SUPREME COURT OF QUEENSLAND

CITATION:	*Cardno CCS P/L v Dwyer & Anor* [2007] QSC 263
PARTIES:	**CARDNO CCS PTY LTD** ACN 010 191 545 (applicant) **v** **MICHAEL DWYER** (first respondent) **FTV PALM COVE PTY LTD subject to Deed of Company Arrangement** ACN 095 305 847 (second respondent)
FILE NO/S:	SC No 482 of 2006 (Cairns)
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	23 July 2007
DELIVERED AT:	Cairns
HEARING DATE:	4 July 2007
JUDGE:	Williams JA
ORDER:	**Application of 15 November 2006 dismissed with costs**
CATCHWORDS:	CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – PROOF OF DEBTS – PROCEDURE – where applicant entered agreement with second respondent for the provision of engineering consultancy services for an agreed amount – where invoices for amounts additional to agreed amount rendered – where some invoices paid and others unpaid – where applicant purported to vary original agreement – where second respondent subsequently went into administration – where applicant sought to prove debt – where first respondent rejected proof of debt – whether debt proved *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314, cited *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, cited
COUNSEL:	M A Jonsson for the applicant P F Agardy for the respondent
SOLICITORS:	McCullough Robertson for the applicant Mills Oakley Lawyers for the respondent

[1] **WILLIAMS JA:** From about 31 August 2001 until about October 2003 the applicant, Cardno CCS Pty Ltd, provided consulting engineering services to the second respondent, FTV Palm Cove Pty Ltd. It was agreed on the hearing of this application that the schedule which is exhibit NM-1 to the affidavit of Neil McLean filed 26 June 2007 accurately recorded details of the invoices submitted by the applicant and payments made by the second respondent.

[2] In circumstances which will be outlined subsequently, the applicant claimed that the second respondent failed to pay $339,488 (the total of invoices 9 and 10) in accordance with invoices as submitted and in consequence on 13 April 2004 commenced a proceeding (178/04) in the Supreme Court at Cairns seeking to recover that amount, plus interest, as damages for breach of contract. The second respondent filed a defence on 15 July 2004 denying liability, but admitted that there were some unforeseen variations to the work referred to in the original agreement between the parties evidenced by a letter from the applicant of 31 August 2001 and a facsimile from the second respondent of 7 September 2001. Early in 2005 the applicant applied unsuccessfully for summary judgment. With respect to that application Frank Vita, a director of the second respondent swore an affidavit in which he stated all moneys due to the applicant had been paid.

[3] That proceeding had not been further advanced by 1 August 2006 when the first respondent, Michael Dwyer, was appointed voluntary administrator of the second respondent. A Deed of Company Arrangement was executed on 15 September 2006 to carry into effect a resolution of the creditors of the second respondent passed at a creditor's meeting held on 28 August 2006. Clause 9 of that Deed provided that the proof and ranking of claims of each creditor should be determined in accordance with the provisions of the *Corporations Act 2001* (Cth) ("the Act") as if a reference therein to a liquidator was a reference to the Deed Administrator. That clause went on to provide the procedure to be followed by the Deed Administrator in determining whether or not to admit any claim of a creditor. In broad terms the provisions of the Act were to be followed.

[4] The applicant made an application in the proceeding 178/04 for leave to proceed notwithstanding the fact the second respondent was under administration. That application was adjourned to a date to be fixed. Then the applicant submitted a proof of debt dated 26 September 2006 to the first respondent claiming that the second respondent was justly and truly indebted to it. The proof was for the amount of $384,689.84 made up of $303,945.44 for professional services rendered (recalculated down from the $339,488 claimed in the action) plus $57,130.92 for interest and $23,613.48 for costs of proceeding 178/04. As was pointed out by the Full Court in *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314 the lodging of a proof of debt constitutes an election by the creditor precluding the creditor from continuing to recover the alleged debt in an action: see in particular per McPherson J at 317. Counsel for the applicant conceded that the applicant's claim now stood to be determined in accordance with the provisions of the Act.

[5] For reasons provided on 2 November 2006 the first respondent wholly disallowed the proof of debt in the total sum of $384,689.84. The following grounds were given for the disallowance:

> "(a) A contract between the Company and Cardno is evidenced by Cardno letter dated 31 August 2001 and acceptance on 7 September 2001. The estimate of fees provided for in this

offer was $254,600. Nowhere in this estimate are the fees based upon any project construction budget.

(b) By letter 24 July 2002 Cardno notified additional works required to be carried out to Building 1 and submitted a claim for $51,425 for additional fees. Both the original estimate and additional fees have been billed and paid by the Company.

(c) By letter 24 July 2002 Cardno sought a variation of the fees for provision of consulting work based upon further works and a project construction budget in the order of $45 million plus GST.

(d) The company did not accept the request for variation for the fee. By letter 29 July 2002 from Total Project Group as project managers for the Company, Total Project Group confirmed the additional fee of $51,425 would be paid but this was not taken to be acceptance of additional overall fee for the project.

(e) By letter 15 October 2002 Cardno again requested consideration for variation of the additional fee for consulting works. Cardno acknowledges no agreement has been reached on a variation to the original fee proposal.

