IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2018 00622

ENGINEERING STRUCTURE RETENTION PTY LTD (ACN 614 167 672) — Plaintiff

v

NORTHERN MASONRY PTY LTD (ACN 153 592 851) — Defendant

JUDGE:	Efthim AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	27 Thursday 2018
DATE OF JUDGMENT:	14 November 2018
CASE MAY BE CITED AS:	Engineering Structure Retention Pty Ltd v Northern Masonry Pty Ltd

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr B Ryde	Stenta Legal
For the Defendant	Ms A Carruthers	Allied Legal

HIS HONOUR:

1 Pursuant to s 459 of the *Corporations Act 2001* (Cth)('the Act'), the plaintiff, Engineering Structure Retention Pty Ltd, applies that a statutory demand served on it by the defendant, Northern Masonry Pty Ltd, dated 11 July 2018 be set aside.

2 The description of the debt in the statutory demand is as follows:

> ...
>
> The Company owes Northern Masonry Pty Ltd ACN 153 592 851 care of Vantage Tax & Business Services, Suite 5 Level 1, 796 High Street, KEW EAST VIC 3102 (**Creditor**) the amount of **$593,293.87 (Debt)**, being the total of the amounts of the debts described in the Schedule
>
> ...
>
> **SCHEDULE**

Invoice Number	Invoice Date	Amount (including GST)
747	30 April 2018	$172,650.50
749	30 April 2018	$90,651.00
752	31 May 2018	$112,233.00
761	31 May 2018	$12,277.65
762	31 May 2018	$8,602.72
763	31 May 2018	$1,584.00
764	31 May 2018	$295,295.00
TOTAL INVOICED AMOUNT		**$693,293.87**
LESS AMOUNT RECEIVED		**$100,000.00**
TOTAL DEBT		**$593,293.87**

3 The plaintiff argues that there is a genuine dispute about the amount of the debt and, alternatively, that it has an offsetting claim. The plaintiff argues that in both situations it is not appropriate for the Court to vary the statutory demand and for it to be set aside.

Background

4 The plaintiff is a commercial builder and the defendant is a commercial supplier of labour hire, particularly for construction work. The defendant was referred to the plaintiff by Mr Dylan Turner, an ex-employee of the defendant, who was then working as site manager of the Doncaster Road, Doncaster, property for the plaintiff.

5 In mid-January 2018 the parties, represented by Mr Rami Ayoubi, one of the three directors of the plaintiff, and Mr Gregory Hallinan, director of the defendant, entered into an oral agreement. The oral agreement was never put in writing.

6 Pursuant to the oral agreement, the defendant would provide labourers to the plaintiff's construction sites around Melbourne, being in:

- Doncaster Road, Doncaster;
- Waratah Place, Melbourne;
- Napier Street, Fitzroy;
- Price Edward Avenue, McKinnon; and
- Adelaide Street, McKinnon.

7 Mr Ayoubi deposes that it was agreed that:

- Mr Hallinan would arrange workers through his business on an ad hoc and separate job basis as a contractor to the plaintiff;
- only those men responsible required for each job would be utilised;
- any works carried out would be carried out in a proper workmen like manner and to a high-quality standard; and
- the plaintiff would pay the defendant a $70 per hour flat rate per the defendant's worker.

8 Mr Ayoubi further deposes that the January meeting was not documented and he and Mr Hallinan did not discuss then or after any of the following:

- that the defendant or any other party would incur disbursements on behalf of the plaintiff;

- that any payments would be made to the defendant when the defendant's workers did not attend any site due to rain; or

- that any other rate (other than the $70 per hour flat rate) would be payable in any circumstances (including in any overtime scenario).

9 Mr Hallinan deposes that at their meeting he was informed by Mr Turner and believes that Mr Turner suggested to Mr Ayoubi that Mr Ayoubi should consider using the services of the defendant for labour assistance at the building works at 463 Doncaster Road, Doncaster. In the conversation, Mr Ayoubi asked Mr Hallinan to arrange for the defendant to provide tradesmen.

