

## The Graywinter principle – quantification of an offsetting claim is not necessary

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### Introduction

1. Where a company applies under s 459G of the *Corporations Act 2001* (Cth) for an order setting aside a statutory demand served on it under s 459E, there is a jurisdictional requirement<sup>1</sup> that the company file and serve an “affidavit supporting the application” within 21 days after the demand is served. An affidavit will satisfy that jurisdictional requirement only if it sufficiently identifies a ground of challenge to the statutory demand under the so-called ‘Graywinter principle’.
2. In *Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 3]* (“**Pravenkav**”),<sup>2</sup> a company challenged a statutory demand on the basis that it had an offsetting claim under s 459H. A question arose as to whether, in order to comply with s 459G under the Graywinter principle, the supporting affidavit was required to contain evidence sufficient to permit the court to quantify the amount of the offsetting claim. The Court of Appeal of Western Australia held that there was no such requirement and that quantification evidence could be given after the expiration of the 21 day period.
3. This article briefly discusses the relevant provisions of the *Corporations Act*, the Graywinter principle and the decision in *Pravenkav*.

### Relevant provisions

4. Under s 459G(1), a company may apply to the Court for an order setting aside a statutory demand served on the company. Under s 459(2), the application can only be made within 21 days after the demand is served. Subsection (3) of s 459G then states as follows

“(3) An application is made in accordance with this section only if, within those 21 days:

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

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

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<sup>1</sup> See *David Grant & Co Pty Limited v Westpac Banking Corporation* [1995] HCA 43; (1995) 184 CLR 265 at 277.

<sup>2</sup> [2014] WASCA 132.

5. The grounds available to challenge a statutory demand are set out in ss 459H and 459J and include an "offsetting claim" under s 459H(1)(b). An "offsetting claim" is defined in s 459H(5) to mean a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).
6. Under s 459H(1)(b), where, on an application under s 459G, the Court is satisfied that the company has an offsetting claim, then, by s 459H(2), the Court must calculate the "substantiated amount" of the demand in accordance with a formula which deducts the offsetting total from the admitted total of the debt.
7. Under s 459H(3), if the substantiated amount is less than the statutory minimum,<sup>3</sup> then the Court must, by order, set aside the demand. Under s 459H(4), if the substantiated amount is at least as great as the statutory minimum, then the Court may make an order varying the demand as specified in the order and declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

### Graywinter principle

8. The Graywinter principle derives from a decision of Sundberg J in *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* ("**Graywinter Properties**").<sup>4</sup> In that case, a statutory demand was challenged on the basis that there was a genuine dispute under s 459H(1)(a). Sundberg J said that a "supporting affidavit" for the purposes of s 459G was required to say something that "promotes the company's case" and that a mere assertion that there was a genuine dispute or a bare claim that the debt was disputed was not sufficient.<sup>5</sup> His Honour also indicated that an initial affidavit which satisfied the threshold test could be supplemented after the expiration of the 21 day period but that an initial affidavit which did not contain the "minimum requirements" could not be supplemented after the expiry of that period.<sup>6</sup>
9. Sundberg J's views in *Graywinter Properties* have been referred to and frequently applied in later cases. In some cases, it was considered that an application of the Graywinter principle required the supporting affidavit to raise or identify a ground of challenge with a high degree of precision.<sup>7</sup> However, authority now favours a less strict view of the scope of the Graywinter principle.
10. This less strict view can be seen in the decision of the Full Court of the Supreme Court of Western Australia in *Financial Solutions Australasia Pty Ltd v Predella Pty Ltd* ("**Financial Solutions**")<sup>8</sup> where Parker J (with whom Anderson and Scott JJ

<sup>3</sup> Defined in s 9 CA.

<sup>4</sup> [1996] FCA 822; (1996) 70 FCR 452.

<sup>5</sup> Above, n 4, at 459.

<sup>6</sup> Above, n 4, at 460.

<sup>7</sup> For a discussion of these cases, see K Ottesen, "Setting aside a statutory demand - an update on *Graywinter*" (2013) BCLB [455].

<sup>8</sup> [2002] WASCA 51; (2002) 26 WAR 306 at [34].

agreed) expressed doubts that Sundberg J's views revealed "a settled and universal principle, which must be satisfied by an affidavit before it can be accepted as 'supporting the application'" and said that "[t]he statutory yardstick remains that the affidavit should support the application. The precise nature of the application may well influence what this requires."

