SUPREME COURT OF QUEENSLAND

CITATION:	*Childcare Providers Pty Ltd v Bright Horizons Australia Childcare Pty Ltd* [2017] QSC 307
PARTIES:	**CHILDCARE PROVIDERS PTY LTD** (applicant) **v** **BRIGHT HORIZONS AUSTRALIA CHILDCARE PTY LTD** (respondent)
FILE NO/S:	SC No 8337 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application to set aside statutory demand
DELIVERED ON:	15 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2017
JUDGE:	Holmes CJ
ORDER:	**The application to set aside the statutory demand is refused.**
CATCHWORDS:	CORPORATIONS LAW – STATUTORY DEMANDS – where the respondent served a statutory demand on the applicant for a debt– where s 459E(3) of the *Corporations Act* 2001 (Cth) requires that an affidavit accompanying a statutory demand comply with the Corporations Proceedings Rules, which in turn require that it comply with Form 7 – where Form 7 requires that the deponent state his or her source of knowledge of the matters stated in relation to the debt - whether the affidavit of the respondent's director complied with Form 7 – whether the demand should be set aside for 'some other reason' under s 459J(1)(b) of the *Corporations Act* – where the applicant contends that it has an offsetting claim for damages – whether the applicant's supporting affidavit identifies the basis for the claim for damages – whether the applicant has a genuine offsetting claim – where the applicant contends that there is a genuine dispute as to the existence of the debt because in other proceedings the respondent has claimed relief inconsistent with the debt's being due and payable – whether there is any real dispute as to the debt's existence – whether the statutory demand should be set aside. *Corporations Act* 2001 (Cth) s 459E(3), s 459G, s 459H(1), s 459J

Uniform Civil Procedure Rules 1999 (Qld) sch 1A

Blayney Wholesale Foods Pty Ltd v BIS Cleanaway Ltd [2008] NSWSC 1146
LB Schofields One Pty Ltd v Trevet Property Pty Ltd, *in the matter of LB Schofields One Pty Ltd* [2015] FCA 1416
Rapcivic Contractors Pty Ltd v Mapol Nominees Pty Ltd [2009] 1 QdR 21
Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd [2012] NSWCA 365
Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd (No 3) [2014] WASCA 132
David Grant & Co Pty Ltd v Westpac Banking Corp (1995) 184 CLR 265

COUNSEL: A Stumer and E Hoiberg for the applicant
S Couper QC and J O'Connor for the respondent

SOLICITORS: Johnson Winter & Slattery for the applicant
Robert Winter (sol) for the respondent

[1] **HOLMES CJ**: The applicant, Childcare Providers Pty Ltd, applies to set aside a statutory demand served on it by the respondent, Bright Horizons Australia Childcare Pty Ltd, in the amount of $1,000,000. It contends that it has an offsetting claim, which exceeds the amount of the statutory demand; that there is a genuine dispute as to the existence of the debt, because in other proceedings Bright Horizons has claimed relief against it inconsistent with the debt's being due and payable; and that Bright Horizons' affidavit in support of the statutory demand does not comply with the requirements of the *Rules for Proceedings under the Corporations Act or ASIC Act* (the *Corporations Proceedings Rules*) as to verification of the debt.

The statutory demand provisions

[2] Section 459E(3) of the *Corporations Act* 2001 (Cth) prescribes what is required of an affidavit accompanying a statutory demand:

> …
>
> (3) Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:
>
> (a) verifies that the debt, or the total of the amounts of the debts, is due and payable by the company;
>
> (b) complies with the rules.

Rule 5.2 of the *Corporations Proceedings Rules* requires that the affidavit accompanying the statutory demand be in form 7; state the matters mentioned in the form; and be made by a person with the authority of the creditor company. Form 7

itself indicates that the deponent of the affidavit is to: state his or her relationship to the creditor and the facts entitling him or her to make the affidavit on its behalf; state the source of his or her knowledge of the matters stated in relation to the debt; confirm that the debt is due and payable; and express a belief that there is no genuine dispute as to its existence or amount.