10 In response to Mr Ayoubi's affidavit regarding the oral agreement he deposes that:

- he agreed the defendant would supply labour on an ad hoc and separate job basis as contractor to the plaintiff;

- it was not stated that only those men reasonably required for each job would be utilised. It was agreed that the plaintiff company would advise as to the number of workers required each day and the nature of works to be carried out and the defendant would supply the tradesmen as required;

- they did not discuss the standard of the works to be carried out or the manner in which such works would be performed;

- they did not agree that the plaintiff would pay the defendant a $70 per hour flat rate. He advised Mr Ayoubi that the hourly rate for labour hire supplied by the defendant would be $90 per hour unless tradesmen were required to work overtime in which case the hourly rate would be $110 per hour. Mr Ayoubi agreed the plaintiff would pay the supply of labour at the said rates;

- Mr Ayoubi advised the plaintiff would pay all invoices within 7 days of receipt by the plaintiff at the end of each month; and

- The parties did not discuss disbursements or rain days at the meeting.

11 On the basis of the oral agreement, the defendant supplied labourers to the Properties for the period January to May 2018.

12 The plaintiff made full payment of invoices rendered by the defendant for the period of January to April 2018, totalling $549,059.50. The invoices had been rendered for workers at the hourly rate of $90/hr and $100/hr overtime. The invoices also contained charges for 'rain days' and numerous disbursements made by the defendant.

13 On 30 April 2018, the defendant issued two invoices to the plaintiff. These invoices were not paid. On 31 May 2018, the defendant sent the plaintiff another five further invoices. These invoices were also not paid.

14 The plaintiff alleges that around May 2018, one of the plaintiff's three directors, Mr Bryce Kemp, had a meeting with Mr Hallinan to discuss the defendant's invoices ('the first meeting'). The parties realised that they were at significant odds with regard to their interpretation of the oral agreement and the rate of labour hire, with the plaintiff believing the agreed rate was $70/hr with no overtime, no rain days and no disbursements.

15 The plaintiff alleges that in early June 2018, two weeks after the first meeting, the parties met for another meeting ('the second meeting'). Mr Kemp deposes that he and his co-directors, Mr Hassan Kassem and Mr Ayoubi, informed Mr Hallinan that they had been overcharged and that the plaintiff had spent significant money remedying defects made by the defendant's labourers on the properties at Adelaide Street, McKinnon and Waratah Place, Melbourne.

16 Mr Hallinan has referred to Mr Kemp's description of the meetings. He does not respond specifically to the first meeting but he raises exchanged text messages with Mr Kassem relating to payments that were required to be made. He states that he contacted the site supervisor known as 'Deano' and asked if he was happy with the works. He says that Deano told Mr Hallinan and Mr Kassem that he was happy with the works, and also that the tradesmen that the defendant had sent to those sites were

excellent.

17 Mr Hallinan agrees that he spoke to Mr Ayoubi, Mr Kemp and Mr Kassem at the plaintiff's premises but says that the meeting took place on or about 28 June 2018. He denies that this was a meeting arranged by the plaintiff and says that he attended the office of the plaintiff on that date to demand payment of invoices, some of which were three months overdue.

18 He deposes that in that conversation:

- he asked Mr Ayoubi, Mr Kemp and Mr Kassem where his money was and when he would be paid;
- Mr Kemp said he believed that the agreement ought to have been for works to be done at $70 per hour. He was not happy that a higher rate had been agreed;
- he said that he would not accept payment based on a lower hourly rate. He said that he had waited months for overdue payments and he was incurring interest on his overdraft and paying overheads, so he was not willing to offer a discount on the agreed rates;
- Mr Ayoubi said that the plaintiff would pay the amount owing. He said that the plaintiff was experiencing cash flow problems but the defendants invoices would be paid in full;
- Mr Ayoubi said the plaintiff had made mistakes in the past but it was a solvent company with a turnover of $7 million per year and the directors of the plaintiff wished to keep the business going; and
- he again requested that payment be made. Mr Ayoubi said the plaintiff would need more time to pay. He did not nominate a date for the proposed payment but said that he would have to check on the plaintiff's capacity to pay and he would contact Mr Hallinan that night.

