SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0026

FAÇADE TREATMENT ENGINEERING PTY LTD (IN LIQ) — Applicant

v

BROOKFIELD MULTIPLEX CONSTRUCTIONS PTY LTD — Respondent

JUDGES:	WARREN CJ, TATE and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	14 September 2015
DATE OF JUDGMENT:	14 October 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 247
JUDGMENT APPEALED FROM:	[2015] VSC 41 (Vickery J)

BUILDING AND CONSTRUCTION – Right to progress payments in *Building and Construction Industry Security of Payment Act 2002* ('BCISP Act') s 9(1) – Reference to person who has undertaken 'to carry out construction work' or 'supply related goods and services' – Whether provisions available to companies in liquidation.

STATUTORY INTERPRETATION – Scope of BCISP Act – Consideration of text, context and purpose of Act – Provisions of BCISP Act pt 3 not available to companies in liquidation.

CONSTITUTIONAL LAW – Whether s 109 inconsistency arises between BCISP Act ss 16(2)(a)(i) and (4)(b) and *Corporations Act 2001* (Cth) ('*Corporations Act*') s 553C – Where s 553C provides for set-off of mutual dealings with insolvent company – Where BCISP Act provides for summary judgment proceeding that precludes reliance upon cross-claims or defences – If ss 16(2)(a)(i) and (4)(b) available to companies in liquidation, they would 'alter, impair or detract from' operation of s 553C.

CORPORATIONS LAW – Where *Corporations Act* s 553C(2) precludes set-off where person had notice of company's insolvency at time of giving credit to or receiving credit from company – Mutual dealings pursuant to contract entered into prior to company's insolvency – Whether date for assessing notice of insolvency is date of entry into contract or date of conduct pursuant to or in breach of contract.

BUILDING AND CONSTRUCTION – Requirements for payment schedules under BCISP Act s 15 – Adequacy of reasons for withholding payment.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr I W Upjohn QC with Mr B G Mason	Aitken Partners
For the Respondent	Mr D J Williams QC with Mr M G Roberts QC	Norton Rose Fulbright

WARREN CJ
TATE JA
McLEISH JA:

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1 This proceeding concerns a dispute between two parties to a construction contract to which the *Building and Construction Industry Security of Payment Act 2002* ('BCISP Act') applies. The applicant subcontractor ('Façade') agreed to design, supply and install facade and curtain works for the respondent ('Multiplex'). Façade issued payment claims which were not paid, or not paid in full, by Multiplex. Façade subsequently was placed into liquidation. Façade by the liquidator then sought to enter judgment against Multiplex pursuant to the BCISP Act to recover the outstanding amounts under the payment claims. The trial judge dismissed Façade's proceeding, and Façade now seeks leave to appeal.

2 The proposed grounds of appeal raise a number of complex questions concerning the interpretation of the BCISP Act and its interaction with the *Corporations Act 2001* (Cth) ('*Corporations Act*'). These include the question of whether the BCISP Act only applies to claimants that are going concerns and whether s 16(2)(a)(i) and s 16(4)(b)(i) and 4(b)(ii) of the BCISP Act are constitutionally inconsistent with s 553C of the *Corporations Act*. For the reasons that follow, we construe the BCISP Act narrowly and conclude that s 9(1) of the BCISP Act does not create an entitlement to progress payments for persons who are in liquidation (that is, persons in respect of whom a winding-up order has been made). Part 3 of the BCISP Act is not available to persons in liquidation. While the adoption of this construction renders it strictly unnecessary for the Court to consider the issue of constitutional inconsistency, in deference to the judge and the parties we have examined this issue and have concluded that a relevant inconsistency exists. We would grant leave to appeal with respect to certain limited grounds, otherwise refuse leave, and dismiss the appeal.[1]

Facts

3 Façade and Multiplex entered into a subcontract dated 7 September 2011 for the design, supply and installation of facade and curtain works for the Upper West Side development at 613–614 Lonsdale Street and 204–240 Spencer Street in Melbourne ('the Subcontract').

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[1] We consider it unnecessary to decide one of the grounds, ground 8.

4 The Subcontract satisfied the definition of a 'construction contract' under s 5 of the BCISP Act. Thus, the BCISP Act applied to the Subcontract. The BCISP Act voids any provision of a contract that excludes, modifies or restricts the operation of that Act.[2] Otherwise, the provisions of the Subcontract operated in conjunction with those of the BCISP Act.

5 Under cl 3.1 of the Subcontract, Façade as subcontractor was required to execute and complete the work under the Subcontract in accordance with the requirements of the Subcontract. Multiplex was required to pay Façade the sum of A$12,250,000 (plus GST), adjusted for any additions or deductions required to be made under the Subcontract.

6 Clause 42.1 of the Subcontract set out terms for the submission of payment claims by Façade to Multiplex. Payment claims were to be submitted on the 25th day of each month and were to include work done, or to be done, to the last day of the month.[3] Façade was required to deliver payment claims in a specified form, accompanied by supporting evidence and including all the information set out in cl 42.1A. Among the information required to be included in payment claims was 'such information as Brookfield Multiplex reasonably requires in respect of the work the subject of the progress claims'[4] and a statutory declaration in the form at Annexure Part R to the Subcontract.[5] The statutory declaration required a representative of Façade to declare that, among other things, all employees, consultants, suppliers and secondary subcontractors engaged by Façade had been paid in full for their work in the period relevant to the payment claim.

7 Within 14 days of receipt of a complying payment claim, Multiplex was required to assess the claim and then 'may issue to [Façade] a payment schedule stating the amount of the payment which, in Brookfield Multiplex's opinion, is to be made by Brookfield Multiplex to [Façade] or by [Façade] to Brookfield Multiplex.' Clause 42.1 of the Subcontract went on to state:

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2 Section 48.

3 Part A item 35(a) to the Subcontract.

4 Clause 42.1A(a).

5 Clause 42.1A(c).

> Brookfield Multiplex shall set out in any payment schedule issued pursuant to this Clause 42 the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by [Façade], the reasons for the difference and for withholding any payment. Brookfield Multiplex shall also set out, as applicable, in any payment schedule issued pursuant to Clause 42, the allowances made for —
>
> (c) the value of work carried out by [Façade] in the performance of the Subcontract to the last day of the relevant month;
>
> (d) amounts due (or which may become due) from [Façade] to Brookfield Multiplex;
>
> (e) amounts paid previously under the Subcontract;
>
> (f) amounts previously deducted for retention moneys pursuant to Annexure Part A; and
>
> (g) retention moneys to be deducted pursuant to Annexure Part A,
>
> arising out of the Subcontract resulting in the balance to [Façade] or Brookfield Multiplex, as the case may be.

8 Clause 42.8 of the Subcontract provided for set-offs in the following terms:

> (a) Brookfield Multiplex may set-off or deduct from:
>
> (i) any amounts due to [Façade], including any amounts in any payment schedule issued by Brookfield Multiplex; or
>
> (ii) the amount available to Brookfield Multiplex if it exercises its rights under security,
>
> any moneys due, or which may become due, from [Façade] to Brookfield Multiplex (whether under this Subcontract or otherwise).
>
> (b) Even if an amount owed by [Façade] to Brookfield Multiplex under the Subcontract has not been included in a payment schedule by Brookfield Multiplex under this Subcontract, Brookfield Multiplex may separately recover the debt from [Façade].

9 Following the commencement of the Subcontract, Façade issued Multiplex with a number of payment claims pursuant to the BCISP Act. The two payment claims that are the subject of these proceedings are Payment Claim 18 and Payment Claim 19.

10 Façade submitted Payment Claim 18 on 23 August 2012. That payment claim sought $1,089,403 (plus GST) for works completed up to 31 August 2012. The parties agree that Payment Claim 18 was a valid payment claim under the BCISP Act.

11 On 11 September 2012, Multiplex issued Façade with a 'recipient created tax invoice' in relation to Payment Claim 18 for the amount of $598,155.80 (inclusive of GST). This amount was paid to Façade on 14 September 2012 by electronic funds transfer. Apart from

this payment, Multiplex has not made any other payments towards Payment Claim 18. Multiplex did not serve a payment schedule pursuant to s 15 of the BCISP Act in response to Payment Claim 18.

12 Façade submitted Payment Claim 19 on 27 September 2012.[6] The payment claim sought $539,347 (plus GST) for works completed up to 30 September 2012. That figure was calculated from the sum of the value of works executed according to the original contract ($11,117,200) and variation works ($42,344), minus the amount already paid by Multiplex ($10,620,197). A table attached to the payment claim listed seven items of original works,[7] and another table listed four items of variations.[8] As required by cl 42.1A of the Subcontract, the payment claim was accompanied by a statutory declaration in the form of Annexure Part R.

13 Multiplex did not make any payments towards Payment Claim 19. While Multiplex initially contested the validity of Payment Claim 19 ultimately this was not pursued.

14 On 5 October 2012, an employee of Multiplex sent an email to an employee of Façade regarding Payment Claim 19 ('the 5 October 2012 email'). The substance of the email was as follows:

> We advise that we cannot reasonably consider the submitted Progress Claim 19 as valid on the following grounds:
>
> — Pursuant to Subcontract Clause 42.1A(a) – BMC has reason to believe that the submitted Statutory Declaration is inaccurate with regard to item 3, please resubmit.
>
> — BMC is unable to ascertain the extent to which items being claimed are for materials that are unfixed, including details of security provided if required under the Subcontract – values attached to certain items would suggest that they do include amounts for unfixed materials.
>
> We also note the requirements for payment claims requested in the attached correspondence of 18th September (attached) and the subject of RCTI #26 have yet to be provided by FTE and as such Progress Claim 18 remains invalid.
>
> Upon FTE remedy of the above and attached Brookfield Multiplex will be in a position to issue FTE with a payment schedule.

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6 The letter from Façade to Multiplex attaching Payment Claim 19 is dated 24 September 2012, but the parties agree that the payment claim was submitted to Multiplex on 27 September 2012.

7 These were: preliminaries, balustrades, podium wall and roof glazings, shopfronts, apartment windows and doors, curtain wall panels, and aluminium folded screens.

8 These were: hotel expenses, a flight ticket, changing of glass on elevation, and powder coating.

15 The 'attached correspondence of 18th September' appears to refer to an email from Ryan Treweek of Multiplex to Andrew Batt of Façade on that date, with the subject line 'RE: UWS – FTE Payments'. In that email, Mr Treweek referred to 'confusion on site of Subcontractors who have amounts outstanding but have not received any consistent communication from [Façade] as to when and under what terms these amounts will be settled.' Mr Treweek also noted Multiplex's concern at the apparent lack of underlying cash balances available to Façade to complete the works. Mr Treweek stated in his email:

> Accordingly, in order for [Multiplex] to continue its current payment scenario, we require the following from [Façade] prior to the release of our next payment on the 28th September 2012.
>
> 1. A full cost to complete cash flow forecast to be performed …
>
> 2. A written acknowledgement from your company directors of this forecast and declaration that funds will be made available to meet [Façade's] obligations as they fall due so as not to cause further delay on site.
>
> 3. Broken down allocation of all funds from Payment 26 due 28th September and the proposed timing of these payments.
>
> 4. Update to the Statutory Declaration (attached) to include specific exceptions where contractors or suppliers have not been paid in accordance with their contractual terms.
>
> 5. An updated inventory list of all facade materials currently claimed off-site and an updated transfer of ownership letter (pervious [sic] attached).

The email concluded by suggesting a meeting between Façade and Multiplex.

16 Also on 5 October 2012, Multiplex served Façade with a show cause notice pursuant to cl 44.2 of the Subcontract. That clause provided that '[i]f [Façade] commits a breach of this Subcontract, Brookfield Multiplex may give [Façade] a written notice to show cause.' Clause 44.3 then set out the requirements for a show cause notice.

17 In its show cause notice, Multiplex alleged that Façade was in breach of the Subcontract as it had: included false statements in statutory declarations provided to Multiplex in support of payment claims; failed to proceed with the Subcontract works with all due expedition; and failed to rectify defects as directed. The notice specified the time by which cause must be shown as 9:00 am on 10 October 2012.

18 Façade responded to the show cause notice by a letter dated 9 October 2012. Façade

denied that it had breached the contract, set out its refutations of Multiplex's show cause notice, and concluded that Multiplex should not exercise the right under cl 44.4 of the Subcontract to take the works out of Façade's hands or terminate the Subcontract.

19 On 10 October 2012, Multiplex served notice on Façade taking the works out of Façade's hands. The notice set out the alleged breaches of the Subcontract by Façade, and the grounds on which Multiplex reached the view that Façade had failed to refute the allegations. Multiplex also alleged in the notice that Façade had effectively abandoned the Subcontract works since 8 October 2012. The notice concluded:

> In light of [Façade's] failure to show cause, Brookfield Multiplex advises that as of 4.00pm today it will proceed to take out of the hands of [Façade] all remaining work under the Subcontract. As a result, [Façade] will not be entitled to any further payment until a payment becomes due (if at all) under clause 44.6[9] of the Subcontract.

20 On 12 October 2012, outside the time period prescribed by s 15(4)(b) of the BCISP Act,[10] an employee of Multiplex sent an email to Façade which stated:

> Brookfield Multiplex does not consider that [Façade] has submitted a valid payment claim in accordance with the requirements of the Subcontract, in that it has: [list of reasons given, including the reasons stated in 5 October 2012 email.]
>
> Nonetheless, in order to preserve its position in relation to any claim under the Security of Payment Act, Brookfield Multiplex has provided a payment schedule in response to the payment claim within the time required under the Subcontract and the SOP Act for doing so.
>
> As is evident from the payment schedule, no monies are due to [Façade]. Even if monies had been certified as due to [Façade] in respect of this payment claim, no payment would be required to be made for the reason that the Subcontract Works have been taken out of the hands of [Façade] as of Tuesday 9 October 2012. … Additionally, no payment would be due as a result of the failure of [Façade] to provide a legitimate statutory declaration as to payment under clause 42.1A(c) or to provide the information reasonably required by Brookfield Multiplex in respect of the payment claim.

21 Attached to the email was a document titled 'Subcontractor Payment Schedule'. That document contained copies of the tables of works items submitted by Façade in its payment claim, which had been hand-annotated to show amounts marked down by Multiplex. It also

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9 Clause 44.6 concerns the adjustments to be calculated on completion of the Subcontract works when the works have been taken out of the hands of the subcontractor.

10 Section 15(4)(b) stipulates the time for providing a payment schedule to be the time required by the construction contract or within 10 business days after the payment claim is served, whichever time expires earlier.

contained a page of typed notes explaining these mark-downs, including, for example, that certain works claimed were incomplete. The Schedule gave the value of work completed during the relevant period in a negative figure, namely $2,563,820.

22 On 25 October 2012, Façade served on Multiplex a demand for payment of the sum of $1,193,469.20, being the unpaid portion of Payment Claim 18 and the full amount of Payment Claim 19. Façade asserted that this amount was due and payable under the BCISP Act. Multiplex did not make payment.

23 Façade is now in liquidation, the Supreme Court having made winding up orders on 6 February 2013.

24 Façade commenced proceedings on 26 September 2014 seeking payment of $1,193,469.20 pursuant to s 16 of the BCISP Act in respect of Payment Claims 18 and 19. That amount comprised $600,187.50 in respect of Payment Claim 18 and $593,281.70 in respect of Payment Claim 19.

25 The proceeding was heard by a judge of the Trial Division. During the proceeding, Multiplex alleged that Façade was liable to it under a proposed counterclaim for completion costs (amounting to $1,858,468) and liquidated damages (amounting to $10,309,650) under the Subcontract. This raised the question of whether s 553C of the *Corporations Act* applied to allow Multiplex to set off any amounts it owed with respect to Payment Claims 18 and 19.

26 On 24 February 2015, the judge dismissed Façade's proceeding with costs.[11]

Legislative provisions

The BCISP Act

27 The main purpose of the BCISP Act is 'to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.'[12] Section 3 of the BCISP Act states:

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11 [2015] VSC 41 ('Reasons').

12 Section 1. 'Construction work' is defined in s 5, 'related goods and services' is defined in s 6, and

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

28 The BCISP Act has equivalents in all the other Australian States and Territories.[13]

29 The BCISP Act commenced operation in January 2003. In the second reading speech introducing the BCISP Bill, the then Minister for Planning stated that:

> The bill gives effect to the government's commitment to securing payment for contractors, subcontractors, consultants and others in the building and construction industry, which has been a major concern in the industry for some time. Accounts of small businesses and companies failing due to larger companies going broke or refusing to pay, and issues relating to cash flow problems, are prevalent within the industry. Up until now, Victoria has been one of the few states across Australia without legislation protecting subcontractors and others involved in the industry that have legitimate claims against defaulting companies.
>
> …
>
> The bill substantially adopts the recommendations of the industry task force which

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'construction contract' is defined in s 4.