[3] Section 459G of the *Corporations Act* permits a company to apply for the setting aside of a statutory demand and prescribes how and when the application is to be made:

> **459G 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.

[4] Under s 459H(1) the Court is to decide whether it is satisfied of either or both of these alternatives:

> (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.

"Off-setting claim" means

> "a genuine claim that the company has against the respondent by way of counterclaim, set-off or cost-demand (even if it does not arise out of the same transaction also circumstances as a debt to which the demand relates)."[1]

If there is an off-setting claim, the court must calculate the substantiated amount of the demand (the admitted total of the debt less the off-setting claim[2]) and if it is less than the statutory minimum (of $2,000), set the demand aside.[3] Where there is a genuine dispute about the debt, the admitted total is nil.[4]

[5] Section 459J provides additional grounds for setting aside a demand:

> **459J Setting aside demand on other grounds**

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1 Section 459H(5).
2 Section 459H(2).
3 Section 459H(3).
4 Section 459H(5).

> (1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
>
> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
>
> (b) there is some other reason why the demand should be set aside.
>
> (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect.

Background

[6] Childcare Providers owns two childcare centre businesses, located respectively at Ballarat and Wodonga in Victoria; it rents the premises on which they are conducted and holds the approvals necessary to conduct the businesses. In 2007, Bright Horizons lent Childcare Providers $3,500,000 and was granted a Deed of Charge over the latter's assets and undertakings. In 2011, the parties entered a deed pursuant to which Bright Horizons accepted the sum of $2,000,000 in full satisfaction of the debt; subsequently, there were deeds of variation which altered the repayment date, the last of the specified dates being in July 2014. As a result of other transactions, the loan amount was reduced to $1,000,000.

[7] At about the same time as the loan was made, Bright Horizons began to occupy and manage the two centres under an arrangement, the nature of which is in dispute: Childcare Providers characterises it as an "Early Possession Arrangement", Bright Horizons as a "Management Agreement". In 2011, Childcare Providers entered Business Sale Agreements for the sales of the two businesses to Bright Horizons, for $300,000 (Wodonga) and $700,000 (Ballarat). Under the Business Sale Agreements, Bright Horizons could elect to set the business purchase prices (payable on completion of the Agreements) off against the debt of $1,000,000; in January 2015, it made that election.

[8] In March 2017, Childcare Providers purported to terminate the Business Sale Agreements, citing an inability to obtain the landlord's consent to assignment of the leases, and sought to re-take control of the childcare centres. Bright Horizons responded by seeking specific performance of the Agreements, and in April 2017 obtained an interim injunction preventing Childcare Providers from attempting to re-take possession of the businesses and premises. That injunction was discharged by consent on 19 July 2017; two days later Bright Horizons advised that it was terminating both the Business Sale Agreements and the Management Agreement for which it contended, on the ground of Childcare Providers' alleged repudiation of them, and would amend its pleading to seek damages for that repudiation. The debt of $1,000,000, it asserted, was now due and payable. Childcare Providers re-took possession of both centres from 24 July 2017. Bright Horizons then served its statutory demand.

The adequacy of the affidavit accompanying the statutory demand

[9] Mr Zullo, director of Bright Horizons, swore the affidavit accompanying the statutory demand. He deposed as follows:

> "1. I am the sole director of the creditor in respect of a debt of $1,000,000 owed by Childcare Providers Pty Ltd to it relating to the balance of a loan made by the creditor to the debtor.
>
> 2. I am authorised by the creditor to make this affidavit on its behalf.
>
> 3. I am the person who signed all the documentation on behalf of the creditor.
>
> 4. The total of the amounts of the debt, mentioned in paragraph 1 of this affidavit, is due and payable by the debtor company.
>
> 5. I believe that there is no genuine dispute about the existence of amount of
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> the *debt/*any of the debts."