11. Subsequently, in *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd*,<sup>9</sup> the New South Wales Court of Appeal (Young AJA, with whom Hoeben JA and Ward J agreed) observed that later decisions had modified the Graywinter principle and that the 'most authoritative' of these later decisions was *Financial Solutions*. It was then indicated that, under the Graywinter principle in its present state, the "vital question" was whether, expressly or by reasonably available inference, the grounds of challenge to the statutory demand were sufficiently identified in the supporting affidavit.<sup>10</sup>

## **Pravenkav**

### *Background*

12. In *Pravenkav*, a company had entered into a sub-contract with Pravenkav Group Pty Ltd ("PG") for PG to undertake certain works at a Perth site. The company alleged defects in the work carried out by PG or PG's contractors. PG issued a progress claim for the entire sum under the sub-contract less the amount previously paid and, subsequently, served a statutory demand on the company for the amount of the progress claim, together with GST.
13. The company applied to set aside the statutory demand, claiming, amongst other things, that it had an offsetting claim under s 459H(1)(b). The company's application was supported by an affidavit filed and served within the 21 day period which:
- provided a description of the sub-contract entered into between the parties and annexed a copy of it;
  - contained a denial that the money demanded by PG was due and an explanation, by reference to specified clauses of the sub-contract, for why it was alleged that the money was not due;
  - annexed correspondence, with photographs, sent to PG alleging defective and incomplete work by PG;
  - annexed correspondence in which the company had requested immediate rectification of the defects and which had referred to a provision in the sub-contract which allegedly gave the company the right to have the works rectified by PG at PG's cost; and
  - in effect, stated that as the rectification work had not been carried out by PG, it had been completed on behalf of the company and that the costs of this

<sup>9</sup> [2012] NSWCA 365; (2012) 92 ACSR 27 at [28]-[29].

<sup>10</sup> Above, n 9, at [32].

were being collated and that once collated, they would be offset against the relevant progress claim.<sup>11</sup>

14. After the expiration of the 21 day period, further affidavits were filed and served on behalf of the company. These elaborated upon the matters raised in the initial affidavit and provided details of the rectification costs.<sup>12</sup>
15. The application was heard at first instance by Master Sanderson who set aside the statutory demand on the basis that the company had an offsetting claim that was greater than the debt alleged in the statutory demand. PG appealed from the Master's decision to the Court of Appeal of Western Australia. The Court of Appeal (Newnes JA, Murphy JA and Edelman J) dismissed the appeal.

#### *PG's Graywinter objection*

16. Two of PG's grounds of appeal challenged the Master's finding that the company's initial affidavit was an "affidavit supporting the application" within the meaning of s 459(3). It was alleged that the initial affidavit did not support the application because it did not contain evidence sufficient to permit the court to quantify the amount of the offsetting claim for the purposes of s 459H and that the subsequent quantification evidence filed outside the 21 day period was not admissible to cure this defect, having regard to the Graywinter principle.<sup>13</sup>
17. PG relied upon the first instance decision of Black J in *Re Infratel Networks Pty Ltd* ("**Re Infratel**").<sup>14</sup>

#### *Re Infratel*

18. The facts of *Re Infratel* were that Infratel had been contracted to undertake certain work in respect of two separate projects and had sub-contracted some of the work under both projects to Gundry's. Gundry's had issued a statutory demand to Infratel and Infratel had applied to set it aside.
19. Infratel's affidavit in support, filed within the 21 day period specified in s 459G, contained statements to the effect that each of the principals under the head contracts had not paid Infratel under the head contracts because of alleged defective work performed by Gundry's. However:
  - the head contracts were not in evidence;
  - the non-conformance reports issued by one of the principals were not in evidence;

<sup>11</sup> Above, n 2, at [13]-[15]; [21]; and [41].

<sup>12</sup> Above, n 2, at [16]-[19].

<sup>13</sup> Above, n 2, at [37]-[38].

<sup>14</sup> [2012] NSWSC 943; (2012) 91 ACSR 170.

