SUPREME COURT OF QUEENSLAND

CITATION:	*Reed Construction (Q) P/L v Dellsun P/L* [2009] QSC 263
PARTIES:	**REED CONSTRUCTION (QLD) PTY LTD** (applicant) **v** **DELLSUN PTY LTD** (respondent)
FILE NO/S:	2556 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2009
JUDGE:	Martin J
ORDER:	**THE STATUTORY DEMAND IS SET ASIDE.**
CATCHWORDS:	CORPORATIONS LAW – STATUTORY DEMAND – SETTING ASIDE – Where respondent entered contract with applicant for construction work – Where dispute over amount to be paid for work – Where respondent served applicant with various versions of a claim for payment, each for different amount – Where applicant asserted an offsetting claim for rectification of faulty workmanship by respondent – Where respondent served payment claim under BCIPA – Where applicant responded with payment schedule – Where dispute referred to adjudicator under BCIPA – Where decision issued in favour of respondent – Where respondent issued statutory demand for adjudication amount - Where inconsistencies among statements of the respondent – Where applicant seeks set aside of statutory demand – Whether there is a genuine dispute concerning the alleged debt – Whether there is a valid offsetting claim – Whether the adjudicator's decision gives rise to res judicata or issue estoppel concerning the existence and amount of debt – Effect of s100 BCIPA – Discussion of principles. *Building Construction Industries Payments Act 2004*, s100 *Corporations Act 2001* (Cth), s 459G, s 459H, s459J *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005]

NSWSC 284
Brodyn Pty Ltd v Dasein Constructions Pty Ltd [2004] NSWSC 1230
Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd (1994) 13 ACSR 37
Demir Pty Ltd v Graf Plumbing Pty Ltd [2004] NSWSC 553
Elm Financial Services Pty Ltd v MacDougal [2004] NSWSC 560
Ettamogah Pub (Rouse Hill) Pty Ltd v Consolidated Constructions Pty Ltd [2006] NSWSC 1450
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd (2005) 62 NSWLR 385
Greenaways Australia Pty Ltd v CBC Management Pty Ltd [2004] NSWSC 1186
J Hutchinson Pty Ltd v Galform Pty Ltd & Ors [2008] QSC 205,
John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd (1994) 14 ACSR 250
Macleay Nominees Pty Ltd v Belle Property East Pty Ltd [2001] NSWSC 743
Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd (2003) 180 FLR 318
Ozy Home Wares v Wesgordon [2007] NSWSC 982
Peekhrst Pty Ltd v Wallace & Anor [2007] QSC 159
Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd [2005] NSWSC 559
Re Morris Catering (Aust) Pty Ltd (1993) 11 ACSR 601
Scanhill Pty Ltd v Century 21 Australasia Pty Ltd (1993) 12 ACSR 341
Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd [2005] NSWSC 1152
Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd [2002] NSWSC 411

COUNSEL: G D Beacham for the applicant
B Wessling-Smith for the respondent

SOLICITORS: Holding Redlich for the applicant
O'Neills Solicitors for the respondent

[1] The applicant (Reed) seeks to set aside the respondent's (Dellsun) statutory demand under s 459G of the *Corporations Act* 2001.

Background

[2] The alleged debt arises out of a contract between the parties with respect to the construction of a block of residential units at Rainbow Beach. Dellsun trades as a contractor providing concrete laying and surface finishing. Pursuant to the contract

it was to perform certain concrete work at the building site. That contract was entered into in July 2007. It provided for a total contract price of $303,000 plus GST, based on a bill of quantities calculation. It further provided that the defects liability period would be 52 weeks.

[3] Dellsun commenced work under the contract in about July 2007 and had concluded most of the work by December of that year. Between September and December 2007 Reed paid Dellsun the sum of $314,180.85.

[4] In June 2008 Reed requested Dellsun to perform further work under the contract and between the end of June 2008 and the beginning of August 2008 Dellsun completed some of that work.

[5] On 31 October 2008 Dellsun sent to Reed the first version of Dellsun's claim in the form of an invoice for moneys which it alleged to be owing under the agreement. The claim asserted that the sum due for work under the agreement was $284,967.50 and that variations amounted to $239,440.20. After crediting the payments referred to above, Dellsun claimed the sum of $209,726.69.

[6] Reed responded to that on 5 November 2008 and, in its calculations, referred to a number of variations, some of which increased the price and others which decreased the price and calculated that the respondent had been overpaid by the amount of $10,130.80.

[7] On 28 January 2009 Dellsun issued a new version of its invoice. This time the sum claimed under the agreement was $262,127.58 with variations of $124,999.10. After allowing for payments already made and back charges, a sum of $67,713 was claimed. This sum, together with GST, forms the basis of the statutory demand, which was served on 18 February 2009.

[8] By a letter of 24 February 2009, Reed's solicitors wrote to Dellsun's solicitors setting out in detail why Reed disputed the amount claimed and, in turn, asserted that it had an offsetting claim in respect to the costs of rectification of work which it said Dellsun had not properly done.

[9] This letter generated Dellsun's third version of its invoice for money said to be owing under the agreement. That explanation was contained in an affidavit by Wadim Jim Balasinovitch, a director of Dellsun. In this affidavit Dellsun purported to claim a further $52,456 for labour and equipment which was not in the statutory demand.

[10] On 27 March 2009 Dellsun served a payment claim under the *Building Construction Industries Payments Act 2004* (BCIPA). That claim alleged that a sum of $196,837.59 was owing.

[11] On 14 April 2009 Reed served a payment schedule under BCIPA on Dellsun. It raised a number of matters, including: that the payment claim was not made in accordance with the Act; that the claim was not made in accordance with the contract; that the claim for delay costs was not claimable under the Act; and that claims for variations were not made in accordance with the Act.

[12] On 20 May 2009 the adjudicator's decision was given in which it was held that Dellsun owed Reed the sum of $71,823.43. An adjudication certificate has not been issued.

