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

Not Restricted

S ECI 2019 02781
S ECI 2019 03101
S ECI 2019 03102

IN THE MATTER of KORNUCOPIA PTY LTD (ACN 615 630 316)
IN THE MATTER of EFEKTIV PTY LTD (ACN 625 719 566)
IN THE MATTER of AVANT-GARDE VENTURES PTY LTD (ACN 620 447 789)

BETWEEN:

JEFFREY CHEN — Plaintiff

v

KORNUCOPIA PTY LTD (ACN 615 630 316) — Defendant

AND BETWEEN:

MADGWICKS (A FIRM) (ABN 82 199 611 971) — Plaintiff

v

EFEKTIV PTY LTD (ACN 625 719 566) — Defendant

AND BETWEEN:

MADGWICKS (A FIRM) (ABN 82 199 611 971) — Plaintiff

v

AVANT-GARDE VENTURES PTY LTD (ACN 620 447 789) — Defendant

JUDGE:	Sifris J
WHERE HELD:	Melbourne
DATE OF HEARING:	16, 17, 18, 19, 20 December 2019
DATE OF JUDGMENT:	24 January 2020
CASE MAY BE CITED AS:	In the Matter of Kornucopia Pty Ltd (No 4)
MEDIUM NEUTRAL CITATION:	[2020] VSC 7

CORPORATIONS – Winding up – Failure to comply with statutory demands – Presumptions of insolvency enlivened – Abuse of process – Applications made under *Corporations Act 2001* (Cth) s 459S – Genuine disputes and offsetting claims – Offsetting claim against landlord of property in

relation to tenant being deprived of quiet enjoyment – Genuine dispute in relation to professional fees charged by law firm to client – Whether creditor has improper purpose in commencing winding up application – Whether VCAT, Magistrates' Court or Costs Court preferable forums for determination of disputes – No prospects of success in defendant's grounds – No evidence of solvency – Leave not granted – Grounds cannot be raised but fail in any event – *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd* (2011) 244 CLR 1, applied – *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* [1978] VR 83, not followed – *Perpetual Nominees Ltd v Masri Apartments Pty Ltd* (2004) 49 ACSR 714, not followed.

PRACTICE AND PROCEDURE – Apprehended bias – Statements made by Judge in directions hearing precluding defendants from making further application to file evidence – Subsequent statement clarified that further application would need to rely on fresh evidence and new grounds – Subsequent statement qualified earlier statement and negated reasonable apprehension of bias which might have otherwise arisen – *Johnson v Johnson* (2000) 174 ALR 655, applied.

PRACTICE AND PROCEDURE – Application by defendants for leave to file evidence of solvency at trial after close of evidence and plaintiffs' closing submissions – Application by defendants to adjourn trial to new year – Numerous breaches of court orders by defendants preceding the trial – Numerous indulgences and extensions given to the defendants – No sufficient explanation of delay – Extensive breaches of overarching obligations – Dishonest, underhanded, tactical and strategic conduct – *Civil Procedure Act 2010* (Vic) ss 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29 – *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14, applied – *Sali v SPC Ltd* (1993) 116 ALR 625, applied.

APPEARANCES:	Counsel	Solicitors
For Jeffrey Chen and Supporting Creditors	P Miller	Keypoint Law
For Madgwicks Lawyers	PG Lovell	Madgwicks Lawyers
For Kornucopia Pty Ltd, Efektiv Pty Ltd and Avant-Garde Ventures Pty Ltd	DJ Williams QC (16 December 2019), I Percy (16 December 2019), N Raghavan (Solicitor) (17 to 20 December 2019)	RM Legal Consultants
For the Supporting Creditors	N McKenzie-McHarg (Solicitor)	Gadens

TABLE OF CONTENTS

A Introduction **1**

B Summary **4**

B1 Kornucopia 4

B2 Efektiv and AGV 6

C Kornucopia **9**

C1 Background 9

Genuine Dispute/Offsetting Claim 11

Tender 16

C2 Tender 17

The Law 17

Analysis 21

C3 Abuse of process 23

The Law 25

Analysis 38

Genuine Dispute 39

Jurisdiction of the VCAT 48

Improper Purpose 49

Stay and Dismissal of the VCAT Proceeding 54

Tender 57

Conclusion 57

C4 The Masri Principle 57

C5 Solvency 64

D Efektiv and AGV **66**

D1 Background 66

Tax Invoices and Costs Disclosure Agreements 68

Costs Court Proceeding 69

D2 The 459S grounds – general 70

The Law 70

Serious question to be tried 72

Grounds the Companies could have relied upon 73

Material to solvency 75

Analysis 77

D3 Costs Disclosure Documents 82

Submissions 82

Analysis 82

D4 Taxation of Costs 101

Submissions 101

Analysis 101

D5 Contracting Party 103

D6 Miscellaneous Oral Arrangements 106

D7 Abuse of Process 107

D8 Solvency 109

E Procedural and Other Matters **110**

E1 Updated Chronology – The Course of the Trial 110

Events Prior to the Trial 111

Monday, 16 December 2019 – First Day of Trial 112

Tuesday, 17 December 2019 – Second Day of Trial 114

Wednesday, 18 December 2019 – Third Day of Trial 116

Thursday, 19 December 2019 – Fourth Day of Trial 120

Friday, 20 December 2019 – Fifth Day of Trial 124
Events Following the Trial 126
E2 Second Recusal Application 131
E3 Adjournment Application 136
E4 Further Leave Application - Evidence of Solvency 146
E5 Evidentiary Ruling – Covert Recording 152
E6 Conduct Issues and the *Civil Procedure Act 2010* (Vic) 154
F Reporting 155
F1 Raghavan 155
Hager – Allegation of Dishonesty 157
McNamara - Threat 158
F2 Kuksal 160
G Conclusion and disposition 161

HIS HONOUR:

A Introduction

1 There are three applications before the Court seeking orders to wind up each of Kornucopia Pty Ltd (**Kornucopia**), Efektiv Pty Ltd (**Efektiv**) and Avant-Garde Ventures Pty Ltd (**AGV**) (collectively, the **Companies**). The plaintiff in the Kornucopia proceeding is Jeffrey Chen (**Chen**),[1] and in both of the Efektiv and AGV proceedings the plaintiff is Madgwicks Lawyers (**Madgwicks**).[2]

2 This is the fourth judgment in these relatively straightforward winding up applications. They have been bedevilled by exhaustive and extensive procedural and interlocutory roadblocks. These include, but are not limited to, interlocutory skirmishes, numerous indulgences, breaches of court orders and adjournments, as well as generally obstructive and discourteous behaviour on the part of the Companies. The conduct of the Companies in this litigation has been appalling.

3 On 12 and 13 November 2019, I heard a number of preliminary questions relating to whether three creditor's statutory demands (one on each of the Companies) had been served effectively and whether certain technical defects with respect to the Originating Process in the Kornucopia proceeding resulted in its invalidity.

4 On 19 November 2019, I published reasons for my decision (**First Judgment**), where I found:[3]

(a) the Companies failed to rebut the presumption of delivery arising pursuant to s 29(1) of the *Acts Interpretation Act 1901* (Cth) (**AIA Act**) and that service by post of the three statutory demands had been effective on each of the Companies;

(b) in the case of Efektiv and AGV, there had also been informal service by email of the statutory demands to a director or officer of the relevant company; and

(c) in the case of Kornucopia, I was obliged not to dismiss the Originating Process,

---

1 Chen is the landlord and Kornucopia is the tenant of a property in Docklands, Victoria.

2 Madgwicks are the former solicitors for the Companies.

3 *In the Matter of Kornucopia Pty Ltd (No 1)* [2019] VSC 756 (**First Judgment**).

notwithstanding the defects present in connection with it, by virtue of the operation of s 467A of the *Corporations Act 2001* (Cth) (**the Act**).

5 On 15 November 2019, and prior to the publication of the First Judgment, the hearing of the winding up applications was fixed for hearing, to commence on 11 December 2019, on an estimate of five days.

6 On 2 December 2019, the Companies filed an application in each proceeding seeking my recusal for apprehended bias. Given that the trial was due to commence on 11 December 2019, the bias applications were heard as a matter of urgency on 3 December 2019.

7 On 5 December 2019, I dismissed the bias applications. Reasons were delivered on 9 December 2019 (**Second Judgment**).[4]

8 On 5 December 2019, the Companies were ordered (after a number of previous extensions) to file evidence relating to solvency by close of business on 10 December 2019, failing which they would need leave of the Court to do so. This was yet a further indulgence and opportunity granted to the Companies to file such evidence. The orders were not complied with. No persuasive reason was given.

9 Given the non-compliance, the proceedings came on for a further directions hearing on 12 December 2019, a day after the trial was due to commence. The Companies suggested that I re-fix the hearing of the applications for the new year (instead of the following Monday, 16 December 2019) and in effect permit them to file evidence of solvency. The Companies advised that preparation of the evidence had not yet been completed and did not specify a time when said evidence would be completed. I rejected the Companies' submissions and re-fixed the trial to commence on 16 December 2019 (**Third Judgment**).[5]

10 On the first day of trial being Monday, 16 December 2019, a second recusal application was brought. It had been foreshadowed over the weekend. It was dismissed on the same date.

---

4 *In the Matter of Kornucopia Pty Ltd (No 2)* [2019] VSC 802 (**Second Judgment**).

5 *In the Matter of Kornucopia Pty Ltd (No 3)* [2019] VSC 821. (**Third Judgment**). I did not vacate the trial dates and the trial eventually commenced on Monday, 16 December 2019, a day that was included in the dates originally scheduled. I will assume familiarity with the First, Second and Third Judgments.

There was no application on that day for leave to file material as to solvency. In somewhat dramatic circumstances, Mr Williams QC, who had until that time been acting for the Companies, indicated that he was unable to act any further. This occurred at 11:30am on 16 December 2019. I stood the matter down to 2:15pm. At 2:15pm, Mr I Percy of Counsel appeared for the Companies and made a fresh application to adjourn the application until next year. It was refused on the same date. Nonetheless, I granted the Companies a short adjournment and indicated that the hearing of the winding up applications would resume at 10:00am on Tuesday, 17 December 2019. They did proceed then, but not without further drama.

11 In the end, as the Companies' various applications were refused, they were required to proceed to the hearing of the winding up applications with no evidence of solvency before the Court, no Counsel, and at times, no legal representative present (due to a contended medical condition). While undesirable, each matter was either at the Companies' request,[6] or entirely their own fault.[7] The Court cannot be held to ransom by the demands of a party, in circumstances where that party's own conduct has led them to the very position of which they complain.[8]

12 The affidavit and oral evidence given by the Companies was rife with lies, inconsistencies and was otherwise vague and evasive in nature. Much of it has been rejected.

13 A detailed chronology of the events preceding the trial and leading up to the directions hearing of 12 December 2019 is recorded in my Third Judgment. The reasons for dismissing the second recusal application and adjournment application made on 16 December 2019 are set out in detail below, as is a chronology of the course of the trial.

---

6 There were various days of the trial when the in-house solicitor of the Companies, Naveen Raghavan (**Raghavan**), was suffering from his contended medical condition and was unable to attend Court. His medical condition is addressed at paragraphs [456] to [470]. For example, on 18 December 2019, he wrote to the Court requesting an adjournment due to his medical condition. This was refused. Alternatively, he asked whether Kuksal and Xu could be cross-examined in his absence. This was allowed. The Companies later complained about the fact that I had allowed their witnesses to be cross-examined when they did not have legal representation present. Of course, they had requested this. This is addressed at paragraphs [384] to [399].

7 The Companies ought to have ensured that they had adequate legal representation.

8 The Companies did not file a written outline of opening or closing submissions (or contrary to my direction) a list of affidavits upon which they relied. This has made the Court's task of assessing the evidence, deciphering the Companies' arguments, or determining the matter as a whole much more difficult. I have done the best that I can in these circumstances.

14 The inclusion of a chronology, while unusual, is necessary in this case. The Companies have continuously and without any merit whatsoever raised issues of procedural fairness and bias. It is, therefore, important to accurately record the conduct of the Companies and their legal representatives during the course of the hearing. Their conduct has been unfair, abusive, threatening, discourteous and appalling to both the plaintiffs and the Court. The conduct of the trial must be assessed in light of their conduct.

15 The trial, fragmented and interrupted as it was, proceeded on all remaining issues and final submissions concluded on Friday, 20 December 2019. The substantive issues in the proceedings were, by contrast, relatively simple and straightforward.[9]

B Summary

B1 Kornucopia

16 I propose to make a winding up order.

17 The relevant facts are set out in more detail below. Chen is the owner and landlord of a property located in Docklands, Victoria. Kornucopia is the tenant of that property. Chen made a statutory demand for $12,281.66 for arrears of rental sworn to be due and payable pursuant to a residential tenancy agreement.

18 The statutory demand was properly served and no application was made to set it aside within the prescribed 21 day period.[10] Kornucopia was and is therefore presumed to be insolvent.[11] Chen commenced the winding up application, relying on presumed insolvency by virtue of the unsatisfied statutory demand.

19 The Originating Process as amended is in proper form thereby enabling the application to proceed, and the Court's discretion to wind up the company enlivened.[12]

20 Kornucopia has not made an application under s 459S of the Act. It raised three matters

---

9 It will be observed that the Companies have failed on most, if not all, substantive issues they had raised. Even if the Companies' evidence had been accepted, it was too vague to make the findings they sought.

10 *Corporations Act 2001* (Cth) s 459G.

11 *Corporations Act 2001* (Cth) ss 459C(2)(a), 459F(1).

12 *Corporations Act 2001* (Cth) s 459A; First Judgment [101]-[145].

directed to the discretion and abuse of process. The main complaint of Kornucopia is that it was denied the right of a tenant to quiet enjoyment, which, it was submitted has given rise to a potential offsetting claim. It is not suggested that Chen denied them such a right, but rather that the Owners Corporation managing the apartment building had.[13] The grounds are referred to below, but in summary are:

(a) The effect of a tender of payment offered by Kornucopia, and rejected by Chen.

(b) Whether the proceeding constitutes an abuse of process given the contended disputed nature of the debt. Kornucopia contends that Chen has improperly subjected Kornucopia to the pressure of a winding up application in order to force the company to satisfy a disputed debt.

(c) Whether Kornucopia is solvent.

21 The tender made by Kornucopia to pay the amount of the statutory demand was rejected. In so rejecting the tender, Chen acted entirely reasonably. The tender was for a pitiful amount given subsequent events, and Kornucopia does not evince a continued willingness to pay the debt.

22 Kornucopia cannot raise the other grounds because it has not made an application under s 495S of the Act and has not adduced evidence of solvency. There is no abuse of process, in the circumstances, of engaging the permitted statutory demand procedure. Each of the grounds relied upon, and in particular the contended genuine dispute, is without merit or substance.

23 There is no evidence rebutting the presumption of insolvency. There are no cogent reasons which justify exercising the discretion in favour of *not* making a winding up order. The discretionary considerations favour a winding up order. Again, there is no evidence of solvency.

---

[13] At no time has Kornucopia referred to the Owners Corporation by its legal name. I do not know what the precise legal entity is. I refer to it as the 'Owners Corporation' as this was the term used by Kornucopia.

B2 Efektiv and AGV

24 I propose to make a winding up order in relation to each company.

25 The relevant facts are set out in more detail below. In Efektiv and AGV, the statutory demands were made by Madgwicks, a firm of solicitors who formerly acted for the Companies, for $69,731.57 and $203,104.88 respectively, for professional services rendered and sworn to be due and payable.

26 The statutory demand, with respect to each company, was properly served and no application was made to set either of them aside within the prescribed 21 day period. Each company was and is therefore presumed to be insolvent. Madgwicks commenced the winding up applications, relying on presumed insolvency by virtue of the unsatisfied statutory demands.

27 The Originating Process, with respect to each company, is in proper form thereby enabling the applications to proceed, and the Court's discretion to wind up each company is enlivened.

28 Each company has, however, made an application under s 459S of the Act for leave to rely on matters that they could have, but did not, rely upon in an application to set aside the demands within the required 21 day period. They are referred to in detail below, but in summary they are:

(a) Whether Madgwicks should be precluded from using the winding regime to collect their fees, because, it was contended, Madgwicks did not provide adequate costs disclosure to the Companies prior to their entry into a retainer agreement. It was contended that Efektiv and AGV did not receive *any* costs disclosure statements or costs agreements. It was not contended that had they been received, disclosure would still have been inadequate.

(b) Whether these applications should be adjourned, stayed or dismissed, because the Companies have filed a summons for taxation with the Costs Court (after these winding up applications were filed by Madgwicks), by which the Companies seek a taxation and assessment of Madgwicks' bills of costs.[14]

---

[14] Efektiv and AGV submitted that they do not require leave under s 459S of the Act to raise this ground as the Costs Court proceeding did not exist at the time Efektiv or AGV *could have* applied to set aside the statutory

(c) Whether Madgwicks does not have standing as a creditor, because, it was contended, there was only one retainer, to which Kornucopia and Madgwicks were parties. There is, it was submitted, no contractual relationship (or debtor to creditor relationship) between Efektiv or AGV and Madgwicks.

29 Those grounds (which may also be relevant to the discretion to wind up and abuse of process) are without merit. To rely on the section Efektiv and AGV are required to provide a reason why the grounds were not raised in the 21 day period, that the grounds are arguable and that they are material to the solvency of the company. None of these matters have been established. There is no explanation as to why the grounds were not raised within the 21 day period, save for that it was said that the statutory demands were not received by the companies. Further, because there is *no* evidence of solvency, I am unable to determine whether those debts would be material to each company's solvency. Regardless, the grounds are not arguable. Leave will not be granted under s 459S of the Act, however, as there is likely to be an appeal, each ground is dealt with below.

30 Madgwicks provided adequate costs disclosure. The relevant documents which provided such disclosure were received by email, sent to Efektiv and AGV. In any event, if there was inadequate disclosure, it is no impediment to the applications proceeding.

31 Likewise, the assessment of costs before the Costs Court is no impediment to the applications proceeding. It does not by operation of the law (and should not in the exercise of my discretion) result in a stay of winding up applications which commenced prior to the filing of the summons for taxation.

32 In relation to the contracting party ground, I find that both Efektiv and AGV engaged Madgwicks to provide legal services and that Madgwicks is a creditor of each company. The 'beneficial owner' of the Companies, Shivesh Kuksal (**Kuksal**) had authority or was held out by Efektiv and AGV to be engaging Madgwicks on behalf of those companies.[15]

---

demands. This is rejected at paragraphs [241] to [245].

15 Until 29 January 2019, Kuksal was the sole director of each of the Companies. On that date, he resigned from that office and now calls himself the 'beneficial owner' of the Companies. The precise corporate structure has not been explained, but it seems that Kuksal owns the shares of the holding company which in turn holds the shares in the Companies. It is clear that the current directors of the Companies are accustomed to act in

33 In relation to the discretion to wind up the Companies, two matters were raised. They are referred to in detail below, but in summary they are:

(a) Whether the proceeding constitutes an abuse of process.

(b) Whether Efektiv or AGV are solvent.

34 There is no abuse of process, in the circumstances, of engaging the permitted statutory demand procedure. The grounds relied upon are the same as those raised by the application under s 459S of the Act and fail for the same reasons.

35 There is no evidence rebutting the presumption of insolvency. There are no cogent reasons which justify exercising the discretion in favour of *not* making a winding up order in relation to each company. The discretion ought to be exercised in favour of winding up order, given there is no evidence of solvency in relation to each company.

C Kornucopia

C1 Background

36 On 11 September 2018, Chen as landlord and owner of an apartment located at 1204N/889 Collins Street, Docklands, VIC 3008 (**Property**) entered into a residential tenancy agreement (**Lease Agreement**) with Kornucopia as tenant. Pursuant to the Lease Agreement, the Property was leased for a term of one year, for monthly rental of $2,086.00 and a bond of $2,086.00. Kornucopia has not paid rental since 10 November 2018.[16]

37 On 7 January 2019, Chen served a 14 day notice to vacate on Kornucopia, requiring payment of the rental arrears which were outstanding at that point in time. On 31 January 2019, Chen commenced VCAT proceeding R2019/4231/00 (**VCAT Proceeding**) seeking payment of rental arrears in the amount of $7,612.38 (including the bond) and an order for possession of the Property.[17]

---

accordance with Kuksal's instructions. He has control over the conduct of the Companies. He gave all of the instructions in relation to this proceeding and his fingerprints are on every aspect of the case. He is the 'puppet master' so to speak. See paragraph [326].

16 According to Chen the lease has expired and Kornucopia is over-holding the Property and according to Kornucopia there is a periodic tenancy. It is unnecessary to determine this issue.

17 While not entirely clear, references in the evidence tend to suggest that there were other proceedings in VCAT

38 On 28 February 2019, Member Knights made orders, inter alia, for the payment of the rental arrears and possession of the Property (**VCAT Orders**). A warrant for execution was issued by the Principal Registrar on 8 March 2019.

39 On 12 March 2019, Registrar Jacobs stayed the order of Member Knights (and enforcement of the same) and adjourned an application by which Kornucopia contended that it had not been served with the notice of the previous hearing before Member Knights on 28 February 2019. The order states:

> 1. On the application of the tenants for a review of the order made on 28 February 2019, and pending further hearing of that application or further order of the Tribunal, the order is stayed and the time in which the warrant for possession issued by the principal registrar on 8 March 2019 may be executed is extended for the maximum time permitted by law.
>
> 2. Pending the further hearing of this matter or other order. I order that the parties and their servants or agents be prohibited from enforcing any of the orders made on 28 February 2019, and executing the warrant of possession and direct that any member of Victoria Police as sufficient evidence of the prohibition against enforcement and execution.

40 On 15 May 2019, while there was a stay of the VCAT Orders, a creditor's statutory demand was signed Vaughan William Hager (**Hager**), a consulting principal of Keypoint Law (**Keypoint**), Chen's solicitors (**Kornucopia Demand**). The Kornucopia Demand *does not* rely on the VCAT Orders, but rather, rental arrears, which were said to be due and payable, in the amount of $12,281.66 (**Rental Arrears**). The Kornucopia Demand was sent by prepaid ordinary post on the same date and effectively served on 21 May 2019.[18]

41 On 4 June 2019, Member Sharkie found that Kornucopia had a reasonable excuse for not attending the hearing on 28 February 2019, a reasonable case to argue for the purpose of a new hearing, and made orders accordingly:

> 1. The application for review is granted and the order dated 28 February 2019 is suspended pending further hearing of the proceeding to 6 June 2019 at 3:00 pm before Member J Sharkie.
>
> …
>
> 3. The warrant of possession issued by the principal registrar on 8 March 2019 is extended for the maximum time allowed by law and suspended until then.

---

commenced prior to this proceeding. It is unnecessary to determine whether that is so.

18 First Judgment [53], [72].

42 On 6 June 2019, Member Sharkie dismissed Chen's application on the basis that Chen had not complied with the requirements of s 506(3) *Residential Tenancies Act 1997* (Vic) (**RTA**) in giving notice to vacate. In other words, the proceeding was dismissed because service of that notice had not been effective on Kornucopia.

43 On 21 June 2019, after the VCAT Proceeding had been dismissed, Chen applied to the Court pursuant to s 459P of the Act for an order winding up Kornucopia on the ground of presumed insolvency by virtue of the unsatisfied statutory demand. Kornucopia accepted that the Originating Process was delivered by post and that it had received it.

44 Kornucopia has not paid rental since 10 November 2018. Accordingly:

(a) rental arrears, said to be due and owing, for the period of 10 November 2018 to 11 January 2019 were in the amount of $7,612.38 (inclusive of the bond). This was the amount the subject of the VCAT Proceeding.

(b) rental arrears, said to be due and owing , for the period of 10 November 2018 to 7 May 2019 were in the sum $12,281.66. This was the amount the subject of the Kornucopia Demand, being the Rental Arrears.

(c) rental arrears, said to be due and owing , for the period of 10 November 2018 to 12 November 2019, is in the amount of $23,180.[19]

45 As noted, the Kornucopia Demand was issued at a time when the VCAT Orders had been stayed and the Originating Process seeking a winding up order was filed after the VCAT Proceeding had been dismissed. However, as noted and most importantly, the Kornucopia Demand *did not* rely upon the VCAT Orders, but rather, the Rental Arrears. The Kornucopia Demand states as follows:

> Kornucopia Pty Ltd (ACN 615 630 316) (**Company**) owes Jeffrey Chen (**Creditor**) the amount of $12,281.66 being the amount of rent owing by the Company for the period from 11 November 2019 to 7 May 2019 for [the Property], pursuant to [the Lease Agreement].

[19] On my calculation, rental owing for the period ending 12 January 2020 is $27,352.

Genuine Dispute/Offsetting Claim

46 Kornucopia contends that Chen was aware of a genuine dispute relating to the Rental Arrears, and while aware of that dispute, issued the Kornucopia Demand and filed the Originating Process. It was initially submitted that this claim, if established in Kornucopia's favour, would have resulted in Chen owing damages to Kornucopia, which Kornucopia would raise, as an offsetting claim under s 459S of the Act. That application was later abandoned. It is nonetheless raised, but now put in terms of an abuse of process in two ways. First, the existence of a genuine dispute means that Chen's standing as a creditor is in doubt. The effect of this, it was submitted, is that it should result in a stay or dismissal of the winding up application, until this claim has been separately determined in VCAT or conventional litigation in the Magistrates' Court. At no time has Kornucopia sought to commence a proceeding for the determination of this claim. Secondly, Chen was aware of the dispute. Kornucopia contended that Chen has an improper purpose in this proceeding, insofar as it was submitted, Chen has attempted to force Kornucopia to pay a debt which he knew to be disputed, by subjecting Kornucopia to the pressure of a winding up application.

47 Kornucopia contends that Chen, as landlord, denied it the right of a tenant to quiet enjoyment (**Offsetting Claim**). It is not contended that Chen has engaged in any positive act which had a direct effect of depriving Kornucopia of this right. Rather, Kornucopia, in possession of the Property, was engaged in a longstanding dispute with the Owners Corporation which managed the apartment. The Owners Corporation had, it was contended, engaged in racial abuse and physical attacks on Kornucopia's officers, and further precluded Kornucopia's officers or customers from utilising common areas and property of the building. It was further alleged that the Owners Corporation had interfered with the key fobs that Kornucopia was in possession of, restricting or denying their access to the building. The claim against Chen, in relation to the actions of these third parties, was said to arise from his failure to assist Kornucopia in its efforts to 'rein in' the Owners Corporation. Kuksal deposed to the following in relation to the Offsetting Claim:

> [8] Regarding the specific Premises, I had advised the Plaintiff, through Ms Dangov, that the unit would be utilised by the company for its own use, including the accommodation of staff and clients of the business. It was also made very clear to the Plaintiff, through Ms Dangov, that Komucopia [sic] was a serviced apartment business and possessed several apartments in the

building for that purpose.

> [9] Soon after, on or around November 2018, Kornucopia's relationship with the management team of the building's Owners Corporation [Owners Corporation] began to deteriorate. Members of my staff were harassed, stalked, racially abused and physically attacked. This caused a major disruption to the business's operations.
>
> [10] The Owners Corporation's abhorrent, improper and intimidating behaviour steadily continued without abating. Specifically, the agents of the Owners Corporation made it impossible to have quiet enjoyment of the Premises.
>
> [11] The Owners Corporation and agents acting on their behalf continually sought to disrupt our business, as they were ideologically opposed to the serviced apartment industry and had a conflict of commercial interest.
>
> [12] Per above, they disrupted our business by racially abusing and harassing Kornucopia's staff, [I personally was regularly subjected to this repugnant impropriety], damaging our assets, including commercial vehicles, defaming us to clients and members of staff, as well as interfering with key fob access.
>
> [13] The Landlord was repeatedly made aware of this. In fact, we had sent him videos of myself being called a transvestite and being subjected to other deplorable slurs by the Assistant Building Manager, Clint Montessano. This was in addition to his associate attacking me and further articulating that "being Chinese was worse than being Black".
>
> [14] As a direct consequence of the above, Komucopia [sic] reached out to the Plaintiff, advising that we wanted him to address the Owners Corporations' behaviour, as we had no direct contractual relationship with them and that only the Plaintiff had the ability to constrain their behaviour. (emphasis added)

48 Prior to the commencement of the VCAT Proceeding (and the making of the Kornucopia Demand), three letters were sent by Kornucopia to Chen in November and December 2018, advising him of the Offsetting Claim and what Kornucopia perceived Chen's obligations to be in the circumstances.

49 On 27 November 2018, Madgwicks (at a time when the firm was still acting for Kornucopia) sent a letter to Chen. The letter sought to 'bring some matters to [Chen's] urgent attention' which were 'currently impeding the enjoyment of peaceful residence' of the Property by Kornucopia. It referred, in general terms, to 'intimidation, physical and racial abuse', 'unlawful prevention' of Kornucopia 'from utilising common property over which it shares proprietary rights'. The letter referred to video clips recorded by Kornucopia's officers, which were said to evidence an instance of 'intimidating conduct', a 'physical assault' and an 'intense concerted effort to deny' Kornucopia access to common property on the part of

Owners Corporation staff. The letter went on to say:

> In accordance with the *Residential Tenancies Act*, our Clients have the right to peacefully enjoy their residence and access all common property in the building; it's the landlord's responsibility to ensure the enforcement of these rights.
>
> In order to assist the landlord in effectively discharging their responsibilities, our Clients have engaged us to take appropriate legal measures against OC Management.
>
> Our Clients understand that as you are not a local resident, it may not be feasible for you to be actively involved in the matter of escalating complaints against OC Management.
>
> Hence, to assist in this regard, our Clients request that you authorise them to raise these complains on your behalf as the proxy holder for the Unit.

The letter went on to offer Chen a renewal or variation of the Lease Agreement, and set out a proposed new term that would be included in any renewed lease that would authorise Kornucopia to be Chen's proxy holder.

50 Chen did not respond to that letter. Three days later, on 30 November 2018 a second letter in somewhat more aggressive terms was sent by Madgwicks, on behalf of Kornucopia, to Chen. It states as follows:

> It is your responsibility to ensure the quiet enjoyment for our clients as required in your lease. In not taking action, after our clients have raised their concerns that the OC Management is not allowing them to have quiet enjoyment of their property, our clients feel that he has no option but to hold you liable as landlord. Our clients estimate that their total loss and damages are in the range of $100,000.
>
> If our clients do not receive a response from you detailing the satisfactory steps you wish to take to immediately remedy the situation by close of business on Monday, 3 December 2018, we have been instructed to issue proceedings.

51 Chen did not respond to that letter. On 3 December 2018 a third letter was sent by Kuksal to Chen. The letter states:

> It has come to our attention that your agency, Nelson Alexander, may not have been very forthcoming with you about all the issues that we have raised with them as the tenants of your property.
>
> As the landlord, it is your responsibility to ensure the peaceful enjoyment of residence for your tenants and to ensure their proprietary rights, including access to all common property, are always preserved.
>
> Any infringement of the above may lead you to incur personal liability.
>
> Despite frequent communication with Nelson Alexander about these matters via phone conversations and email exchanges spanning several months, we have reason to believe that they may not have fairly communicated the gravity of the situation to

> you owing to their personal relationships with the culprits.
>
> We are sending you some of the most recent correspondence sent to Nelson Alexander by our legal team. …

52 Chen did not reply to that letter either. Kathy Dangov (**Dangov**), a real estate agent employed at the relevant time by Nelson Alexander, managed the Property for Chen. Chen generally communicated with Kornucopia through Dangov. Chen gave evidence that Dangov had informed him of the nature of the dispute, as detailed below and he accepted that he had received the two letters which had been sent to him by Madgwicks. Chen and Dangov resolved that Chen would not formulate an individual response to the letters. Rather, Dangov would send a letter on behalf of a number of landlords of properties located in the same building, against whom Kornucopia maintained the same or similar allegations.[20]

53 On 3 December 2019, Dangov sent a letter to Madgwicks, which states as follows:

> We are in receipt of your two letters dated 27th November and 30th November 2018.
>
> As you are well aware Section 152 allows an occupier of a lot to submit an official complaint form on the Owners Corporation regarding the alleged breaches of the lot owner or management. This is also covered in the Module Rule 6 (Dispute Resolution) that this type of complaint must be dealt with via Section 153 prior to the matter proceeding to VCAT.
>
> In regards to your direct complaint against 1204N/889 Collins St, Docklands [this is the Property, and the letter then goes on to state the addresses of other apartments in the building] for failure to provide quite enjoyment [sic]. This allegation has not be [sic] proven, nor have we been notified under Section 208 of the alleged breach of the Residential Tenancies Act 1997.
>
> We also, refer to Section 5.2 of the standard Module Rules if the main complaint of your client relates to the common area only, we again advise this would be covered by another general complaint form under Section 152 and then this would then be dealt with Section 153 [sic] and Module 6.

54 Kornucopia did not make an application under s 459G of the Act to raise the Offsetting Claim and set aside the Kornucopia Demand on that basis. Although the Offsetting Claim was initially foreshadowed as a ground relied upon for an application under s 459S of the Act, Kornucopia later abandoned it. Its sole relevance therefore is to the abuse of process argument. I consider, however, that Kornucopia is barred from raising the Offsetting Claim by s 459S. It requires leave, which has not been sought.

---

20 Kornucopia has or had control of approximately 70 apartments located in the building. That is 40 per cent of the apartments located in the building. See T40 (17 December 2019).

Tender

55 On 11 October 2019, Kornucopia paid Nelson Alexander the sum of $12,281.66 being the amount claimed by Chen in the Kornucopia demand. On 14 October 2019, Kornucopia's in-house solicitor, Naveen Raghavan (**Raghavan**) wrote to Chen's solicitor, Hager, noting that 'Kornucopia has now paid your client the amount claimed in their Statutory Demand (which Kornucopia maintains was ill-conceived and never actually served).'

56 On 18 October 2019, Hager wrote to Raghavan to advise him that Chen was considering whether to accept or reject the payment.

57 On 22 October 2019, Hager wrote to Raghavan to advise him Chen had rejected the Kornucopia's tender and attached an email from Chen addressed to Nelson Alexander directing them to repay the full amount of the tender. Keypoint outlined three reasons for rejecting the tender as follows:

> (i) The risk of a preferential payment is too great. Your client has not filed evidence of solvency and is presumed to be insolvent. Further, there are a number of supporting creditors who have VCAT orders supporting their debts;
>
> (ii) The tender does not take into account any amount in respect of my client's legal costs;
>
> (iii) The tender does not take into account that my client is owed considerably more rent than that claimed in the statutory demand and there is no proposal to pay that rent. Further, despite my client's efforts to have your client removed, it remains in possession of the property and has said that it will not pay rent in the future. This is unacceptable.

58 The tendered amount was repaid to Kornucopia by Nelson Alexander on 25 October 2019.

C2 Tender

59 Kornucopia submitted that, in light of the tender and Chen's rejection of the same, the Court should exercise its discretion to refrain from making a winding up order.

60 Chen submitted that his rejection of the tender does not form a legitimate reason for the Court to refrain from making a winding up order. First, Chen's rejection of the tender means that the debt claimed by the Kornucopia Demand was not extinguished, and accordingly, Chen retains standing to make this application as a creditor. Secondly, the rejection was entirely

reasonable as there was a real risk that, if accepted, it would most likely become the subject of a preference claim brought by a liquidator in the future. Finally, Kornucopia's indebtedness to Chen had increased since the time the Kornucopia Demand was made due to rental which had since accrued. The tender did not take into account the increased indebtedness and his legal costs.

61 Kornucopia submitted that it was unnecessary to pay Chen any more than the amount claimed by the Kornucopia Demand, and the fact that the tender did not cover the increased indebtedness is neither here nor there. The amount owing claimed by the Kornucopia Demand was tendered and it was unnecessary for Kornucopia to pay or tender any more.

The Law

62 In *Australian Mid-Eastern Club v Yassim,*[21] the debtor paid the amount demanded by cheque to the creditor's solicitors on a 'without admissions' basis. The cheque was banked by the solicitors, but, after taking instructions from the creditor, was later returned to the debtor. Meagher JA set out what constitutes a 'valid tender':[22]

> There is ample authority that the proffering of cash or its equivalent in the full amount demanded constitutes a valid tender, even if proffered "without admissions" or "under protest", provided only it is unconditional: see *Scott v Uxbridge and Rickmansworth Railway Co* (1866) LR 1 CP 596; *Sweny v Smith* (1869) LR 7 Eq 324; *Greenwood v Sutcliffe* [1892] 1 Ch 1 and *Burnham v Carroll Musgrove Theatres Ltd* (1928) 41 CLR 540 at 558 per Isaacs J….

63 His Honour said that where acceptance of the tender is refused by the creditor, the relationship of debtor and creditor subsists. It does not 'vitate' the plaintiff's standing as a creditor: [23]

> If a valid tender be made, a refusal of that tender (whether for good or bad reason, or for no reason at all) does not eliminate the debt in question. The relationship of creditor and debtor still subsists. The tender is no answer to a claim for the debt unless (as did not happen here) there is a continued readiness to pay, coupled with an actual payment into court: see *Halsbury's Laws of England*, vol 8, 3rd ed, Butterworths, para 289, p 169.

64 Despite payment of the amount claimed by the statutory demand not being made into Court

---

[21] (1989) 1 ACSR 399 (**Yassim**).
[22] Ibid 403 (Meagher JA).
[23] Ibid.

following refusal of the tender, the debtor sought the Court to infer that there had been a continued readiness to pay on the part of the debtor. Meagher JA did not accept this:[24]

> The appellant's counsel asked us to infer a continued readiness to pay from the circumstances of the case. But I would make the opposite inference in view of its persistence in the assertion that no relationship of debtor and creditor existed. In any event (not that it matters) there is no evidence that the respondent's solicitors were authorised to accept the payment, much less that they were compelled to do so. Further, their action in returning an equivalent sum (on their client's instructions) must be construed as a refusal by their client to accept the money, not as an acceptance of it.

65 His Honour dismissed the appeal from the winding up order made at first instance. His Honour considered that the reasons expressed by the creditor for rejecting a tender would be relevant to the Court's discretion. In this case, the refusal of the tender was entirely reasonable:[25]

> Moreover, both the solicitors and their client had every reason to refuse the money: a winding up summons was on foot, and there were other creditors. The client would probably have had to return the payment in the event of a winding up order being made: see *Tellsa Furniture Pty Ltd (in liq) v Glendave Nominees Pty Ltd (1987)* 9 NSWLR 254; 13 ACLR 64.