- there was no evidence of the other principal's standards which Infratel had claimed Gundry's had failed to meet;
  - there was no evidence as to the scope of works that Gundry's was required to undertake, the works in fact done by Gundry's or whether other persons also undertook works on the sites; and
  - there was no documentary evidence recording the principals' refusal to pay Infratel or the basis of that refusal.
20. Infratel had claimed that it had partly performed rectification work at its own expense to rectify the defects but while the affidavit contained statements that Infratel had been forced to rectify some works at its own cost to enable the sites to be completed and funds released by one of the principals in respect of one of the projects, no offsetting claim had been identified in respect of rectification works in relation to the other project.
21. Black J had found that the offsetting claim could not be pursued by reason of the Graywinter principle for 2 reasons:
- The affidavit had neither contained a general statement that the quantum of any offsetting claim exceeded the debt nor had provided any basis for calculation of the amount of the offsetting claim and so had not allowed any assessment of the magnitude of the offsetting claim.
  - The affidavit had not identified any offsetting claim in respect of rectification works in relation to the second project.<sup>15</sup>
22. In reaching this decision, Black J had mainly relied upon the following first instance decisions:<sup>16</sup>
- *Broke Hills Estate Pty Ltd v Oakvale Wines Pty Ltd* ("**Broke Hills Estate**"),<sup>17</sup> where it had been said that "some evidence" of quantum had to be contained in the supporting affidavit to enable the court to determine the offsetting total.
  - *Kerslake Superannuation Pty Ltd v C & L Building Pty Ltd* ("**Kerslake Superannuation**"),<sup>18</sup> where it had been stated that in order to be a supporting affidavit, there had to be some indication that the offsetting claim was of a magnitude that could sensibly be compared with the amount of the statutory demand.
  - *185L6 Pty Ltd v Strata Corporation 07176 Inc* ("**185L6 Pty Ltd**"),<sup>19</sup> where Blue J, after referring to a number of cases including *Broke Hills Estate*, had summed up the effect of these cases as follows:

*"Where the deponent of the original supporting affidavit deposed to quantum exceeding the debt, it was held to be sufficient, and where*

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<sup>15</sup> Above, n 14, at [32]-[33].

<sup>16</sup> Above, n 14, at [29]-[31].

<sup>17</sup> [2005] NSWSC 638; (2005) 23 ACLC 1266 at [26].

<sup>18</sup> [2010] NSWSC 424 at [10].

<sup>19</sup> [2011] SASC 164.

*he did not, it was held to be insufficient, to permit the court to receive a subsequent affidavit on quantum.*"<sup>20</sup>

23. Black J's decision to refuse to set aside the statutory demand had been upheld on appeal by the New South Wales Court of Appeal (Young AJA, with whom Hoeben JA and Ward J had agreed) in *Infratel Networks Pty Ltd v Gundry's Telco & Rigging Pty Ltd* ("**Infratel Networks**").<sup>21</sup>

#### *Court of Appeal's reasoning and decision*

24. In *Pravenkav*, the Western Australian Court of Appeal said that Black J's decision in *Re Infratel* had to be read in the context of the particular circumstances of that case and noted that, on the appeal, Young AJA had stated that the "basal problem" for Infratel was that the supporting affidavit was "so bare of detail."<sup>22</sup>
25. It had been argued on behalf of Infratel that Black J had followed *185L6 Pty Ltd* which was "outside the mainstream line of authority."<sup>23</sup> The Western Australian Court of Appeal noted<sup>24</sup> in this regard that Young AJA had said that it was not wise to rely on Blue J's summary of the authorities in *185L6 Pty Ltd* as being "a comprehensive test" and that what was required was to "see whether the affidavit supports the claim by expressly or impliedly identifying the real dispute." The Court further noted that Young AJA had then concluded that whatever test was applied within either the wording of the statute or one of the mainstream authorities, Black J's ruling was unarguably correct.<sup>25</sup>
26. The Western Australian Court of Appeal then referred to a number of intermediate appellate court authorities<sup>26</sup> which, the Court said, were consistent with Young AJA's "broad approach" which focused upon whether the supporting affidavit expressly or impliedly identified the real dispute. These authorities, the Court said, had assumed, or held, that evidence from which the court could calculate an offsetting total did not need to be contained in the supporting affidavit and were consistent with the proposition that the amount of the offsetting claim for the purposes of s 459H was to be decided as at the date of the hearing of the application to set aside the statutory demand, and not at some earlier time.<sup>27</sup> One of the authorities referred to by the Court was *Equuscorp Pty Ltd v Perpetual Trustees WA Ltd*<sup>28</sup> where the Full Court of the Federal Court (French, Kiefel and Sundberg JJ) had said that it followed from the ordinary English construction of the relevant provisions in s 459H that the amount of

<sup>20</sup> Above, n 19, at [25].