[13] *Building and Construction Industry (Security of Payment) Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act'); *Construction Contracts (Security of Payments) Act* (NT); *Building and Construction Industry Payments Act 2004* (Qld) ('the Qld Act'); *Building and Construction Industry Security of Payment Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Construction Contracts Act 2004* (WA) ('the WA Act').

> was appointed by the government to review the remedial action that may be taken to address poor payment practices under building and construction contracts. The main thrust of the task force recommendations was for the introduction of legislation reflecting the New South Wales *Building and Construction Industry Security of Payment Act 1999* which has proved successful in that jurisdiction. The bill is modelled on the provisions and processes of the New South Wales Act and this has the benefit of allowing building and construction firms with national operations to be subject to common payment requirements in both jurisdictions.[14]

30 In 2004, the Building Commission (now the Victorian Building Authority) conducted a review of the BCISP Act. The Commission produced a discussion paper which was distributed to industry for comment. An industry working group was subsequently established which proposed amendments to the BCISP Act. The result of this process was the *Building and Construction Industry Security of Payment (Amendment) Act 2006*, which was passed in July 2006 and which mostly came into effect in March 2007. The amendments included expanding the payments that could be claimed under the BCISP Act; clarification of what could be claimed; expanding the availability of adjudication; and a number of other matters.

31 The right to progress payments is created by s 9(1) of the BCISP Act. That provision states:

> On and from each reference date[15] under a construction contract, a person —
>
> (a) who has undertaken to carry out construction work under the contract; or
>
> (b) who has undertaken to supply related goods and services under the contract —
>
> is entitled to a progress payment under this Act, calculated by reference to that date.

32 The procedure for recovering progress payments is set out in pt 3 of the BCISP Act. The first step is to serve a payment claim in accordance with s 14. Section 14 states:

> (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
>
> (2) A payment claim—
>
> (a) must be in the relevant prescribed form (if any); and

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14 Parliamentary Debates, Victoria, Legislative Assembly, 21 March 2002, 426–7 (Mary Delahunty, Minister for Planning).

15 The term 'reference date' is defined in s 9(2).

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and

(e) must state that it is made under this Act.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);[16]

(b) must not include any excluded amount.[17]

33 Subsections (4)–(9) go on to stipulate further requirements for a valid payment claim.

34 Section 15 sets out how the recipient of a payment claim responds to the claim. It relevantly provides for the respondent to a payment claim to provide a payment schedule indicating, amongst other things, the amount the respondent proposes to pay. It states:

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

(d) must be in the relevant prescribed form (if any); and

(e) must contain the prescribed information (if any).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If—

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16 Section 29 relates to circumstances where the claimant suspends work. Section 29(4) obliges the respondent to pay the claimant the amount of any losses or expenses the claimant incurs in exercising the right to suspend the carrying out of construction work, or the supply of related goods and services, as a result of the respondent's removal from the contract of any part of the work or supply.

17 Section 10B defines 'excluded amounts' to include any amount that relates to a variation of the construction contract that is not a claimable variation, and amounts claimed under the construction contract for compensation due to the happening of an event such as amounts relating to latent conditions; time-related costs; changes in regulatory requirements; and amounts claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract.

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served;

whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

35 At the time of the relevant events in this proceeding, there was no prescribed form or prescribed information as referred to in sub-ss (2)(d) and (e).[18] This remains the case.[19]

36 Section 16 sets out the consequences for a respondent that fails to provide a payment schedule. It relevantly states:

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

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18 See *Building and Construction Industry Security of Payment Regulations 2003*.

19 See *Building and Construction Industry Security of Payment Regulations 2013*.

(a) judgment in favour of the claimant is not to be given unless the court is satisfied—

(i) of the existence of the circumstances referred to in subsection (1); and

(ii) that the claimed amount does not include any excluded amount; and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

37 Section 18 sets out the circumstances in which a claimant may apply for adjudication of a payment claim. These circumstances include where a payment schedule has been provided but the scheduled amount is less than the claimed amount or the respondent fails to pay the scheduled amount.[20] They also include where a payment schedule has not been provided and the respondent fails to pay the claimed amount.[21] In the latter case, the claimant is required to notify the respondent of the claimant's intention to apply for adjudication, and to give the respondent an opportunity to provide a payment schedule within two business days after receiving the claimant's notice.[22]

38 Pursuant to s 21, a respondent who has provided a payment schedule may lodge a written response to the claimant's adjudication application.[23] That response 'may contain any submissions relevant to the response that the respondent chooses to include'.[24] Section 21(2B) contemplates that the response may include reasons for withholding payment that were not included in the payment schedule. It states:

> If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant—
>
> (a) setting out those reasons; and
>
> (b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

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20 Section 18(1)(a).

21 Section 18(1)(b).

22 Section 18(2).

23 Sections 21(1), (2)(a) and (2A).

24 Section 21(2)(d).

39 An adjudicator is required to determine the amount of the payment (if any) to be paid by the respondent to the claimant, the date on which that amount is payable, and the rate of interest payable.[25] Where the respondent has served a payment schedule, the adjudicator in making a determination is required to take into account all of the respondent's submissions in support of that schedule.[26] This would include any reasons for withholding payment, additional to those set out in the payment schedule, provided by the respondent in its written response to the adjudication application.

The *Corporations Act*

40 Part 5.6 of Chapter 6 of the *Corporations Act* deals with the winding up of companies. Section 553(1) provides:

> Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date,[27] are admissible to proof against the company.

41 Section 553C then provides for set-off of mutual claims. It provides that, in the context of the winding up of an insolvent company, a party to whom the company owes a debt is entitled to set off that debt against any sum it owes to the company. It states:

> (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
>
> (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
>
> (b) the sum due from the one party is to be set off against any sum due from the other party; and
>
> (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
>
> (2) A person is not entitled under this section to claim the benefit of a setoff if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was

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25 Section 23(1).

26 Section 23(2)(d).

27 'Relevant date' in relation to a winding up is defined in s 9 to mean 'the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun'.

insolvent.

42 Section 553C also existed in the *Corporations Law*. It was inserted into the *Corporations Law* by the *Corporate Law Reform Act 1992* (Cth), but similar provisions have existed in bankruptcy legislation for many years.[28]

The trial judge's reasons

43 The judge considered the following issues in his judgment:

(a) whether the 5 October 2012 email satisfied the requirements for a payment schedule pursuant to s 15 of the BCISP Act;

(b) whether the claim for payment pursuant to s 16 of the BCISP Act fails because pt 3 of the BCISP Act, including s 16, is invalid to the extent that it is inconsistent with the operation of s 553C of the *Corporations Act*; and

(c) whether Multiplex was precluded from relying upon s 553C of the *Corporations Act* because it was on notice of Façade's insolvency.

44 On the first issue, the judge first observed that there is no prescribed form for payment schedules.[29] He referred to cases where courts have stated that the requirements of security of payments legislation should be applied in 'a commonsense practical manner'[30] and not from 'an unduly critical viewpoint'.[31] They must 'apprise the parties of the real issues in the dispute', but need not be 'as precise and as particularised as a pleading in the Supreme Court'.[32] A party seeking to withhold payment in a payment schedule is permitted 'some want of precision and particularity' in stating the reasons for withholding payment, 'as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the

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28 See *Bankruptcy Act 1966* (Cth) s 86 and the discussion in *Old Style Confections Pty Ltd v Microbyte Investments Pty Ltd (in liq)* [1995] 2 VR 457, 461 (Hayne J); *Ansett Australia Holdings Ltd v International Air Transport Association* (2006) 60 ACSR 468; [2006] VSCA 242 [103]–[109] (Nettle JA).

29 Reasons [26].

30 Ibid [29], quoting *Protectavale v K2K Pty Ltd* [2008] FCA 1248 [11] ('*Protectavale*').

31 Reasons [29], quoting *Protectavale* [2008] FCA 1248 [11], which in turn quoted *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 [20].

32 Reasons [30], quoting *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 [76].

nature of the case it will have to meet in adjudication'.[33]

45 Façade had argued before the judge that the 5 October 2012 email did not satisfy the requirements for a payment schedule in s 15 of the BCISP Act for two reasons. First, as the email denied that a valid payment claim had been submitted by Façade, it did not purport to operate as a payment schedule. Second, contrary to s 15(2)(b), it did not specify the amount Multiplex proposed to pay Façade in response to the payment claim.[34]

46 The judge rejected these arguments and concluded that the 5 October 2012 email did satisfy the requirements of s 15 of the BCISP Act. He held that it was 'clear from a plain reading of the 5 October email, when read as a whole, that Multiplex did not propose to pay anything to Façade'.[35] The 5 October 2012 email therefore satisfied the requirements of s 15(2)(b). The email also satisfied the requirements of s 15(3), as it stated that Multiplex regarded Payment Claim 19 as invalid and set out the reasons for the claimed invalidity.[36]

47 On the constitutional issue, the judge first canvassed the purposes and operation of the BCISP Act and s 553C of the *Corporations Act* as described in the case law.[37] He described Multiplex's alleged counterclaims against Façade, being $1,848,658 to complete the Subcontract work and $10,309,650 in liquidated damages.[38] Having regard to the material before him, the judge was satisfied that Multiplex had potential claims that it intended to advance,[39] and that the quantum of those counterclaims, if proved, was likely to exceed the amounts sought by Façade pursuant to the BCISP Act.

48 The judge observed that the potential for inconsistency arose between s 16(4) of the BCISP Act, which precludes a respondent to proceedings to recover an unpaid payment claim from bringing any cross-claims or defences, and the right to set-off in s 553C of the

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33 Reasons [30], quoting *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 [78].

34 Reasons [34].

35 Reasons [36].

36 Reasons [38].

37 Reasons [40]–[51], [60]–[65].

38 Reasons [66].

39 Reasons [69].

Corporations Act. The judge set out the principles for s 109 inconsistency from *Telstra Corporation Ltd v Worthing*[40] and applied those principles to conclude that a relevant inconsistency arose between the BCISP Act and the *Corporations Act*. We will discuss the judge's reasoning on this point in more detail later in our judgment.[41]

49 The judge stated that in the event that Multiplex evinced an intention not to proceed with its alleged counterclaims, Façade could seek declaratory relief before proceeding to obtain judgment pursuant to s 16 of the BCISP Act.[42]

50 Given the judge's conclusion on s 109 inconsistency, he did not consider whether the BCISP Act should be construed as intending to operate only when the parties are going concerns.[43]

51 The judge then turned to consider whether Multiplex was precluded from relying upon s 553C of the *Corporations Act* because of s 553C(2), which provides that a person is not entitled to claim the benefit of a set-off if, at the time of giving credit to or receiving credit from the company, the person had notice of the fact that the company was insolvent.

52 Façade submitted that the relevant time under s 553C(2) for assessing whether Multiplex had notice of Façade's insolvency was the time when Multiplex became liable to make progress payments in response to Payment Claims 18 and 19, being 23 August 2012 and 27 September 2012. Multiplex, in contrast, submitted that the relevant time was the date of entry into the Subcontract, being 7 September 2011.[44]

53 The primary judge relied upon *Grapecorp Management Pty Ltd (in liq) v Grape Exchange Management Euston Pty Ltd*,[45] *Old Style Confections Pty Ltd v Microbyte Investments Pty Ltd (in liq)*[46] and *JLF Bakeries Pty Ltd (in liq) v Baker's Delight Holdings*

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40 (1999) 197 CLR 61 ('*Telstra v Worthing'*).

41 See [103]–[120] below.

42 Reasons [84].

43 Reasons [86].

44 Reasons [90]–[91].

45 (2012) 265 FLR 33 ('*Grapecorp*').

46 [1995] 2 VR 457 ('*Old Style*').

Ltd[47] to conclude that the relevant time to assess whether Multiplex had notice under s 553C(2) was the date on which the Subcontract was executed.[48] Since it was not suggested that there were indications of Façade's insolvency at that date, s 553C(2) did not preclude Multiplex from relying on the set-off under s 553C.

Grounds of appeal and notice of contention

54 Façade advanced eight proposed grounds of appeal, grouped around three issues: the constitutional issues (grounds 1–4); the application of s 553C(2) of the *Corporations Act* (grounds 5–7); and whether the 5 October 2012 email constituted a valid payment schedule (ground 8).

55 In addition, Multiplex contended in its notice of contention that the decision of the trial judge should be affirmed on the additional ground that the BCISP Act only applies to claimants that are going concerns. In oral submissions, counsel for Multiplex clarified that Multiplex's position is that it is the making of the winding-up order that is the cut-off for the application of the BCISP Act.

56 We will address the issues broadly in the following order**:**

(1) First, we consider the scope of the BCISP Act and the grounds raised by Multiplex's notice of contention, in accordance with the general precept that questions of the construction and operation of legislation should be resolved first before constitutional validity.[49] The text, context and purpose of the BCISP Act provide a number of indications that the entitlement to progress payments under s 9(1) of the Act is only available to persons who have undertaken to, and are capable of, carrying out construction work and/or supplying related goods and services. Consequently, we conclude that s 9(1), and therefore pt 3 of the BCISP Act, is not available to persons in liquidation.

(2) Secondly, we consider the constitutional issues. We conclude that the judge was correct in finding that s 16(2)(a)(i) and ss 16(4)(b)(i)–(ii) of the BCISP Act are inconsistent with s 553C of the *Corporations Act*. Once a company has gone into liquidation, and where there are mutual dealings so that s 553C is engaged, a payment claim cannot be enforced by means of a summary judgment

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47 (2007) 64 ACSR 633 ('*JLF Bakeries*').

48 Reasons [97]–[98].

49 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 19 [11] (French CJ, Kiefel and Bell JJ).

under s 16(2)(a)(i) of the BCISP Act, and there is no scope for the ousting of the cross-claims or defences under s 16(4)(b). Thus, if we are wrong with respect to the narrow application of pt 3 of the BCISP, as a matter of construction, then, in any event, Façade could not invoke the protection of s 16(2)(a)(i) and ss 16(4)(b)(i)–(ii) because they are inoperative with respect to Façade.

(3) Thirdly, we consider the question of whether Multiplex cannot have the benefit of s 553C because of the exception in s 553C(2). We conclude that the relevant time for determining notice of insolvency for the purposes of s 553C(2) was the time of entry into the Subcontract. As Multiplex did not have notice of Façade's insolvency at that time, s 553C(2) does not apply in this case.

(4) Finally, we consider the issue of whether the 5 October 2012 email constituted a valid payment schedule. We conclude, contrary to the trial judge, that it did not. However, in view of our conclusions on the other issues, this does not affect the outcome of the application, which is that leave to appeal should be granted only with respect to certain grounds, leave should otherwise be refused, and the appeal be dismissed.

The scope of the BCISP Act — the notice of contention

57 Multiplex's notice of contention put forward two grounds on which the trial judge's decision should be affirmed:

> 1. The [BCISP Act] must be construed as only intending to operate when a claimant (as referred to in section 13 of the BCISP Act) is a going concern.
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> 2. In circumstances where [Façade] ceased to be a going concern when it was placed into liquidation on 6 February 2013, [Façade] is not entitled to the benefit of the interim statutory progress payment regime established by the BCISP Act.

58 As stated above, Multiplex clarified in oral submissions that its position is that the BCISP Act should not apply once a person seeking payment has been placed into liquidation.

59 In one sense, the arguments raised by Multiplex's notice of contention, if successful, are simply another path towards the same result as that achieved by the s 109 inconsistency argument: namely, that Façade is unable to rely upon the BCISP Act to enter summary judgment against Multiplex because it has been placed into liquidation. It is for this reason that the trial judge, having found s 109 inconsistency, did not consider the question of the scope of the BCISP Act. Nonetheless, as the issues raised by the notice of contention involve questions of construction which are distinct from those considered under s 109 of the

Constitution, and as questions of construction ought be determined first, we consider it desirable to set out our views on the grounds in the notice despite the judge not having addressed the issue.

Parties' submissions

60 In oral submissions, counsel for Multiplex accepted that there are no express words in the BCISP Act limiting that Act's operation in the manner contended for by Multiplex. Rather, Multiplex's argument was that that limitation should be read into the BCISP Act, having regard to its objectives.

