SUPREME COURT OF QUEENSLAND

CITATION:	*Doctors of Optimization Pty Ltd v MPA Engineering Pty Ltd (Subsidiary of Aquatec Maxon Group Ltd)* [2023] QCA 219
PARTIES:	**DOCTORS OF OPTIMIZATION PTY LTD** ACN 618 587 901 (appellant) **v** **MPA ENGINEERING PTY LTD** ACN 011 069 533 (respondent)
FILE NO/S:	Appeal No 3547 of 2023 SC No 16262 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 21 February 2023 (Bradley J)
DELIVERED ON:	10 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2023
JUDGES:	Morrison JA and North and Henry JJ
ORDERS:	**1. Appeal dismissed.** **2. Within 14 days, the respondent is to file and serve any written submissions it has as to costs, not exceeding four pages.** **3. Within a further 7 days thereafter, the appellant is to file and serve any written submissions it has as to costs, not exceeding four pages.** **4. Within a further 7 days thereafter, the respondent is to file and serve any written submissions it has in reply, not exceeding two pages.** **5. The question of costs will be determined on the papers.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENERALLY – where the appellant has been served with a statutory demand by the respondent – where the appellant made an application to set aside the statutory demand for payment – where the primary judge refused an application to set aside the statutory demand – where the appellant submits

that the application to set aside the statutory demand should not have been dismissed

Corporations Act 2001 (Cth), s 459A, s 459C, s 459E, s 459G, s 459H

Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785, cited
Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] 2 VR 290; (1993) 11 ASCR 362; [1994] VicRp 61, cited
Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2) [2003] NSWSC 896, cited
Re Morris Catering (Australia) Pty Ltd (1993) ACSR 601; [1993] QSC 278, cited
TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd (2008) 66 ACSR 67; [2008] VSCA 70, cited

COUNSEL: The appellant appeared on his own behalf
T Pincus appeared for the respondent

SOLICITORS: The appellant appeared on his own behalf
Gadens Lawyers for the respondent

[1] **MORRISON JA:** I agree with the reasons and the orders proposed by North J.

[2] **NORTH J:** Under s 459A a court may order that an insolvent company be wound up upon an application under s 459P of the *Corporations Act 2001*.[1] In that context s 459E authorises a creditor to serve upon a company a demand, in the form and circumstance that the section stipulates, requiring payment of a debt. By s 459C a court must presume that a company is insolvent if the company fails (as defined by s 459F) to comply with the demand. But the company served with a demand has an avenue of defence under the *Act*. Section 459G provides that the company may apply to the court for an order setting aside the demand so served. And s 459H applies in the circumstances of an application under s 459G if the court is satisfied either that there is "a genuine dispute" about the existence or amount of the debt or that there is an off-setting claim with the consequence that the court may set aside the demand.

[3] The words "a genuine dispute" have, not surprisingly, been the subject of many judicial pronouncements explaining what it means and the extent of the inquiry required to determine whether a dispute is genuine.

"A genuine dispute" – the Cases

[4] In *Mibor Investments Pty Ltd v Commonwealth Bank of Australia*[2] Hayne J said:

> "… what is meant in s 459G by "a genuine dispute between the company and a respondent about the existence or amount of the debt" may be better understood in the light of this as well as some other considerations to which I now refer.

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1 These sections and those that follow are found in Part 5.4, Divisions 1, 2 and 3 of the *Act*.
2 (1993) 11 ASCR 362.