[10] Childcare Providers contended that the affidavit did not comply with Rule 5.2 because it did not, as form 7 required, identify the source of Mr Zullo's knowledge of the matters stated in it in relation to the debt; it simply said that he was the person who signed all the documentation. It was not sufficient that he identified himself as a director, or that knowledge on his part might be inferred from that position. The example was given of Markovic J's decision in *LB Schofields One Pty Ltd v Trevet Property Pty Ltd*, *in the matter of LB Schofields One Pty Ltd;* [5] there it was held that a deponent's failure to identify his source of knowledge beyond a statement that he was a director of the creditor amounted to a non-compliance with the *Corporations Rules*, of sufficient seriousness to set aside statutory demands pursuant to s 459J(1)(b). Mr Zullo, it was submitted, had failed to identify the documentation referred to, which might have been the loan agreement, the deed of charge, the settlement deed or the subsequent deeds of variation. In any event, if the debt existed, it arose when Bright Horizons purported to accept the repudiation of the Business Sale Agreements, and the letter to that effect was signed not by Mr Zullo, but by the solicitor for Bright Horizons.

[11] A deficiency in the supporting affidavit could, it was argued, constitute "some other reason" for setting the demand aside. There was a distinction between a defect in the demand itself and a defect in the affidavit accompanying the demands which took the form of a disregard of the Rules;[6] in the case of the latter, it was unnecessary to show substantial injustice. Particular reliance was placed on the decision of de Jersey CJ in *Rapcivic Contractors Pty Ltd v Mapol Nominees Pty Ltd.*[7] In that case a director of the creditor company made the statement:

> "The Creditor provided painting services to the Debtor Company. The Creditor rendered invoices with respect to these services which remain unpaid."

The deponent went on to say that the amount of demand was due and payable and she believed there to be no genuine dispute about it. De Jersey CJ noted that the deponent had not stated the facts authorising her to make the affidavit or the source of her knowledge of the matters stated in it, the latter being the more significant deficiency.

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5 [2015] FCA 1416.

6 *Kezarne Pty Ltd v Sydney Asbestos Removal Services Pty Ltd* (1998) 29 ACSR 11 at 18; *Portrait Express (Sales) Pty Ltd v Kodak (Australasia) Pty Ltd* (1996) 132 FLR 300 at [312].

7 [2009] 1 Qd R 21.

Those defects were enough reason, in terms of s 459J(1)(b), to set the demand aside. Childcare Providers advocated a similar approach here.

[12] In response, Bright Horizons relied on a decision of Barrett J in *Blayney Wholesale Foods Pty Ltd v BIS Cleanaway Ltd*.[8] In that case, the deponent had identified himself as the national credit manager of the creditor company and went on to say that the source of his knowledge of the matters stated in the affidavit was his personal knowledge. This was, Barrett J said, a meaningless statement; however, as to whether it constituted "some other reason" to set aside the demand, the essential requirement of specifying the source of the deponent's knowledge was that it

> "be seen through the affidavit that either the deponent's knowledge is the knowledge of the creditor or is credibly sourced from the creditor".[9]

The lack of any explicit statement of source in that case was remedied by the fact that the deponent identified himself as the national credit manager. Someone occupying that position, his Honour said, would be taken to have access to information concerning defaulting customers and debtors. The debtor was not denied its entitlement to know that the information came from the creditor.

Conclusions: adequacy of accompanying affidavit

[13] Part of Childcare Providers' argument implies that the adequacy of the affidavit is to be assessed by a factual inquiry into matters outside its compass, such as what the loan documentation comprised and the suggested significance of the letter of repudiation from Bright Horizons' solicitor, said to be the means by which the debt arose. That cannot be correct, when the complaint is of a defect in form. In any event, I doubt the correctness of the contention that the debt arose when Bright Horizons' solicitor repudiated the Business Sale Agreements on its behalf. In my view, it came into existence when the loan agreement was entered in 2007, the relevant deeds being executed by Mr Zullo. It did not cease to exist on Bright Horizons' electing to set off the purchase prices in the Business Sale Agreements against it, but would remain in existence until the purchase prices became payable on completion. The real issue was whether it was due and payable.