[13] In an affidavit sworn in this application by David Mackley, a project manager employed by Reed, he sets out his calculations which he says demonstrate that, after taking into account all claims and payments, Dellsun is owed the sum of $39,640.40 (including GST) by Reed, but asserts that the work done by Dellsun was defective and that the cost of rectifying that work is of the order of $28,000 to $45,000.

[14] In a further affidavit of Mr Mackley, sworn some two months after his first affidavit, he deposes to Reed having expended approximately $34,000 (excluding GST) on rectification work and says that those works are not complete and that a further $9,000 will be needed in order to complete rectification.

[15] Mr Balasinovitch, in his affidavit in support of the respondent Dellsun, deposes that the claim made in the statutory demand is not a claim for payment for variations, but for concrete poured. But, in the documents supporting the payment claim under BCIPA, six of the invoices relied upon for the statutory demand are described as being claims for variation work.

Setting aside a Statutory Demand

[16] Sections 459G and 459H of the *Corporations Act 2001* (Cth) provide:

> "**459 G Company may apply**
> (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
> (2) An application may only be made within 21 days after the demand is so served.
> (3) An application is made in accordance with this section only if, within those 21 days:
> (a) an affidavit supporting the application is filed with the Court; and
> (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.
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> **459H 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.

(4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(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.

(6) This section has effect subject to section 459J."

[17] First, what is a genuine dispute? In a statement which has been the subject of frequent reference, Thomas J in *Re Morris Catering (Aust) Pty Ltd*[1] said:

> "There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a 'genuine dispute' and whether there is a 'genuine claim'.
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> It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.
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> The essential task is relatively simple – to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it)."

[18] Of similar effect is the decision of Young J (as he then was) in *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* [2] where he said:

> "It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt. On the other hand, if proof of a claim was required then one would be doing the very thing that one is not to do, and that is to try this sort of dispute in the Companies Court. What more than assertion is required is something that may differ from case to case."

[19] Finally, in *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd*[3] Barrett J said:

> "[23] It is appropriate to dwell for a moment on the guidance provided by these cases. The tests of 'plausible contention requiring investigation', 'real and not spurious, hypothetical, illusory or misconceived" and "perception of genuineness (or lack of it)', applied in the context of a summary procedure where 'it is not expected that the court will embark on any extended inquiry', mean that the task faced by a company challenging a statutory demand on the 'genuine dispute' ground is by no means at all a difficult or demanding one. The company will fail in that task only if it is found

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1 (1993) 11 ACSR 601
2 (1994) 14 ACSR 250 at 253
3 [2002] NSWSC 411

> upon the hearing of its s459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."

[20] Secondly, what is an offsetting claim? This term has been the subject of consideration on many occasions. It is defined in s 459H(5) as meaning "a genuine claim that the company has against the respondent by way of counterclaim, setoff or cross demand (even if does not arise out of the same transaction or circumstances as a debt to which the demand relates)".

[21] In considering whether or not an offsetting claim has been shown to exist for the purposes of this section, a court should be satisfied that there is a serious question to be tried that the party does have an offsetting claim – *Scanhill Pty Ltd v Century 21 Australasia Pty Ltd*;[4] or that the claim is "not frivolous or vexatious" – *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd*.[5] In *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd*,[6] Palmer J said:

> "18. In my opinion, a genuine offsetting claim for the purposes of … s 459H(1) and s 459H(2) means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. '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. In a claim for unliquidated damages for economic loss, the Court will not be able to determine whether the amount claimed is claimed in good faith unless the plaintiff adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. If such evidence is entirely lacking, the Court cannot find that there is a genuine offsetting claim for the purposes of [those subsections]."

[22] It is not necessary for a party asserting an offsetting claim to be able to particularise it to a fine degree. As was said in *Elm Financial Services Pty Ltd v MacDougal*:[7]

> "… It is not necessary that the party seeking to have the statutory demand set aside should particularise the amount of the claim to the last dollar and cent. There may be various ways of approaching the issue of assessment … It is sufficient that there be, on the evidence, a plausible and coherent basis for asserting a claim to a sum which,

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4 (1993) 12 ACSR 341
5 (1994) 13 ACSR 37
6 [2001] NSWSC 743
7 [2004] NSWSC 560

> despite elements of uncertainty, can be seen to be, in any event, greater than the amount of the debt the subject of the statutory demand. Of course, the narrower the margin between the alleged debt and the plaintiff's estimate or initial quantification, the greater will be the need for particularity in assessing the amount of the offsetting claim."

Preliminary point - *res judicata*

[23] Before considering the facts in this application I need to consider a preliminary point raised by the respondent. Dellsun argues that the decision of the adjudicator (that Reed owes it the sum of $71,823.43) means that there is an issue estoppel concerning the debt and any part of the claimed offset which was part of the adjudicator's decision. It follows, in Dellsun's submission, that Reed cannot argue that there is a genuine dispute or that it has an offsetting claim. In making that submission, Dellsun relies on two decisions.

[24] The first is a decision of Chesterman J (as he then was) in *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors.*[8] The facts of that case were, in brief, that Galform had served a payment claim on Hutchinson for $778,409.97. The matter went to an adjudicator who determined that the amount sought was owing and gave a decision to that effect. Galform entered judgment against Hutchinson in this Court and proceeded to obtain an enforcement warrant. When Hutchinson became aware of that, it commenced proceedings and sought interlocutory injunctions. A series of steps then occurred which resulted in claims that the disputes between the parties had been compromised and an action was commenced by Hutchinson seeking declarations to that effect. Sometime after delivering its defence in that matter, Galform served another payment claim on Hutchinson seeking payment of $1,102,255.61. That claim included the amount of $750,966.73 which had been the subject of the first adjudication. It also sought other sums for variations and for retention moneys. Hutchinson delivered a payment schedule to that claim and Galform then lodged a second adjudication application. Hutchinson, not surprisingly, objected to the inclusion in the payment claim and adjudication application of the amount the subject of the earlier determination. Nevertheless, the adjudicator proceeded to find in favour of Galform in the full amount decided in the previous adjudication decision, rejected the claim for variations but allowed a claim for retention moneys.

