SUPREME COURT OF QUEENSLAND

CITATION:	*Project 88 TPF Pty Ltd v Open Projects Group Pty Ltd* [2020] QSC 167
PARTIES:	**PROJECT 88 TPF PTY LTD** (applicant) **v** **OPEN PROJECTS GROUP PTY LTD** (respondent)
FILE NO:	BS 14109 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2020
JUDGE:	Ryan J
ORDERS:	**1. The application is granted: The statutory demand dated 26 November 2019, and served upon Project 88 on 28 November 2019, is set aside.** **2. I will hear the parties as to costs.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – where the parties entered into a commercial building contract for the respondent to fit out the applicant's premises – where the applicant fell behind in its payments – where the respondent contends that the parties settled on a compromise agreement out of which a debt, in the amount of $450,000, was due and payable and forms the basis for the statutory demand – where the applicant disputes that a settled compromise agreement was reached – whether there is a genuine dispute about the debt *Corporations Act* 2001 (Cth) s 459E, s 459G, s 459H, s 459J *Aust Communication Exchange Ltd v Pilot Partners P/L; Premier Fasteners P/L v Pilot Partners P/L; Bridgeman Agencies P/L v Pilot Partners P/L; Assesscomm P/L v Pilot Partners P/L; Direction Fund Ltd v Pilot Partners P/L* [2017] QSC 176, applied

Citation Resources Ltd v IBT Holdings Pty Ltd (2016) 116 ACSR 274, applied
SGR Pastoral Pty Ltd v Christensen [2019] QSC 229, applied
In the matter of Bastow Civil Constructions Pty Ltd [2017] NSWSC 934, applied

COUNSEL: M E Clarke for the applicant
C D Coulsen for the respondent

SOLICITORS: MKW Legal for the applicant
Morgan Conley Solicitors for the respondent

Overview

[1] In April 2019, Open Projects Group ('OPG') entered into a commercial building contract with Project 88 Pty Ltd ('Project 88') and its directors to fit out the Pink Flamingo Spiegelclub – a nightclub on the Gold Coast. OPG calculated the cost of the work at approximately $1.1 million. OPG worked on the fit out from April until August 2019. OPG invoiced Project 88 regularly for progress payments.[1]

[2] By July 2019, Project 88 had fallen behind in its payments. It was about $330,000 in arrears in July 2019. And, according to OPG, it was about $714,000 in arrears in August 2019.

[3] The sole director of OPG is Kane McCarthy. Anthony Rigas and Susan Porrett are the directors of Project 88.

[4] After correspondence between them about the amount owing by Project 88 to OPG, they decided to meet. As far as Mr McCarthy is concerned, they reached an agreement – a "compromise" – in August 2019, on certain terms which included that the outstanding debt under the contract would be satisfied upon payment by Project 88 or Mr Rigas or Ms Porrett to OPG of $450,000.

[5] According to Mr McCarthy, Mr Rigas and Ms Porrett also agreed to other terms (discussed below).

[6] Neither Project 88, Mr Rigas nor Ms Porrett paid any money to OPG in pursuance of the alleged compromise.

[7] On 1 October 2019, OPG served upon Project 88 a statutory demand for $450,000. On 20 November 2019, Project 88 successfully applied for the demand to be set aside. Holmes CJ found that the debt had not been precisely identified in the demand.

[8] On 28 November 2019, OPG served another statutory demand upon Project 88 for $450,000 – which addressed the deficiency in the first demand identified by the Chief Justice.

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1 I note that OPG's "Debtor Ledger" for Pink Flamingo refers to invoices from December 2018 – even though the contract commenced in April 2019.

[9] On 18 December 2019, Project 88 applied to have the second statutory demand set aside under section 459J and section 459H of the *Corporations Act* 2001 (Cth).

[10] For the reasons which follow, I will grant Project 88's application and order that the second statutory demand be set aside.

The Corporations Act

[11] The relevant sections of the *Corporations Act* follow –

> **459E Creditor may serve statutory demand on company**
>
> (1) A person may serve on a company a demand relating to:
>
> (a) a single debt that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum; or
>
> (b) 2 or more debts that the company owes to the person, that are due and payable and whose amounts total at least the statutory minimum.
>
> (2) The demand:
>
> (a) if it relates to a single debt – must specify the debt and its amount; and
>
> (b) if it relates to 2 or more debts – must specify the total of the amounts of the debts; and
>
> (c) must require the company to pay the amount of the debt, or the total of the amounts of the debts, or to secure or compound for that amount or total to the creditor's reasonable satisfaction, within the statutory period after the demand is served on the company; and
>
> (d) must be in writing; and
>
> (e) must be in the prescribed form (if any); and
>
> (f) must be signed by or on behalf of the creditor.
>
> (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; and
>
> (b) complies with the rules.
>
> (4) A person may make a demand under this section relating to a debt even if the debt is owed to the person as assignee.
>
> (5) A demand under this section may relate to a liability under any of the following provisions of the *Income Tax Assessment Act 1936*:

(aa) former section 220AAE, 220AAM or 220AAR;

(a) former section 221F (except subsection 221F(12)), former section 221G (except subsection 221G(4A)) or former section 221P;

(b) former subsection 221YHDC(2);

(c) former subsection 221YHZD(1) or (1A);

(d) former subsection 221YN(1);

(e) section 222AHA;

and any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*, even if the liability arose before 1 January 1991.

(6) Subsection (5) is to avoid doubt and is not intended to limit the generality of a reference in this Act to a debt.

459F When company taken to fail to comply with statutory demand

(1) If, as at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period.

(2) The period for compliance with a statutory demand is:

(a) if the company applies in accordance with section 459G for an order setting aside the demand:

(i) if, on hearing the application under section 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand – the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or

(ii) otherwise – the period beginning on the day when the demand is served and ending 7 days after the application under section 459G is finally determined or otherwise disposed of; or

(b) otherwise – the statutory period after the demand is served.

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 the statutory period after the demand is so served.

(3) An application is made in accordance with this section only if, within that period:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

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.

…

459J Setting aside demand on other grounds

(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:

(a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or

(b) there is some other reason why the demand should be set aside.

(2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect."

The statutory demand

[12] The statutory demand served on 28 November 2019 described the debt in these terms –

> The amount of $450,000.00 being the amount due and owing pursuant to an agreement between the Company [Project 88] and the Creditor [OPG] reached on 11 August 2019 particulars which are contained in the supporting affidavit.

The parties' position about the "agreement" and the debt

Respondent's position

[13] Mr McCarthy's affidavit accompanied the statutory demand.

