore the seal of the District Court of Queensland.

25 On perusal of the defence filed in the Queensland District Court, I could distil the following:

(a) Mr Brunner did not dispute the loan agreement and the guarantee nor the advance or part repayment;

(b) Mr Brunner primarily relied upon an estoppel which he contended prevented the creditor from calling up the loan;

(c) Mr Brunner had not sought to join the plaintiff in this proceeding (B.S.B.

---

13 Plaintiff's Submissions, 20 April 2018, [4].

14 Ibid [5].

Mining) as a party to the proceeding.

The 21 day affidavit

26 The *Graywinter* principle was considered in the Western Australian Court of Appeal in *Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 3]*[15] the Court of Appeal said at [62] referring to *Graywinter*:

> In that case, his Honour referred to "minimum requirements" for a supporting affidavit. His Honour said that in an application that alleges a "genuine dispute" about the existence or amount of a debt (s 459H(1)(a)) the supporting affidavit must "disclose facts showing there is a genuine dispute between the parties. A mere assertion that there is a genuine dispute is not enough. Nor is a bare claim that the debt is disputed sufficient". [citation omitted]

27 At [63] the Court of Appeal referred to Parker J in *Financial Solutions* as follows:

> In that case, Parker J said that there was no settled and universal principle, which must be satisfied by an affidavit before it can be accepted as "supporting the application" within the meaning of s 459G(3)(a) and as satisfying the jurisdictional requirement being considered. The statutory yardstick remains that the affidavit should support the application. The precise nature of the application may well influence what this requires. [citation omitted]

28 In *Dromore Fresh Produce Pty Ltd v W Paton (Fertilisers) Pty Ltd,*[16] Young J held that an affidavit by the plaintiff's solicitor which simply said that the plaintiff disputed that it was indebted to the defendant, was insufficient to satisfy the statute.

29 In *Process Machinery v ACN 057 260 590,*[17] Barrett J said:

> It is thus reasonably clear that the relevant concept of "raising" or "identifying" a particular ground involves some verbal delineation of that ground in the s 459G(3)(a) affidavit.[18]

30 Barrett J further said at [22]:

> The real point is that the application and affidavit filed and served within the 21 day period must fairly alert the claimant to the nature of the case the company will seek to make in resisting the statutory demand. The content of the application and affidavit must convey, even if it be by necessary inference, a clear delineation of the area of controversy so that it is identifiable with one or more of the grounds made available by ss 459H and 459J....

---

15 [2014] WASCA 132.
16 (1997) 23 ACSR 230.
17 [2002] NSWSC 45.
18 Ibid [21].

31 In *Hansmar Investments Pty Ltd v Perpetual Trustee Company Ltd*,[19] White J queried the rigidity of the test set out by Barrett J and stated at [28]:

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

32 Barrett J came around to the same view after considering his judgment in *Elm,* the judgment of Austin J in *POS Media Online Ltd v B Family Pty Ltd*[20] and the judgment of White J in *Hansmar*:

> [His Honour] concluded that his observation in *Elm* to the effect that the ground of challenge to a statutory demand must be raised expressly in, or appear by necessary inference from, the supporting affidavit, was 'too strict' and that the correct approach was to treat a ground as having been raised within the 21 day period 'if the ground is evident from the supporting affidavit, even if only because it can be discerned from some annexed document the content of which "reveals" it.'[21]

33 I also refer to the submissions on behalf of the defendant and adopt the same as follows:

> In recent years, our own Court of Appeal has found that a supporting affidavit:[22]
>
> (a) must convey "a clear delineation of the area of controversy";[23]
>
> (b) must disclose "the general nature of the case being advanced";[24] and
>
> (c) must "fairly alert" the respondent to the nature of the case made in support of the application" and "must fairly notify the respondent of the evidentiary basis for a submission … on the particular ground upon which the applicant seeks to rely".[25]

34 *In the matter of Australian Institute of Fitness (VIC & TAS),* Barrett AJA said:[26]

> The principle associated with *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* [1996] FCA 822; 70 FCR 452 confines a s 459G applicant to grounds revealed by the supporting affidavit. The ground relied on must be evident from the affidavit, even if only from an annexure which reveals it. A mere reference to some other application having been made, albeit in proceedings between the same

---

19 [2007] NSWSC 103.
20 (2003) 21 ACLC 533.
21 *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (In Liq)* [2015] VSCA 330 [63].
22 Defendant's Submissions, 20 April 2018, [4].
23 *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in Liq)* [2015] VSCA 330 [59].
24 *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* (2017) 118 ACSR 592 [62].
25 *Goconnect Ltd v Sono Strategic International Ltd (In Liq)* [2016] VSCA 315 [40].
26 [2016] NSWSC 1143 (per Barrett AJA).