[25] In the application before Chesterman J, Hutchinson sought a declaration that the second adjudication was void on the grounds that the amount earlier claimed and awarded had merged in the judgment which had been registered and that the making of the second adjudication application was an abuse of process given the history of the litigation. Injunctions were sought restraining Galform from seeking an adjudication certificate with respect to the second adjudication.

[26] In considering the matter, Chesterman J said:

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8 [2008] QSC 205

"[35] A payment claim is a claim or an assertion of a right to be paid a progress payment due under a construction contract. Sections 12 and 13 of the Act expressly provide to this effect. It is a cause of action of a very common sort. The Act provides a speedy and informal process by which the cause of action may be determined by way of an adjudication. The adjudication procedure which results in a speedy determination does not alter the nature of the claim: it is a cause of action in contract. The Act provides that the cause of action is to be judged by an adjudicator qualified in accordance with the Act rather than a court. But there is no doubt that the adjudication, once made, is binding on the parties. It can, as I have mentioned, be entered as a judgment of the court and enforced as such. The rather special procedure for dealing with claims for progress payments by subcontractors should not be allowed to disguise the fact that what is in question is a cause of action in contract resulting in a judgment.

[36] **There can, I think, be no doubt that an adjudication giving rise to a judgment does give rise to a *res judicata* and, indeed, issue estoppel**. Galform obtained an adjudication in its favour, then a certificate and then judgment which it sought to enforce. It is impossible to think that the cause of action which it described in its payment claim of 24 August 2007 has not merged in the judgment. It is nothing to the point that the amount of the judgment debt has not been paid to Galform. The existence of a *res judicata* does not depend upon a judgment being satisfied. It arises from the fact of judgment itself. See *Res judicata* 3rd ed by Handley para 399 and cases cited in note 36." (emphasis added)

[27] In response to the arguments against its position, Galform submitted before Chesterman J that s 100 of the BCIPA came to its aid. That section provides:

"**100 Effect of pt 3 on civil proceedings**

(1) ... nothing in Part 3 affects any right that a party to a construction contract –

(a) may have under the contract; or

(b) may have under part 2 in relation to the contract; or

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

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

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

(a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and

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

[28] Justice Chesterman dealt with that in the following way:

> "[43] The effect of s 100 is to make progress payments enforced by the statutory procedures for adjudication, certification and entering of judgment 'only payments on account of a liability that will be finally determined otherwise ...'. Per Hodgson JA in *Brodyn* at 440-1. Payments made pursuant to the Act are meant to effect a quick resolution of payment disputes between parties to a construction contract on an interim basis without extinguishing a party's ordinary contractual rights to obtain a final determination with respect to the dispute by a court of competent jurisdiction. See *Intero Hospitality Projects* at para 46.
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> [44] The first respondent's contention is that because these payments are made on an interim basis, or on account of a liability to be subsequently determined, they do not give rise to *res judicata*. They lack finality which is a necessary prerequisite.
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> [45] The answer to this submission is that a judgment obtained pursuant to Part 3 of the Act is conclusive, final and binding, unless and until a court pronounces judgment in a proceeding brought by virtue of the contractual rights preserved by s 100, which is inconsistent with the earlier judgment. Unless and until a court gives judgment which affects the rights of the parties determined by a judgment obtained pursuant to Part 3 that judgment stands. In principle the case is the same as that of a judgment [which] is reversed on appeal. Until the appellate reversal the judgment is conclusive and gives rise to *res judicatae*. See *Railways Commissioner for New South Wales v Cavanagh* (1935) 53 CLR 220 at 225.
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> [46] Accordingly I conclude that the third respondent had no jurisdiction to embark upon the adjudication and erred in law in proceeding to determine the first respondent's claim for the payment which had already resulted in the entry of judgment in its favour. The applicant is entitled to a prerogative order quashing the adjudication and a declaration that it is void."

[29] In this case, Dellsun relies upon the reasoning of Chesterman J and submits that the adjudicator's decision is sufficient to make the question of the liability of Reed *res judicata.*

[30] Dellsun also relied on the decision of Douglas J in *Peekhrst Pty Ltd v Wallace & Anor*.[9] That was an application to set aside a statutory demand served by the respondent on the applicant. The application to set aside the statutory demand was based on an argument that there was an offsetting claim of $54,000 and that substantial injustice would be caused unless the demand was set aside. The statutory

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[9] [2007] QSC 159.

demand was based upon the adjudication of the claim between the parties. In considering this matter, Douglas J said:

> "[16] The Act provides what has been described as a "fast track interim progress payment adjudication vehicle"; *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019 adopted by Mackenzie J in *Roadtek, Department of Main Road v Davenport* [2006] QSC 47 at [17].
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> [17] As Einstein J went on to say in *Brodyn* at [14]:
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> > "What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution *critically* does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That claw back route expressly includes the making of restitution orders."
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> [18] In the interim, however, an adjudicator's certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction. Mackenzie J went on to say at [18]:
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> > "Section 31(4) refers to 'proceedings to have the judgment set aside' and what is within the scope of such an application. In particular, no counterclaim can be brought against the claimant; no defence in relation to matters arising under the contract can be raised; and the adjudicator's decision cannot be challenged. The reference to setting the judgment aside and the limitation on what can be raised in such proceedings makes the challenge dependent on the existence of grounds for setting aside a judgment other than those enumerated."
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> [19] It is against this background that one needs to consider the arguments by Peekhrst that the statutory demand based on the judgment debt Glenzeil obtained should be set aside on the ground that it is an abuse of process. The argument relies upon assertions that there are defects. There is evidence that certain defects were shown to Glenzeil's employees which were said to have been rectified. Glenzeil had asked on a number of occasions that Peekhrst commit to writing a list of defects pursuant to the terms of the contract but no such list was received during the defects period which was said to have expired on 10 August 2006. Peekhrst, however, contends that Glenzeil cannot now claim that the defects period did expire on 10 August 2006, arguing that the parties had agreed to vary the contract in respect to the defects liability period.
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> [20] If there is validity in such a submission, however, it is my view that it is a topic which can be raised by Peekhrst in subsequent