19 The parties discussed potential part payment by instalments. The parties differ in their accounts of whether an agreement for part-payment was settled.

20 On 7 June 2018, a representative from the plaintiff sent an email to a representative from the defendant requesting documents from missing timesheets which made up the sum of the invoices. According to Mr Hallinan, around mid-June 2018 he attended at the plaintiff's premises with all relevant day books and provided the plaintiff with copies of any and all time sheets they requested.

21 On 3 July 2018 Mr Ayoubi texted Mr Hallinan stating that:

> I'm expecting payment to be made this Friday for $100,000 and following with another $100,000 this month. That is the best I can give you right now. Sorry if it inconvenience.

22 On 10 July 2018 the plaintiff paid $100,000.00 to the defendant.

23 On 11 July 2018 the defendant served the statutory demand on the plaintiff for the amount of $593,293.87, being the sum total of the seven invoices from 30 April and 31 May 2018.

24 In June 2018 the defendant issued three more invoices to the plaintiff. The invoices did not form part of the statutory demand as they were not overdue at the time of service, being 11 July 2018. The invoices are now outstanding.

The Law

25 Section 459H(1) of the Act states:

> (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.

26 The meaning of a genuine dispute in the context of the challenge of a statutory demand was formulated by McLelland CJ in *Eyota Pty Ltd v Hanave Pty Ltd*.[1] His Honour said:

> It is, however, necessary to consider the meaning of the expression "genuine dispute"... 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.[2]

27 In *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd*,[3] Dodds-Streeton JA, with whom Neave and Kellam JJA agreed, referred to the principles that are to be taken into account in determining a genuine dispute and off-setting claim. Her Honour said:

> As the terms of s 459H of the *Corporations Act* and the authorities make clear, the company is required, in this context, only to establish a genuine dispute or off-setting claim. It is required to evidence the assertions relevant to the alleged dispute or off-setting claim only to the extent necessary for that primary task. The dispute or off-setting claim should have a sufficient objective existence and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile. As counsel for the appellant conceded however, it is not necessary for the company to advance, at this stage, a fully evidenced claim. Something "between mere assertion and the proof that would be necessary in a court of law" may suffice...[4]

28 It is not for the Court to determine the merits of a dispute when an application is made to set aside a statutory demand. In *Mibor Investments Pty Ltd v Commonwealth Bank of Australia*,[5] Hayne J said:

> ...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 the dispute. All that the legislation requires is that the Court conclude that there

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1 (1994) 12 ACSR 785.
2 Ibid at 787.
3 (2008) 66 ACSR 67.
4 Ibid [71].
5 (1993) 11 ACSR 362.

is a dispute and that it is a genuine dispute.[6]

Submissions/Consideration

The Genuine Dispute

29 The plaintiff submits that:

- the initial invoices sent during the period of January and April were not examined in detail before payment was approved by Mr Kemp. Mr Kemp alleges that he did not notice any inconsistencies as he did not closely examine the invoices when they were in the payment system. However, after Mr Turner left the employment of the plaintiff, Mr Kemp went through all the past invoices and noted charges for high hourly rates, overtime pay, rain days and disbursements. The plaintiff disputes that the rates in the oral agreement were for $90 to $110;

- the invoices for 'rain days' were not expressly agreed between the parties at the oral agreement. There is no evidence of any agreement stating that the terms would be based on the CFMEU Enterprise Bargaining Agreement ('CFMEU EBA');

- the disbursements charged had not been agreed between the parties. Mr Hallinan deposed that the disbursements related to equipment hire which was necessary for carrying out the works of the plaintiff. He says if the plaintiff did not pay these costs the defendant would have been unjustly enriched. The defendant submits that Mr Hallinan's affidavit is instructive as to the dispute on this point when he says the plaintiff will be unjustly enriched at the expense of the defendant. Any such argument in restitution should be ventilated in open Court;

- the invoices contained an excessive amount of hours charged for the work done, arising from an alleged excessive number of workers onsite; and

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6 Ibid 366-7.

- the parties reached an agreement in July 2018 where the dispute was resolved and that the plaintiff would pay $100,000.00 while seeking to reconcile invoices.