66 In *Occidental Life Insurance Company of Australia Limited v Life Style Planners Pty Limited*,[26] the tender was rejected on the basis that the creditor considered that the payment would more than likely be a preferential payment and therefore potentially recoverable by the liquidator. Before winding up the company, Lockhart J said:[27]

> The deponent states that the company tendered the sum of $5,863 to the applicant's solicitors and that the tender was refused on the ground that any payment by the company to the applicant would more likely than not have been a preferential payment and therefore recoverable by the liquidator.
>
> It is well established that if a valid tender be made, a refusal of that tender does not eliminate the debt. The relationship of creditor and debtor still subsists: see *Australian Mid-Eastern Club Ltd v Yassim* (1989) 1 ACSR 399 per Meagher JA at 403 and the cases there cited by his Honour.
>
> In my opinion the refusal of the tender did not constitute a discharge or elimination of the debt due by the company to the applicant. Also, the applicant had every reason to refuse the tender in view of the probability of the payment being a preference in the winding up of the company.

---

[24] Ibid.

[25] Ibid.

[26] *Occidental Life Insurance Company of Australia Limited v Life Style Planners Pty Limited* (1992) 38 FCR 444 (**Occidental Life Insurance**).

[27] (1992) 38 FCR 444, 445 (Lockhart J).

67 In *Alcatel Australia Ltd v PRB Holdings Pty Ltd*, Santow J said:[28]

> The defendants correctly respond that the amount proffered by Crown Ltd…was not a valid tender – nor such as to eliminate the relevant debt – for the following reasons (quoted below from his written submissions of 17 March 1998):
>
> …
>
> (c) Even if tender was valid (and it was not), refusal of the tender for any or no reason, did not eliminate the debt, and the relationship of debtor and credit still subsists.
>
> 1.4 The tender was refused by the defendants (for good reasons) (Annexure C to the Quinn affidavit No 4) (as they were entitled to do) and the plaintiff has not provided evidence and does not assert a continued readiness to pay the 'tendered amount' and has not paid the amount into Court. Instead it asserts that it is not obliged to make any payment at all.
>
> 1.5 The plaintiff has not made a valid tender and the tender is no answer to the statutory demand.

68 In *Deputy Commissioner of Taxation v Guy Holdings Pty Ltd*,[29] there had been an unconditional payment of the amount referred to in the statutory demand which had been accepted by the creditor. The debtor submitted that this ought to result in a dismissal of the winding up application. Zeeman J accepted that submission. His Honour considered, however, that the existence of indebtedness other than the amount claimed by the statutory demand, and accepted via the tender, might form a basis to make a winding up order, notwithstanding the creditor's acceptance of the tendered amount:[30]

> I would not wish to be taken as necessarily agreeing that a creditor, who has served a statutory demand under the Law and who has been paid the debt the subject of that demand, ordinarily ought not to be granted an order for the winding up of the company even though it establishes that the company is indebted to it in some other amount. Particularly if such other debt arose after the service of the statutory demand, its existence, in the absence of other relevant considerations, might well be sufficient reason to make the order.

69 In *Deputy Commissioner of Taxation v Visidet,* Gyles J said:[31]

> I agree with the analysis by Zeeman J of the Supreme Court of Tasmania in *Deputy Commissioner of Taxation v Guy Holdings Pty Ltd* (1994) 116 FLR 314; (1994) 14 ACSR 580, which gives support to the view that the failure to comply with a statutory demand giving rise to the presumption of insolvency, and the status of the plaintiff as a creditor at the time of the institution of the proceedings would give jurisdiction to make a winding up order,

---

28 (1998) 27 ACSR 708, 714 (Santow J).

29 (1994) 116 FLR 314.

30 Ibid 319-20 (Zeeman J).

31 [2005] FCA 830 [6] (Gyles J).

> even if payment of the debt had occurred in the meantime.

70 In *Commonwealth Bank v Parform Pty Ltd,*[32] the creditor rejected a tender. Sundberg J found that the company had not displaced the presumption of insolvency and that notwithstanding the attempted tender, it was appropriate to wind up the company:[33]

> Parform is not solvent, and adopting the presumption in the latter case, there is in the present case a positive reason for making a winding up order: the company does owe money to other creditors, though their identifies are not known. In *Guy Holdings* there was no evidence as to the company's financial position, and in that vacuum Zeeman J refused an order to wind up. There is no vacuum here.
>
> Granted that Parform is insolvent, the Bank had every reason to reject the tender. There are other creditors, and the Bank may well have had to return the payment in the event of a winding up order being made. Cf *Australian Mid-Eastern Club Ltd v Yassim*, supra.

71 Kornucopia submitted that I should follow *Nationwide Produce Holdings Pty Ltd (in liq) v Franklins*, where Barrett J (as his Honour then was) said:[34]

> The plaintiff says that it was proper for it to decline to accept payment because of a fear that it would be receiving what turns out to be a preference. That is for the plaintiff to decide. It would be in no worse position if it accepted and was later forced to disgorge. There is nothing compelling a creditor somehow to remain pure by shunning a payment in respect of which there exists some theoretical future possibility of its proving to be preferential. A normally motivated creditor would be inclined to accept such a payment conscious of any risk of disgorgement, and with fingers crossed to the extent indicated by the circumstances.

72 In *In the Matter of Vitamin Co Pty Ltd* (**Vitamin Co**)*,* Hetyey JR agreed with Barrett J and did 'not regard the plaintiff's stated concern about the defendant's solvency to constitute a sufficient basis for refusing tender.'[35]

73 In my opinion, it is reasonable for a creditor to refuse to accept a tender on the basis that it might become the subject of a preference claim at some later point in time. By accepting the payment, the creditor exposes themselves to the uncertain prospect of litigation at a future time, inclusive of the stress, time and expense this might bring. Further, if the creditor sought to resist any preference claim commenced and the creditor is ultimately unsuccessful, in the ordinary course, they would be liable for the liquidator's costs, as well as their own. With

---

32 (1995) 13 ACLC 1309.

33 Ibid 1313 (Sundberg J).

34 [2001] NSWSC 1120 [6] (Barrett J) (**Nationwide Produce**).

35 [2019] VSC 540 [64] (Hetyey JR).

respect, I cannot accept that the creditor 'would be in no worse position if it accepted and was later forced to disgorge'.[36] Of course, fear of a future preference claim will not be a legitimate reason in all cases. There must be a reasonable basis to suspect that the company may still be wound up, quite aside from the statutory demand and winding up application the subject of the tender, and that the accepted payment would fall within any relevant relation-back period.

Analysis

74 Kornucopia paid Chen the amount stated in the Kornucopia Demand, that is, $12,281.66. Since Chen's refusal and repayment, there is nothing to suggest that Kornucopia remains continually ready or willing to pay that amount. That amount also has not been paid into Court. I refuse to draw an inference that Kornucopia has remained continuously ready to pay the amount claimed by the Kornucopia Demand. The opposite is true. Kornucopia contends that Chen is no longer a creditor. The corollary of this is that from Kornucopia's perspective, it no longer needs to pay Chen and nor does it intend to. As the authorities show, in the event of a refusal, the debt owing by Kornucopia to Chen still exists and as does the relationship of debtor to creditor between them.

75 Chen's refusal of the payment was entirely reasonable. First, Chen was concerned that the 'the risk of a preferential payment is too great,' which is a legitimate basis to refuse a tender in this case. Kornucopia is presumed to be insolvent, has filed no evidence of solvency, and there numerous supporting creditors on the record who allege that Kornucopia owes them various amounts. They remain willing to be substituted in Chen's place in the event that Chen no longer wishes to prosecute the winding up application. There are also winding up proceedings against related companies (Efektiv and AGV) on foot. There is always the risk that if those companies are wound up and there are inter-company loans or debts owed to them by Kornucopia, a liquidator may call upon them in future. The liquidation of one company has the potential to result in the liquidation of the group. While there is no evidence inter-company finance, given that no accounts of the Companies have been adduced, the risk cannot be excluded. Further, Efektiv and AGV each allege that Madgwicks are creditors of Kornucopia and not of those companies, for an amount exceeding $250,000. On the

---

36 *Nationwide Produce* [2001] NSWSC 1120 [6] (Barrett J).

Companies' own position, Chen has all the more reason to suspect that Kornucopia may be factually insolvent (aside from the application of any statutory presumption). From Chen's perspective, the risk that Kornucopia might later enter liquidation is high.

76 Second, the tender did not take into account the increased amount of accrued rental which was owed at the time of the tender. As at 11 October 2019, rental arrears were approximately $21,100. The tendered amount was $12,281.66. The differential, not covered by the tender, is approximately $8,800. That amount is not insignificant compared to the debt claimed by the Kornucopia Demand. Further, the tender did not cover Chen's costs in prosecuting this winding up application, which given the history, I suspect would substantially exceed the amount. Chen is just as entitled to the increased quantum of accrued rental, and his costs, as he is to the amount claimed by the Kornucopia Demand.

77 The tender does not form a sufficient or legitimate reason to refrain from making a winding up order against Kornucopia. The tender was unreasonable and audacious in the circumstances. Quite aside from any acceptance or rejection, Kornucopia remains indebted to Chen in amounts other than the tendered amount. Kornucopia does not remain willing to pay either the tendered amount and was never willing to pay the increased indebtedness. Further, there is *no* evidence of solvency. By not making a winding up order, the Court may be releasing an insolvent company into the public domain, which is entirely undesirable. In those circumstances, the Court ought not to exercise its discretion to dismiss the winding up application.

C3 Abuse of process

78 The abuse of process submission is put in a number of ways, and will be dealt with in the following sequence:

(a) First, Kornucopia maintains the Offsetting Claim against Chen in relation to the conduct of the Owners Corporation. With reference to authority,[37] it was contended

---

37 *Tokich Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Ltd (in liq)* [2004] NSWSC 527*; John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250; *CVC Investments Pty Ltd v P & T Aviation Pty Ltd* (1989) 18 NSWLR 295; *Re Huizhong Investment Group Pty Ltd* [2018] NSWSC 390 (**Re Huizhong Investment Group**); *Bartex Fabrics v Phillips Fox* [1994] 13 ACSR 667; *Commonwealth Broadcasting Pty Ltd v Pacific Mobile Phones Pty Ltd* [2008] QSC 210.

that the Court has a discretion to stay or dismiss a winding up proceeding as an abuse of process, where there is a bona fide dispute on a substantial ground as to the company's contended liability to the plaintiff. Given the contended set-off, there was said to be serious doubt surrounding Chen's standing as a creditor. This is referred to as the 'disputed debt principle'. Further Chen knew of the Offsetting Claim when he issued the Kornucopia Demand and filed the Originating Process. It was submitted that an improper purpose will be found where a creditor issues a statutory demand in order to compel or pressure a company into satisfying a disputed debt.

(b) Secondly, it was submitted that VCAT is the appropriate forum for the dispute, given that it has exclusive jurisdiction with respect to residential tenancy disputes.[38] By this proceeding, Chen is, it was submitted, 'circumnavigating the appropriate jurisdiction for obtaining orders of full possession and rental arrears, being the VCAT.'[39]

(c) Thirdly, Chen has, it was submitted, an improper purpose in issuing this proceeding (aside from the Offsetting Claim). By a winding up application, a plaintiff must seek a winding up order, however, it was contended, Chen seeks to bring this proceeding either for the purpose of debt collection, or to obtain possession of the Property.[40]

(d) Fourthly, the Kornucopia Demand was issued at a time when the VCAT Orders were stayed. The Originating Process was filed after the VCAT Proceeding had been dismissed. Kornucopia contended that the VCAT Orders extinguished the debt claimed by Chen. In the alternative, it was submitted that if the debt subsists, the stay of the VCAT Orders means that the debt was not due and payable when the Kornucopia Demand was issued.

(e) Finally, it was unreasonable for Chen to refuse to accept a tender of payment

---

38 See *A.B.C. Developmental Learning Centres Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) v B.M. Children's Services Pty Ltd* [2010] VSC 262 [5] (Pagone J).

39 T242:27-30 (20 December 2019).

40 T67:9 (17 December 2019).

offered by Kornucopia (as referred to above). Having declined a reasonable tender, it was submitted, Chen ought to be precluded from prosecuting this application. This ground, as discussed above, is rejected.[41]

79 Each of the grounds relied upon by Kornucopia is fundamentally misconceived and rejected.

The Law

80 Prior to the commencement of Part 5.4 of the Act, the weight of the authority supported the existence of three bases upon which a debtor-company was permitted to assert that a winding up application constituted an abuse of process. These were:

(a) that the winding up application was bound to fail (where, for example, the plaintiff could not prove that it possessed standing as a creditor, or that the company was insolvent); [42]

(b) where the winding up application is made for an improper purpose, according to the principles set out by the High Court in *Williams v Spautz*;[43] and

(c) where there is a substantial contest as to the existence or enforceability of a debt relied upon by the plaintiff or the existence of a cross-claim or offsetting claim, which should properly be resolved in separate proceedings. This is the 'disputed debt' principle, as referred to above and below.[44]

81 The third ground is supported by the following authorities. In *Tokich Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Ltd (in liq)*, White J said:[45]

> The preponderance of authority is that a company may not be wound up on the application of a person claiming to be a creditor whose debt is disputed unless that dispute is resolved. Otherwise the applicant will not establish its standing to apply for the company's winding up. Because the winding up jurisdiction should not be used to resolve disputed questions of debt, it may be an abuse of process for an alleged creditor, whose debt is disputed, to apply to wind up the company.

---

41 See paragraphs [55] to [77].

42 *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* [1978] VR 83, 88, 93 (McGarvie J) (**Fortuna Holdings**); *L & D Audio Acoustics Pty Ltd v Pioneer Electronics Aust Pty Ltd* (1982) 1 ACLC 536, 538 (McLelland J) (**L & D Audio**).

43 *Williams v Spautz* (1992) 174 CLR 509; *L & D Audio* (1982) 1 ACLC 536, 538 (McLelland J).

44 *Fortuna Holdings* [1978] VR 83, 93, 95-96 (McGarvie J); *L & D Audio* (1982) 1 ACLC 536, 538 (McLelland J).

45 [2004] NSWSC 527 [72] (White J).

82 In *CVC Investments Pty Ltd v P & T Aviation Pty Ltd,* Cohen J said:[46]

> The authorities seem almost unanimously to agree that where a claimed debt is bona fide disputed on substantial grounds and there is no basis for regarding the claimant as a contingent or prospective creditor then that claimant has no standing to bring proceedings to wind up the company, and if he does so the bringing of those proceedings is an abuse of process. The fact that there is a ground for winding up in existence does not give that claimant any greater standing. There are a number of grounds under s 364 upon which the court may make an order for the winding up of a company. The most common one relied upon is that the company is unable to pay its debts. Nevertheless the Code gives only a limited number of persons a right to have the company wound up on that or any other ground. It is an abuse of process if a person in bringing proceedings assumes a standing which it does not have and seeks orders to which it is not entitled.

83 In *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* (**Fortuna Holdings**),[47] McGarvie J set out what his Honour described to be the 'second branch' of abuse of process. That is the third ground set out above. His Honour said:[48]

> The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.
>
> …
>
> The second branch applies to cases where there is more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time.

84 In *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd,*[49] Beazley JA (with whom Hodgson and Santow JJA agreed) discussed the principles engaged in *Fortuna Holdings*.[50] Her Honour said:[51]

> I agree that those principles still apply. The court retains a discretion to make an order

46 (1989) 18 NSWLR 295, 302 (Cohen J).
47 *Fortuna Holdings* [1978] VR 83, 88, 93 (McGarvie J).
48 Ibid 83, 93, 95-96 (McGarvie J).
49 (2007) 69 NSWLR 374.
50 [1978] VR 83.
51 *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374 [57] (Beazley JA).

> in the circumstances discussed by McGarvie J in *Fortuna Holdings* under the "second branch" …

85 These decisions, however, and the principles relating to the 'broader' grounds or 'second branch' of abuse of process they stand for are no longer good law. In 1992, Part 5.4 of the Corporations Law was introduced.[52] Under Part 5.4, an application may be made under s 459G to set aside a statutory demand within 21 days after service. Section 459C provides for a presumption of insolvency upon expiry of a statutory demand. Section 459S(1) provides that in an application that relies upon a failure to comply with a statutory demand, the company may not, without leave of the Court, oppose the application on any ground it could have relied on to set aside the demand. Section 459S(2) provides that the Court is not to grant leave unless it is satisfied that the ground is material to proving the company is solvent. The *Explanatory Memorandum to the Corporate Law Reform Bill 1992* states:[53]

> The provisions in relation to the setting aside of a statutory demand are intended to be a *complete code* for the resolution of disputes involving statutory demands, and to do so on the basis of the commercial justice of the matter, rather than on the basis of technical deficiencies. (emphasis added)

86 Notwithstanding that Part 5.4 is a 'code', the Court retains a discretion to stay or dismiss a proceeding as an abuse of process, as made plain by the words of s 459A or 467(1). However, the effect of the enactment of Part 5.4 is that disputes which fall within the first and third 'categories' of abuse of process must now be dealt with under the provisions of Part 5.4.[54] Where a winding up application relies upon the failure of a company to satisfy a statutory demand, a presumption of insolvency arises as an automatic consequence pursuant to ss 459C(2)(a) and 459E of the Act. That consequence is unlike that which occurred under the predecessor legislation, where the existence of a dispute 'explained why the demand was not complied with "and so rebuts the presumption of insolvency which would otherwise arise".'[55] If the presumption had not invoked, there was no evidence of insolvency, and the company

---

52 *Corporate Law Reform Act 1992* (Cth).

53 See the Explanatory Memorandum to the Corporate Law Reform Bill 1992 at [688]-[689] and the discussion in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 279 (Gummow J).

54 In *Pacific Communication Rentals Pty Ltd v Walker* (1994) 12 ACLC 5, Brownie J said at 289: 'The submissions accepted that the intention of the drafters of Pt 5.4 was to establish a code, and that disputes in the first and third of these categories were now to be dealt with under Pt 5.4. However, the argument is that disputes, or at least some disputes in the second category are not covered by Pt 5.4.'

55 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Recs and Mgrs Apptd)* (2011) 244 CLR 1, 10 [15] (Gummow, Heydon, Crennan, Kiefel and Bell JJ) (**Lanepoint**).

was able to establish that the debt was bona fide disputed upon some substantial ground, it followed that there was no reason *not* to stay or dismiss the winding up application. The Court would not, however, stay or dismiss the application in the case of an insolvent company.

87 The starting point under the present regime is that the company is presumed to be insolvent. It follows that the old practice and principle cannot be applied and the company must first displace that presumption. Mere assertions that the plaintiff lacks *locus standi* as a creditor, or that the debt is disputed and that this was the reason why the company did not satisfy the statutory demand, will not suffice. A debtor *may* argue that a debt is bona fide disputed on substantial grounds, and while the Court retains discretion as to whether it should make orders under ss 459A or 461, it will *not* stay or dismiss the application in the absence of evidence of solvency. Where the presumption has not been displaced, the existence of a genuine dispute does not give rise to a predisposition of the Court in favour of a stay or dismissal of the application.

88 Accordingly, where the company asserts a substantial dispute, it must first displace the presumption. It may do so by adducing evidence that it is solvent and in the ordinary course that would lead to the application's dismissal with the dispute then able to be determined in some other forum or proceeding. If the company seeks to argue that it would be solvent if the debt were not taken into account, or that it would affect the solvency position in a manner favourable to the company, then it must in most cases make an application under s 459S, which in turn requires the Court to be satisfied that the dispute is material to the question of solvency.[56] Axiomatically, that too requires evidence of solvency.

---

56 In *Lanepoint* (2011) 244 CLR 1, the High Court arguably left open (at 15 [32]-[33]) the possibility that in some cases a winding up application should be stayed or dismissed due to some dispute relating to the debt that still exists at the time the application reaches the final hearing. The Court indisputably retains discretion under ss 459A and 467(1) of the Act to do exactly that. However, their Honours said (at 15 [33]) that 'the current statutory scheme that disputes concerning a statutory demand should, *where possible*, be determined prior to the determination of the winding up application'. The Court made plain that before entertaining any such dispute there must be some evidence that would permit the Court to ascertain the solvency position of the debtor company. To this, I would add that the High Court's comments should not be misconstrued. In the ordinary course, a genuine dispute relating to the debt is to be determined within the parameters of an application made under s 459S of the Act. A company cannot circumvent the provisions of Part 5.4 (and the preconditions for leave under s 459S) by instead raising the dispute within the sphere of abuse of process. In exceptional cases, it may be necessary to determine the dispute outside of the s 459S framework (see e.g. *Re Huizhoug Investment Group* [2018] NSWSC 390). There must be some cogent why the s 459S procedure was not followed. I would

89 While the second category alleging that an application is brought for an 'improper purpose' according to the principles of *Williams v Spautz*[57] is said to fall outside of the regime imposed by Part 5.4, and may still be raised, it is affected by the provisions of Part 5.4. A company may allege that the application has been 'used for the improper purpose of compelling a *solvent* company to pay a disputed debt',[58] but to establish that improper purpose, it remains necessary for the company to adduce evidence of solvency, given that the starting point is the presumption of insolvency.[59] The short point is that where the company is presumed to be insolvent, and there is *no* evidence of solvency, the existence of a genuine dispute is largely irrelevant to the Court's discretion. The company ought to have raised the dispute prior to the final hearing of the winding up application, by an application made under either ss 459G or 459S, as contemplated by the regime imposed by Part 5.4. That is the case regardless of how the company frames the abuse of process it relies upon. The common law doctrine of abuse of process cannot be employed in a manner that would undermine the intention of Parliament that disputes as to the existence or enforceability of a debt be dealt with under the provisions of the Act.

90 Part 5.4 has been observed by this Court on countless occasions to have the potential of operating harshly, but that is the only way that the regime could effectively function. Were a genuine dispute surrounding a debt a legitimate basis to have a winding up application dismissed as an abuse of process, the s 459G procedure would be rendered ineffective. A company's failure to comply with a statutory demand provides the creditor with various benefits. They include the presumption of insolvency and the barrier erected by s 459S of the Act. Those two matters preclude the company from distracting attention from the central question of solvency or asserting unsubstantiated disputes which they ought to have raised in an application to have the statutory demand set aside. That application is to be made by the

---

imagine that nothing short of impossibility of doing so should suffice. Any other conclusion would invite back the types of disputes which the High Court warned against entertaining at the final hearing of the winding up application. In this case, there is no reason why the s 459S procedure has not been followed.

57 (1992) 174 CLR 509.

58 *Lanepoint* (2011) 244 CLR 1, 10 [16] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

59 See e.g. *Owen-Pearse v Lander Land Co Pty Ltd* [2018] FCA 2077 (**Owen-Pearse**). It should further be noted that in the absence of commercial duress, undue pressure, extortion or some other improper conduct on the part of a creditor, an improper purpose is unlikely to be found. See *Liverpool Cement Renderers (Aust) Pty Ltd v Landmarks Constructions (NSW)* (1996) 19 ACSR 411, 416-7 (Tamberlin J) (**Liverpool Cement**).

company promptly. The overarching aim of Part 5.4 is to provide for a 'speedy resolution of applications to wind up in insolvency' and to minimise the risk that an insolvent company may be permitted to continue trading in the public arena, incurring debts which it might not be able to satisfy.[60] Matters of public policy defeat cases of individual hardship which may be faced by a company as a result of its own carelessness or negligence in not promptly addressing a statutory demand issued upon it. The preconditions for leave required by s 459S of the Act finely balance the maintenance of an efficient, timely and effective regime for the winding up of insolvent companies and the Court's ability to do justice in appropriate cases. As the *Explanatory Memorandum to the Corporate Law Reform Bill 1992* states, in relation to s 459S of the Act:[61]

> The rules in this section will penalise debtor companies who do not give early notice of all the issues they have with the statutory demand, since needless delay and expense will occur if those issues are raised only at the winding up hearing.

91 That exposition of the law is borne out from, and expanded upon, in the following authorities.

92 In *State Bank of New South Wales v Tela Pty Ltd (No 2)* (**Tela**), Barrett J set out the differences between the regime enacted by Part 5.4, and that which previously subsisted:[62]

> The scheme of the legislation makes it clear that a creditor who has duly served a statutory demand which remains unsatisfied for the relevant period has a right to seek winding up. In former times, it was regarded as an abuse of process for such an application to be pursued in circumstances where the debt was disputed or an off-setting claim existed. The rationale was that winding up proceedings were not the appropriate occasion for those matters to be addressed and that the threat of such proceedings, with their serious commercial consequences, involved resort to the particular remedy for a purpose regarded by the law as improper. All that has been changed by Part 5.4. It is now abundantly clear that, unless the Div 3 [of Part 5.4] process is employed by the company concerned to ventilate in advance, by way of opposition to the statutory demand, any claim it has about the existence or amount of the debt or any off-setting claim, it is perfectly legitimate for the creditor to proceed with a winding up application even though such a dispute or off-setting claim may in fact exist.

93 In *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd* (**Lanepoint**),[63] ASIC applied to the Federal Court for leave to seek orders, pursuant to s 459P of the Act, to have Lanepoint Enterprises wound up. The application relied upon a

---

60 *Lanepoint* (2011) 244 CLR 1, 13 [27] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

61 See the Explanatory Memorandum to the Corporate Law Reform Bill 1992 at [717].

62 (2002) 188 ALR 702 [11] (Barrett J) (**Tela**).

63 *Lanepoint* (2011) 244 CLR 1.

presumption of insolvency pursuant to s 459C(2)(c) of the Act. At first instance, Gilmour J considered that certain transactions which the company relied upon to establish its solvency were ineffective to reduce its indebtedness. It could not rebut the presumption of insolvency. On appeal, the majority of the Full Court held that the application 'was an inappropriate vehicle for the determination' of the validity and effect of those transactions.[64] The majority set aside the winding up order and considered the proceeding ought to be stayed pending the determination of proceedings relating to those identified inter-group transactions, however even then, such proceedings had not been commenced.

94 The High Court (Gummow, Heydon, Crennan, Kiefel and Bell JJ) unanimously set aside the orders of the Full Court and restored the orders of Gilmour J. Their Honours recognised that the principle relied upon by the Full Court was the 'disputed debt' principle, which is the same principle the Companies now rely upon. Their Honours said:[65]

> Where a creditor sought to prove a company's insolvency by relying upon a debt owed by it, but without resort to the procedure of statutory demand, the court, as a general principle, would not order winding up where a debt was bona fide disputed upon some substantial ground. The principle informed the court's discretion whether to dismiss the application. McPherson says that, although the principle may have had some basis in the court's concerns as to the status of the applicant for winding up as a creditor where there was a genuine dispute about the debt, the principal reason for it was that the court would not permit an application for winding up to be used for the improper purpose of compelling a solvent company to pay a disputed debt. It followed that it had no application in the case of an insolvent company.
>
> The power given to the court to order a winding up of a company was expressed in permissive terms, as it is now. Subject to two express limitations, the court could dismiss the application. And the court might refuse to make an order for winding up even if a creditor proved a debt, although the discretion to do so was regarded as one to be exercised according to defined principles. More pertinent to the present case was the practice of the court to dismiss an application for winding up where a debt was the subject of a genuine dispute on substantial grounds. The practice is explained by the principles discussed above. An order for dismissal would not be made in the case of an insolvent company.

95 However, the High Court recognised that the principle would *only* apply where an evidentiary presumption of insolvency under s 459C of the Act is *not* relied upon. The starting point, where the presumption applies, is evidence of solvency:

> Under the present statutory scheme, where a demand has not been complied with, the statutory presumption of insolvency applies unless the demand is set aside in

---

64 Ibid 8 [11] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

65 Ibid 10-11 [16]-[17].

> proceedings brought for that purpose prior to the hearing of the application for an order to wind up. *Unless the demand is rendered ineffective, by an order setting it aside, the company is required to prove to the contrary of the presumption. This may be contrasted with the position which formerly pertained, where the presumption that a company was unable to pay its debts could not arise if the debt the subject of the demand was shown to be the subject of a genuine dispute of substance.* (emphasis added).

96 Their Honours held that the Full Court had erred by applying a principle which could not therefore apply in circumstances where ASIC, rather than a creditor, had made the application, and in circumstances where the application relied upon a presumption of insolvency:[66]

> More relevant to the reasons of the majority in the Full Court is the principle applied by the court in winding up proceedings brought under the former legislation, where the statutory demand process was not invoked. It will be recalled that the principle was based upon the potential abuse, by creditors, of the winding up process to compel a solvent company to pay a genuinely disputed debt. … More fundamentally, because the principle has no application in the case of an insolvent company, it cannot apply in the context of the current Pt 5.4, where the statutory presumption of insolvency operates.
>
> The majority in the Full Court were therefore wrong to conclude that the general principle could apply to ASIC's application or that it continues to apply to creditors' proceedings, given the presumption provided by s 459C. The current statutory scheme provides no basis for an assumption in favour of a dismissal or stay of proceedings where a company disputes the existence or amount of a debt.

97 The High Court did, however, appear to leave open the possibility that in *limited or exceptional* circumstances and cases, the Court could, in its discretion, stay or dismiss a winding up application which relies upon a debt which is disputed. In those few cases, it might be desirable to defer the winding up application to a later time, once the controversy surrounding the debt has been resolved:[67]

> There is a policy evident in the current statutory scheme that disputes concerning a statutory demand should, where possible, be determined prior to the determination of the winding up application and therefore separately from that application. The requirement of leave, to raise an objection at the hearing of that application which could have been taken in an application to set aside a demand, confirms this. *But such a policy says nothing about what is to occur if there remains an issue about a debt at the time the application for an order for winding up in insolvency is heard. Sections 459A and 467(1)(c) make plain that the court retains a discretion to stay proceedings on an application to wind up a company in insolvency.* (emphasis added)

98 That proposition must, however, be qualified and read against the remainder of the decision.

---

66 *Lanepoint* (2011) 244 CLR 1, 14 [29]-[30] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

67 Ibid 15 [32].

Whenever a creditor seeks to raise a genuine dispute (as a ground of abuse of process) in relation to the debt upon which the winding application is based, in circumstances where a presumption of insolvency applies, the starting point is to adduce evidence of solvency. Only when faced with such evidence, will the Court entertain whether it is appropriate to stay or dismiss a winding application, and direct that any anterior dispute in relation to the debt be separately determined. It follows, that in a case where there is *no* evidence of solvency (such as the present case), the existence of a genuine dispute goes nowhere. The Court must presume the company is insolvent and is unable to determine how far removed that dispute is to the central question of solvency. The High Court (Gummow, Heydon, Crennan, Kiefel and Bell JJ) said:[68]

> The court may consider that although such a dispute may affect a conclusion as to solvency, the dispute may be more conveniently resolved in other proceedings which have been, or will be, brought for that purpose. Much may depend upon the nature of the dispute, and the extent to which it is removed from the central question of solvency. In this regard the court will bear in mind that the question of solvency, which it is required to determine upon an application for winding up in insolvency, is affected by the statutory presumption. *The starting point, where the presumption operates, is that the onus is on the company to rebut the presumption, by proof of its solvency. And when considering whether to separate out a dispute from the winding up proceedings, the court will also bear in mind the statutory objective, that such applications are to be determined within 6 months, subject only to extensions granted in special circumstance.* (emphasis added).

99 The conclusions reached above are supported by various recent decisions of this Court which have analysed *Lanepoint*.[69] In *A G Coombs Pty Ltd v M & V Consultants Pty Ltd* (**A G Coombs**),[70] the company sought injunctive relief to restrain the creditor from making a winding up application. The company contended that there was a genuine dispute about the amounts claimed in a statutory demand, there were offsetting claims exceeding the amount of the demands, the company was 'unquestionably solvent', and the filing of a winding up application would cause the company to suffer irreparable damage. The company relied upon the 'second branch' of abuse of process, set out in *Fortuna Holdings,*[71] that is, a scenario where there is a more suitable means, alternative to a winding up proceeding, of resolving the disputed claim. That alternative means was said here to be 'conventional litigation'. Sloss J

68 Ibid 15 [33].
69 (2011) 244 CLR 1.
70 (2018) 55 VR 513.
71 [1978] VR 83.

extensively reviewed the authorities and considered that this ground, in light of *Lanepoint*,[72] may no longer available to the plaintiff:[73]

> It is clear that the regime established by Pt 5.4 of the *Corporations Act* does not preclude allegations of an abuse of process where the abuse is alleged to be the institution of proceedings for an improper purpose. There is, however, some uncertainty as to the extent to which the abuse of process principles decided under the previous winding up regime continue to apply today, particularly in the context where a winding up application is brought based on non-compliance with a statutory demand. *When the decision of the High Court in Lanepoint is viewed against the background of the Court's rejection of the approach taken by the majority in the Full Federal Court below, it seems unlikely that any scope remains for the continued application of the 'second branch' of Fortuna Holdings type of abuse of process, particularly in a case where an application for winding up is pursued on the basis of presumed insolvency.*
>
> …
>
> For the reasons outlined earlier, it seems unlikely that any scope remains for the continued application of the 'second branch' of *Fortuna Holdings* type of abuse of process, particularly in cases where an application for winding up is pursued on the basis of presumed insolvency. If, in the face of the Pt 5.4 regime and following the decision of the High Court in *Lanepoint*, it nevertheless remains available, the plaintiffs contend that the particular facts of this case manifest an abuse of process. That is because, in the plaintiffs' view, conventional litigation is the appropriate avenue for determining the existence (and quantum) of the disputed indebtedness, in circumstances where the defendant previously threatened the plaintiffs with litigation in relation to the debts the subject of the statutory demands, before withdrawing that threat in March 2017. Since, contrary to its earlier position, the defendant now contends that there is an amount due and owing to it, the plaintiffs submit 'it is plain that conventional litigation is the appropriate course', particularly given that other litigation may in any event be pursued in relation to the alleged indebtedness for the additional $7.5 million, being a claim raised by the liquidator following an investigation and assessment of all of the defendant's claims against the plaintiffs.
>
> Insofar as the debts the subject of the statutory demands are concerned, the defendant has embarked on the Pt 5.4 process in a manner consistent with the statutory scheme. The liquidator has given sworn evidence that there was a proper basis for serving the statutory demands (in his earlier role as administrator), there was opportunity for the plaintiffs to dispute the debts, and upon their failure to do so, the statutory presumption of insolvency was enlivened. As the High Court observed in *Lanepoint*, '[t]he evident policy of Pt 5.4 is that there be a speedy resolution of applications to wind up in insolvency'. In my view, it would be contrary to that policy to deviate from the statutory process so as to enable the plaintiffs to dispute the debts in satellite litigation, simply for the reason that they may well be solvent. *In Australian Beverage Distributors, Beazley JA described the second branch of Fortuna Holdings as applying to cases where there is 'a more suitable alternative means of resolving a disputed claim against the company sought to be wound up'. In the present case, if the solvency of the plaintiffs is as clear-cut as they contend, it will remain open to them to dispute the debts underlying the statutory demands at a later point. It is only if they are unable to demonstrate their solvency to the requisite standard that they will be foreclosed from disputing the debts any further, and while that outcome may seem harsh, it is one envisaged by the statutory regime. As such, I do not consider*

72 (2011) 244 CLR 1.

73 *A G Coombs* (2018) 55 VR 513, 527 [46], 540-1 [82]-[83] (Sloss J).

> *that the plaintiffs have established that there is a more suitable alternative means of resolving the dispute as to the debts pursued by the defendant by way of the statutory demands.* (emphasis added)

100 In *Vitamin Co*,[74] Hetyey JR similarly expressed doubt with respect to the 'second branch' of abuse of process articulated in *Fortuna Holdings.*[75] Hetyey JR said:[76]

> However, there is real doubt as to whether the principle [in *Fortuna Holdings*] continues to apply in light of the regime established by Part 5.4 of the *Corporations Act*, especially where the winding up application is brought for non-compliance with a statutory demand and where a presumption of insolvency arises under s 459C(2)(a).

101 In *Zeninvest Pty Ltd v Altus Development Pty Ltd (No 2)* (**Zeninvest**),[77] the company contended the application was an abuse of process, on the basis that the debt was genuinely disputed. Efthim AsJ rejected this argument and said:[78]

> Senior Counsel for the defendant submits that *Fortuna* remains good law and that the decision in *Lanepoint* can be distinguished because the applicant was ASIC and it was not a case involving a statutory demand. He asserts that the application was made under a different regime and the applicant had a different standing.
>
> In my view, after considering *Lanepoint* and *AG Coombes, Lanepoint* cannot be distinguished on that basis. It is a decision that I am bound to follow. It is not an abuse for the plaintiff to bring an application to wind up the defendant even though a debt was disputed because the defendant was presumed insolvent as it had not satisfied the statutory demand.

102 In *AXF Entertainment Pty Ltd v AXF Group Pty Ltd (No 2)* (**AXF Entertainment**), Efthim AsJ again had the opportunity to consider *Lanepoint* and repeated the view his Honour had earlier set out in *Zeninvest*,[79] in relation to a scenario where there is a genuine dispute:[80]

> It is the principle applied by the Court in winding up proceedings brought under the former legislation where the statutory demand process was not invoked. It was based on an abuse of process where a debt was genuinely disputed and that a company should not be compelled to pay it. That principle, according to the High Court, has no application to an insolvent company. It cannot apply where there is a statutory presumption of insolvency.