[14] It attached as exhibits documents which Mr McCarthy described as "a statement of account". The "statement of account" included a document entitled "Statement of Anticipated Project Revenue" which showed that $714,037.18 was owing by Project 88 to OPG as at 5 August 2019. Its next entry, dated 11 August 2019, showed that that amount had been reduced to $450,000 because of a "Credit Note (Agreed Credit)" of $264,037.18.

[15] Mr McCarthy's affidavit also attached e-mail correspondence between the parties (that is, the individuals Mr McCarthy, Mr Rigas and Ms Porrett) from 12 April 2019 to 9 August 2019, which included several e-mails from Mr McCarthy to Mr Rigas and Ms Porrett chasing payment, including for the initial deposit.

[16] Generally, Mr Rigas and Ms Porrett either did not reply (at least by e-mail) to Mr McCarthy's e-mails, or replied with excuses, including "Westpac didn't… like the amount of money been done remotley from China, so the fruad department of the bank rejected the transfer"; or "our budgets were done on the guarantee of the extra $150,000 from Silver Chef [see below] so since that was not given, it has put us in a bit of a pickle. Also with the delay in works and the push back of our opening date has been another cost to us that was not in our budget." (The errors in quotes from the correspondence between the parties are as per the original documents.) I note though that despite the e-mail silence or excuses, some progress payments were made.

[17] As to "Silver Chef": The parties arranged finance for certain items which were to be installed at the nightclub through "Silver Chef" (the supplier of those items). The correspondence implies that the Silver Chef finance was facilitated by Mr McCarthy. It was hoped that Silver Chef would provide finance to Project 88 in the amount of $300,000. However, it only provided finance in an amount of $150,000.

[18] On 2 August 2019, Mr McCarthy e-mailed Ms Porrett and Mr Rigas, informing them that he had been "talking with [his] legal team" about the "best way to move forward with a payment arrangement for the outstanding balance of the project." He said they were working through documentation which he would send to Ms Porrett and Mr Rigas. He said that his legal team had requested "a Morgage statement for Tony[']s loan on his house to prove there is equity left in the property" and asked Mr Rigas for such a statement, showing its "outstanding balance and any other institutions that have loans against it".

[19] On 5 August 2019, Mr McCarthy sent an e-mail to Ms Porrett and Mr Rigas which attached an "updated reconciliation with both outstanding invoices" (one for $149,805.52 and the other for $165,367.40). It continued –

> My solicitor is working on documents as follows
>
> - Personal guarantees from you both that the debt will be paid back in the shortest time period possible – this should be ready by COB tomorrow for your viewing.

- 2nd mortgage over Tony's house – Tony has guaranteed that I will have the current valuation and bank statement for the total outstanding amount on the house tonight so my solicitor can prepare all paper work.
- A preposed payment plan for the outstanding amount and what weekly amounts will be guaranteed as payment.
- Confirmation that goods on site will not be owned by Pink Flamingo and Open Projects Group has the write to remove and resell at any time if payment commitments are not upheld until the final amount is received.
- Interest for the outstanding amount will be charged at 10% until the debt is paid in full.

All though I am keeping works going on site no more major items will be delivered to site until all the documents are finalised and we have confirmation that the debt that my company is owed will be settled. Once we have all legal documents back I will deliver and install all final items. This is not a debt that I can afford to carry and the repayment structure needs to be large and fast for this to work in all our favours.

So in short tonight I need

- Valuation and amount owing in formal document – Bank Statement for Tony's House
- A preposed payment plan that can be achieved and when it will start.

We can then all discuss a program of moving forward tomorrow once I receive the above information.

[20] It is apparent that the e-mails do not contain all of the communications between the parties (for example, there is no e-mail containing Tony's "guarantee", or any discussion about the ownership of the goods on site which the recipients were asked to confirm).

[21] On 8 August 2019, at 4.32 pm, the General Manager of OPG sent to Mr Rigas and Ms Porrett an e-mail enclosing "information documents prepared by our solicitors in relation to the debt owed to" OPG. The documents "enclosed"/attached were a Loan Agreement; a Guarantee and Indemnity; a Second Mortgage and a General Security Deed.

[22] The e-mail explained the requirements for execution of those documents and requested that the documents be executed by "COB Monday 12 August 2019 in order to prevent any delays in finalisation of onsite works and deliveries".

[23] Ms Porrett replied to that e-mail at 5.08 pm on 8 August 2019. She said it was not possible to have the documents "prepared by Monday" (for various reasons). She continued (my emphasis) –

Also, **our legal representative is in Mexico** as discussed with Kane.

We will need by the end of next week to be fair.

This needs to be done quickly and efficiently as we all know but deadlines like this are impossible to achieve and not in the spirit of the good faith we are really trying to uphold here given the strain of BOTH businesses.

We understand the urgency but we are not going anywhere and will always honour our agreements and financial debts with OP.

Again, the last thing we need is more delays when we are all so close to the finish line.

We appreciate your understanding and we will get the ball rolling our end immediately.

[24] Mr McCarthy met with Mr Rigas and Ms Porrett on 11 August 2019 (Sunday) "to discuss the non-payment of the outstanding Progress Claims and Invoices … with a view to reach some form of resolution".

[25] Mr McCarthy believes that "a compromise" was reached on 11 August 2019 after "considerable discussions". He asserts that the terms of the compromise were reduced to writing and contained in the e-mail sent on 11 August 2019 at 4.42 pm, which read (my emphasis)–

Good afternoon Tony & Sue.

Thank you for your time today and for meeting at the venue to run through all final items.

As per our meeting and agreement I have listed below what was discussed.

1. Agreement that the current outstanding amount on the project is confirmed at $450,000.00 including GST which is made up from the below figures
    a. Contract amount outstanding $272,544.48
    b. Design Package outstanding $7,623.00
    c. Credit amounts towards contract $57,530.00
    d. Variations amount on top of contract $227,362.52
2. We all agree that this amount will not be contested and that this is the amount that is to be inserted into the legal documents including 2nd mortgage.
3. Legal documents to be signed as soon as possible, preferably by close of business Wednesday the 14th of August.
4. Agreement that items that are installed and built you are happy with and will not contest the design or quality.
5. Agreement that in the above price includes the variations to date bellow as well as the original variation sheet sent on Saturday 3rd of August.

a. Stage back room desks

b. Alterations to upstairs bar shelf

c. Balcony ply sheets

d. Swing door for wash room

e. Window reveals in plywood

f. Plaster repairs to windows

g. Laminate to 2 window sills

h. Gold laminate to harry potter room door

i. Alterations to VIP bar ice well

j. All above variations are as per Pauls quotes sent across except for back stage desks which is an agreement with me and will be included as per Sue's drawings.