> parties, does not reveal anything about the content of other documents filed in connection with the other proceedings. In the *Britten-Norman* case, the Court of Appeal accepted that these restrictions apply to a s 459J case as well as a s 459H case. The fact that a document filed in connection with the instalment order application referred to the $590,000 indebtedness, without in some way making the connection with the s 459G application, would be insufficient revelation of a ground of challenge of the kind that AIVT seeks to advance.[27]

35 Accordingly, the mere production of the defence, even if it were able to be relied upon as giving rise to a 'reasonably available inference', is insufficient to demonstrate a 'genuine dispute' as the pleading has been produced to this court after 21 days since the service of the statutory demand. Hence the question of an adjournment arises if it is possible to establish that the 21 day affidavit is a sufficient delineation of the issue.

The principles with respect to an adjournment to augment

36 In *Missay Pty Ltd v Seventh Cameo Nominees Pty Ltd (In Liq),*[28] Mandie J said:

> If a ground in support of an application to set aside a statutory demand is not identified within the period provided by the *Corporations Law* then it seems to me that it cannot be relied upon out of time upon appeal....[29]

37 In *D & S Group of Companies Pty Ltd v O'Connor Investments Pty Ltd,*[30] Perry J said:

> It seems to be implicit in that observation and from the terms of s 459G(3) that if an affidavit is to be used in support of the application, it must be filed within the defined period of 21 days.
>
> It seems to me then that the affidavit of Mr Savvas having being filed and served well after the expiration of the period of 21 days, insofar as it raises any ground offered in support of the application not identified in the affidavit of Mr Gerovasilis filed within time, it could not be taken into account in determining the application. Furthermore, *David Grant* is authority for the proposition that there is no ability to extend the time limit.[31]

38 In *Energy Equity Corp Ltd v Sinedie Pty Ltd*,[32] Wallwork J said:

> In my view it now seems to be accepted that an affidavit filed outside the 21 day period which raises a new ground or grounds to set aside a statutory demand (as opposed to an affidavit which expands on grounds in an earlier affidavit which has satisfied the threshold test) cannot be used in an application of this nature. The *Corporations Law* operates throughout Australia and uniformity of approach is desirable.[33]

---

27 Ibid [41].
28 [2000] VSC 397.
29 Ibid [2].
30 (1997) 15 ACLC 1794.
31 Ibid [9].
32 [2001] WASCA 419.
33 Ibid [29].

Plaintiff's submission

39 The primary submission by the plaintiff's counsel was:

> Such information depends on the information available to the company at the time it is required to make the application: *Financial Solutions Australasia Pty Ltd v Predella Pty Ltd* (2002) 26 WAR 306, 308 [30].
>
> The *Graywinter* principle does not restrict reliance on evidence which was not known to the deponent of an affidavit: *In the matter of Spartan Sporting Goods Pty Ltd* [2017] NSWSC 1146 [10].[34]

40 In an ex tempore judgment *in the matter of Spartan Sporting Goods Pty Ltd*,[35] Black J was vexed with the issue of whether the '*Graywinter* principle' prevented subsequent reliance on material which could not have been known to the company at the time of making the s 459G application. Black J ultimately resolved the dispute by determining that the fact unknown at the time of the s 459G application, being the knowledge of the existence of a parallel proceeding filed by the creditor seeking to agitate the same debt claimed in the statutory demand, was a particular of the dispute raised by the company rather than a discrete and unconnected matter. In those circumstances Black J considered that the existence of the parallel proceeding could 'be raised consistently with the requirements of s 459G of the *Act*, as applied by the *Graywinter* principle.'[36]

41 Further, Black J said:

> I should add that I more readily reach this view where it avoids a result that seems to me highly inconvenient, for all parties and for the administration of justice. If I had reached the contrary result, and Spartan was not entitled to raise the existence of the proceedings which existed but which were not known to it, in an application to set aside the Demand, then the Court would have had to determine that application on a wholly artificial basis. If that was what s 459G of the *Corporations Act* required, then the Court would, of course, proceed in that way. Had the Court been required to proceed in that way, then its consequence would have been that the Court should have more readily declined to wind up Spartan, in any subsequent winding up application founded on the Demand, where all relevant matters had not been able to be raised in the application to set aside the Demand. The *Graywinter* principle would not have prevented that matter being raised, as a matter relevant to the exercise of the Court's discretion, in any subsequent winding up application. It would not have been in the interests of the parties, or the administration of justice, or consistent with the policies underlying the relevant provisions of the *Corporations Act*, that a dispute of that character, which the *Act* seeks to have determined in an application to set aside the Demand, should be deferred to the hearing of a winding up application.[37]