> First, any application to set aside a statutory demand must be made very quickly: it must be made within 21 days. Second, the statute contemplates a summary procedure, the only outcome of which will be an order affecting the statutory demand, not any order or judgment declaring a debt to be owing or not to be owing or ordering payment of any money sum. Third, the only significance that the statutory demand has is that if there is failure to comply with it then the company is deemed to be insolvent. Thus the demand is no more than a precursor to an application for winding up in insolvency. Fourth, an application to wind up in insolvency must be determined within 6 months (unless the court is satisfied that special circumstances justify an extension of that time): s 459R. Fifth, on the hearing of the application to wind up, the company may not oppose the application on grounds that it might have taken in any application to set aside the demand, unless those grounds are material to proving that the company is solvent.
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> These matters, taken in combination, suggest that at least in most cases, **it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute.** All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute."[3]
>
> (Emphasis added)

[5] Thomas J in *Re Morris Catering (Australia) Pty Ltd*[4] said:

> "There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. **That is not to say that the court will examine the merits or settle the dispute.** The specified limits of the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".
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> It is often possible to discern the spurious, and to identify mere bluster or assertion. But **beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.**
>
> The essential task is relatively simple – to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it)."[5]
>
> (Emphasis added)

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3 *Mibor Investment Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362 at 366-367 per Hayne J.

4 (1993) 11 ACSR 601.

5 See *Re Morris Catering (Australia) Pty Ltd* (1993) ACSR 601 at 605 per Thomas J.

[6] In *Eyota Pty Ltd v Hanave Pty Ltd*[6] McLelland CJ in Eq said:

> "It is, however, necessary to consider the meaning of the expression "genuine dispute" where it occurs in s 450H [sic]. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth" (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of facts unsupported by evidence": cf *South Australia v Wall* (1980) 24 SASR 189 at 194.
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> But it does mean that, except in such an extreme case, **a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute.** There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute. In *Mibor Investments* (at 366-7) Hayne J said, after referring to the state of the law prior to the enactment of Dev 3 of Pt 5.4 of the Corporations Law, and to the terms of Div 3:
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> > These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.
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> In *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601 at 605 Thomas J said:
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> > There is little doubt that Div 3 … prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a "genuine dispute" and whether there is a "genuine claim".
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> > It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it), the court has no function. It is not helpful to

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6 (1994) 12 ACSR 785.

> perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.
>
> The essential task is relatively simple – to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it).”[7]
>
> (Emphasis added)

[7] In *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2)*[8] Barrett J said:

> “The test to be applied in cases of this kind has been established in several well known cases, of which those most often quoted are **Mibor Investments Pty Ltd v Commonwealth Bank of Australia** [1994] 2 VR 290, **Eyota Pty Ltd v Hanave Pty Ltd** (1994) 12 ACSR 785, **Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd** (1997) 76 FCR 452 and **Re Morris Catering (Aust) Pty Ltd** (1993) 11 ACSR 601. Those cases refer to tests of “plausible contention requiring investigation”, “real and not spurious, hypothetical, illusory or misconceived” and “perception of genuineness (or lack of it)”.
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> These tests, applied in the context of a summary procedure where it is not expected that the court will embark on any extended inquiry, mean that the task faced by a company challenging a statutory demand on the “genuine dispute” ground is by no means at all a difficult or demanding one. The company will fail in that task only if it is found upon the hearing of its s.459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. **Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court does not engage in any form of balancing exercise between the strengths of competing contentions.** If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.”[9]
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> (Emphasis added)

[8] Each of the pronouncements are by a judge of considerable experience in the field and deserving respect. Some of them were cited with evident approval in this court in *JJMMR Pty Ltd v LG International Corp*.[10] Three of them[11] were quoted with

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7 *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 per McLelland CJ in Eq at 787.

8 [2003] NSWSC 896.

9 See *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2)* [2003] NSWSC 896 per Barrett J at [17] and [18].

10 [2003] QCA 519 at [3] and [4].