103 Kornucopia relies upon the decision of Black J in *Re Huizhong Investment Group Pty Ltd,*[81] where, it was contended, Black J relied upon the 'broader concept' of abuse of process. That

---

74 [2019] VSC 540.
75 [1978] VR 83.
76 *Vitamin Co* [2019] VSC 540 [79] (Hetyey JR).
77 [2019] VSC 450.
78 Ibid [30]-[31] (Efthim AsJ).
79 [2019] VSC 450.
80 [2019] VSC 753 [38] (Efthim AsJ) (**AXF Entertainment**).
81 [2018] NSWSC 390.

decision does not assist them. Black J identified that the circumstances there were 'somewhat exceptional'.[82]

104 His Honour remarked that 'it may constitute an abuse of process to serve a creditor's statutory demand in respect of a debt that is plainly known to be disputed' and that 'the winding up application would at least be an abuse of process within the "second branch" identified in *Fortuna'*.[83] Each of these matters were sufficient to support the declaration of abuse of process sought.[84] The debt was owed in relation to a loan agreement which had been entered into seven years previously, and his Honour considered that it would be difficult to see how that debt could ever form a proper basis to issue a statutory demand. The creditor's claim was 'convoluted'.[85] That is a far cry from the present case. Fundamentally, however, Black J was not referred to the decision of the High Court in *Lanepoint*,[86] and did not consider whether there was evidence that the company was solvent. It is perhaps further distinguishable as a case where the convoluted nature of the creditor's claim entirely justified the applying exception from the general rule articulated in *Lanepoint*.[87]

105 Kornucopia also relies upon the decision of Banks-Smith J in *Owen-Pearse v Lander Land Co Pty Ltd*,[88] in which the plaintiff sought review of a decision to refuse an application brought under s 459P of the Act on the basis that it comprised an abuse of process. His Honour did not consider *Lanepoint*, however, his Honour said:[89]

> In most circumstances, the only matter which may relevantly be asserted by a company where there has been no application to set aside a demand is solvency, or displacement of the presumption of insolvency: *State Bank of New South Wales v Tela Pty Ltd* (No 2) [2002] NSWSC 20; (2002) 188 ALR 702 at [4] (Barrett J).
>
> …
>
> However, it is clear from the cases that abuse is more difficult to establish since the enactment of Pt 5.4: *House of Tan Pty Ltd v Beachiris Pty Ltd* (1996) 21 ACSR 527 at 529–530 (Brownie J)*; Redglove Holdings Pty Ltd v GNE & Associates Pty Ltd* [2001] NSWSC 867; (2001) 165 FLR 72 at [26]-[29] (Palmer J); *Tela* at [13]–[14];

82 Ibid [36] (Black J). His Honour also made a declaration that the statutory demand had not been served. See [20] and [22]-[26].
83 Ibid [30]-[31].
84 Ibid [32].
85 Ibid [36].
86 (2011) 277 ALR 243.
87 (2011) 244 CLR 1.
88 [2018] FCA 2077.
89 *Owen-Pearse* [2018] FCA 2077 [69] and [73] (Banks-Smith J).

> *2020 Construction Systems Pty Ltd v Dryka & Associates Pty Ltd* [2010] WASC 22 at [57] -[61] (Beech J).

His Honour went on to quote the passage from the Judgment of Barrett J in *Tela*, which I have referred to above.[90]

106 His Honour found that there was 'no suggestion in the evidence that the company lacked the financial capacity to pay the debt'. To the contrary, other than the creditor's claim, 'the company has no outstanding liabilities due and payable'.[91] The Court was 'satisfied as to the company's solvency'.[92] The decision is consistent with what I have said above. The company adduced material capable of displacing the presumption of insolvency meaning that it was open for the Court to stay or dismiss the application on account of a genuine dispute relating to the debt. The decision does not assist Kornucopia.

Analysis

107 I am, of course, bound to follow *Lanepoint*. Likewise, I intend to follow the substantial body of authority of single Judges or judicial officers of this Court, in *A G Coombs,*[93] *Vitamin Co,*[94] *Zeninvest,*[95] and *AXF Entertainment*.[96] The only ground which Kornucopia may maintain is that which alleges improper purpose. The ground which alleges improper purpose, in relation to the genuine dispute similarly requires evidence of solvency, of which there is none. The starting point, and ending point in this matter, is the presumption of insolvency.

108 I am also satisfied that Kornucopia requires leave under s 459S of the Act to raise each of the grounds, with the exception of the ground relating to the tender of payment, as that was not a ground which could have been raised in an application to set aside the Kornucopia Demand. The grounds relating to genuine dispute or Offsetting Claim, jurisdiction of VCAT and VCAT Orders were all available at the time Kornucopia could have made an application under s 459G to set aside the Kornucopia Demand. It did not make that application and is now barred from raising these grounds. No application for leave under s 459S has been made,

---

90 Ibid [74].
91 Ibid [84].
92 Ibid [107].
93 (2018) 55 VR 513.
94 [2019] VSC 540.
95 [2019] VSC 450.
96 [2019] VSC 753.

and in any event, I would not grant leave.[97]

109 If I am wrong, and Kornucopia can raise each of the grounds it now contends, I will deal with each upon their merits. They all fail on multiple levels and are fundamentally misconceived.

Genuine Dispute

110 Section 67 of the RTA provides that: 'A landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.' It has previously been accepted, but was not argued before me, that a positive obligation may be imposed on a landlord to ensure that a tenant is not deprived of quiet enjoyment by the actions of third parties, such as a local council or owners corporation.[98]

111 Kornucopia contends that the Offsetting Claim constitutes a genuine dispute, and if established in their favour, may result in Chen becoming a debtor, rather than a creditor, to Kornucopia. The ground fails because the debt is not disputed on *substantial* or *legitimate* grounds.

112 My preliminary observation of the Offsetting Claim, expressed in a directions hearing and the First and Second Judgments, was that it is 'extravagant'.[99] I said, in the First Judgment, '[i]t is not apparent and has not been explained what this has to do with Chen, and indeed what the loss is, especially if Kornucopia's subtenants have continued paying rental to the company.[100] I have not otherwise been persuaded and maintain that position.

113 First, the contended deprivation of quiet enjoyment has not been alleged with a sufficient (or any) degree of specificity. It was said that the Owners Corporation's acts caused 'disruption' to the business and key fob access had been interfered with. It was further said that there had been 'intimidation, physical and racial abuse, unlawful prevention from the utilisation of common property for which we had proprietary rights'.[101] However, no precise dates, events, or individuals have been identified. I have not been directed to any contemporaneous

---

97 See paragraph [210].

98 *Abdel-Messih v Mao* [2016] NSWCATAP 223 [52]-[57] (Principal Member Harrowell and Senior Member Robertson).

99 T30:9, 32:6 (24 October 2019).

100 First Judgment [7].

101 Affidavit of Shivesh Kuksal affirmed 11 September 2019 [17].

documents, or indeed any evidence, recording the dispute, save for the Kornucopia affidavits. No members of the Owners Corporation were called to give evidence. The evidence is too vague, unsupported and mere assertion in nature, to make a finding that Kornucopia was deprived of quiet enjoyment. It is all contained in Kornucopia's affidavits, without any relevant exhibits, and is either too vague or not sufficient to support any findings. Further, it is not even clear what findings I am being asked to make, which itself is rather telling.

114 While I need not be satisfied to the same degree as I would be had this been a trial of the Offsetting Claim, it was still entirely necessary for these matters to have been sufficiently particularised and explained.

115 Indeed, it has not been said whether Kornucopia has been deprived of access to the Property, or the entire building, or in particular what 'common property' it was refused access to. The Owners Corporation manages the entire building. Kornucopia is a tenant of approximately 70 apartments in, or 40 per cent, of the building. Chen is the owner and landlord of only one apartment. Kornucopia maintains this Offsetting Claim against Chen as well as other landlords of properties in that building. Multiple questions arise, which include but are not limited to, whether Chen could have done *anything* without the concurrence of the other landlords, whether all or only a portion of the Owners Corporation's conduct is attributable or referable to Chen's Property, and whether there would be any apportionment of a damages sum with the other landlords (if loss were established, which it is not).

116 For example, during Chen's evidence reference was made to a dispute which occurred in the building manager's room, involving physical or verbal abuse, between Owners Corporation staff, and Kornucopia's officers. Again, no dates or individuals were identified. The following extract from Chen's cross-examination illustrates the issues with the claim:[102]

Mr Raghavan:	And I put it to you that the tenant, for any number of reasons, did not have peaceful enjoyment of the premises, your apartment?
Mr Chen:	So you added 'my apartment' at the end so the dispute happened in the building manager's room, it looked like. Um, I believe to my power I gave as much peace and enjoyment as I could for my apartment.

[102] T45:19-24 (17 December 2019).

117 There is also a question as to whether it was or would be necessary to give the Owners Corporation an opportunity to be heard on the Offsetting Claim. The accusations against them are serious and, if found in Kornucopia's favour, are likely to affect their reputation.[103] It is unnecessary to resolve that question.

118 Secondly, Kornucopia has not articulated what precisely Chen was duty-bound to do or ensure in the circumstances. It has been vaguely said that Chen:

(a) was under a duty to 'constrain their behaviour';[104]

(b) should have ensured enjoyment of the Property and common property;[105]

(c) was obliged to undertake 'positive action that would address [Kornucopia's] right' to peaceful enjoyment;[106]

(d) had some undefined 'obligation' as a landlord;[107]

(e) should have taken 'steps' to provide quiet enjoyment to the tenant;[108]

(f) 'failed to cooperate as it's obliged as landlord' with Kornucopia's 'attempts to rein in the Owners Corporation';[109]

(g) ensured a 'continued failure to fulfil' his obligations by doing nothing;[110]

(h) should have taken steps to remove the Owners Corporation Manager, and to replace them with one who would not engage in such conduct;[111] and/or

(i) ought to have authorised Kornucopia to raise its complaints on his behalf, as proxy holder for the Property, in exchange for a variation or renewal of the Lease

---

103 See e.g. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 , 576-577 (Mason CJ, Dawson, Toohey and Gaudron JJ).
104 Affidavit of Shivesh Kuksal affirmed 11 September 2019 [15].
105 Affidavit of Shivesh Kuksal affirmed 11 September 2019 [17].
106 Affidavit of Shivesh Kuksal affirmed 11 September 2019 [20].
107 T48:22-31, 57:24-7 (17 December 2019).
108 T57:12-23 (17 December 2019).
109 T31:4-15 (18 October 2019).
110 Affidavit of Naveen Raghavan affirmed 24 July 2019 [4].
111 T30:9, 32:6 (24 October 2019).

Agreement;[112]

119 The Offsetting Claim has only ever been discussed at a high level. It remains as vague and unclear as the time it was first raised before me. The following extract from Kornucopia's closing submissions illustrates this insofar as absolutely no specificity is provided:[113]

> Now, due to a long-standing and acrimonious dispute between the owners corporation management of the premises and the defendant, the plaintiff was eventually involved and was eventually asked to uphold its obligations in providing peaceful and quiet enjoyment of the premises of which he was the landlord, something which the tenant was being denied.
>
> Arising from the failure to do the same, the defendant eventually sent three letters of demand compelling him to uphold his obligations under s.67 of the *Residential Tenancy Act*. The plaintiff refused to do so therefore, to mitigate on nothing and future financial prejudice arising from the tenant's inability to properly utilise the premises …
>
> I was giving a bit of a background to how the plaintiff and the defendant got involved in this dispute between the owners corporation and the defendant. Well, basically the defendant holds that the plaintiff breached his contract with the defendant, was unable to provide, you know, to maintain his obligations under the *Residential Tenancies Act* and further, through his conduct, caused damage arising from his breach of the same and that damage occurred because it impacted the case between the owners corporation management and the defendant.

120 Obviously, nothing can be made of the general 'steps' or 'obligations' which, it was contended, Chen was obliged to undertake. As to the more specific matters, no submissions were directed to whether 'reasonable steps', as contained within s 67 of the RTA, encompassed a legal duty which obliged him to engage in such acts.

121 Chen conceded that he took no positive steps to ensure that Kornucopia had quiet enjoyment of the Property in relation to the conduct of the Owners Corporation. It also has not established any specific facts or conduct engaged by the Owners Corporation has been established. Kornucopia has also not established that Chen had a legal duty to undertake any such specific act to ensure the Owners Corporations did not continue its conduct.[114]

122 Thirdly, and fundamentally, there is no loss. The letter from Madgwicks to Chen on 30 November 2018 outlined an 'estimate' of loss that had been provided by Kornucopia in the

---

112 See paragraph [49].

113 T236:29, 237:24 (20 December 2019).

114 T57:8 (17 December 2019).

amount of $100,000. The letter did not attempt to explain how that amount had been arrived at or calculated, nor whether it is attributable to economic loss in the form of lost revenue, property damage, physical harms or mental anguish to Kornucopia or its officers. Evidently, there is no breakdown or justification given for the nature or amount of the 'loss'. Given that the letter says nothing more than the figure, I infer that it was an unsubstantiated figure with absolutely no basis, plucked out of thin air by Kornucopia.

123 Kornucopia also does not reside in the Property itself. Rather, it is in the business of short-stay accommodation, or providing serviced apartments, through licence or lease arrangements, through 'Airbnb' or similar platforms. There is no evidence that its licensees or subtenants have refused to pay rental to Kornucopia. Indeed, Mr Williams QC intimated at a directions hearing on 25 October 2019 that (without proof to the contrary) rental had been paid.[115] At trial, Kornucopia did not even attempt to substantiate that $100,000 figure, or any other figure, which it could characterise as loss or damage. The $100,000 'estimate' is self-evidently unsupported and utterly ridiculous.

124 Further, I accept Chen's evidence that Kornucopia had represented to him that the Property would only be used to house Kornucopia's workers, rather than as commercial short-stay accommodation. Chen only became aware of this after he found out about Kornucopia's dispute with the Owners Corporation. As far as Chen knew, the Property would not be used for the generation of profit.[116] If Kornucopia had lost short-stay rental revenue (which I reject) as a result of being deprived of quiet enjoyment (which I reject), I do not see how Chen could be liable for damages. He could not have foreseen the loss to the tenant, in circumstances where the tenant had in-effect sublet the Property without his consent or knowledge to third-parties. Ensuring that Kornucopia maintained its profits was not within the scope of Chen's duty, either at law under s 67 of the RTA or as function of the rules of causation and remoteness of damages.

125 In *Eyota Pty Ltd v Hanave Pty Ltd*, McLelland CJ in Eq (as his Honour then was) said when dealing with the meaning of the phrase, 'genuine dispute' (as it appeared in the Corporations

---

115 T30:9, 32:6 (24 October 2019).

116 T37:8, 44:13-8 (17 December 2019).

Law):[117]

> 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 189at 194.
>
> …
>
> In *Re Morris Catering (Aust) Pty Ltd* (1993) 11 ACSR 601at 605 Thomas J said:
>
> > …
> >
> > 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.

126 In *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd*, Young J (as his Honour then was) said:[118]

> There may be cases, and indeed it may be the majority of cases, where the court will look not only to an assertion of a dispute, but some sort of material short of proof which backs up the claim that is made that the amount is disputed. It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt.
>
> On the other hand, if proof of a claim was required then one would be doing the very thing that one is not to do, and that is to try this sort of dispute in the Companies Court. What more than assertion is required is something that may differ from case to case. In *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)* (1994) 13 ACSR 787; 12 ACLC 490 I indicated that so long as the claim is not fictitious or merely colourable and is genuinely believed to exist one can ordinarily take that as sufficient. That is something more than mere assertion. Even if the proposition in *Jesseron (No 2)* goes too far, as Mr Hutley submits, it would seem to me that in a sizeable construction case, where the contemporaneous correspondence between the parties shows that there is a disputing of the figures, then one can say, without looking at the figures, or without looking at the evidence that backs up the figures, that there is a genuine dispute between the company and the respondent about the amount of debt. A similar thing can be said about any offsetting claim.

127 In *Redglove Holdings Pty Ltd v GNE & Associates* (**Redglove**), Palmer J said:[119]

---

[117] (1994) 12 ACSR 785, 787 (McLelland CJ in Eq).

[118] (1994) 14 ACSR 250, 253 (Young J).

> ...at the heart of the scheme imposed by Pt 5.4 is the legislative intent that debtors wishing to dispute debts should not be permitted merely to protest in general terms and for an indefinite period; they must particularise the grounds of the dispute upon affidavit and they must do so quickly.

The Offsetting Claim is not genuine. It is spurious, without foundation and entirely misconceived. No attempt has been made to particularise it. It is rejected.

128 Kornucopia further contended that Chen had an improper purpose, insofar as he was aware of the Offsetting Claim relating to the conduct of the Owners Corporation, and with such knowledge issued the Kornucopia Demand and Originating Process. It was submitted that Chen subjected Kornucopia to the pressure of a winding up application in order to compel Kornucopia to satisfy a debt which Chen knew to be disputed.

129 As discussed, the claim is misconceived. Chen was aware of the claim, but did not believe (for good reason) its genuineness or legitimacy. That belief was held honestly, and given what I have found above, reasonably. It follows that there is no improper purpose.

130 That is borne out as follows. Chen gave evidence of his understanding of the dispute:[120]

> So the demand was about a dispute between the body corp [sic] and the tenant for – the tenant was claiming that there was a dispute about not having peaceful enjoyment of the premise and that I would owe the tenant $100,000 in loss and damages. That was my understanding of this dispute.

After being asked a similar question, he said:[121]

> Ah, my understanding was that there was a dispute between our I think building manager. My understanding was that Kornucopia was not following the body corp's [sic] rules with moving around the apartment where there needed to be an appointment made in order to move further or anything around and that's where the building manager stepped in to, I guess, reinforce that with Kornucopia. That's basically my understanding. So that's where this all started, it seems.

131 He was asked: 'You believe it's not a genuine dispute?' Chen responded: '*Yes*'.[122] He repeated this response a number of times.[123] He said he was 'aware' of the assertions but at the time he did not 'believe' in them.[124] He 'didn't feel that was relevant for [his] apartment'.[125]

---

119 *Redglove Holdings Pty Ltd v GNE & Associates* (2001) 165 FLR 72 [28]-[29] (Palmer J) (**Redglove**).

120 T40:5-10 (17 December 2019).

121 T44:5-12 (17 December 2019).

122 T40:20 (17 December 2019).

123 Chen repeated this view at T41:30-1 (17 December 2019), and at 17: 'my understanding at the time was that we would take no action for the dispute, since I felt that it wasn't really, ah, a genuine one against myself as a landlord.' This view was again repeated at T56:10-1.

Chen's belief, I infer, is that the dispute was a matter between Kornucopia and the Owners Corporation and that he had no obligation to intervene (and therefore no liability for damages if he did not). That belief was entirely genuine. Given what I have found, it was entirely reasonable.

132 It was submitted that his knowledge of the dispute was sufficient to found an improper purpose, and that his belief in its genuineness was irrelevant. That is rejected. Where the submission is couched in terms of improper purpose, it calls into question whether the creditor made the application for a purpose extraneous to that contemplated by the statutory regime. That is, the creditor's intentions and motivations, and therefore, their beliefs. It is determined subjectively, on the direct evidence and permissible inferences.[126] Chen held an honest and reasonable belief that he was not compelling Kornucopia to pay a disputed debt. Further, he exerted no under-handed tactics, commercial duress, or pressure on Kornucopia so as to compel Kornucopia to satisfy the debt. To the contrary, he elected to forego payment and continue prosecuting the winding up application by rejecting the tender offered by Kornucopia. The direct evidence and inferences drawn from the objective facts illustrate that Chen has acted entirely properly.

Jurisdiction of the VCAT

133 Kornucopia contended that VCAT was the appropriate avenue for the dispute, given that it has exclusive jurisdiction with respect to residential tenancy disputes. It was submitted that this application constitutes an abuse in so far as it seeks to prosecute a dispute relating to a residential tenancy outside of that forum.

134 Kornucopia relies upon s 188 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), which it mischaracterises as providing that VCAT is the 'only "appropriate form" for this dispute. That section provides:

> (1) This section applies if a person—
>
> (a) commences proceedings in a court; and

---

124 T46 (17 December 2019).

125 T57:22-3 (17 December 2019).

126 *Williams v Spautz* (1992) 174 CLR 509, 542-550 (Deane J).

(b) the proceedings arise wholly or predominantly from a consumer and trader dispute or are other proceedings in respect of which VCAT has jurisdiction under this Act.

(2) The court must stay the proceedings if—

(a) the proceedings could be heard by VCAT under this Act; and

(b) the court is satisfied that the proceedings would be more appropriately dealt with by VCAT.

135 That submission is, on all accounts, misconceived. VCAT does not have jurisdiction with respect to corporate insolvency and cannot hear an application brought under the Act seeking a winding up order. The subject-matter of the claim relates to a debt, which in turn, arises from a residential tenancy agreement. One transaction, set of facts, or loss may give rise to a myriad of potential actions and remedies, each of which may be pursued in different forums. The fact that one of those remedies may be sought exclusively from one forum does not mean that the plaintiff is excluded from seeking a second remedy available to them in a second forum, or that the second forum is deprived of the jurisdiction to grant that second remedy.

136 In *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd*, Weinberg J said:[127]

> It is no abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, *or because there may be alternative means available to the applicant to vindicate its rights* (emphasis added)

137 A debt is a debt, and upon that debt, a creditor has a prima facie right to a winding up order.[128] In *Mercantile Credits Ltd v Foster Clark (Australia) Ltd*, Kitto, Taylor and Windeyer J described this as the 'leading principle'.[129] Similarly, in *Partnership Pacific Ltd v Binalong Pty Ltd,* Boehm J said:[130]

> No judge, in my judgment, could possibly be criticised if, in the absence of other relevant circumstances, he chooses to exercise his discretion by giving effect to the prima facie right of the petitioning creditor to a winding-up order.

138 Kornucopia's submission, carried to its logical conclusion, seeks to confine, suppress or compartmentalise that leading principle. It says that only some debts, but not others which

---

127 *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728 [44] (Weinberg J) (**Ace Contractors**) citing *Elite Motor Campers Australia v Leisureport Pty Ltd* (1996) 22 ACSR 235. Quoted with approval in *Zeninvest Pty Ltd v Altus Development Pty Ltd* [2019] VSC 363 [20] (Efthim AsJ).

128 *Titchfield Management Ltd v Vacinoma Inc* [2008] NSWSC 1196 (2008) 68 ACSR 448, 457 [43] (Barrett J).

129 (1994) 112 CLR 169, 173 (Kitto, Taylor and Windeyer J).

130 (1994) 178 LSJS 21 (Boehm J).

relate to a particular subject matter and may be prosecuted in a different forum, will form the proper basis upon which a creditor can seek a winding up order. At VCAT, Chen was seeking rental arrears and a possession order. By this proceeding, Chen seeks a winding up order. His reasons for doing so were genuine and reasonable, and his purpose proper, as the next section demonstrates.[131]

Improper Purpose

139 Kornucopia contends that the statutory demand and winding up application were commenced for the improper purpose, aside from the genuine dispute issue already addressed, of enforcing a debt. The submission fails at every conceivable level.

140 In *Williams v Spautz*,[132] Mason CJ, Dawson, Toohey and McHugh JJ recognised that the onus is on the defendant to prove that the plaintiff has an improper purpose in issuing proceedings. They must establish that the improper purpose is a *predominant* purpose and the onus on the party moving that submission is a heavy one.[133] In *Australian Beverage Distributors Pty Ltd v the Redrock Co Pty Ltd*, White J said:[134]

> …it is not an abuse of process to bring proceedings for the purpose of pursuing them to a conclusion to obtain whatever entitlement or benefit the law provides if the proceedings terminate in the plaintiff's favour.

141 There is no evidence that Chen brought this proceeding otherwise than to obtain a winding up order, and any associated benefits, being payment, which might have accrued to him by reason of the proceeding. Chen was frank in his evidence that he wanted to send a statutory demand as an alternative means of reclaiming the rental arrears.[135] He cannot be criticised for doing so and there is no improper purpose insofar as a creditor seeks to be paid.

142 I earlier recited an extract from the Judgment of Palmer J, in *Redglove*.[136] It is appropriate to set it out in full here:[137]

---

131 The submission echoes the 'second branch' of abuse of process set out in *Fortuna Holdings* [1978] VR 83. That 'second branch' is no longer good law. In *A G Coombs* (2018) 55 VR 513, it was argued that the creditor should first resort to 'conventional litigation'. Like here, that was rejected. See paragraphs [149] to [150] and footnote 146.

132 *Williams v Spautz* (1992) 174 CLR 509.

133 (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ).

134 (2007) 213 FLR 450 [37] (White J).

135 Transcript of Hearing of 17 December 2019, T55:19-25.

136 (2001) 165 FLR 72.

> *In the present case, there is no evidence that the Defendant, in issuing its statutory notice of demand, seeks to invoke the legislative scheme of Pt 5.4 for any purpose other than to have its debt paid or else to have the Plaintiff wound up and its debt admitted to proof in the liquidation*. True it is that, prior to issuing the statutory demand, the Defendant knew that the Plaintiff disputed the debt. But at the heart of the scheme imposed by Pt 5.4 is the legislative intent that debtors wishing to dispute debts should not be permitted merely to protest in general terms and for an indefinite period; they must particularise the grounds of the dispute upon affidavit and they must do so quickly. By this means, many spurious attempts to delay payment of just debts will be defeated, either because the debtor company cannot support the existence of a genuine dispute when called upon to do so on affidavit or because the grounds of the dispute, once sufficiently exposed, simply do not stand up to the Court's scrutiny.
>
> Every creditor claiming payment by a company of a disputed debt is entitled to test the genuineness of that dispute by serving a notice of demand under s.459E in order to invoke the procedures of Pt 5.4. If the dispute is indeed genuine, the creditor will pay the penalty of a costs order when the debtor successfully applies to set aside the demand under s.459G. That is the risk that the creditor takes in serving the notice of demand. *But if the debtor company fails to substantiate the dispute in the manner which is required by Pt 5.4 and, in particular, by s.459G, then it cannot, without more, be an abuse of process for the creditor to proceed with a winding up application in reliance upon s.459C, s.459Q and s.459S. This is the very procedure which the legislature has devised to secure either the prompt payment of just debts or else the winding up of insolvent companies unable to pay their just debts. Where the debtor company has failed to set aside a statutory demand, it would have to establish by very cogent evidence that, despite the existence of a debt which can no longer be disputed, the creditor's purpose in seeking the winding up is not to collect payment of its debt or, in default to have 'the company wound up, but is, rather, to achieve some entirely collateral end. Such a case is conceivable but would be extremely rare in reality.* (emphasis added)

143 Likewise, in *Liverpool Cement Renderers (Aust) Pty Ltd v Landmarks Constructions (NSW) Pty Ltd,* Tamberlin J said in relation to an entirely analogous scenario:[138]

> In my view, no such improper purpose has been shown in the present case. *Indeed, the purpose which emerges from the evidence, is that Liverpool seeks to recover the moneys allegedly owed to it, which, it seems to me, is not only proper but is the purpose for which the statutory demand was issued*. There is no suggestion of threats of undue pressure, extortion, or commercial duress. Nor is there any suggestion that the demand was a charade in that it was not intended to be pursued to its conclusion. (emphasis added)

144 Insofar as it was said that the winding up application was sought for the collateral purpose of regaining possession of the Property; there is nothing improper in that.[139] Kornucopia was in possession of the Property and withholding. If Kornucopia was not paying rental on the basis of the entirely spurious Offsetting Claim it maintained, then Chen as registered proprietor,

---

137 Ibid [28]-[29] (Palmer J). See also *Tela* (2002) 188 ALR 702 [11] (Barrett J); *2020 Construction Systems Pty Ltd v Dryka & Associates Pty Ltd* [2010] WASC 2 [61] (Beech J).

138 (1996) 19 ACSR 411, 416-7 (Tamberlin J).

139 T274:6-14, 281:26, 282:2 (20 December 2019).

was and is entitled to his property. The only party which can fairly be criticised in that situation is Kornucopia.

145 Chen gave evidence that following the stay and dismissal of the VCAT Proceeding, he felt 'frustrated'. He gave evidence in cross-examination as to his intention:[140]

> Ah, so I was owed rent from the tenant, and I wanted to receive that money back, because we had an agreement through, ah – yeah, like, an owner and tenant that I would be receiving rent, which I didn't receive, so I sent the statutory demand.

146 He considered that at VCAT they had 'never really argued the point' and that he was always 'struck out' because of 'not being able to properly deliver the notice to vacate…to the business.'[141] Kornucopia sought to contend that frustration associated with the making of a statutory demand constitutes an improper purpose. If that were the case, I suspect that most if not all winding up applications would be stayed or dismissed for abuse of process. Frustration associated with the issuing of a winding up application does not constitute an improper motive, especially if that frustration is founded upon a creditor's attempts to vindicate their rights at law, in circumstances where those attempts are stifled by a debtor in another forum on technical and procedural grounds, or where that debtor raises a spurious offsetting claim or dispute it does not even attempt to particularise.

147 Kornucopia criticised Chen for not having attempted to resolve the dispute either at VCAT or prior to or during this proceeding.[142] That is rejected. It has never been a requirement of the corporations law that a creditor must negotiate in good faith prior to issuing a statutory demand or winding up application. Of course, that is a desirable practice, but a creditor cannot be denied their prima facie right to make the application on the basis of their unpaid debt. In any event, given that Chen considered the dispute relating to the Owners Corporation did not concern him, and this 'claim' demanded an unreasonable amount in 'loss and damages' of $100,000, it is entirely unsurprising that he considered that any attempt to mediate the dispute would be pointless. That belief was reasonable.

148 Chen was also asked why he did not continue at VCAT which, it was contended, is 'the

---

140 T53:25-37 (17 December 2019).

141 T54:16-20 (17 December 2019).

142 T47, 49 (17 December 2019).

rightful place' to seek rental arrears and possession. He said: 'But at the same time, we also couldn't proceed with VCAT if our debt was past $10,000, I believe.'[143] Chen submitted that pursuant to s 447(1A) of the RTA, VCAT did not have jurisdiction to hear and determine any claim for rent by Chen as at 15 May 2019, given the debt exceeded $10,000.[144] Kornucopia asserted that this is incorrect. Whether that is right or wrong is irrelevant. Chen's belief, I accept, was genuine and reasonably held. If Chen honestly and reasonably believed that he could no longer prosecute an action in VCAT, as the rental arrears had exceeded a jurisdictional limit, it follows that he would need to prosecute the action in another forum.

149 In response to this, Kornucopia submitted:[145]

> Leaving aside VCAT and circumnavigation and blah, blah, parallel proceedings, I repeat what I've said before, [sic] the plaintiff should have gone to the Magistrate's Court if he was under any misapprehension about his inability to prosecute this matter at VCAT. He should have gone to the Magistrates Court. This should have been a conventional civil trial.

150 His options would have been a common contractual claim in the Magistrates' Court; or a winding up application. Given his experience in relation to procedural arguments and protracted proceedings with Kornucopia at VCAT, and the asserted Offsetting Claim which at that point still remained unarticulated, it made commercial sense for him to have opted to issue a statutory demand. Such an approach, at least prior to commencement, would have carried benefits of obliging Kornucopia to immediately particularise its dispute and hopefully, a prompt resolution. As things turned out, that was only the beginning of the procedural roadblocks raised by Kornucopia.[146]

151 It was said that Chen was legally represented, making his misapprehension as to VCAT's jurisdictional limit unreasonable.[147] On a first reading, the words of s 447A(1A) tend to

---

143 T54:29-31 (17 December 2019).

144 See *Hoh v Shi* [2003] VSC 271, [41] (Gillard J).

145 T263:5-11 (20 December 2019).

146 Kornucopia makes the same submission as that raised by the plaintiff in *A G Coombs* (2018) 55 VR 513, to the effect that 'conventional litigation' was a more appropriate avenue for the dispute. I reject the submission and adopt the reasoning as Sloss J expressed at 540-1 [82]-[83]. Further, it should be observed that these proceedings have not been dealt with in the usual way by this Court, that is by the applications having been dealt with in the Court's Winding Up List. It was necessary to refer the matter out of that list, first to the Associate Judge's Chambers and then to the Judge in Charge of the Corporations List - me. That illustrates how resource-intensive these matters have been. With no criticism intended, I doubt that the Magistrates' Court would have been able to devote the same amount of resources to the matters. They have given rise to an immense amount of attention and work and are inherently complex given the long and protracted procedural history.

suggest that there *is* a jurisdictional limit of $10,000 to ordinary residential tenancies proceedings in VCAT. As the advice received by Chen that there was such a limit does not appear to be plainly unreasonable for him to have relied upon, the Court will not call for or go behind that advice.

152 Finally, it was submitted, that a creditor must have a suspicion that the debtor is or may be insolvent in order to issue a statutory demand with a proper purpose.[148] That has never been a requirement of the law and is unsupported by authority, principle and logic. It elicits a misapprehension of the operation of the statutory regime. The very point of issuing a statutory demand, where not complied with, is to raise a presumption of insolvency which may be relied upon in a subsequent winding up application. It obviates the need for the creditor to adduce evidence of insolvency, which only the company would have and would be most unwilling to part with. As Spiegelman CJ said in *Switz Pty Ltd v Glowbind Pty Ltd* (**Switz**):[149]

> The process of proving solvency is not some kind of forensic game. Solvency is a matter peculiarly within the knowledge of the company. The primary source of information on the solvency of the company must be the company itself.

153 The onus is therefore cast on the company to establish that it is solvent. Requiring a creditor to have a suspicion of insolvency requires some objective basis, and therefore evidence, upon which the company is suspected of being insolvent, casting the onus back onto the debtor. That is plainly wrong.[150]

Stay and Dismissal of the VCAT Proceeding

154 Kornucopia contends that the application constitutes an abuse of process, given the Kornucopia Demand was issued while the VCAT Orders were stayed. This ground fails.

155 First, and fundamentally, the Kornucopia Demand claimed the Rental Arrears, and not the amount stated in the VCAT Orders. Kornucopia has mistaken or misapprehended the debt

---

[147] T245:6-13 (20 December 2019).
[148] T240:17-25 (20 December 2019).
[149] (2000) 33 ACSR 723, 725 [55] (Spiegelman CJ) (**Switz**).
[150] It was submitted that Chen was 'completely unreliable' and that his evidence ought to be struck out (T247:1-10 (20 December 2019)). It goes without saying that I have found Chen to be an entirely trustworthy and reliable witness. I accept his evidence.

upon which the Kornucopia Demand is based, insofar as it asserted it to be a debt created by the VCAT Orders, despite the clear words the Kornucopia Demand bears.[151]

156 Secondly, a monetary order made by VCAT is not a 'judgment debt' for the purposes of enforcement. In order to enforce an order of VCAT, it must be registered with the appropriate court under s 121 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), to be treated as a judgment of that court. There could, therefore, be no merger of the debt owed under the Lease Agreement with the VCAT Orders, which had not been registered.

157 Thirdly, even if that is wrong, for the purposes of insolvency proceedings, the original debt does not merge in a judgment or otherwise extinguish the antecedent debt.[152] The headnote to *Re King & Beesley; ex parte King & Beesley* states:[153]

> The general rule, where judgment has been recovered upon a simple contract debt, the original debt is for most purposes merged in the judgment, does not cause the judgment to operate as an extinguishment of the debt for the purposes of bankruptcy proceedings, and such debt is still available as a petitioning creditor's debt.

158 Gageler J explained this clearly in *Ramsay Health Care Australia Pty Ltd v Compton*:[154]

> Where a creditor to whom a debtor has a legal or equitable obligation to pay a liquidated sum that is owed proceeds first to obtain a judgment against a debtor, the antecedent obligation is not treated for the purposes of bankruptcy as merging in the judgment. The creditor, in going on to present a bankruptcy petition, can rely either on the debt created by the judgment or on the prior debt, which arose at law or in equity. …

159 To the same effect, in *O'Mara Constructions Pty Ltd v Avery*, the Full Court of the Federal Court (Heerey , Dowsett and Conti JJ) said:[155]

> In presenting the petition the appellant relied upon the judgment debt. In general, where a creditor recovers judgment for the amount of a pre-existing debt, that debt is merged in the subsequent judgment. However it seems that for bankruptcy purposes, the pre-existing debt continues to be available as the basis for a bankruptcy petition: see *Re King & Beesley; Ex parte King & Beesley* [1895] 1 QB 189 , per Vaughan

---

151 See e.g. T249-50 (20 December 2019): 'there's an actual stay, there's an actual prohibition on it, enforcement of the same. How can it be held to be a debt that is presently due and payable'. T271-2: 'When VCAT issued the stay, the wording of the stay clearly indicated that, you know, VCAT had exclusive jurisdiction over…a matter arising from rental arrears'.

152 Further, and in any event, as Counsel for Chen said: 'Because the VCAT proceeding is dismissed and the order disappears it'd be nonsensical to say that there's been merger and extinguishment of the contractual debt.' (T212:8-12 (19 December 2019)).

153 [1895] 1 QB 189, 189 and 191 (Vaughan Williams and Kennedy JJ).

154 (2017) 261 CLR 132, 153 [76] (Gageler J).

155 (2006) 151 FCR 196, 199 [9] (Heerey , Dowsett and Conti JJ).

> Williams J at 191–2 and per Kennedy J at 193; see also *Re Seckold; Ex parte Sargood Gardiner Ltd* (1933) 5 ABC 195 , per Lukin J at 197–9. Those cases indicate that a judgment creditor may rely on either the original debt or the judgment debt, presumably subject to any limitation provision. …

160 Fourthly, it follows that Chen was permitted to rely upon the Rental Arrears, pursuant to the underlying Lease Agreement, to issue a statutory demand and winding up application. The stay, regardless of whether it stayed the operation or only execution of the VCAT Orders did not affect the underlying liability pursuant to the Lease Agreement.

161 Finally, if Chen was permitted to rely upon the debt, then the only basis upon which an abuse of process can be found, is if Chen had sought to circumvent the jurisdiction of VCAT, by pressuring Kornucopia into proceeding in another forum. As I have found, rightly or wrongly, Chen honestly believed that he could not prosecute an action for rental arrears if the quantum exceeded $10,000. The proceeding in VCAT was issued at a time while the quantum was $7,612.38 (inclusive of the bond). As at 15 May 2019, when the Kornucopia Demand was issued, the amount owing was $12,281.66. At that time, Chen believed he could not continue the action at VCAT in respect of that quantum, which now exceeded the apparent jurisdictional limit of $10,000. As Counsel for Chen said:[156]

> So, in fact, as at 15 May, Mr Chen at that time being owed $12,000 approximately, was not able to go to VCAT to seek a money order, if it matters at all.

162 Further, and in any event, if the stay did operate to preclude him from seeking any portion of the debt, it could not exceed the amount of the VCAT Orders, being $7,612.38. It could not apply to the other $4,669.28 of the Rental Arrears. That amount is above the statutory minimum of $2,000.[157] If there is any irregularity in terms of the amount stated on the Kornucopia Demand, it is dispensed with pursuant to s 467A.[158] Alternatively, it appears open to me that I could simply write-down the amount of the demand, pursuant to s 459H(2) of the Act.

Tender

163 For the reasons discussed above, the refusal of the tender was entirely reasonable. No abuse

---

156 T211:12-4 (19 December 2019).

157 *Corporations Act 2001* (Cth) ss 459E (1), 9 definition of 'statutory minimum'.

158 First Judgment [131]-[140].

is made out.

Conclusion

164 Each of the grounds raised by Kornucopia, with the exception of that which relies upon improper purpose and tender, cannot be maintained in light of the enactment of Part 5.4. Even if they could be raised they do not provide a reason to exercise the discretion against making a winding up order, because there is no evidence of solvency. Further and in any event, each ground is frivolous, vexatious and entirely without merit.

C4 The Masri Principle

165 The Companies submitted:[159]

> The defendants are only able to do so much in relation to, you know, arguing against the basis for the plaintiff's claim. We've been shut out, I would say, throughout these entire proceedings by certain readings of the Corporations Act, 'You can't – you didn't – you never received a statutory demand. So – well – but it was – it's deemed to have been served. 'So too bad'.