(f) By letter 29 October 2002 Cardno again sought agreement from the company for an additional fee for project works based on "the present project budget" set to substantiate the basis of a claim for variation of the fee.

(g) By letter 11 November 2002 the company rejected the request for additional fees or a variation to the basis of calculation of the fees.

(h) In summary, no agreement was reached between the parties to pay additional fees sought by Cardno. The company did not request additional works beyond what was contemplated by agreement dated 31 August 2001.

(i) I reject your assertion that the Cardno claim has largely been admitted and the only issue which is outstanding is the quantum of the Cardno claim. I am satisfied that the company has a defence to the Cardno claim. The company has paid Cardno the agreed fee and for agreed variations. There is no contractual or other basis for Cardno's claim for a greater fee based upon a higher budgeted cost of construction.

(j) Cardno have, without adequate explanation failed to prosecute their claim since February 2005.

(k) Cardno has no current entitlement to legal costs."

[6] By originating application filed 15 November 2006 the applicant, relying on s 1321 of the Act and reg 5.6.54 of the *Corporations Regulations 2001* (Cth), appealed to this Court seeking an order that the proof of debt lodged 26 September 2006 be admitted in full. The nature of such an appeal was considered by Brennan and Dawson JJ in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 340-1. As was said therein: "The issue in the proceeding is whether the liability

referred to in the proof of debt is a true liability of the company enforceable against it."

[7] It should be noted that the initial dealings were between the second respondent and Colefax Clayton Smith Pty Ltd, Consulting Engineers. Shortly after the initial contact was made Colefax Clayton Smith Pty Ltd changed its name to that of the applicant. It is convenient to refer to the company under either name as the applicant.

[8] The critical document is the letter from the applicant to the second respondent of 31 August 2001 offering to provide consulting engineering services on the basis therein set out. Whilst the whole of the letter is material to the issues raised on this appeal it is sufficient to set out the following extract in these reasons:

> "Further to our earlier proposal for the provision of certain consulting engineering services dated 16/7/01 and our discussions with Mr Frank Vita, we have now perused the latest information on the project provided by yourselves and reviewed our fees. As requested we have included the hydraulics and sewerage services in our proposal, however we have excluded pools and some site works. Our revised proposal is now presented as follows:
>
> [Thereafter follows a description of services to be provided as set out in paragraphs numbered 1 to 13.]
>
> The estimated fees for these services total $254,600 and are as follows:
>
> [Thereafter follows a table particularising $30,000 for Design Development, $174,000 for Contract Documentation, and $50,600 for Construction Phase.]
>
> In the event of any additional unforseen work which maybe required, hourly rates would be as follows:
>
> Director - $145/hour
> Engineers - $65-$80/hour
> Draftsman - $40-$79/hour
>
> This estimate of fees is based on the following assumptions and qualifications:
>
> 1. The general arrangement will be as shown on the sketches made available to us to date and no significant changes will be made from the drawings provided to us for the purpose of preparing our proposal. Should any significant changes be made to the project which would require extra work or additional cost to us we would require to be reimbursed for the effect of such changes on a time charge plus reimbursables basis.
>
> The degree of repetition indicated on the drawings has been assumed as typical throughout the project.
>
> …

> 4. No external civil works have been allowed for at this stage. These may be necessary subject to Cairns City Council requirements and should be discussed further with yourselves. We note that the Master Plan indicates an external road within the current property boundary. …
>
> …
>
> 15. Our terms are payment within 14 days of date of invoice and as per the attached ACEA Conditions of Engagement of Consulting Engineering Services irrespective of project financing, any approvals, appointment of builders or other conditions of which we are not aware. Our proposal is based on monthly invoicing and after completion of particular stages.
>
> We have endeavoured to make this proposal fully responsive to you and your client's requirements. However, we recognise that there may be areas of our proposal which may require discussion and further consideration and should be pleased to discuss our proposal further with you if so required."

[9] Paragraph 5 of the ACEA Conditions of Engagement for Consulting Engineering Services provided:

> "All moneys payable by the Client to the Consultancy Engineer shall be paid within 14 days of invoice. Moneys not paid within that period shall attract interest from the date of invoice until payment at the rate of 20% per annum."

[10] By facsimile of 7 September 2001 the second respondent informed the applicant it was "pleased to accept your revised proposal dated 31 August 2001."

[11] The observation should be made at this stage that there was no evidence at all before the Court on the hearing of this application as to the "latest information on the project provided by yourselves" or as to "the drawings provided to us for the purpose of preparing our proposal", being material referred to in that letter. In other words, there was no datum against which any change in the extent of work to be performed by the applicant could be objectively determined. It should also be noted that the total for design development and contract documentation was $204,000. The project never reached the construction phase.

[12] In fact the first invoice submitted by the applicant for services performed was submitted on 9 July 2001, that is prior to the letter of 31 August. That invoice was for the sum of $2,800, and was for: "Provision of consulting engineering services in relation to the above project including: liaison with…, preliminary structural concept design and provision of sketches and advice generally as requested." That invoice was paid in full on 13 August 2001.

[13] The first invoice submitted after the letter of 31 August was that dated 28 September and was for the amount of $4,200. It particularised the services rendered as: "Client liaison, site inspections, design and drafting sales offers, attendance at

meetings and preliminaries for work completed to 30/9/2001." That invoice was paid in full on 12 November 2001.