11 The fourth, the reasons of Barrett J in *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2)* [2003] NSWSC 896 is consistent with the others.

express approval by the Court of Appeal in Victoria in *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd*[12] where Dodds-Streeton JA[13] referring to many of the authorities said:

> "[56] The court, in the context of an application to set aside a statutory demand, must determine whether there is a genuine dispute about the existence or amount of the debt or whether the company has a genuine off-setting claim.
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> [57] **No in-depth examination or determination of the merits of the alleged dispute is necessary, or indeed appropriate,** as the application is akin to one for an interlocutory injunction. Moreover, the determination of the "ultimate question" of the existence of the debt should not be compromised.
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> [58] On appeal, the sole question is usually whether the primary judge erred in determining that there was, or was not, a genuine dispute or off-setting claim. That is, of course, a different question from whether the debt exists.
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> [59] As Brooking and Charles JJA observed in *Spacorp*:
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> > [3] The only question for us is whether the judge erred in determining that there was no genuine dispute. One can of course differ from the judge without deciding that the debt did not exist. A great range of states of mind on what we might call the ultimate question – the existence of the debt – may accompany the view that there is a genuine dispute, ranging from a clear conviction that the debt does not exist to the opinion that the genuine dispute hurdle has only just be cleared.
> >
> > [4] We think, if we may say so, that**, except in a case in which it is as plain as a pikestaff that there is no debt (where bluntness may be in the interests of both sides), Judges should, in general at all events, in dealing, whether at first instance or an appeal, with the question of genuine dispute, be at pains to perform the admittedly delicate task of disposing of that question without expressing a view on what we have called the ultimate question.** For otherwise, on an application which resembles if it is not in law an interlocutory one, things may be said which embarrass the judge before whom the ultimate question comes.
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> [60] In *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd*, the Full Federal Court cited a variety of different formulations of the principles applicable to determining the existence of a genuine dispute or off-setting claim. Their Honours considered the different articulations helpful, but warned that they should not become a substitute for the words of the statute.

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12 (2008) 66 ACSR 67.

13 With whom the other members of the court agreed.

[61] As recognised by Heerey J in *Gribbles Pathology (Vic) Pty Ltd v Shandford Investments Pty Ltd*, **any tendency to "trawl through a myriad of judgments" and plethora of formulations is equally to be avoided.**

[62] The Full Federal Court in *Spencer* concluded that:

In our view a "genuine" dispute required that:

- The dispute be bona fide and truly exist in fact
- The grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

[63] That statement was endorsed by Ormiston JA (with whom Brooking and Charles JJA agreed) in *Spacorp*.

[64] One of the many formulations referred to by the Full Federal Court in *Spencer* was that of McClelland CJ in Equity in *Eyota Pty Ltd v Hanave Pty Ltd*, where his Honour stated (at 787):

> It is, however, necessary to consider the meaning of the expression "genuine dispute" where it occurs in s 450H. In my opinion that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be" not having "sufficient prima facie plausibility to merit further investigation as to [its] truth" (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of facts unsupported by evidence": cf *South Australia v Wall* (1980) 24 SASR 189 at 194.
>
> But does it mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute.
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> …

> These matters, taken in combination, suggest that at least in most cases, it is not expected that the court will embark upon any extended inquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute.

[65] In *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACSR 601 at 605 Thomas J said:

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

I respectfully agree with those statements."[14]

(Footnotes omitted) (Emphasis added)

[9] The interpretation of national legislation by the Court of Appeal of Victoria deserves respect. This court should not depart from the interpretation unless convinced that it is plainly wrong.[15] The interpretation is consistent with observations in this court in *JJMMR Pty Ltd v International Corporation*.[16]

The demand and his Honour's reasons

[10] In or about 14 August 2019 the Respondent to the appeal and the Appellant entered into an agreement for the performance of works on the Charters Towers Water Treatment Plant. The agreement was contained in the "Formal Instrument of

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14 *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* (2008) 66 ACSR 67 at 77-78, [56]-[65].

15 See *Australian Securities Commission v Marlborough Gold Mines Ltd* (1992) 177 CLR 485 at p 492.

16 [2003] QCA 519 at [3] and [4].

Agreement" ("FIA") executed by the parties.[17] Under the agreement the Appellant was to provide and install various software components and systems in respect to the Charters Towers Water Treatment Plant including a programable logic controller.