---

34 Plaintiff's Submissions, 20 April 2018, [3].
35 [2017] NSWSC 1146.
36 Ibid [10].
37 Ibid [11].

42 Consistent with the approach taken by Black J, I do not wish to proceed on a basis which might be described as 'artificial'. However, it must be stressed that the initial 21 day affidavit must set out a basis to demonstrate a genuine dispute as to the existence of the debt. That requirement is a jurisdictional requirement. If the initial affidavit does not support the s 459G application, I have no jurisdiction to permit a further adjournment to facilitate the filing of further affidavits. It is not a matter of exercising a discretion.

43 In *Financial Solutions,* Parker J gave the leading judgment. Anderson and Scott JJ agreed with the reasons set out by Parker J. In *Financial Solutions* the creditor, in the particulars of debt in the statutory demand, set out:

> Moneys owing pursuant to two loan agreements now consolidated made between the Company and the National Mutual Life Association of Australasia Ltd … assigned to the creditor by virtue of a deed of assignment …[38]

44 The 21 day affidavit relevantly set out:

> The applicant has not sighted the deed of assignment referred to in Annexure "AF-1" and being described as "moneys owing pursuant to two loan agreements now consolidated made between the Company and the National Mutual Life Association of Australasia Pty Ltd … assigned to the creditor by virtue of a Deed of Assignment between … stamped on 27 September 2000, and it is the genuine bona fide belief of the applicant that the said deed of assignment may be void and of no legal force or effect.
>
> Accordingly, the applicant seeks discovery of the documents referred to in the statutory demand comprising Annexure "AF-1" … in order to determine whether the respondent has a legally enforceable claim against the applicant.[39]

45 At [30] Parker J said:

> As Financial Solutions could be expected to have (or to have access to) the documents on which it's claim depended, there appears to be substance and reality in the view that until Financial Solutions allowed Predella access to the documents on which its claim expressly depended, there existed adequate and sound reason for Predella to dispute the claim. **The dispute was none the less genuine because its foundation may have been no more than Predella's inability to verify the validity of the claim made by Financial Solutions with which Predella had not had any commercial relationship before the purported assignment.**
>
> [emphasis added]

46 At [33] Parker J said:

> When the basis of Predella's application is correctly appreciated it follows, in my

---

38 *Financial Solutions Australasia Pty Ltd v Predella Pty Ltd* [2002] WASCA 51, 5.

39 Ibid [23].

> view, having regard to the views of Sundberg J in *Graywinter*, that the material facts on which the applicant intended to rely to show a genuine dispute of the nature identified were sufficiently, though less than ideally, set out in [the 21 day affidavit and its annexures].

47 Each of *Spartan Sporting Goods* and *Financial Solutions* are distinguishable from the current application as in each it was determined that the initial 21 day affidavit was sufficient to permit the augmenting of material in further affidavits. Further, the plaintiff's position is distinguishable as, even though a defence to the guarantee proceeding may not have been formulated at the time of making the s 459G application, all the facts and matters relied upon were known to Mr Brunner. Nothing is discovered after the expiration of the 21 days. Accordingly, Mr Brunner could have set out the facts or, even an outline of the facts, or perhaps an argument without the need to formulate a defence at law such as contained in the pleading. If he had done so, the defendant would have been fairly alerted to the nature of the case made in support of the application. I am not required to grapple with the issue of timing of events or the revelation of facts that may have arisen post the s 459G application.

48 Clearly, deposing that instructions had been given to his solicitors to brief counsel and expect to file a defence to the claim is something altogether different to contending that the plaintiff had an arguable defence to the claim in the District Court of Queensland. Further, the giving of instructions cannot constitute a genuine dispute in this Court. I note that observation even though the affidavit refers to "my solicitors" and defence to the claim. That is not a reference to a defence available to the plaintiff. However even if I were to construe the reference to a defence available to the plaintiff, the reference does not convey, reveal or disclose the general nature of the case being advanced on behalf of the plaintiff. Further, I determine that neither the statement set out in the 21 day affidavit nor the exhibiting of the statement of claim gives rise to a reasonably available inference.

49 Accordingly, I determine that an adjournment to permit a supplementary affidavit ought not be permitted.

50 Based upon material before the Court to which I am permitted to have regard, the plaintiff has not demonstrated an 'arguable dispute'.

51 The following orders will be made:

1. The admitted total is $250,000.

2. The offsetting total is $2,000.

3. The statutory demand is re-written to claim the sum of $248,000.

4. The plaintiff pay the defendant's cost of the application on a standard basis.