> proceedings. It does not seem to me to constitute an abuse of process for Glenzeil to pursue its judgment debt with a statutory demand when it has adopted the procedure available to it under the Act which is designed to achieve swift and early progress payments.
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> [21] In this case the defects on which Peekhrst relies were not notified until the process was instituted before Mr Wallace. He dealt with them in his reasons. There has been no application to set aside the judgment obtained by Glenzeil, a course available under s. 31(4) of the Act, nor had Peekhrst commenced civil proceedings available to it pursuant to s. 100 where allowance might be made for any amount paid by it as a consequence of the filing of an adjudication certificate under the Act.
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> [22] Although recourse to the use of a statutory demand may be oppressive, for example, in the pursuit of a tax debt which is disputed by a tax payer who has objected and is seeking a review of the assessment, it does not seem to me that this regime should necessarily apply to an attempt to rely upon a statutory demand in circumstances such as these. The intention of the Act is clear in seeking to 'fast track' progress payments even where it is likely that the parties will continue to dispute the decision made by an adjudicator. Where the party against whom judgment has been given has not sought to set it aside nor commenced civil proceedings pursuant to its rights under s. 100 and where, as here, has delayed in identifying and quantifying the alleged defects, it does not seem to me to be an oppressive use of a statutory demand made in reliance upon the judgment obtained under the Act. In my view, it is a different situation from that which applies when the demand is used in support of a tax debt clearly still the subject of a genuine dispute; cf. *Re Softex Industries Pty Ltd* [2001] QSC 377 and *KW & KM Quinn Investments Pty Ltd v DCT* [2003] QSC 336 at [4]."

[31] In the first case referred to above (*Hutchinson*) it was held that the effect of an adjudication was to raise an issue estoppel with respect to the subject of that adjudication so that a claimant could not issue another payment claim for the same amount. In the second (*Peekhrst*) it was held that it was not an abuse of process for a person to pursue a judgment debt by means of a statutory demand when it had adopted the procedure available to it under BCIPA.

[32] Unfortunately, it appears that in neither of those cases was the court referred to a line of authority in New South Wales dealing specifically with the question of whether an adjudication can work to prevent the recipient of a statutory demand from disputing the existence of the debt or raising an offsetting claim.

[33] In considering the New South Wales authorities I will insert the number of the relevant BCIPA section after the reference to the New South Wales legislation. The line of authorities commences with the decision of Master Macready (as he then

was) in *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd.*[10] Master Macready said:

> "29 In respect of the defendant's claim that *res judicata* will apply as a result of the adjudicator's determination an initial question is whether the adjudicator's decision is a "final judicial decision". There were no submissions to the effect that the adjudication was not a "Judicial Tribunal" for the purposes of the rule. Normally, a domestic tribunal such as an arbitrator is such a body but the procedure under the Act is more akin to a statutory tribunal. In *Patstras v Commonwealth* (1996) 9 FLR 152 Lush J stated the test for distinguishing between decisions which are judicial for present purposes and those which are purely administrative. He said at 155:
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> > 'The underlying principle of this form of estoppel is that parties who have had a dispute heard by a competent tribunal should not be allowed to litigate the same issues in other tribunals. When the decision-making body is an administrative body not affording the opportunity of presenting evidence and argument, it seems to me there is no room for the operation of this principle. In New Brunswick Railway Co. v. British and French Trust Corporation Ltd. [1939] A.C. 1 Lord Maugham L.C. said this: "If an issue has been distinctly raised and decided in an action in which both parties are represented it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them".
> >
> > It appears to me that both upon the general language of the authorities to which I have referred and upon the principle which I have endeavoured to describe, no estoppel can arise from a decision of an administrative authority which cannot be classed either as 'judicial' or as 'a tribunal', and that an authority cannot be given either of those classifications if it is one which is under no obligation to receive evidence or hear argument.'
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> 30 Given the procedure set out in sections 20 [BCIPA 24] and 21 [BCIPA 25] of the Act it is at least arguable that the adjudication is judicial in the relevant sense. A contrary view was mentioned in passing in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 at Para [43]. Rather than decide the matter on this basis in the absence of argument I will consider the other aspects.
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> 31 To be a final decision the decision must finally declare or determine the defendant's liability for an ascertained amount leaving nothing to be judicially determined, to fix the amount recoverable and render the judgment effective and capable of execution. See Spencer Bower, Turner and Handley "*The Doctrine of Res Judicata***"** at 69.

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[10] (2003) 180 FLR 318

> 32 It may be that an adjudicator's determination will be final for the purposes of payment of a progress claim under the Act but not in respect of the final determination of the contractual claim. The specific provisions for adjustment in s32 (3) (a) and (b) [BCIPA 100] allow correction of the amounts ordered to be paid by an adjudicator. Such amounts may or may not have involved a consideration of claims for defective work. The terms of s32 (2) are:
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> > "(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3)."
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> 33 These are extremely wide words and on their face are apt to include the effect of *res judicata* between the parties. In **Beckhaus v Brewarrina Council** [2002] NSWSC 960 I analysed the nature of the statutory scheme and its interplay with the contractual rights of the parties. I concluded at para 60 in these terms:
>
> > The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) [BCIPA 7 and 8] and 32 [BCIPA 100]. The parties cannot contract out of the Act (see s 34 [BCIPA 99]) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 [BCIPA 16] of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words 'person who is entitled to a progress payment under a construction contract' in s 13(1) [BCIPA 17] refers to a contractual entitlement.
>
> 34 I note that there is a very limited right of challenge to an adjudicator's decision (see *Musico* above). But that does not mean it is not a final decision: see *McGregor v Telford* [1915] 3 KB 237. A proper construction of the Act as a whole would mean that the adjudicator's decision does not give rise to *res judicata* on such matters in respect of the latter civil proceedings. The adjudicator's decision is nothing more than an interim determination for the purpose of progress payments under the Act."