[11] In December 2022 the Appellant served upon the Respondent a statutory demand claiming from the Respondent a sum of $21,898.80 said to be owing under a tax invoice[18] that itself was dated 30 September 2019. By application filed on 23 December 2022 the Respondent to the appeal applied to set aside this statutory demand under s 459G of the *Act*. The application was heard and determined in applications jurisdiction on 21 February 2023. In his reasons, which were given ex tempore, his Honour said:

> "The question is whether there is a genuine dispute between the applicant company and the respondent about the existence or the amount of a debt to which the statutory demand relates. There is also a question about whether the applicant company has an offsetting claim."[19]

[12] His Honour framed the inquiry by reference to one of the authorities quoted above:

> "The type of dispute that is regarded as a genuine dispute in this context is one that involves a plausible contention requiring investigation. It has been described by Chief Justice in Equity McLelland, in Eyota Proprietary Limited v Hanave Proprietary Limited as similar to the enquiry (sic) that is made by the court in other situations about whether there is a serious question to be tried. As his Honour noted in that decision:
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> > This does not mean that the court must accept uncritically as giving rise to a genuine dispute every statement in an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself. It may be not having sufficient prima facie plausibility to merit further investigation as to its truth, or it may be patently a feeble legal argument or an assertion of facts unsupported by evidence."[20]

[13] His Honour then addressed the circumstances of the engagement between the parties for the work to be done by the Appellant and paid for by the Respondent as follows:

> "Here, the applicant company engaged the respondent to do work on a control systems software engineering task. A purchase order was issued for the work on 14 August 2019. A formal instrument of agreement was executed on 16 August 2019.

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17 RB p 35.
18 No 20193 MPA.
19 RB p 7.
20 RB p 7.

Those documents reflect an understanding that the work was to commence practically immediately, and that it was to be completed in a relatively short time. Amongst the terms in the formal instrument of agreement is one that provided that the payment of the security amount would be made upon successful completion of a certain test planned for 4 October 2019, unless significant design changes were agreed by the project management team of the applicant company to have warranted an extension of time.

The formal instrument of agreement and the purchase order both include provisions about invoicing and payment. The respondent relies upon some parts of these provisions. They are to this effect:

> *Monthly progress claims will be required to be submitted by the 25th of each month. Details must be provided for the breakdown of the claim to support the value of the claim being made. The claim will be assessed within five business days from date of receipt. The payment of the approved invoice will be made 30 days from the end of the month. As a requirement and before release of any payments, the work must be signed off by an authorised employee of the main contractor.*"[21]

[14] His Honour then considered the evidence before him and summarised it:

> "The invoice that is the subject of the statutory demand is one issued on 29 September 2019. It is dated 30 September 2019. It describes the work as:
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> > *Controlled systems software engineering services, 20 per cent payment for the PO-060283, dated 14/08/2019.*
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> The amount of the invoice, including GST, is $21,898.80. As the date of the invoice indicates, it was not submitted by the 25th day of the month. In the billing cycle provided for in the formal instrument of the agreement, it would therefore fall into the following month's cycle. In accordance with the formal instrument of agreement, one might then expect that it would have been assessed within five business days of the 25th of October 2019, and if approved, paid within 30 days of 31 October 2019.
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> The applicant company has adduced evidence from its human resources coordinator, Mr Smith. He draws on the company records to attest that the invoice was not approved. Clearly, the invoice was not paid. What occurred subsequently was that issues were raised by the applicant company about the timing and quality of work undertaken by the respondent, and a notice was given of intention to terminate the formal instrument agreement in seven days. The evidence before the court is that there was no response to that notice, and seven days later, the applicant company terminated the agreement.
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> …

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21 RB p 7.