Based on you agreeing to the above and confirming all items Open Projects will

1. Install all items as soon as they are finished and ready to install
2. Install all upholstery on Monday/Tuesday
3. Install all bird cage frames upstairs after upholstery
4. Install all back bar shelving and overheads after upholstery
5. Install all router cut screens once they are painted.

As per conversation in meeting all items are manufactured and we are still painting quite few items. The painting process is very tedious and we have 2 painters on the items full time 12 hours a day.

Open Projects Team will on Monday do the following things

1. Place all tools in office once it has been cleared and room has been created
2. Any dust or messy cutting will be preformed in fire stairwell where possible
3. All areas working in will be kept clean to help with the final opening process
4. Work a minimum 12 hour day (where possible with staff commitments) – except apprentices who will do 10 hour days to achieve as much completed works as quickly as possible
5. Work until all items are finished and finalised even if that means working Sunday this week.

If you agree to all the above can you both please reply to this email stating that you do and agree to all components and information of the email. As per meeting your reply will be

> **taken as a guarantee that the below will happen as soon as possible**
>
> 1. **All legal documents to be signed at the earliest convenience**
> 2. **The debt will be paid back as soon as possible with all extra cash flow and any other monies that come up in the near future (planning on $20,000 a week if possible with large amounts as they come available)**
> 3. **You will not go back on your word and contest works or amounts of the project from today forward.**
>
> I look forward to your replay and getting you ready to open your new venue that I know is going to be very successful.
>
> Kind regards
>
> Kane McCarthy

[26] Mr Rigas and Ms Porrett replied as follows. First, at 6.51 pm on 11 August 2019, Mr Rigas said (copying in Ms Porrett) –

> Hi there Kane,
>
> I do agree to all components and information of the email. As per our meeting today my reply should be taken as a guarantee that the below will happen as soon as possible. The $20,000 weekly payments might vary week to week some weeks depending on end of month and other unforeseen reasons. Thank you for your time today and let's hit the ground running tomorrow to finishing the venue asap.
>
> …

[27] Mr McCarthy replied at 6.53 pm, "Thank you Tony, Much appreciated."

[28] Then at 7.33 pm, Ms Porrett said –

> Hi Kane,
>
> As per the Tony Rigas email, I too agree on all components stated in email
>
> I am happy to move forward.
>
> Thank you

[29] The debt is said to arise out of this agreement. However, the "basis" for the agreement set out in Mr McCarthy's affidavits, differs from the "terms" as per the e-mail.

[30] In paragraph 16 of Mr McCarthy's affidavit filed in support of the statutory demand he said (my emphasis) –[2]

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2 This paragraph was repeated (as paragraph 14) in his affidavit filed 17 January 2019 (document 7).

> The terms reached [on 11 August 2011] were reduced to writing and are contained in an email from myself to Mr. Rigas and Ms. Porrett (including as representatives of the Debtor Company), **the basis being**:
>
> a. that the outstanding debt owed under the Building Contract would be satisfied on payment to the Creditor of the amount of $450,000 by the Debtor Company **or** its directors Mr. Rigas and Ms. Porrett;
>
> b. Mr. Rigas and Ms. Porrett would execute a:
>
> i Loan Agreement;
>
> ii Deed of Guarantee and Indemnity;
>
> iii General Security Agreement: and
>
> c. Mr. Rigas's wife, Louise Huxham, would provide a second registered mortgage over property she owned:
>
> (collectively, "the Security Documents")
>
> d. The Creditor **would** receive instalments of **no less than $20,000** per week in reduction of the amount of $450,000 **commencing immediately.**

[31] Mr McCarthy asserted that OPG completed the fit out at the nightclub in accordance with the terms of the compromise. He said that that Mr Rigas and Ms Porrett partially complied with its terms by executing a Deed of Guarantee and Indemnity, and a General Security Deed.

[32] Mr McCarthy informed Mr Rigas and Ms Porrett that practical completion had been achieved on 20 August 2019. He did not receive any of the $450,000. He asserted that that amount was due and payable and was the basis for the statutory demand.

[33] He stated in his affidavit in support of the statutory demand (paragraph 24) and in his affidavit filed on 17 January 2020 (document 7, paragraph 22), "I believe that there is no genuine dispute about the existence or amount of the Debt".

[34] Mr McCarthy exhibited other e-mail correspondence between the parties to document 7.

[35] On 20 August 2019, at 6.55 am, Mr McCarthy e-mailed Mr Rigas and Ms Porrett, asking about the status of the mortgage documents and loan agreement. In reply, at 7.22 am, Mr Rigas referred Mr McCarthy to his "Lawyer's correspondence".

[36] Mr McCarthy e-mailed Mr Rigas and Ms Porrett at 5.28 pm, complaining that Mr Rigas had promised that the mortgage documents and loan agreement "would be finalised last week" and continuing (my emphasis), "You called me on Friday to ask for an extension until Monday **so Louise could seek legal advice when Sam returned** and that the documents would be signed on that day. This time line is not acceptable … I don't have signed documents as per your and Sue's word as per the below emails".

[37] On 27 August 2019, at 12.46 pm, Mr McCarthy e-mailed Ms Porrett and Mr Rigas stating (my emphasis) –

> Hi Sue & Tony,
>
> **Can you please update me to your position of the amount outstanding towards your project.** I have still not received the documents back as promised and no effort has been made to pay any money towards the account or come back to me with a proposed payment arrangement.
>
> If documents and payment arrangements are not received by COB tomorrow you will force my hand to start legal proceedings against you both and the company to retrieve the amount owing. As of tomorrow you will of had the documents for 20 days with only slight action, **your solicitor has now been back for over 7 working days**. Please understand that this is not my preferred option but I will not hesitate to move forward if I do not get an outcome. If proceedings are put into motion **the original without prejudice offer below will be canceled and all items will be calculated as per contract terms.**
>
> As we have reached practical completion last week and your venue traded, any items you are not happy with come under your 12 month warranty period and will be looked at once you have all documentation in place as per our quote and contracts signed by you both.

[38] That e-mail was in a chain which commenced with the e-mail sent by Mr McCarthy on 11 August 2019. Thus, the reference by Mr McCarthy to the "without prejudice offer below" was plainly a reference to the terms of the 11 August 2019 "compromise". Mr McCarthy's description of the "agreement" contained in his e-mail of 11 August 2019 as a "without prejudice offer" is evidence of significant weight in this application.