[34] That Master Macready had correctly stated the law so far as it relates to the setting aside of statutory demands by reason of offsetting claims and the effect of the

relevant section of the New South Wales legislation was confirmed by Campbell J (as he then was) in *Demir Pty Ltd v Graf Plumbing Pty Ltd*.[11] Justice Campbell said:

> "16 It was submitted, for the defendant, that I should construe the definition of *"offsetting claim"* in section 459H(5) of the *Corporations Act* 2001 (Cth) so that it did not relate to a claim alleged to offset a judgment debt arising from the *BACISOP* Act. I do not accept that submission.
>
> 17 The fact that there is a judgment debt is no reason to deny a claim the status of being an "*offsetting claim"*. The definition of *"offsetting claim"* is perfectly general, and it frequently happens that a company is a judgment debtor, but has an offsetting claim arising by reason of transactions separate to those which gave rise to the judgment debt.
>
> 18 It was submitted that, if it were possible to set aside a statutory demand founded on a judgment debt arising from a notice of determination under the *BACISOP* Act, then that Act would be rendered toothless.
>
> 19 As a first step in the submission, I was reminded that the purpose of Parliament in introducing that legislation was to ensure that, once a quick, and possibly rough, adjudication by a neutral person had taken place, a progress payment in the amount found by the adjudicator should be made to a builder, and that the ultimate correctness of the progress payment being made should be argued afterwards. I was reminded that the *BACISOP* Act was concerned with maintaining a builder's cashflow, not determining its ultimate rights. I accept, in broad terms, that first step.
>
> 20 Next, it was submitted that, if it were possible to rely upon an offsetting claim to set aside a statutory demand, the object of the *BACISOP* Act would not be achieved. I do not accept that this is so. There are means of enforcement, short of a winding up action, which are open to a judgment creditor. When a judgment has been obtained pursuant to the *BACISOP* Act, if the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the *Corporations Act* 2001 (Cth), to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Division 3 of Part 5.4 of the *Corporations Act* 2001 (Cth) set out a regime whereby a statutory demand is set aside *whenever* there is an offsetting claim, as defined."

[35] This reasoning was adopted by Barrett J in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd.* [12] Further consideration of this question was given by Palmer

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11 [2004] NSWSC 553

12 [2004] NSWSC 1186

J in *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd.*[13] In that case Palmer J said:

> "[4] The Defendant says that even if the evidence were sufficient to support the existence of a genuine dispute as alleged, that dispute can now no longer be raised. It is precluded, says the Defendant, by the provisions of s 14 [BCIPA 18] and s 15 [BCIPA 19] of the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the BACISOP Act").
>
> [5] It is not in issue that the Defendant served a payment claim on the Plaintiff within the provisions of the Act and that the Plaintiff did not serve a payment schedule in response to that claim within the time provided by the Act. Sections 14 and 15 of the BACISOP Act provide:
>
> > "14. **Payment schedules**
> > (1) A person on whom a payment claim is served (the 'respondent') may reply to the claim by providing a payment schedule to the claimant.
> > (2) A payment schedule:
> > (a) must identify the payment claim to which it relates, and
> > (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the 'scheduled amount').
> > (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
> > (4) If:
> > (a) a claimant serves a payment claim on a respondent, and
> > (b) the respondent does not provide a payment schedule to the claimant:
> > (i) within the time required by the relevant construction contract, or
> > (ii) within 10 business days after the payment claim is served, whichever time expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.
> >
> > 15. **Consequences of not paying claimant where no payment schedule**
> > (1) This section applies if the respondent:
> > (a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
> > (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
> > (2) In those circumstances, the claimant:

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13 [2005] NSWSC 284

> (a) may:
> (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
> (ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and
> (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
> (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
> (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
> (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
> (b) the respondent is not, in those proceedings, entitled:
> (i) to bring any cross-claim against the claimant, or
> (ii) to raise any defence in relation to matters arising under the construction contract."

6 The Defendant says that the provisions of s.15(2) and (4)(b) create a statutory debt owing by the Plaintiff to the Defendant and that it is no longer open to the Plaintiff to contest the existence of that debt. I do not agree with this submission.

7 The provisions of s.15(2) apply to the recovery of an amount claimed "as a debt due to the claimant in any court of competent jurisdiction". A proceeding for the winding up of a corporation under Pt 5.4 of the Corporations Act is not a proceeding for recovery of a debt; it is a proceeding to wind up a company on the ground that it is insolvent: s.459A. It is true that s.459C(2)(a), which raises a presumption of insolvency in the case of non-payment of a statutory demand, has the effect in many cases of placing a great deal of pressure upon a company served with a statutory demand to pay the debt claimed. However, if the company does not pay the debt, does not comply with the statutory demand, and is therefore subjected to the presumption of insolvency which the Act provides, it is still able to resist a winding up order by demonstrating positively that, despite non-compliance with the statutory demand, it is in fact solvent: s.459C(3). If the company succeeds in proving its solvency, the winding up application is dismissed and the creditor is left to commence proceedings for recovery of the debt in a court of competent jurisdiction.

8 A proceeding to wind up a company for failure to comply with a statutory demand cannot, therefore, properly be regarded in law as a proceeding to 'recover' the amount claimed in the statutory demand 'as a debt' in the sense in which s.15(2)(a)(i) uses those words. In my

view, the provisions of s.15(2) and (4) of the BACISOP Act do not preclude a company served with a statutory demand from raising a genuine dispute for the purpose of setting aside that statutory demand under s.459G, even where that dispute has not been the subject of a payment schedule served in accordance with the provisions of the BACISOP Act.