[14] Next came the invoice dated 23 November 2001 for the amount of $18,000. It again specified in some detail the nature of the engineering services rendered by the applicant. Significantly it also stated "Professional fees up until request to cease work on 9/11/2001." That invoice was paid in full on 11 February 2002.

[15] As suggested by that invoice the applicant had received a letter from the second respondent's then solicitor dated 9 November 2001 which relevantly stated:

> "We advise that at a meeting of Directors of our client yesterday a decision was taken to put the Project on hold pending an assessment of the design and level of finish of the proposed building. As soon as that assessment has been completed our client will be in touch with you further.
>
> In the meantime we have been instructed to advise that you should not undertake any further work on the Project until you receive further written instructions directly from our client."

[16] Then followed the letter from the second respondent's solicitors of 8 January 2002 which relevantly stated as follows:

> "We refer specifically to our letter of 9 November 2001 and advise that our client company has now resolved to proceed to a point where it is in a position to call for Tenders for the construction of the proposed development. Accordingly our client now requires full working drawings and specifications to enable it to prepare Tender documentation.
>
> To ensure that the process advances efficiently our client proposes that a meeting of all construction and/or development consultants be held in Cairns next week."

[17] That was followed by a further letter from the solicitors for the second respondent on 19 February 2002 relevantly stating:

> "We note that at a meeting … on 5th January 2002 it was agreed that all final tender documents including plans, drawings and specifications would be completed by mid May 2002.
>
> We have been instructed to seek confirmation from you that you will have completed your role in the planning of the development in sufficient time to enable our client to call for tenders by mid May 2002."

[18] On 1 March 2002 a letter was sent by the applicant to the solicitors for the second respondent. In that letter the following statements were made:

> "We were requested by Total Project Group (TPG) in their letter of 9/7/01 to provide a submission on provision of consulting engineering services for the project. No time was stipulated.

We provided various proposals to TPG with our detailed letter of 31/8/01 being accepted by FTV Palm Cove Pty Ltd in their fax to us dated 7/9/01. Again no time period was discussed or agreed.

On 9/11/01 we received a letter from yourselves requesting us to cease work on the project until we receive further written instructions. No indication was given to us as to how long the delay would be.

On 20/11/02 in response to a request from the Architect we advised him that our estimated date for completion would be 22/4/02 if the project proceeded on 22/11/02. The Architect requested invoices for work completed to date and was unable to advise on the extent of the delay.

On 8/1/02 you advised us that FTV was in a position to proceed to a point where it is in a position to call for tenders for the construction of the proposed development. You also advised that the Architect would be in touch regarding a meeting. There was still no advice on timing.

At the consultant's meeting on 15/1/02 it was mentioned that the anticipated date for inviting tenders would be 15/5/02 and that documents should be fully co-ordinated. There was no discussion regarding the ability of consultants to achieve that date or the importance of achieving it. Accordingly it was understood to be a goal to be achieved if possible. This was the first time a documentation period had been set and came just over nine weeks after your notice to cease work. If nine weeks was added to our originally advised program it would mean an estimated completion date of 24/6/02.

…

We are able to confirm achievement of the target date to a stage where drawings are suitable for tender subject to several conditions:– The conditions are as follows:

(i) We urgently need FTV's confirmation of its commitment to continue to employ us to carry out the work … . We are mobilising a strong team in order to achieve FTV's target dates but we need some degree of certainty of our position on the job in order to continue with these investments.

(ii) All necessary information from other members of the design team is provided in sufficient time to allow the program to be met.

(iii) There are no changes to the project.

(iv) Our monthly invoices are promptly paid to allow us to fund the necessary resources being provided.

Please note that there are several variations that have occurred to date to the scope of services anticipated in our proposal. These

> variations will be charged on a time basis as previously agreed with FTV.
>
> The variations to our proposal to date in accordance with FTV's instructions are:-
>
> (a) Assistance and attendance at meetings relating to construction of the external works …
> (b) Footbridge designs are now considerably more involved than allowed.
> (c) Liaison with statutory authorities, meetings etc. as required to obtain environmental approvals.
> (d) This work to be paid on time basis as per our proposal.
>
> We will make our best endeavours to minimise the cost to FTV.
>
> We request FTV's confirmation of its commitment to continue to employ us to carry out the work as a matter of urgency."

[19] The applicant stated in a facsimile later on 1 March 2002 that it was "pleased to read in your letter that your client expects us to continue to provide services for the project … and we are proceeding accordingly."

[20] The applicant then submitted an invoice described as "progress claim no. 4" dated 7 March 2002 for the sum of $19,000 and the description of the services rendered was as follows: "… provision of consulting engineering services in relation to the above project in accordance with our proposal … dated 31/8/01, including: preliminary conceptual design, services in relation to sales office, design, development and detailed design and documentation for resort (part only)." That invoice was paid in full on 13 March 2002.