30 The defendant submits that:

- the parties agreed on forming the oral agreement in accordance with the CFMEU EBA. Mr Hallinan deposes that Mr Ayoubi did not request the CFMEUA EBA. He also states that an email was sent from Mr Kassem with the front page of the current CFMEU EBA;

- the plaintiff's directors were aware of the defendant's charge out rates as another of Mr Ayoubi's businesses, B + R Construction Group, had contracted with the defendant in 2017;

- the plaintiff had been paying invoices in full and without dispute from January until May 2018;

- even if a rate of $70/hr was proven, the invoice amount would be a balance between $377,550.65 to $461,450.79. This amount has not been paid and thus the plaintiff is still indebted to the defendant from somewhere between these amounts;

- the defendant did not oversupply workers. The initial agreement was that the defendant supply workers according to what was sought by the directors or the site manager of the plaintiff the day before labourers were required. However, as per the oral submissions of the defendant, what eventuated was work was described to Mr Hallinan, who then had to decide how many workers to send. Further, the properties where work was done were routinely visited by the site managers and the directors of the plaintiff, who never raised concern with the defendant's director over the number of labourers on site;

- Mr Hallinan had informed the plaintiff that the oral agreement would be pursuant to CFMEU EBA. The rain delay invoices were sent pursuant to s 23 of the CFMEU EBA. Section 23.7 states that:

> Where an employee is not able to perform any work at any location because of inclement weather, the employee will receive payment at the ordinary time hourly rate for ordinary hours... subject to a maximum of 32 hours pay in any four week period.

- there is no evidence to support the plaintiff's claim that a part-payment agreement was agreed between the parties. The only evidence of the kind was the text message dated 3 July 2019 sent from Mr Ayoubi to Mr Hallinan.

Consideration

The rates charged

31 The sworn evidence of the plaintiff and defendant is in conflict. If that was all the evidence available to the Court then it would be held that there would be a genuine dispute. However, Mr Turner, formerly an employee of the plaintiff, deposes that:

> On or about 15 January 2018, while employed by the Plaintiff, I had a conversation with Adnan Kassem (Adnan) who was employed by the Plaintiff as a project manager. Adnan is the brother of Hassan Kassem, who is a director of the Plaintiff.
>
> In that conversation:
>
> a. Adnan was looking for a labour hire company to assist with projects at Doncaster Road Doncaster and Waratah Place Melbourne.
>
> b. I recommended Northern Masonry Pty Ltd, as I had previously been an employee of that company.
>
> c. Adnan asked me if Northern Masonry was capable of supplying the labour required. I said that it was more than capable of doing so.
>
> d. I told Adnan that Northern Masonry would charge for labour at the rate of $90.00 per hour for ordinary work and $110.00 per hour for overtime.
>
> e. Adnan said "Oh, they are cheaper and better" or words to that effect.[7]

32 Mr Ayoubi deposes that he understood Mr Turner was a friend of Mr Hallinan. That has not been contradicted by the plaintiff. Mr Hallinan did depose that Mr Turner was a former employee of the defendant. The evidence of Mr Turner is not sufficient to contradict the evidence of the plaintiff due to its relationship with Mr Hallinan.

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7 Affidavit of Dylan Turner sworn 23 August 2018 at [3]-[4].

33 The defendant submits that the earliest evidence of the dispute was after the statutory demand was served. I note that the statutory demand was served on 11 July 2018. There was at least one meeting prior to that date where according to the plaintiff a dispute was raised. This is again contradicted by the defendant. However, nothing was put in writing regarding the dispute or what were the terms of the oral agreement.

34 An important factor in considering whether there is a genuine dispute is that between January and April 2018, the plaintiff paid in full invoices sent by the defendant which totalled $549,059.50. No dispute was raised when the invoices were paid. Those invoices included charges at the rate contended for by the defendant, amounts for rain delay and disbursements.