61 Multiplex identified the overriding objective of the BCISP Act as being to ensure prompt payment to assist those in the construction industry who depend on cash flow for their continued existence. Once a party enters into liquidation, it no longer requires cash flow to conduct construction work or to supply related goods and services. In those circumstances, Multiplex submitted, the party should not be entitled to the benefit of the interim payment regime established by the BCISP Act. Multiplex noted that payments made under the BCISP Act are intended to be interim in nature. However, where the claimant is in liquidation, any payment made to the claimant is in effect final because the funds may be distributed among creditors and therefore unable to be recovered by the respondent. Further, Multiplex submitted that if the State legislature had intended to interfere with the long-standing regime of set-off, this would have been expressly stated in the BCISP Act. Counsel for Multiplex submitted in the hearing that it would be very surprising if the State legislature intended to change the law of insolvency set-off 'by a side wind' when there was nothing to that effect stated in the BCISP Act, the second reading speech or the explanatory memorandum.

62 Multiplex submitted that the limitation that it urged could be derived from s 9(1) of the BCISP Act. Section 9(1) states[50] that 'a person' who has undertaken to carry out construction work or supply related goods and services under a construction contract is entitled to a progress payment under the BCISP Act. Section 14, regarding payment claims, is available

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50 See above at [31].

to ‘a person referred to in section 9(1)’, who is defined as ‘the claimant’. The sections that follow regarding payment schedules, the consequences of not responding to a payment claim, and the adjudication of disputes, all refer to ‘a claimant’. Multiplex argued that the reference in s 9(1) to a ‘person’ could be read to mean ‘those who have undertaken to do things and *are doing them*’ (emphasis added), excluding those who previously made undertakings but are in liquidation and thus unable to fulfil those undertakings.

63 Multiplex relied upon the New South Wales decision of Young CJ in Eq in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd,*[51] in which his Honour expressed the view that the NSW Act did not apply where the subcontractor seeking payment was not a going concern. Multiplex submitted that the BCISP Act was enacted some three years after the NSW Act, and was plainly modelled on it. Therefore, the Victorian Parliament can be taken to have intended the BCISP Act to operate similarly to the NSW Act.

64 Multiplex accepted that the Queensland Court of Appeal’s observation in *R J Neller Building Pty Ltd v Ainsworth,*[52] with respect to the cognate Queensland legislation, the Qld Act, that it was intended to shift the risk of insolvency to the owner of a building (or the head contractor) rather than to the builder (or subcontractor), was applicable to the BCISP Act. In *Neller* Keane JA (with whom Fraser JA and Fryberg J agreed) observed that the legislature had ‘assigned to the owner’[53] the risk that the subcontractor might not be able to refund moneys ultimately found to be due to the owner. He said:

> The [Qld] Act proceeds on the assumption that the interruption of a builder’s cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the [Qld] Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder’s financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the [Qld] Act applies, the legislature has, prima facie at least, assigned to the owner.[54]

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51 (2005) 21 BCL 443 (‘*Brodyn*’).

52 (2009) 1 Qd R 390 (‘*Neller*’).

53 Ibid 401 [40].

54 Ibid. The analysis by Keane JA was followed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 437 [207] (McDougall J), 407 [52] (Spigelman CJ), *Cardinal Project Services*

65 Multiplex submitted that *Neller*, when read properly, did not undermine Multiplex's position. Multiplex drew a distinction between the risk of insolvency before and after liquidation. The risk identified in *Neller* was the risk present where a builder or subcontractor is teetering on the edge of insolvency — that is, pre-liquidation. That, Multiplex submitted, is a different landscape to the present circumstances, where Façade is in liquidation.

66 Façade submitted that giving the BCISP Act a broad scope so that it applies to companies in liquidation would further the statutory objects of liquidation. It would assist a liquidator seeking to realise a company's property to have recourse to the expedited procedure in the BCISP Act. Façade relied upon *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd [No 3]*[55] in support of this argument which we discuss below.

67 Façade raised two arguments against interpreting the BCISP Act so that it does not apply to builders in liquidation who are seeking payment. The first was that it would invite respondents to payment claims to 'brazen it out'. While the BCISP Act might provide for an expedited process, the reality is that there can be delays. A recalcitrant debtor might seek to delay the process so that the risk of insolvency comes to fruition. Secondly, Façade submitted that the interpretation sought by Multiplex was contrary to the words used by the BCISP Act. Façade argued that s 9(1) uses the word 'person', and a company in liquidation remains a person until de-registered at the conclusion of the winding-up process.

Analysis

68 The issues raised by the notice of contention were considered by Young CJ in Eq in *Brodyn*.[56]

69 In *Brodyn* the subcontractor, Dasein Constructions Pty Ltd ('Dasein'), went into voluntary administration the day after it was sued for liquidated damages in a sum greater than a judgment debt it had obtained under the NSW Act.

Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716, 720 [6], and in *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 [95], [99].

55 [2007] NSWSC 459 ('*Veolia*').

56 (2005) 21 BCL 443.

70 The circumstances were that Dasein was a party to a construction contract with Brodyn Pty Ltd ('Brodyn'). In mid-June 2003 Brodyn gave Dasein a notice alleging that Dasein had repudiated the contract and purporting to accept that repudiation as bringing the contract to an end. In late-June 2003 Dasein served Brodyn with a purported payment claim. Brodyn responded and a further round of the exchange of documents ensued. In September 2003 Brodyn served a payment schedule contending that money should be deducted for incomplete work and rectifying defects and alleged that Dasein had breached the contract by not furnishing a statutory declaration as to payment of workers. Dasein made an adjudication application and the adjudicator made a determination in Dasein's favour. An adjudication certificate was issued and filed in the District Court giving rise to a judgment in favour of Dasein for $183,493.64. On 30 October 2003 Brodyn issued a statement of liquidated claim in the District Court against Dasein claiming damages of $385,441.93. On 31 October 2003, Dasein went into voluntary liquidation. Shortly after Dasein became subject to a deed of company arrangement. Brodyn lodged a proof of debt which was rejected in full by the administrator of the deed.

71 Brodyn unsuccessfully sought to set aside the District Court judgment. It sought to appeal. On 10 May 2004 Dasein undertook to take no steps to enforce the District Court judgment upon the condition that Brodyn lodge with the Registrar a bank guarantee to pay to Dasein $265,000 in the event that the appeal was unsuccessful or abandoned. The appeal was dismissed.

72 Brodyn brought proceedings before Young CJ in Eq, seeking a declaration that it was entitled to set off an amount in excess of $183,493.64 against a District Court judgment obtained by Dasein under the NSW Act. Young CJ in Eq described 'the vital questions' in the proceeding as being 'the effect of any claim for set off where there is a judgment debt under s 25 of the [NSW] Act in place and also what should happen to the bank guarantee'.[57] Section 25(1) of the NSW Act ('Filing of adjudication certificate as judgment debt'), under which Dasein was awarded its adjudication certificate, permits an adjudication certificate to be filed as a judgment debt in any court of competent jurisdiction and, under s 25(4), restricts

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[57] Ibid 445 [10].

the bringing of any cross-claim or defence if the respondent seeks to have the judgment set aside.[58] It is somewhat similar to s 16 of the BCISP Act with which the judge was here concerned ('Consequences of not paying claimant where no payment schedule'), in that it denies the availability of a cross-claim or defence with respect to a judgment debt obtained under the relevant statute[59] but it further provides that, in proceedings to have the judgment set aside, there is to be no challenge to the adjudication determination and the unpaid portion of the amount due is to be paid into court as security. Section 25 of the NSW Act is largely equivalent to s 28R of the BCISP Act.

73 Young CJ in Eq found that the administrator should have admitted the proof of debt for $486,371.57. Brodyn's counsel were content to have the proof admitted for $262,388.65 which Young CJ in Eq considered was the minimum sum due to Brodyn. He held that there was a constitutional inconsistency between the NSW Act and the *Corporations Act*. This is discussed later.[60] In the alternative, he considered that the NSW Act should be construed so that it only applies to 'going concerns'. On this latter approach, he stated:

> It is clear that the mischief addressed by the Act was to assist subcontractors and others who depended on cash flow for their continued existence. The Act was to alter the effect of delays in adjudicating claims between head contractors and subcontractors by compelling the payment of monies to the subcontractors in advance of settling the real dispute so that the subcontractor would have cash flow so that his business could continue. The Minister said when introducing the Bill that it was to prevent, inter alia, pressure being put on subcontractors because of delays in adjudication where there was a cross claim. The Minister said: 'There will be no more legal delays'. He then went on to say that the changes 'will improve cash flow throughout the building and construction industry'. Of course, I should remark that whilst it is true that there are no more legal delays, unfortunately legal delays are usually necessary in order to do justice. In the instant case the head contractor has already been in three courts and spent $130,000 and has not been able to have its claim adjudicated upon because, as soon as it did raise its claim, the subcontractor went into voluntary administration.
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> It is now faced with a situation where although it has established its claim on the evidence before me, the administrator is arguing that it is necessary for it to pay the full amount of the provisional District Court judgment to the administrator who will then use it to pay his own fees and to fund further litigation and there will not be a ghost of a chance of the just claim of the head contractor ever being paid.
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> To my mind the Act does not go that far. It only intends to operate when the head contractor and the subcontractor are going concerns. Once the subcontractor ceased

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58 The terms of s 25(4) of the NSW Act are set out in [132] below.

59 The equivalent of s 16 of the BCISP Act is s 15 of the NSW Act and s 19 of the Qld Act.

60 See [114]–[119] below.

> to be a going concern, it no longer needs cash flow and the mischief to be covered by the Act is not present in that situation. No-one forced the subcontractor to go into voluntary administration. It elected to do so and in my view the protection of the BCISP Act ceased at that point and the Commonwealth law as to adjustments of rights under administration and later under a [deed of company arrangement] came into play.[61]

74 We pause to note that in reaching his conclusion on the construction of the NSW Act, Young CJ in Eq focused on the purposes underlying the Act, rather than the text used in the provisions of the Act. Multiplex adopted a similar approach on the notice of contention, relying largely upon policy arguments to support its position that the BCISP Act should be interpreted so that it does not apply to builders or subcontractors that are in liquidation.

75 However, as the High Court has stated on numerous occasions, the starting point for the task of statutory construction is the statutory text.[62] Of course,

> [t]he statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[63]

76 What, then, can be gleaned from the text of the BCISP Act? Section 1 states that the purpose of the Act 'is to provide for entitlements to progress payments for persons *who carry out construction work or who supply related goods and services* under construction contracts' (emphasis added). Thus, the very first provision of the BCISP Act suggests that the protection it offers is targeted to persons who are *acting* pursuant to a construction contract.

77 Section 9(1) creates a right to progress payments to a person 'who has undertaken to carry out construction work under the contract' or 'who has undertaken to supply related goods and services under the contract'. Unlike s 1, s 9(1) refers to a person who 'has undertaken' to do certain things, rather than a person who is doing those things in the present. But in its ordinary meaning, the word 'undertake' connotes an expectation of performance. It is also significant that s 9(1), in creating a person's entitlement to progress payments under the

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61 *Brodyn* (2005) 21 BCL 443, 452 [85]–[87].

62 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ) ('*Alcan*') and the authorities cited therein; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) ('*Consolidated Media*').

63 *Consolidated Media* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

BCISP Act, emphasises that person's undertaking to perform actions under the construction contract, rather than, say, the person's status as a party to the contract. The text of s 9(1) accords importance to the actions of carrying out construction work and supplying related goods and services.

78 Therefore, it is open to interpret s 9(1) in two ways. The first is that it is available to any person who has undertaken to carry out construction work or supply related goods and services under a construction contract. The second is that it is only available to a person who not only has undertaken to carry out construction work or supply related goods and services, but also continues to perform such activities.

79 Interpreting s 9(1) in the latter manner would have flow-on effects for the availability of the pt 3 procedure for recovering progress payments. Section 14, which provides for the service of payment claims, is available to '[a] person referred to in section 9(1) who is or who claims to be entitled to a progress payment'. Such a person is defined as 'the claimant'. The term 'the claimant' is then subsequently used throughout pt 3. Thus, a respondent who fails to provide a payment schedule to 'the claimant' may become liable to pay the claimed amount to 'the claimant' under s 15(4); and 'the claimant' may then, pursuant to s 16(2), recover the unpaid amount in a court or make an adjudication application. Adopting the narrower interpretation of s 9(1) would mean that the term 'the claimant' is only apt to cover persons who still carry out construction work or who still supply related goods and services pursuant to the construction contract. Consequently, once a winding-up order is made in respect of a builder, such that it only continues to exist for the purpose of being wound up, it would cease to be a claimant for the purposes of pt 3 of the BCISP Act. It would therefore lose the right to issue payment claims under s 14, or recover unpaid amounts pursuant to s 16(2).

80 There are a number of factors that favour the narrower interpretation of s 9(1), an interpretation which we adopt. We have already referred to s 1, which focuses on persons acting pursuant to a construction contract. A similar focus is evident in s 16(2)(b). Under that provision, where a respondent has failed to provide a payment schedule and thereby becomes liable to pay the claimed amount, the claimant may serve notice on the respondent

of its intention to suspend construction work or the supply of related goods and services. Section 16(2)(b) therefore contemplates a claimant who is still carrying out construction work or supplying goods and services.

81 As has been observed by the courts on numerous occasions, pt 3 of the BCISP Act (or its interstate equivalents) is intended to create an interim payment regime.[64] Section 47(1) of the BCISP Act provides that the regime instituted by pt 3 does not affect the rights of the parties under the construction contract. Courts or tribunals deciding matters under the construction contract must allow for any amount paid pursuant to pt 3, and may make orders for the restitution of any such amount paid.[65] The BCISP Act therefore envisages that a respondent making a payment pursuant to pt 3 may be entitled to claw back some or all of that payment in the future. However, as Multiplex submitted, in the case where the claimant is in liquidation, any payment made by the respondent pursuant to the BCISP Act would enter the general pool for distribution to the claimant's creditors. The respondent would be unlikely to see much if any of the amount returned, even if the respondent is vindicated in future legal proceedings. In that sense, if pt 3 of the BCISP Act was held to compel payment to a builder in liquidation, such a payment would become final in effect, rather than provisional as intended by the BCISP Act. We consider that these considerations are also powerful ones in the context of the constitutional issue.

82 The answer to the proper interpretation of the scope of s 9(1) lies in the text. We note, however, that, the textual interpretation we have arrived at finds support in the extrinsic materials.[66] The second reading speeches for both the BCISP Act and for the NSW Act on which the BCISP Act was modelled[67] indicate that a driving concern underpinning the introduction of the respective Acts was cash flow problems within the construction industry. In the second reading speech for the BCISP Bill, the Minister for Planning referred to '[a]ccounts of small businesses and companies failing due to larger companies going broke or

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64 See, eg, *Brodyn* (2005) 21 BCL 443, 445 [15] (Young CJ in Eq); *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* (2009) 26 VR 172, 202 [110]–[111] (Vickery J); *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* [2011] NSWCA 399 [6] (Basten JA).

65 Section 47(3).

66 See *Interpretation of Legislation Act 1984* s 35.

67 See above at [29].

refusing to pay, and issues relating to cash flow problems'.[68] In the second reading speech for the NSW Bill, the Minister for Public Works and Services referred to '[h]undreds of subcontractors in New South Wales [who] struggle to survive when they do not receive money owed to them for work undertaken. They do not have the cash flow allowing them to keep on working while waiting for payment.'[69] Of course, cash flow problems cease to be a concern when a company enters into liquidation.

83 Furthermore, the set-off procedure in s 553C has a long history[70] and it is to be presumed that the State Parliament was aware of its existence at the time of the introduction of the BCISP Act. This factor on its own has limited force, but taken together with the textual and contextual indications already canvassed, it further tips the balance in favour of a narrow interpretation of s 9(1).

84 In our view, therefore, s 9(1) creates an entitlement to progress payments only for persons who have undertaken to, and continue to, carry out construction work or supply related goods and services. The term 'the claimant' used throughout pt 3 is commensurately limited. Consequently, the payment regime in pt 3 of the BCISP Act is not available to companies in liquidation, since such companies cannot carry out construction work or supply goods and services, and thus do not satisfy the requirements for 'a claimant'.

85 We have noted that in *Brodyn*, Young CJ in Eq considered that the scope of the NSW Act was limited to persons who are 'going concerns'. This was the language adopted by Multiplex in its notice of contention. Of course, the concept of a 'going concern' is different to that of a company in liquidation. A company may cease to be a going concern before a winding-up order is made. As a practical matter, it is generally easier to identify when a company enters into liquidation than it is to identify when it ceases to be a going concern. In oral submissions, Multiplex eschewed reliance on the 'going concern' formulation and

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68 Parliamentary Debates, Victoria, Legislative Assembly, 21 March 2002, 426 (Mary Delahunty); see above at [29].