<sup>21</sup> Above, n 9.

<sup>22</sup> Above, n 2, at [50]; [52].

<sup>23</sup> Above, n 9, at [38].

<sup>24</sup> Above, n 2, at [52].

<sup>25</sup> Above, n 2, at [53].

<sup>26</sup> See *Royal Premier Pty Ltd v Taleski* [2001] WASCA 48 at [57]; *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 at [90]; *Equuscorp Pty Ltd v Perpetual Trustees WA Ltd* [1997] FCA 1366; (1997) 25 ACSR 675 at 697.

<sup>27</sup> Above, n 2, at [54]-[56].

<sup>28</sup> [1997] FCA 1366; (1997) 25 ACSR 675 at 697.

the offsetting claim was to be considered as at the time the court was determining the application under s 459G.

27. The Western Australian Court of Appeal then concluded that a supporting affidavit filed within the 21 day period was not required to contain material from which the offsetting claim could be quantified and said that, if, and to the extent that any of the first instance decisions in *Re Infratel*, *Broke Hills Estate*, *Kerslake Superannuation* and *185L6 Pty Ltd* suggested otherwise, they should not be followed on this point.<sup>29</sup>

28. The Court gave the following reasons for reaching this conclusion:

- Section 459G only required that the affidavit be one which was “supporting the application” and did not contain any express requirement that the supporting affidavit contain evidence permitting the court to quantify the amount of the offsetting claim. There was also no express provision in s 459H that an affidavit could only ‘support’ an application in relation to s 459H if all the requirements of s 459H were met by the supporting affidavit.
- There was no basis in Pt 5.4 of the *Corporations Act*<sup>30</sup> or in s 459H, for an implication that the supporting affidavit was required to contain such evidence because s 459G did not require all material be contained in the supporting affidavit. Subsequent affidavit evidence was admissible at the hearing in addition to the supporting affidavit. Although the reforms which introduced Pt 5.4 were designed to minimise delay and legal costs, Parliament’s intention could not be taken to require a supporting affidavit to contain evidence to permit the Court to estimate an offsetting claim because, for example, in the case of unliquidated damages, sufficient expert evidence to quantify the claim would not be able to be obtained within 21 days.
- Any implication from s 459H that a supporting affidavit was required to contain evidence permitting the court to quantify the amount of the offsetting claim was inconsistent with the approach taken to affidavit evidence in s 459G applications in intermediate appellate courts.
- The first instance decisions which suggested that the supporting affidavit was required to contain such evidence had been influenced by the decision of Sundberg J in *Graywinter Properties* but, as Young AJA had observed in *Infratel Networks*, later decisions had modified the Graywinter principle, the most authoritative of which was *Financial Solutions* which had indicated that the statutory yardstick remained that the affidavit should support the application and that the precise nature of the application could influence what this required.<sup>31</sup>

29. The Court then held that the initial affidavit in the case before it was a sufficient supporting affidavit within the meaning of s 459G and that the subsequent quantification evidence was admissible. The initial affidavit was a sufficient supporting affidavit because:

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<sup>29</sup> Above, n 2, at [57].

<sup>30</sup> Pt 5.4 CA deals with winding up in insolvency.

<sup>31</sup> Above, n 2, at [58]-[63].

- it had annexed the sub-contract between the parties and had stated that amounts said to be owing under the progress claim were not payable until rectification costs had been collated and these costs deducted from any amount payable;<sup>32</sup>
- it had disclosed the legal basis upon which the offsetting claim was being asserted and the basis for the calculation of that offsetting claim, being the costs actually incurred in remedying and completing the work.<sup>33</sup>

### **A final word**

30. It is suggested that the Western Australian Court of Appeal is correct in its reading of the relevant statutory provisions and in its findings that the initial affidavit in the case before it was a sufficient supporting affidavit.
31. *Pravenkav* is another authoritative decision favouring a less strict view of the scope of the Graywinter principle although it would appear from the judgment that the Court would probably have preferred to simply address the statutory provisions and to have avoided speaking of the “Graywinter principle” as the Court made the comment that “[i]t can be a mark that a principle is opaque when the principle is named after a case.”<sup>34</sup>

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<sup>32</sup> Above, n 2, at [66].

<sup>33</sup> Above, n 2, at [42].

<sup>34</sup> Above, n 2, at [63].