35 Mr Kemp, in explaining why the invoices were paid, deposes:

> During May 2018, an employee of the plaintiff, Mr Dylan Turner (Dylan) left his role with the plaintiff. Dylan had commenced his role with the plaintiff during January 2018. Dylan had been responsible for the management of various job sites of the plaintiff, including management of those job sites where workers of NM, or arranged by NM, had attended.
>
> Shortly after Dylan left his role with the plaintiff, I checked what the outstanding amounts claimed by NM were, and I was shocked to learn that a large sum was claimed to be outstanding.
>
> Given that Dylan had referred NM business to the plaintiff, and that Dylan had commenced his role with the plaintiff around the same time that NM had commenced carrying out works for the plaintiff, I became concerned about the veracity of amounts charged by NM. As a result, I sought to examine more closely the invoices (including those invoices now subject of the Statutory Demand).
>
> The following things came to my attention as a result of my said examination of the invoices:
>
> a. The invoices lack specificity in their particulars. In many instances, the amounts claimed were not supported by the proper dockets or evidence that in fact the hours claimed were worked;
>
> b. The hourly rate noted on the invoices is $90 per hour in some instances, and $110 per hour for 'overtime'. The applicable rate was in fact a $70 per hour flat rate per worker;
>
> c. Some of the Invoices include claims for 'rain days' where no NM workers in fact carried out any work, nor did the plaintiff ever agree to any liability on 'rain days'. Now produced and shown to me marked "**BK-2**" are true copies of those dockets indicating claims for 'rain days';

d. Some of the Invoices include disbursements that the plaintiff had not authorised to be incurred (and those amounts were not substantiated with any evidence of invoices or receipts from third parties); and

e. Having regard to the broad categories of the work claimed on the Invoices, in my experience, it appeared to me that an excessive number of men were claimed to have been working on jobs that ought to have required less manpower.[8]

36 Nowhere does he depose that Mr Turner was responsible for those invoices being paid. He does not say who checked the invoices and who approved them. These invoices were for a large sum of money. The evidence is insufficient to demonstrate that these invoices were paid at the wrong rate. The explanation given by Mr Kemp is not plausible.

37 Based on that evidence, and after considering all of the affidavit evidence, there is no genuine dispute here as to the rates charged.

Overcharging supply of workers

38 Again the evidence is diametrically opposed. Mr Kemp deposes that having regard to the broad categories of work claimed in the invoices, in his opinion it appeared to him an excessive number of men were claimed to have been working on jobs that ought to have required less manpower. Mr Kassem deposes that each time the defendant's workers attended the job sites of the plaintiff, the plaintiff had not requested the number of workers that the defendant required to attend. Instead the nature of the job was described to the defendant and the defendant brought his men on an ad hoc basis. He observed on numerous occasions that an excessive number of workers were assigned to each job. He states that having regard to the nature of the task assigned to the defendant by the plaintiff, those jobs ought to have required less manpower.

39 This is contradicted by Mr Hallinan. He says that the responsible manager for each site would contact him to describe the services to be carried out and that the site manager for each site would also advise as to the number of tradesmen required. He

8 Affidavit of Bryce Kemp sworn 1 August 2018 at [8]-[11].

arranged for the tradesmen to attend the sites based on the requests received. Exhibited to his affidavit is an email from Mr Kassem dated 17 January 2018 which states:

> Greg,
>
> Hope all is well-
>
> Can you please provide 3-5 formworkers at 463-535 Doncaster Road, Doncaster tomorrow?
>
> It'd be okay if we have a couple of skilled formworkers and some formwork labourers assisting.
>
> They will be forming a crane base, then moving on to form the perimeter of the basement slab off a strip of footings.
>
> All material is onsite, the team just need tools.
>
> Can you accommodate?
>
> Cheers,[9]

40 The supervisor to the site was not provided by Mr Hallinan. The supervisor was an employee of the plaintiff. No affidavit has been filed on behalf of the plaintiff from any site supervisor to contradict Mr Hallinan's evidence.

41 I also note that previous invoices were paid without any dispute.

42 On the evidence the plaintiff has not provided any plausible explanation which merits investigation. There is no genuine dispute in relation to the oversupply of workers.