69 Parliamentary Debates, New South Wales, Legislative Assembly, 8 September 1999, 104 (Morris Iemma).

70 *Ansett Australia Holdings Ltd v International Air Transport Association* (2006) 60 ACSR 468; [2006] VSCA 242 [103]–[109] (Nettle JA).

instead argued that the scope of the BCISP Act excluded companies in liquidation. Hence, it is unnecessary for us to consider further whether the BCISP Act should be even more narrowly interpreted to only apply to companies that are going concerns.

86 In response to the notice of contention, as we mentioned above, Façade relied upon the observations of the Queensland Court of Appeal in *Neller* that the BCISP Act and its interstate equivalents were intended to shift the risk of a builder's (or subcontractor's) insolvency to the owner (or head contractor).[71] So much may be accepted. However, once a builder enters into liquidation, it is no longer a question of the *risk* of insolvency; insolvency is a certainty. Relevantly, *Neller* did not involve a builder in administration or liquidation. Rather, the owner wished to resist making a payment to the builder because the builder was a two-dollar private company operating an overdraft secured over real property where the security was not provided by it and with a charge registered over its assets and undertakings. Therefore, the observations by Keane JA in *Neller* were concerned with the situation where the builder may be teetering on the edge, but has not yet fallen over. In those circumstances, preserving the builder's cash flow might still be able to rescue the builder from insolvency. There is, therefore, a sound policy reason under the BCISP Act for allocating the risk of the builder's insolvency to the other party. Once the winding-up process has commenced, however, that rationale no longer applies. A narrow interpretation of s 9(1) of the BCISP Act is consistent with the observations made by the court in *Neller*.

87 Façade also relied upon the policy argument that interpreting the BCISP Act narrowly would undermine the purposes of that Act, as it would invite owners or head contractors to find ways of delaying payment until the builder entered into liquidation. However, the timeframes imposed by the BCISP Act are short. The deadlines for a respondent to respond to a payment claim or respond to an adjudication application, and the deadline for an adjudicator to make a determination, are all within 10 business days (or in the latter case, within 15 business days with the claimant's consent). The claimant can therefore pursue enforcement within a relatively short period. Of course, delays may occur in enforcement

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[71] (2009) 1 Qd R 390, 401 [40] (Keane JA, Fraser JA and Fryberg J agreeing), quoted above at [64] above.

and a builder already in a perilous financial state may enter into liquidation in a matter of months, as was the case here. However, in our view this consideration does not justify construing the legislation so that it confers benefits on companies in liquidation in the manner for which Façade contends. In the usual case, the legislation is designed to help avoid builders going into liquidation. The fact that this goal will not always be achieved, and may sometimes be frustrated, is not a reason for construing the statute so that it has an operation wider than the statutory purpose we have identified.

88 We note for completeness that counsel for Façade relied upon *Veolia.* In *Veolia*, Kruger Engineering Australia Pty Ltd ('Kruger'), the subcontractor, had obtained an adjudication determination in its favour in respect of a payment claim given to Veolia Water Solutions & Technologies (Australia) Pty Ltd ('Veolia') under the NSW Act in July 2006. Kruger recovered judgment in respect of that determination, pursuant to s 25(1) of the NSW Act. It was subject to a deed of company arrangement dated 26 April 2006. Veolia lodged a proof of debt with the administrator for a significantly greater sum than the judgment debt. It then sought orders that the execution of the judgment procured by Kruger be stayed permanently and the securities given by Veolia as the price of the stay to date be returned to it.

89 McDougall J held that the circumstances did not justify the grant of a permanent stay as the cross-claim had not been established and nor was Veolia presently entitled to the return of the security given by it. He went on to make the following observations, relied upon by Façade:

> I am not sure that it is correct to say that the [NSW Act] has no application to companies in administration. The object of Pt 5.3A of the *Corporations Act* is set out in s 435A:
>
> > **435A Object of Part**
> >
> > The object of this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
> >
> > (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
> >
> > (b) if it is not possible for the company or its business to continue in existence — results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

> Cash flow is of obvious importance to the first aspect of this statutory object; and getting in debts in an orderly manner is of obvious importance to the second. It is at least arguable that the purpose underlying the [NSW Act] is as relevant to a company in administration, in that it will tend towards achieving the statutory object of administration, as it is to a company that is trading as a going concern.[72]

We do not consider these observations to be pertinent to this case. The circumstances under consideration in the present proceeding do not involve pt 5.3A[73] but instead concern a company in liquidation in relation to which s 553C of the *Corporations Act* might operate.[74]

90 In the result, s 9(1) of the BCISP Act does not create an entitlement to progress payments for persons who are in liquidation (that is, persons in respect of whom a winding-up order has been made). This is because such persons no longer carry out construction work or supply related goods and services pursuant to a construction contract. On the construction we adopt, pt 3 of the BCISP Act is not available to persons in liquidation. It is not available to Façade. We uphold Multiplex's grounds in the notice of contention.

91 Given our conclusions on construction, which have the effect that Façade cannot avail itself of the protection afforded by pt 3 of the BCISP Act, it is strictly unnecessary for us to consider the issue of constitutional inconsistency. Nevertheless, in the event that we are wrong with respect to the construction issues, and in deference to the judge below, and the parties, and acknowledging that the question of inconsistency was fully argued before us, we proceed to consider that question. We first make some preliminary observations about the fact that the proceeding before the judge was heard in federal jurisdiction.

Federal jurisdiction and s 79 of the *Judiciary Act*

92 It was accepted by both parties that here the judge was exercising federal jurisdiction. Although the proceeding for summary judgment was brought under the BCISP Act in a State Court the reliance upon s 553C of the *Corporations Act*, and the allegation of an inconsistency under s 109 of the Constitution, converted the entire proceedings to a proceeding in federal jurisdiction[75] within the meaning of s 76(i), s 76 (ii) and s 77 (iii) of the

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72 [2007] NSWSC 459 [76]–[77].

73 'Administration of a company's affairs with a view to executing a deed of company arrangement'.

74 McDougall J's observations about s 553C are considered in the context of the constitutional issue at [130]–[137] below.

Constitution. Federal jurisdiction was exercised by the Court pursuant to s 39(2) of the *Judiciary Act 1903* (Cth). The laws applicable to the proceeding are those provided for under s 79(1) of the *Judiciary Act* which reads:

> **79 State or Territory laws to govern where applicable**
>
> (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

93 Where a State law applies to a proceeding in a court exercising federal jurisdiction it applies as a 'surrogate federal law'.[76] A State law does not apply in federal jurisdiction by its own force.[77] A State law will be 'picked up' by s 79 of the *Judiciary Act* and applied in proceedings in federal jurisdiction if there is no other Commonwealth law which 'otherwise provides'. The test for whether a Commonwealth law 'otherwise provides', within the meaning of s 79, is distinct from the test which applies to a question of s 109 inconsistency, the former requiring that the provisions be irreconcilable.[78]

94 Façade submits that, as the proceeding was heard in federal jurisdiction, there is no scope for a s 109 inconsistency to arise between the BCISP Act and the *Corporations Act*. It submits that the provisions are not irreconcilable; in particular, it submits that s 16(4)(b) does not affect substantive rights because a final account of all claims has still to be taken under the Subcontract.

95 We consider that Façade's submission should be rejected because it fails to appreciate that the sequence in which these issues are to be addressed is to consider the inconsistency question first to determine if there is a valid State law and only then, if the law is held to be valid, to turn to s 79 of the *Judiciary Act*. Basten JA identified the approved sequence in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd*[79] when he said:

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75 *Felton v Mulligan* (1971) 124 CLR 367, 373–4.

76 *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134 [20]–[23].

77 Ibid 134 [21].

78 *Northern Territory v GPAO* (1999) 196 CLR 553, 576, 588 [80]–[81].

79 (2006) 67 NSWLR 9 ('*Bitannia*').

> [T]he authorities which expressly address the issue require this Court to consider, first, the proper construction of the State law and, secondly, whether, so construed, it is inoperative because of inconsistency with a Commonwealth law. The third step is to determine whether, even if not inconsistent with a Commonwealth law, it is nevertheless not 'picked up' by s 79, because a Commonwealth law otherwise provides.[80]

96 We consider that the inconsistency question must be addressed first. If not, where an Act, or a section of an Act, may be held to be inconsistent but not irreconcilable with a Commonwealth law, this would allow, wrongly, for the 'restor[ation] to life'[81] of an invalid law through the medium of s 79. As Gleeson CJ and Gummow J said in *Northern Territory v GPAO*:[82]

> A State law is not applied by s 79 in circumstances where it could have no direct application by reason of its invalidity for inconsistency with an existing law of the Commonwealth, within the meaning of s 109 of the Constitution. Likewise, a law of the Territory which is invalid or inoperative by reason of 'inconsistency' with a law of the Commonwealth is not restored to life through the medium of s 79 of the *Judiciary Act*.[83]

97 Section 79 cannot be used to 'finesse or sidestep [the] prior question of constitutional invalidity by reason of inconsistency and effectively to override … a constitutional provision of great importance'.[84] Rather, 'the constitutional provision, as the basic law, must receive prior consideration'.[85]

98 We consider that the constitutional question must be considered before any issue arising from s 79 of the *Judiciary Act*.

The constitutional point — s 109 inconsistency

99 Grounds 1—4 relate to the constitutional point raised by Multiplex.[86] Grounds 1, 2 and 3 are concerned with the judge's finding that the payment recovery provisions under the BCISP

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80 Ibid 24 [41]. This was despite some observations made in *Austral Pacific Group (in liq) v Airservices Australia* (2002) 203 CLR 136.

81 *Northern Territory v GPAO* (1999) 196 CLR 553, 576 [38].

82 (1999) 196 CLR 553.

83 Ibid 576 [38] (citations omitted).

84 *Dao v Australian Postal Commission* (1987) 162 CLR 317, 331.

85 Ibid.

86 A Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was served on the Attorneys-General of the Commonwealth, the States and the Territories but none intervened.

Act, that is, pt 3 (including, in particular, s 16), are inconsistent with the set-off provisions under s 553C of the *Corporations Act*, with the result that the former is invalid to the extent of the inconsistency, pursuant to s 109 of the Constitution. These grounds of appeal provide:[87]

> *Ground 1*
>
> The judge erred in finding (at [85] of the [Reasons]) that a company to which s 553C of the *Corporations Act* applies, subject to the application of sub-s 2 thereof, is precluded from entering any judgment pursuant to s 16(2)(a)(i) of the BCISP Act in respect of a debt due to it under that Act, and is further precluded from relying on s 16(4)(b) as a bar to bringing a cross-claim or raising any defence by way of set-off in relation to the matters arising under the relevant construction contract.
>
> *Ground 2*
>
> The judge ought to have found that there was no inconsistency between the BCISP Act and the *Corporations* Act, such that s 109 of the Constitution was not engaged.
>
> *Ground 3*
>
> The judge ought to have found that:
>
> (a) the BCISP Act permitted the assertion of a set-off, whether by means of a payment schedule duly submitted within the time permitted by s 15(4) of that Act, or later in proceedings in respect of the construction contract between Façade and Multiplex, or in Façade's liquidation; and
>
> (b) Sections 16(2)(a)(i) and 16(4)(b) of the BCISP Act are consistent with the *Corporation Act*'s mechanism for setting off mutual debts, credits and other dealings at s 553C. The judge ought to have applied a construction of both provisions which enabled them to operate side by side.

100 Ground 4 is concerned with whether the judge ought to have distinguished the authorities relied upon by Multiplex when determining whether there was a potential conflict between the BCISP Act and the *Corporations Act*:

> *Ground 4*
>
> The judge erred in finding (at [76] of the [Reasons]) that the potential conflict between s 553C of the *Corporations Act* and ss 16(2)(a)(i) and 16(4)(b) of the BCISP Act (including their interstate equivalents) had been considered by the courts. The authorities relied upon by Multiplex in its submissions and cited in paragraph [77]–[79] ought to have been distinguished by the judge on their facts, as they concerned different types of claims or different legislative provisions.[88]

101 Section 109 of the Constitution provides:

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87 These grounds of appeal have been adapted to reflect matters already defined.

88 The authorities cited in [77]–[79] of the Reasons include *Brodyn* (2005) 21 BCL 443, *Demir Pty Ltd v Graf Plumbing Pty Ltd* [2004] NSWSC 553 ('*Demir*') and *Telstra v Worthing* (1999) 197 CLR 61.

> Inconsistency of laws
>
> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

102 For convenience we consider grounds 1–4 together.

The judge's reasons for finding a constitutional inconsistency

103 The judge, quoting from *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,[89] noted that the principle behind the BCISP Act is that respondents to payment claims 'should pay now and argue later'.[90] As the judge had observed in that earlier case:[91]

> The [BCISP] Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Sub-contractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which complements the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the [BCISP] Act.[92]

104 The judge also accepted the proposition that the BCISP Act 'alters the allocation of insolvency risk between contracting parties'[93] by reference to the observations of Keane JA in *Neller*.[94]

105 The judge observed that, although there appeared to be a clear understanding that the BCISP Act (and the Qld Act, and the NSW Act) assigned to the owner the risk that the subcontractor might become insolvent and be unable to repay to the owner money to which the owner was ultimately entitled, none of the cases mentioned dealt with circumstances in which the claimant company was being wound up.

106 In turning to s 553C of the *Corporations Act*, and the set-off of opposing claims that it provides for, the judge identified the policy on which s 553C is based as that which was

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89 (2009) 26 VR 112 ('*Hickory Developments*').

90 Reasons [45].

91 *Hickory Developments* (2009) 26 VR 112.

92 Ibid 114–5 [2] (citation omitted).

93 Reasons [47].

94 See [64] above.

stated in *Gye v McIntyre*[95] to be applicable in the context of bankruptcy:

> Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in bankruptcy could insist upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar on the whole of the debt owed by the bankrupt to him.[96]

107 He identified the principles applicable to s 553C:

(1) it allows set-off of opposing claims that 'exist or are inchoate at the time of the commencement of the winding up', usually the date of the order;[97]

(2) the inclusion of the phrase 'mutual dealings' in s 553C includes circumstances where one party has a damages claim for breach of contract entered into before the administration; in those circumstances, the damages claim 'arises out of a prior dealing between the parties';[98]

(3) for s 553C to apply, there is no need for a party to have lodged a proof of debt;[99]

(4) s 553C should be given the widest possible scope.[100]

108 He held that no judgment should be entered under s 16(2)(a)(i) of the BCISP Act in favour of Façade and against Multiplex because there was a 'conflict' 'in the application of the legislative provisions between the scheme set out in the [BCISP] Act on the one hand, as provided for in s 16(2)(a)(i) and s 16(4)(b), and the scheme set out in s 553C of the [*Corporations Act*]'.[101] He further considered that the application of the BCISP Act to the facts of the present case would have the effect of altering, impairing or detracting from the operation of the *Corporations Act*.[102] He acknowledged that, 'in both circumstances, [the]

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95 (1991) 171 CLR 609.

96 *Gye v McIntyre* (1991) 171 CLR 609, 618-9. See also *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd (in prov liq)* (1982) 150 CLR 85, 95 where Gibbs CJ said:

> It is well understood that the law which relates to the set-off of mutual dealings in bankruptcy, which has a long history, exists to prevent the injustice of a man who has had mutual dealings with a bankrupt from having to pay in full what he owes in respect of such dealings while only receiving a dividend on what the bankrupt owed him in respect of them: see *Ex parte Barnett; Re Deveze* (1874) 9 Ch App 293, 297.

97 Reasons [60], quoting from H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) ('*Ford*') [27.450].

98 Ibid [61]. See also [117] below.

99 Reasons [62].

100 Ibid [63].

101 Ibid [81].

102 Ibid.

BCISP Act must yield to the provisions of the [*Corporations Act*]'.[103] The judge summarised his conclusion by saying:

> A company to which s 553C of the *[Corporations Act]* applies, subject to s 553C(2), is precluded from entering any judgment pursuant to s 16(2)(a)(i) of the [BCISP] Act in respect of the debt due to it under that Act, and is further precluded from relying on s 16(4)(b) as a bar to a respondent under the [BCISP] Act from bringing any cross-claim against the company or raising any defence by way of set-off in relation to matters arising under the relevant construction contract.[104]

109 The principles governing the general application of s 109 of the Constitution, as identified by the judge,[105] are those set out in *Telstra v Worthing*,[106] which in turn referred to the two propositions stated by Dixon J in *Victoria v Commonwealth*.[107] In *Telstra v Worthing* the High Court said, in a unanimous judgment:

> In *Victoria v Commonwealth*,[108] Dixon J stated two propositions which are presently material. The first was:http://www.lexisnexis.com/au/legal/ - 03-01981fn033
>
> > When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.
>
> The second, which followed immediately in the same passage, was:
>
> > Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.
>
> The second proposition may apply in a given case where the first does not, yet, contrary to the approach taken in the Court of Appeal,[109] if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.[110]

110 The judge was of the view that both propositions explained by the High Court in *Telstra v Worthing* were applicable in the present case.[111] He held that, at the time that Façade went

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103 Ibid.