[14] Similar reasoning to that of Barrett J in *Blayney Wholesale Foods* is applicable here. Mr Zullo was, he deposed, the sole director of Bright Horizons; the directness of his knowledge was not in doubt, nor the sources of it obscure. In context, the documentation of which he spoke could only be that relating to the loan, and his statements that he was the only director and that he signed the documentation seem to me an adequate explanation of his means of knowledge of the debt. As sole director, he was in a position to know that it was due and payable.

[15] Courts have differed as to whether the operation of s 459(J)(1)(b) is governed by s 459J(2) so that a mere defect will not suffice,[10] but whatever approach is taken, it is accepted that the discretion under s 459J(1)(b) is only to be exercised for "reasons of

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8 [2008] NSWSC 1146 at [44-45].

9 At [43].

10 *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452 at [458] cf. *Portrait Express Sales Pty Ltd v Kodak Australasia Pty Ltd* (1996) 132 FLR 300 at [306]-[307].

appropriate seriousness";[11] "sound or positive ground or good reason"; consistent with the legislative intent of the relevant part of the *Corporations Act*.[12] In my view, Mr Zullo's affidavit is adequate to meet the requirements of form 7. But even if it could be said that it should have been more expansive about his source of knowledge, that would not convince me, in the circumstances of this case, that it was a good reason for the exercise of the jurisdiction under s 459J(1)(b).

The supporting affidavit in relation to the offsetting claim

[16] Childcare Providers' "offsetting claim" is in the nature of a counterclaim; for damages for diminution in value of the centres, which it alleges has occurred during the period they were operated by Bright Horizons. Its application to set aside the statutory demand was supported by the affidavit of Mr Sheehan, the sole director of the company. In that affidavit, Mr Sheehan explained the circumstances in which Bright Horizons came to make the loan to Childcare Providers and, in particular, outlined the entry of the Business Sale Agreements for the childcare centres to be sold to Bright Horizons, saying:

> "Under the terms of the BSAs, from the date of the agreements Bright Horizons was entitled to the taking and profits of the Centres. It was also liable for all debts and liabilities. Bright Horizons operated the centres during that time."

[17] Copies of the Business Sale Agreements were annexed to Mr Sheehan's affidavit. Clause 2 of each provided (as Mr Sheehan deposed) that Bright Horizons was entitled to the takings and profits from the business, with Childcare Providers not entitled to a refund if the Agreement was terminated for any reason. Bright Horizons was in turn to pay all the debts and liabilities of the business incurred during the life of the Agreement and to indemnify Childcare Providers against all claims in relation to those debts and liabilities. Curiously, in light of that clause, cl. 5 of each Business Sale Agreement required Childcare Providers to use reasonable endeavours to maintain the business' goodwill, to carry on the business in its usual manner until the completion date and not to do anything to prejudice any asset. ("Asset" was defined to include stock and fixed assets, the latter in turn defined to include plant, equipment, furniture, fixtures and fittings and such further items as Childcare Providers might acquire for use in the business up until the completion date). Notwithstanding the reference in cl. 5 to Childcare Providers carrying on the business, it is common ground that Bright Horizons ran the centres from 2007 until March 2017.

[18] Having set out the history of litigation between the two parties, Mr Sheehan went on to depose that Bright Horizons had failed to properly manage the centres, had allowed them to fall into disrepair and had diminished their value. Its conduct

> "during its tenure as operator under an arrangement whereby it managed the Centres pending completion of the BSAs"

had caused significant loss and damage. Mr Sheehan annexed to his affidavit an email dated March 2011, from a company of which Mr Zullo was said to be the director. It listed valuations for the two centres the subject of the Business Sale Agreements – the

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[11] *Portrait Express Sales Pty Ltd v Kodak Australasia Pty Ltd* (1996) 132 FLR 300 at [311].
[12] *Meehan v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229 at [235].