Rain delay charges

43 Mr Hallinan has deposed that job sites were CFMEU sites and that labourers were engaged in accordance with the CFMEU EBA. On 16 January 2018, Mr Hallinan forwarded a cover page of the agreement to Mr Ayoubi. I note that the plaintiff was provided with timesheets including timesheets saying rain delays and some have creative rain droplets drawn on them. I also note that the plaintiff was invoiced previously for rain delays and paid them.

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9 Exhibit GH3 to the affidavit of Gregory Hallinan sworn 23 August 2018.

44 Again, on the evidence there cannot be a genuine dispute in relation to rain delays.

The disbursement charges

45 The plaintiff has paid for disbursement charges in previous invoices. It makes no sense that the plaintiff would not be paying disbursement charges in the circumstances deposed to by Mr Hallinan. Again, there is no genuine dispute here.

The settlement of the claim

46 The plaintiff alleges that there was an agreement for the debt to be paid in instalments.

47 Mr Ayoubi deposes that at the beginning of July 2018 he had a meeting with Mr Hallinan. In a good faith attempt to help resolve the dispute, Mr Ayoubi agreed the plaintiff would make part payment of $100,000.00 towards any debt and continue to pay $100,000.00 per month against any outstanding debt, while reconciling all charges with a view to determining any properly outstanding amount by the end of July 2018 as soon as possible.

48 He also says the arrangement was accepted by Mr Hallinan and on 10 July 2018, in accordance with the arrangement, the plaintiff made payment of $100,000.00. There was certainly no mention made by Mr Hallinan at the meeting that the defendant was considering making a formal demand on the plaintiff. He was surprised to learn a statutory demand was made on 11 July, the day after the plaintiff had made $100,000.00 payment, especially given the fact that Mr Hallinan was aware there was a dispute on foot.

49 Mr Hallinan deposes that he agrees that the plaintiff paid the sum of $100,000.00 on or about 10 July in part satisfaction of the invoices that were outstanding on that date. That was not part of an agreement as alleged by the plaintiff but as a result of discussions that he had previously with Mr Ayoubi. He did not agree that the balance of the debt would be paid at $100,000.00 per month.

50 The remittance advice exhibited by Mr Hallinan to his affidavit shows that the $100,000.00 had been paid in part payment of an invoice and the balance of the invoice ($72,650.00) remained outstanding.

51 If there had been an agreement the statutory demand would not have been issued one day after the payment was made. There is nothing in writing demonstrating the agreement. Mr Ayoubi sent an email on 3 July referring to the $100,000.00 payment and makes no reference to any agreement. There is no acknowledgement of any agreement nor any acknowledgement of any acceptance. There is nothing but a bare assertion made by the plaintiff.

The Offsetting Claim

52 The plaintiff alleges that some of the work completed by the defendant was defective. Mr Ayoubi, Mr Kemp and Mr Kassem deposed that the defects were raised with Mr Hallinan in the first, second and third meetings, prior to the service of the statutory demand.

53 The defendant, in response, submits that:

- the plaintiff has never produced evidence which directly states what defects were explicitly caused by the defendant;
- in exhibit HK-1 of the Affidavit of Hassan Kassem dated 1 August 2018, the plaintiff's list of defects at the Adelaide Street and Waratah Place properties is dated 7 February 2017, almost a year before the defendant commenced work on those sites and should be disregarded;
- the list of defects are not related to the list of works directly undertaken by the defendant's labourers;
- Mr Hallinan had discussions with site managers on the two properties and was given positive feedback, including that his workers were 'excellent'.

54 The plaintiff has provided a defects list produced by Hutchison Builders in relation to the Adelaide Street project dated 7 February 2017. That list is dated 7 February 2017. I am prepared to infer that the defects list is wrongly dated and it does relate to the Adelaide Street work.

55 The plaintiff does not provide any evidence regarding:

- the involvement of labourers from the defendant, involvement of other labourers employed from elsewhere;
- when the works were performed;
- the circumstances in which they were conducted to be found defective;
- what, if any, rectification or completion was sought by the plaintiff from the defendant to resolve any alleged issues of defects; and
- what steps were taken by any of the plaintiff's supervisors, foremen or the like due to their supervisory role regarding the defective works.