166 While the precise case was not raised, and the submission was not sufficiently articulated, I apprehend that the submission relates to the so called 'Masri principle' which was referred to in passing by the plaintiffs and set out below.

167 There is authority for the proposition that where a statutory demand has been served, but not *received* by the company (as may arise when the plaintiff relies on presumed service pursuant to s 29(1) of the AIA Act) or has not otherwise come to its attention, s 459S will not preclude the company from raising a genuine dispute in relation to the debt upon which the statutory demand is based.

168 In *Perpetual Nominees Ltd v Masri Apartments Pty Ltd* (**Masri**),[160] the company was not required to obtain leave under s 459S of the Act, because it had been established that the company's directors had only become aware of the existence of a properly-served demand after the expiration of the 21 day period within which they could have made an application under s 459G. Furthermore, the directors had acted reasonably with respect to the collection

159 T263 (20 December 2019). This applies equally to each of Kornucopia, Efektiv and AGV.

160 (2004) 49 ACSR 714 (**Masri**).

of mail within their office. Austin J said:[161]

> In my opinion, to construe s 459S(1)(b) in the way that I have outlined is not to contradict or undermine the legislative policy standing behind the section, as explained by Gummow J in *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265 ; 131 ALR 353 ; 18 ACSR 225 and by Spigelman CJ in *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 ; 33 ACSR 723 . The legislative policy is that the provisions relating to the setting aside of a statutory demand are to be a complete code for the resolution of disputes about the subject matter of the demand, thereby preventing disputes about the underlying debt from being contested at the hearing of the winding-up application: *Switz*, at NSWLR 672, [39]; ACSR 732–3. *But that policy assumes that the debtor company has the opportunity to make an application, within the prescribed time limit, to set the demand aside.* Such an opportunity will exist if the statutory demand is both properly served and comes to the notice of the company's directors in a timely fashion. Arguably, the opportunity will also exist if, although the directors did not in fact discover the existence of the statutory demand within the time limit, they would have done so if they had acted reasonably in the superintendence of the collection of mail from the company's registered office. *Where, however, it is established on the evidence that the directors of the company did not become aware of the existence of the statutory demand until after the expiration of the 21-day period, and they have acted reasonably with respect to superintendence of the collection of mail from the company's registered office, the case is one where the company could not, in a factual sense, have relied on any of the grounds available to challenge the demand within the time period.* In such a case, fairness requires that the company be permitted to raise those issues at the only hearing available to it, namely the final hearing of the application for winding up, even though to that extent one reverts to the old practice which the Harmer reforms were intended to reverse. (emphasis added)

169 This is known as the '*Masri* principle' and has been referred to and applied by Perram J in *Grant Thornton Services (NSW) Pty Ltd v St George Wholesale Distributors Pty Ltd,*[162] Barrett J in *Willard King v CT Franchises Pty Ltd* (**Willard King**)*,*[163] and White J in *Re Tomic Industries Pty Ltd* (**Re Tomic Industries**).[164] In *Willard King*, Barrett J said:[165]

> I therefore accept that, purely on the facts as they appear at this interlocutory stage, the matters the defendant wishes to put forward by way of defects in the statutory demand and the accompanying affidavit are not matters on which the defendant "could have" relied upon a s 459G application for an order setting aside the statutory demand. The defendant was not able to initiate such an application within the time allowed by s 459G(3) because the statutory demand did not come to its notice within that time. It follows that, on the basis stated by Austin and Perram JJ in the cases I have mentioned, s 459S will not preclude reliance by the defendant on those grounds upon the hearing of the winding up application.

170 The *Masri* principle was, however, recently considered by Efthim AsJ in *AXF Entertainment,*[166]

---

161 Ibid 717 [19] (Austin J).
162 [2008] FCA 1777.
163 (2009) 69 ACSR 612 .
164 [2012] NSWSC 1478.
165 (2009) 69 ACSR 612, 616 [15] (Barrett J).
166 [2019] VSC 753.

where his Honour concluded that in light of the High Court's decision in *Lanepoint*[167] the *Masri* principle was no longer good law. Efthim AsJ said:[168]

> In my view, the Masri Principle should not be followed in view of the decision in *ASIC v Lanepoint*. … The focus on the present Australian legislative scheme is on a company's solvency. If a statutory demand has been served and not complied with, then a debt can only be challenged if a company demonstrates solvency in accordance with s 459S of the Act.

171 The High Court was not considering the *Masri* principle in *Lanepoint*, but rather the disputed debt principle, to which I have referred. In any event, I agree with the conclusion reached by Efthim AsJ in *AXF Entertainment.* The *Masri* principle cannot be relied upon.

172 First, the *Masri* principle has a very similar application to the disputed debt principle. It permits the company to raise a genuine dispute relating to the debt upon which the statutory demand is based, if the statutory demand as a matter of fact (and aside from any presumption of service) never came to the attention of the company. The company does not need to obtain leave under s 459S to raise the dispute, and if established in their favour, may permit a finding to be made that the creditor does not or may not have standing with the consequence that the winding up application ought to be dismissed.

173 The similarities between the two principles can be exposed by reference to *Re Tomic Industries*,[169] where presumed service had been effective, but the statutory demand did not come to the attention of the company. White J applied the *Masri* principle and said:[170]

> To put it shortly, the defendant could not have relied on the grounds that the plaintiff is not a creditor and that there is a genuine dispute about the asserted liability for the purposes of an application to set aside the statutory demand, because it had no opportunity to do so. That was because, through no fault of the defendant, it had not received a statutory demand and did not know or have the means of knowing that it needed to make the application to set the demand aside.
>
> …
>
> It follows that the defendant is entitled to contest the plaintiff's standing and is entitled to raise the ground that there is a genuine dispute as to the liability asserted by the plaintiff. Whilst this does not stop the presumption of insolvency from arising, as I have said earlier in my reasons, the court will not permit an alleged creditor, whose debt is genuinely disputed, to proceed with a winding-up application, if the

---

167 (2011) 244 CLR 1.

168 *AXF Entertainment* [2019] VSC 753 [36] (Efthim AsJ).

169 [2012] NSWSC 1478.

170 Ibid [39], [42] (White J).

> circumstances are such that the company is entitled to raise such a dispute at the hearing of the winding-up application.

174 In *Lanepoint*, the High Court concluded that the disputed debt principle cannot be applied where a winding up application relies upon a presumption of insolvency and there is no evidence of solvency. It must follow that the *Masri* principle also cannot be relied upon in those same circumstances.

175 Secondly, in *Re Tomic Industries*, White J said that while the presumption of insolvency subsists, the court only has jurisdiction to wind up a company on the application of a creditor; and '[i]f the applicant for winding up has no standing to bring the application, then the court has no power to make the winding up order even if the company is insolvent.'[171] The *Masri* principle therefore allows a collateral attack to be mounted against the plaintiff's standing as a creditor, without requiring the company to displace the presumption. In *Lanepoint*, the High Court said that the disputed debt principle had 'some basis in the court's concerns as to the status of the applicant for winding up as a creditor', but that this principle 'had no application in the case of an insolvent company.'[172] The High Court concluded that the starting point was to adduce evidence of solvency. Only once this is done, can there be an attack on the creditor's standing which may have a result of staying or dismissing the winding up application. The *Masri* principle, is therefore inconsistent with the decision of the High Court in *Lanepoint*.[173]

176 The presumption, unlike that which arose under the predecessor legislation, arises regardless of whether the debt the subject of the demand is shown to be the subject of a genuine dispute of substance. It is telling, that in *Masri*, Austin J conceded that 'to that extent one reverts to the old practice which the Harmer reforms were intended to reverse'.[174] But the Court is constrained by the effect of the enactment of Part 5.4, and it has no option but to *not* apply that old practice and instead apply the framework imposed by Part 5.4. Where the application relies upon the company's failure to comply with a statutory demand, the debt can only be impugned under applications (depending on the timing and status of the proceeding) brought

---

171 Ibid [43].

172 (2011) 244 CLR 1, 10 [16] and 14 [30] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

173 (2011) 244 CLR 1.

174 (2004) 49 ACSR 719, 723-4 [12] (Austin J).

under ss 459G or 459S, and in the case of the latter, solvency must be addressed. The *locus standi* of the plaintiff as a 'genuine' creditor cannot be impeached at the hearing of the winding up application in the absence of evidence of solvency.

177 In a summary of the law which I adopt, in *Bibby Financial Services Australia Pty Ltd v Wolf Industries Australia Pty Ltd*, Austin J said:[175]

> [The provisions contained within Part 5.4] have the consequence that the proper occasion to raise a genuine dispute about a debt which has been the subject of a statutory demand is in an application to set aside the statutory demand, rather than at the hearing of the winding up application. Subsection 459P(1)(b) confers standing on a "creditor" to make an application for a company to be wound up in insolvency. If it were necessary, at the hearing of the winding up application, for the applicant to prove its status as a creditor, or to rebut a contention by the company that there was a genuine dispute as to the existence of the debt, the scheme of Part 5.4 would be undermined.
>
> That is why courts have taken the view, since the commencement of Part 5.4 in its present form, that it is not open to the company to challenge the standing, as a creditor, of an applicant who has served an unsatisfied statutory demand which has not been set aside, at the hearing of the application to wind the company up in insolvency: *Braams Group Pty Ltd v Miric* (2002) 171 FLR 449; 44 ACSR 124; *House of Tan Pty Ltd v Beachiris Pty Ltd* (1996) 21 ACSR 527; *Chief Commissioner of Stamp Duties v Paliflex* (1995) 149 FLR 179; 17 ACLC 467. Where the company wishes to challenge the debt which was the subject of the statutory demand, it must satisfy the requirements of s 459S: *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 ; 33 ACSR 723.

178 Thirdly, I would, in any event, adopt a different construction of s 459S(1)(b). When s 459S(1)(b) of the Act refers to grounds which the company 'could have so relied on', it is not referring to whether the company, as a matter of fact, was able to make an application under s 459G and then rely upon those grounds. Those words give the section a temporal operation.[176] A ground which 'could' have been relied upon is one for which the relevant facts were in existence at the time the company could have made the application under s 459G. Section 459S(1)(b) refers to grounds that the company 'could have so relied on, but did not so rely on *(whether it made such an application or not).*' Those closing words indicate beyond a doubt that the section is not concerned with a company's ability to make the application. Whether or not the company could have made the application, the ground could have been relied upon. If they were not relied upon, leave is required under s 459S.

---

175 (2004) 49 ACSR 45, 50 [22]-[23] (Austin J).

176 See paragraphs [220] to [222].

179 Fourthly, the *Masri* principle gives rise to inconsistencies within the broader statutory regime in relation to service of a statutory demand. In *Fancourt v Mercantile Credits Limited*,[177] the High Court (Mason, Murphy, Wilson, Deane and Dawson JJ) held that the presumption of service raised by s 29(1) of the AIA Act is rebutted by proof that a document (here, a statutory demand) was not *delivered* to a specified address, rather than proof that it had not been *received* by the addressee. Section 29(1) of the AIA Act and s 109X of the Act presume that a statutory demand has been delivered to the registered office to which it was posted, and therefore, effectively served. The provisions contemplate that delivery, rather than receipt, is sufficient for the question of service.

180 It must follow that the remainder of the statutory regime contemplates that delivery is sufficient. Even if it is established that the officers of the company did not become aware of the existence of the statutory demand until after the expiration of the 21-day period (because they say it was not received), they are deemed to have been able to rely on any of the grounds available to challenge on an application under ss 459G or 459S, because it was effectively served. The alternative conclusion would require delivery to be sufficient for the question of service, but in contrast to that, to preclude the company from raising a genuine dispute outside of the operation of s 459S, the creditor must establish that the company had received the statutory demand.

181 That conclusion would undermine the statutory regime to an impermissible degree. Only in cases where the creditor establishes the company 'received' the statutory demand, without the aid of a presumption, would the company be restrained from attacking the debt or the creditor's standing. This would be an insurmountable task in most cases. The creditor could not bring any probative or sufficient evidence to establish receipt that could overcome the assertion evidence given by the company that it simply was not received. That is precisely the mischief that s 29(1) of the AIA Act and s 109X of the Act sought to overcome. It would also undermine the efficient and effective operation of Part 5.4 insofar as it would take disputes outside of the stages contemplated by that framework, and instead bring them to the final hearing of the application. On no view would that promote the object that 'there be a speedy

---

177 (1983) 154 CLR 87.

resolution of applications to wind up in insolvency'.[178]

182 I am satisfied that the *Masri* principle is no longer good law.

183 Finally, even if the *Masri* principle remains good law, there are two reasons it does not assist the companies. First, as demonstrated, all of the grounds have no merit. Secondly, I do not accept that the directors of the Companies, or Kuksal, or at the very least one of the officers, did not receive or have knowledge of the statutory demands.[179] The *Masri* principle requires the Companies' officers to 'have acted reasonably with respect to superintendence of the collection of mail from the company's registered office'.[180] I am not satisfied of this. As I found in the First Judgment, the most probable inference in those circumstances was that the Kornucopia Demand had simply been lost or mislaid by the Companies:[181]

> Rather, in my opinion it is more probable than not that the documents were delivered to each company at their registered office but might not have come to the attention of the relevant person. … There is more scope for documents to have 'fallen through the cracks' at the Companies' end rather than that of the post office.

C5 Solvency

184 On 10 September 2019, Kornucopia filed an affidavit affirmed by Vjekoslav Fak, a registered company auditor and director of Mischel & Co Pty Ltd. He deposed to undertaking the audit for Kornucopia. The affidavit states:

> [4] The engagement to audit the accounts of Kornucopia Pty Ltd started on Thursday, 15th August 2019.
>
> [5] Based on current estimates and review of the work involved, I estimate the engagement will end on Friday, 20th September 2019.
>
> [6] The requirement to prepare these accounts was brought substantially forward in time, as there were no legislative, or regulatory requirements to lodge these documents in the near future, thereby causing undue pressure to have them completed within the timeframe provided, due to the action in the present proceeding.

178 *Lanepoint* (2011) 244 CLR 1, 13 [27] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

179 It was not necessary to find in the First Judgment that the Demands had been received. However, in light of the findings made in the Judgments which followed, it is more probable than not that they had been received. The evidence filed by the Companies has since been found to be contrived and inherently unreliable.

180 *Masri* (2004) 49 ACSR 714, 723 (Austin J).

181 First Judgment [65] and [69]. I further found, in the case of the AGV Demand, that the most probable inference was that it was returned to the Post Office and Madgwicks by one of the officers of the Companies. It had, therefore, been received.

185 On 11 September 2019, Kornucopia filed an affidavit of Andrew Alabakis (**Alabakis**), a chartered accountant who works at Magnus Advisory and (in his previous position, at BDO) oversaw Kornucopia's tax return for the financial year of 2017 to 2018. Magnus Advisory was apparently engaged to prepare the financial accounts for the financial year of 2018 to 2019. The affidavit states as follows:

> [4] Whilst at BDO, I oversaw the lodgement of Kornucopia Pty Ltd's last tax return for the financial year 2017-18.
>
> [5] Now produced and show to me, maker [sic] "AA-1" is a copy of the financial statements for Kornucopia Pty Ltd for 2017-18 as they were reported to the Australian Tax Authority [sic].
>
> [6] Kornucopia Pty Ltd's next lodgement (for 2018-19) is not due until end of May 2020.
>
> [7] In order to assist with the evidentiary requirements in the Proceeding, we had to undertake a large volume of unscheduled and unanticipated accounting work. Although there is no statutory or regulatory obligation for an audit, we have especially organised for an audit process to be undertaken.
>
> [8] Based on my familiarity with Kornucopia Pty Ltd's Draft Management Accounts, the entity had a gross revenue in excess of $3,000,000; a gross profit in excess of $1,250,000 and a net profit in excess of $500,000 for the financial year 2018-2019.
>
> [9] Kornucopia Pty Ltd has accounts are [sic] currently undergoing the aforementioned audit process and the auditor's estimated completion date is 20th September 2019.

186 The affidavit exhibits a copy of the financial statements for the financial year ending 30 June 2018. It is unnecessary to refer to those statements in detail. The statements disclose, for the financial year ending 30 June 2018, net profit after tax of $472,302, current assets of $448,002, current liabilities of $154,200, non-current assets of $825,398 and equity of $582,356. The statements are special purpose reports and therefore do not comply with generally accepted accounting principles. They do not disclose any contingent liabilities (such as ongoing litigation in which damages or compensation may be payable) which I suspect would appear on more recent financial statements. They are not audited. Audited financial statements for the *current* financial year were never adduced in evidence.

187 It is well accepted the Court must be provided with the 'fullest and best' evidence of solvency.[182] Among other reasons, these financial statements are rejected because they are

stale. I refer to and repeat the observations of the Full Court (Gordon, Griffiths and Farrell JJ) in *First Equilibrium Pty Ltd v Bluestone Property Services Pty Ltd (in liq)*:[183]

> Second, the court cannot disregard the evidence adduced by Equilibrium. Equilibrium elected to adduce evidence directed to the question of its solvency in the form of a financial report for the year ended 30 June 2011. …. Having made that choice, it cannot complain when the court identifies fundamental deficiencies in that evidence. And the financial report adduced by Equilibrium was deficient. It was unsigned. It was stale (being the financial report for the year ended 30 June 2011). …

188 The evidence filed by Kornucopia is of poor quality and not sufficient to displace the presumption of insolvency.

D Efektiv and AGV

D1 Background

189 In or around March and October 2018, Kuksal engaged Madgwicks to act on behalf of AGV and Efektiv respectively.[184]

190 Kuksal had an 'exclusive role in instructing Madgwicks' on behalf of the Companies,[185] and would deal with the firm through its managing partner, Peter Robert Kennedy (**Kennedy**).[186] Kuksal said that following his resignation as a director of Efektiv and AGV on 29 January 2019, he had 'limited involvement in certain matters',[187] but instructed on at least one matter involving the University of Melbourne.[188] Madgwicks' bills of costs record various phone calls, attendances and emails with Kuksal which post-date his resignation as a director.[189] Kuksal denied these entries as a fabrication by Madgwicks.[190]

---

182 *Commonwealth Bank of Australia v Begonia* (1993) 11 ACLC 1075, 1081 (Hayne J); *Ace Contractors* [1999] FCA 728 [44] (Weinberg J).

183 (2013) 95 ACSR 654, 664 [39] (Gordon, Griffiths and Farrell JJ).

184 There is an issue insofar as the Companies assert that Kuksal did not engage Madgwicks on behalf of Efektiv or AGV, and rather, that only a single retainer agreement existed between Madgwicks and Kornucopia. It is said that all fees were to be charged to Kornucopia, and that Efektiv or AGV acted as agents of Kornucopia. This is the subject of the s 459S application and it is rejected below. See paragraphs [319] to [327].

185 T116:20-5, 121:1-8, 122:5 (18 December 2019).

186 T127:17-20 (18 December 2019).

187 T124:22-4 (18 December 2019).

188 T131:19 (18 December 2019).

189 T133:15-9 (18 December 2019). The notations state, for instance, 'Email to S Kuksal', 'Perusing and considering email from S Kuksal', 'Phone call to S Kuksal', 'Phone call attendances with Shivesh'.

190 T115, 133:20-22 (18 December 2019). The sheer number of notations referring to communications or attendances with Kuksal would necessarily require Madgwicks to have engaged in widespread fraud. There is no evidence to suggest that the notations are belated fabrications. Kuksal's assertion is rejected.

191 Neither Xu or the director of AGV, Maria Di Gregorio (**Di Gregorio**) gave instructions to Madgwicks upon their respective appointments as directors of Efektiv or AGV.[191] Xu said that she had 'limited contact with Madgwicks',[192] and it was Kuksal's responsibility to give Madgwicks instructions and deal with their fees.[193]

192 At some point, the Companies became dissatisfied with Madgwicks' provision of legal services and refused to pay the outstanding accounts. They notified Madgwicks of their complaints and have since contended that Madgwicks' negligence has caused them loss. The nature and extent of any such loss or damage has not been identified. The Companies adduced a voluminous amount of evidence directed to this allegation, however, it is irrelevant to these proceedings and no claim has ever been formally made against Madgwicks alleging negligence.[194] It has not been said that this has given rise to a potential offsetting claim.[195]

193 On 9 April 2019, Madgwicks ceased acting for Efektiv and AGV.

194 Madgwicks issued numerous invoices with respect to legal costs which remain unpaid. As at 6 June 2019, the debts said to be due and payable were as follows:

(a) Efektiv – the amount of $69,731.57; and

(b) AGV – the amount of $203,104.88.

195 The invoices have been admitted into evidence. It is not necessary to refer to each or any one of them in detail.

196 On 6 June 2019, two creditor's statutory demands (one in relation to each company) were signed by Kennedy (the **Efektiv Demand** and/or **AGV Demand**). The Efektiv and AGV Demands were effectively served by post on 10 July 2019.[196] Kennedy also sent the Efektiv and AGV Demands by email to Kuksal, Xu and Di Gregorio on 18 June 2019. In the First

---

191 T132:2-12 (18 December 2019).

192 T153:6 (18 December 2019).

193 T160 (18 December 2019).

194 The evidence is in the nature of assertion, contained within the Companies' affidavits, and numerous emails between the Companies and Madgwicks in which the Companies air their grievances to Madgwicks. The evidence could not support a finding of negligence in any event.

195 T143-4 (18 December 2019).

196 First Judgment [84].

Judgment, I found that if I was wrong and service by post was ineffective, informal service was effected by email on 18 June 2019.[197]

197 On 10 July 2019, Madgwicks applied to the Court pursuant to s 459P of the Act for an order winding up Efektiv and AGV on the grounds of presumed insolvency by virtue of the unsatisfied statutory demands.

Tax Invoices and Costs Disclosure Agreements

198 Over the period during which Madgwicks was acting, the firm sent tax invoices and Costs Disclosure Agreements (comprising a Reference Schedule, Disclosure Statement and Costs Agreement) (together, **Costs Disclosure Documents**) for each matter it was retained for, via email to an email maintained by the Companies, 'director@efektiv.com.au' (**Efektiv Email Address**).[198] The Efektiv Email Address was the client email listed by Madgwicks for Efektiv and AGV. It was used and maintained exclusively by Kuksal.

199 Between October 2018 and April 2019, Madgwicks sent nine invoices relating to fees for services it performed for Efektiv. Between March 2018 and June 2019, Madgwicks sent 25 invoices in relation to AGV. These were the unpaid invoices which together formed the debts which were the subject of the Efektiv or AGV Demands. These invoices were itemised bills and otherwise in taxable form. Again, it is not necessary to refer to any particular invoice in detail.

200 Madgwicks tendered emails printed directly from Microsoft Outlook which clearly show the emails were sent and addressed to the Efektiv Email Address. Each invoice was sent with a standard form covering email, directing the recipient's attention to the attachment.

201 Helen McNamara (**McNamara**), solicitor for Madgwicks, gave evidence that each invoice was, to her knowledge, successfully delivered to the email address listed, given that none of them bounced back to her or other staff as undeliverable. She opined that she would have heard if other members of her firm had said something to the effect that 'all these invoices are bouncing back', and if that had occurred, somebody would have called Kuksal.[199] At no time

---

197 First Judgment [92]-[93].

198 Xu confirmed that this email address was only used by Kuksal: T159:29 (18 December 2019).

while Madgwicks acted for Efektiv or AGV did Kuksal (or any other representative of the Companies) raise that no invoices had been received.

202 Kuksal denied that any Costs Disclosure Documents had been received by Eketiv or AGV at any time prior to the commencement of this winding up application. The documents were, according to his evidence, received for the first time by the Companies on 21 August 2019, long after the Efektiv and AGV Demands had been served and the Originating Processes filed. On 21 August 2019, Madgwicks (via McNamara) made physical copies of the documents available, which the Companies' officers obtained from Madgwicks' offices. Kuksal gave evidence unequivocally rejecting that the documents were received via the Efektiv Email Address, to which Madgwicks had purportedly sent those documents.

203 Kuksal's evidence, for reasons given below, is rejected as false. Kuksal used the Efektiv Email Address. Kuksal received the invoices from that email address prior to 21 August 2019 when they were sent by Madwicks. In all likelihood, and I find, he received the Costs Disclosure Agreements at that email address too.

Costs Court Proceeding

204 On 13 August 2019, the Companies and Kuksal filed a summons for taxation of costs pursuant to s 198 of the *Legal Profession Uniform Law 2014* (Vic) (**Uniform Law**) against Madgwicks in the Costs Court of this Court (**Costs Court Proceeding**).[200]

205 On 3 September 2019, the Costs Court Proceeding came before Gourlay JR but was adjourned for a callover on 22 October 2019.

206 On 22 October 2019, the Costs Court Proceeding was struck out with a right of reinstatement. This was due to non-attendance by the Companies' legal representative who, it was said, collapsed on public transport on the way to the hearing from a contended medical condition.

207 On 28 October 2019, consent orders were filed to have the Costs Court Proceeding reinstated. Gourlay JR made those orders on the same date. The Costs Court Proceeding was listed for

---

199 T173-4 (19 December 2019).

200 Supreme Court Proceeding Number: S ECI 2019 03641.

callover on 3 December 2019.

208 On 2 December 2019, the callover was adjourned on the papers at the request of the Companies to 4 February 2020.

D2 The 459S grounds – general

The Law

209 Section 459S of the Act provides:

> **Company may not oppose application on certain grounds**
>
> (1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
>
> (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
>
> (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
>
> (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent.

210 Leave is not required for a company to adduce evidence that they are solvent as evidence of solvency is not a ground for having a statutory demand set aside.[201] Leave *is*, however, required for grounds that could have been raised under ss 459H or 459J in an application made pursuant to s 459G of the Act to set aside the statutory demand. These include 'a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates' or 'an offsetting claim' (s 459H). Leave may also be required for a ground which alleges that the winding up application is an abuse of process, if that ground could have been raised to have the statutory demand set aside.[202] That will be so if the ground constitutes 'some other reason' (s 459J) that was in existence at the time an application could have been made under s 459G and which could have been raised to have the statutory demand set aside.

211 Section 459S is expressed in mandatory terms. The Court *must* not grant leave unless it is

---

201 *Aust Yieh Stainless Pty Ltd v Horans Steel Pty Ltd* [2000] NSWSC 244.

202 *Radiancy (Sales) Pty Ltd v Bimat Pty Ltd* [2007] NSWSC 962 [20] (White J) (**Radiancy (Sales)**).

satisfied that the ground that the company could have relied upon to set aside the statutory demand under s 459G, 'is material to proving that the company is solvent.'

212 In *Re Vangory Holdings Pty Ltd (***Vangory Holdings***)*,[203] Black J referred to *Chief Commissioner of Stamp Duties v Paliflex* (**Paliflex**),[204] and set out the following three matters which the Court should have regard to:[205]

(a) whether 'there is a serious question to be tried on the ground sought to be raised';

(b) 'the sufficiency of any explanation as to why that ground was not raised in an application to set aside the creditor's statutory demand involving an evaluation of the reasonableness of the debtor's conduct at the time when the application might have been made'; and

(c) 'whether the court is satisfied that the relevant ground is material to proving whether the debtor is solvent'.

213 Black J went on to say:[206]

> The discretion conferred by s 459S of the *Corporations Act* is to be exercised cautiously and sparingly and with regard to the purpose of Pt 5.4 of the *Corporations Act* to provide for determination of any objections to a creditor's statutory demand by an application under s 459G of the *Corporations Act*, rather than at the time of the winding up application.

214 The onus is on the companies seeking leave to place relevant material before the Court on the question of its solvency.[207]

Serious question to be tried

215 The test under s 459S is not dissimilar to the requirement that there be a 'serious question to be tried' when one applies for an interlocutory injunction. In *Soundwave Festival Pty Ltd v Altered State (WA) Pty Ltd (No 1)*, Wigney J said:[208]

---

203 [2015] NSWSC 546 (**Vangory Holdings**).
204 (1999) 149 FLR 179, 193 [49] (Austin J) (**Paliflex**).
205 *Vangory Holdings* [2015] NSWSC 546 [10] (Black J).
206 *Vangory Holdings* [2015] NSWSC 546 [10]. See also *Paliflex* [1999] NSWSC 15 [40] (Austin J).
207 *Expile Pty Ltd v Jabb's Excavations Pty Ltd* [2003] NSWSC 96 [4] (Barrett J) (**Expile**); *Re OCNR (Australia) Pty Ltd* [2014] QSC 102 [16]-[17] (Mullins J).
208 [2014] FCA 466 [10] (Wigney J).

> A "preliminary" consideration of the nature and basis of the dispute concerning the existence of the debt that the defendant wishes to raise in opposition to the winding up application does not involve a final determination of whether there is in fact a genuine dispute, or a final determination of whether the debt actually exists. To approach s 459S in that way would defeat the very purpose of the statutory scheme of which s 459S is a part (as to which see *Switz* at [46]-[51]). Rather, the preliminary consideration is directed to a consideration of whether the defendant (the applicant for leave under s 459S) has a seriously arguable case that the debt is the subject of a bona fide dispute: *D.A.G. International Pty Ltd v D.A.G. International Group Pty Ltd* [2005] NSWSC 1036 at [5].

216 In *Re Pioneer Cryogenics Pty Ltd* (**Re Pioneer Cryogenics**), Black J said:[209]

> … it would set too high a standard to require that affidavit evidence prove the facts that raise the ground in an initial affidavit to set aside a creditor's statutory demand, and that all that was required was to establish that there was a plausible contention requiring evaluation.

217 In *Macleay Nominees v Belle Property East Pty Ltd*, Palmer J observed that the offsetting claim in that case was arguable on the basis of facts that were asserted 'with sufficient particularity to enable the court to determine that the claim is not fanciful.'[210]

218 The authorities make clear that the Court is not to approach the question of whether to grant leave by conducting a 'trial within a trial'. The winding up application is an inappropriate vehicle for the final determination of whether a debt to which the statutory demand relates is, in fact, owing or whether a company can make good its offsetting claim. The nature of the leave application is not dissimilar to the court's summary jurisdiction. It is generally undesirable to engage in a detailed assessment of the credit of relevant witnesses (particularly on matters that are not directly relevant to the applications) or to determine whether the evidence of one witness, which contradicts that of another, should be preferred.

219 However, the Court is entitled to look at the claim in order to determine whether it is 'seriously arguable', or 'plausible', or conversely, whether it may be characterised as 'fanciful' or 'spurious'. The Court does not need to blindly accept all evidence put before it, but rather, is entitled to scrutinise it within permissible limits. If the evidence is an obvious fabrication, or so ludicrous, spurious or implausible that accepting it would run contrary to the interests of justice, the Court is entitled to reject it. Furthermore, the Court is entitled to determine a disputed question of law, especially if it would be dispositive of the dispute or

---

209 (2015) 108 ACSR 461, 46 [9] (Black J).

210 *Macleay Nominees v Belle Property East Pty Ltd* [2001] NSWSC 743 [18] (Palmer J).

contended offsetting claim. The Judge hearing the winding up application is in as good of a position to determine a question of law which does not bear upon the acceptance or rejection of evidence, as any other Judge would be on the hearing a trial of the dispute or offsetting claim. The Court might find that even if it accepts the company's evidence, the claim is frivolous, vexatious or does not disclose a valid cause of action. It might be, for instance, that the documents which evidence the debt speak for themselves, contrary to uncorroborated and undocumented assertions of the company's officers or, for instance, that the facts and circumstances which make up the company's offsetting claim were not causative of any loss suffered by it.

Grounds the Companies could have relied upon

220 The words 'could have so relied' gives the section a temporal element. Namely, grounds which the company 'could have relied upon', are grounds which were in existence and could have been relied upon at a time when the company could have brought an application under s 459G of the Act. If the ground was actually available according to the facts in existence at the time the company could have applied under s 459G, then it will require leave under s 459S to raise that ground in opposition to the winding up application. If those facts were not in existence at that time, with the consequences that the ground could not have been raised, then leave is not required to raise that ground.

221 In *Roberts v Wayne Roberts Concrete Constructions Pty Ltd*, Barrett J said:[211]

> In a case such as the present where a statutory demand is served and there is no application under s.459G for an order setting it aside, the barrier erected by s 459S is one that pays attention to grounds on which the defendant company "could have" relied had it made a s 459G application. It follows that any ground which was not available during the period when such an application could have been instituted but, because of some change in circumstances, has subsequently become available may be relied on in opposition to the winding up application even though it is of a kind or character that ss 459H or 459J makes relevant to an application under s 459G: *Biron Capital Ltd v Velowing Pty Ltd* [2003] NSWSC 1181; BC200307633.

222 In *Shakespeares Pie Co Australia Pty Ltd v Multipye Pty Ltd*, Barrett J said:[212]

> Once changes in circumstances are asserted, it becomes necessary to consider whether there is any need for s 459S(1) leave at all. In speaking of "a ground … that

211 (2004) 208 ALR 532, 535-6 [11] (Barrett J).
212 [2005] NSWSC 1338 [15] (Barrett J).

> the company could have relied on", s 459S(1) is concerned not with a ground of a particular kind or description in a generic sense but, rather, with a ground that was actually available to be asserted according to the facts and circumstances existing at the time when it was open to the company to resort to the s 459G procedure: see *Biron Capital Ltd v Velowing Pty Ltd Perpetual Nominees Ltd v Masri Apartments Pty Ltd* (2004) 49 ACSR 719; *Goman v Scope Data Systems Pty Ltd* [2004] NSWSC 314. It follows that, if all the "changes in circumstances" are of such a kind as to make defences on the basis of circumstances grounds that were not available to be asserted upon the s 459G application, leave under s 459S will be refused as unnecessary.

223 The company seeking leave under s 459S should provide a reasonable, legitimate and sufficient reason as to why it did not raise the ground in an application under s 459G of the Act to set aside the statutory demand. One explanation may be that the company did not become aware of the statutory demand until the expiration of the 21 day period within which it could have made that application. In some cases, that will be a sufficient explanation and in others it will not. The conduct of the company's officers will be relevant, and in particular, whether they acted carelessly on the one hand, or reasonably on the other. That inquiry is directed to whether the statutory demand would have come to the notice of the company acting reasonably. In this case, I have found that the officers acted unreasonably, such that it is an insufficient explanation.

Material to solvency

224 Section 459S(2) requires that leave *must* only be granted where 'the ground *is* material to *proving* that the company is solvent'. The company bears this onus. Two approaches (one strict, and one somewhat more lenient) have arisen in relation to the meaning of the phrase, 'material to proving the company is solvent'.

225 *Switz* illustrates the 'strict' view. The New South Wales Court of Appeal (Spiegelman CJ, with Handley and Giles JJA agreeing) stressed the words of the statute are not 'material to solvency' or 'material to finding solvency', but rather that the ground is 'material to *proving* solvency'.[213] Spiegelman CJ said:[214]

> If, as here, the company intends to prove that it is solvent whether or not a debt is payable, then with respect to a ground based on dispute about the debt, the test of materiality to it "proving" its solvency, cannot be satisfied.

213 (2000) 33 ACSR 723, 733 [43] (Spiegelman CJ).

214 Ibid 735 [54] and [56].

…

> It may well prove to be the case that whether or not a particular debt is owing is material, indeed crucial, to a company being able to establish its solvency. However, if the company itself is not prepared to mount a case which contemplates that as a possibility, then it is not open to the Court to be "satisfied" in the sense required by s459S(2) on the basis that the company should be protected from itself. As I have said, the fact that the company does intend to so contend would not determine the issue of whether the disputed debt is "material", let alone whether leave should be granted under s459S(1). On the submissions made to this Court, these issues do not arise. The appeal should be dismissed.

226 In other words, the company must show that the debt demanded by the creditor if found not to be due and payable, or the offsetting claim alleged by the company if established, is the difference between the company being solvent and insolvent. As the learned authors of *Ford, Austin & Ramsay's Principles of Corporations Law* said:[215]

> If by ignoring the debt demanded, the company might be found to be solvent, then, and only then, the existence of a bona fide dispute would be a relevant consideration and a discretion to grant leave would exist.

227 In *Paliflex*, Austin J preferred a more 'lenient' approach and said:[216]

> … The Court considers the materiality question before deciding whether to grant leave to the company to dispute the debt. It has not, at that stage, reached a conclusion about the company's overall solvency, and may not have heard all the relevant evidence. It is not in a position to decide, at that stage, whether the debt in question is the difference between solvency and insolvency.

228 In *Re Pioneer Cryogenics*, Black J preferred this view and said:[217]

> *It seems to me that, as a matter of the language of the section, and consistent with the cases which have subsequently adopted a somewhat less strict approach, it is not possible to say that the existence of a debt is not material to proving the company is solvent, where it will make a significant difference, on any view of the evidence, to Pioneer's ability to achieve proof of that matter.* If I were required to choose between the strictest and the less strict approach, a choice which many of the cases in this area have sought to avoid, I would on balance adopt the less strict approach, albeit I should also note that that difference between the two tests may be a false dichotomy, where what is involved is a question whether the Court is satisfied, or not, of materiality of the debt to the proof of solvency in the particular circumstances. (emphasis added)

229 However, where the company contends that it is solvent in any event or irrespective of the debt, the difference between these two approaches is not engaged. If the company is solvent irrespective of the debt, the debt could not, on any view, be 'material' to solvency. White J

---

215 *Ford, Austin & Ramsay's Principles of Corporations Law* at [27.062.12].

216 (1999) 149 FLR 179, 192 [44] (Austin J).

217 (2015) 108 ACSR 461, 465 [12] (Black J).

explained this, with reference to *Switz,* in *Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No 2)*:[218]

> What is material to proving solvency is not the same as what is determinative of solvency. This is not inconsistent with the decision of the Court of Appeal in *Switz Pty Limited v Glowbind Pty Limited*. There the defendant asserted that it was solvent whether or not it owed the debt the subject of the statutory demand. Spigelman CJ, with whom Handley and Giles JJA agreed, held that because the defendant contended that it was solvent whether or not it owed the disputed debt, the ground for disputing the debt was not material to proving the defendant's solvency. Attention was to be focused on the case the defendant advanced and how it intended to prove it (at [53], [54] and [56]). Spigelman CJ did not say that whether the ground for disputing the debt the subject of the statutory demand was material to proving the company's solvency depended on whether it could be seen from the evidence adduced on the s 459S application to be determinative. Rather, his Honour said that the ground would not be material if the company's case was that it was not determinative. His Honour (at [32]) denied that it was necessary to consider the concept of materiality in s 459S(2) in the appeal. That shows that his Honour was not intending his reasons to have a wider significance.
>
> …
>
> In short, the existence or non-existence of the plaintiff's debt is not material to proving that the company is solvent where the company claims it is solvent, even if it owes the debt. It does not follow that all questions of a company's solvency are to be advanced to the stage at which leave is sought under s 459S, so that the company must then establish by the fullest and best evidence that it is solvent if it does not owe the disputed debt. A finding of the existence or non-existence of the debt will be pivotal to a decision on solvency at the s 459S stage, if the company might be found to be solvent if the debt does not exist. That would establish materiality for the purposes of s 459S(2).