[21] Then came the invoice being progress claim no. 5 dated 16 April 2002 for the sum of $55,000. Again a description of the services rendered was provided as follows: "… provision of consulting engineering services in relation to the above project in accordance with our proposal … dated 31/8/01, including: preliminary conceptual design, services in relation to sales office, design, development and detailed design and documentation for resort (part only)." That invoice was paid in full on 21 May 2002.

[22] That was followed by the invoice being progress claim no. 6 and dated 9 May 2002. It was for the total sum of $54,999.45. The description of the work was as follows: "…provision of consulting engineering services in relation to the above project in accordance with our proposal … dated 31/8/01, including: preliminary conceptual design, services in relation to sales office, design, development and detailed design and documentation for resort (part only). Estimated fee for design and documentation – $204,000." That invoice was also paid in full on 21 May 2002.

[23] Next in point of time came an invoice dated 3 June 2002 which was headed "Fees Additional to Scope of Work". The description of work commenced with the following statement: "In accordance with our fee proposal dated 31/8/01 the time spent on work outside the scope of our proposal is now claimed as follows for the period between 11/9/01 and 31/5/02." There then followed a description of work relating to external roadwork and sewer, environmental report, EPA approvals, high

energy impact compaction, and acid sulphate soils management and in each case the number of hours worked on each item and the employee was specified. The rate specified was in accordance with the proposal of 31 August 2001. The total for that invoice was $7,612 and that was paid on 22 July 2002.

[24] Then came the invoice dated 17 June 2002 described as progress claim no. 7. Again it specifically referred to the proposal of 31/8/01 and the type of work performed. Included in the description was the following: "(Total design fees $204,000 including GST) Amounts to 31/5/02." That invoice was for $33,000 and was paid in full on 8 August 2002.

[25] The eighth invoice was dated 12 July 2002. It again referred to the proposal of 31 August and indicated that the work described was performed to 28/6/02. That invoice was for $17,000 and it was paid in full by instalments on 2 October 2002 and 17 October 2002.

[26] The applicant sent to the second respondent a letter dated 24 July 2002 which enclosed what was described as the ninth interim invoice; these are the most critical documents for present purposes. Again the letter must be read in its entirety but the following extracts are sufficient for present purposes:

> "This letter confirms our verbal advice that we seek variation of our fee for provision of consulting engineering services for the above project.
>
> We have attempted from the outset of this commission to deliver our scope of work within the estimate of fees we provided in our proposal. Unfortunately as the project has progressed it has become impossible to hold our costs to the estimated level and we are therefore compelled to seek this variation.
>
> Although some preliminary architects drawings were provided to us for the purpose of assessing our fee, those drawings were inevitably at an early stage of development and as such could not alone provide a reliable basis for such assessment. We therefore had to rely on information provided to us on the budgeted project construction cost in order to judge our own likely costs on the evidence of cost records for previous major projects for which we have provided similar services.
>
> At the time our estimate of fees was negotiated we were advised by your team that the project construction budget was of order $25M to $30M including GST. We are sure that you will recall your early discussion with us on the subject of a preliminary indication of order of percentage fee which we had provided. At that time you advised us that our initial indication of percentage fee was unacceptable; and that a fee for design and documentation of 0.75% of project construction costs, such as you said could be obtained from a Melbourne based consulting engineer, would in your judgment be appropriate. Taking that advice into account, we revived our likely costs on a percentage basis and estimated a fee for design and documentation of $204,000 based on 0.75% of a project construction

budget of $27.2M, making allowance for items excluded from our scope of works.

As the project has progressed it has become more and more apparent that its magnitude and complexity have developed well beyond that originally envisaged, and the construction budget has grown accordingly. We have recently been advised by your team that the construction budget is now of order $45M plus GST, clearly a design and documentation fee of $204,000 including GST about 0.4% of that construction budget, is unsustainable, and so it has proved to be.

This major increase in construction cost will inevitably be similarly reflected in consultancy costs during the construction period.

It is not only the increased magnitude of the project which has caused our severe financial difficulty. Other issues which have arisen which were not included for in our estimate of fees.

There are many important differences in detail between the buildings as now documented and those originally proposed. Many such differences are reflected in the increase in construction costs, such as those listed in the enclosed Annex A. However, there are also differences in design complexity as opposed to differences in magnitude.

[The letter then set out four areas of alleged differences in very general terms.]

There has also been a reduction in the degree of repetition upon which we relied, and to which we drew attention in our proposal.

A further matter which has caused us difficulty and additional cost has been continuing changes in details of building layout. Such changes would be expected to some extent during design development in the early stages. However, when the project was recommenced in January after a period on hold, a severely compressed timeframe was imposed on the consultancy team on the understanding that the architect's drawings were to be frozen effective the end of January. The continuing layout changes have not only required extensive re-engineering in particularly drafting time; they have also disrupted our progress generally, in the context of us having increased our staff working on the project in an endeavour to accelerate our progress.