Ballarat centre at $700,000 and the Wodonga centre at $300,000 - and a third centre at Charters Towers, purchased from Childcare Providers, at $200,000. Mr Sheehan also annexed an affidavit by Mr Zullo in which the latter said that in September 2014, Bright Horizons had entered into an agreement to sell the three centres for a total price of $4,200,000.

[19] Mr Sheehan then deposed that the centres were at present poorly occupied and, without further expenditure to repair and market them in order to increase their occupancy rates, would not attract a price comparable to that referred to in Mr Zullo's affidavit. He concluded on this point by expressing his belief that Childcare Providers:

> "has a claim sounding in damages against Bright Horizons in respect of its conduct in managing the centres".

[20] Annexed to Mr Sheehan's affidavit was a copy of the order made in March 2017 restraining Childcare Providers from attempting to re-take possession of the businesses; it showed that Bright Horizons had given the usual undertaking as to damages. Also exhibited were the pleadings in Bright Horizons' application for specific performance. In in its statement of claim, Bright Horizons alleged a Management Agreement made orally or by conduct in 2007 in consideration of the loan to Childcare Providers, pursuant to which it was to operate the businesses, receiving all receipts, paying expenses and retaining all profits, and controlling the business bank accounts, while Childcare Providers maintained the necessary approvals for the businesses. The Management Agreement, it was pleaded, constituted an assignment of the businesses to Bright Horizons. In its defence, Childcare Providers denied the existence of any Management Agreement, and said that there was instead an Early Possession Arrangement entered into on the basis that Bright Horizons was to acquire the businesses. It had permitted Bright Horizons to occupy the premises for the purpose of operating the businesses; the Arrangement was a licence revocable at will.

Supplementary affidavits supporting the off-setting claim

[21] Mr Sheehan swore a second affidavit in which he asserted, without elaboration, that the centres "had been operated on behalf of [Childcare Providers] by Bright Horizons". He detailed drops in occupancy rates for the centres, and set out their revenue and profit figures over recent financial years. A July 2017 email from his solicitors, annexed to his affidavit, asserted that the Ballarat centre had lost $58,000 since April 2017 and Wodonga $36,000 over the same period; Mr Zullo was injecting his own funds to keep them afloat. Mr Sheehan also annexed to his affidavit valuations for the centres, which gave respective values for Ballarat and Wodonga of $50,000 and $300,000. According to the valuers, these figures were below market expectations. Among matters affecting the centres' value were their poor occupancy levels, poor presentation, and need for capital expenditure on them. Mr Sheehan also noted that the floor coverings at the Wodonga centre needed replacement and annexed a quote of $125,000 for flooring replacement at a similar sized childcare centre.

[22] Childcare Providers also filed an affidavit from a Ms Ross, an employee of the agency currently running the centres, as to various deficiencies in the physical environments at the two centres, poor resourcing and insufficient numbers of qualified staff. Ms Ross deposed to a lowering in the ratings given the centres on assessment against the National Quality Standard. She had obtained quotes for replacing and repairing

equipment and staff training in order to ensure that the centres were compliant with the Standard, amounting to about $182,000 for each centre.

The arguments concerning the offsetting claim

[23] Childcare Providers submitted that if there were in existence a Management Agreement, as Bright Horizons had pleaded, it was a contract for services into which an obligation to exercise reasonable skill and care in the centres' operation should be implied as a matter of law.[13] This would be consistent, it was suggested, with Mr Sheehan's assertion in his second affidavit that the centres were operated by Bright Horizons on Childcare Providers' behalf. Alternatively, implication of such a term was necessary to give business efficacy[14] to the arrangement by which Bright Horizons took over the centres, whether it was a Management Agreement or an Early Possession Arrangement. Bright Horizons had failed to meet the obligation and had not managed the businesses properly, with the result that the premises had fallen into disrepair and the centres' value had diminished. In addition to the implied duty to exercise reasonable care and skill, Bright Horizons' undertaking as to damages given in March 2017 would also provide a basis for recovery for any diminution in the value of the centre since that date. Childcare Providers was entitled to compensation by way of the damages which could have been foreseen when the injunction was granted.[15]