> The parties engaged in further correspondence. The respondent sent a letter dated 19 November 2019, which was headed, "Letter of demand and final notice of dispute resolution". It is clear from that letter that the parties were in dispute about the invoice, amongst other things. The applicant company responded to that letter on a without prejudice basis on 12 December 2019. It appears that the dispute was then referred to arbitration, apparently pursuant to the formal instrument of agreement.
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> Correspondence between the applicant company's representative and the arbitrator in May 2020 led the arbitrator to terminate the reference. There is no evidence before the court of any continuing engagement about the matter until about the time that the statutory demand was served. The respondent contends that the invoice is not – and the debt arising from the invoice is not – genuinely disputed. He says that the dispute has been manufactured by the applicant company. He says this was done at about the time the invoice was issued, and contemporaneous documents created by the applicant company were created for the purpose of showing that there was a dispute."[22]

[15] In giving his reasons for ordering that the statutory demand be set aside his Honour said:

> "The evidence before the court does not permit the reaching of a confident conclusion in respect of that submission. I am satisfied that the material adduced by the applicant company shows that it has a plausible contention about the debt claimed in the invoice and in the statutory demand that requires investigation. There is a serious question about whether the debt is owed. As I mentioned at the beginning, the applicant company also asserts that it has an offsetting claim that exceeds the value of the debt claimed in the statutory demand. This claim is said to be for remedial work or further work which the applicant company had to do because of the quality or incompleteness of the work performed by the respondent.
>
> The applicant company raised this contention at an early stage, and papers from the period October, November and December 2019 attest to its investigations in this respect, and into the making of demands by it against the respondent for the payment of those costs. It is not apparent on the material whether that claim by the applicant company against the respondent was the subject of the arbitration, but it seems likely that it was. That is also a sufficient basis upon which the statutory demand should be set aside.
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> In the circumstances, I am persuaded that the court should made orders that the creditors statutory demand for payment of debt dated 12 December 2022 issued against the applicant company by the respondent be set aside."[23]

The evidence and submissions below and in this Court

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22 RB p 8.

23 RB p 9.

[16] The elaborate recitation of the cases in the preceding paragraphs was necessary because of some of the submissions made on behalf of the Appellant. Before his Honour below and in this court the Appellant was represented by Dr Waqqas Ahmad, the company's sole director who is described as the "principal control systems engineer". The Respondent relied upon an affidavit by Mr Kevin Smith[24] who was described as the controller for human resources who had access to the books and records maintained by the Respondent in respect of engineering projects undertaken by the Respondent. In his affidavit Mr Smith identified the FIA. Some of the provisions which he identified were the stipulations and arrangements for the timing of the submission of invoices and the payment upon and a dispute resolution revision (including arbitration). Exhibited to the affidavit was a letter from Dr Ahmad dated August 2019 in which Dr Ahmad estimated that the works would be completed by 30 September 2019. According to Mr Smith on 29 August 2019 the Appellant submitted for payment an invoice for 30 per cent of the works but a review of the works estimated that only 14.4 per cent had been completed. A client complained about the quality of the work. There were delays in the progression of the work and ultimately on 29 October 2019 the Respondent issued a Notice of Intention to terminate the FIA. After termination a reconciliation of the works found that less than 30 per cent of the works had been completed. With respect to the tax invoice the subject of the demand[25] dated 30 September 2019[26] Mr Smith said that it had not been approved for payment by the Respondent and he was unaware of what completed works it referred to. Mr Smith referred to subsequent correspondence between the parties in which the Appellant continued to demand payment and the Respondent disputed any obligation to pay. According to Mr Smith in early 2020 the parties began an arbitration process in respect of the dispute which had not concluded. According to Mr Smith because the Appellant failed to complete the works and because of defects in the work the Respondent suffered loss and damage. The cost of the completion of the works were calculated to be $151,560 (not including site-based commissioning) and according to Mr Smith the damage caused by the Appellant to the Respondent was $91,833.