230 The same is true if the company does not adduce evidence of the financial position of the company. Regardless of the size of the debt, if there is no evidence of the overall asset and liability position, the Court cannot gauge what the effect on solvency would be if the debt were not taken into account. It cannot assess whether the ground is material to the question of solvency, as required by s 459S(2) and must not grant leave to raise the ground. That is the case here, and for that reason I do not need to analyse the 'strict' and 'lenient' views any further.

Analysis

231 I am not satisfied that I should grant leave to Efektiv or AGV to raise any of the grounds referred to below. Each of the three considerations referred to by Black J in *Vangory*

---

[218] [2011] NSWSC 113 [35] and [48] (White J).

Holdings,[219] dealt with in order below, point against any such grant of leave.

232 First, there is no serious question to be tried. Each of the grounds, as analysed below, is spurious.

233 Secondly, no sufficient explanation has been raised as to why the grounds were not raised in an application brought under s 459G to set aside the creditor's statutory demands. The only explanation given for why Efektiv and AGV did not rely on those grounds is because, it was said, the Efektiv and AGV Demands were never received meaning that the companies were not aware that they had been made until it was too late to make the applications under s 459G.

234 That explanation is not, in these circumstances, sufficient. The Efektiv and AGV Demands were sent by post to the registered office of the Companies. In the First Judgment, I drew the inference that the Efektiv Demand had most likely been lost or mislaid by the Companies' officers: [220]

> Rather, in my opinion it is more probable than not that the documents were delivered to each company at their registered office but might not have come to the attention of the relevant person. … There is more scope for documents to have 'fallen through the cracks' at the Companies' end rather than that of the post office.

235 The officers had acted carelessly or had failed to maintain adequate procedures for the collection and maintenance of mail. Had they acted prudently, in all probability the Efektiv Demand would have been found and Efektiv could have brought an application to have it set aside.

236 I also drew the inference that in the case of the AGV Demand, 'the circumstances are consistent with its delivery, and then immediate return, by someone within the organisation.'[221] I found that the Companies' officers had received the AGV Demand and, therefore, they could have brought an application to have had it set aside. Instead they returned the AGV Demand back to Madgwicks and asserted that it had never been delivered or received.

---

219 *Vangory Holdings* [2015] NSWSC 546 [10] (Black J).

220 First Judgment [65] and [69].

221 First Judgment [83].

237 Even if I were satisfied that the documents were not received after having been delivered in the post, which I am not, the Companies' officers were in any event aware of the AGV and Efektiv Demands during the relevant period.

238 On 18 June 2019, Kennedy sent an email to Kuksal, Xu and Di Gregorio which referred to, and attached copies of, the Efektiv and AGV Demands which had been sent by post on 6 June 2019 and effectively served on 10 June 2019.[222] In the First Judgment, I found that the Efektiv and AGV Demands came to the attention of Di Gregorio on 18 June 2019, when she 'skimmed' or 'perused' the email.[223]

239 As at 18 June 2019, Efektiv and AGV were aware of the Efektiv and AGV Demands. Efektiv and AGV had until 1 July 2019 to make an application under s 459G of the Act to set aside the Efektiv and AGV Demands. Accordingly, as at 18 June 2019, Efektiv and AGV still had nine days to make those applications.

240 Instead, they did nothing. On 29 June 2019, Di Gregorio sent an email to Kennedy rejecting that any documents had been sent by post or received at the registered office, such that service had not been effective. The email simply demanded Madgwicks to not take any further steps to act upon the Efektiv or AGV Demands and that the firm withdraw them.[224] That was a most unreasonable decision in the circumstances. By their own conduct, Efektiv and AGV foreclosed themselves of the opportunity to make applications under s 459G of the Act to set aside the Efektiv and AGV Demands. Having acted in this manner and with every opportunity to raise the dispute under the s 459G procedure, they will not be granted leave under s 459S of the Act.

241 It was further submitted that Efektiv and AGV do not require leave in order to raise the ground relating to Costs Court Proceeding and whatever effect that proceeding might or should have on these applications. That is because, it was submitted, the Costs Court Proceeding was commenced after the winding up applications were filed, and therefore, after the time for compliance with the Efektiv and AGV Demands had expired. This means that it

---

222 First Judgment [77].

223 First Judgment [92]-[93].

224 First Judgment [28].

was not a ground which Efektiv and/or AGV could have relied upon in an application made to set aside the Efektiv and AGV Demands. As a new ground, it was submitted that leave is not required to raise it.

242 That submission is rejected. It is true that the Costs Court Proceeding was only commenced following the expiry of the period within which Efektiv and AGV could have applied to set aside the Efektiv and AGV Demands. However, the Costs Court Proceeding raises a dispute in relation to Madgwicks' fees which was in existence for a long time preceding the expiry of that period. Efektiv and AGV did not commence the Costs Court Proceeding during that period, which they were at liberty to do, and instead only commenced it after the winding up applications had been made. As Madgwicks submitted:

> Importantly, each of the plaintiff's Unpaid Invoices were fully itemised and were readily in taxable form. Yet, despite ample time to do so, no application had been made by the defendants to have any of the Unpaid Invoices assessed by the Costs Court whether:
>
> (a) after their delivery by the plaintiff to the defendants and before the effective service of the Statutory Demands on 13 June 2019; or
>
> (b) within the 21-day period (which expired on 4 July 2019) after the effective service of the Statutory Demands; or
>
> (c) after the expiry of the 21-day period and before the plaintiff's winding-up applications filed on 10 July 2019; or
>
> (d) after the plaintiff's winding up applications and before the hearing of these proceedings conducted by Judicial Registrar Hetyey on 7 August 2019.
>
> In other words, all possible "event promptings" were ignored by the defendants until 13 August 2019.

243 Further, each tax invoice, which I find below was received by Efektiv and AGV ensured that the companies were aware of their rights. Taking one invoice as a sample, it stated:

> **Notification of Rights**
>
> **Your rights in relation to legal costs**
>
> 1. Discuss your concerns with us. Angelo Conti is designated as responsible principle for this bill.
>
> 2. Request an itemised bill. You must do this within 30 days from the date which the legal costs become payable. We will provide an itemised bill at no charge. …

3. Have our costs assessed before the Supreme Court Costs Court ('Costs Court') under Division 7 of Chapter 4.3 of the Uniform Law OR, alternatively, make a complaint to the Victorian Legal Services Commissioner ('VLSC') in relation to a costs dispute under Division 1 of Part 5.2 of the Uniform Law. The parameters for taking such steps are as follows:

   i. In relation to a costs assessment before the Costs Court – you must make the application within 12 months of when the bill was given or a request for payment was made, or where there was no bill or request made, when the legal costs were paid. An application can be made outside of 12 months in certain circumstances where the delay and reasons for the delay make it just and fair to do so. …

244 No explanation, other than non-receipt of the invoices, was given for the delay in commencing the Costs Court Proceeding. That explanation is rejected below as false.

245 The ground *was* available at the time when Efektiv and AGV could have made an application to set aside the Efektiv and AGV Demands. Efektiv and AGV could have at the same time filed the summons for taxation and applications under s 459G. Efektiv and AGV could have alternatively filed applications under s 459G in relation to their right to seek a taxation of costs, which they would exercise soon thereafter by filing the summons for taxation. They should have, but did not, take steps to preserve their position. Instead they have delayed with no sufficient explanation.

246 Thirdly, no evidence of solvency has been filed, and it is therefore impossible for me to be 'satisfied that the ground is material to proving that the company is solvent'.[225] I refer to and repeat the observation of Spiegelman CJ in *Switz*:[226]

> However, if the company itself is not prepared to mount a case which contemplates [solvency] as a possibility, then it is not open to the Court to be "satisfied" in the sense required by s459S(2) on the basis that the company should be protected from itself.

247 Efektiv and AGV will not be granted leave under s 459S of the Act. In any event, and given the foreshadowed appeal, various grounds are dealt with below to illustrate why they are without merit.

---

225 *Corporations Act 2001* (Cth) s 459S(2).

226 (2000) 33 ACSR 723, 733 [56] (Spiegelman CJ).

D3 Costs Disclosure Documents

Submissions

248 Efektiv and AGV submitted that there is a genuine dispute in relation to the existence of the debts, Madgwicks are not creditors to those companies, and the debts were and are not due and payable. They submit that Madgwicks breached their costs disclosure obligations towards them under the Uniform Law and as a consequence, the relevant costs agreements which form the basis of the debts are void. It was submitted that Madgwicks are further in breach of the Uniform Law by having commenced and maintained these proceedings for, it was submitted, the recovery of legal costs against Efektiv and AGV.

249 Madgwicks submitted that each of the invoices were sent to the Efektiv and AGV, in accordance with the terms of the relevant costs agreement and the provisions of the Uniform Law. Madgwicks contended that Efektiv and AGV have not adduced evidence sufficient to find they breached their costs disclosure obligations. The sheer volume and extent of costs agreements, invoices, costs disclosure statements and other relevant documentary material which was, as Madgwicks contends, sent to Efektiv and AGV makes Kuksal and Xu's blanket denials a matter which defies belief. Their evidence, rife with inconsistencies, and entirely vague in nature, ought to be rejected. Madgwicks went as far as to 'suggest' that I find or refer Kuksal for having potentially perjured himself. In any event, were the Court to find that the agreements were void for a want of disclosure, Madgwicks would still, it was submitted, be entitled to charge fair and reasonable legal costs pursuant to s 172(2) of the Uniform Law. Madgwicks would consequently have standing as a contingent creditor.

Analysis

250 Prior to assessing whether Madgwicks gave adequate disclosure, it is necessary to say something of the evidence, and in particular that given by Kuksal. I intend to reject his evidence unless it is supported by contemporaneous documents.

251 Kuksal gave evidence that he had never seen *any* of Costs Disclosure Documents.[227] He also said that neither Xu or Di Gregorio had received the documents prior to the commencement

---

[227] T112:13-4, 117:11-3, 129:29-30, 130:12, 132:29-31, T134:1-17, T135:5-16, T135:20-8 (18 December 2019).

of these applications, for they would have brought them to his attention (but did not) after he ceased acting as a director of the Companies on 29 January 2019.[228] He categorically denied having seen or received *any* and *all* of the documents:[229]

> Mr Lovell: Are you denying receipt of all costs agreements, cost disclosure statements, and invoices which are in these supplementary court books?
>
> Mr Kuksal: Well, I deny receiving tax invoices and cost disclosure agreements, period. I have not gone through each document, but that would logically follow, yes …

252 Xu also denied having received any of the documents.[230] Her affidavit affirmed 9 October 2019, which she confirmed in cross-examination, states:[231]

> I've never received, and to my knowledge, Efektiv never received whilst I was a director of it, any correspondence from Madgwicks concerning the legal costs or which indicated or suggested that Efektiv had retained Madgwicks.

253 She was asked whether she recalled receiving any Cost Agreements or Cost Disclosure Statements relevant to Efektiv or AGV. She responded: 'No.'[232] She said invoices would have been sent to Kuksal.[233] As Xu was not a primary 'contact point' for Madgwicks, and rather Kuksal was, her evidence is ultimately of little assistance or weight to the questions of receipt of the relevant documents and disclosure.

254 Kuksal gave evidence that the client email address listed by Madgwicks – the Efektiv Email Address - was not the only email address used by Efektiv and/or AGV and that each officer had their own personalised email address.[234] It was also 'the wrong email address for Efektiv'.[235] Further, Kuksal said that when he resigned as a director of Efektiv, he no longer used it.[236] The invoices arising after that time should have been directed to Xu or Di Gregorio.[237] Kuksal further denied that the emails were sent to the Efektiv Email Address.[238]

---

228 T132:4-12, 142:3-7 (18 December 2019).
229 T138:19-26 (18 December 2019).
230 T152:7-10 (18 December 2019).
231 T149:16-20 (18 December 2019).
232 T153:21-7, 158:1-4 (18 December 2019).
233 T154:4-6 (18 December 2019).
234 T117:22-31 (18 December 2019). These email addresses were, for instance, 'shivesh@efektiv.com.au' or lulu@efektiv.com.au'.
235 T123:2-13 (18 December 2019).
236 T117:14-21 (18 December 2019).
237 T124:6-10 (18 December 2019). That would tend to contradict Xu's evidence that Kuksal dealt with matters pertaining to Madgwicks fees, and Kuksal's later evidence that he would still instruct Madgwicks and

255 Kuksal's evidence in relation to both, non-receipt of the invoices and the usage of the email address, is not accepted. His evidence is unreliable and rejected.

256 First, I am satisfied that Kuksal actively used and maintained the Efektiv Email Address . There are various emails in evidence received by or sent to Kuksal from that email address. For example:

(a) on 13 November 2018, Kuksal sent an email to Grant Walker,[239] copied to Kennedy, with the subject heading 'Re: Tomorrow's Hearing';

(b) on 13 November 2018, Kuksal sent an email to Melissa Passarelli (**Passarelli**),[240] copied to Kennedy, with the subject heading 'Documents requested';

(c) on 15 November 2018, Kuksal sent an email to Kennedy, with the subject heading 'Documents requested'. Kennedy responded to Kuksal on the same date;

(d) on 10 January 2019, Kuksal sent an email to Kennedy, with the subject heading 'Regarding recent delays in delivery of work'; and[241]

(e) on 18 January 2019, Kuksal sent three emails to Catherine Ballantyne (**Ballantyne**), and another to Passarelli, copied to Kennedy, with the subject heading 'Further to conversation'. Ballantyne responded on the same date.

257 Madgwicks acted for the Companies between March 2018 and April 2019. Between March 2018 and June 2019, Madgwicks sent the Costs Disclosure Documents via email to the Efektiv Email Address. Kuksal used the Efektiv Email Address over the period of time that the Costs Disclosure Documents were sent to it. It defies reasonable belief to consider that while the emails sent by Madgwicks comprising the email chains referred to above were clearly received by Kuksal and responded to by him, according to Efektiv and AGV, the many other emails sent by Madgwicks (and some by the very same individuals and email

---

correspond with them in relation to matters that he had instructed them for while he was still a director. It is unnecessary to resolve this.

238 T116:27, 117:1 (18 December 2019).

239 Walker is a solicitor at Madgwicks.

240 Passarelli is a solicitor at Madgwicks.

241 Ballantyne is a solicitor at Madgwicks.

addresses) attaching the Costs Disclosure Documents were not received by Kuksal.[242] Rather, the most probable conclusion is, and I find, that the emails attaching the Costs Disclosure Documents were received by Kuksal and that his denial of receipt is false.[243]

258 Secondly, there is an issue in the evidence as to when and how the tax invoices were received by Efektiv and AGV in the first instance. That is, when and how Efektiv and AGV received the invoices the first time. It is necessary to discuss this issue at some length.

259 Kuksal gave evidence that Efektiv and AGV did not receive the Costs Disclosure Documents by email at or around the time they had purportedly been sent by Madgwicks to the Efektiv Email Address. Consequently, Efektiv and AGV had to request those documents from Madgwicks (via McNamara) in August 2019. Kuksal said that the Companies were only in the position to file the summons for taxation in the Costs Court once those documents had been received.

260 Kuksal maintained on various occasions in his evidence that they did *not* have the documents until they were provided to Efektiv and AGV by McNamara. They had to:[244]

> …specifically request Ms McNamara around August 2019 to give us all the tax invoices and costs disclosure agreements. Ms McNamara initially refused to give them, ah, because she said that we should seek them through the costs court, at which point we wrote to her and said that she was – or the firm was in breach of their, ah, obligations under the uniform law in not giving us all the costs – costs disclosure agreements and, ah – and invoices. And then she wrote back to us and said the information was rather voluminous and that someone would need to compile them; there would be somebody doing that. And ultimately after some back and forward, ah, we collected, ah, I think at least a couple of very large boxes from Madgwicks' offices. And that's when we got all the invoices and costs disclosure agreements that Madgwicks had purportedly issued.

261 Kuksal later sought to expand upon and clarify his answer:[245]

> Naveen [Raghavan] advised me that there were difficulties in progressing with the

242 As noted, McNamara gave evidence that none of the emails 'bounced back' as 'undeliverable'. No submissions were directed to whether the *Electronic Transactions (Victoria) Act 2000* (Vic) (see e.g. s 13A(2) – Time of receipt) would provide any assistance in resolving the issues.

243 Strictly speaking, it is unnecessary to say anything further on this ground. Nonetheless other issues arose in the evidence which are important and should be addressed.

244 T113-4 (18 December 2019). Xu was cross-examined on this topic. She recalled that Madgwicks had provided the Companies with boxes or volumes of documents on several occasions and that she had gone to Madgwicks' offices to collect them on various occasion. Her evidence was vague insofar as she could not recall particular occasions this had occurred. She appeared to recall this particular occasion in August 2019, and noted that she did not open the box of documents and instead left them for Raghavan. T160-1 (18 December 2019).

245 T121:16, 122:2 (18 December 2019).

> first mention because he was trying to get the costs court to permit him to file the thing without having each and every tax invoice on the basis of some approximate figures but (a) that was not the usual practice and he was experiencing some impediments to that. I think they were being a little bit accommodating given the large volume of work but they had made it very clear that at least by the first hearing of the matter he would need to have all the costs disclosure and tax invoices. Therefore, we collected the material from Madgwicks before the first hearing. I am not completely, ah clear, on what material Naveen had submitted to initiate the costs court thing but I do know that all the material was required by the time of the first hearing because if you do not have the invoices you wish to dispute, what are you disputing.

262 He again stated, emphatically, and unequivocally, that the documents had not been received prior to their receipt following the request made to McNamara:[246]

> We did not submit the details of the invoice [to the costs court] until we got them from Ms McNamara. *I can state that unequivocally.* (emphasis added)

263 Raghavan deposed on affidavit affirmed on 25 September 2019 that he 'further requested all documentation relating to financial accounts between the parties, including all cost disclosure agreements, invoices, payment receipts for monies received in trust for and on behalf of all relative entities.' He said, that after an 'initial refusal, Madgwicks agreed to provide this information'. Raghavan made that request to McNamara on 20 August 2019.[247]

264 On 21 August 2019, Madgwicks made available copies of the Costs Disclosure Documents.[248] This, again and according to Kuksal's evidence, was the *first time* Efektiv and AGV received any or all of the Costs Disclosure Documents.

265 For reasons given below, this evidence is patently false.

266 The summons for taxation was filed on 13 August 2019 at 2:27pm, as evidenced by the seal of the Supreme Court present on the front page of the summons for taxation.[249] The summons for taxation further states that Madgwicks was summoned to attend, on the hearing of an application by the Companies 'for the costs which are payable to which are claimed by you against the Applicants *in accordance with the attached bill of costs served herewith*'.[250]

---

246 T129:4-6 (18 December 2019).

247 That request took the form of a threat. See paragraphs [518] to [526].

248 T118:6-11 (18 December 2019).

249 T118:17-22 (18 December 2019).

250 McNamara gave evidence about the documents referred to above which 'may or may not have been filed with the defendant's summons for taxation in the Costs Court'. She was presented with the summons for taxation 'and a bundle of invoices' also filed on 13 August 2019, which bore the seal of the Supreme Court. She said, as supported by the seal of the Supreme Court, that all of those documents were obtained from RedCrest, and in

267 On the same date, and at the same time, *the Companies also filed a bundle of invoices in the Costs Court Proceeding*. The bundle of invoices also bears the seal of the Supreme Court evidencing that they were filed on 13 August 2019 at 2:27pm. These are invoices in electronic copy which are the same as those which had been sent by email to the Evektiv Email Address. Each invoice bore that email address on its face.

268 To reiterate, Kuksal gave emphatic and unequivocal evidence that the documents were not received prior to their receipt by Efektiv and AGV on 21 August 2019 following the request made to Madgwicks:[251]

> We did not submit the details of the invoice [to the costs court] until we got them from Ms McNamara. *I can state that unequivocally.* (emphasis added)

269 However, Efektiv and AGV had the invoices before this date, and at the very latest, by 13 August 2019, given that on 13 August 2019 the Companies had filed the invoices in the Costs Court Proceeding. I therefore cannot accept Kuksal's 'unequivocal' evidence. Efektiv and AGV must have received the invoice from a source other than McNamara, prior to 21 August 2019. Kuksal's evidence is false. I refuse to believe that Kuksal was mistaken.[252]

270 In their closing submissions, the Companies disavowed any suggestion that Kuksal had been dishonest in his evidence.[253] Raghavan suggested that there was a further alternative manner, which had not yet been raised in evidence, by which the invoices had apparently been received by the Companies. This alternative explanation meant that the Companies had the invoices prior to 13 August 2019, but it would permit them to maintain that they had not received them by email sent by Madgwicks to the Efektiv Email Address.

---

particular, the electronic file maintained for the Costs Court Proceeding. (T169:14-7, T171:12-7 (19 December 2019)).

251 T129:4-6 (18 December 2019).

252 He had control over all matters relevant to the Companies and in particular, the dispute with Madgwicks. He did not express any doubt or uncertainty in his answers before the Court. To the contrary, he could not have been more emphatic in his evidence that the Companies did not have the documents.

253 The Companies disavowed a suggestion that Kuksal 'was acting dishonestly in evidence in stating that he did not receive the costs disclosure agreements and tax invoices at the relevant times'. (T297:13-298:5 (20 December 2019)). The Companies highlighted that the fact tax invoices were received does not necessarily mean that the costs disclosure agreements were received. (T298:6-11 (20 December 2019)). However, if the invoices were received via the email address to which they were sent, it follows that there is no reason to suspect that the other documents also sent to that address were not received. I refuse to draw an inference that only the invoices, but not the other documents, were received.

271 Raghavan suggested that Kennedy had previously made the invoices available for delivery to Efektiv and AGV. Raghavan gave evidence or submitted as follows:[254]

> Now, it conveniently overlooks … the evidence put forth by the defendants in the form of the affidavits of Mr Kuksal and Mr Youl, which exhibit email exchanges between Madgwicks and Mr Kuksal …
>
> On the subject of resolving the dispute regarding these alleged invoices, these documents clearly evince that as part of that resolution process, Mr Kennedy had organised for the delivery of tax invoices that had repeatedly been requested by Mr Kuksal, so that members of his staff that he had assigned could get across this material, and make some effort at resolving the dispute between the parties; therefore, Mr Kennedy organised for the delivery of tax invoices to Mr Kuksal's staff, and I believe – yes, so these were delivered well after, you know, the fact. This is all evinced in the various affidavits themselves.
>
> And so Mr Kennedy arranged, both by physical delivery and by organising electronic access to an online cloud storage software; however, the same evidence adduced in the affidavits makes it clear that Mr Kuksal was not personally involved in the process of reviewing the tax invoices, but rather that responsibility had been delegated to a member of his staff.
>
> It is important to note that this was significantly after the fact of the work being undertaken, and the provision of documents by Madgwicks was limited only to tax invoices and not cost disclosure agreements.
>
> …
>
> Just two points, quickly. I realise I didn't complete what I was saying about the allegations about the source of the tax invoices that were used for the Cost Court summons for taxation. Those tax invoices were obtained from Mr Kennedy, as I submitted earlier, when Mr Kennedy delivered a bunch of tax invoices, and only tax invoices. No disclosure agreements.
>
> I recollect now, if you look at the filing I made for the summons of taxation, I included the invoices. At that time I – you know, I think I was kind of confused at what I was looking at, but looking back at it now, I realise that only tax invoices were uploaded. I did not see a single costs disclosure agreement that made up part of the filing, and, well, that's – yes, so just to double-confirm again, these were invoices that were not sent to that director@efektiv.com.au, and I apologise for not being more clear on this, but I was not present at this yesterday, so I'm – I don't have firsthand knowledge.
>
> …
>
> Mr Kuksal requested tax invoices from Mr Kennedy, because there was a dispute, you know. Mr Kuksal had made previous requests for the tax invoices to be provided, Mr Kennedy finally agreed to provide – and I should clarify, not provide it to him directly to that same email address, for example, but was made available by physical delivery and cloud storage not to Mr Kuksal directly, but to members of his staff who he had assigned to taking care of these invoices, insofar as it meant just reviewing them and making sure things are okay. … That was before the summons for taxation was filed, but well after whatever dates were on the invoices. Well after.

[254] T298:17-299:16, 300:12-30, 301:13-28 (20 December 2019).

272 Accordingly, Efektiv and AGV had revised their position and submitted that the tax invoices, but not the Costs Disclosure Agreements had been made available by Kennedy for physical delivery and via a cloud storage system (**the Dropbox**) to the Companies at some time prior to the filing of the summons for taxation on 13 August 2019, but after the dates of the respective invoices or the dates Madgwicks contends they had been sent by email.

273 The Companies did not direct me to any affidavits which refer to the request made to Kennedy for the documents. In fact the affidavits do not refer to it. David Youl (**Youl**), an employee or contractor of the Companies, affirmed two affidavits in these proceedings, and neither of them refer to the Dropbox or exhibit any emails. Kuksal affirmed four affidavits dated 25 September 2019, 9 October 2019, 3 December 2019 and 16 December 2019. The correspondence with Kennedy and the Dropbox is not referred to by him in any of them. To the contrary, Kuksal's affidavit of 16 December 2019 refers to the request for documents made to McNamara, but not to any request made to Kennedy.[255]

274 Nonetheless, I have managed to identify a reference to the Dropbox in two emails exhibited to Kuksal's affidavit of 9 October 2019.

275 On 13 November 2018, Kuksal sent an email to Kennedy. It requests, amongst other things, the invoices:

> …in the interim, I need access to the following documents and electronic articles immediately (via upload to the Box folders to which you have just been given access):
>
> *(a) All itemised bills*
>
> (b) All Madgwicks case notes related to my matters
>
> (c) All documents as well as video and audio files related to my cases provided by me, the other side, the Police or any other entity, including evidence, supporting documents, charge-sheets etc.
>
> (d) All emails exchanged with any party on my matters. (emphasis added)

276 On 15 November 2018, Kennedy responded to Kuksal. He stated 'I advise that we have begun uploading all itemized bills to date'.

---

255 Affidavit of Kuksal affirmed 16 December 2019 at [9]-[11].

277 This, however, raises more questions than it answers.[256]

278 I am at a loss as to why this did not arise during Kuksal's cross-examination. Kuksal was a director at the time. He was the individual who created (or directed the creation of) the Dropbox, requested Kennedy to upload the invoices to it, received confirmation from him that they were being uploaded, and I infer would have reviewed the documents which Madgwicks had uploaded to it. Kuksal did not raise this matter in his affidavit or oral evidence. Instead, he stated 'unequivocally' that the documents were only received after delivery had been arranged by McNamara, on 21 August 2019. He said 'I deny receiving tax invoices and cost disclosure agreements, period.' I reject that Kuksal simply did not remember the request made to Kennedy or the apparent existence of the Dropbox, or that Efektiv and AGV or any of their staff might have received them from this source instead of when they were provided by McNamara. Kuksal's evidence is patently false. I infer that he has attempted to hide the existence of the Dropbox. I infer that his evidence was designed to engineer a scenario, whereby, the invoices were only received after the AGV and Efektiv Demands had been served and the Originating Processes had been filed, on 21 August 2019, when they were provided by McNamara. That evidently is not the case. His evidence will not be relied upon and is rejected.

279 That begs the question of *why* Kuksal would not have referred to it in his evidence. The answer is, in my opinion, self-evident. It only makes their position more dire. Hiding it was a forensic yet improper decision. Had the Companies raised it, they would have admitted to possessing itemised bills leading up until November 2018, as at November 2018. Madgwicks

---

[256] There are some discrepancies between these documents and Raghavan's submissions or evidence. Raghavan said: 'Mr Kuksal requested tax invoices from Mr Kennedy, because there was a dispute, you know. Mr Kuksal had made previous requests for the tax invoices to be provided, Mr Kennedy finally agreed to provide – and I should clarify, not provide it to him directly to that same email address, for example, but was made available by physical delivery and cloud storage not to Mr Kuksal directly, but to members of his staff who he had assigned to taking care of these invoices, insofar as it meant just reviewing them and making sure things are okay.' (T301:13-28 (20 December 2019)). There is no evidence of any previous requests. There are no references to the invoices being made available to officers other than Kuksal. The timing is also off, insofar as Raghavan seemed to present it. In the submission, it was coloured so as to suggest that it occurred after Madgwicks ceased acting for the Companies. Raghavan said 'this [the provision of the invoices] was significantly after the fact of the work undertaken' (T298-99 (20 December 2019)) and that it occurred as part of a dispute resolution process. However, as at November 2018, Madgwicks would go on to act for the Companies for a further six months. There were disputes throughout the relationship between the parties, but the invoices were not discussed again in those emails or the evidence generally at any other point in time. These matters required clarification but will be put to one side.

continued to act, and only ceased acting on 9 April 2019. Accordingly, the Companies would have had the itemised bills from November 2018, demonstrating the extent of the liability (and in particular which of the Companies was liable for fees – which they now dispute) for a period of six months prior to Madgwicks ceasing to act. Over that period, the Companies continued to instruct Madgwicks. There is *no* reference in the evidence to an objection having been raised to the invoices following their receipt via the Dropbox. Indeed, the quantum of fees and the particular notations by reference to those invoices, is not spoken about again. That is sufficient for me to infer that the dispute as to Madgwicks' fees, in its totality, has been engineered at the eleventh hour. The first time any issue was taken as to the notations in the invoices was after these winding up applications had been commenced.

280 The substantive disputes between Madgwicks and the Companies arose from around January 2019. Reading the correspondence as a whole, it appears that the Companies were aggrieved by Madgwicks (apparent and unarticulated) acts of negligence, which I have not found they engaged in, and because of this the Companies felt as though they no longer needed to pay Madgwicks for the services they had rendered. Everything else raised by the Companies is simply an ex-post facto justification to preserve and bolster their position that they did not need to pay the debts.

281 This leaves the Court with two possibilities as to how Efektiv and AGV had for the first time obtained the invoices. The first is via the Efektiv Email Address. The second is the Dropbox. The Companies did not adduce *any* evidence in support of the second possibility. There is no evidence as to *which* documents were uploaded to the Dropbox, how or by whom it was maintained or who had access to it. These two emails are the *only* references to the Dropbox in the evidence. Further, Kennedy was not cross-examined on the topic, and in fairness the Companies ought to have done so.[257] He ought to have had an opportunity to give evidence on what precisely was provided to the Companies via the Dropbox and in particular, whether the invoices filed by the Companies in the Costs Court Proceeding were the same as those uploaded to the Dropbox. Given that this belated explanation has arisen by way of ambush, the Companies cannot therefore rely upon it.[258] Even so, I am satisfied that it is more

[257] *Browne v Dunn* (1893) 6 R 67.

probable that the Companies obtained the invoices, for the first time, via the Efektiv Email Address.[259]

282 Having rejected Kuksal's evidence, I am satisfied that it is more probable than not that Madgwicks made adequate costs disclosure as required by s 174 of the Uniform Law.

283 The contemporaneous documents and evidence of McNamara confirms that the Costs Disclosure Documents were sent to the Efektiv Email Address. The invoices bear that email address on their face. Madgwicks adduced evidence in the form of the covering emails, clearly addressed and sent to that email address.

284 The invoices were filed by the Companies with the summons for taxation in the Costs Court on 13 August 2019. They were obtained when they were received by Kuksal via the Efektiv Email Address. Kuksal used that email address over the period they had been sent and no emails bounced back to Madgwicks. There is no reason to suspect that the other documents, being the Costs Disclosure Agreements, also sent to that email address, were not received. I refuse to draw an inference that the documents, other than the invoices, were not received.

285 Having reviewed the Costs Disclosure Agreements, I am satisfied that they disclose the basis upon which legal costs would be calculated in the relevant matter, an estimate of the total legal costs, the scope of the matter, exclusions from the fee estimate, the names of the supervising partner and responsible lawyers, the applicable fee rates, and where relevant, information disclosing any changes to the legal costs that would be payable by the client.[260] It has not been contended that the documents provide inadequate disclosure pertaining to Madgwicks' costs. Efektiv and AGV have run their case on the basis of non-disclosure (by virtue of non-receipt) as distinct from inadequate disclosure (by reference to the form of or

---

258 Again I emphasise that the Dropbox is not discussed in *any* of the affidavits. The first time it arose was the Companies' closing submissions.

259 Invoices filed by the Companies in the Costs Court Proceeding are dated as recently as 17 January 2019. Unless invoices were uploaded continuously, and after November 2018 to the Dropbox, then the existence of the Dropbox still does not explain how the Companies had them. Again, no evidence was given, and Kennedy was not cross-examined. In the absence of evidence, I infer that no further invoices were uploaded to the Dropbox, meaning that to have received the invoices which post-date November 2018, the Companies *must* have received them via the Efektiv Email Address.

260 For example, on 18 June 2018, Passarelli wrote to Kuksal to advise him that circumstances had arisen which varied the scope of his matter and required Madgwicks to revise their estimate of total legal costs. Madgwicks attached a Revised Costs Disclosure Agreement.

information conveyed by the Costs Disclosure Agreements).

286 While none of the Costs Disclosure Agreements were signed by Efektiv or AGV (or Kuksal), s 180 of the Uniform Law provides that a costs agreement may be 'accepted in writing or…by other conduct'. Each Costs Disclosure Agreement was accompanied by a covering email sent to Kuksal, which provided:

> Madgwicks sends its Costs Disclosure Agreements electronically and signed by electronic signature. Please let me know if you do not consent to receiving your costs documents in this way and I will arrange to send you a hard copy. If we do not hear from you, you are taken to have consented to receiving your costs documents electronically with electronic signature.
>
> You may accept the Costs Disclosure Agreement by writing to us indicating your acceptance, by returning a signed copy of the agreement…*or by continuing to give us instructions in this matter.* (emphasis added)

287 Paragraph 3.6(b) of each Disclosure Statement provided:

> You may accept the Costs Agreement by signing this Agreement via DocuSign, by writing to us indicating your acceptance, by returning a signed copy of this Agreement (including the Reference Schedule and this Disclosure Statement) to us, by orally telling us that you accept it *or by continuing to instruct us to act in this matter.* (emphasis added)

288 Paragraph 19 of each Costs Agreement provides:

> **19 Electronic Signature and Delivery**
>
> 19.1 Madgwicks' standard practice is to send its Costs Disclosure Agreements to clients in electronic format and signed electronically by the Supervising Partner.
>
> 19.2 Unless and until you inform us otherwise, if you accept this Costs Disclosure Agreement, you consent to:
>
> (a) having received this Costs Disclosure Agreement; and
>
> (b) receiving any Revised Costs Disclosure Agreement
>
> in electronic form and signed electronically.

289 Kuksal received the Disclosure Statements and Costs Agreements by email sent to the Efektiv Email Address. He stood by and did nothing by way of objection. He continued to instruct Madgwicks. He is taken by his conduct to have accepted the agreements.

290 I am satisfied that Madgwicks has not breached its disclosure obligations. In any event, I will

consider the position on the assumption that there was non-disclosure or inadequate disclosure.

291 Section 174(1) of the Uniform Law deals with the main disclosure requirement imposed on a legal practice to their clients. It states:

> **174 Disclosure obligations of law practice regarding clients**
>
> (1) Main disclosure requirement
>
> A law practice—
>
> (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
>
> (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client—
>
> together with the information referred to in subsection (2).

292 Section 178(1) of the Uniform Law sets out the consequences which flow from non-compliance with disclosure obligations:

> **178 Non-compliance with disclosure obligations**
>
> (1) If a law practice contravenes the disclosure obligations of this Part—
>
> (a) the costs agreement concerned (if any) is void; and
>
> (b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; and
>
> (c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation;

293 It must be remembered that the granting of leave under s 459S does not result in the setting aside of the creditor's statutory demand and nor does it displace the presumption of insolvency which has otherwise arisen.[261] In *Radiancy (Sales) Pty Limited v Bimat Pty*

[261] *Lanepoint Enterprises Pty Ltd (Recs & Mgrs Appt'd) v Australian Securities and Investments Commission*

Limited, White J observed:[262]

> The effect of failing to comply with the statutory demand is to create a presumption of insolvency (s 459C(2)(a)). However, the grant of leave under s 459S does not result in the statutory demand being set aside. Nor does it allow an application to be made out of time for the setting aside of the demand. The presumption of insolvency is not displaced by the grant of leave under s 459S (*Braams Group Pty Ltd v Miric* (2002) 171 FLR 449 at 455-456 [36]; (2002) 44 ACSR 124 at 130 [36]).

294 Where a company obtains leave to raise a dispute relating to a debt for legal fees, in circumstances where s 178 of the Uniform Law is engaged, the provisions of the Uniform Law may mandate that a stay be imposed or may revoke the firm's standing as a creditor. However, where this is not the case, the presumption of insolvency continues and there is no assumption in favour of a dismissal or stay of proceedings simply because company disputes the existence or amount of a debt.[263]

295 Section 178(1)(a) provides that the agreement is made void. That may well extinguish the standing of Madgwicks as a creditor of a debt which is presently due and payable. However, Madgwicks would remain a contingent creditor with standing, subject to obtaining *nunc pro tunc* leave under s 459P(2)(a), because while the costs agreement no longer subsists, Madgwicks would have a claim either for *quantum meruit* with respect to services rendered or for any amount payable following an assessment in the Costs Court for the amount that the Court deems Madgwicks to be able to charge for fair and reasonable legal costs.[264] Given the quantum presently said to be owing (by Efektiv - $69,731.57, and AGV - $203,104.88), it is inherently unlikely that any damages award or assessment would be for an amount below the statutory threshold of $2,000. I would grant Madgwicks leave to proceed as a contingent creditor if necessary.[265]

296 Similarly, s 178(1)(b) provides that the client 'payer is not required to pay the legal costs until they have been assessed' by the Costs Court. Madgwicks may not be a creditor of a due and payable debt, but a contingent creditor depending on the outcome of the assessment. The

---

[2010] FCAFC 49 [49]. Of course, leave has not been granted. I have considered the position on the assumption that leave has been granted.

262 *Radiancy (Sales)* (2007) 25 ACLC 1216, 1220 [21] (White J).