[24] The loss to Childcare Providers by way of diminution in value of the centres was calculated in two ways. Using a valuation based on a multiple of business earnings of 3.75 and applying that multiplier to profits for the centres for the final year 30 June 2015, as compared with the months August and September 2017, the value of the Ballarat centre would on the 2015 figures be approximately $1,600,000, but on the 2017 figures, only $261,705. Secondly, applying a ratio representing the purchase prices of the Ballarat Wodonga and Charters Towers centres under the Business Sale Agreements to Mr Zullo's proposed 2014 sale figure of $4,200,000, it could be seen that the Ballarat and Wodonga centres were then worth about $3,500,000. Professional valuers now estimated the combined market value of the two centres at $350,000, indicating a loss in value since 2014 of $3,150,000. Calculated on either basis, Childcare Providers had an offsetting claim exceeding the $1,000,000 debt.

[25] Bright Horizons argued that the supporting affidavit did not establish a genuine offsetting claim. It adverted to the decision of the New South Wales Court of Appeal in *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd;*[16] the court had held inadequate a supporting affidavit which did not provide a general statement that the quantum of the offsetting claim exceeded the debt, nor any basis for calculation of the amount of the offsetting claim, and did not properly identify the reason for the offsetting claim. It was suggested that the decision conflicted with the later decision of the Western Australian Court of Appeal in *Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd (No 3)*,[17] in which it was concluded that an initial supporting affidavit under s 459G did not require evidence from which the court could calculate the substantiated amount of the demand. The reasoning in *Infratel* was to be preferred, it

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13 *Astley v Austrust* (1999) 197 CLR 1 at [46]-[48].
14 *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at [283].
15 *European Bank Ltd v Robb Evans of Robb Evans & Associates* (2010) 242 CLR 432 at [17]-[18].
16 [2012] NSWCA 365.
17 [2014] WASCA 132.

was submitted: a party seeking to set aside a statutory demand should not be permitted to use supplementary affidavits to provide for the first time evidence regarding the quantum of its offsetting claim.

[26] In any case, it was submitted, there was no evidence which supported Mr Sheehan's assertions about Bright Horizons' failures of management or resulting disrepair and loss of value; or his contention that without significant further expense the centres would not attract the prices contemplated in Mr Zullo's proposed sale of the three centres for $4,200,000. The supporting affidavit alone did not demonstrate a legal basis for an offsetting claim. Nor did it attempt to quantify or estimate the claim. That being so, Childcare Providers should not now be permitted to rely on subsequently filed affidavits.

[27] Bright Horizons contended even if Childcare Providers' material were taken as a whole, it did not establish any basis in law for the offsetting claim. Whether there were a licence revocable at will or the Management Agreement for which Bright Horizons contended, neither constituted an agreement for services, and there was no basis for implying an obligation of reasonable care as a matter of law. Even if there were an agreement for provision of services, the implied obligation could only extend to the management and operation of the child care centre businesses; it could not require Bright Horizons to undertake capital expenditure of the kind suggested in Childcare Providers' affidavits.

[28] No obligation to exercise reasonable care was necessary to give efficacy either to the claimed Early Possession Arrangement, or the Management Agreement alleged by Bright Horizons. At its highest, Childcare Providers' defence alleged the entry of an Early Possession Arrangement, on the basis that Bright Horizons was to acquire the businesses; any such arrangement must thus have been superseded by the Business Sale Agreements. The clauses by which Bright Horizons was to take all the business profits and be responsible for the liabilities, while Childcare Providers was to preserve the good will and refrain from prejudicing physical assets, including those it acquired, were at odds with any proposed implied term which required Bright Horizons to expend its own funds on maintenance and repairs for Childcare Providers' benefit.