On 15 July 2002 we were notified that major changes are now proposed to be made to Building 1 …

Our proposal for the project provided that should significant changes be made to the project which would require extra work or additional cost to us we would require to be reimbursed for the effect of such charges on a time charge plus reimbursables basis. We note that

> during our meeting on 24 July 2002 you appeared to acknowledge that some variation to our fee is justified. However, you appeared to have in mind a far lesser order of variation than that to which we believe we should be entitled. The changes to the project have been so extensive that we now propose that it would be appropriate and equitable for the whole of our fee to be determined on the basis of time charges plus reimbursement of direct costs. On this basis … we estimate that our fee for the design and documentation phase of the project excluding the effect of the major changes now proposed to be made to Building 1 will be of the following order:
>
> …Estimated total for design and documentation phase excluding proposed changes to Building 1: including GST $551,100.
>
> In accordance with your request expressed during our meeting, the effect of the major changes now proposed to be made to Building 1 are addressed in a separate letter.
>
> We propose that our fee for services during the construction period be similarly calculated on a time charge and reimbursables basis.
>
> …We enclose our interim invoice no. 23707 in the sum of $254,000 including GST for fees calculated on the basis of time charges plus reimbursables for services to 12 July 2002 extra to those provided for in our proposal in accordance with the provisions of that proposal.
>
> We are continuing to exert our best endeavours to complete our part in the project. We ask that you assist us by recognising that our costs have been increased for reasons beyond our control and settle this invoice in accordance with the terms of our agreement."

[27] It should also be noted that there was an annexure to the letter of 24 July setting out what the appellant claimed to be "changes in building magnitude". Very broad assertions were set out and it is not possible to determine the significance or extent of the alleged changes. No specific tasks were identified, no time was specified for carrying out the alleged extra work, and there was no designation of the employee who carried out, or would carry out, the work.

[28] The second respondent initially, and the first respondent when considering the proof of debt, understandably regarded that letter as a request for a variation of the agreement of August to September 2001.

[29] The accompanying invoice was for $254,500. It gave the following description of the services involved: "Ninth interim invoice for provision of engineering services extra to those provided for in our proposal calculated on the basis of time charges plus reimbursables as provided for in our proposal … dated 22/7/02 refers for period ending 12/7/02." There was obviously a typographical error; the reference should have been to the letter of 24/7/02. The invoice did not specify over what period of time the work in question had been performed. Was it to be taken that the work in question had all been performed after 31 May 2002, the date referred to in the invoice of 3 June 2002?

[30] There was no assertion in the invoice as to how the charge was calculated; there was no reference to a particular task, to an amount of time or to the designation of the person who provided the services.

[31] That invoice has not been paid and the $254,500 forms the bulk of the applicant's present claim. In a letter of 29 July the project manager for the second respondent said with respect to that letter of 24 July that the applicant had "sought a variation not only of your fee for providing services in this matter but also the basis upon which your fee is to be calculated. You have outlined in that letter various matters upon which you rely in seeking the variations. Obviously it will be necessary for the Board of Directors of FTV Palm Cove Pty Ltd to consider the request…".

[32] In a letter from the applicant dated 15 October 2002 there was reference to its "request for fee variation" and a request that the second respondent give "urgent consideration" to making an "interim payment". That request was effectively repeated in a further letter from the applicant dated 29 October 2002.

[33] Ultimately in a letter of 11 November 2002 the second respondent informed the applicant that it was "not prepared to accept your claim for additional fees or a variation of the basis upon which your fees are charged on the basis asserted by you or indeed at all. Your continued involvement in the project must be on the basis of your fee proposal dated 31 August 2001 which was accepted by FTV on 7 September 2001. Kindly advise your intentions with regard to the matter as soon as possible."

[34] There was a reply from the applicant dated 20 November 2002. Relevantly it stated:

> "We refer to your letter dated 11/11/02 received by fax on the same day. Your letter states that our continued involvement must be on the basis of our fee proposal dated 31/8/01. We confirm that it is our opinion that our claim for variation of fee dated 24/7/02 and the associated invoices are in accordance with that proposal.
>
> Your letter refuses acceptance of our claim, yet in our meeting of 24 July you seem to accept that some variation in our fees was applicable."

[35] The letter went on to "request your reconsideration of our claim" and suggested that there be a mediation with respect to the dispute. There was reference to mediation in a further letter from the applicant of 24 March 2003.

[36] In a letter from the solicitors for the second respondent dated 28 March 2003 it was said that, whilst it was contended the claim "for additional fees is without foundation", if the applicant wished "to proceed to mediation, then our client will do so".

[37] Finally the solicitors for the second respondent in a letter dated 14 July 2003 made the following statements:

> "I am instructed that my client has paid to your client all fees which have been levied in accordance with the fee proposal between our respective clients. In addition, I am instructed that my client has paid to your client a significant amount of money in respect of variations in accordance with that fee proposal.

> What your client has sought to do is to revisit the fee proposal by changing the basis upon which your client charges its fees from a lump sum basis plus variations on a time charge plus reimbursables basis as was originally agreed to a basis on which your client will charge on a time charges plus reimbursables basis from the date upon which it first became involved in this project.
>
> My client will not agree to your client changing the fee structure in that way. Accordingly my client sees no point in mediation and will not participate."

[38] It will be recalled that in the letter of 24 July 2002 there was reference to the fact that charges consequent upon the major changes to Building 1 would be addressed in a separate letter. That separate letter was also dated 24 July 2002. It referred to major changes to Building 1 and estimated the total additional fee consequent upon those changes in the sum of $51,425.