[39] Ms Porrett replied to Mr McCarthy at 12.55 pm. She said (my emphasis) –

> We have been waiting to hear from you re Tony's conversation with you on Thursday?
>
> …
>
> As discussed **we just want to go over a few things with you before signing** and correct if I am wrong but you agreed to this with Tony on Thursday?
>
> Sorry I am now confused with what you have just emailed to us.
>
> Can we please meet with you?

[40] Mr McCarthy replied (at 1.01 pm) –

> Hi Sue,
>
> Happy to meet after documents are signed and completed.

> Conversation with Tony on Thursday was Louise was signing documents and I was happy to meet at the venue to run through items once completed.
>
> We all agreed at out meeting as per below that this was the case, I'm not waiting any longer to start to receive funds.
>
> …
>
> I'm sick of hearing you we're waiting for me to come back to you, please do what was agreed.

[41] At 1.31 pm that same day, Mr Rigas e-mailed Mr McCarthy (my emphasis) –

> Hi Kane
>
> I have forward your email to my Lawyer and I have spoken to him as well. We will have documents back to you by COB tomorrow. Hope you understand that we are all under the pump including my lawyer. Sue and I **still feel the need to meet with you to explain our side of events** leading up to the opening that cost us alot of stress and $$$$. Thank you talk soon!

[42] On Monday 2 September 2019, at 6.08 am, Mr McCarthy e-mailed Mr Rigas and Ms Porrett (and "Sam Rees") –

> Good morning Tony, Sue and Sam,
>
> Just confirming as per phone conversations with you all last week I will be receiving the following as per below.
>
> 1 Signed and completed documents by close of business Wednesday 4th of September.
>
> 2 Preposed payment plan today on how we will be receiving funds from this moment forward and how much.
>
> 3 Payment towards account with any spare cash flow you have today
>
> If you could all please respond to this email confirming the above it would be appreciated.

[43] The next e-mail in the chain was another sent by Mr McCarthy on 3 September 2019 at 4.28 pm, which included as its subject line, "FINAL WARNING BEFORE LEAGAL ACTION". It said –

> Hi Tony & Sue,
>
> As I have not had a response to my email from Monday morning I have now stopped all repair and variation works. All Open Projects Group staff have been informed that no communication is to be had with all parties with your companies until the outstanding matters have been rectified. All contracts and any supplied documents will be given to our legal team tomorrow. **Sue instructed me that I would have a payment plan by Friday as you were meeting**

> **Thursday to run through all company financials and that we could receive a payment with any leftover funds.**
>
> **As per my email last week and on Monday it seems that we will not be receiving completed documents by close of business tomorrow and I will be issuing a statutory demand to move forward with a winding up notice.**

[44] As noted above, the first statutory demand was served on 1 October 2019.

Applicant's position

Respondent's objections to applicant's evidence

[45] For the purposes of Project 88's application, it read an affidavit of Mr Rigas. The respondent objected to Mr Rigas' evidence that he did not consider there to have been a concluded agreement reached on 11 August 2019 and that he denied the compromise. I informed counsel for the respondent that the relevance or weight of that evidence was obvious to me – conveying that statements to that effect were of little relevance or weight. I note that evidence of this kind is in the same category as the evidence of Mr McCarthy to the effect that the parties reached a compromise. Although there was no objection to Mr McCarthy's evidence, his assertion that the parties in fact reached a compromise is of limited weight in this application.

[46] The respondent also objected to the evidence of Keith Vandyke which was relied upon by the applicant. In his affidavit, Mr Vandyke said that he inspected the "state of the fit-out works" on 24 and 28 January 2020 and prepared a "defects and incomplete works" list.

[47] Counsel for the respondent submitted that that evidence did not bear upon what was the relevant question for me – namely, whether the parties had reached an agreement on 11 August 2019. Obviously, the defects identified by Mr Vandyke had no bearing on that question. Nor had he looked at the contract to inform himself of the scope of OPG's work. Nor had he inspected the site at the time at which the agreement was said to have been reached. Counsel for OPG impliedly conceded that the fact that there were defects might be relevant to the question whether there is a genuine dispute about that debt, but submitted that Mr Vandyke's affidavit was of limited probative value because of its limitations.

[48] As will emerge in these reasons, I had no need to consider Mr Vandyke's evidence to reach my conclusion. Therefore I do not need to rule on its admissibility.

Applicant's submissions

[49] The applicant has a different view from that of Mr McCarthy of the outcome of the meeting on 11 August 2019.

[50] Putting to one side Mr Rigas' *opinion* about the outcome of the meeting on 11 August 2019, I note his position, as the director and secretary of Project 88, that Project 88 owes nothing "whatsoever" to OPG and disputes the debt.

[51] In his affidavit, Mr Rigas complained about the way in which OPG performed the work required to fit out the nightclub and defects in OPG's work. I do not need to

repeat the details of his complaints. He asserts that there has not been practical completion. He complains that Silver Chef items said to have been installed were not installed.

[52] He complains about errors in the payments claims made by OPG – which he said did not take into account items which he had purchased (that is, items which had not been supplied by OPG).

[53] It seems that credit for those items was discussed before 11 August 2019 but as at the date of his affidavit (18 December 2019), Mr Rigas claimed that he had not yet assessed whether the amount credited was "a reasonable amount". That assertion is contrary to correspondence from his solicitor, from September 2019, which nominated "in the vicinity of $115,000" as the appropriate amount.

[54] Of the compromise agreement he says –

> On 11 August 2019, Sue and I met with Mr McCarthy at the Venue to discuss the ongoing works and various issues. The purpose of the meeting was to try and negotiate an outcome for all parties so that the works could be completed. Upon leaving the meeting, it was my understanding that we, myself and Sue as directors of the Applicant, would consider and revert to the Respondent with details of:
>
> (a) Any amount that we considered was payable to the Respondent, less offsetting claim such as the Chinese items;
>
> (b) To the extent amounts were outstanding, a proposed arrangement for payments by instalments.

[55] He does not explain in his affidavit what he meant by his e-mail of 11 August 2019 (in which he said that he agreed to "all components and information" of Mr McCarthy's e-mail). Nor was there any evidence from Ms Porrett about what she meant in her similar e-mail of 11 August 2019.

[56] Mr Rigas claimed that Mr McCarthy was "very threatening" on 11 August 2019 and "refused to do any further work" unless Mr Rigas and Ms Porrett signed the Loan and other agreements. His affidavit implies that he and Ms Porrett were under pressure and therefore signed the Guarantee and Indemnity and the General Security Deed, but not the Loan Agreement or Mortgage. He explained in his affidavit his reasons for signing some, but not all, of the documents – but it is not clear whether he communicated those reasons to Mr McCarthy on 11 August 2019. One of the reasons Mr Rigas nominated for not signing all of the documents was that he and Ms Porrett required an opportunity to obtain legal advice.