104 Ibid [85].

105 Ibid [73].

106 (1999) 197 CLR 61; see also *Bell Group NV (in liq) v Western Australia* [2016] HCA 21 [51].

107 (1937) 58 CLR 618.

108 Ibid 630.

109 The High Court was referring to the Court of Appeal of New South Wales. The High Court allowed the appeal.

110 *Telstra v Worthing* (1999) 197 CLR 61, 76–7 [28].

111 Reasons [79].

into liquidation, on 6 February 2013, the quantum of Multiplex's proposed counterclaim was 'likely to well exceed'[112] Façade's entitlement to any judgment under s 16(2)(a)(i) of the BCISP Act in respect of the sum of $600,187.50, the unpaid portion of Payment Claim 18.[113] Multiplex had relied on affidavit material to the effect that its proposed counterclaim would encompass the additional (direct and indirect) costs to complete the work that was the subject of the subcontract, $1,848,658, together with liquidated damages in the amount of $52,870 per day (the rate specified in the subcontract) up until the date for practical completion, quantified at $10,309,650.[114]

111 The judge recognised that the force and effect of s 16(4)(b)(i) of the BCISP Act was that Multiplex would not be entitled to rely upon its counterclaim, as a cross-claim, in the application for judgment under s 16(2)(a)(i). If summary judgment was to be awarded, it would take no account of any cross-claim. For this reason, the judge concluded that the 'prohibition against raising a cross-claim in s 16(4) of the [BCISP] Act potentially conflicts with [the] express right of set-off enshrined within s 553C of the [*Corporations Act*].'[115]

112 The judge observed that 'the question is whether s 553C of the [*Corporations Act*] came into effect to deprive [Façade] of any right to prosecute the claims the subject of this Proceeding?'[116] If it did so deprive Façade, Façade's claim would be 'automatically extinguished' by s 553C of the *Corporations Act*.[117] In the judge's opinion, for summary judgment to be entered in favour of a company in liquidation, under s 16(2)(a)(i) of the

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112 Ibid [70].

113 Ibid. The judge describes this as the amount 'in respect of Payment Claim 19 ($600,187.50)' but this would appear to be a slip: see Reasons [2]. On the constitutional point, the judge was primarily concerned with the unpaid portion of Payment Claim 18 ($600,187.50) (Reasons [2(a)]) because, as discussed at [46] above, he considered that, while, in respect of Payment Claim 18 no payment schedule was served pursuant to s 15 of the BCISP Act (thus enlivening s 16), with respect to Payment Claim 19, an email of 5 October 2012 advising that Multiplex considered Payment Claim 19 to be invalid, was a 'Payment Schedule' and satisfied s 15 of the BCISP Act: Reasons [6], [35]. The effect of this finding was that, as far as the judge's conclusions were concerned, regardless of the constitutional point, Façade was not entitled to a judgment debt with respect to Payment Claim 19: Reasons [39]. Nevertheless, the judge did consider both Payment Claims 18 and 19 when discussing the constitutional point: Reasons [54]–[55].

114 Reasons [66].

115 Ibid [72].

116 Ibid [70].

117 Ibid [72].

BCISP Act, without the court taking into account any cross-claim or defence by way of set-off, such cross-claims being prohibited by s 16(4)(b), 'would fly directly in the face of the scheme established by s 553C of the [*Corporations Act*].'[118] Nor was it open to avert any inconsistency by imposing a stay on the judgment sought by Façade because the entry of the judgment itself gave rise to the inconsistency.[119]

113 The judge considered that the position might change should Multiplex either expressly decide not to proceed with its counterclaim, or should it evince an intention not to pursue its claim by allowing 'further and inordinate time [to] pass without taking steps to prosecute these claims.'[120]

114 In reaching the conclusion he did, the judge had regard to[121] the approach taken by the New South Wales Supreme Court to the question of the potential conflict between *the Corporations Act* and the NSW Act in *Brodyn*[122] where Young CJ in Eq resolved a somewhat similar conflict by finding, on the basis of s 109 of the Constitution, that s 553C of the *Corporations Act* prevailed over the NSW Act.

115 As noted,[123] in *Brodyn* Dasein had obtained an adjudication certificate in its favour under the NSW Act for $183,493.64 which it had filed with the District Court as a judgment debt. Young CJ in Eq noted that once an adjudication certificate has been filed as a judgment for debt in the District Court, the subcontractor 'is entitled to execute on that judgment'.[124] He nevertheless described the judgment as 'provisional' which could be set aside in the course of a proper determination of all the contractual claims. He noted that the rights of the parties under the contract are preserved under s 32 of the NSW Act. He said:

> [I]t is recognised that even though there may be execution under the judgment, in a very real sense the judgment is a provisional judgment which may be set aside in due course after all the contractual claims have been properly considered.

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118 Ibid [80].

119 Ibid [82].

120 Ibid [84].

121 Ibid [77]–[78].

122 (2005) 21 BCL 443. See [69]–[73] above.

123 See [70] above.

124 *Brodyn* (2005) 21 BCL 443, 445 [14].

> The purpose of the [NSW] Act is to enable the subcontractor to have access to actual monies while those disputes are being considered. Accordingly, s 25(4) of the … Act provides that the respondent is not entitled in any proceedings to have the provisional judgment set aside: (i) to bring any cross-claim against the claimant; or (ii) raise any defence in relation to matters arising under the construction contract; or (iii) to challenge the adjudicator's determination, and further is required to pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.
>
> Section 32 of the … Act makes it clear that virtually nothing in the Act affects any right that a party to a construction contract may have under the contract or may have, apart from the Act, in respect of anything done or omitted to be done under the contract nor does the Act affect any civil proceedings arising under the contract. In such proceedings, a court or tribunal must allow for any amount paid to a party to the contract under the … Act and make such orders as it considers appropriate for restitution if that be required.[125]

116 The preservation of the parties' contractual rights is similarly protected under s 47 of the BCISP Act.

117 Young CJ in Eq had to consider whether, in view of the NSW Act, the proof of debt of $262,388.65[126] could be set off against the District Court judgment of $183,493.64 under s 553C of the *Corporations Act*.[127] He held that there was a constitutional inconsistency between s 25 of the NSW Act and s 553C of the *Corporations Act* with the result that s 553C prevailed and a set-off was available. He said:

> Section 553C applies where there are mutual credits, mutual debts or other mutual dealings. It seems now accepted that the inclusion of 'mutual dealings' covers the situation where one party has a damages claim for breach of contract entered into before the administration. In such a case the claim arises out of a prior dealing between the parties …
>
> The vital question is whether, in the light of s 25 of the [NSW] Act, one can apply s 553C.
>
> [Counsel for Brodyn] say that because the claim of the plaintiff exceeds the claim of the company the company's claim was automatically extinguished by s 553C. This means that the District Court provisional judgment under s 25 of the [NSW] Act must now be set aside or stayed. This is because it is clearly a provisional judgment which is to be dealt with when the whole of the dispute between the parties has been litigated as has now occurred.
>
> On the other hand, [counsel for Dasein] says that the policy of the [NSW] Act means that the only entitlement to judicial intervention once a judgment is made under s

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125 Ibid 445 [15]–[17].

126 As mentioned at [73] above, Young CJ in Eq found that the administrator should have admitted the proof of debt for $486,371.57 but Brodyn's counsel were content to have the proof admitted for $262,388.65 which Young CJ in Eq considered was the minimum sum due to Brodyn.

127 Relevantly, s 553C of *the Corporations Act* was incorporated into the deed of company arrangement ('DOCA') pursuant to the *Corporation Regulations 2001*.

> 25(1) is to commence proceedings to have it set aside under s 25(4). In those proceedings the applicant is not to bring a cross-claim or raise any defence in relation to matters arising under the construction contract …
>
> There is a conflict of legislative provisions in the instant case and the scheme set out in the [NSW] Act and the scheme set out in the *Corporations Act* where a company is under a DOCA do conflict. …
>
> The first reason is s 109 of the Australian Constitution. …
>
> The *Corporations Act* is a Commonwealth Act, the [NSW] Act is a State Act, so if there is any inconsistency, the former prevails.
>
> In *Demir Pty Ltd v Graf Plumbing Pty Ltd* Campbell J said that if a person obtains a judgment under the [NSW] Act and 'the judgment debtor does not pay it voluntarily, then the judgment creditor can use the range of remedies open to a judgment creditor. It is not possible, however, for the terms of a Commonwealth Act, the *Corporations Act 2001* (Cth) to be construed, or limited, by reference to the intention implicit in a State Act. The provisions of Div 3 of Pt 5.4 of the *Corporations Act 2001* (Cth)[128] set out a regime whereby a statutory demand is set aside *whenever* there is an offsetting claim as defined'.[129]

118 In what follows, we treat Young CJ in Eq's reliance on *Demir* as indicating that he adopted the approach of Campbell J in *Demir* to the question of constitutional inconsistency, namely, recognising that the question of the potential application of a Commonwealth Act is not to be assessed by first determining whether a State Act is intended to govern the same set of circumstances, and nor is the sphere of operation of a Commonwealth Act to be restricted by the potential application of a State Act. Relevantly, in the context of statutory demands, the *Corporations Act* provides for them to be set aside whenever there is an offsetting claim and the application of the *Corporations Act* is not to be restricted because the NSW Act seeks to limit any reliance on cross-claims in respect of a judgment debt obtained under it. So too, reasoned Young CJ in Eq, the provision the *Corporations Act* makes for the set-off of mutual debts under s 553C is not to be construed as restricted in its operation by reference to the purported intention of the NSW Act that judgment debts obtained under the NSW Act are not to be susceptible to cross-claims.

119 He declared that the judgment debt of $183,493.64 was extinguished by set-off under the provisions of the *Corporations Act*.

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128 See, in particular, s 459H(1) which provides that: 'This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following: (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates; (b) that the company has an offsetting claim.'

129 *Brodyn* (2005) 21 BCL 443, 451–2 [77]–[80], [82]–[84] (emphasis in original)(citations omitted).

120 The judge here placed considerable weight on the observations of Young CJ in Eq in *Brodyn* in concluding that s 16(2)(a)(i) and s 16(4)(b) of the BCISP Act are inconsistent with s 553C of the *Corporations Act*.

Are s 16(2)(a)(i) and s 16(4)(b) of the BCISP Act inconsistent with s 553C of the *Corporations Act*?

121 Façade submits that, although the judge correctly identified the test endorsed in *Telstra v Worthing* for applying s 109 of the Constitution, he erred in concluding that the BCISP Act engaged either aspect of s 109.

Façade's approach: BCISP Act restrictions are procedural and interim

122 Façade submits that the relevant provisions of the BCISP Act are procedural, provisional, and yield only interim results. It submits that the BCISP Act does not affect the substantive rights a party may have under the contract,[130] or at common law, or with respect to a statutory cause of action (for example, for misleading or deceptive conduct). The BCISP Act also expressly provides for a respondent to a payment claim to contest the amount specified in the payment claim and to assert any right of set-off or cross-claim, within time limits, by issuing a payment schedule under s 15. Here Multiplex chose not to issue a payment schedule with respect to Payment Claim 18.[131] Moreover, Façade submits, if a respondent does not use the mechanisms under the BCISP Act to assert a set-off or cross-claim with respect to a payment claim, the payment schedule mechanism can still be used with respect to subsequent payment claims and the rights asserted in that way.

123 Façade argues that the provisional nature of the mechanisms provided for under the BCISP Act is also confirmed by cl 42.1 of the Subcontract which deals with 'Payment Claims, Payment Schedules, Calculations and Time for Payment'. It provides for payments to be made on account only:

> Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only.

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130 As noted above, s 47 of the BCISP Act expressly preserves the rights of the parties under the contract.

131 See n 113 above.

124 Clause 42.1 also provides that a payment made pursuant to that clause 'shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable'.

125 Moreover, Façade submits, it is too early to tell what the eventual outcome will be of the issues in dispute between it and Multiplex. Façade's variations claims may be allowed in full or in part. Multiplex's claim for liquidated damages, the basis of its cross-claim, is contested and much depends on whether it properly took the Subcontract work out of Façade's hands by its letter dated 10 October 2012.[132] Façade submits that there is much that is unknown at this stage and the right of set-off under s 553C of the *Corporations* Act remains available to Multiplex at a later date. This, so the argument went, demonstrates the compatibility, and concurrent operation, of the BCISP Act and the *Corporations Act*. This was said to be illustrated by the following three scenarios:[133]

(1) The Court may accept Multiplex's termination of the contract of sale, the matter may proceed to arbitration or adjudication in another forum, with liquidated damages being disallowed, but Façade's variations claim succeeding (in full), and Multiplex's costs to complete the works also being allowed (in full);

(2) Façade may fail to establish all of its variations and have no entitlement to general damages, but Multiplex may succeed in its claim for liquidated damages, allowed at $15 million;

(3) Multiplex may pay Façade's statutory entitlements under the BCISP Act when due, but otherwise the circumstances may be the same as (b) above.

126 Façade submits that the scenarios demonstrate that any right of set-off enjoyed by Multiplex is not extinguished by the obtaining of a summary judgment in Façade's favour under s 16(2)(a)(i) of the BCISP Act:

> These scenarios show how the right of set-off has not been extinguished, ie the [BCISP] Act and the *Corporations Act* can operate together.

127 Moreover, Façade submits, the scenarios indicate that it was wrong for the judge to conclude, as it says he implicitly did, that no debt would be owing to Façade on a final

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132 See [19] above.

133 Façade replied upon these three scenarios in reply before the judge below.

determination of all claims and cross-claims, whether under the subcontract or otherwise. It argues that this assumption was necessary for the judge to reach the conclusion that Multiplex would be denied the opportunity to set off any amount it might have been ordered to pay if the judge had awarded a judgment debt under s 16(2)(a)(i), a conclusion which, it argues, was essential to generate any inconsistency. Façade submits that this assumption was misplaced and overlooks the interim nature of the statutory right to payment that the BCISP Act creates.

128 Façade also submits that the judge ought not to have relied on the authorities he did because in *Brodyn* Young CJ in Eq failed to identify which limb of s 109 was engaged and applied *Demir* when *Demir* concerned the setting aside of statutory demands, under s 459H of the *Corporations Act*,[134] and not s 553C. Ultimately, Façade argues that it would be a perverse result for a company that issues a valid payment claim, to which no payment schedule is provided in response, thereby enlivening the right to a summary judgment in its favour, to suddenly lose that right because it goes into liquidation or voluntary administration. The perversity of the result is submitted to be apparent from the consequence that would flow, namely, that a creditor in receipt of a payment claim can choose to issue no payment schedule and simply 'brazen it out' in the knowledge that some subcontractor or other creditor of the party that issued the payment claim will most likely issue a statutory demand and bring about its winding up.

Façade's approach: concurrent operation — Veolia

129 Façade also points to the judgment of McDougall J in *Veolia*[135] where a cautious approach was adopted to the construction of the NSW Act avoiding any risk of constitutional inconsistency.

130 One of the issues that fell to be determined there was whether Veolia was entitled to the return of its securities on the basis that the *Corporations Act*, in particular ss 553 and 553C, applied to the exclusion of the NSW Act.

131 In resolving that issue against Veolia, McDougall J considered the decision in *Brodyn* and

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134 See n 128 above.

135 [2007] NSWSC 459. See [88]–[89] above.

the conflict Young CJ in Eq identified there between s 25 of the NSW Act, in particular s 25(4), and s 553C of the *Corporations Act*. Section 25 is concerned with the circumstances where an adjudication certificate has been obtained which is filed with a court and judgment entered accordingly. McDougall J held that no conflict arose before him because the prohibition under s 25(4) of the NSW Act on bringing a cross-claim, or raising a defence, was restricted to proceedings that sought to set aside the judgment entered (upon the filing of an adjudication certificate), not where there was a collateral attack on the effect of the judgment not involving the setting aside of the judgment.[136] He held that it was evident from the introductory words to the prohibition against cross-claims in s 25(4)(a)(ii) that the prohibition only applies 'in those proceedings', that is, in a proceeding where there is an application to set aside a judgment based on an adjudication determination.[137]

132 Section 25(4) of the NSW Act provides:

> If the respondent commences *proceedings to have the judgment set aside*, the respondent:
>
> (a) is not, *in those proceedings*, entitled:
>
> (i) to bring any cross-claim against the claimant, or
>
> (ii) to raise any defence in relation to matters arising under the construction contract, or
>
> (iii) to challenge the adjudicator's determination, and
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> (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.[138]

133 As Veolia was not seeking to set aside the judgment Kruger had recovered against it, s 25(4) had no application.[139] McDougall J concluded that there was no conflict and s 553C of *the Corporations Act* applied.