56 The evidence in support of the defects is not sufficient to support an offsetting claim. On the evidence the allegation of defects caused by the defendant's workers is nothing more than a bare assertion.

57 The only quantification in relation to the defects is provided in an affidavit by Mr Kassem. He deposes that Hutchison Builders has declined to release retention monies to the plaintiff of $30,690.65 plus GST due to incomplete and defective works at the Adelaide Street/McKinnon job site. He deposes that those incomplete and defective works are attributable to the works carried out by the defendant's labour. At the time of swearing his affidavit Mr Kassem states that the plaintiff incurred the following costs in relation to rectifying the defendant's defective and incomplete works. He says that:

> At the time of swearing this affidavit, in relation to the Adelaide Street, McKinnon job site, the plaintiff has determined that the plaintiff incurred the following costs in relation to rectifying NM's defective and/or incomplete

works:[10]

DESCRIPTION OF REMEDIAL WORK REQUIRED	TOTAL
ESR labour over 2 weeks (6 days per week)	$27,360.00
Panel patching work required for defective patching work	$400.00
Fairing coat required for defective works	$400.00
Bondcrete required for defective work	$134.40
Self-levelling compound required for defective work	$300.00
Floor grinder hire (3 weeks)	$4,500.00
	$22,474.40

58 Mr Kassem deposes that in relation to the Waratah Place, Melbourne job site the plaintiff has determined that the plaintiff incurred the following costs in rectifying the defendant's defective and/or incomplete works. He says that:

> At the time of swearing this affidavit, in relation to the Waratah Place, Melbourne job site, the plaintiff has determined that the plaintiff incurred the following costs in relation to rectifying NM's defective and/or incomplete works:[11]

DESCRIPTION OF REMEDIAL WORK REQUIRED	TOTAL
ESR labour over 1 week	$9,120.00
Self-levelling compound required for defective works	$90.00
Floor grinder hire (1 week)	$1,500.00
	$10,710.00

59 At best the statutory demand would be varied by reducing the amount claimed by $33,184.40 which is a small amount compared to the amount claimed in the demand.

60 The plaintiff submits that due to the nature of the defects, the Court is not in a position to calculate the substantiated amount and should therefore not attempt to vary the statutory demand. The plaintiff relies on the decision of Justice Campbell in *Kirch Communications Pty Ltd v Gene Engineering Pty Ltd* [2002] NSWSC 485. The statutory demand in that case concerned a winch which had been damaged and required repair. The Court considered that the cost to fix the winch was not a matter the subject of the statutory demand and therefore it could not calculate the reduced 'admitted amount' taking into account such a repair cost. The statutory demand was set aside. Campbell J indicated he would have, if necessary, exercised his discretion under s 459(4) and set aside the demand rather than vary it and said:

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10 Affidavit of Hassan Kassem sworn 1 August 2018, [7].

11 Affidavit of Hassan Kassem sworn 1 August 2018, [8].

It is established that if an original demand was grossly inflated by the inclusion of matters which are clearly genuinely in dispute, the Court can decline to vary it (at [57]-[59]).

61 In the case of *In the matter of Infratel Networks Pty Ltd*,[12] Black J held that an offsetting claim must contain sufficient material indicating the nature of the offsetting claim and the way in which it is calculated.

62 Here the plaintiff has not provided adequate evidence relating to the quantum of any defect. There is nothing to demonstrate that the demand is grossly inflated and the quantum of any defect is considerably low when compared to the amount claimed. Even if I have a discretion under s 459(4) of the Act to set aside the demand rather than vary it, in this case, I would not do so. The evidence does not support that there is an offsetting claim and is not sufficient to quantify such a claim.

Conclusion

63 The plaintiff does not have a genuine dispute nor an offsetting claim. The application will be dismissed.

CERTIFICATE

I certify that this and the 17 preceding pages are a true copy of the reasons for Judgment of Efthim AsJ of the Supreme Court of Victoria delivered on 14 November 2018.

DATED this fourteenth day of November 2018.

12 [2012] NSWSC 943.