[17] Mr Ahmad swore an affidavit on behalf of the Appellant company which was relied upon at the hearing before his Honour.[27] In it he contended for a summary dismissal or striking out of the application before his Honour and asserted that the Respondent company was taking an unfair advantage by introducing "artificial layers of non-genuine dispute". Dr Ahmad contended that no dispute was created [sic] by the [Respondent] "on my word" before 28 October 2019 and that on 29 October 2019 the Respondent started "creating artificial layers of dispute". He maintained that the grounds for alleging the dispute were not real.

[18] In this court the Appellant relied upon the oral submissions made by Dr Ahmad, the grounds of appeal attached to and forming part of the Notice of Appeal, an outline and list of authorities[28] and an affidavit of Dr Ahmad filed 19 May 2023. The submissions made in the different documents and orally in the hearing before the court tended to be repetitive. Dr Ahmad contended that his Honour below had not applied the case law correctly nor the legislation correctly and he contended the internal inconsistencies between the cases he referred to. He also asserted that the

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24 RB p 20.
25 No 20193MPA.
26 See RB 33.
27 RB 248.
28 Received in the Registry on 27 April 2023.

way he was treated by the Respondent and the dealings the Respondent had with the Appellant breached or engaged various statutes. In this context he referred to a number of Acts including the *Building Industry Fairness (Security of Payment) Act 2017* (Qld), and the *Building and Construction Industry Security of Payment Act 1999* (NSW). But there was no content to the submission, merely a reference to the Acts. In addition, he invoked without developing the submission international treaties and conventions.[29]

Discussion

[19] The authorities referred to[30] establish that the inquiry and assessment of whether there is a genuine dispute or in that context an off-setting claim should not involve an extended consideration of the evidence in light of the credit of witnesses or the cogency of any documentary evidence. Rather what is required is an assessment of the cogency of the evidence to determine if the issue is arguable. As Hayne J[31] said the court will not embark upon any extended inquiry nor attempt to weigh the merits of the dispute.[32] But it is just the inquiry that the Appellant's contentions demands.

[20] There is no inconsistency or conflict between the cases which was contended by the Appellant. The judicial pronouncements quoted,[33] including the reasons of the Victorian Court of Appeal in *TR Administration v Frank Marchetti & Sons*[34] makes that clear. The Appellant submitted that the "plausible contention" formulation proposed by McLelland CJ in Eq[35] was contrary to the Act and other cases but that description accords with the other cases that have considered the statutory formation and has been approved by authority.[36] His Honour below identified their dispute by reference to the evidence before him. He conducted the sort of inquiry the legislation (in light of the cases) requires. His Honour's reasons demonstrate that his approach to the inquiry and consideration of the evidence was orthodox. His conclusion that there was a "plausible contention" whether the debt was owed and that there was a sufficient basis for setting the demand aside because of an off-setting claim was not only open on the evidence, it was correct. There is no substance to the complaints made by the Appellant.

Orders

[21] The appeal should be dismissed. At the hearing the respondent indicated that it sought indemnity costs in the event of a successful outcome, but the Appellant was not in a position to meet the argument. The issue should be determined "on the papers" without any further oral argument after the exchange and filing of short written outlines.

[22] I would therefore order:

1. Appeal dismissed.

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29 Outline & List of Authorities dated 7 April 2023.
30 See para [2] to [7].
31 As his Honour then was.
32 See [3] above.
33 See paras [3] to [7].
34 *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* (2008) 66 ACSR 67.
35 See *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787 (quoted at [5] above).
36 It was referred to with evident approval in this court in *JJMMR Pty Ltd v LG International Corporation* [2003] QCA 519 at [4].

2. Within 14 days, the respondent is to file and serve any written submissions it has as to costs, not exceeding four pages.

3. Within a further 7 days thereafter, the appellant is to file and serve any written submissions it has to costs, not exceeding four pages.

4. Within a further 7 days thereafter, the respondent is to file and serve any written submissions it has in reply, not exceeding two pages.

5. The question of costs will be determined on the papers.

[23] **HENRY J:** I agree with the reasons and the orders proposed by North J.