134 He considered that the set-off provisions of the *Corporations Act* do not undermine the

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136 Ibid [18].

137 Ibid [17].

138 Emphasis added. Section 25(4) of the NSW Act is in comparable terms to s 28R(5) of the BCISP Act. McDougall J observed (at [20]–[21]) that his reasoning was consistent with that adopted in *Demir* [2004] NSWSC 553 [20] (Campbell J) and in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186 [11] (Barrett J).

139 *Veolia* [2007] NSWSC 459 [19].

purpose of the NSW Act because, in permitting a set-off, the *Corporations Act* acknowledges the viability of the payment claim, and the consequent judgment debt, by bringing it to account. Section 553C of the *Corporations Act* does not set the payment claim at nought; rather, in a set-off the payment claim is in effect satisfied. He said:

> Nor do I think that there is anything in this reasoning that is inconsistent with the underlying policy of the [NSW] Act, which is concerned with ensuring that those who undertake to carry out construction work, or to supply related goods and services, under a construction contract should receive prompt payment of progress claims. *The effect of the application of s 553C (in a case where the offsetting claim exceeds the amount of the progress claim) is that the progress claim is satisfied by set-off.* The person entitled to the progress claim has received the benefit of payment. That is so regardless of whether the progress claim has given rise to an adjudication determination or a judgment debt. *Operation of the statutory scheme of set-off under the Corporations Act does not impeach the progress claim (or any adjudication determination or judgment founded on it). On the contrary, the effect of the progress claim is accepted, because its amount is brought to account in the process of set-off.* It may be that the process of satisfaction through set-off rather than satisfaction through payment has an adverse effect on other creditors. But that is a necessary consequence of the application of the scheme of set-off that the legislature, in s 553C, saw fit to enact.[140]

135 He described the interaction between s 553C of the *Corporations Act* and s 25(4) of the NSW Act as one whereby the mechanism of s 553C is a means to give effect to a judgment debt obtained under the NSW Act. He said that:

> At most, Veolia would be entitled to a stay pending a decision on its proof of debt, or pending a determination of its cross-claim by some other means. A stay pending determination of its proof of debt would give effect to the principle recognised in *Brodyn v Dasein*, to the effect that the right of statutory set-off under s 553C of the *Corporations Act* is not ousted by s 25(4) of the [NSW] Act. But a stay on this basis would not be permanent; and would not stop effect being given to the judgment through the mechanism of s 553C.[141]

136 He later described the 'principal value of Veolia's cross-claim must be its capacity to cancel out, on a dollar for dollar basis through s 553C, the judgment debt presently held by Kruger'.[142] The amount of the cross-claim that may be in excess of the judgment debt would

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140 Ibid [24] (emphasis added). He went on to say: 'I must say that the factors referred to in the preceding paragraph lead me to question why it is appropriate to set aside a judgment once it has been satisfied by set-off pursuant to s 553C. A judgment may be satisfied by a number of means, including payment, accord and satisfaction and set-off under s 553C. Satisfaction by payment, or by accord and satisfaction, does not impeach the validity of the judgment. Nor, I think, does satisfaction by set-off pursuant to s 553C. But since this point was not argued, it is unnecessary for me to express a concluded view': ibid [25].

141 Ibid [31].

142 Ibid [80].

be recovered on the basis of the ultimate distribution, a result that flowed from the fact that Kruger was in administration with a compromise between it and its creditors.

137 Façade relies upon *Veolia* for the compatibility it acknowledges between s 25 of the NSW Act and s 553C of the *Corporations Act*. However, the relevance of *Veolia* to the constitutional issue in the present case is limited by three factors; first, as s 25(4) had no application to the proceeding before McDougall J there was no basis for a conflict to arise; secondly, the circumstances were ones in which the judgment debt had already been obtained before the proceeding commenced; and thirdly, the significance of s 553C was undeniable.

138 More generally, we consider that Façade's submissions on the constitutional point should be rejected. This is because, as Multiplex submits, it follows from well- established authority and principle[143] that, because Façade is in liquidation, the claims Multiplex has with respect to the completion of the work ($1,848,658) and its liquidated damages claim ($10,309,650)[144] will be set off, pursuant to s 553C, against the sum in respect of which Façade sought to obtain a judgment debt. The opposing claims existed or were inchoate at the time of the commencement of the winding up, 6 February 2013,[145] and arose from mutual dealings between the parties, namely a prior dealing arising with respect to the subcontract.[146] As mentioned,[147] there is no need for a party to have lodged a proof of debt for s 553C to apply. Façade's winding-up attracts s 553C, and, against that background, for a court to make an order for summary judgment under s 16(2)(a)(i) with respect to a payment claim, excluding the raising of any cross-claim or defence in relation to matters arising under the subcontract, in accordance with s 16(4)(b), is, in our view and for the reasons we explain below, inevitably to alter, impair or detract from the operation of the *Corporations Act*.[148]

Finding of s 109 inconsistency with Trade Practices Act —Bitannia

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143 See [106]–[107] above.

144 See [110] above.

145 There may be a few items that are an exception.

146 See [107] above.

147 Ibid.

148 See especially [175]–[181] below.

139 The potential conflict between State legislation governing the security of payments for subcontractors who carry out construction work and Commonwealth legislation has been commented upon in numerous cases. This is most notably so in *Bittania* where the New South Wales Court of Appeal (Hodgson, Tobias and Basten JJA) held that a defence under s 52 of the *Trade Practices Act 1974* (Cth) ('TPA') could be raised in response to an application for a summary judgment arising from the making of a payment claim to which no payment schedule was forthcoming. This was so despite s 15(4)(b)(ii) of the NSW Act[149] providing that the respondent to a payment claim is not entitled to raise any defence in relation to matters arising under the construction contract. Basten JA went so far as to hold that if a claim under the TPA could not be raised as a defence then it could be relied upon as a cross-claim because there was an inconsistency, under s 109 of the Constitution, between s 15(4)(b)(i) of the NSW Act, which provided that the respondent is not entitled to bring any cross-claim in proceedings for summary judgment under the NSW Act,[150] and s 52 of the TPA.[151]

140 Bitannia Pty Ltd ('Bitannia') and its partner, the second appellant, Rossfield Nominees Pty Ltd[152] entered into a construction contract with Parkline Constructions Pty Ltd ('Parkline') for the building of the Ettalong Hotel. Bitannia appointed an architectural firm, S & S Quirk ('Quirk'), which acted as its agent for the general administration of the construction contract. The contract provided for retention of 10 per cent of each progress claim made by Parkline in a retention fund created by Bitannia, 50 per cent of which fund would be released within 10 days of the notice of practical completion. Acceptance of the tender was made conditional on Parkline providing all warranties and 'as built' drawings. Parkline served various payment claims including two payment claims seeking the release of the retention monies. These were rejected by Quirk. Parkline submitted a further payment claim identified as 'Final Claim + 50% Retention' which was addressed not to Quirk but to a Mr Brown, the general manager of a company associated with Bitannia which administered

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149 This is equivalent to s 16(4)(b)(ii) of the BCISP Act.

150 This is equivalent to s 16(4)(b)(i) of the BCISP Act.

151 *Bitannia* (2006) 67 NSWLR 9, 38–42 [105]–[119].

152 For convenience, the partnership formed by both appellants in *Bittania* will be jointly referred to by the name of the first appellant, Bitannia.

the contract on Bitannia's behalf and who made the payments approved by Quirk. On the facsimile cover of the payment claim there was the statement that it related to 'retention release and variations as previously forwarded to S & S Quirk'.[153] The identical claim for release of the retention monies had been forwarded to Quirk on two separate previous occasions but not a copy of this further payment claim. No payment schedule was provided to Parkline within the appropriate time frame. Under s 15 of the NSW Act Bitannia became liable to pay the full amount of the claim.

141 Bitannia alleged, amongst other things, that Parkline had engaged in misleading or deceptive conduct in contravention of s 52 of the TPA (referring to the statement on the facsimile coversheet) inducing Bitannia's failure to serve a payment schedule. It claimed damages and other relief under the TPA. At first instance the judge held that the NSW Act prevented Bitannia from bringing a cross-claim.

142 The New South Wales Court of Appeal held that the TPA claim could be raised as a defence despite the apparent prohibition in s 15(4)(b)(ii) of the NSW Act, for a variety of reasons.

143 Basten JA held that, as a matter of statutory interpretation, a defence of misleading or deceptive conduct could be raised in response to an application for summary judgment where the impugned conduct is conduct accompanying the service of the payment claim because that conduct is not a matter 'arising under the construction contract' under s 15(4)(b)(ii). He said that s 15(4)(b)(ii) should not be construed so broadly as to prohibit a defence based upon conduct undertaken in service of a payment claim for the purpose of creating a statutory right.[154]

144 Relevantly, he observed that if he was wrong with respect to Bitannia's capacity to rely

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153 *Bitannia* (2006) 67 NSWLR 9, 25 [48].

154 Ibid 36 [96]. In full he said: 'Section 15(4)(b)(ii) precludes a respondent from raising "any defence in relation to matters arising under the construction contract". But in truth, the defence raised did not arise under the contract, nor was it in relation to a matter arising under the contract: rather it was in relation to misleading or deceptive conduct on the part of the claimant which could lead to injunctive relief under s 87 of the *Trade Practices Act* (Cth). While it is true that the phrase "in relation to" may identify any rational connection between the prohibited defence and a matter arising under the construction contract, and while the entitlement to a progress payment depends in part upon the construction contract and conduct in execution thereof, this language should not be construed so broadly as to prohibit a defence based upon conduct undertaken in service of a payment claim for the purpose of creating a statutory right.'.

upon the TPA as a defence, Bitannia could only rely upon the TPA as a cross-claim if there was a constitutional inconsistency between s 15(4)(b)(i) and s 52 of the TPA. He supported his conclusion that there was an inconsistency on the basis that s 15(4)(b)(i) had the effect of abridging Bitannia's statutory rights under the TPA because it purported to preclude reliance on rights made available under Commonwealth law; conversely, it had the effect of exempting corporations from obligations under the TPA. He held that both the NSW Act and the TPA sought to regulate conduct in trade and commerce, albeit that the NSW Act operated in a particular area of trade and commerce. In doing so he accepted the statement of principle from Dixon J in *Stock Motor Ploughs Ltd v Forsyth*[155] which was later reiterated in *Victoria v Commonwealth* (and, as we noted above, applied in *Telstra v Worthing*).[156] He said:

> The [NSW] Act prevents the respondent to a payment claim raising, by way of cross-claim, a complaint about the conduct of the claimant in serving the payment claim. The effect is to preclude the respondent from relying upon a complaint which might otherwise have been available in resistance to a claim, even though, if the claim were not payable, the payment may be recoverable in separate proceedings. If that analysis of the effect of the [NSW] Act is correct, one may ask, adopting the language from *Gould v Robson, how can the respondent be said not to be injured, by this abridgment of its rights?* … The [TPA] is a law which applies generally … to the conduct, in trade and commerce, of constitutional corporations. While it does not provide a code in relation to such conduct, it prescribes broad standards and confers entitlements on those who may suffer from a breach of its proscriptions. The [NSW] Act also operates in relation to trade and commerce, but in a particular area. Nevertheless, *it could not validly exempt the operation of corporations who are parties to construction contracts from their obligations under Commonwealth law*.
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> In *Stock Motor Ploughs v Forsyth*, Dixon J stated:
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> > … The question is whether a State law operating to prevent recovery upon a promissory note, which, at the time of its enactment, was valid and subsisting, is inconsistent with the Commonwealth statute. *A provision which prevents or suspends the enforcement of an accrued right cannot do otherwise than impair the enjoyment of that right*. In this Court an interpretation of s 109 of the Constitution has been adopted which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth.
>
> Although Dixon J was in dissent as to the outcome of *Stock Motor Ploughs v Forsyth*, his statement of the underlying principle is well-accepted. …
>
> That approach focuses on the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law.[157]

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155 (1932) 48 CLR 128.

156 See [109] above.

157 *Bitannia* (2006) 67 NSWLR 9, 40–1 [112]–[115] (emphasis added) (citations omitted).

145 Basten JA expressly distinguished the outcome in *Stock Motor Ploughs Ltd v Forsyth* where, by majority,[158] the High Court held that there was no inconsistency between the *Bills of Exchange Act 1909* (Cth), which entitled the holder of a bill of exchange in due course to enforce payment against all parties liable on the bill, and State legislation, the *Moratorium Act 1932* (NSW) whereby a person entitled to rent under the terms of a hire purchase agreement was prohibited from suing to recover the rent without obtaining leave of the District Court or a Court of Petty Sessions. The lack of inconsistency was partly explained because the *Bills of Exchange Act* had not sought to codify the law dealing with bills of exchange and the *Moratorium Act* was not directed to bills of exchange or promissory notes as such, but to security transactions, namely, mortgages and hire purchase agreements. In emphasising the difficulty that McTiernan J had acknowledged in resolving the issue, Basten JA pointed to the need to consider the 'practical effect' of State legislation upon rights and duties conferred under Commonwealth law, the effect of s 15(4)(b)(i) on rights under the TPA being 'direct and significant':

> As Gummow J noted in *APLA Ltd* …, it may be necessary to look at the 'practical effect' of the State law in relation to the Commonwealth right, so that it is not sufficient to look purely at the legal operation of the Federal and State laws in question. That comment was of particular concern in the circumstances of that case, which involved a contention that a State law preventing lawyers making known the existence of their services might impact on the ability of members of the community to seek redress available under Commonwealth laws. Any compromise of the operation of Commonwealth laws in those circumstances was indirect and could only be demonstrated by reference to practical effects. A similar approach was required in relation to a State levy on hospital benefit funds discussed in *New South Wales v Commonwealth*. In the present case, however, the impact of the State law on rights conferred under the [TPA] is direct and significant, in the sense explained by Dixon J in *Stock Motor Ploughs v Forsyth*.[159]

146 He acknowledged that on occasion a Commonwealth law will be drafted to include a statement demonstrating that what is intended is the concurrent operation of Commonwealth and State laws, thereby avoiding an 'operational inconsistency' where, for example, Commonwealth and State authorities both seek to exercise their conflicting powers at the same time.[160] He held that there was no such intention apparent in the TPA:

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158 Gavan Duffy CJ, Starke, Evatt and McTiernan JJ were in the majority; as referred to in [144] above, Dixon J was in dissent.

159 *Bitannia* (2006) 67 NSWLR 9, 41 [115] (citations omitted).

160 On the statement in pt 1.1A of *the Corporations Act* with respect to the interaction between it and State legislation see [183]–[187] below.

> [A] Commonwealth law and a State law may operate in one circumstance, an example being concurrent legislation providing for the removal of wrecks from navigable waters. There would be no practical conflict unless both Commonwealth and State authorities sought to exercise their powers in relation to the same wreck. It was at that point that inconsistency would arise, of a kind commonly described as 'operational inconsistency': see *Victoria v Commonwealth*. It is not uncommon for the Commonwealth to enact provisions invoking the same doctrine. Thus in s 6A(2) of the *Racial Discrimination Act 1975* (Cth) where a person could make a claim under either the Commonwealth Act or a State law, and in fact takes proceedings under the State law, the right under the Commonwealth Act is withdrawn: see also the *Sex Discrimination Act 1984* (Cth), s 10(4); cf the *Corporations Act 2001 (Cth),* ss 5E–5G. But there is no provision which limits or regulates the operation of the relevant provisions of Pt V of the [TPA] in a similar way. While s 75 of the [TPA] (which appears in Pt V) states that 'this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory', that expression of intention must be understood as saving the operation of State laws having a similar effect to the [TPA] and not State laws which are in conflict with it. Accordingly s 75 provides little assistance in answering the present question.[161]

147 Basten JA expressly rejected the view that s 15(4)(b)(i) was concerned only with a procedural rule for applications under the NSW Act, permitting the bringing of proceedings under the TPA in a separate action, an argument reflective of that made by Façade, to the effect that the relevant provisions of the BCISP Act are procedural, provisional, and yield only interim results.[162] He held that construing s 15(4)(b)(i) as a procedural rule failed to acknowledge that, as a practical matter, the loss that Bitannia was seeking to prevent was the loss arising from the summary judgment proceeding under the NSW Act; it was not to the point that a separate proceeding could be brought:

> One answer to this challenge to the State law, being an answer accepted by the primary judge in the present matter, is that the State law does nothing to prevent rights being pursued in separate proceedings. In that sense, the only constraint imposed by s 15(4) is a procedural constraint. As explained by Callinan J in *APLA Ltd*, '… in an action in a State court exercising federal jurisdiction, the rules of court may impose more onerous procedural obligations on plaintiffs than in a federal court' … Such matters of procedural regulation, his Honour noted, were legitimate and did not give rise to inconsistency.
>
> However, the suggestion that an injured party could bring separate proceedings in relation to misleading or deceptive conduct is to disregard an important practical consequence of the State law. *The loss which the appellants seek to prevent is one which will occur, in a summary way, in the s 15 proceedings*. The institution of separate proceedings will not avail them in that respect, unless they can obtain a stay of the s 15 proceedings to allow the separate [TPA] proceedings to be completed. At best that involves a claim for a stay, on discretionary grounds, of the s 15 proceedings. Although dicta in *Brodyn* suggests that such a stay may be appropriate in some circumstances, there must be real doubt as to whether a stay would be appropriate if its purpose were to allow the respondent to the proceedings to raise a

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161 *Bitannia* (2006) 67 NSWLR 9, 41–2 [116].