[57] Mr Rigas attached to his affidavit the e-mail correspondence between the parties which had been exhibited to Mr McCarthy's affidavits.

[58] In addition to the narrative revealed by the e-mails, Mr Rigas' evidence established that on 4 September 2019, Mr McCarthy's solicitors wrote to the solicitors for Project 88 and its directors, asserting, in effect, that although OPG would have been entitled to cease the fit out because Project 88 was in breach of the commercial building contract –

- Mr McCarthy had reached agreement with the applicants to complete the fit out on the condition that security for the outstanding payments would be provided;
- the security had not been provided but OPG continued with the fit out to its detriment; and
- OPG allowed the "further requested extension" of time for provision of the security.

[59] The letter continued by stating that if the executed documents were not provided (by no later than close of business on 5 September 2019), then OPG would issue a statutory demand on Project 88 and "mak[e] demand on all guarantors".

[60] In reply, by letter dated 5 September 2019, the applicant's lawyers said (in effect) that –

- Project 88 and Mr Rigas and Ms Porrett denied that a formal agreement had been reached;
- It was necessary for Project 88 "and related entities" to obtain formal legal advice before considering their options;
- The security documents did not represent the agreement between the parties;
- There were issues with the work done by OPG at the nightclub, including:
    - delays costing Project 88 approximately $150,000;
    - the need for Project 88 to engage additional cleaners and other staff to complete the works (at a cost); and
    - the interruption of "aspects" of the business causing loss;
- The amount owing to OPG for the goods purchased from China by Project 88 was in the vicinity of $115,000. (As noted above, this is inconsistent with Mr Rigas' assertion in his affidavit that he had not assessed whether the amount nominated by OPG for those items was a reasonable amount.)

[61] The letter said –

> It goes without saying that the alleged debt is genuinely disputed by our client (and related entities).

[62] The letter made other accusations about Mr McCarthy's conduct which are unnecessary to repeat.

Proceedings in the District Court

[63] On 8 November 2019, OPG's solicitors served on Project 88, via its solicitors, a claim and statement of claim, filed in the District Court of Queensland against Anthony Rigas, Susan Porrett and Louise Huxham.

[64] Against Mr Rigas, OPG claimed *inter alia*, "[t]he sum of $450,000 due and owing" by Mr Rigas to OPG; alternatively, damages for breach of contract; alternatively, damages on a quantum meruit basis.

[65] Against Ms Porrett, OPG claimed *inter alia*, "[t]he sum of $450,000 due and owing" by Ms Porrett to OPG; alternatively, a declaration that OPG has an equitable interest in property owned by Ms Porrett "as claimed in the Lot 1 Caveat having dealing number […]"; alternatively, damages for breach of contract; alternatively, damages on a quantum meruit basis.

[66] Against Ms Huxham, OPG claimed *inter alia*, "the sum of $450,000 due and owing" by Ms Huxham to OPG; alternatively, a declaration that OPG has an equitable interest in property owned by Ms Huxham "as claimed in the Lot 192 Caveat having dealing number […]".

[67] OPG makes no claim against Project 88 in the District Court proceedings.

[68] The statement of claim alleges that, in breach of the commercial building contract, Mr Rigas and Ms Porrett failed to pay amounts due and owing.

[69] It alleges that on 11 August 2019, an agreement was reached to (among other things) compromise the debt; for the three defendants to pay $450,000 to OPG; and for the provision of certain security.

[70] It alleges that the three defendants breached the compromise agreement. And it alleges that "Pursuant to the terms of the Agreement, [Mr Rigas and Ms Porrett] are indebted to the Plaintiff in the amount of $450,000 recoverable by way of liquidated damages".

[71] The statement of claim also makes a claim for damages for breach of the commercial building contract if the District Court determines that the compromise agreement is "not enforceable".

The applicant's arguments about setting the statutory demand aside

[72] In seeking to have the statutory demand set aside, Project 88 disputes the debt on the basis that the alleged 11 August 2019 agreement –

- is not enforceable (the '**not enforceable**' ground); and
- in any case, does not oblige Project 88 to pay the debt (the '**no obligation**' ground).

[73] Project 88 further submits that the statutory demand ought to be set aside as an abuse or process and, in any case, says it has offsetting claims.

Is there a genuine dispute about the existence or amount of the debt (section 459H (1)(a) *Corporations Act* 2001 (Cth)?

[74] The "test" for a genuine dispute in this context is well established. I rely on its succinct expression by Bowskill J in *SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229 at [51] –

> The relevant principles concerning whether there is a genuine dispute under s 459H were summarised by McKerracher J in *Citation Resources Ltd v IBT Holdings Pty Ltd* (2016) 116 ACSR 274 at [17]. The threshold is not high or demanding; a genuine dispute means there must be a plausible contention requiring investigation; and it is only if the applicant's contentions are so devoid of substance that no further investigation is warranted that the applicant will fail. The court is not called on to determine the merits of, or to resolve, the dispute.

[75] In terms of the court's approach, Jackson J explained in *Aust Communication Exchange Ltd v Pilot Partners P/L; Premier Fasteners P/L v Pilot Partners P/L; Bridgeman Agencies P/L v Pilot Partners P/L; Assesscomm P/L v Pilot Partners P/L; Direction Fund Ltd v Pilot Partners P/L* [2017] QSC 176 at [18] that –

> the requirement [in section 459H(1)(a)] that any dispute must be genuine entails that the court must examine the facts alleged to see whether the threshold of a genuine dispute is crossed. Beyond that the court does not go.

[76] Also, his Honour said (at [19]-[20]) –

- An applicant bears the onus of establishing the existence of a genuine dispute on the balance of probabilities; and
- To satisfy a court that there is a genuine dispute (referring to *Ligon 158 Pty Ltd v Huber* (2016) 117 ACSR 495) –
    - there must be evidence showing a serious question to be tried or an issue deserving of a hearing;
    - while the court is generally not concerned to engage in an enquiry as to the credit of the deponent of the supporting affidavit – it is not required to accept uncritically every statement in the affidavit that is inconsistent with undisputed contemporary documents, is inherently improbable, does not have sufficient prima facie plausibility to merit further investigation or is an assertion of facts unsupported by evidence; and
    - inconsistent contemporaneous documents are not necessarily sufficient to defeat the company's challenge even though they might pose difficulties for the ultimate proof of the case that it would advance if the dispute were litigated.

[77] In *Citation Resources*, McKerracher J said, quoting from his earlier decision in *Pharmanet Group Ltd v Primeland Pty Ltd* [2015] FCA 208 at [26], that –

- The function of the court is to determine whether there is a genuine dispute *not* to attempt to weigh the dispute; and
- The issue of the credibility of key witnesses is not something which would usually be resolved on an application to set aside a statutory demand.