263 *Lanepoint* (2011) 244 CLR 1, 14 [30] (Gummow, Heydon, Crennan, Kiefel and Bell JJ).

264 *Legal Profession Uniform Law 2014* (Vic) s 172.

265 In particular, because there is no evidence of solvency.

position is the same as it is under s 178(1)(a). I would grant Madgwicks leave to proceed if necessary.

297 Section 178(1)(c) provides that 'the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs'. If engaged it would appear to require me to stay these applications, by operation of the law, as distinct from a stay arising from the exercise of my discretion. This provision calls into question whether a winding up application can properly be characterised a 'proceeding for the recovery of legal costs'. Having reviewed the authorities, I am of the view that it cannot, with the consequence that no stay is imposed by the Uniform Law.

298 Efektiv and AGV rely on the decisions of Heerey J in *Jarena Pty Ltd v Sholl Nicholson Pty Ltd* (**Jarena**),[266] and Santow J in *Callite Pty Ltd v Adams* (**Callite**).[267] Those decisions do not assist them.

299 *Jarena* concerned an application under s 459G to set aside a statutory demand issued by a firm of solicitors. The decision predates the enactment of the Uniform Law. The legislation under consideration by Heerey J was s 64(4) of the *Supreme Court Act 1986* (Vic) which provided at the relevant time:[268]

> Section 61(4) of the Act provides, in effect, that even where no request is made for a bill in taxable form within one month after service of the bill, *any proceeding by a solicitor to recover costs may on the application of the client be stayed by the court* until one month after the solicitor has served a bill of costs drawn in taxable form. (emphasis added).

300 His Honour did not consider that a statutory demand could properly be construed as a 'proceeding by a solicitor to recover costs', but nonetheless, the statutory demand was set aside on 'public interest' grounds, pursuant to s 459J(1)(b) of the Corporations Law which then (and now) provides the Court with a wide discretion to set aside a statutory demand for 'some other reason':[269]

> Now it is true that there is no "proceeding to recover the costs" in this court brought by the solicitor within the meaning of s 61(4). The only proceeding in this court is

---

266 (1996) 136 ALR 427 (**Jarena**).

267 [2001] NSWSC 52 (**Callite**).

268 *Jarena* (1996) 136 ALR 427, 427 (Heerey J).

269 Ibid 429.

> one brought by the applicants to set aside the demands. Nevertheless it seems to me that I can and should, for the purpose of exercising the discretion conferred by s 459J(1)(b) of the Law, take into account the policy behind s 61 of the *Supreme Court Act*, which seems to me that even if a client does not avail himself or herself of the right to request a bill, nevertheless the statute provides a second line of defence should the solicitor take any proceedings. That provision was obviously enacted by the Victorian Parliament with a view to providing protection for clients against solicitors. I think it would be wrong if that protection could be effectively bypassed by utilising winding up proceedings. I will therefore set aside the demands.

301 *Callite* was also an application under s 459G to set aside a statutory demand issued by a firm of solicitors for work purportedly done for the applicant company. There was no costs agreement between the firm and company, and the firm had not complied with their disclosure obligations. Santow J followed the reasoning of *Jarena* and set aside the statutory demand:[270]

> There, Heerey J concluded that, though a statutory demand is not of itself "a proceeding to recover the costs", nonetheless as a matter of public policy the corresponding provision of the Victorian legislation should not be capable of being "effectively bypassed by utilising winding-up proceedings" (at 427).

302 This question was also considered by Brereton J in *In the Matter of Bitar Pty Ltd* (**Bitar**).[271] His Honour was dealing with a winding up application which relied upon a statutory demand issued by an incorporated legal practice on a former client. The client, by interlocutory process, sought orders under s 355(b) of the *Legal Profession Act 2004* (being a predecessor to s 198(7) of the Uniform Law).[272] His Honour explained why he was not satisfied that a winding up application could be characterised as a proceeding for the 'recovery of legal costs'. His Honour said:[273]

> If the plaintiff were to succeed in the present proceedings, it would not obtain a judgment or order for payment of the legal costs it claims; it would obtain only an order that the defendant be wound up and a liquidator appointed. Courts have frequently emphasised that proceedings of this kind are not debt recovery proceedings, but proceedings for the winding up of insolvent companies. It is true that the plaintiff's standing as a creditor may depend on the existence of a debt in respect of legal costs, but that does not mean that the proceedings are proceedings for recovery of those costs.
>
> It is also true that the defendant might, as a matter of discretion, avoid a winding up order by paying the amount of the debt asserted by the plaintiff. *But fundamentally,*

---

270 *Callite* [2001] NSWSC 52 [12] (Santow J).

271 [2015] NSWSC 2158 (**Bitar**).

272 That section provides: 'If an application for a costs assessment is made in accordance with this Division …the law practice must not commence any *proceedings to recover the legal costs* until the costs assessment has been completed.'

273 *Bitar* [2015] NSWSC 2158 [7]-[8] (Brereton J).

> *the test must be what relief could be given in the proceedings. On no view would the relief given in the proceedings be a judgment for or in respect of the legal costs in question. In my view, these are not proceedings for recovery of legal costs within Legal Profession Act, s 355, and accordingly the basis upon which a stay is sought is not established.* (emphasis added).

303 In an analogous situation, in *Re Kassab; Ex parte Deputy Federal Commissioner of Taxation (***Re Kassab**), the Full Court of the Federal Court (Black CJ, Sweeney and Sheppard JJ) held that a bankruptcy notice did 'not fall within the words of s 214 of the *Income Tax Assessment Act 1936*, "any process in proceedings against a taxpayer for recovery of income tax"'.[274] Their Honours said:[275]

> In place of those rights, a petitioning creditor obtains the right to prove in the administration of the estate of the bankrupt. The fruits of any such proof are dividends pro rata with other creditors, they are not recovery of income tax.

304 *Jarena*, *Callite* and *Bitar* each support the proposition that issuing a statutory demand, or filing a winding up application is not characterised as a step in a proceeding by a solicitor for the recovery of legal costs. There is no reason to depart from those decisions, and I agree and endorse the reasoning of Brereton J in *Bitar*.[276] An incident of a winding up application made by a firm of solicitors is that the former client may well pay the debt, but 'on no view would the relief given in the proceedings be a judgment for or in respect of the legal costs'.[277] The remedy is for the collective benefit of a company's creditors – a winding up order. All the petitioning creditor – the firm – gains is the right to submit a proof of debt in the liquidation of the debtor and receive a pro rata dividend. That right is also provided to all other creditors of the debtor.

305 Accordingly, s 178(1)(c) of the Uniform Law does not mandate that there must be a stay of the winding up applications.

306 Further, in *Jarena* and *Callite*, the statutory demands were set aside on 'public interest grounds'. The same cannot occur here. Those decisions concerned applications under s 459G. The statutory demands were set aside under s 459J(1)(b) and the broad discretion conferred on the Court to set aside the statutory demand, on whatever reason it deems fit. There is no

---

274 (1994) 55 FCR 305, 310 (Black CJ, Sweeney and Sheppard JJ).
275 Ibid 313.
276 [2015] NSWSC 2158.
277 Ibid [7]-[8] (Brereton J).

equivalent provision when it comes to winding up applications. Further, as they were applications to set aside statutory demands, the presumption of insolvency had not yet been invoked.

307 Applying the reasoning of *Jarena* and *Callite* here seeks to adjourn, dismiss or stay the winding up applications as being contrary to public policy and in the exercise of the Court's discretion, or in other words, as an abuse of process. In light of decision in *Lanepoint*,[278] and for the reasons recited earlier in these reasons, that cannot be done.[279] Here and unlike those decisions, the presumption of insolvency has been invoked and there is no evidence of solvency to displace it. There is accordingly no reason to adjourn, stay or dismiss the winding up application as a matter of discretion or public policy.[280]

308 This ground fails. Leave will not be granted under s 459S of the Act. Madgwicks did not breach their disclosure obligations as the Costs Disclosure Documents were received by Efektiv and AGV at the relevant times. Even if they had not, as there is no evidence of solvency, I would not stay or dismiss the applications.

D4 Taxation of Costs

Submissions

309 Efektiv and AGV contended that until Madgwicks' bills of cost have been assessed by the Costs Court, the debts the subject of the invoices are not due and payable. It was said that this ought to result in a stay of this proceeding.

310 Madgwicks submitted that the Costs Court Proceeding does not affect Madgwicks standing as a creditor. That matter was commenced on 13 August 2019, long after this proceeding was commenced. At that time the debt was due and payable.

311 In any event, Madgwicks contends that no matter the outcome of the Costs Court Proceeding, it could not seriously be contended that the result of any assessment could vitiate Madgwicks' standing as a creditor. Given that the statutory minimum for winding up purposes is a mere

---

278 (2011) 244 CLR 1.
279 See paragraphs [83] to [90] and related discussion throughout this Judgment.
280 See *Bitar* [2015] NSWSC 2158 [10]-[13] (Brereton J).

$2,000, a reduction of the unpaid costs (i.e. the debts) to such a low amount would be extraordinary. As Counsel submitted:[281]

> Insofar as the defendants may be expecting to achieve a Tattslotto result via the Costs Court Proceeding, that is in my submission, just unbelievable and unimaginable. And no matter what occurs, it is most improbable that any amount of the debt would be reduced to an amount below $2,000 for each company, if the matter ever proceeds in the Costs Court.

Analysis

312 Section 198(7) of the Uniform Law sets out the consequences which flow from a client applying for a costs assessment:

> **198 Applications for costs assessment**
>
> (7) If an application for a costs assessment is made in accordance with this Division—
>
> …
>
> (b) the law practice must not commence any proceedings to recover the legal costs until the costs assessment has been completed.

313 This section was considered by Brereton J in *Bitar*, where his Honour said:[282]

> The new Uniform Law prohibits commencement, but not maintenance, of such proceedings in those circumstances. Apparently, the intent of the provision in the new law is to prohibit commencement of recovery proceedings if proceedings for costs assessment had already been commenced but not to prohibit their maintenance if the recovery proceedings were commenced before application was made for the costs assessment.

314 The summons for taxation was filed on 13 August 2019, approximately one month *after* the winding up applications had been commenced by Madgwicks on 10 July 2019. I intend to follow Brereton J, and am content to hold that s 198(7)(b) does not prohibit the 'maintenance' of a proceeding which was commenced prior to the commencement of a costs assessment. Section 198(7)(b) does not therefore mandate that a stay of the winding up application be imposed. Further, and in any event, a winding up application is not a proceeding for the recovery of legal costs. Section 198(7)(b) has no application in these circumstances.

315 The assessment also does not provide a discretionary reason to adjourn, stay or dismiss the

---

281 T225 (19 December 2019).

282 *Bitar* [2015] NSWSC 2158 [5], [7]-[8] (Brereton J).

winding up applications. In addition, there is no evidence to displace the presumption of insolvency.

316 At all material times, Efektiv and AGV had the right to seek an assessment in the Costs Court or otherwise commence a proceeding against Madgwicks in relation to the fees or their contended negligence. Efektiv and AGV did not take any step or action to establish a genuine dispute about the debt until well after service of the Efektiv and AGV Demands and Originating Processes seeking orders under s 459A of the Act. Other than reciting the possibility of a generic costs assessment, Efektiv and AGV have not articulated in detail the scope or ambit of a genuine dispute, or of any offsetting claim (save for its vague and incomprehensible allegations of negligent conduct for which no claims have been brought).

317 Further, Efektiv and AGV were, at the relevant time, aware of their right to seek an assessment from the Costs Court.[283] They did not avail themselves of that right. No reason has been given for the delay, save for the contended non-receipt of the invoices which precluded the companies from making the application. I have rejected that explanation. Indeed, on their 'revised' position, they had invoices leading up to at least November 2018 at that time.

318 Given the circumstances surrounding the belated commencement of the Costs Court proceeding, referred to above, I am satisfied and infer that the summons for taxation is 'a belated attempt to create a false scenario of genuine dispute well after service of the plaintiff's statutory demands.' The commencement of the Costs Court Proceeding can be characterised as nothing short of a strategic or tactical manoeuvre by Efektiv and AGV. I would not in those circumstances, exercise my discretion (even if I could in the absence of evidence of solvency, in light of *Lanepoint*),[284] to adjourn, stay or dismiss the winding up applications. This ground, therefore, fails. Leave has, in any event, not been granted under s 459S of the Act.

---

283 See paragraphs [242] to [244].

284 (2011) 244 CLR 1.

D5 Contracting Party

319 Efektiv and AGV submit that they are not debtors to Madgwicks. Rather, they contend that there was only one retainer, to which Kornucopia and Madgwicks were the parties. Either Kuksal engaged them without the authority of Efektiv or AGV (but with the authority of Kornucopia), or alternatively, they were engaged by Efektiv and AGV as agents on behalf of Kornucopia who was the principal. As there was no Costs Agreement between Madgwicks and Efektiv or AGV, there is no liability for legal fees.

320 Kuksal deposed in his affidavit affirmed 16 December 2019 to having engaged Madgwicks, only though Kornucopia's sole account with Madgwicks. That was an oral agreement between Kuksal and Kennedy. Kuksal went on to depose:

> [15] With reference to the retainer arrangement described above, at the Efektiv Group's direction, payments were made by different entities in the group to discharge the payment obligations pursuant to the retained arrangement described earlier.
>
> [16] Madgwicks was aware of which entity made each payment, both because of the details specified for the transaction and the fact that I regularly sent remittance receipts (clearly displaying the name of the sender) to Madgwicks, usually Ms Johanna Jackson, following payment of funds to Madgwicks.
>
> [17] The payments received by Madgwicks were then discretionarily allocated to various invoices relevant to the single retainer, unilaterally by Madgwicks. Neither Kornucopia nor any of its related entities was ever asked to express any preference for which invoices were settled first using the funds remitted to Madgwicks.
>
> …
>
> [19] In the period commencing 10 September 2018 and ending 1 April 2019, Efektiv made eleven [11] separate payments to Madgwicks.
>
> [20] These direct payments were made by Efektiv out of its bank account and transferred to the Trust Account of Madgwicks.
>
> [21] These sum total of the aforementioned payments is $103,869.80, which far exceeds the alleged amount that Madgwicks claims was owed to it by Efektiv.
>
> [22] Now produced and shown to me, marked "SK-4", is a true copy of a financial report generated from Efektiv's Accounts detailing payments to Madgwicks for the period between 1 July 2018 and 4 April 2019. This report was generated on 15 December 2019.[285]

[285] I note that Efektiv is able to generate a financial report of payments made for this period. On 15 December 2019 and at a moment's notice, but it is unable to adduce *any* evidence of solvency, including reports of any management accounts generated from a program such as MYOB or Xero or similar.

321 Section 180 of the *Uniform Law* provides:

> (1) A costs agreement may be made--
>
> (a) between a client and a law practice retained by the client; or
>
> …
>
> (2) A costs agreement must be written or evidenced in writing.
>
> (3) A costs agreement may consist of a written offer that is accepted in writing or … by other conduct.

322 Section 184 states that subject to the other provisions contained within the Uniform Law, 'a costs agreement may be enforced in the same way as any other contract'. Extrinsic evidence may be admitted in exception to the parole evidence rule to identify the parties to a contract where the document does not make this clear.[286]

323 Each of the Costs Agreements name (in the relevant case) either Efektiv or AGV as the client (and therefore, the party to the relevant agreement). Kuksal gave evidence that the Costs Agreements were never received. As I have found, they were received by Kuksal via email. I reject the evidence of Kuksal. He was a most untruthful witness and I will not accept any of his evidence unless it is supported by other cogent documentary evidence. Efektiv and AGV therefore received the Costs Agreements which stated that those companies were the clients of Madgwicks and parties to the Costs Agreements. Having received the agreements, they should have raised the issue with Madgwicks. They did not.

324 While the Costs Agreements had not been signed by Kuksal (or any other representative of the Companies) and returned to Madgwicks, s 180 of the Uniform Law provides that a costs agreement may be accepted by 'other conduct'. That includes acceptance in writing by signing the agreement, by correspondence, by oral acceptance, or by providing instructions to the firm. Kuksal, having received those documents, accepted them by continuing to provide instructions to Madgwicks.[287]

325 I am satisfied that each of the Companies, through Kuksal, engaged Madgwicks to perform legal services and that Madgwicks is a creditor of each company. The evidence is compelling.

---

286 See e.g. *Giliberto v Kenny* (1983) 48 ALR 620.

287 See paragraphs [286] to [288].

The Costs Disclosure Agreements and tax invoices were sent to each company, instructions were provided by Kuksal and work done on behalf of each company. That is, in the relevant case, Efektiv or AGV. Each company is liable for the work done. Madgwicks recorded each company as a client and there is no indication or anything in writing to suggest that the responsibility to pay fees was that of Kornucopia exclusively. Indeed, payments were made from the accounts of Efektiv. Having found the invoices were received by the Companies, either by email when they were sent or via the Dropbox in November 2018, it beggars belief that invoices directed to Efektiv or AGV were not objected to.

326 Further, and for whatever it may be worth, I am satisfied that even if Kuksal did not have express authority to enter into these contracts on behalf of Efektiv and AGV (which I severely doubt), he was otherwise held out to have authority as an officer of the Companies, or in relation to these particular contracts. Kuksal had ultimate control over the affairs of each of the Companies (and to a relevant degree, its officers). He is the 'puppet master' of this operation.[288] At no time did he indicate that a direct contractual relationship would exist between only Madgwicks and Kornucopia.

327 This ground fails. In any event, it should have been raised earlier and leave will not be given under s 459S for reasons given above.

D6 Miscellaneous Oral Arrangements

328 There are two further matters of note. The Companies, in passing, raised two 'arrangements' relating to Madgwicks' fees.

329 First, it was said that Kennedy and Kuksal had an oral agreement that Kornucopia would be liable for only a flat-fee and no more. Kuksal deposed that 'Kornucopia had agreed to pay fixed, bi-monthly amounts to Madgwicks, at pre-arranged dates.'[289]

330 That 'arrangement' is thoroughly contradicted by the contemporaneous documents. It is clear that Kuksal would provide a fixed amount bi-monthly, and the initial intention was that any balance remaining would roll over to the next bi-monthly period. However, as time went on,

---

288 T228:24-8 (19 December 2019).

289 Affidavit of Kuksal affirmed 16 December 2019 at [6].

the fees incurred by Madgwicks far exceeded the fixed amount provided by the Kuksal. For example, on 20 August 2018 Kennedy sent an email to Kuksal:

> Shivesh
>
> Thank you for your recent payment of $5,000 on 16 August 2018.
>
> We have recently had a credit committee meeting where accounts informed me that the work we are doing on your matters is well over $20,000 per month. Please see attached a record of outstanding accounts showing an outstanding balance of $60,818.24. Accordingly, I am requesting to have the 2 monthly payment increased to $7,500 from the next payment on 31/8.
>
> Shivesh, kindly confirm that this amended payment plan is acceptable.
>
> Regards

331 Similarly, on 13 November 2018, Kennedy sent an email to Kuksal:

> Shivesh,
>
> Thank you for continuing to make your payments of $15,000 bimonthly. Please see attached a statement of your outstandings as at 9th November (and after the last $7,500 has been credited).
>
> It appears your work volume and requirements have increased significantly over the last months. As a result, I need to ask you to increase your monthly payments to $25,000 (i.e. 2 payments of $12,500 each). This will hopefully assist with catching up the outstanding accounts.
>
> Shivesh, if you wanted to retain the $15,000 per month schedule we would need a lump sum of say $60,000 to reduce the outstandings.
>
> Shivesh, can we please have a discussion around these issues.
>
> Regards

332 I am satisfied that the 'fixed-fee' arrangement is a recent invention. It is rejected.

333 Secondly, it was said (as far as I understand) that a third-party would pay the Companies' fees pursuant to something the Companies described as a 'factoring' arrangement. This was not explored in cross-examination with Kennedy. There is no evidence save for vague assertions contained within the affidavits. The submission was not articulated. It is rejected.[290]

D7 Abuse of Process

334 The submissions made in relation to abuse of process rely on the same grounds raised by the

---

290 See T308:7-23 (20 December 2019).

application brought under s 459S of the Act. It is unnecessary to repeat them.

335 For the reasons given above in Kornucopia and in relation to the decision of the High Court in *Lanepoint*, the grounds do not result in a stay or dismissal of the winding up applications in the absence of solvency. Likewise, each of the grounds analysed above is without merit.

336 Further, and insofar as it concerns the discretion, in *CGU Workers' Compensation (Victoria) Ltd v Carousel Bar Pty Ltd*,[291] the creditor's solicitors knew within the 21 day period after serving a statutory demand addressed to the registered office that the respondent did not know of the statutory demand because it was returned marked "Return to Sender" and "Left Address". Information noting a change of address was available in the debtor company's annual report. Gillard J referred to what his Honour observed to be a qualification in the effect of s 109X and 109Y of the AIA Act, which establish service by post by delivery in the ordinary course of post. His Honour posed the question: 'If the documents are returned within the statutory period having been delivered to the registered office address what is the effect of the return on the service which has been effected properly?'[292]

337 Gillard J identified that 'qualification' as follows:[293]

> The qualification is that unless it is established that the creditor has taken all reasonable steps to bring the demand to the attention of the company after the demand has been returned, it would be an abuse of process to bring a winding up application knowing that the demand never came to the notice of the company. But if all steps were diligently pursued by the creditor to bring the statutory demand to the notice of the company then service would be effective and the proceeding would not be an abuse of process.

338 I do not think that failing to take reasonable steps to bring a statutory demand to the attention of the company after its return is sufficient to found an allegation that a winding up application (as distinct from a statutory demand) is an abuse of process, in the absence of evidence of solvency, in light of the decision in *Lanepoint*. However, that issue does not arise before me.

339 As discussed in the First Judgment, on 18 June 2019, the AGV Demand was returned by

---

291 (1999) 151 FLR 270 (**Carousel Bar**).

292 Ibid 279 [83] (Gillard J).

293 Ibid [84] citing *Re Future Life Enterprises Pty Ltd* (1994) 33 NSWLR 559, *FP Leonard Advertising Pty Ltd v K D Travel Service Pty Ltd* (2003) 12 ACSR 136 and *Golden Orchid Pty Ltd v Komax Pty Ltd* (1995) 58 FCR 113.

Australia Post to Madgwicks.[294] On the same date, Kennedy sent an email to Kuksal, Xu and Di Gregoio attaching copies of the Efektiv and AGV Demands.[295] Madgwicks took steps to ensure that the Efektiv and AGV Demands came to the attention of those companies. There can be no abuse of process in Madgwicks relying upon the AGV Demand, which is presumed to have been effectively served upon the company, but was returned in the post to Madgwicks. Madgwicks did all that it could to bring the AGV Demand to the notice of the company, and AGV had the opportunity to make an application under s 459G of the Act. AGV did not avail itself of that opportunity.

D8 Solvency

340 On 24 September 2019, each of Efektiv and AGV filed affidavits affirmed by Alabakis, the companies' accountant. That affidavit states as follows:

> [4] [AGV and Efektiv's] next lodgement (for 2018-19) is not currently due.
>
> [5] In order to assist with the evidentiary requirements in the Proceeding, we had to undertake a large volume of unscheduled and unanticipated accounting work much in advance of any regulatory requirements.
>
> [6] We expect to finalise the Financial Accounts for [AGV and Efektiv] by 15th October 2019.
>
> [7] Although there is no statutory or regulatory obligation for an audit, [AGV and Efektiv] has especially organised for an audit process to be undertaken by Mischel & Co.
>
> [8] Mischel & Co has commenced the audit process and will conclude shortly after the firm's accounts are settled by us.

341 On 9 October 2019, each of Efektiv and AGV filed a second affidavit affirmed by Alabakis, which I take to be directed to the applications made under s 459S of the Act. That affidavit states:

> [6] [AGV and Efektiv] has traded profitably since its commenced [sic] trade and has consistently had positive cashflow.
>
> [7] [They have] regularly met [their] payment obligations and I am not aware of any concerns, present or past, around its liquidity or solvency.
>
> [8] The management of [AGV and Efektiv] have recently advised me regarding an insolvency proceeding against [AGV and Efektiv] brought on by Madgwicks based on a statutory demand...

---

294 First Judgment [26]-[27].

295 See paragraphs [238] to [239].

...

> [10] Based on my understanding of [AGV and Efektiv's] draft management accounts, were [AGV or Efektiv] obliged to pay this amount presently, it may not be able to maintain solvency.
>
> [11] There is otherwise no reasonable concern for [AGV or Efektiv's] solvency and it continues to maintain a healthy cashflow.

342 The affidavits affirmed by Alabakis did not contain any exhibits. The financial accounts referred to by the first affidavit were never provided to the Court.[296] The draft management accounts, which I assume would have been easily accessible, were not exhibited to those affidavits. They were never provided to the Court.

343 It is well established that the companies must adduce the 'fullest and best' evidence of financial position and solvency, if it is to displace the presumption of insolvency. I should not, and cannot, be satisfied of solvency merely by 'unaudited accounts, unverified claims of ownership or valuation and assertions of solvency arising from a general review of the accounts'.[297] The affidavits of Alabakis assert solvency, without any basis from which I can assess the reliability or accuracy of those assertions. They are not probative to the question of solvency.

344 Efektiv and AGV have not displaced the presumption of insolvency. I intend to make a winding up order in relation to each company.

E Procedural and Other Matters

E1 Updated Chronology – The Course of the Trial

345 The Third Judgment sets out a chronology of these proceedings, including the numerous breaches of court orders and indulgences granted to the Companies, over the period beginning with the commencement of the proceedings to the directions hearing on Thursday, 12 December 2019. It is important that there is a full and proper appreciation of the Third Judgment. I will assume familiarity with it, and the balance of this Judgment, relating to procedural matters, should be read in conjunction with those reasons.

---

296 The procedural history concerning solvency evidence is set out in the Third Judgment and below.

297 *Expile Pty Ltd v Jabb's Excavations Pty Ltd* (2003) 45 ACSR 711, 712 [4] (Santow JA).

346 Throughout the course of the proceeding (and following the trial) the Companies have consistently asserted that they have been deprived of procedural fairness and that I have exhibited apprehended bias. A chronology of the trial and events subsequent to the Third Judgment is set out below to ensure certain matters are put on the record

Events Prior to the Trial

347 On Thursday, 12 December 2019, I decided and ruled that the hearing of each of the winding up applications would proceed on all issues on Monday, 16 December 2019. This date and other dates had previously been reserved and fixed.

348 On Friday, 13 December 2019, Raghavan sent an email to my Chambers foreshadowing two applications that the Companies sought to make:

(a) A recusal application arising out of the events of the directions hearing held on the previous day. This would be the second application for my recusal in this proceeding (**Second Recusal Application**);[298] and

(b) A further application seeking leave to file evidence relating to the solvency of the Companies (**Further Leave Application**).

349 I directed that both applications would proceed on the first day of the trial, Monday, 16 December 2019. I directed that there was no need to file any affidavits, submissions or summonses in relation to the Second Recusal Application. In relation to the Further Leave Application, affidavits (including the evidence the Companies sought to rely upon) were to filed and exchanged at the earliest possible opportunity.

Monday, 16 December 2019 – First Day of Trial

350 The trial was fixed to commence at 10:00am. The Companies filed and exchanged the following materials prior to that time:

(a) At 9:10am, the Companies submitted written submissions on the Second Recusal Application.

298 See Second Judgment.

(b) At 9:20am, the Companies submitted affidavits of Xu and Raghavan, each affirmed 16 December 2019. Xu's affidavit exhibited various emails which were exchanged between the parties over the previous weekend.

No affidavits or solvency materials relating to the Further Leave Application were filed.[299] The affidavits of Raghavan and Xu related only to the illness which Raghavan deposed to in an earlier affidavit, which had been relied upon in the previous application of the Companies to seek an adjournment of the trial and for leave to adduce evidence of solvency in future.[300]

351 The hearing commenced at 10:00am. I handed the parties a revised ruling for my decision to proceed to trial, and indeed, published detailed written reasons for the decision. That is the Third Judgment.

352 I then proceeded to give a short summary of the current position, clarifying some of the comments which I had made at the directions hearing on Thursday, 12 December 2019. The summary, extracted from the transcript, is set out in full below:

> There are just a few comments I want to make before we start with any preliminary applications. Part of the debate on Thursday was whether the trial should be refixed or proceed today on all or some issues in circumstances where the contemplated solvency material was not filed, despite numerous orders and assertions that I would be forthcoming.
>
> Part of the discussion in relation to refixing the date necessarily involved a consideration of further affidavits, although no formal application for leave to file such affidavits was made. I refer, of course, to the orders that required such leave in each matter. The fact that no formal application was made had no effect on the nature, extent and substance of the discussion, which included, of course, any further filing of affidavits in relation to solvency.
>
> This issue, that is, the filing of any further affidavits following the default and, indeed, repeated defaults was squarely before the court. Indeed, an affidavit was filed by the company solicitor deposing to his medical condition and inability to adequately attend to the preparation for trial, including the filing of affidavits.
>
> I note that he is still on the record and has, indeed, filed further affidavits for the purpose of an application to be made this morning. On the material filed on Thursday as to the medical condition of the solicitor, for the reasons given, leave was, in effect, refused, whether or not any formal application was made.
>
> On the assumption that there was no other basis for leave to be granted, noting that the event or time for filing had passed, I indicated that leave would not be given. With

299 As has commonly occurred in these matters, the Companies addressed the secondary and satellite matters, diverting their attention from the critical matters, being the evidence of solvency.

300 See Third Judgment.

> that introduction, Mr Williams, is there a renewed or further application for leave based on different or new grounds other than the medical condition of your instructing solicitor?

353 Shortly thereafter, Mr Williams QC, for the Companies, requested that I stand the matter down to enable him to discuss certain matters with his clients. The proceedings were stood down until 10:45am.

354 When the proceedings resumed, Mr Williams QC made an oral application for me to recuse myself on the grounds of apprehended bias. This was the Second Recusal Application.

355 It was submitted, by reference to the transcript of Thursday, 12 December 2019, that I had effectively denied the Companies the opportunity of making any application for leave to file affidavits relating to solvency, and that this conduct, together with the other conduct identified in the first recusal application in the Second Judgment was sufficient to make out a case of apprehended bias.

356 At one point, I interrupted Mr Williams QC and asked if the affidavits as to solvency were ready. He said that some material was ready but that he was not making any application to file the same.[301] Mr Williams said that it was not 'appropriate' that he move beyond the Second Recusal Application.

357 The Second Recusal Application was dismissed and I indicated reasons would be given as part of this Judgment following the hearing of the winding up application on all issues. The reasons are set out below.[302]

358 Thereafter, at about 11:30am, Mr Williams QC informed the Court, that as a result of matters that had arisen in discussions with his clients earlier that morning, he was unable to represent the Companies any further. He said the decision was not tactical. Nevertheless, the Court was not informed of the basis of the decision, and is unable to gauge whether this was 'on the cards' or whether this arose very suddenly. Whatever the position, Mr Williams QC made it clear that he did not make this decision willingly, and I consider that it was clearly brought about by some request made by the Companies or some conduct on their part.

---

301 T10-18 (16 December 2019).

302 See paragraphs [432] to [444].

359 I stood the matters down to 2:15pm and urged the Companies to have legal representation in place by then.

360 At 2:15pm, Mr Percy of Counsel appeared solely for the purpose of making an application to adjourn the trial until next year. Given the history of the matter, it may fairly be called an audacious application. Three grounds were relied upon, each of which was rejected. First, it was submitted that there were numerous grounds to seek leave to appeal on interlocutory decisions, and a trial judge should not proceed with the trial pending the existence of such grounds. Secondly, the contended medical condition of the instructing solicitor, Raghavan. Thirdly, the sudden and unexpected departure of Mr Williams QC and associated 'impossibility' of briefing Counsel at the time. The reasons for rejecting the adjournment application appear below.[303] The matter was adjourned to 10:00am on the following morning, Tuesday, 17 December 2019.

Tuesday, 17 December 2019 – Second Day of Trial

361 The second day of the trial ran relatively smoothly. Whilst commencing at 10:10am, in the absence of representatives of the Companies, the representatives arrived soon thereafter. Upon their arrival, the Companies informed the Court that they either could not, or did not, brief Counsel. Raghavan would be appearing and defending the applications on behalf of the Companies.

362 Prior to commencing with cross-examination of the first witness, Raghavan sought to make a further application. He noted that the Companies' evidence of solvency was ready to be filed. However, he noted that the material was not in hardcopy and the matter would need to be stood down in order to allow that to happen. The Companies were directed to send softcopies of the materials by email to my Chambers. That did not occur.

363 It should also be noted, during the trial, the Companies sought to file by email to my Chambers, a further affidavit in the Efektiv and AGV proceedings, relating to (as was contended) Kornucopia's retainer with Madgwicks.[304] Leave (as was required by previous

---

303 See paragraphs [445] to [473].

304 This is the affidavit of Kuksal affirmed 16 December 2019.

procedural orders) was not sought or addressed, but the affidavit has nonetheless been received and referred to.

364 Raghavan also noted that he had confidential exhibits relating to his medical condition which would be made available should the Court so require them. It was not necessary for the Court to receive the exhibits, sought to be filed once again at the last minute. While referred to below, it is inappropriate for a solicitor to present material on the basis that it is there 'if the Court requests it'. The Companies have consistently relied on his medical condition for various applications they have sought to make and ought to have ensured that all evidence necessary for the Court to adequately consider the issues were before it. This 'drip-feed' of information is inappropriate.

365 Once the hearing commenced, Raghavan conducted the trial on behalf of the Companies. Two witnesses were called for cross-examination by Raghavan. They were Chen, the plaintiff in Kornucopia, and his solicitor, Hager. The cross-examination ran smoothly and without material disruptions.

366 The trial was adjourned to 2:00pm. Kuksal and Raghavan arrived at 2:20pm. By email minutes prior to this, Raghavan informed the Court that he was not feeling well and required a short break to recover. When he arrived, he briefly addressed the Court on his illness, as well as matters in relation to the Companies' solvency evidence. Each of those matters is referred to below. I did not respond at the time. I note that Raghavan continued to act notwithstanding his contended condition, and still no evidence of solvency has been adduced even though it had been foreshadowed prior to the luncheon adjournment. The Companies did not produce and present hardcopies which they said they were in a position to so produce in the morning session. Nor did they provide softcopies by email to my Chambers and the plaintiffs.

Wednesday, 18 December 2019 – Third Day of Trial

367 At 9:10am on Wednesday, 18 December 2019, Raghavan sent the following email to my Chambers:

> Unfortunately, my symptoms worsened considerably yesterday, and despite best

> efforts, I am not in the physical state to attend Court this morning. I apologise for the inconvenience this may cause to the Court and my colleagues, however, I have no option but to request that the Court give me a day so I may tend to my health and get myself to a point which allows me to attend Court tomorrow.
>
> I have already deposed to my health condition in two affidavits and as I had advised His Honour, I had brought confidential exhibits (evidence of continued leave from work over the last couple of years approximately and medical documents) to Court yesterday.
>
> Given how strongly His Honour feels about concluding these trials expeditiously, I would not have asked for consideration if I had any other option. I await your response.

368 I directed that the hearing would continue at 10:00am. Raghavan responded:

> In that instance, I would request that His Honour schedule the cross-examination of Mr Kuksal, Ms Xu and Ms Di Gregorio today and that His Honour permit me to resume with the cross-examination of Mr Kennedy tomorrow.

369 I directed that this matter would be considered at 10:00am as it depended on various matters, including the availability of Kennedy, Kuksal and Xu.

370 The hearing was listed for 10:00am, but did not commence until 10:10am when Kuksal and Xu appeared. I indicated that I had accepted Raghavan's second request:[305]

> The matters are proceeding. There was a request to have the day off and recommence tomorrow, which was denied. There's a further request to interpose other witnesses today, that is the witnesses that you propose to cross-examine, and to have Mr Kennedy tomorrow morning. I'm inclined to accept that request and deal with the other witnesses today. … And then Mr Kennedy tomorrow morning, if he's available for no longer than one and a half hours, namely between 10:00 and 11:30. … And then for final submissions to commence straight after that, so that we finish the case on Friday.

371 Accordingly, it was directed that the cross-examination of Kuksal and Xu would proceed on the morning of Wednesday, 18 December 2019, interposing the cross-examination of Kennedy. Di Gregorio was given notice to attend at 4:00pm on that day for cross-examination, if necessary. Ultimately, she was not required. Kennedy's cross-examination would resume on Thursday, 19 December 2019. For the benefit of the Companies, the plaintiffs would make their closing submissions immediately following the cross-examination of Kennedy, and the matter would then be adjourned to 10:00am on Friday, 19 December 2019, for the Companies to make their closing submissions.

---

[305] T106:3-17 (18 December 2019).

372 It should be observed that the Companies had specifically requested that Kuksal and Xu be cross-examined in the absence of legal representation. This has become important, given that the Companies (following the trial) indicated that this constituted a further ground of apprehended bias.

373 Cross-examination of Kuksal commenced soon thereafter. As noted, his evidence has been rejected as untruthful.[306] Kuksal was persistently evasive, argumentative and hostile towards Counsel for Madgwicks, Mr Lovell.

374 Kuksal challenged matters which were plainly indisputable. That included the date and time a document was filed, in circumstances where the document itself bore the seal of the Supreme Court, or the date certain events occurred according to the information contained on the ASIC Register.[307] At a certain point, I intervened as follows:[308]

> Just as a matter of information, Counsel can't mislead you. If he says – suggests to you that [a document was filed or created] on a date, it's because he knows that's the date from the document. … [You're] still entitled to see the document, but if he puts to you a date that it happened, you can accept that's accurate. … All I'm saying is that he has an ethical obligation to put an accurate statement to you.

375 Kuksal, however, said the following:[309]

> With all due respect to Your Honour … I know Mr Lovell to have lied. … I have personally witnessed Mr Lovell to lie at the cost court proceeding. … I raised the complaints with the judicial registrar at the time … to discipline him. … I could submit a transcript of the hearing.

376 That allegation should not have been made. It is entirely improper. It goes without saying that the allegation has been rejected.

377 At a later time, I was required to warn the witness:[310]

> I think we're off to a very bad start. You're being argumentative. You're making speeches. Your role is to answer questions, and where a short explanation is required, that's fine; the rest is a matter for submissions. Now, I suggest you ask short questions, Mr Lovell, and we'll have short answers. You're entitled to say no. You're entitled to say you entirely disagree; of course, that's your evidence. But you're not entitled to be argumentative and indulge in the explanations that you've just given.

---

306 See paragraphs [250] to [280].
307 T118:29, 119:11 (18 December 2019).
308 T123-4 (18 December 2019).
309 T119:3-21 (18 December 2019).
310 T125:22-26 (18 December 2019).