[39] In the letter from the project manager for the second respondent of 29 July 2002 referred to above, it was stated that "the estimated additional fee of $51,425 being for changes principally affecting the area around the conservatory and entrance and northern end of the building adjacent to the restaurant in Building 1 is acceptable by our client." In consequence a formal invoice for that amount was sent dated 12 September 2002, and that amount was paid in full on 16 October 2002.

[40] Also another invoice was submitted on 12 September 2002; it was described as the "Tenth interim invoice for provision of engineering services extra to those provided for in our proposal … calculated on the basis of time charges plus reimbursables as provided for in our proposal … for the period ending 30/8/02." It was for $84,988. That is the other disputed invoice; it has not been paid. Again, as with the ninth invoice no particulars were given with respect to the tasks performed, time spent, or charge-out rate used.

[41] It should be noted at this stage that it is not clear from the "Tenth interim invoice" to what services it relates. The ninth invoice, sent 24 July 2002 referred to the period ending 12/7/02; the tenth refers to the period ending 30/8/02. Is one to infer that the services in question were performed during that period? That would appear not to be so because the tenth invoice speaks of a total amount of $551,100 which is the figure mentioned in the letter of 24 July. If the total of $551,100 was known by 24 July why was not the full amount claimed in the invoice of that date? Again, though the letter of 24 July speaks of charging on an hourly basis, neither the ninth or tenth invoice specifies any number of hours or the rates used in calculating the amount.

[42] Notwithstanding the dispute which effectively arose in July 2002 the applicant continued providing engineering consultancy services to the second respondent with respect to the project.

[43] An invoice dated 16 December 2002 claiming $5,479.10 was sent to the second respondent. It particularised the personnel involved in the work, their charge-out rate, and the number of hours each worked. That was said to be for "variation to scope of work as per our proposal". That invoice was paid on 3 January 2003.

[44] Another invoice claiming for "variation to scope of work as per our proposal" was sent with respect to work performed between 30 November and 27 December 2002. It was for $550, and again the personnel who performed the work were identified, their charge-out rate stated, and the number of hours worked stated. That invoice was paid on 21 January 2003.

[45] There was then another invoice dated 26 February 2003 relating to the period 22 November 2002 to 31 January 2003. Reference was made therein to "alterations to the building" and again the personnel who performed the work were identified, their charge-out rate stated, and the number of hours worked stated. That invoice for $4,926.90 was paid on 7 March 2003.

[46] There was then an invoice dated 13 March 2003 for the sum of $992 being for "additional to scope of work for the period 28/12/02 – 28/2/03". That invoice was paid on 3 April 2003.

[47] There were then a number of invoices sent which referred to "professional fees claimed in accordance with our proposal dated 10/3/03." There is nothing in the material which indicates what that proposal was, neither counsel was in a position to refer to any document containing any such proposal. It is sufficient to record briefly the date of each of those invoices, the amount claimed, and the date each was paid in full:

1. Invoice No. 24106 – date 16/5/03 – amount $1,320 – paid 21/7/03
2. Invoice No. 24150 – date 10/6/03 – amount $2,831.40 – paid 20/8/03
3. Invoice No. 24219 – date 8/7/02 – amount $4,648.60 – paid in two instalments on 1/10/3
4. Invoice No. 24268 - date 7/8/03 – amount - $1,650 – paid 1/10/03
5. Invoice No. 24315 - date 11/9/03 – amount - $550 – paid 1/10/03

[48] There were two further invoices which should be noted. One dated 8 July 2003 for $847 which was paid in full on 20 August 2003. There was also an invoice on 12 November 2003 for $1,631.30 which was said to cover the period 27/9/03 to 31/10/03. That was paid on 1 December 2003.

[49] Whilst all that work was going on the applicant submitted to the second respondent a document dated 22 May 2003 and headed "Credit Adjustment/Note". One would have thought that that document would have been sent undercover of a letter, but no relevant letter was placed in evidence. The wording set out in that part of the document entitled "description" was identical with that set out in interim invoice no. 9 forwarded under cover of the letter of 24 July 2002 and claiming the amount of $254,500. Whereas all the other invoices had at the bottom a section entitled "remittance advice" referring, inter alia, to the amount of the invoice, this document at the foot had a section entitled "credit adjustment – note" and then provided "total adjustment amount:– $254,500". That document was included in the material submitted to the first respondent as supporting the claim lodged for proof. No further explanation was then provided to the first respondent, and no further explanation was provided during the course of the hearing of the application. When counsel for the applicant was specifically asked what findings should be made with respect to that document of 22 May 2003 the response was:

> "…it's a document that, whilst it may have some evidentiary value to be weighed up in – and within the context of all the evidence, – it's not a document that directly bears upon the rights and liabilities of

> the parties, it doesn't amount to a release of the law, it's not supported by consideration, it's not under seal. So the ultimate question is whether or not the liability accrued in the first instance and – in my submission, that, that's is the case, for many reasons I have advanced."

[50] In his affidavit of 30 May 2007 Cotter, a partner in the firm of solicitors currently acting for the applicant, deposes to the fact that a number of documents were misplaced in a relocation process and archives had to be searched in an endeavour to retrieve relevant documentation. That may explain the absence of any correspondence relating to the credit note, but it does not strengthen the applicant's case.