[78] In the circumstances of this case, it is also worth repeating the observations of Black J in *In the matter of Bastow Civil Constructions Pty Ltd* [2017] NSWSC 934, in

which his Honour set aside a statutory demand. In his opening remarks, his Honour said (at [2] and [3]) (my emphasis) –

> … **[I]t is fundamental to the Court's jurisdiction in dealing with creditor's statutory demands that it does not determine their underlying commercial merit**, but instead determines, within a summary and interlocutory procedure, whether there is a genuine dispute about the relevant debt, or whether there is a genuine offsetting claim, or some other reason to set aside the creditor's statutory demand. **That is a matter that is, or ought to be, well understood, and a failure to recognise it will often lead to disappointment**, because a creditor's statutory demand will be set aside, as it ought to be, without a determination of the underlying merit of the dispute.
>
> It should also be recognised that the consequence of setting aside a creditor's statutory demand in that manner is that the parties will ultimately be left to the course which ought to have been adopted in the first place, namely to bring proceedings in a Court of appropriate jurisdiction, where both parties can lead evidence, that evidence can be contested, and that Court can ultimately determine those matters that are the subject of the genuine dispute or the genuine offsetting claim. Difficulties arise when claims that are in fact genuinely disputed are brought by way of creditor's statutory demand, such that the demand has to be set aside, the costs of the application to do so are wasted, and the parties are then left to bring the proceedings that could have been commenced in the first place, after having incurred the delays and the additional costs of an application to set aside the creditor's statutory demand.

The not enforceable ground

Applicant's submissions

[79] Project 88 submits that the (reasonable) inference to draw from the evidence is that no agreement (or compromise) was reached between the parties on 11 August 2019. Thus, because there is a genuine dispute about whether an agreement was reached (that is, whether there is anything enforceable), there is a genuine dispute about whether a debt arose out of that agreement.

[80] Further, it submits that the following plausible contentions require investigation as to the enforceability of the agreement –

(a) whether it is void for uncertainty;

(b) whether all the terms were reduced to writing or whether the terms were partly oral and partly in writing;

(c) whether anything said at the meeting, including potential oral terms, conflicts with written terms;

(d) whether consideration was provided;

(e) whether there was an intention to be legally bound:

(f) whether it was subject to implied terms;

(g) how, and when, it was actually formed and the affect [*sic*] of same on the terms;

(h) whether it was, properly construed, an agreement to agree;

(i) whether it, or the building contract it varied, was affected by vitiating factors, such as duress;

(j) whether the original building contract was effectively varied by it; and

(k) whether the dispute resolution provisions of the building contract have been complied with.

Respondent's submissions

[81] OPG submitted, in effect, that on an objective analysis, there was a binding agreement made between the parties which provided a basis for the demand.

[82] OPG submitted that the terms of the agreement were as set out in paragraph 16 of Mr McCarthy's affidavit.[3] That paragraph is set out above. A simple comparison of the content of the e-mail with paragraph 16 reveals that the content of paragraph 16 does not reflect the terms as set out in the e-mail.

[83] OPG submitted that the e-mails spoke for themselves – and that, upon my review of them, I would conclude that a compromise agreement had been formed.

[84] It submitted that any dispute which the applicant wished to raise had been compromised by the 11 August 2019 agreement and there was no dispute about the obligation to pay under the agreement.

[85] In support of its submission that the parties reached a binding agreement on 11 August 2019, OPG referred in particular to the e-mail sent by Mr Rigas to Mr McCarthy on 27 August 2019, after the guarantee and general security agreement had been executed and returned to OPG. That e-mail is set out above but repeated here for convenience –

> I have forward your email to my Lawyer and I have spoken to him as well. We will have the documents back to you by COB tomorrow. Hope you understand that we are all under the pump including my lawyer. Sue and I still feel the need to meet with you to explain our side of events leading up to the opening that cost us alot of stress and $$$$. Thank you talk soon!

[86] OPG submitted that this e-mail was "only consistent" with a binding agreement because it communicated that, after speaking with his lawyers, Mr Rigas *promised* to have the mortgage and loan agreement documents returned the next day. It also argued that, by returning *some* of the documents executed, Mr Rigas and Ms Porrett

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3 T20/20 -23; T22/1 – 5.

affirmed the existence of a concluded agreement by doing some of that which they had agreed to do.

Conclusion – no enforcement ground

[87] I do not need to finally decide whether in fact the parties' "agreement", made on 11 August 2019, amounted to an enforceable agreement which had the effect of creating a debt owed to OPG by Project 88 in the amount of $450,000. Nor do I need to decide whether there is any merit in Mr McCarthy's claims against the applicant or its directors: *In the Matter of Bastow Civil Constructions Pty Ltd* [2017] NSWSC 934; *SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229. As Jackson J said in *Pilot Partners*, I am not to "go beyond" determining whether the "threshold" of a genuine dispute has been crossed.

[88] Thus, my focus is on whether I am satisfied that there is a genuine dispute about the existence (or amount) of the debt to which the demand relates. In this case, at the heart of that dispute is whether there was a concluded agreement reached between the parties on 11 August 2019 out of which a $450,000 debt arose.

[89] I do not accept Mr McCarthy's assertions as to the terms of, and the fact of, a concluded agreement as set out in his affidavits (*cf Ligon 158*, referred to in *Pilot Partners*).

[90] First, the language used in, and the inferences to be drawn from, the contemporaneous e-mail correspondence are inconsistent with Mr McCarthy's affidavit evidence about the terms of the agreement, and his assertion that those terms were agreed between the parties; and secondly, there was no evidence presented of other communications or conversations between the parties which supported Mr McCarthy's version of the terms or the fact that there was agreement between the parties about them.

[91] Evidence of the existence of a genuine dispute about whether a concluded agreement was reached on 11 August 2019, and therefore whether a debt exists, may be found in the e-mail correspondence – which I consider to be a reliable reflection of the status of the discussions and the parties' position at the relevant time.

[92] On the basis of that correspondence I infer that –

- by 2 August 2019, the parties had *discussed* the potential for a payment plan and Mr Rigas providing security (by way of a mortgage over his home) for the amount outstanding under the commercial building contract;
- Mr Rigas and Ms Porrett intended to discuss the security documents – and perhaps the proposal more broadly – with their lawyers and needed time (about a week from 8 August 2019) to do so; and
- Mr McCarthy wished to resolve things quickly – thus arranging the meeting on 11 August 2019.