9 I think that this approach is supported by a number of decisions of the Court. Those decisions are concerned with the ability of a company to raise an offsetting claim in order to set aside a statutory demand under s.459H and with the effect of s.25(4) [BCIPA 31] BACISOP Act whereas the present case concerns the existence of a genuine dispute under s.459G and the effect of s.15(4) BACISOP Act. Nevertheless, in my opinion, the rationale of those decisions is applicable in the present case.

10 The decisions are referred to and summarised by Barrett J in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186. His Honour quotes with approval from the judgment of Campbell J in *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 as follows:

> 'It was submitted that, if it were possible to set aside a statutory demand founded on a judgment debt arising from a notice of determination under the BACISOP Act, then that Act would be rendered toothless.
>
> As a first step in the submission, I was reminded that the purpose of Parliament in introducing that legislation was to ensure that, once a quick, and possibly rough, adjudication by a neutral person had taken place, a progress payment in the amount found by the adjudicator should be made to a builder, and that the ultimate correctness of the progress payment being made should be argued afterwards. I was reminded that the BACISOP Act was concerned with maintaining a builder's cashflow, not determining its ultimate rights. I accept, in broad terms, that first step.
>
> Next, it was submitted that, if it were possible to rely upon an offsetting claim to set aside a statutory demand, the object of the BACISOP Act would not be achieved. I do not accept that this is so. There are means of enforcement, short of a winding up action, which are open to a judgment creditor. When a judgment has been obtained pursuant to the BACISOP Act, if the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the Corporations Act 2001 (Cth), to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Div 3 of Pt 5.4 of the Corporations Act 2001 (Cth) set out a regime whereby a statutory demand is set aside whenever there is an offsetting claim, as defined.'

> 11 As I have observed, in my opinion the rationale underlying those observations is not affected by the circumstance that the ground for setting aside a statutory demand is said to be an offsetting claim rather than a dispute as to whether the debt has been contracted in the first place. It seems to me, with respect, that both Campbell and Barrett JJ are correct in their conclusion that it is not possible for the provisions of the Corporations Act, a Commonwealth statute, to be limited by reference to the provisions of the BACISOP Act, a State Act, and that the question for the Court in an application under s.459G is simply whether, as a matter of fact, a genuine dispute exists.
>
> 12 For those reasons, I am of the opinion that the Plaintiff is not precluded by the provisions of s.15(4) of the BACISOP Act from endeavouring to prove a genuine dispute in order to set aside the Defendant's statutory demand under the provisions of s.459G."

[36] Consideration of the interaction of the cognate New South Wales legislation and the *Corporations Act* was also undertaken by Young CJ in Eq (as he then was) in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd.*[14] He said:

> "[76] This now means I must turn my consideration to the question as to whether, in view of the BCISP Act, there is a set off under s 553C of the Corporations Act as incorporated into administration of a DOCA in the way in which I have set out earlier.
>
> [77] Section 553C applies where there are mutual credits, mutual debts or other mutual dealings. It seems now accepted that the inclusion of "mutual dealings" covers the situation where one party has a damages claim for breach of contract entered into before the administration. In such a case the claim arises out of a prior dealing between the parties; see eg *Booth v Hutchinson* (1872) LR 15 Eq 30; *Mersey Steel & Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434.
>
> [78] The vital question is whether, in the light of s 25 [BCIPA 31] of the BCISP Act, one can apply s 553C.
>
> [79] Mr Harper and Ms Rana say that because the claim of the plaintiff exceeds the claim of the company the company's claim was automatically extinguished by s 553C. This means that the District Court provisional judgment under s 25 of the BCISP Act must now be set aside or stayed. This is because it is clearly a provisional judgment which is to be dealt with when the whole of the dispute between the parties has been litigated as has now occurred.
>
> [80] On the other hand, Mr Fisher says that the policy of the BCISP Act means that the only entitlement to judicial intervention once a judgment is made under s 25(1) is to commence proceedings to have

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14 (2005) 21 BCL 443; [2004] NSWSC 1230

it set aside under s 25(4). In those proceedings the applicant is not to bring a cross claim or raise any defence in relation to matters arising under the construction contract nor challenge the adjudicators to termination. The applicant also has to pay into court security for the unpaid portion of the adjudicated amount.

[81] He points to the fact that Austin J said in *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395 at [41] that the BCISP Act offers to a claimant special statutory rights which override general contractual rights and place the claimant in a privileged position.

[82] There is a conflict of legislative provisions in the instant case and the scheme set out in the BCISP Act and the scheme set out in the Corporations Act where a company is under a DOCA do conflict. However, in my view, the two methods of approaching the problem each give the same result, and that is that the scheme set out in s 553C of the Corporations Act prevails.

[83] The first reason is s 109 of the Australian Constitution. It provides that:

> 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

The Corporations Act is a Commonwealth Act, the BCISP Act is a State Act, so if there is any inconsistency, the former prevails.

[84] In *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553, Campbell J said that if a person obtains a judgment under the BCISP Act and 'the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the *Corporations Act 2001* (Cth) to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Div 3 of Pt 5.4 of the Corporations Act 2001 (Cth) set out a regime whereby a statutory demand is set aside whenever there is an offsetting claim as defined.'

[85] The second approach is to construe the BCISP Act itself. It is clear that the mischief addressed by the Act was to assist subcontractors and others who depended on cash flow for their continued existence. The Act was to alter the effect of delays in adjudicating claims between head contractors and subcontractors by compelling the payment of monies to the subcontractors in advance of settling the real dispute so that the subcontractor would have cash flow so that his business could continue. The Minister said when introducing the Bill that it was to prevent, inter alia, pressure being put on subcontractors because of delays in adjudication where there was a cross claim. The Minister said: 'There will be no more legal delays'. He then went on to say that the changes 'will improve cash flow throughout the building and construction industry'. Of course, I

should remark that whilst it is true that there are no more legal delays, unfortunately legal delays are usually necessary in order to do justice. In the instant case the head contractor has already been in three courts and spent $130,000 and has not been able to have its claim adjudicated upon because, as soon as it did raise its claim, the subcontractor went into voluntary administration.