162 See [122] above.

> matter (albeit elsewhere) which could not, on the present hypothesis, be raised directly in the s 15 proceedings by way of cross-claim or defence. *The very purpose of the prohibition is to prevent a right to judgment on a payment claim being delayed by a cross-claim. It is quite likely that a Court would refuse a discretionary stay in those circumstances, on the basis that the respondent was trying to achieve indirectly the very result which the Parliament had prohibited it from obtaining directly*. That could be seen as an abuse of process, rather than a legitimate basis for a stay.[163]

148 Basten JA concluded that s 15(4)(b)(i) of the NSW Act was invalid to the extent of the inconsistency:

> In these circumstances, and assuming the complaint under the [TPA] cannot be raised by way of defence, there is, in my view, inconsistency between the State law and the [TPA] in the manner for which the appellants contend. Accordingly, the State law will be 'inoperative' to the extent of the inconsistency: see *Carter v Egg and Egg Pulp Marketing Board (Vic)*.[164]

149 Hodgson JA agreed with Basten JA that a defence relying on s 52 of the TPA was not prohibited by s 15(4)(b)(ii) of the NSW Act.[165] He reasoned that the TPA disclosed a legislative intention that a remedy should be available to protect people from misleading or deceptive conduct and that 'it would not be in accordance with that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which [the non-service of a payment schedule] has been created by the corporation's misleading conduct against that defendant'.[166] He held that it would be appropriate for a court to give effect to that intention by granting an injunction or by making an order dismissing the proceedings under the Act.[167] He also agreed with Basten JA 'that to place significant procedural obstacles in the way of obtaining relief provided by the [TPA] would make s 15(4)(b) inconsistent with that Act'[168] but that, on his analysis, there were no obstacles applicable. He emphasised that s 52 of the TPA was relevant in the circumstances of the case because it related to a claimant's entitlement to a judgment pursuant to s 15 and in other cases the allegedly misleading conduct may not impact in that way.[169]

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163 *Bitannia* (2006) 67 NSWLR 9, 42 [117]–[118] (emphasis added) (citations omitted).

164 Ibid 42 [119] (citations omitted).

165 Ibid 16 [12].

166 Ibid 15 [8].

167 Ibid.

168 Ibid 16 [13].

169 Ibid 16 [14].

150 Tobias JA agreed with the interpretation of s 15(4)(b)(ii) adopted by Basten JA that permitted the raising of s 52 of the TPA as a defence[170] and therefore found it unnecessary to decide whether there was an inconsistency between s 15(4)(b)(i) and s 52 of the TPA.[171]

Security of Payments legislation and insolvency — Grosvenor & Hamersley Iron

151 Another area in which the potential conflict between State security of payments legislation and Commonwealth legislation has been recognised is, most relevantly, the area of insolvency.

152 In *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico*[172] Einstein J granted a stay of the execution of a judgment debt that had arisen from the filing of an adjudication certificate under the NSW Act because the claimant had subsequently been placed under external administration. In doing so, he recognised that, without a stay, the judgment debt, intended in effect to be an interim payment within the statutory scheme of the NSW Act, would become a final payment. The sum paid would not be recouped and the defendants would suffer irreversible prejudice. Einstein J said:

> It is quite plain that unless the stay of proceedings now sought is granted the defendants, if successful in final proceedings, would suffer irreparable prejudice as payment pursuant to the judgment debt presently on foot could never be recouped. In effect a failure to order the stay would in practice, convert an amount which ought to be an interim payment into a final payment.[173]

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170 Ibid 17 [17].

171 Ibid 17 [19]. *Bitannia* was relied on in *Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] 1 Qd R 505 where Dutney J set aside a payment claim on the basis of the misleading or deceptive conduct of the applicant in deliberately concealing the payment claim in a box of trade certificates and invoices. He held that the prohibition on raising any defence in relation to matters arising under the construction contract in s 19(4)(b)(ii) of the Qld Act, the equivalent of s 16(4)(b)(ii) of the BCISP Act, 'does not preclude reliance on s 52 of the TPA to prevent the entry of summary judgment where a payment schedule is not delivered': 519 [65]. See Elisabeth Maryanov and Fiona Dernikovic, 'Section 52: Challenging Summary Judgment Applications under Security of Payment Legislation' (2009) 21(6-7) *Australian Construction Law Bulletin* 65; Shelley Maxwell-Smith, 'Death Of Payments Legislation Greatly Exaggerated — A Review of the Decision in *Bitannia v Parkline Constructions*' (2006) 18(8-9) *Australian Construction Law Bulletin* 89.

172 (2005) 21 BCL 266 ('*Grosvenor*').

173 Ibid 267 [4]. He was also aware that the defendants had provided security in the form of an unconditional bank guarantee for a sum in excess of the amount payable on the judgment debt. He also noted that the case was unusual; he said: 'The present is apparently the first occasion upon which this court has had to consider the circumstances (if any) in which the court should grant a stay of the execution or operation of orders or judgments arising from the filing of an adjudication certificate, in circumstances where any moneys paid would in practice be irrecoverable because of the claimant's insolvency or liquidation': ibid 269 [15].

153 In support of the grant of a stay he relied upon decisions of English courts, faced with the very same circumstances, where it has been held that when there is a real doubt as to a claimant's capacity to repay, a stay is likely to be awarded:

> The English Courts have had to deal with the precise issue for determination in the present case: in what circumstances (if any) should the court grant a stay of a judgment following from an adjudication determination, where the claimant is insolvent and would be unable to repay the amount paid if on the final hearing the claimant were to fail and the court were to order restitution?
>
> In *Herschel Engineering Ltd v Breen Property Ltd*, Dyson J (as he then was), dealing with the analogous UK legislation, [the *Housing Grants, Construction and Regeneration Act 1996* (UK)[174]] held that if it were the case that the successful claimant in the adjudication were insolvent, his Lordship would have granted a stay. … Dyson J put the matter as follows:
>
> > The only remaining issue is whether I should grant a stay of execution pending the final determination of the county court proceedings. I have decided not to grant a stay for the following reasons. If the claimant's appeal on 24 May is successful, then the judgment in the full amount claimed will be restored. On that basis, the defendant would have suffered no real prejudice as a result of being required to pay that amount now, rather than in a few weeks' time. If it is unsuccessful in its appeal, the parties will be faced with a contested multi-track case. It seems likely that it will take about two days to try. No-one has been able to indicate when the hearing is likely to take place. Judging by the delays that have occurred so far, it is possible, if not probable, that the trial will not take place until the early autumn. On that basis, I see no reason why for several months the claimant should be kept out of the money that the adjudicator decided it should receive. To keep the claimant out of this money for several months would be contrary to the plain intent of the 1996 Act. I should add that there is no evidence that, if the defendant is successful in defending the county court proceedings, the claimant will be unable to repay the sum awarded by the adjudicator. *Had the position been otherwise, and there was a real doubt as to the claimant's ability to repay if it loses in the county court, I would probably have granted a stay of execution pending the final determination of the county court proceedings*. (Emphasis added).[175]

154 A more recent authority from Western Australia, *Hamersley Iron Pty Ltd v James,*[176] examined the relationship between the WA Act, the Western Australian equivalent of the BCISP Act, and s 553C of *the Corporations Act*, in circumstances of the insolvency of the claimant.

155 Hamersley Iron Pty Ltd ('Hamersley') and Forge Group Construction Pty Ltd ('Forge') were parties to a construction contract for the design and construction by Forge of fuel hubs at West Angelas and Brockman. In March 2013 Hamersley instructed Forge to discontinue

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174 This is referred to as 'the UK Act' below.

175 (2005) 21 BCL 266, 269–70 [20]–[21] (emphasis in original) (citations omitted).

176 [2015] WASC 10 ('*Hamersley Iron*').

work on the Brockman fuel hub. On 4 February 2014 Forge submitted preliminary progress payment claim number 13 for $14,335,778.07 plus GST. On 11 February 2014 Forge appointed administrators, and receivers and managers were also appointed by Forge's principal secured creditor. By letter dated 17 February 2014, Hamersley informed Forge that it only accepted $641,607.33 of the amount claimed by Forge in payment claim number 13. On 24 February 2014 Hamersley terminated the contract. On 17 March 2014 Forge served an adjudication application under the WA Act. Hamersley served a response on 31 March 2014 contending that Forge had not demonstrated that it had completed the remaining scope of work with respect to its payment claim, other than in relation to work to the value of $641,607.33, and that it was entitled to set off the sum of $7,416,742 under cl 47(a) of the general conditions of the contract and under s 553C of the *Corporations Act*.

156 The adjudicator determined that the adjudicated amount in respect of payment claim number 13 was $641,607.33 plus GST. The adjudicator also accepted Hamersley's claim for liquidated damages of $2,055,359.56 and found that Hamersley was entitled to the sum of $1,328,919.87 in respect of other costs and charges. He considered other claims from both parties. He accepted that there was a right of set-off but concluded that he was not satisfied that Hamersley had established a prima facie case for a set-off in excess of the sum of $9,868,198 which it had in hand from the balance of the contract sum and securities it had called upon. Ultimately, he directed Hamersley to pay Forge the sum of $705,768.06 on or before 30 April 2014, together with interest at 6 per cent from 17 February 2014.

157 Hamersley brought proceedings in the Supreme Court of Western Australia for a writ of certiorari quashing the adjudication determination on the basis of jurisdictional error.[177] Beech J refused the application to set aside the adjudication determination and turned to the question of whether Forge should be given leave to enforce the adjudicator's determination, as required under the WA Act. Hamersley opposed the grant of leave on the ground of Forge's insolvency and its entitlement to damages which, it submitted, engaged the set-off provisions under s 553C of the *Corporations Act*. Beech J said:

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[177] The availability of judicial review of an adjudicator's determination for jurisdictional error was confirmed in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319.

> In essence, Hamersley relies on Forge's insolvency, coupled with Hamersley's claim to be entitled to damages against Forge exceeding the amount of the adjudication determination (the Adjudicated Sum). Hamersley contends that in those circumstances, s 553C of the *Corporations Act 2001* (Cth) is engaged, and consequently leave should be refused.
>
> In more detail, Hamersley contends that:
>
> (1) the material before this court demonstrates that Hamersley has an arguable case, giving rise to a serious question to be tried, of a counterclaim against Forge that substantially exceeds the amount of the Adjudicated Sum;
>
> (2) Hamersley's contingent and partly unliquidated counterclaim is a mutual dealing for the purposes of s 553C of the *Corporations Act*;
>
> (3) s 553C operated as at the date of the administration, which is the day the winding up is taken to have begun, to mean that the Adjudicated Sum was only one of the entries in the account required to be taken, and Hamersley's contingent partly unliquidated counterclaim was another entry in that account. Only the balance due after the taking of the account is payable. The balance lies in favour of Hamersley, or there is at least a serious question to be tried in that respect; and
>
> (4) in those circumstances, leave to enforce the adjudication determination should be refused.[178]

158 Beech J accepted Hamersley's contentions but held that, due to the uncertainty surrounding its counterclaim, he would not dismiss the application for enforcement but rather would stay the application pending resolution of Hamersley's counterclaim.

159 Beech J observed that where there are mutual dealings, s 553C of the *Corporations Act* requires an account to be taken of amounts due from each party to the other, including an adjudicated sum and a counterclaim;[179] s 553C operates to produce a balance upon which the liquidation can proceed and only that balance is recoverable. He said:

> The section is a statutory directive which operates as at the time the liquidation takes effect. It produces a balance upon the basis of which the liquidation can proceed. Only that balance can be claimed in the liquidation or recovered by the liquidator. The section is self-executing in that it is not dependent on anything done by either party, such as the lodging of a proof of debt.[180]

160 He concluded:

> [T]he application for leave to enforce the adjudication determination should not be granted. In essence, that is because:

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178 *Hamersley Iron* [2015] WASC 10 [117]–[118].

179 Ibid [144].

180 Ibid [137].

(1) Hamersley has established a serious question to be tried that it has a counterclaim exceeding the Adjudicated Sum;

(2) Hamersley's counterclaim constitutes mutual dealings for the purposes of s 553C of the *Corporations Act*;

(3) s 553C operated as at the date of the administration to mean that the Adjudicated Sum and Hamersley's counterclaim must both be taken account of in determining the net balance payable by one party to the other; and

(4) there is, at least, a serious question to be tried that the balance, assessed as required by s 553C, lies in favour of Hamersley.

To my mind, *to grant leave to enforce the determination in these circumstances would defeat the purpose and object of s 553C. A grant of leave to enforce would mean that Forge would receive from Hamersley the full amount of the Adjudicated Sum, whereas Hamersley would be left to prove in the liquidation of Forge in respect of its counterclaim*. Moreover, in circumstances where Forge as contractor is insolvent, and in liquidation, the object of the [WA Act] — keeping the money flowing in the contracting chain by enforcing timely payment and sidelining protracted and complex disputes — does not demand the grant of leave to enforce the adjudication determination.

For these reasons, I consider that s 553C requires that leave to enforce be declined, or, alternatively, the operation of that section in the circumstances of this case provides a good reason to decline to grant leave to enforce the adjudication determination.[181]

161 He explained his reasons for granting a stay rather than dismissing the application as based on his concern that if the counterclaim was not pursued, Hamersley could avoid paying the adjudicated sum without having demonstrated what it was owed. In effect the uncertainty of the counterclaim meant that s 553C might not be engaged. He said:

> In my opinion, the application for leave to enforce should be stayed, not dismissed. At this stage, Hamersley has not proved its counterclaim. Rather, it has only demonstrated a serious question to be tried. *If this application is dismissed, and if Hamersley did not pursue proceedings to advance its counterclaim, Hamersley would avoid payment of the Adjudicated Sum without ever having proved its counterclaim*. In the circumstances I think justice between the parties requires that this application for leave be stayed pending resolution, by legal proceedings or by agreement, of Hamersley's counterclaim.[182]

162 In our view, Beech J was correct in recognising that granting leave to enforce an adjudication certificate in circumstances where the claimant is insolvent would defeat the

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181 Ibid [170]–[172] (emphasis added).

182 Ibid [173] (emphasis added). The issue of whether an alleged counterclaim will be pursued was also of concern to the judge here: Reasons [84]; see [113] above. See also Jennifer McVeigh and Louis Zetlin, 'Corporations Act Trumps Security of Payment Legislation' (2015) 27(4) *Australian Construction Law Bulletin* 71; Sarah Leonard and Kristian Cywicki, 'Can an Adjudication Determination Be Enforced by an Insolvent Company?' (2015) 27(5) *Australian Conservation Law Bulletin* 86, which discuss *Hamersley Iron*.

purpose and object of s 553C. It is a short step to conclude that, relevantly, awarding summary judgment where the party that issued the payment claim is insolvent, and there is a mutual dealing between the parties by reason of a counterclaim, would 'alter, impair or detract from'[183] the operation of s 553C of the *Corporations Act*.[184]

163 The judgment of Beech J also supports the view that, where it remains uncertain as to whether a respondent to a payment claim has a counterclaim, and thus whether s 553C is engaged, the prudent approach is to stay an application for summary judgment pending resolution, by legal proceedings or by agreement, of the counterclaim.

Automatic application of s 553C anterior to proceeding

164 The effect of liquidation upon a corporation is that s 553C of the *Corporations Act* is automatically attracted to any mutual dealings between the parties.[185] *Gye v McIntyre*[186] confirmed this in respect of s 86 of the *Bankruptcy Act 1966* (Cth),[187] a kindred provision to s 553C:

> Section 86 is a statutory directive ('shall be set off') which operates as at the time the bankruptcy takes effect. It produces a balance upon the basis of which the bankruptcy administration can proceed. Only that balance can be claimed in the bankruptcy or recovered by the trustee. If its operation is to produce a nil balance, its effect will be that there is nothing at all which can be claimed in the bankruptcy or recovered in proceedings by the trustee. The section is self-executing in the sense that its operation is automatic and not dependent upon 'the option of either party': see, per

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183 *Victoria v Commonwealth* (1937) 58 CLR 618, 630. See [109] above.