[93] In my view, matters which provide the basis for a *plausible contention* that the outcome of the meeting on 11 August 2019 was *not* a concluded agreement or compromise include –

- that on 11 August 2019, Mr McCarthy was aware that Mr Rigas and Ms Porrett wished to speak to their lawyers and needed time to do so: see for example –
    - Mr McCarthy's e-mail to Mr Rigas and Ms Porrett dated 27 August 2019, in which he observed that their solicitor had been "back for over 7 working days" – not inconsistent with Mr McCarthy appreciating that they were intending to get legal advice before committing to the agreement discussed on 11 August 2019; and
    - Ms Porrett's e-mail to Mr McCarthy on 8 August 2011;
- the uncertainty of expression used in Mr McCarthy's 11 August 2019 e-mail when it came to the matters which Mr McCarthy wished Mr Rigas and Ms Porrett to "guarantee" would happen, namely –
    - that the legal documents were to be signed "at the earliest convenience" – not inconsistent with a desire on the part of Mr Rigas and Ms Porrett to speak to their lawyers first; and
    - that the debt was to be paid back "as soon as possible"; including from moneys coming up in the "near future" – not inconsistent with there having been no *agreement* about the payment plan (a critical component of any compromise) on 11 August 2019; and not inconsistent with Mr Rigas' understanding (at the end of the meeting) that he and Ms Porrett were to "revert" to Mr McCarthy with "any amount that [they] considered payable to OPG" and "a proposed arrangement for payments by instalments".
- that the repayment schedule in Mr McCarthy's e-mail of 11 August 2019 was expressed, effectively, in terms of the amounts which Mr McCarthy *hoped* to receive: that is, he was "*planning* on $20,000 a week *if possible* with large amounts as they become available" (my emphasis) – not inconsistent with an understanding that the parties were yet to settle on a payment plan;
- that, although Mr Rigas sent an e-mail to Mr McCarthy indicating his agreement with "all components and information of the email" of 11 August 2019, he *qualified* his agreement by indicating that he (or the entity responsible for the payment of $450,000) might not be able to pay OPG $20,000 per week – not inconsistent with the terms of any payment plan not having yet been settled;
- that on 27 August 2019, Mr McCarthy sent to Mr Rigas and Ms Porrett an e-mail asking them to "update" him on their "position of the amount outstanding towards [their] project" – not inconsistent with the parties not having settled on that amount on 11 August 2019; and indeed not inconsistent with Mr McCarthy appreciating that Mr Rigas and Ms Porrett were to provide to him (or "revert" to him with) their calculation of the amount outstanding *after* 11 August 2019, and thus appreciating that there was no agreement reached about it on 11 August 2019;
- Mr McCarthy's own reference to the 11 August 2019 "agreement" as a "without prejudice offer" which could be "cancelled" with "all items …calculated as per contract terms" in his e-mail of 27 August 2019 – not

inconsistent with his understanding that Mr Rigas and Ms Porrett were yet to agree with his 11 August 2019 proposal;

- that, in his e-mail to Mr Rigas, Ms Porrett and Mr Rees on 2 September 2019, Mr McCarthy wrote to "[confirm] as per phone conversations" that Ms Porrett and Mr Rigas were to provide a "preposed payment plan… on *how* we will be receiving funds from this moment forward and *how much*" (my emphasis) – not inconsistent with Mr McCarthy appreciating that a payment plan had not been agreed on 11 August 2019; and

- that, in his e-mail to Mr Rigas and Ms Porrett on 3 September 2019, Mr McCarthy referred to Ms Porrett's "instruction" that he would have their payment plan by "Friday" – not inconsistent with Mr McCarthy appreciating that a payment plan had not been agreed on 11 August 2019.

[94] I do not accept OPG's submission that Mr Rigas' e-mail of 27 August 2019 was *only* consistent with a binding agreement having been reached on 11 August 2019. It is just as consistent with Mr Rigas and Ms Porrett wishing to have further discussions with Mr McCarthy about the terms of any yet-to-be-reached agreement; and just as consistent with Mr Rigas and Ms Porrett not intending to enter into any agreement without their lawyer's input (even though they might have *assumed* that their lawyer's advice would be to sign the documents provided by Mr McCarthy).

[95] Bearing in mind the low threshold, and bearing in mind that I am expressing no view about the merits of the dispute, I am satisfied that there is a genuine dispute about the existence of the debt as identified in the statutory demand because there is a genuine dispute about whether a concluded agreement was reached, between anyone, on 11 August 2019 out of which that debt is said to arise. I say "between anyone" because it is not clear to me on the face of the evidence that the discussions between the parties on 11 August 2019 concerned anything that Project 88 – rather than its directors personally – had to do.

[96] On my analysis, the applicant's primary plausible contention is that no concluded agreement was reached on 11 August 2019. I do not need to go on to consider any other of the matters raised by the applicant about the enforceability of the agreement. However I note that, at the least, there seem to be issues around the certainty of the terms of the agreement; whether it was an agreement to agree and the intention of the parties to be legally bound by it.

The no obligation ground

[97] Project 88 submitted that, even if the compromise agreement were enforceable, plausible contentions requiring investigation arose as to whether the debt was "due and owing" under the terms of the agreement.

[98] It submitted that – contrary to OPG's assertion that the effect of the agreement was that OPG would receive "instalments of no less than $20,000 per week in reduction of the $450,000, commencing immediately" – the agreement only required the payment of $20,000 per week "if possible" and, as stated by Mr Rigas, it was likely to vary from week to week (assuming his e-mail contained another term of the

agreement). Also, it was not clear to whom the payment obligation applied. Plausibly, it obliged Project 88's directors, rather than the company, to pay.

[99] At worst, Project 88 submitted, by the date of the first statutory demand only $300,000 was payable.

[100] OPG did not respond to this aspect of the applicant's argument in its written submissions.

[101] In oral submissions, the respondent argued that the whole of the $450,000 was owing on the basis that the compromise agreement had been repudiated. Counsel for OPG submitted –

> What we say is that there was an agreement that said $450,000 has to be paid over time and it was to be paid from your cash flow. No payments were ever made … which means what we say is that's a repudiation of the agreement… So everything that becomes payable under the agreement becomes payable.

[102] Counsel said that the reason why – upon repudiation of the agreement – the amount which became payable was $450,000 and not the balance outstanding as per the commercial contract was "the doctrine of merger".

[103] In reply to this argument, counsel for the applicant submitted, in effect, that rights only merged by way of a compromise created by *deed* – and there was no deed.