[86] It is now faced with a situation where although it has established its claim on the evidence before me, the administrator is arguing that it is necessary for it to pay the full amount of the provisional District Court judgment to the administrator who will then use it to pay his own fees and to fund further litigation and there will not be a ghost of a chance of the just claim of the head contractor ever being paid.

[87] To my mind the Act does not go that far. It only intends to operate when the head contractor and the subcontractor are going concerns. Once the subcontractor ceased to be a going concern, it no longer needs cash flow and the mischief to be covered by the Act is not present in that situation. No-one forced the subcontractor to go into voluntary administration. It elected to do so and in my view the protection of the BCISP Act ceased at that point and the Commonwealth law as to adjustments of rights under administration and later under a DOCA came into play.

[88] This has been the general approach taken by this Court in corporate insolvency matters.

[89] The cases in this respect do not bear out Mr Fisher's submission that the present exercise is one properly classed as enforcement.

[90] *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186 was a case where a party had signed judgment under s 25 of the BCISP Act and had issued a statutory demand in respect of it. The claimant had gone into administration and thence creditors voluntary liquidation. The plaintiff sought to set aside the statutory demand on the basis of an offsetting claim.

[91] The claimant protested that s 25 prevented that offsetting claim. Barrett J rejected that argument and said that the constraints of s 25 of BCISP:

> ‘apply only in proceedings in which it is sought to have a judgment resulting from filing of an adjudication certificate under the Act set aside. It may be ignored in the present context as there is no suggestion that pursuit of the offsetting claim that the plaintiff considers itself to have involves any attempt to have the District Court judgment set aside.
>
> Section 32(3) of the (BCISP) Act deals with proceedings 'in relation to any matter arising under a construction contract'. Proceedings in which the plaintiff sought to agitate its offsetting claim would be proceedings of that kind. But all the section says is that the court must allow for any amount paid

> to a party to the contract under Part 3 of the Act when formulating the relief to be granted and may make restitutionary orders. Again, therefore the Act would not have any impact on the pursuit of the offsetting claim.'
>
> See *Tooma Constructions Pty Ltd v Eaton & Sons Pty Ltd* [2002] NSWSC 514 and Demir Pty Ltd v Graf Plumbing Pty Ltd (above).
>
> [92] Once one removes the influence of the BCISP Act, there is a clear case where s 553C applies.
>
> [93] The High Court said in *Gye v McIntyre* (1991) 171 CLR 609 at 622 with respect to the corresponding section in the Bankruptcy Act s 86:
>
> > 'Section 86 is a statutory directive ('shall be set off') which operates as at the time the bankruptcy takes effect. It produces a balance upon the basis of which the bankruptcy administration can proceed. Only that balance can be claimed in the bankruptcy or recovered by the trustee. If its operation is to produce a nil balance, its effect will be that there is nothing at all which can be claimed in the bankruptcy or recovered in proceedings by the trustee.'
>
> The same applies mutatis mutandis to administration under a DOCA and s 553C of the Corporations Act: *Metal Manufacturers Ltd v Hall* (2002) 41 ACSR 466."

[37] The capacity of the parties to litigate the final amount due and ultimately receive an order for restitution by a Court under the equivalent of s 100 of BCIPA has been advanced as another reason why a genuine dispute about liability might lead to an offsetting claim under the *Corporations Act.*

[38] In *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd*[15] the application before White J concerned a statutory demand which was based upon a judgment entered following an adjudication under the New South Wales equivalent of BCIPA. Consistent with the other decisions to which I have referred, his Honour said the following:

> "[11] Part 3 of the Building and Construction Industry Security of Payment Act provides a summary procedure for determining what payments should be made on an interim basis, but it does not preclude the right of the parties to a building contract to have their rights and liabilities under that contract determined in accordance with the usual civil procedures. Thus, s 32(2) and (3) [BCIPA 100] of that Act provide, inter alia, for restitution to be ordered by a court or tribunal hearing the matter arising under a construction contract, of any amount paid in accordance with Pt 3 of that Act.

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15 [2005] NSWSC 559

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

[39] More recently, White J considered the situation where the recipient of payment claims under the New South Wales legislation did not serve payment schedules as permitted by s 14 of the New South Wales Act [BCIPA 18]. As a result, the recipient became liable to pay the amount claimed by the builder. The builder sought and obtained summary judgment from the Supreme Court of New South Wales in the sum of $1,336,567.48. The builder then issued a statutory demand for the amount for which summary judgment was given. The question again arose as to the effect of a judgment obtained pursuant to the New South Wales legislation so far as a statutory demand was concerned. Justice White said:

> "[12] Whilst there can be no dispute that the plaintiff is indebted to the defendant for the amount claimed in the statutory demand, the plaintiff will nonetheless have an offsetting claim equal to the amount of that debt if there is a genuine dispute that the defendant was not contractually entitled to the amount claimed in the payment claims made under s 13 [BCIPA 17] of the Security of Payment Act (see *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* (2003) 202 ALR 680; *M & D Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553; *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186; *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284; *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559; and *CCD Group Pty Ltd v Premier Drywall Pty Ltd* [2006] NSWSC 1012)."[16]

[40] The proper characterisation of an adjudication or a judgment which follows an adjudication for a failure to provide a payment schedule was considered by Hammerschlag J in *Ozy Home Wares v Wesgordon.*[17] His Honour referred to the decision in *Plus 55 Village Management* and said:

> "[26] Having regard to the provisions for restitution in the Act, it seems to me doubtful that a judgment[,] which comes about because of the statutory regime in the Act in circumstances where a defendant cannot raise a defence or any cross-claim which might nullify it is a

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16 *Ettamogah Pub (Rouse Hill) Pty Ltd v Consolidated Constructions Pty Ltd* [2006] NSWSC 1450.