378 Again, at a later point, Kuksal became argumentative. He remarked:[311]

> This is the fourth time I'm turning to p. 54 [of the Court book] … And you're [Mr Lovell] being very repetitive. I do not see the point in asking me the same question over and over again. … If you go through all the questions related to this stage in one go, please.

379 Mr Lovell explained that it was his cross-examination, and he would conduct it in a manner that he saw fit. I explained, and again, warned the witness:[312]

> Mr Kuksal, it's not how the system works. You are asked questions and you have to answer the questions. Now, just listen to the question and answer the question. That's all.

Kuksal attempted to interject and argue with me. I cut him off and said:[313]

> You're struggling. You're struggling with everything because … you're trying to be too clever and you're trying to … anticipate the questions and all the answers. … Now, if it carries on like this, I'm going to terminate the cross-examination and I'm going to draw adverse inferences against you for being totally non-responsive.

Kuksal noted: 'I resent the "too clever".'[314] My warning against Kuksal has since been said to constitute a further ground of apprehended bias.

380 Kuksal's cross-examination eventually concluded. Given that Raghavan was not present for his cross-examination, I gave Kuksal what was, in-effect, the opportunity to re-examine himself and clarify any answers which he had given. I said:[315]

> I want to give you an opportunity, in fairness to you. Normally counsel would be entitled to ask you questions in re-examination if you wanted to clarify anything. The object of re-examination is to enable your counsel, which you haven't got at the moment, after cross-examination, to clarify certain aspects. So I'm going to just make a few notes. While I'm making a few notes, think about whether you want to clarify any of your answers. If you don't want to clarify any of your answers, that's fine, but this is the opportunity for you to clarify some of the answers that you think you should clarify. It's not an opportunity to restate anything; do you follow?

381 Kuksal became argumentative. He said that he would decline to do so and that he instead had the right for his solicitor to read from the transcript and call him for re-examination. I advised him that from my perspective there was nothing which required clarification, that Kuksal was

---

311 T137 (18 December 2019).
312 T137:22-25 (18 December 2019).
313 T138:1-11 (18 December 2019).
314 T138:12 (18 December 2019).
315 T144:8-20 (18 December 2019).

unequivocal in his answers and what, at the time, I perceived his evidence to be. Kuksal went on to discuss various peripheral and irrelevant matters which did not arise from cross-examination. I terminated his cross-examination.[316]

382 Xu was called for cross-examination, which ran without material disruptions.

383 Prior to closing the Court, Kuksal raised a matter. This related to the admissibility of certain transcripts which were produced by the Companies' officers from audio recordings of meetings between the Companies and Madgwicks. They were recorded without the knowledge or consent of Madgwicks. Mr Lovell objected to the admissibility of those transcripts. I directed that argument on the subject should be raised in closing submissions. The Companies could make whatever submissions they wished to make, relying on the substance of those transcripts, and then I would rule on their admissibility and substance in this Judgment.[317] I have ruled that they are inadmissible or excluded.[318]

Thursday, 19 December 2019 – Fourth Day of Trial

384 Shortly before Court, at 10:00am on Thursday, 19 December 2019, Raghavan sent an email to Court requesting that the trial re-commence at 12:00pm. Raghavan said as follows:

> Following the recent of bout aggravated symptoms, I am making every effort to keep up with the strenuous schedule of the trials despite diminished ability given His Honour's decision not to grant an adjournment. As advised earlier, I had taken a medical leave from work which had to be abruptly ended when Mr Williams QC stood down from the matter.
>
> I have been struggling to function this morning, however, I am hopeful that I will be able to resume work later today. Therefore, I request that His Honour stand the matter down until mid-day, today. Please find attached a copy of my medical certificate from yesterday's examination.

385 The certificate, from Dr Sedeh is in the following terms:

> **Medical Certificate** **18 December 2019**
>
> This is to certify that Mr Naveen Raghavan is unable to work from 18/12/2019 to 19/12/2019 inclusive due to a medical condition.

386 The certificate is self-evidently inadequate in the circumstances and given the history.[319] The

---

316 T144-6 (18 December 2019).

317 T165-6 (18 December 2019).

318 They were rejected as inadmissible or excluded. See paragraphs [496] to [500].

request was denied. The trial resumed at 10:00am. There was no legal representation on behalf of the Companies until 11:50am. Xu was present in the public gallery of the Court.

387 As discussed, Kennedy's cross-examination was interposed with that of Kuksal and Xu at the request of the Companies.[320] Kennedy's cross-examination had originally commenced on Tuesday, 17 December 2019. Interposing Kuksal and Xu was done in order to have Raghavan available to conclude his cross-examination of Kennedy. In yet a further indulgence given to the Companies, I deferred the cross-examination of Kennedy until later in the morning of Thursday, 19 December 2019, so as to provide Raghavan with further time to arrive in Court.

388 Foreshadowed the previous day, on Wednesday, 16 December 2019 and in the presence of Kuksal and Xu, Mr Lovell indicated that he wished to call McNamara to give evidence contradicting that given the previous day by Kuksal.[321] The Companies were on notice that McNamara would be called to give evidence. No objection was made to this course, either in Court by Kuksal on Wednesday, 16 December 2019 or by email from Raghavan to my Chambers at any time thereafter. This has become important, given that it is said to constitute a further ground of apprehended bias.

389 McNamara was called to give evidence in the absence of a legal representative of the Companies. Various documents were tendered through her. First, there were two supplementary court books. These were the summons for taxation and bundle of invoices filed by the Companies in the Costs Court Proceeding. The documents bore the seal of the Supreme Court. They were uncontentious and accepted. Two bundles of emails were also tendered. The emails were merely covering emails of no contentious substance, sent to the Efektiv Email Address, which attached the invoices. These documents are similarly uncontentious. An issue has arisen with the tender of these documents, as noted below.[322]

390 McNamara's evidence ran without material disruptions. McNamara told me that she had received threats from Kuksal and Raghavan. It was said that they had threatened to refer her

---

319 T216:28-31 (19 December 2019).

320 See paragraphs [368] to [371].

321 See T165 (18 December 2019).

322 See paragraphs [414] to [431].

for disciplinary action. I have not taken this evidence into account in the determination of the issues arising in these proceedings. McNamara requested that I refer Raghavan to the Legal Services Commissioner.[323]

391 After completion of McNamara's evidence, there was still no appearance on behalf of the Companies. I terminated the cross-examination of Kennedy. I gave the following ruling:

> The cross-examination of Mr Kennedy commenced on 17 February. It was not completed during that day, being the second day of the trial but the first day effectively of the trial and the giving of evidence. I agreed to give the companies a further indulgence by not requiring Mr Kennedy for the 18th, that is, yesterday, and, rather, dealing with other witnesses on condition that Mr Kennedy's cross-examination would be completed today over an hour and a half between 10 and 11.30.
>
> I deferred recalling Mr Kennedy at 10 am to give the parties a further opportunity, that is, the companies. They have not availed themselves of that opportunity, and the cross-examination of Mr Kennedy is now terminated. A party only ever has a reasonable right to litigate and inconvenience the court and other parties. And in those circumstances and for reasons that will appear in the written decision, the termination of any cross-examination is entirely justified in the circumstances.

392 This is now said to constitute a further ground of apprehended bias. On reflection, no further reasons are required. The record speaks for itself.

393 Counsel for Chen, Mr Miller then commenced his final submissions. Mr Lovell followed with final submissions on behalf of Madgwicks. Half way through his submissions, and at 11:50am (approximately two hours after commencement of the hearing on this day), Raghavan and Kuksal entered the Court. The proceedings were not interrupted and Mr Lovell continued until about 12:20pm.

394 Thereafter, I explained to Raghavan what had transpired during the morning in his absence, and that he should commence his final submissions on Friday, 20 December 2019 at 9:30am. In a further indulgence, I allowed the Companies to make submissions in response, and gave them further time (in comparison to the plaintiffs) to make those submissions.

395 Raghavan then raised four matters. First, he wished to file evidence of solvency. Secondly, he wished to complete his cross-examination of Kennedy. Thirdly, he wished to re-examine Xu and Kuksal, who were cross-examined in his absence on the previous day, Wednesday, 18

---

323 T176-7 (19 December 2019). See paragraphs [518] to [526].

December 2019. They were interposed at the Companies' request, because Raghavan was unable to attend on 18 December 2019. Fourthly, he questioned the basis on which the evidence of McNamara was permitted.

396 The evidence of solvency is dealt with below.[324] The cross-examination of Kennedy is dealt with above.[325]

397 In relation to the proposed re-examination of Xu and Kuksal, again every opportunity was afforded. There was no-one in Court to conduct the re-examination. The cross-examination of Xu and Kuksal in the absence of Raghavan was specifically requested to enable Raghavan to have a day off because of his contended medical condition. In the circumstances there is no cause to complain. As Raghavan said:[326]

> …now, I understand there was cross-examination of Mr Kuksal and Ms Xu which took place without me, and of course, in all fairness, I was the one who made that request.

398 The evidence of McNamara was contemplated. It was foreshadowed the previous day, when Xu and Kuksal were both present in Court. Neither objected. Her evidence arose out of evidence given by Kuksal and Xu to the effect that neither had received any Costs Disclosure Agreements. McNamara's evidence established to my satisfaction that the documents were in fact received by the Companies well prior to their request (under threat of report to the regulator) on 20 August 2019. That evidence was necessary given Xu and Kuksal's blanket denials that they had received the relevant documents. Their evidence, as analysed above, is rejected. The evidence of McNamara, while critical to this matter, was relatively uncontroversial. She gave evidence only directed to the documents which the Companies themselves had filed with the Costs Court and that no emails had bounced back. [327] There was, further, no legal representative to cross-examine her. I have rejected the sufficiency of Raghavan's contended medical condition elsewhere within this Judgment and it was for the Companies to ensure that they had adequate legal representation present.[328]

---

324 See paragraphs [474] to [495].

325 See paragraphs [391] to [392].

326 T233:13-6 (19 December 2019).

327 The documents filed with the Costs Court were filed on RedCrest, and included the relevant tax invoices. Two further bundles were tendered dealing with emails sent to each of Efektiv and AGV. None of the emails bounced back.

399 In any event, I am satisfied that the Companies have waived their rights with respect to the cross-examination of Kennedy and McNamara, and re-examination of Xu and Kuksal.[329] Xu and Kuksal were interposed as specifically requested by Raghavan, with knowledge that there would be no representative of the Companies to conduct any re-examination on Wednesday, 18 December 2019. That request is inconsistent with the maintenance of any right to re-examine those witnesses. Similarly, the Companies were aware that Kennedy and McNamara would be cross-examined on Thursday, 19 December 2019. By requesting cross-examination (in the case of Kennedy) be deferred to that date, and not objecting to the evidence of McNamara, and then not appearing when that was due to occur, the Companies have acted inconsistently with their rights to cross-examine those witnesses. As noted, these rulings are now the subject of grounds of further contended instances of apprehended bias.

Friday, 20 December 2019 – Fifth Day of Trial

400 The hearing commenced at 9:45am on Friday, 20 December 2019. Raghavan commenced his final submissions promptly thereafter.

401 Raghavan noted that he was still feeling somewhat ill. Accordingly, regular breaks were given to him, during which time he could recover.[330] Raghavan also requested that he be given regular instructions by Kuksal (who was seated in the public gallery behind him). While this was disruptive, given the circumstances, it was permitted.[331]

402 At one point or another, Mr Miller, Counsel for Chen rose to his feet to note that the Companies still had not put forward a list of affidavits upon which they relied. I had directed this to be done on Tuesday, 17 December 2019. The direction had not been complied with. This left the Court in the position where it did not know which affidavits the Companies relied upon, no written submissions to support their case, and no bundle of authorities. I have, of course, done the best that I can do in the circumstances to assess their evidence (most of

---

328 See paragraphs [456] to [470].

329 See e.g. *Mann v Carnell* (1999) 168 ALR 86.

330 T270, 290 (20 December 2019).

331 T235 (20 December 2019). Raghavan noted that Kuksal, who is not legally qualified, ‘assisted’ with the preparation of submissions. It was requested that Mr Kuksal address the Court directly. This was refused. Raghavan noted that he ‘reading [Kuksal’s] notes, and they’re a little creative’. (T295:10-1 (20 December 2019)).

which has been rejected) and gauge their submissions (which in many cases were incomprehensible).

403 An objection was also raised by Mr Miller with respect to a certain email that was said to constitute without prejudice negotiations. I rejected that objection, as it was plainly relevant to the rejection of the tender by Chen, and his reasons for doing so.[332]

404 First, Raghavan made a further submission or application that the Companies be permitted to file evidence of solvency. That was refused, and the reasons appear below.[333]

405 Secondly, it was necessary to terminate Raghavan's closing submissions. It was foreshadowed a number of times that Raghavan would have from 9:30am to 12:30pm. Given that we had started late, at 9:45am, I permitted his closing submissions to go on until 1:00pm. This is said to constitute a further ground of apprehended bias. However, the termination of Raghavan's closing submissions was entirely fair. Mr Miller was given one and a half hours in his closing submissions. Mr Lovell was given one hour. Raghavan was given over three hours.

406 Finally, it is of note that there was one final application made by the Companies at the conclusion of their closing submissions. This was a recusal application. This was the third of its kind made in this proceeding:[334]

Mr Raghavan:	Your Honour, I appreciate that Your Honour will not want to hear this, but I am instructed by my client that had there been more time, I was to – and by making an application for you to recuse yourself based on procedural fairness arising from events
Sifris J:	Well, the case is finished.

407 Obviously, it was not necessary to rule on that application.

Events Following the Trial

408 Following the trial the Companies sought to make two further applications by email to my

332 T286 (20 December 2019).
333 See paragraphs [474] to [495].
334 T306:23-29 (20 December 2019).

Chambers. The first was a further fourth recusal application. The second sought fresh hearing on certain discrete matters.

409 On 2 January 2020, Raghavan sent an email to my Chambers. He foreshadowed that the Companies sought to make a further application to have me recuse myself from giving Judgment. They sought guidance as to how that application could be heard and determined prior to the delivery of Judgment, which I foreshadowed would occur on 24 January 2020. The email set out sixteen enumerated grounds. It is unnecessary to recite each ground here. Raghavan submitted:

> By reason of these proceedings being winding up proceedings, such that if a winding up order is made (and/or reasons given in support of same) there are immediate and very significant consequences, the Defendants respectfully submit that their foreshadowed recusal application should be heard and determined before His Honour delivers judgment. Otherwise, there is a grave risk that the recusal application, if successful, is nonetheless rendered nugatory.

410 I directed that I would deliver Judgment on 24 January 2020 and that no further applications would be permitted.

411 Given that the trial had concluded, the application was unorthodox, and in my view, audacious. Each of the enumerated grounds related to a decision made or ruling given during the trial. I have flagged them within this chronology. When making those rulings, I noted that the reasons for so ruling would appear within this Judgment. The Companies were not, however, content to wait.

412 Most, if not all, of the enumerated grounds are considered within this Judgment. The bias application would therefore simply require me to repeat the reasons for the particular procedural decision or ruling said to be impugned by bias. That would be wasteful. I also suspect that it would also have the effect of delaying the delivery of Judgment.

413 Any such application should be directed to the Court of Appeal, as a proposed ground of appeal. The Court of Appeal is in a better position, with the benefit of these reasons, to assess whether there is any merit in the Companies' fourth bias application.

414 Moving to the next matter and as noted above, on Thursday, 19 December 2019, McNamara

was examined to give evidence on behalf of Madgwicks. Raghavan was not present in Court due to his contended medical condition. Two supplementary court books and two bundles of emails were tendered during McNamara's evidence. Raghavan advised the Court that the Companies had not received copies of these documents and that they had only found out about the tender once they had reviewed the transcript following the conclusion of the trial.

415 On 3 January 2020, Raghavan sent an email to my Chambers. He advised that he was instructed to make an urgent request to make the documents tendered in Court by Madgwicks on 19 December 2019 available to the Companies.

416 On 6 and 7 January 2020, my Senior Associate made arrangements for those documents to be made available to the Companies' officers from the Principal Registry of the Court.

417 On 6 January 2020, Raghavan sent an email to my Chambers making a further application for a 'fresh hearing' so as to permit the Companies to argue the documents' admissibility and to permit them to cross-examine McNamara and re-examine Kuksal and Xu on the documents. It is worth stating Raghavan's email in full:

> Dear Associate,
>
> Having seen just the bundles of stapled emails (and attachments) tendered in Court on 19 December 2019 by Madgwicks and even before having an opportunity to see the remaining two folders, the situation seems to be even worse than what the Defendants had apprehended.
>
> Besides the fact that the Defendants' did not have an opportunity to see the documents or object to their submission into Court on 19 December 2019, even if His Honour were minded to penalise the Defendants for my illness (or lack of its satisfactory verification), I respectfully submit that the number of sheets of paper containing the emails and attachments (none of which had been filed in any proceeding involving the Defendants) being in the region of a hundred pages (that is before counting the pages in the two folders we have not yet received), even if I were not delayed in attending Court that morning on account of my illness, the Defendants would have had a right to examine the documents being tendered carefully and seek counsel before making submissions about their accuracy and relevance to the current proceedings – this would have necessitated that His Honour give the Defendants at least a day to address him on the subject.
>
> Furthermore, this is especially shocking given His Honour's firm and clear directions that he would not permit any new evidence to be filed in the proceedings which were inflexibly enforced on the Defendants much before Madgwicks' documents were simply accepted without any discussion in the courtroom about whether the appropriateness of accepting them into evidence at that late stage in the proceeding.
>
> The Defendants are also concerned about the way in which the Court has retained

> and preserved these documents.
>
> We request that His Honour require all the documents in evidence that were not filed through RedCrest be re-filed through the system for transparency and that His Honour hold a fresh hearing to permit the Defendants to address him on the admissibility of the documents and the appropriateness of permitting the Defendants to file documents in response. The Defendants also request that His Honour give them an opportunity to cross-examine Ms McNamara and re-examine Mr Kuksal and Ms Xu to address the new evidence submitted through Ms McNamara's testimony.

418 I declined the Companies application for a 'fresh hearing' and noted that the documents had been admitted into evidence. I also directed Madgwicks to file the documents on RedCrest. Madgwicks undertook to do so, and did so, on 8 January 2020.

419 The email and application is daring to say the least. Any objection to the documents would be and is fundamentally misconceived.

420 First, it is the Companies' obligation to ensure they were aware of what was happening in the trial in the absence of their legal representative. They had (or ought to have had, in accordance with the Court's Practice Note) the relevant transcripts during the trial.

421 Further, I have doubt that the Companies were entirely unaware that materials had been tendered. Raghavan's email to the Court dated 3 January 2020 states:

> I emphasise that the Defendants are not aware of what has been tendered into the Court record and would like immediate access to the documents submitted by Madgwicks on 19 December 2019. Please make these available to me promptly.

422 However, McNamara's evidence was a subject which Raghavan had made submissions on, on Friday, 20 December 2019. He submitted, for instance:[335]

> Ms McNamara further makes a point that, given the defendant's filing of some of the tax invoices with the summons for taxation – and that was filed by myself on 13 August, at the Costs Court, obviously – that arising from the same Mr Kuksal's evidence was false. This allegation is based on a contention that invoices were only sent to director@efektiv.com.au

423 Knowledge of her evidence necessarily requires an appreciation of the transcript, which would in turn draw attention to the documents in relation to which she gave evidence. Raghavan did not raise that the documents had not been received during his closing submissions.

---

[335] T297:24-30 (20 December 2019).

424 Secondly, Xu was present in Court during McNamara's evidence and knew that documents had been tendered.

425 Thirdly, it was for Madgwicks to provide the documents. I accept that by innocent omission they were not provided. In any event, my Senior Associate arranged for these documents to be provided to the Companies on 6 and 7 January 2020. Madgwicks later filed the documents on RedCrest.

426 Fourthly, the request smacks of simply seeking a further opportunity for Kuksal to qualify the 'unequivocal' answers which he had previously given. Were Kuksal and Raghavan present in Court for McNamara's evidence, I would not have granted leave for Kuksal to be re-called. Kuksal gave evidence on the precise topics which were the subject of the documents. McNamara then gave evidence. McNamara's evidence contradicted that of Kuksal. That is, in critical respects, quite simply how civil litigation goes. A witness does not get a second opportunity to change their story, when as I have found, the first is rejected.[336] Had Kuksal been recalled, regardless of the content of his evidence, it would have contradicted his 'unequivocal' position previously given that the documents were only received on 21 August 2019.

427 Fifthly, Xu could not give any relevant evidence on the topic. She stated that she had never seen the Costs Disclosure Documents. There is nothing more she could say.

428 Sixthly, as for the cross-examination of McNamara, as noted above, the Companies had their opportunity, were not present in Court, and waived their rights.

429 Seventhly, the documents tendered through McNamara are uncontentious and no objection could be maintained on a proper basis. The documents contained within the supplementary court books were merely the summons for taxation and bundle of invoices filed by the Companies in the Costs Court Proceeding. Those documents are not only on the Court's record (albeit in a different proceeding) but were presented to the Court in the first instance by the Companies. The Companies' witnesses did not refer to those documents and instead

---

336 Nonetheless, the Companies by their closing submissions had contradicted the evidence of Kuksal - their own witness.

gave evidence that they had not seen any of the documents and set out when they had first received them. They could add nothing further that would not contradict their earlier evidence.

430 The bundles of emails are similarly uncontentious. They were the invoices, already adduced into evidence in these proceedings (exhibited to the affidavit of Kennedy affirmed 21 October 2019). The covering emails were similarly sent to the Efektiv Email Address, and were documents already seen and received by the Companies. It was only necessary to adduce those emails given that the Companies took issue (unnecessarily) with the question of whether those emails had in fact been sent to the Efektiv Email Address. Emails had previously been adduced but on the face of those documents the Efektiv Email Address (as recipient of the email) was obscured. Kuksal therefore said there was no proof they had been sent to that address. The emails adduced during McNamara's evidence were the same documents, but the only difference was that the Efektiv Email Address was not obscured.

431 The documents are not contentious, and the Companies' request audacious.

E2 Second Recusal Application

432 As noted, on Monday, 16 December 2019, Mr Williams QC made an application on behalf of the Companies seeking my recusal. Again, as noted, this is the second application seeking this relief in this proceeding. It is unnecessary to recite the legal principles, which are set out in detail in the Second Judgment.[337]

433 I will assume familiarity with the Second Judgment, and indeed as Mr Williams QC submitted, this application *must* be read with it, as the fresh grounds may 'supplement the grounds that were heard and deemed…insufficient on the previous occasion.'[338] The fresh grounds should, it was submitted, be considered cumulatively. I agree. As I noted in the Second Judgment, in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd,* Callinan J explained when assessing a question of apprehended bias, one must analyse the course of the trial, the reasons for Judgment, and to this I would add, the history of the

337 Second Judgment [23]-[28], [40], [50]-[55].
338 T5:8-14 (16 December 2019).

proceeding including any previous recusal applications, and 'read them together to see whether the cumulative effect was one of apparent bias.'[339]

434 The circumstances relating to the Second Recusal Application are as follows. On Thursday, 12 December 2019, there was a directions hearing in these proceedings. The conduct of that hearing is set out in in the Third Judgment.[340] In short, I refused to grant the Companies an extension of time within which they would be permitted to file solvency evidence, in circumstances where the Companies were unable to inform the Court as to when that evidence would be ready, and where an eleventh hour affidavit had been affirmed (ten minutes before the hearing) by Raghavan deposing to his health issues. At the conclusion of the hearing I said:[341]

> In fact, that may well amount to – no, I think it's best that I don't put it anymore. There is an order that you're not permitted to file material without leave. You've sought leave today, in effect, and I've denied that or dismissed that and there's no reason to believe I'll change my mind at all, in fact, the opposite. The closer we get to the trial, the more I will refuse any such application.
>
> …
>
> It is ridiculous. I mean seriously, it is absolutely ridiculous the degree of indulgences that the Companies have been given for the filing of material that is the essence of the whole case without any explanation and to the contrary with an assertion in affidavits that the material was being ready and audited in September. That's beyond belief. I won't allow any application for filing any financial statements.
>
> …
>
> Monday will be too late. If you seek to file affidavits directed to solvency on Monday, it will be refused.

435 In terms of context, the following exchange occurred:[342]

> Mr Williams QC: Your Honour, if I could be so bold as to clarify something. Your Honour said that I'd applied for leave today; I don't believe I have. I applied for an extension of time under the order. I didn't apply for leave because I don't have any evidence to apply for leave in respect of so it would be my submission that Your Honour has not today rejected an application for leave; Your Honour has rejected an application for an extension of the time to file material.
>
> Sifris J: It's the same thing.

339 (2006) 229 CLR 577, 636 [179] (Callinan J).

340 Third Judgment [50]-[55].

341 T24: 26-31, 25: 4-11, 26: 2-4 (12 December 2019).

342 T25:12-22 (12 December 2019).

Mr Williams QC:	Not quite, Your Honour, I would respectfully say.

436 Mr Williams QC submitted that he had not made an application for leave to file the material, but rather an application for leave to extend the time by which the same material could be filed. However, if the application was acceded to, it would give leave to the Companies to file the relevant materials at some time in the future. They are the same thing.

437 It is sufficiently clear from the transcript and certainly the context, that my intention was that any further application for leave to file would need to rely on *new ground*s. That is first illustrated by the following, which transpired immediately preceding the statements made: [343]

Mr Williams QC:	I would apprehend that the only course now available to me is to have the evidence prepared anyway and ask, on an appropriate application for leave, for leave. Now, Your Honour may well refuse that in due course but we're not precluded from making such an application.
Sifris J:	Well, you can always make an application for leave but my present disposition is not to grant it.
Mr Williams QC:	Yes.
Sifris J:	Have I predetermined the matter? *No, but you have to raise something really serious.*
Mr Williams QC:	Yes.
Sifris J:	*Not the same matters.* I won't say anything more about that but you're not going to come along with affidavits that the other need to respond to and expect an adjournment, it won't happen. The matter's proceeding on Monday. (emphasis added).

438 When the trial started, on Monday, 16 December 2019, I made a statement to the parties. This was, in part, aimed at the exchange which had occurred between myself and Mr Williams QC on Thursday, 12 December 2019. I repeat the statement here for ease of reference:[344]

> There are just a few comments I want to make before we start with any preliminary applications. Part of the debate on Thursday was whether the trial should be refixed or proceed today on all or some issues in circumstances where the contemplated solvency material was not filed, despite numerous orders and assertions that I would be forthcoming.
>
> Part of the discussion in relation to refixing the date necessarily involved a consideration of further affidavits, although no formal application for leave to file such affidavits was made. I refer, of course, to the orders that required such leave in

343 T24:8-24 (12 December 2019).

344 T2:11, 3:15 (16 December 2019).

> each matter. The fact that no formal application was made had no effect on the nature, extent and substance of the discussion, which included, of course, any further filing of affidavits in relation to solvency.
>
> This issue, that is, the filing of any further affidavits following the default and, indeed, repeated defaults was squarely before the court. Indeed, an affidavit was filed by the company solicitor deposing to his medical condition and inability to adequately attend to the preparation for trial, including the filing of affidavits.
>
> I note that he is still on the record and has, indeed, filed further affidavits for the purpose of an application to be made this morning. *On the material filed on Thursday as to the medical condition of the solicitor, for the reasons given, leave was, in effect, refused, whether or not any formal application was made.*
>
> On the assumption that there was *no other basis for leave to be granted*, noting that the event or time for filing had passed, I indicated that leave would not be given. With that introduction, Mr Williams, is there a renewed or further application for leave based on *different or new grounds other than the medical condition of your instructing solicitor?* (emphasis added)

439 At the hearing of the Second Recusal Application (at the trial), I asked Mr Williams QC whether it would be fair, to read into my previous statements: 'You can never foreclose an application relying on new material, but you can relying on material that was the subject of ... an application for leave that's already been dealt with.'[345] Mr Williams QC submitted that those words were not there and that a reasonable reader would not agree; and rather, they would consider that I had entirely foreclosed on the possibility of granting the Companies leave at any time in the future.

440 However, as submitted by the Companies, when one considers apprehended bias, the *entire* context must be considered, including 'what was done by the judge subsequently, which may be sufficient to eradicate any reasonable apprehension of bias notwithstanding an earlier lapse in the observance proper procedures'.[346] I am, of course, referring my statement made before the matter commenced on Monday, 16 December 2019.

441 In *Johnson v Johnson* (**Johnson**),[347] a case referred to in the Second Judgment, the Judge ordered the appellant to list as discoverable certain transcripts of proceedings in a previous investigation by a corporate regulatory authority. The Judge made the following comments: [348]

> As I indicated a couple of times earlier in these proceedings, I will be certainly

---

345 T9:16-22 (16 December 2019).

346 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 372-1 (Dawson J) (**Re JRL**).

347 *Johnson v Johnson* (2000) 201 CLR 488 (**Johnson)**.

348 Ibid 491 [6]-[7] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

> looking to the independent people and independent documents in the search for the truth in this matter.
>
> Well, [let] me go back to what I said at the very beginning … is that I will rely, principally, on witnesses other than the parties in this matter – and documents – to determine where the truth lies …

442 An application for the Judge's recusal followed on the next day of the trial. The Judge refused that application and made the following statement:[349]

> Before this matter began, I spent 2 days reading the affidavits filed by both parties and some of the witnesses. … It was apparent that there was a wide divergence between the evidence of both parties relating to the matters in issue in this case. That has become more apparent as the case has proceeded. I drew attention to this difficulty. When yesterday I repeated what I earlier said, I was simply pointing out to the parties the wide divergence. It was going to be a difficult task. My statement was not to be taken as a predetermination of the credibility of both parties, or of either of them. My statement merely affirms my need to look to the other evidence to assist in determining who is telling the truth. I was not saying I would not accept the evidence of either party; I did not reject the credit of both parties; I was merely saying that the other evidence was important in determining the credit of one or other of the parties

443 The Judge's refusal was upheld by the High Court. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:[350]

> There was argument in this Court, prompted by Anderson J's explanation of what he intended to communicate, about whether the effect of a statement that might indicate prejudgment can be removed by a later statement which withdraws or qualifies it. Clearly, in some cases it can. So much has been expressly acknowledged in the cases.[351] No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances of the particular case. The hypothetical observer is no more entitled to make snap judgments than the person under observation.
>
> The comment made by Anderson J at the conclusion of proceedings on 19 March 1997 has to be considered in the context in which it was made. The judge was ruling on an application to vacate an order requiring discovery of certain documents. Counsel was urging that the obligations of discovery which had been imposed on his client were unduly onerous. In response, the judge reminded counsel that, early in the case, having read the written statements of the parties and other witnesses, he had said that he expected that, in determining where the truth lay, he would be looking to independent evidence, including documentary material. Hence the importance he attached to discovery. He repeated that view. He was making a point about the significance of documentary evidence, which was the subject of the application on which he was ruling.
>
> If one were to remove some of the words used by Anderson J from the context of the ruling on discovery, and the reference back to earlier statements, then, upon parsing

---

349 Ibid [8].

350 Ibid 494 [16].

351 *Re JRL* (1986) 161 CLR 342, 372 (Dawson J); *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ), 577 (Dawson J).

> and analysis, they could possibly have created an impression that the judge was discounting the credit of the respondent (whose evidence he had heard) and of the appellant (whose evidence he had not heard). To isolate the words in that way would not have been reasonable. When, on the following day, the judge gave an explanation of what he had intended to convey by his earlier remarks, there was no reasonable ground for not accepting that explanation. A reasonable observer would not have imputed to Anderson J, who had not yet heard the appellant give evidence, a view that the appellant was a person whose credit was of no worth.

444 The statement which I had made on Monday, 16 December 2019 made clear that any fresh application for leave to file solvency evidence would need to rely on new grounds or fresh evidence. None were raised. It is plain that there can be no predetermination in rejecting a second application of the same subject matter previously determined, where the second application raises nothing different from the first. It suffices to say, that after having been made aware of the statement, the fair-minded lay observer would understand this and consider any earlier statements to be nothing more than expressions of frustration, which given the history and circumstances, is entirely understandable.

E3 Adjournment Application

445 As noted, Mr I Percy of Counsel appeared on the afternoon of Monday, 16 December 2019 for the limited purpose of making an application to adjourn the trial until the new year. Three grounds were relied upon, each of which was rejected. First, there were, it was contended, numerous grounds to seek leave to appeal on interlocutory decisions, and the trial judge should not proceed to trial pending the existence of such grounds. Secondly, the medical condition of the instructing solicitor, Raghavan. Thirdly, the sudden and unexpected departure of Mr Williams QC and associated 'impossibility' of briefing Counsel at the time.

446 In the Second Judgment, I referred to the relevant principles set out by the High Court in *Aon Risk Services Australia Ltd v Australian National University* (**Aon**).[352] It is unnecessary to repeat them here.

447 It is, however, worth mentioning *Sali v SPC Ltd* (**Sali**),[353] in which the Full Court of the Supreme Court of Victoria refused to grant an adjournment of an appeal. The solicitor of the appellant had been informed that the matter would be fixed for hearing no earlier than

---

352 (2009) 239 CLR 175. See Third Judgment [6]-[11].

353 (1993) 116 ALR 625 (**Sali**).

February 1993. However, in October and November, the judges of the Court conducted what was called 'the Spring Offensive'. This meant that the Court 'devoted itself to getting rid of as many civil cases as they possibly could in the space of about two months'.[354] As a consequence, on or around 20 November 1992, the appellant's solicitor was informed the matter had been fixed for 30 November 1992 and would proceed on that date.

448 The matter proceeded on that date. Junior Counsel, who was not briefed in the appeal, applied for an adjournment of the appeal. Junior Counsel sought an adjournment of two weeks, relying upon an affidavit from the appellant's solicitor. The solicitor stated, among other things, that even after extensive inquiries, he was unable to secure Senior Counsel to be briefed for the appeal. The Full Court refused the application for an adjournment for two weeks. Junior Counsel made an application to adjourn the matter until 2.15 pm at which time he would advise the Court that Counsel had been obtained and for the matter to proceed the following day. That application was also refused. The High Court dismissed an appeal with respect to that refusal. The following occurred at the hearing before the Full Court:[355]

> Mr Justice Marks asked why the court should look at the affidavit. He said the appellant had had many warnings concerning the hearing date; his Honour's associate had contacted the solicitors for each party on several occasions to ensure that they were ready to proceed. Mr Jones then read the affidavit of the appellant's solicitor, although it was not formally filed. In answer to a question whether junior counsel had been briefed in the appeal, Mr Jones said that junior counsel had been briefed but he was otherwise engaged "today". Mr Jones said "that Mr Murdoch QC had all the papers and a conference had been held with him". The court invited Mr Jones to make any other application that he wished to make. He said there was nothing that he wished to add. In opposition to the application, the solicitor for the first respondent had filed an affidavit which set out the history of the matter since the lodging of the appeal and annexed copies of correspondence including the facsimile transmission. *A solicitor employed by the solicitors for the second respondent filed an affidavit in which she deposed that on 27 November she had spoken to four barristers' clerks "regarding the availability of Queen's Counsel to appear on an appeal to the Full Court of the Supreme Court of Victoria on 30 November 1992". She was informed that these clerks had a total of 29 Queen's Counsel available. The court refused the application for an adjournment for two weeks.* (emphasis added).

449 After that application was refused, Junior Counsel made a further application, 'having regard to the matters put before the court today as to the availability of counsel', that the matter should be adjourned until 2:15pm. Quite obviously, that application was also refused:[356]

---

354 *Sali* (1993) 116 ALR 625, 626 (Brenan, Deane and McHugh JJ).

355 Ibid 628.

356 Ibid 628.

> The reference to "the matters put before the court today as to the availability of counsel" was obviously a reference to the 29 Queen's Counsel who were said to be available. Counsel for the respondents opposed the application. The court then refused it.

450 Brenan, Deane and McHugh JJ dismissed the appeal. Their Honours recognised the point, later emphasised in *Aon*, that:[357]

> In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. … What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

451 It was contended that the refusal of the appeal 'had the inevitable consequence of depriving him of right of appeal.'[358] The High Court referred to the judgment below, of Marks J and said:[359]

> Marks J said that it was a long-standing practice of the court that, while it would do its best to meet the convenience of counsel, it would not delay access to the courts by other litigants by putting off hearings in the way the court was asked to do in this case. His Honour said that the background of the case strongly suggested that:
>
> > the appellant is in a financially embarrassed position, that he is conducting this appeal in a way which could possibly stave off the proceedings for sequestration of his estate in the Federal Court. There is, therefore, a tactic of delay which seems to me to be used by the appellant.

452 The High Court considered that there was an appropriate basis on which Marks J had inferred the 'adjournment was designed to stave off proceedings for sequestration of the appellant's estate, that the application was a tactic of delay, and that the appellant did not want the appeal to go on at all.'[360] There was a 'striking inconsistency' between the appellant's affidavit, and the terms of the facsimile that had been provided to the respondent, which remained unexplained.[361] There was no explanation as to why other Junior Counsel, nor any other Counsel, had been briefed in the appeal. Any explanation of the attempts to brief Senior Counsel which had been made were 'extreme vague'.[362] Tadgell J:[363]

---

357 Ibid 629.
358 Ibid.
359 Ibid.
360 Ibid.
361 Ibid 630.
362 Ibid 630.
363 Ibid 630-1.

> … sympathised with counsel for the applicant "who has been obliged to fashion submissions based upon instructions which to me smack of humbug". His Honour also said that he was quite unable to accept the submission that it had been impossible to obtain the services of counsel for the purposes of arguing the appeal that morning. His Honour was of the view that the appeal was of a kind that "could be worked up by counsel in two or three days". For the reasons we have already given, it was open to Tadgell J to conclude that counsel's instructions smacked "of humbug".

453 Brenan, Deane and McHugh JJ concluded:[364]

> Having regard to the findings of the Full Court, the appellant suffered no injustice when the court refused to adjourn the hearing for two weeks. It is true that it is only in extraordinary circumstances that the interests of justice will be served by a refusal of an adjournment in a case such as the present where the practical effect of the refusal is to terminate the proceedings. The members of the Full Court were, however, conscious of that fact. Thus, Tadgell J commented that it was, in his experience, "unique" that the Full Court had had to refuse "an application for an adjournment of this kind". Clearly, their Honours considered that the circumstances before them were both extraordinary and extreme. On the findings which they made, they were fully entitled to be of that view. On those findings, the appellant was the author of his own misfortune.
>
> Although there is force in the argument that no injustice would have been done to the respondents by adjourning the matter until 2.15 pm, that application had to be considered in the light of the findings of the Full Court in the first application. If the Full Court was entitled, as we think it clearly was, to regard the appellant's application as mere delaying tactics, there was no warrant for granting any adjournment. … Indeed, in the context of the grounds advanced by the appellant as the basis of the application for an adjournment for two weeks, the suggestion that it was what had been said in the Full Court about the availability of counsel which gave rise to the application for a short adjournment would justifiably have been seen by their Honours as confirming the appropriateness of Tadgell J's earlier use of the word "humbug".