[104] Having found the applicant to be in a position to plausibly contend that no agreement was reached, I do not need to consider whether the agreement effected a merger of rights. Nor do I need to consider whether there was a repudiation of it, causing everything under the agreement to become payable. But the parties' argument in this context demonstrates that there is another plausible contention requiring investigation (around whether the doctrine of merger applies to the agreement, and whether it was repudiated so as to cause the whole of the $450,000 to be due and owing) which would be enough to cause me to set aside the statutory demand.

The some other reason ground

[105] In *Citation Resources*, McKerracher J outlined the principles concerning "some other reason" why a statutory demand ought to be set aside. His Honour referred to *Tekno Autosports Pty Ltd v Jenkins* [2014] FCA 774 and Gleeson J's discussion of those principles at [23] – [25]. Those points of principle include (but not only) the following (at [18] of *Citation Resources*) (my emphasis) –

- The Court's power under s 459J(1)(b) exists to maintain the integrity of the process provided under Pt 5.4 of the Act [Winding Up in Insolvency] and is to be used to counter an attempted subversion of the statutory scheme, **but is not exercised by reference to subjective notions of fairness**;
- The Court retains a **residual jurisdiction** to restrain reliance on the statutory demand procedure on the ground of an **abuse of process and/or on the ground of impropriety of purpose**;

- There will be an abuse of process if the purpose of the party issuing the statutory demand is not the purpose of pursuing the statutory demand to wind up the company on the ground of insolvency, but rather to use the process as a means of obtaining an advantage for which the process is not designed or to obtain some collateral advantage beyond what the law offers – **such as the application of pressure to compel payment of a disputed debt.**

[106] In this case, as another reason why I ought to set aside the demand, the applicant referred to OPG's claim in the District Court and submitted that it was "unclear" how OPG could oppose the application to set aside the statutory demand whilst prosecuting "an inconsistent claim" in the District Court.

[107] The applicant noted that the claim in the District Court pleaded that the parties subject to the payment obligation under the compromise agreement did not include Project 88. Also, the parties to the District Court claim were *not* sued as guarantors of the applicant's debt. Thus, a question about the person or entity responsible for the debt was raised on OPG's own case – providing another reason for setting the demand aside.

[108] The applicant contended that OPG was attempting, by its statutory demand, to subvert the need for a set of pleadings: it was an abuse of process. OPG ought to join the applicant in its District Court proceedings. There would be no injustice to OPG if the demand were to be set aside. OPG was not thereby precluded from suing for the debt and the simplest way it could do that would be by adding the company as a party to its proceeding in the District Court.

[109] Counsel for the applicant took me to OPG's pleadings and in particular to paragraph 15 which asserted the reaching of an agreement on 11 August 2019 and its terms – which were similar to, but different from, those as set out in paragraph 16 of Mr McCarthy's affidavit in support of the demand – which, in turn, were different from the "terms" contained in the 11 August 2019 e-mail.

[110] The applicant complained (having regard to the different expressions of the agreement) that it had to contest a contract on three different grounds in these proceedings, without pleadings, which was "inappropriate". Further, it was submitted, the requirement that a loan agreement be executed "only made sense" if there was no longer an obligation on the applicant to pay the money but instead the obligation shifted to the directors.

[111] Counsel for OPG submitted that the statement of claim made it clear that the defendants were being sued under the guarantee,[4] and that there was nothing improper about OPG proceeding simultaneously against the company by way of a statutory demand and against the defendants by way of claim.

[112] Counsel for OPG submitted that the statutory demand procedure was not "determining the rights of the parties" – it was about "giving rise to a presumption of insolvency". He said, "If somebody has a problem with our debt, then that is dealt with in the course of the winding up by the adjudication of our proof of debt" which could be contested by the directors, shareholders and other creditors of the company.

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4 T28/30 – 33; T31.

[113] In support of his submission that the directors and the third party (sued in the District Court) were being sued "under the guarantee", counsel took me to paragraph 15 of the statement of claim and said that it was clear that the named defendants were being sued in pursuance of the guarantee which they gave.

[114] Paragraph 15 of the statement of claim refers to the meeting on 11 August 2019 and the agreement reached therein which included (it asserted) an agreement "that the debt owing under the Building Contract would be compromised and that the First, Second and Third Defendants would pay to the Plaintiff the amount of $450,000". It also asserted an agreement that the security documents would be executed. The statement of claim alleged that the defendants had breached the agreement by not returning the loan agreement or the second mortgage and by not paying OPG $20,000 per week. It also asserted that the defendants were "indebted to the Plaintiff in the amount of $450,000 recoverable by way of liquidated damages".

[115] The statement of claim does not clearly assert that the defendants are being sued as guarantors of Project 88's debt. OPG may well have intended to plead its case in that way – but in my view that has not been achieved.

[116] Counsel for OPG submitted that it was a "hollow submission" for Project 88 to assert that the statement of claim pleaded that the three individual defendants were "responsible for the debt". He argued that such a submission ignored Mr Rigas' e-mail, in which he used the word "guarantee" (that is, the e-mail of 11 August 2019, in which Mr Rigas said "my reply should be taken as a guarantee that the below will happen as soon as possible"). He submitted that Mr Rigas was thereby acknowledging his position as guarantor. I do not accept that Mr Rigas was acknowledging his position as a "guarantor" of Project 88's debt in that e-mail. In my view, he was plainly using the word "guarantee" in a colloquial way.

[117] Bearing in mind the relevant legal principles, if it were necessary for me to rely on the "some other reason" ground in this matter, then I would conclude that the fact of the proceedings in the District Court for the same debt provided a sufficient reason to set aside the statutory demand, particularly in light of the ambiguity in the "agreement" of 11 August 2019 about who is responsible for the $450,000 debt and the basis upon which the defendants have been sued.

[118] There is another matter of relevance to this application raised by the statement of claim and that is the alternative claim based on a potential finding by the District Court that the agreement of 11 August 2019 is not enforceable. Thus, OPG itself anticipates as a possibility a finding of unenforceability – consistent with my conclusion that it may be plausibly contended that the agreement is not enforceable.

Other matters relied upon by the applicant

[119] Having found a genuine dispute about the existence of the agreement and thus the existence of the debt the subject of the demand, I do not need to consider any of the other arguments made by the applicant.

Orders

[120] I order that the statutory demand dated 26 November 2019 and served upon Project 88 on 28 November 2019 be set aside.

[121] There does not appear to be any reason why the costs of the present application ought not follow the event. However, I understand that there are outstanding costs incidental to this application, which were reserved by Daubney J on 23 January 2020, at the concurrent hearing of the applicant's and the respondent's interlocutory applications, both of which were resolved by way of a consent order on that date.

[122] I will hear the parties as to costs.