17 [2007] NSWSC 982

> final judgment[,] creat[es] a *res judicata* between the parties so as to preclude a genuine dispute in relation to the judgment debt for the purposes of s 459H (as opposed to not precluding the raising of an offsetting claim)."

[41] I return to the decision in *J Hutchinson Pty Ltd v Galform Pty Ltd.* In that case the judge was faced with a submission that a builder was entitled, having received a favourable adjudication for a particular amount and entered judgment for that amount, to claim the same sum again (with other amounts) and obtain another favourable adjudication for the same amount. In response, Chesterman J held that the builder was estopped and that s 100 of BCIPA did not assist. His Honour was not asked to, nor did he need to, consider the entirely different question of whether an adjudication can work to prevent a contractor from raising a genuine dispute or an offsetting claim in an application to set aside a statutory demand. Although it is unnecessary for the purposes of this decision, I would respectfully adopt the conclusion of Chesterman J that a builder, in the circumstances of Hutchinson, cannot seek successive adjudications upon the same amount.

[42] In *Peekhrst Pty Ltd v Wallace & Anor* the authorities to which I have referred were not provided to the court and, so, the judge hearing that matter did not have the benefit of the analysis contained in those decisions.[18]

[43] Of particular importance in the consideration of this question are the provisions of s 100 of the BCIPA which are set out in paragraph [27] above. The equivalent provision in the New South Wales legislation is s 32. That section was considered in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*[19] where Handley JA said:

> "[21] Subsection (1) provides that Pt 3 of the Act (s 13–s 32), does not affect the rights of any party under a construction contract. Subsection (2) is particularly important because it relevantly provides that nothing done under, or for the purposes of Pt 3, affects any civil proceedings arising under a construction contract. Finally, subs (3)(b) makes a judgment entered under s 25 on an adjudication certificate provisional only, both in what it grants and in what it refuses. **A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid**.
>
> [22] The common law does not permit inconsistent judgments, but this may be sanctioned by statute and this is not the only example of such a statute in this jurisdiction. Compare *Toubia v Schwenke* (2002) 54 NSWLR 46 at 50. The power under s 32(3)(b) to make such other orders as it considers appropriate would probably allow the court to set aside or vary any judgment entered under s 25. It is clear that the Act confers statutory rights on a builder to receive an interim or progress payment and enables that right to be determined

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18 See also *Tesoro MB Pty Ltd v Total Building Group Pty Ltd* [2009] FCA 802

19 (2005) 62 NSWLR 385

> informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner." (emphasis added)

[44] Section 100 of BCIPA operates to allow a contractor who has been the subject of an adverse adjudication to bring an action, on the building contract, against the builder on matters which include matters the subject of the adjudication. As has often been said, the purpose of BCIPA is to maintain a builder's cash flow, not to finally determine the rights of the parties to a building contract.

[45] This issue was also considered by Barrett J in *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd*:[20]

> [37] Matters of the present kind seem often to be approached on the footing that the s 25 [BCIPA 31] result (filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs. The limits imposed by s 25(4) upon attempts to have such a judgment set aside are referred to in that connection. **But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work**. This is made clear by s 32 [BCIPA 100]. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if thought fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s 25 has had the effect of creating. The s 25(4) limitations do not apply to an application for a stay, as distinct from an application to have a judgment set aside.
>
> [38] It was pointed out in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385 by Handley JA (with whom Santow JA and Pearlman AJA agreed) that a judgment entered under s 25 is, by reason of s 32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses. His Honour added (at [21]):
>
> > 'A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.'
>
> As Handley JA observed, the specific statutory context is one in which inconsistent judgments are contemplated and allowed."

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[20] [2005] NSWSC 1152

[46] It would be a curious, indeed unsatisfactory and inconsistent, construction of BCIPA which would result in a contractor being estopped from raising a dispute or an offsetting claim in an application under s 459G of the *Corporations Act* in circumstances where it is specifically allowed to do so in an action contemplated by the provisions of s 100. The reasoning advanced by Macready As. J in *Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd* has been adopted and refined by the authorities which have followed it. The terms of BCIPA cannot be used to constrain the operation of a Commonwealth statute such as the *Corporations Act*. It is sufficient, for the purposes of this decision, to hold that s 100(1)(c), by providing that nothing in part 3 of BCIPA affects any right that a party to a construction contract may have apart from the Act in relation to anything done or omitted to be done under the contract, is sufficient to allow (if it is otherwise needed) a party to raise a genuine dispute or an offsetting claim under s 459G of the *Corporations Act*.

Genuine dispute or off-setting claim

[47] I turn now to the facts in this case. The history of the claims made by Dellsun against Reed does not engender any confidence in the manner in which Dellsun has assessed its claim. As set out above, there have been a number of claims which differ substantially from each other in the amount sought. Dellsun relied on affidavits from Mr Balasinovitch in which he simply controverts assertions made by deponents of affidavits relied upon by Reed. I am satisfied that there is a dispute between the parties as to the work which was done, the quality of the work which was done, the events surrounding the performance of the work and the liability of Reed to pay all or part of the claim. The affidavit containing Mr Mackley's analysis also satisfies me that there is a genuine dispute as to at least half of the sum claimed in the statutory demand and that the balance is the subject of an offsetting claim with respect to work which was allegedly performed defectively and which has and will require the expenditure of an amount in the order of $40,000 to remedy.

[48] In its written submissions, the applicant sought to rely on s 459J of the *Corporations Act*. That section is not referred to in the application by Reed. The basis for the argument that there is "some other reason" to set aside the demand under s 459J is the confusion with respect to the claims made by Dellsun. Given that there was no application made to amend the application to incorporate s 459J, I do not think it appropriate to consider that matter.

[49] I am satisfied that the applicant has established there is a genuine dispute as to part of the claim and that it has an offsetting claim for at least the balance of the amount in the statutory demand.

Order

[50] The statutory demand is set aside. I will hear the parties on costs.