[29] Bright Horizons raised other matters: disputes as to the quality of the observations made in relation to the conditions of the centres and the significance of their ratings; whether Mr Sheehan should be accepted when he said that the physical condition of the centres was the reason for low occupancy rates; and whether the methodologies adopted by Childcare Providers for calculation of its loss should be accepted. Those matters however, seem to me essentially factual disputes which ought not to be explored on an application of this kind.

Conclusions: offsetting claim

[30] The task for the court on an application such as this is to determine whether the debtor has a genuine claim against the creditor, not to resolve it; although it may in that exercise be appropriate to determine a legal argument which is "patently feeble".[18] The test for whether an offsetting claim is genuine under s 459H(1)(b) is not different from

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[18] *Drillsearch Energy Ltd v Carling Capital Partners Pty Ltd* [2009] NSWSC 1192 at [45].

that for whether there is a "genuine dispute" under s 459H(1)(a).[19] Various adjectives have been used to express the idea of what is, and is not, genuine; for example, whether:

> "The claim [is] bona fide and truly exist[s] in fact and … the grounds for alleging the existence of the dispute are real and not spurious, hypothetical, illusory or misconceived."[20]

[31] To constitute an affidavit supporting an application to set aside a statutory demand, so as to meet the requirement in s 459G(3)(a), the affidavit in question must identify the dispute; although it may be sufficient if it does so "expressly, by necessary inference, or by reasonably available inference".[21] It is not imperative that the ground of claim be set out in the affidavit itself: it may suffice that it is raised by a document annexed to the supporting affidavit.[22] The scheme of this part of the *Corporations Act* was described in *David Grant & Co Pty Ltd v Westpac Banking Corporation*[23] as anticipating quick resolution of issues of solvency and winding up, with any disputes raised promptly;[24] which necessitates that a viable ground should be raised in the supporting affidavit filed within the 21 days prescribed by s 459G(3).[25]

[32] I do not think, in fact, that *Infratel* stands for any general proposition that the maker of a supporting affidavit must specifically depose to the fact that the quantum of the claim exceeds the amount of the demand, and set out the basis for calculation of its amount. That decision was an assessment of the adequacy of a particular affidavit; but as Young AJA observed, it was not a matter of seeing whether certain forms had been observed, but whether the affidavit supported the claim "by expressly or impliedly identifying the real dispute".[26] The affidavit there had failed on any test to comply with s 459G. There is no necessary conflict between that case and the conclusion in *Pravenkav* that the evidence necessary for the court to calculate the substantiated amount of a statutory demand could be contained in a supplementary affidavit.

[33] The concern with Mr Sheehan's supporting affidavit is, in my view, not so much a matter of a failure to set out quantum or the manner of its calculation, as to identify the basis on which the proposed claim was to be made. Putting together the affidavit itself and the pleadings annexed to it, the most one can discern is that Bright Horizons had a right of some sort to run the businesses pending the completion of the Business Sale Agreements. Childcare Providers contended that if the arrangement were a Management Agreement, it was a contract for services. Inherent in that is the curiosity of Childcare Providers apparently seeking to rely on an agreement alleged in a pleading which it denied; but in any case, the Management Agreement as pleaded by Bright Horizons was purely for its own benefit. Whether the arrangement was a Management Agreement or an Early Possession Arrangement, it cannot be characterised as a contract for services.

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19 *Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* (2006) 94 SASR 269 at [285].
20 Ibid.
21 *Hansmar Investments Pty Ltd v Perpetual Trustee Co Ltd* (2007) 61 ACSR 321 at [326]; *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* [2012] NSWCA 365.
22 *Canon Australia Pty Ltd v Yong Bros Pty Ltd* [2009] NSWSC 842 at [8].
23 (1995) 184 CLR 265.
24 At [270].
25 *QNI Resources Pty Ltd v North Qld Pipeline No. 1 Pty Ltd*; *QNI Resources Pty Ltd v North Qld Pipeline No. 2 Pty Ltd* [2017] QCA 297 at [52].
26 *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* [2012] NSWCA 365 at [40].