[51] In the circumstances I fail to see how the first respondent could have regarded the document as anything other than what it appeared to be on its face. The applicant was continuing to provide engineering services to the second respondent, was continuing to invoice the second respondent for those services, was being paid for work being undertaken and against that background forwarded a credit note with respect to one of two disputed invoices. The only rational conclusion is that the applicant was indicating that it was no longer pursuing the amount claimed in that disputed invoice.

[52] That is a matter to which I will return when dealing with the question whether or not on the evidence the applicant has proved the indebtedness it claims.

[53] It has already been noted that invoices 9 and 10 did not provide any particulars such as would enable either respondent or the Court to identify the work the subject of the claim for payment made therein. Although it was asserted in the letter of 31 August 2001 that the charge for "unseen" works would be calculated using a charge-out rate for different personnel multiplied by the number of hours worked no such particulars were provided in invoices 9 and 10. In the voluminous material submitted to the first respondent in support of the proof of debt a lot of detail is set out (for example, at pages 72 to 74 of the Buggy affidavit) with respect to personnel, hours, rates and amount but it is not possible to refer that to any particular item of work or to the amounts claimed in invoices 9 and 10. It is not possible to ascertain objectively whether or not the work there referred to was additional to what was contemplated by the proposal of 31 August 2001 to complete design development and contract documentation for $254,600.

[54] Ultimately counsel for the applicant relied heavily upon a statement contained in a recent affidavit of B N Clayton a principal of the applicant. In that affidavit filed 20 June 2007 the following paragraphs appear:

> "4. The particulars of variations contained at pages 72 to 74 of the Buggy Affidavit described the work that:
>
> (a) Was done by the personnel of the applicant for and at the request of the second respondent, and for the benefit of the second respondent;
>
> (b) Was not foreseen as falling within the scope of works reasonably required by the second respondent at the time that I sent the letter of 31 August 2001 to the second respondent … because it involved work that:

(i) was not foreshadowed in the sketches and information then available to the applicant; and

(ii) was additional work associated with the accelerated timeframe referred to in the letter from the applicant to the second respondent's then solicitor of 1 March 2002 …;

(c) Is calculated at no greater than the rate stipulated for unforseen works in the applicant's letter to the second respondent dated 31 August 2001 (that is, Director - $145/hour, Engineers $65-$80/hour and Draftsman - $40-$79/hour);

(d) Was reasonably charged for, both in terms of time spent and amounts claimed.

5. In respect of the amount of $339,488 originally claimed in proceedings 178/04, the amount was decreased to the amount of $303,945.44 in the particulars of variations at pages 72 to 74 of the Buggy Affidavit as a consequence of the applicant's review of all the relevant invoices, corresponding time sheets, applicable charge-out rates and payments made by the second respondent. The amount of $303,945.44 was the amount claimed in the proof of debt in respect of the variations."

[55] It is true that no subsequent document was filed in the proceeding challenging the assertions contained in that affidavit.

[56] It is in the light of the facts and circumstances previously set out that the Court must consider whether or not the applicant has established that the second respondent is truly indebted to it in the sum of $303,945.44 (or some other sum). In my view the following observations and conclusions should be made in the light of the matters herein before set out:

(i) there is no evidence before the Court with respect to "the latest information on the project" or with respect to the "drawings" on which the offer of 31 August 2001 was based. That means that it is not possible to determine objectively what work subsequently performed by the applicant came within the ambit of "additional unforseen work" or was work performed in consequence of "significant changes" as referred to in that letter;

(ii) the applicant did not render invoices on a monthly basis and "after completion of particular stages" as provided for in the letter of 31 August 2001;

(iii) in the disputed invoices, numbers 9 and 10, the applicant did not calculate the amount claimed therein in accordance with the provisions of the letter of 31 August 2001 in that the invoices did not specify hourly rates and the final amount was not calculated on a time charge plus reimbursables basis;

(iv) all invoices rendered between 9 July 2001 and 23 November 2001 were paid in full. The invoice of 23 November 2001 was with respect to work performed up until the applicant was directed to cease work on 9 November 2001. Prima facie that would suggest

that the second respondent had by then been invoiced for all fees payable for work done up to 9 November 2001;

(v) in response to the letters of the second respondent of 8 January 2002 and 19 February 2002 advising that work should be resumed, the applicant in its letter of 1 March 2002, in dealing with the problems it faced in meeting the deadline of mid-May 2002 for completion of all design work, did not suggest that there were as at the date of the letter any specific outstanding fees. Further, that letter intimated that there had been a number of variations to the scope of the work the subject of the proposal contained in the letter 31 August 2001 and that consequential work occasioned by those variations would be charged on the time basis previously agreed upon, that is using the charge-out rates referred to in the letter of 31 August 2001 multiplied by the time spent plus reimbursables;

(vi) after the resumption of work progress claims made in invoices 4, 5, 6, 7 and 8 were paid in full;

(vii) the invoice for additional work dated 3 June 2002 was paid in full. That referred to work outside the scope of the original proposal performed during the period 11 September 2001 to 31 May 2002. That would suggest that all work performed up to 31 May 2002 outside the scope of the original proposal was charged for in that invoice;