454 In this matter, the adjournment application made on the first day of trial was without merit and was accordingly, dismissed. Quite aside from the delay tactics, which are now expected in these matters, the three grounds are referred to in order below.

455 First, I previously declined to grant a stay in relation to any foreshadowed applications for leave to appeal from interlocutory decisions in these proceedings. The Companies have not, at any time, made an application to the Court of Appeal for a stay.[365] This does not constitute a legitimate reason to adjourn a trial, on its first day, especially when it has been raised as a ground and disposed of previously (following the First Judgment). Any stay should have been sought from the Court of Appeal prior to the trial.

---

364 Ibid 631-2.

365 See Third Judgment [46]-[47].

456 Second, for the following reasons, I reject the evidence in relation to the medical condition of the solicitor.[366] It is unsupported and inadequate. The solicitor remains on the record and has actively represented the Companies at the trial. Further, the Companies have repeatedly and continually over a period of months relied on Raghavan's medical condition, yet there is not one iota of sufficient medical evidence in support.[367] This is referred to next.

457 There is Raghavan's affidavit affirmed 12 December 2019, which was discussed and rejected in the Third Judgment.[368] Two further affidavits (of Raghavan and Xu) were filed on 16 December 2019, each of which was affirmed on the same date. Raghavan deposed largely to the same matters as his previous affidavit. Xu deposed to the fact that the Companies have never required Raghavan to disclose the nature of his health issues out of respect for his privacy. Each is vague and unconvincing and neither provides proper evidence of the alleged medical condition.

458 Raghavan's affidavit of 16 December 2019 deposes to his 'longstanding chronic illness, which began on or around July 2017', which at its height, left him incapacitated for almost a year. He states, 'to the best of my knowledge and belief, the condition arose from complications arising from untreated sinus issues.' Raghavan goes on to say:

> I have confidential exhibits in the form of communication about absences from previous workplaces owing to my health, in addition to some medical documentation of my illness. I do not want any parties to keep copies of the exhibits and I would seek this Honourable Court's advice on the most appropriate way of introducing the same into evidence.

459 Raghavan confirmed, at the hearing on 17 December 2019 (after the making and dismissal of this application on 16 December 2019), that he had confidential exhibits which he was willing to hand up to the Court.[369] He also said, at the trial, on 17 December 2019:[370]

> I do wish to quickly say something that I wish to clarify this morning. As deposed to, I'm not in great health. I had to take a bit of a breather just now.
>
> And what happened was I had actually commenced leave starting yesterday, and when Mr Williams advised my client in the morning in quite unanticipated fashion, I

366 See paragraphs [456] to [470].

367 The doctor's letter (see paragraphs [384] to [386]) was provided to Chambers only after this application was made and dismissed. That letter is, in any event, inadequate.

368 See Third Judgment [50]-[53].

369 T34:7-11 (17 December 2019).

370 T85:17- 31, 86:1-17 (17 December 2019).

> had to rush back, because I had heard that if the companies were unrepresented, Your Honour had indicated that it would then be considered an unopposed winding up application.
>
> Hence why I had to – and the other issue was we had difficulties arranging counsel, given the time of the year, and we did luckily manage to find Mr [Percy] yesterday, who adjourned the matter until today, and for that indulgence we are extremely grateful.
>
> I just wish to advise Your Honour that I may not be in a condition to properly see through a five-day trial. And I must put the court on notice that because of my symptoms, my condition is quite unreliable, and symptoms may come across me.
>
> And I just wanted to state for the record that if a situation arose where I needed urgent medical attention or if I needed time to just recover, even though it's just briefly, if that would inevitably prejudice the representation of my clients, not just arising from my ill health, but because of the same I've not been completely across the material, given my sort of disengagement from the matters, not just in these proceedings, but in other matters as well the last few weeks. I just wish to state that for the record before we proceed.

460 It is not necessary, and I do not intend to make a finding as to the legitimacy or otherwise of Raghavan's medical condition other than to say that is has not been established by cogent and proper medical evidence in the usual way. In any event he has continued to represent the Companies for months and the Companies have had months to engage another solicitor. They have not done so and instead urge the Court to re-arrange the hearing because of this factor, well known for many months, if it indeed is the case, which the evidence does not support and I very much doubt. Finally, they have given no indication at all that they intend to engage new solicitors. This is entirely unacceptable.

461 Raghavan's first affidavit was filed ten minutes prior to the directions hearing on Thursday, 12 December 2019. That affidavit was proffered as the reason why solvency evidence had not been filed and why an extension ought to be granted. Those applications were not granted.

462 Raghavan did not appear before the Court at that time on Thursday, 12 December 2019. That is because, at the time, he was appearing on behalf of the Companies in an unrelated matter before Cavanough J of this Court. This was not disclosed to me on Thursday, 12 December 2019 (or at any time afterwards).[371] That raises questions as to the extent and effect of his condition upon him to say the least.

---

[371] This came to my attention by way of a disclosure, perhaps accidentally, in an affidavit filed by the Companies in this proceeding. The affidavit exhibited an email exchange between Raghavan and the plaintiffs' solicitors which discussed Raghavan's appearance before Cavanough J on that date.

463 Further, when Raghavan spoke to the Court in relation to his health issues, on Tuesday, 17 December 2019, he was regularly being prompted by Kuksal as to matters that he should and should not raise, in terms of matters that his condition precluded him from undertaking. This raises a further issue relating to the Companies' knowledge of his condition, contrary to the affidavit of Xu, to which I refer to below.

464 It is unnecessary to say anything further about the legitimacy of the condition. There is, as noted, no cogent evidence of it before the Court, barring assertion.

465 Raghavan's second affidavit and Xu's affidavit, are both assertion in nature without proper medical evidence to support them. From the Companies perspective, the situation was incredibly dire. These affidavits were filed on the first day of trial and sought to make good a basis to adjourn the trial to the new year. The Companies knew that if I rejected the medical condition as that basis, the trial would proceed immediately, whether or not the Companies were ready. Further exacerbating that position were the events of the directions hearing on Thursday, 12 December 2019. The Companies knew that I would reject any further application which did not rely on any fresh evidence or grounds. Rather than provide 'fresh' or 'cogent' evidence, the Companies provided more evidence of the same quality that has previously been rejected.

466 Raghavan deposed in his second affidavit, and submitted on Tuesday, 17 December 2019, that confidential exhibits relating to his contended medical condition were available 'if the Court requests it'. That is not appropriate. It is not to the point that they are confidential. They could have been provided in confidence to the Court and dealt with appropriately.[372] By presenting 'evidence' in that manner, the Court cannot function effectively or at all. If the exhibits *were* requested, it would have necessitated a further delay as the exhibits were gathered, provided and considered. All materials relevant to the application should have been provided frankly and immediately. It is not for the Court to ask for relevant material. The Court will not adjourn a trial on mere assertion, and it certainly will not adjourn a trial on assertion that there is evidence, not before it, 'but available on request.' Given the emphasis

[372] It could have been provided to me, and to the solicitors for the plaintiffs, in accordance with the confidentiality arrangement that had been contemplated in relation to the solvency evidence.

placed on the matter, cross-examination of Raghavan might well have been required or permitted.

467 Then, addressing the content of the affidavits, Raghavan observes that his condition worsened around October 2019, which necessitated him to take absences from work. He was, however, reluctant to extricate himself from the matters. He commenced taking leave when necessary, but his conditioned worsened in November 2019. He stated that he 'increasingly required significant time off from work and my productivity at work diminished further.' Nonetheless, he considered that he could manage the symptoms and that they would not persist, and '[t]hus, I did not raise any concerns about my health with [his] employer'.

468 Xu deposes that Raghavan only provided the Companies' management with 'details about his illness in a meaningful way on 11 December 2019, at a meeting that he had requested'. That, to me, appears somewhat inconsistent and I do not accept this evidence, either from Raghavan or Xu. Raghavan deposes to a history of deterioration, necessitating 'significant time off from work.' Xu, in effect, deposes to a scenario where the Companies considered that nothing was amiss and accordingly, that Raghavan was fulfilling his duties as an employee, and any such absences must have been within a tolerable and unnoticeable range. Given the history of deterioration, the significant leaves of absence deposed to, and the emphasis which has been placed on his condition before me, his employer, the Companies, must have been aware of it.

469 Finally, Raghavan goes on to further depose that from 9 December 2019, being three days prior to the directions hearing, he had 'become seriously unwell and was unable to properly function for much of the remainder of that week.' At that time he was tasked with preparing the evidence, and in particular the presentation of the how the contingent asset and liability accounts, given the substantial litigation the Companies are engaged in, were to be prepared. Due to his condition, he was unable to do so. As noted in the Third Judgment, the Court was made aware at all of this ten minutes prior to the directions hearing on Thursday 12 December 2019. For the reasons given there, and expressed again here, that is not sufficient.

470 The only conclusion to be reached is that the Companies have intentionally and unashamedly

used the suggested medical condition, legitimate or otherwise, of their solicitor as and when it suits them for tactical purposes. Raghavan has permitted or facilitated this. It is not lost on me that he is a solicitor and officer of the Court.

471 Thirdly, the exit of Mr Williams QC, although unfortunate does not and did not entitle the Companies to an indulgence beyond resuming the trial at 10:00am on Tuesday, 17 December 2019. They audaciously asked for an indulgence until next year. It was the Court that indicated that the best they could hope for was the next day. They still did not agree but I gave them the indulgence anyway. In my view this was sufficient in the circumstances. The Companies brought about the position they found themselves in. Finally, the solicitor was across all of the issues, having signed all of the submissions, and if necessary could conduct the trial with or without Counsel. Indeed, that is what occurred. The matter was adjourned to 10:00am on Tuesday, 17 December 2019. As I said by way of ruling:[373]

> Regard this as an indulgence beyond what ordinarily should be required in this case. It's the last indulgence. … I accept there should be some further opportunity given to the Companies, but it's not going to extend beyond 10:00am tomorrow morning, and I hope I make myself absolutely clear. The trial will proceed at 10:00am and will carry on until it's completed.

In this regard, there was no explanation or elucidation of the Companies' attempts to brief other Counsel to act on their behalf.

472 Any adjournment sought would not have simply adjourned the trial for a short period; it would have adjourned it to at the very least February 2020. Even then, that assumes no further interlocutory steps would have an effect on any future trial date, a matter I heavily doubt, especially given that two further applications have been raised following the trial. I refer to and repeat the Third Judgment. The result may seem a little harsh, but given the history and nature of these proceedings, it is entirely justified, reasonable and appropriate. Indeed, it is the only just outcome in these circumstances.

473 As the Court of Appeal has previously observed, the Court must actively hold parties to account for undesirable practices in civil litigation.[374] That is especially so in circumstances

---

[373] T25:10-12, 26:4-8. (16 December 2019).

[374] *Yara Australia Pty Ltd v Oswal* [2012] VSCA 356 [26] and [52] (Redlich, Priest JJA and Macaulay AJA) (**Oswal**).

of continued and prolonged delinquency with the Court's orders and directions, or where untruths, baseless assertions and strategic conduct is employed by a party to achieve a favourable outcome. It is even more so when the conduct is engaged in intentionally or with wilful disregard for the interests of the Court and other parties to the proceeding.

E4 Further Leave Application - Evidence of Solvency

474 The relevant history, so far as it concerns solvency evidence and the various extensions of time granted in this proceeding is set out in the Third Judgment.

475 By orders made on 5 December 2019, the time for compliance with orders for the filing of affidavits was extended to 4:00pm on Tuesday, 10 December 2019, after which time, the Companies were not permitted to file any further affidavits without leave of the Court. This included, critically, the Companies' evidence of solvency.

476 Given the material had not been filed, on Thursday, 12 December 2019, Mr Williams QC on behalf of the Companies, made an oral application seeking an extension of time within which the Companies could file that evidence. As noted, that application was refused. Mr Williams QC intimated that such materials were in existence but uncompleted and not before the Court. The reasons for refusing that application appear in the Third Judgment and it is unnecessary to recite them here.

477 The trial commenced on Monday, 16 December 2019. No evidence of solvency had been adduced, save for affidavits filed in September or October 2019, within which the Companies' accountant asserts that the Companies are solvent, were undertaking an audit process, and which exhibited stale financial accounts. Those affidavits, for obvious reasons, have been rejected as insufficient to displace the presumptions of insolvency.

478 Over the course of the trial, the Companies repeatedly intimated that evidence of solvency was 'ready to file' or 'was available' or 'was here' or 'was there'. It was never adduced, and no application was made to file that evidence until Thursday, 19 December 2019, after the close of evidence, as referred to below.

479 On Monday, 16 December 2019, Mr Williams QC made clear that he was not at that point

making the application for leave.[375] I discussed the following with Mr Williams QC:[376]

Sifris J:	Well, are they ready for filing this morning?
Mr Williams QC:	I'm sorry, Your Honour?
Sifris J:	Are the financial statements ready for filing this morning?
Mr Williams QC:	There is material, Your Honour, that could be filed, but I don't want to go to that at this stage, because it's not appropriate that I move beyond the present application.
Sifris J:	Very well.

Following the unsuccessful recusal application, Mr Williams QC informed the Court that he was no longer able to act, and consequently, no application for leave was made on that date.

480 On Tuesday, 17 December 2019 Raghavan appeared on behalf of the Companies. He addressed the Court:[377]

> Your Honour, so Mr Williams made an application yesterday for leave to file material relevant to the defendant's solvency, and that, I understand, was rejected. *Now, I have the material here with me, and given that this is an insolvency proceeding and given that I'm defending three separate insolvency proceedings, it would be highly prejudicial to the defendants if another application to seek to leave in filing the material was rejected.*
>
> And I have to put to Your Honour, I understand Your Honour indicated that yesterday's adjournment would be the last indulgence granted to the defendant companies. But in light of what I have just said, it would be, as I said, next to impossible to – well, not next to impossible, but it would – it would put the defendant companies at a massive disadvantage to try and defend the proceedings without material relevant to at least this financial year. And it would also have some material impact on the 459S applications and the two proceedings separate from the Kornucopia ones. (emphasis added).

481 I corrected Raghavan that Mr Williams QC had *not* made an application the previous day seeking leave to file evidence. As I said:[378]

> I invited him to advise the court whether he would be making one, and he sidestepped that by saying he would go to the bias application, which he did, and then we never got back to that, but in any event, he indicated that some material was available, and now you say that there is material available and you seek leave to file that material given its relevance to solvency and the 459S application. … Is that material ready to be filed now?

---

375 T12:16-7 (16 December 2019).
376 T11:10-8 (16 December 2019).
377 T33:17, 34:5 (17 December 2019).
378 T34:18-25 (17 December 2019).

482 Raghavan confirmed in the first instance that the material was ready and available to be filed.[379] There was then, the following exchange:[380]

Sifris J:	Yes. Could you hand me a copy of the affidavit, please.
Mr Raghavan:	Yes. Sorry. I apologise. The defendant companies are only in possession of electronic copies at this stage and would need a brief recess just to appropriately send that to Your Honour.
Sifris J:	Yes. Yes. Thank you for that. I make no further comment at this stage.
Mr Raghavan:	Your Honour, just to clarify…we did try to file material on RedCrest, but we've had difficulties. I believe Your Honour will understand.
Sifris J:	Well, you do need leave and…the usual course is to hand up a copy, a hard copy.
Mr Raghavan:	Yes.
Sifris J:	If and when it's available, I will deal with that further.
Mr Raghavan:	I understand, Your Honour.

My Senior Associate spoke to Raghavan and Kuksal in Court and advised them that if they were to email the materials to my Chambers, a hardcopy would be produced for their and my benefit. None was provided.

483 During the afternoon of Tuesday, 17 December 2019, Raghavan said again:[381]

> Your Honour, just for the solvency material, so just to clarify that it had been settled by me, and I did then send it on to Mr Williams QC for – he was going to finalise – how do you call – settle the material that was going to close the solvency material. And as Mr Williams indicated, that material was available to be filed yesterday.

484 However, it should be observed that over the luncheon adjournment, no solvency evidence was produced in hardcopy, or provided to my Chambers and to the plaintiffs by email in softcopy. As at Tuesday, 17 December 2019, the second day of trial, no solvency evidence had been sought to be filed. No occasion arose to consider any application for leave.

485 Legal representatives of the Companies did not appear on Wednesday, 18 December 2019.

---

379 T34:30-1 (17 December 2019).

380 T35:1-23 (17 December 2019).

381 T86:19-25 (17 December 2019).

Kuksal appeared, and was cross-examined, but there was no discussion or relating to solvency materials.

486 As noted, the Companies appeared at a very late stage on Thursday, 19 December 2019. Prior to the arrival of Raghavan, I asked Counsel for the plaintiffs the following:[382]

> Sifris J: Before you start, if I may say, the cases having been completed and we're into final submissions, have any of you been served with any affidavits in relation to solvency or any other affidavits other than the affidavit of Mr Kuksal, which I haven't yet received, that we spoke about the other day?
>
> Mr Lovell: Yes. We've not received anything.
>
> Sifris J: Mr Miller?
>
> Mr Miller: No, Your Honour.

487 Accordingly, following the close of evidence, and as at the commencement of the plaintiffs' closing submissions, no evidence of solvency had been filed or served. No application for leave had been made.

488 Raghavan appeared at approximately 11:50am on Thursday, 19 December 2019. Mr Lovell concluded his closing submissions at 12:20pm. Raghavan then made a number of applications. One of these was a much-awaited application for leave to file evidence relating to solvency of the Companies. It was refused.

489 Raghavan said as follows:[383]

> Before I realised closing submissions were being made, I did intend to make certain applications on the three defendant companies' behalf, and the most important one would have been to make an application seeking leave to hand up the solvency material for all three entities.
>
> I have the physical copies with me now, and it was my intention – I believe it was Monday Mr Williams QC indicated that such material was ready to be filed. The following day, I mentioned the same thing to Your Honour. And Your Honour indicated that if I had hard copies, I could just hand them up to Your Honour and Your Honour would consider the matter at a later stage, whether to grant leave for the defendants to rely on the same.
>
> Well, that was going to be the main application, obviously. And that issue with the filing of the solvency material – as I may have indicated to Your Honour, we've been unable to file anything on RedCrest, and we understand this is because of Your

382 T180:12-20 (19 December 2019).

383 T232:19, 233:8 (19 December 2019).

Honour's directions to prevent us from filing anything online.

490 I ruled that no application would be permitted for leave to rely on any further material.[384]

491 Prior to discussing why the application was refused, it is worth noting that I had not deferred consideration of the application to a later stage. As I stated on Tuesday, 17 December 2019, 'If and when it's available, I will deal with that further.'[385] The obligation was solely on the Companies to produce for this material. I had already requested either a hardcopy to be produced in Court, or a softcopy emailed to my Chambers. Only then would any application potentially be entertained. Neither was available until 12:20pm on the fourth day of trial, on Thursday, 19 December 2019, after the close of evidence *and* the plaintiffs' closing submissions.

492 Every opportunity was given to the Companies to establish solvency by credible evidence. It was only at 12:20pm on Thursday, 19 December 2019, and after closing submissions had been made by the plaintiffs, that the Companies indicated that they actually had, for the first time, such evidence immediately available which could be (but was not) 'handed up'. Needless to say, in the circumstances, the request was denied. Further, at no point prior to 12:20pm had the Companies advised the plaintiffs or the Court of the basis of solvency or which material they proposed to file. Nothing. There was no indication whatsoever. No attempt to accord the other parties or the Court the very fairness that the Companies continually complain about. The conduct is appalling and cannot be countenanced by a Court of law. What did they expect to happen when not the slightest inkling of solvency evidence – the most critical issue in the case – was given, despite numerous indulgences, prior to the plaintiffs having completed their cases?

493 On Friday, 20 December 2019, during the Companies closing submissions, Raghavan said:[386]

> Third, the plaintiff maintains that it is solvent and in this refers to a tax lodgement made with the Australian Taxation Office, the ATO, and this lodgement was made on Tuesday 10 December 2019 …

494 The following exchange then occurred:[387]

---

384 T234:8-9 (19 December 2019).

385 T35:1-23 (17 December 2019).

386 T236:18-21 (20 December 2019).

Mr Raghavan: Okay. On the matter of solvency, and I'll be very direct about this. On 10 December 2019 the defendant lodged its tax return for the financial year 2018 to 2019, ending 30 June 2019 with the ATO, Australian Taxation Office. That has been lodged.

Sifris J: What date was that? 10 December?

Mr Raghavan: Yes, that's correct.

Sifris J: Yes. Yes.

Mr Raghavan: And Tuesday 10 December, that would have been the same day that Your Honour made orders to – for the defendant companies to – what do you call – to file the same with the court. So there is no dispute that the defendant lodged its tax return on that date, and that is with the ATO, and I'm sure that can be verified, because I understand offhandedly that certain assertions were made about the defendant's intention to file or submit or – well, to have anything, really, about solvency.

Unfortunately, the same could not be provided to the court on the same day, with being the final deadline of the filing of solvency material, and I've indicated to the court, you know, the sequence of rather unfortunate events that led to that situation.

495 This is simply astounding. I have traced the history of the absence (and promises) of solvency evidence throughout the entire lifespan of this proceeding. Now, apparently, on the final day of trial, there is a tax return which had been lodged with the Australian Tax Office on 10 December 2019. That was two days prior to the date on which Mr Williams QC sought an extension of time within which solvency evidence could be filed, which was refused. The document was not alluded to at that time. But now, on Friday, 20 December 2019, and following the trial, it is revealed that the Companies had *some* form of financial evidence (whether sufficient or not is a separate issue) that could shine some light on whether the Companies were solvent. If solvency were as critical as the Companies say (which of course, it is in a winding up application), why was this not provided or even alluded to previously. It certainly was not when the application for leave to file was made on Thursday, 19 December 2019. An application for leave to rely upon it was refused.[388]

---

387 T287:23, 288:5 (20 December 2019).

388 T289:11-25 (20 December 2019).

E5 Evidentiary Ruling – Covert Recording

496 The Companies attempted to enter into evidence certain transcripts of conversations which took place between (amongst others) Kuksal and Kennedy. Kuksal deposed on affidavit affirmed on 9 October 2019:

> [4] I refer to the affidavit of Mr David Youl, affirmed on 18 September 2019, which deposed to transcription of eight separate audio recorded conversations of meetings involving representatives of Madgwicks and Efektiv Group. I was physically present for all meetings and recorded the conversations.
>
> [5] I have carefully gone through the transcripts made by Mr Youl and believe them to be an accurate representation of the conversations.
>
> [6] I know that Efektiv's solicitor has also made the original audio recordings available to Madgwics [sic] and that Madgwicks have had access to both the transcripts and the audio recordings for almost two weeks; Madgwicks have not raised any concerns about the accuracy of the transcripts.
>
> [7] The conversations recorded in the transcripts, although not unfriendly, were robust and forthright. Within those eight transcripts there are various statements by me expressing dissatisfaction with the amounts of Madgwicks' legal bills, the failure of those bills to clearly identify the work performed, and the quality of the work performed. All of the criticisms which I made of Madgwicks in those transcripts were true. Indeed, in most cases Mr Kennedy of Madgwicks accepted the criticisms which I made.

497 Kuksal's evidence, for obvious reasons, is rejected. David Youl was not called to give oral evidence. He deposed on affidavit affirmed on 18 September 2019, that he transcribed the recordings between Kuksal and Madgwicks. The conversations occurred between 7 September 2018 and 6 May 2019, and he had 'taken every care to ensure that [his] transcriptions are accurate and representative of the conversations that took place.'

498 Madgwicks objected to the admission of the transcripts. Oral submissions were not made on the issue. Madgwicks did, however, note their objections in their written submissions on the footing that they are 'covert transcribed recordings without knowledge or consent of the plaintiff's participants which were not recorded or transcript by an independent authorised person'. I accept that submission, and rule that the transcripts are either inadmissible or should be excluded.

499 The Companies conceded that the transcripts were not produced by an authorised and independent transcript provider. They were produced by Youl, an employee or contractor of the Companies. I am not able to determine whether the transcripts accurately reflect what was

said during the conversations which they apparently transcribe. The recordings have furthermore not been adduced in evidence. The transcripts, without any verification, are so unreliable that giving them any weight would be erroneous. They could not therefore rationally affect the assessment of any fact in issue in the proceeding, and as a result are inadmissible as irrelevant.[389] Even if they were admissible, I would for the same reasons, exclude the transcripts under s 135 of the *Evidence Act 2008* (Vic) on the basis that any probative value those documents would have is overwhelmingly outweighed by the danger that they would be misleading and unfairly prejudicial to Madgwicks. The Companies ought to have, but did not, present authorised transcripts.

500 I have reviewed the transcripts in any event. As noted, they were recorded without the knowledge or consent of Kennedy or other members of Madgwicks' staff. The substantive content of the transcripts is, in any event, irrelevant. The transcripts only go to the Companies contentions that Madgwicks were negligent, which is not a relevant issue in these proceedings. There is nothing in the discussions which changes my view on any of the matters referred to in any of my Judgments. I am also alert to the possibility that the discussions, in some cases, may constitute without prejudice meetings to endeavour to resolve the dispute. Even though inadmissible, and excluded, no regard has been had to them.

E6 Conduct Issues and the *Civil Procedure Act 2010* (Vic)

501 It is a gross understatement to say that I am dissatisfied with the manner in which the Companies and their solicitor have conducted this litigation. They have been rude and discourteous. They have continuously breached court orders. They have breached many of the overarching obligations contained within the *Civil Procedure Act 2010* (Vic) (**CPA**).[390] They have been untruthful. They have consistently and most unfairly alleged procedural unfairness, bias, and a longstanding medical condition that has not been given proper consideration. This has caused enormous frustration to the Court and the plaintiffs. The fact is

389 *Evidence Act 2008* (Vic) s 55.

390 I am satisfied that there have been breaches of ss 17 (Acting honestly, at the very least in the case of Kuksal), 18 (Applications made without a proper basis), 19 (Steps taken strategically rather than to resolve dispute), 20 (Non-cooperation in proceeding), 21 (Misleading or deceptive conduct, at the very least in the case of Kuksal), 22 (Lack of reasonable endeavours to resolve dispute), 23 (Expand, rather than narrow, issues in dispute), 24 (Costs have become disproportionate, because of the Companies' conduct), 25 (Extensive delay due to the Companies' conduct).

that on the critical substantive matter (evidence of solvency) and the critical procedural matter (medical condition) there is not an iota of credible evidence. On what should have been relatively straightforward winding up applications, there are now four Judgments of the Court, delivered in the course of four months, which exceed 800 paragraphs and almost 300 pages. The abuse of process is all one way.

502 Although calling for comment and criticism, it is not apparent what should be done. Section 29 of the CPA is a provision by which the Court can of its own motion or on application 'sanction legal practitioners and parties who fail to meet their overarching obligations.'[391] The object of any orders, including orders as to costs, may be compensatory or punitive.

F Reporting

503 It goes without saying that there are a number of matters which have arisen in these proceedings which have caused me much concern. I intend to provide this Judgment to the relevant authorities in relation to the conduct detailed below.

F1 Raghavan

504 Raghavan is the in-house solicitor who acts for the Companies. His conduct has given rise to various concerns.

505 First, I have serious concerns about his professional independence. At times, he appeared to be nothing more than a mere mouthpiece to his clients, and in particular Kuksal. For instance and as noted, Raghavan made the Companies closing submissions on Friday, 20 December 2019. He noted in passing that Kuksal, who is not legally qualified, 'assisted' with the preparation of submissions. It was requested that Kuksal address the Court directly. This was refused. Raghavan noted that he was 'reading [Kuksal's] notes' to the Court, 'and they're a little creative'.[392] I am concerned that he is accustomed to act in accordance with the wishes of his client, and does not provide independent Counsel in line with his ethical obligations. I am further concerned that Raghavan may have provided his name to documents presented to

---

391 *Oswal* [2012] VSCA 356 [17]-[27] (Redlich, Priest JJA and Macaulay AJA) citing *Hudspeth and Scholastic Cleaning and Consultancy Services (No 4)* [2013] VSC 14.

392 T295:10-1 (20 December 2019).

the Court, which may have in fact been produced by Kuksal.

506 Secondly, Raghavan followed instructions and facilitated the Companies to make numerous applications which did not have a proper basis. There have been four recusal applications and two adjournment applications. Raghavan followed instructions to put any and all matters in issue, rather than give effect to his duty to narrow the issues in dispute.

507 Thirdly, I have expressed significant doubt with respect to his contended medical condition. I am satisfied, and have inferred, that he has allowed it to be used strategically for the benefit of the Companies. I have not made a finding as to its legitimacy, given that it was not necessary for this proceeding. That, however, requires investigation outside of this context. He has not been forthcoming with the Court with that matter, which has become highly relevant to the applications on various occasions.

508 Further, his medical condition was the basis for the adjournment of the trial sought on 12 December 2019. He affirmed an affidavit deposing to the condition which was filed in this proceeding on the morning of that hearing at 9:50am. He did not appear in Court, and one would naturally be led to believe that he was too ill to appear. However, on the same morning, he appeared to argue an application on behalf of the Companies in a related matter before Cavanough J of this Court. This was not disclosed to me.[393]

509 Fourthly, and most seriously, Raghavan has continually acted in a discourteous manner towards the Court and to solicitors acting for Chen and Madgwicks in this proceeding. He has made baseless allegations of dishonesty. He has made threats. This is a serious matter. Detailed below are two instances of abhorrent conduct identified in the course of these proceedings.

Hager – Allegation of Dishonesty

510 As discussed above, Kornucopia tendered the amount the subject of the Kornucopia Demand by paying that amount to Nelson Alexander. Chen rejected that tender.[394]

---

393 See paragraph [462] and footnote 371.
394 See paragraphs [55] to [77].

511 On 22 October 2019, Hager informed Raghavan that Chen's solicitors, Keypoint, would arrange for Nelson Alexander to refund the money promptly.

512 Raghavan did not accept this because he had 'no evidence' that Hager had actually instructed Nelson Alexander to reimburse the funds. An email exchange soon followed. It is appropriate to set it out in full.

513 On 23 October 2019, Raghavan emailed Hager:

> Vaughan,
>
> It is quite clear to the Defendant that *the Plaintiff has no intention of actually returning the tender and is merely making false assertions to conveniently use them before His Honour Justice Sifris,* so, when the proceeding is actually dismissed for lack of an Originating Process, the Plaintiff May then simply keep the funds.
>
> We note that no one from Nelson Alexander has sent us a proof of transfer or reached out to facilitate one.
>
> We put you on notice that if there is no proof of transfer received by Kornucopia Pty Ltd before close of business today, we will use this correspondence in Court tomorrow *as yet more evidence of the abuse of the Court's processes.* (emphasis added)

514 On the same date, Hager responded to Raghavan:

> Dear Naveen,
>
> The attempt to engineer a position is commendable, but it is rejected. I have given you my client's direction to Nelson Alexander to pay the money back. We will follow them up. I have written to you rejecting the tender and the reasons for the rejection. I have asked for your client's bank account details, but you will not provide them. If you won't give them to me, I will arrange for a cheque to be drawn.
>
> I look forward to hearing from you.
>
> If you are going to put correspondence before the Court, please include this e-mail.

515 On 24 October 2019, Raghavan sent an email to Hager:

> Vaughan,
>
> We note that we have yet not received any confirmation of the alleged reimbursement of the payment made by our client to Mr Chen.
>
> Please see the attached email from Mr David Anderson of Nelson Alexander confirming that they had received the bank details for our clients from Ms Lulu Xu yesterday.
>
> *Please note that we will produce the correspondence in the matter as proof of your client's continued misrepresentation to abuse the Court's processes for collateral*

purposes. (emphasis added)

516 On 25 October 2019, Nelson Alexander sent an email to Raghavan notifying him that the funds had been reimbursed. I accept that on or around 22 October 2019, Hager instructed Nelson Alexander to do this.

517 Raghavan, as a solicitor and officer of the Court, does not need to be reminded of his ethical obligations.[395] Nonetheless, these statements are discourteous in the extreme. They are clear, continued and baseless allegations of dishonesty. While the allegation is expressed to be made against Chen (not that this makes that any better), it is clearly directed towards Hager, given that Hager said that he would arrange for the reimbursement of the tender to Kornucopia. Raghavan's conduct is despicable.

McNamara - Threat

518 As discussed above, Raghavan requested McNamara to provide the Costs Disclosure Documents to the Companies on 20 August 2019. McNamara arranged for the documents to be made available for the Companies to pick up hard-copies from Madgwicks' office on 21 August 2019.[396] She did so under the pressure of a threat made by Raghavan.

519 On 16 August 2019, Raghavan sent an email to McNamara attaching the summons for taxation. On 20 August 2019, he sent a further email, stating that it had come to his attention that various documents 'were never sent to our clients'. He went on to say:

> To ensure a fair and comprehensive taxation process at the Supreme Court of Victoria, our clients request that your firm provides to us all documents related to their financial accounts with your firm including, but not limited to, all costs disclosure agreements, all invoices, all payment receipts for monies received in trust from our clients, or on behalf of our clients, and a complete and up to date statement of account.

520 On 21 August 2019, McNamara responded, stating 'In our view it is more appropriate for you to raise this matter at the callover [in the Costs Court Proceeding] on 3 September 2019'.

521 On the same date, Raghavan responded to McNamara:

> Please note that this is a violation of our clients' rights and a breach of the Legal

---

395 See *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) rr 4.1.2 and 32.1.

396 See paragraphs [259] to [264].

> Profession Uniform Law. *If we do not receive the requested information by 5pm today, Wednesday 21 August 2019, our clients' will be making a complaint to the Victorian Legal Services Board.* (emphasis added)

522 Again on the same date, McNamara sent an email to Raghavan:

> We will provide this information however it is voluminous. We hope to contact you tomorrow so that you may make arrangements to collect it. It is unrealistic to expect such a volume of material to be provided in such a short time frame.

523 McNamara gave evidence on 19 December 2019. At this time, she addressed me as follows, clearly shaken by the threat made by Raghavan. She said:[397]

> I am very concerned of this allegation – there's emails; there's affidavits affirmed; Mr Kuksal said it in the witness box – how Mr Raghavan threatened to report me to the Legal Services Board should I not produce the costs agreement, statements of account and invoices. Now, Your Honour, that is a threat, and it's no better than holding someone up in the street and saying, 'If you don't hand over your cash, I'm gonna shoot you'. And, Your Honour, I feel I've had a long, unblemished career, and I do not wish to spend the twilight years of my career in correspondence with the Legal Services Commissioner over this kind of thing. And, Your Honour, I'm just going to say this and I will let it lie where it falls, but I know Your Honour does have the authority or the power or whatever to refer a solicitor to the Legal Services Commissioner. And, as I say, I am not asking Your Honour to do so, but if Your Honour can just accept that this has caused me some distress and it was very hard. This threat made me shake, you know, when it came in that afternoon. I was very distressed about it. … Now, Mr Kuksal tried to say yesterday – when he was being cross-examined, he said, 'Oh, you know, we were going to report the firm or Ms McNamara', that sort of thing. Well, when I got that email, I took it to be me, and I think it was fair enough to think so. And I might add, Your Honour, I have received some of the worst emails from Mr Raghavan during the course of this proceeding. They did cease when Mr Williams commenced acting, but I think that there have been emails written that shouldn't have been.

524 It should be put on the record that I have *not* have had regard to this statement in the determination of the issues which have arisen in these proceedings. However, it illustrates the seriousness of the threat made by Raghavan, in terms of the impact that it has had on McNamara.

525 Raghavan's email was discourteous. It is a threat. Raghavan has held the opposing solicitor to ransom, under the threat of disciplinary action, in order to have an opposing solicitor produce documents which he and his clients have requested. Madgwicks did not act improperly by refusing the documents. They did not even refuse them. McNamara merely suggested that the issue would be more appropriately raised at the callover of the Costs Court Proceeding.

---

397 T176:12, 177:23 (19 December 2019).

Raghavan's response was entirely unwarranted and abhorrent.

526 Raghavan will be referred to the Legal Services Commissioner. The Judgments in this proceeding will be provided to the Commissioner.

F2 Kuksal

527 The Court is permitted, where it is concerned of perjury having been committed, to make a referral to the Office of Public Prosecutions.

528 In *Simpson v Hodges,* Hall J said:[398]

> It is important to observe that such a referral, if it is to be made, simply has the effect of directing the attention of the executive arm of government to a possible breach or breaches of the law so that it may, if it sees fit, investigate the matter and, as a consequence of that investigation, take such steps as it sees to be appropriate: see *In the Marriage of P and P* (1985) Fam LR 1100 per Lindenmayer J; *Normandy Woodcutters Limited v Simpson* [2002] NTSC 43 at [53].

529 In *Normandy Woodcutters Limited v Simpson,* Mildren J said:[399]

> A judicial officer who believes that offences have been committed is under a duty to refer the proceedings to the relevant authority. That duty arises by virtue of the ethical duty of persons occupying judicial office to uphold the law. It is not an exercise of judicial power: see *In the marriage of P and P* (1985) FLC 91-605. No investigative role by the judicial officer is involved. No recommendation is made. There are no findings made. There is no injury to anyone's reputation by a mere referral. Nor is the judicial officer exercising executive power

530 As I have discussed above at length, I suspect that Kuksal may have perjured himself in the witness box.[400] He gave 'unequivocal' evidence that the Companies had not received the invoices produced by Madgwicks until they were supplied to them by McNamara on 21 August 2019, under pressure of the threat previously referred to, and that Kuksal had not received those documents at earlier times when they were sent by email to the Efektiv Email Address. As I have found, the Companies received those documents prior to receiving them from McNamara. They were received when they were sent to that email address or at least when Kennedy caused them to be uploaded to the Dropbox.

531 I intend to refer Kuksal to the Office of Public Prosecutions. I will say nothing further.

---

398 [2007] NSWSC 1230 [266] (Hall J).

399 [2002] NTSC 43 [53] (Mildren J).

400 See paragraphs [250] to [280].

G Conclusion and disposition

532 There will be a winding up order in each case. I propose to appoint Brent Leigh Morgan of Rodgers Reidy as liquidator of each of the Companies.