Nothing is pointed to which suggests an agreement by Bright Horizons to do anything on Childcare Providers' behalf in running the centres.

[34] For a term to be implied, among other things, it

> "must be necessary to give business efficacy to the contract, so that no term would be implied if the contract is effective without it… it must be so obvious that 'it goes without saying'[and]…it must not contradict any express term of the contract".[27]

On Childcare Providers' pleaded case, Bright Horizons was let into possession of the businesses in the expectation that it would take ownership of them, as part of the consideration for their purchase. The Early Possession Arrangement contemplated that the Business Sale Agreements would come to fruition; in that event, Bright Horizons would bear any loss in value of the centres resulting from its management of them. The Early Possession Arrangement did not require implication of the proposed term to be effective. Indeed, the notion of an implied term which would require Bright Horizons to be responsible to Childcare Providers for the operation of the businesses and the maintenance of the premises and the business equipment is at odds with the specific terms in the Business Sale Agreements which confined its obligations to meeting the debts and liabilities incurred in the businesses, while any responsibility in relation to plant and equipment was placed on Childcare Providers.

[35] Mr Sheehan's first affidavit did not support the application to set aside the statutory demand; it did not raise any plausible contention by way of pointing to anything which would justify the implication of an obligation on Bright Horizons' part to operate the businesses with reasonable skill and care.

[36] The situation does not improve if one goes beyond Mr Sheehan's first affidavit to the materials subsequently filed or the oral evidence given on behalf of Childcare Providers.[28] Indeed, in cross-examination, Mr Sheehan agreed that he had never understood that Bright Horizons was to use its own money to maintain or improve the properties for Childcare Providers' business. Mr Sheehan's bald assertion in his second affidavit that Bright Horizons operated the centres on behalf of Childcare Providers is unsupported by evidence or even a pleading to that effect. Childcare Providers cannot offer any convincing basis for asserting that Bright Horizons accepted an obligation to exercise reasonable care and skill so as to maintain the value of the businesses. And so far as any reliance might be placed on Bright Horizons' undertaking as to damages, there is no evidence to support a conclusion that there was any diminution in value of the centres in the relevant period between March 2017, when the undertaking was given, and July 2017 when Childcare Providers retook possession of the centres.

[37] The offsetting claim, whether as it appears in the supporting affidavit or more broadly, does not meet the threshold of genuineness.

Genuine dispute as to the existence of the debt

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[27] *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at [283].

[28] Unusually, deponents of some of the affidavits filed were cross-examined; this was because the present application to set aside the statutory demand was heard with Bright Horizon's application for an injunction restraining Childcare Providers from selling the centres.

[38] Childcare Providers' remaining argument was that because Bright Horizons had previously elected to offset the debt against the purchase price of the centres under the Business Sale Agreements, and maintained a claim for specific performance of those Agreements in its still unamended pleading, it followed that there was a genuine dispute as to the existence of the debt. Childcare Providers' solicitors had advised Bright Horizons in August 2017 that there was an inconsistency between its pleadings and the statutory demand.

Conclusion – genuine dispute

[39] The submission is made in a context in which Bright Horizons has made it clear that it regards the Business Sale Agreements as repudiated and has communicated its intention to amend its pleadings accordingly. Its dilatoriness in doing so can hardly sustain life in a dispute which both parties have abandoned, as to whether the Business Sale Agreements remain on foot and can be enforced. The issue now is not as to whether the Business Sale Agreements have been ended, but how and by whom. There is no argument on either side that there is any effective election in place or that there exist any prospective purchase prices for the centres to be paid or set off against the debt in respect of which Bright Horizons makes its demand. Childcare Providers' argument on this point is, with respect, spurious; it has not established any real dispute.

Order

[40] The application to set aside the statutory demand is refused. I will hear the parties as to costs.