(viii) then came the letter of 24 July 2002. On at least four occasions in that letter the word "variation" was used, and other expressions used therein clearly indicated that the applicant was proposing a basis of charging other than that contained in the letter of 31 August 2001. As was stated in that letter the applicant was then proposing "that it would be appropriate and equitable for the whole of our fee to be determined on the basis of time charges plus reimbursement of direct costs". The second respondent did not agree with the changes proposed in that letter;

(ix) the ninth interim invoice for $254,500 (the first of the disputed invoices) was not based on "time charges plus reimbursables" as provided for in the letters of 31 August 2001 and 24 July 2002. Further it did not indicate over what time period the work in question was performed;

(x) the invoice of 12 September 2002 relating to the additional work consequent upon changes to Building 1 was paid in full;

(xi) the tenth interim invoice for services extra to those originally proposed in the amount of $84,988 was not paid as it was not based on detailed charge-out rates, time spent, and reimbursables paid. Further it is not clear during what time period it is alleged the work broadly specified therein was performed;

(xii) all subsequent invoices were paid. Many detailed the identity of the person who performed the work, the charge-out rate and the time spent;

(xiii) on 22 May 2003 a "Credit Adjustment/Note" for the amount $254,500 was forwarded to the second respondent. No explanation was placed before the Court suggesting that it was other than a credit note for that amount;

(xiv) the total for invoices numbered 1 to 8 is the amount of $203,999.45 which has been paid in full by the second respondent. That equates to the figure of $204,000 which was the total referred to in the letter of 31 August 2001 for design, development and contract documentation;

(xv) after paying the amount referred to in the preceding sub-paragraph the second respondent paid a total of $84,463.50 on receiving invoices. Those invoices were those dated 3 June 2002, 12 September 2002, and all the invoices rendered subsequently to 16 December 2002. All work referred to in those invoices was obviously work beyond what was contemplated in the letter of 31 August 2001;

(xvi) the payment of that additional sum of $84,463.50 was arguably the basis of the admission in the defence in proceeding 178/04 that there were some unforseen variations to the work contemplated by the letter of 31 August 2001;

(xvii) from the time the ninth invoice for $254,500 was disputed (at the latest by the letter of 11 November 2002) there was no further demand for payment of that amount (other than the references to mediation in the letters of 20 November 2002 and 24 March 2003) until the commencement of the action on 13 April 2004;

(xviii) the applicant did not prosecute proceeding 178/04 expeditiously. The proceeding was commenced on 13 April 2004, the defence delivered on 15 July 2004, but no step was taken after February 2005 until the appointment of the administrator on 1 August 2006. That constitutes significant delay in prosecuting that action;

(xix) it is impossible given the generality of the descriptions to correlate the work referred to at pages 72 to 74 of the Buggy affidavit and in the passage quoted above from the affidavit of Clayton with the work particularised in invoices 9 and 10. The impression one gets from reading that material is that the applicant has done a calculation of all work claimed to have been done for the second respondent over the whole period of time and then deducted the total paid leaving a balance of $303,945.44. That is not the basis on which invoices 9 and 10 were submitted;

(xx) the second respondent has consistently maintained that all moneys due to the applicant have been paid.

[57] Given those observations and conclusions it is not possible for the Court to conclude that the second respondent is truly indebted to the applicant in the sum of $303,945.44 or some other particular sum. It follows that the first respondent was justified in rejecting the proof of debt.

[58] The claim made in proceeding 178/04 was based on the amount claimed in invoices 9 and 10 and though the statement of claim referred to "damages for breach of contract" the claim was really one for a debt. The principal contention of the applicant has always been that the second respondent was indebted to it for the total claimed in invoices 9 and 10. The proof of debt was similarly based. But in submissions on hearing of the application counsel for the applicant contended that the applicant had an entitlement to remuneration either contractually or on a quantum meruit. The applicant's claim has always been in contract rather than quantum meruit and in my view it is not open to the applicant to allege at such a late

stage an entitlement to recover some indeterminate amount on a quantum meruit. There was an agreement between the parties which governed the entitlement of the applicant to recover fees for work performed. If, because of the want of evidence, the applicant is unable to prove an amount owing in accordance with the contractual provisions it is not now entitled to claim on a quantum meruit.

[59] The Conditions of Engagement attached to the letter of 31 August 2001 contained a provision with respect to the payment of interest on unpaid invoices. The acceptance by the second respondent of the proposal contained in the letter of 31 August 2001 constituted an acceptance of those conditions, including the provision as to interest. Mr Agardy, counsel for the respondents, conceded that interest would be a contingent liability which in theory was admissible to proof. However, he submitted that in the circumstances of this case, if the applicant was successful on its principal claim, the Court should at least discount any allowance for interest because of the significant delay on the part of the applicant in pursuing the outstanding amount. In the circumstances it is not necessary for me to consider that matter further.

[60] Finally, it should be noted that if the applicant was successful on the principal claim costs incurred in proceeding 178/04 would be a contingent liability and it would be for the administrator to assess the amount to be allowed or have those costs assessed pursuant to a court order. Again it is not necessary to deal further with that aspect.

[61] It follows that the application of 15 November 2006 should be dismissed with costs.