184 See [176]–[179] below.

185 As the judge recognised here: see Reasons [72] and [112] above.

186 (1991) 171 CLR 609.

187 Section 86 of the *Bankruptcy Act* provides:

> (1) Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person who has become a bankrupt and a person claiming to prove a debt in the bankruptcy:
>
> (a) an account shall be taken of what is due from the one party to the other in respect of those mutual dealings;
>
> (b) the sum due from the one party *shall be set off* against any sum due from the other party; and
>
> (c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.
>
> (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the person who has become a bankrupt or at the time of receiving credit from that person, he or she had notice of an available act of bankruptcy committed by that person. (emphasis added).

Lord Selborne LC, *In re Deveze; Ex parte Barnett*.[188]

165 The automatic set-off operates whether the party seeking to make a claim is the company in liquidation (as here) or the other party.[189]

166 *Gye v McIntyre* was applied in the context of s 553C of *the Corporations Act* in *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd*[190] where Batt JA (with whom Ormiston and Callaway JJA agreed) emphasised that the taking of the account and the balance produced by s 553C has the effect that the original claim 'ceased to exist'.[191] This is consistent with the understanding that '[w]hen set-off applies, s 553C applies automatically … so that *only the balance* between the claims is admissible to proof against the company, or is payable to the company, as the case may be.'[192] Section 553C operates at the date of the commencement of the liquidation.[193] As was observed in the circumstances of *Pearce*, 'a set-off occurred once and for all at the beginning of the administration and destroyed the claim on which the respondent later purported to sue'.[194]

167 Batt JA's observation that the original claim 'ceased to exist' in the set-off effected by s 553C drew upon the remarks of Lord Hoffmann in *Stein v Blake*:[195]

> The principles so far discussed [in *Gye v McIntyre*] should provide an answer to the first of the issues in this appeal, namely, whether if A, against whom B has a cross-claim, becomes bankrupt, A's claim against B continues to exist as a chose in action so that A's trustee can assign it to a third party. In my judgment the conclusion must be that *the original chose in action ceases to exist and is replaced by a claim to a net balance*. If the set-off is mandatory and self-executing and results, as of the bankruptcy date, in only a net balance being owing, I find it impossible to understand how the cross-claims can, as choses in action, each continue to exist.

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188 *Gye v McIntryre* (1991) 171 CLR 609, 622 (citations omitted). See also *Ansett Australia Holdings Ltd v International Air Transport Association* (2006) 60 ACSR 468 ('*Ansett*'), 496 [109] (Nettle JA). The orders made in *Ansett* were reversed on appeal (*International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151) but this is not material here.

189 *Gye v McIntryre* (1991) 171 CLR 609, 621–2.

190 [1998] 4 VR 888, 899–900 ('*Pearce*').

191 Ibid 901.

192 Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, 16th ed, 2015) [28.270] (emphasis added).

193 *Brodyn* (2005) 21 BCL 443, 452–3 [93], *Metal Manufacturers Ltd v Hall* (2002) 41 ACSR 466, 469-70 [8]–[9].

194 *Pearce* [1998] 4 VR 888, 891 (Callaway JA).

195 [1996] 1 AC 243.

> This was the conclusion of Neill J in *Farley v Housing and Commercial Developments Ltd*. Mr. Farley was the principal shareholder in W Farley & Co (Builders) Ltd, which in 1972 had entered into two agreements with the defendant company to build blocks of flats. Both led to disputes, with claims by the building company for money due under the contracts and cross-claims by the defendant for damages. In 1975 the building company went into insolvent liquidation. In 1979 the liquidator purported to assign to Mr Farley the benefit of the agreements and all moneys payable thereunder. Mr Farley then commenced arbitration proceedings under the agreements. The arbitrator stated a special consultative case asking … :
>
> > (1) Whether by reason of the provisions of [the then equivalent of section 323 [of the *Insolvency Act 1986* (UK)] as applied to companies] upon the contractor becoming insolvent and being wound up … the debts due under the [two agreements] ceased to have a separate existence as choses in action (and thus thereafter could not be assigned) being replaced by a balance of account under [section 323].
>
> Neill J answered in the affirmative. I think that he was right. The cross-claims must obviously be considered separately for the purpose of ascertaining the balance. For that purpose they are treated as if they continued to exist. So, for example, the liquidator or trustee will commence an action in which he pleads a claim for money due under a contract and the defendant will counterclaim for damages under the same or a different contract. This may suggest that the respective claims actually do continue to exist until the court has decided the amounts to which each party is entitled and ascertained the balance due one way or the other in accordance with section 323. But the litigation is merely part of the process of retrospective calculation, from which it will appear that from the date of bankruptcy, the only chose in action which continued to exist as an assignable item of property was the claim to a net balance.[196]

168 The observations of Batt JA in *Pearce* hold good also for the United Kingdom. In the United Kingdom, upon liquidation of a building contractor, r 4.90 of the Insolvency Rules 1986 (UK) takes effect. Rule 4.90 reflects the terms of s 553C.[197] Its application in the context of the execution of an adjudicator's award arising under the *Housing Grants, Construction and Regeneration Act 1996* ('the UK Act') was considered in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*.[198]

169 In *Bouygues*, an adjudication had been made in favour of Dahl-Jensen Ltd ('Dahl-

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196 Ibid 255 (citations omitted). *Gye v McIntyre* was referred to at [1996] AC 243, 253–4. The equivalent of the bankruptcy set-off provision in s 323 of the *Insolvency Act 1986* (UK) applicable to insolvent companies, to which Lord Hoffmann referred, was r 4.90 of the Insolvency Rules 1986 (UK). See [168] and [170] below.

197 Rule 4.90 relevantly provides: '(1) This Rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation. (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other ... (4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets.'

198 [2001] 1 All ER (Comm) 1041 ('*Bouygues*').

Jensen'), the subcontractor, under the UK Act. The adjudicator had wrongfully included certain amounts which should have been retained pending certificates of completion under the main contract. The adjudicator refused to revisit the award and Dahl-Jensen brought an application for summary judgment. The judge granted summary judgment and held that the adjudicator had not exceeded his jurisdiction because he had asked the right question although he had arrived at the wrong answer. Bouygues (UK) Ltd ('Bouygues') appealed. The English Court of Appeal held that, as the judge was correct to consider that the award made was within jurisdiction, the Court would not interfere to set aside the judgment. The Court determined, however, to stay the execution of the summary judgment because by the time the award was made Dahl-Jensen had gone into liquidation. The Court was emphatic that, in those circumstances, summary judgment is not appropriate. It held that when a company goes into liquidation, and there are latent claims and cross-claims, r 4.90 of the Insolvency Rules applies, as explained in *Stein v Blake*, and summary judgment is not appropriate. Rather, the amount due under the adjudicator's award in favour of the insolvent party will become part of the fund for distribution amongst its creditors and any cross-claim ought be resolved within the context of the set-off provided for under the insolvency rules whereby any debt owed to the insolvent company is set off, pound for pound, against any debt owed by the insolvent company.

170 Chadwick LJ (with whom Peter Gibson and Buxton LJJ agreed) said:

> In the ordinary case I have little doubt that an adjudicator's determination … ought to be enforced by summary judgment. The purpose of the 1996 Act [the UK Act] is to provide a basis upon which payment of an amount found by the adjudicator to be due from one party to the other (albeit that the determination is capable of being reopened) can be enforced summarily. But this is not an ordinary case. At the date of the application for summary judgment — indeed at the date of the reference to adjudication — Dahl-Jensen was in liquidation.
>
> In those circumstances r 4.90 of the Insolvency Rules … has effect. …
>
> …
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> There is no doubt that the rule has statutory force. It applies wherever there have been mutual dealings, giving rise to mutual obligations and mutual credits, between a company which subsequently goes into liquidation and another party.
>
> The effect of the rule was explained by Lord Hoffmann in his speech in the House of Lords in *Stein v Blake*. In that appeal Lord Hoffmann was addressing the provisions of s 323 of the 1986 Act, which is applicable in an individual insolvency or bankruptcy. But the provisions of s 323 of the 1986 Act and r 4.90 of the rules are

> indistinguishable. … What Lord Hoffmann had to say about s 323 of the 1986 Act is equally applicable to corporate insolvency; to which r 4.90 applies. Lord Hoffmann … explained the difference between bankruptcy set-off and legal set-off outside bankruptcy:
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> > Bankruptcy set-off … affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance. …
>
> The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those moneys, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.[199]

171 Chadwick LJ emphasised that, as explained by Lord Hoffmann in *Stein v Blake*, as at the date of the winding up order there is only a single claim that represents the balance between the parties, the claims and cross-claims having merged and thereby being extinguished. He said:

> Lord Hoffmann pointed out in *Stein v Blake* … that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffmann pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim —represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where … the account … has to be reopened in the insolvency of Dahl-Jensen.
>
> … [W]here there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. This is what r 4.90 of the rules requires.[200]

172 *Bouygues* is authority for the proposition that an adjudicator's award will not be enforced by summary judgment where the claimant is in liquidation. In *Straw Realisations (No 1) Ltd v Shaftsbury House (Developments) Ltd*[201] Edwards-Stuart J stated the following principle:

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199 Ibid 1048–9 [29]–[33] (citations omitted).

200 Ibid 1049 [34]–[35] (citations omitted).

> If, at the date of the hearing of the application to enforce an adjudicator's decision, the successful party is in liquidation, then the adjudicator's decision will not be enforced by way of summary judgment: see *Bouygues v Dahl-Jensen*.[202]

173 By reference to *Bouygues* and *Straw*, *Keating on Construction Contracts* describes the liquidation of a successful claimant as 'operat[ing] as an automatic

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201 [2011] BLR 47 ('*Straw*').

202 Ibid 65 [89].

stay of the proceedings by virtue of r 4.90 of the Insolvency Rules 1986'.[203]

174 It is apparent from the United Kingdom authorities that, when a company is in liquidation, the law governing insolvency set-off prevails over the statutory rights and duties governing construction contracts, including statutory rights in relation to the obtaining of summary judgment and its execution. Although the constitutional setting within the United Kingdom is significantly different from that which applies in Australia, it is instructive that the courts in the United Kingdom have given primacy to insolvency law over security of payments legislation when a party to a construction contract is placed in liquidation. This implicitly recognises, and resolves, a conflict between the two legislative regimes. It supports the view that, in Australia, there is an inconsistency between the *Corporations Act* and the BCISP Act.

The practical effect on rights under Commonwealth law

175 With respect to the application of these considerations to Façade's insolvency, Façade was ordered to be wound up by Efthim AsJ and placed into liquidation on 6 February 2013.[204] Façade had issued Payment Claims 18 and 19 before the winding-up.[205] The proceeding for summary judgment was issued on 26 September 2014.[206]

176 It follows from *Bouygues,* and from *Stein v Blake*, as affirmed by Batt JA in *Pearce*, that the effect of s 553C of the *Corporations Act* is that as at 6 February 2013 any unpaid portion of Payment Claims 18 and 19 ceased to exist, as did the sum claimed by the counterclaim, and what replaced them was a single claim that represented the balance between them. For the purpose of ascertaining the balance between them, the sum claimed and the counterclaim are taken to exist separately,[207] but the automatic effect of s 553C is that what remained after 6 February 2013 was a claim to a net balance. The automatic effect of s 553C was anterior to the commencement of the proceedings before the judge.

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203 Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 9th ed, 2012), [18–034].

204 Reasons [13].

205 As mentioned above at [10] and [12] respectively, Payment Claim 18 had been issued on 23 August 2012 and Payment Claim 19 issued on 27 September 2012.

206 The hearing took place on 10–11 February 2015 and orders made on 24 February 2015.

207 See [167] above.

177 In these circumstances, we consider that the constitutional point requires, as Basten JA said in *Bitannia*,[208] close attention to the practical effect of the BCISP Act upon rights and duties conferred under Commonwealth law. We consider that the practical effect of the summary judgment proceeding made available by s 16(2)(a)(i) of the BCISP Act on the right to a set-off conferred by s 553C, is direct and significant in that it interferes with the rights made available under the *Corporations Act*. This is so because the BCISP Act purports to preclude reliance upon cross-claims or defences, by reason of s 16(4)(b)(i) and s 16(4)(b)(ii), whereas that reliance is protected under Commonwealth law. Cross-claims and defences are protected, where relevant, as mutual dealings under s 553C. Without the protection afforded by s 553C, summary judgment would mean that Façade would receive from Multiplex the full amount of the sum owed under the relevant payment claims, whereas Multiplex would be left to prove in the liquidation of Façade in respect of its counterclaim. This would be similar to the circumstance recognised by Beech J in *Hamersley Iron* as sufficient to 'defeat the purpose and object of s 553C'.[209]

178 Adapting what was said by Chadwick LJ in *Bouygues*,[210] set-off under s 553C affects substantive rights by enabling the creditor of a company in liquidation to use its indebtedness to that company as a form of security. Instead of having to prove with other creditors for the whole of its debt in the winding-up, it can set off dollar for dollar what it owes the company in liquidation and prove for or pay only the balance. If the judge here had given summary judgment under s 16(2)(a)(i), the moneys paid in execution of the summary judgment would be received by the liquidator to form part of the fund available for distribution amongst Façade's creditors. If Multiplex was not permitted to rely upon its counterclaim as a cross-claim, or by way of a defence, it would be required to prove its claim in the liquidation and receive only a dividend pro rata to the amount of its claim despite having paid the full amount it owed. That is, Multiplex might have given 100 cents in the dollar to the liquidator, yet have to be satisfied with a dividend of some few cents in the dollar on the whole of its counterclaim. The circumstances would give rise to the very injustice which s 553C was

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208 See [145] above.

209 See [160] above.

210 See [170] above.

enacted to avoid, as recognised in *Gye v McIntyre*.[211] Multiplex would thereby have foregone the benefit of treating the sum it owes under the relevant payment claims as security for its own counterclaim. It would be deprived of the protection afforded by s 553C. In other words, as Einstein J recognised in *Grosvenor*,[212] the summary judgment, intended under the BCISP Act to be an interim payment, would become a final payment.[213] The full sum paid could not be recouped and Multiplex would suffer irreversible prejudice. In effect s 16(2)(a)(i), together with s 16(4)(b)(i) and s 16(4)(b)(ii), of the BCISP Act would compromise the operation of s 553C of the *Corporations Act*.

179 In our opinion, the test articulated in the first proposition in *Victoria v Commonwealth*, as affirmed in *Telstra v Worthing*, is satisfied, namely, that ss 16(2)(a)(i) and 16(4)(b) 'alter, impair or detract from'[214] the operation of s 553C of the *Corporations Act*. Once a company has gone into liquidation, and where there are mutual dealings so that s 553C is engaged, a payment claim cannot be enforced by means of a summary judgment under s 16(2)(a)(i) of the BCISP Act, and there is no scope for the ousting of the cross-claims or defences under s 16(4)(b) of the BCISP Act.

180 We consider that s 16(2)(a)(i) and ss 16(4)(b)(i) and 4(b)(ii) of the BCISP Act are inconsistent with s 553C of the *Corporations Act* and are invalid to the extent of the inconsistency.

181 These considerations also provide a response to the scenarios Façade identified[215] and its claim that there is much that is yet unknown with respect to the competing claims of the parties (whether the matter may proceed to arbitration, whether Multiplex's claim for liquidated damages will be allowed, or disallowed and there having been as yet no final account taken under the subcontract).[216] We consider that these issues do not preclude s 553C being engaged, given that s 553C extends to debts that are inchoate at the time of the

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211 See [106] above.

212 See [152] above.

213 See [81] where this observation was made for the purposes of adopting a narrow construction.

214 See [109] above.

215 See [125] above.

216 Clause 42.5 of the subcontract provides a mechanism for the taking of a final account of all claims.

commencement of the winding up[217] and where the liabilities can be 'unascertained in amount or subject to contingency',[218] the mutual dealings of which s 553C speaks not being restricted to matters of which a party has lodged a proof of debt.[219] The inability to tell exactly what the eventual outcome of the issues in dispute between Façade and Multiplex will be does not preclude the operation of s 553C of *the Corporations Act*, given that Façade is in liquidation, and has been since 6 February 2013. The judge was satisfied of the existence of Multiplex's counterclaim and of its resolve to pursue that counterclaim.[220] In those circumstances we consider that s 553C is engaged and operates to invalidate, and thus to preclude reliance upon, the provisions for obtaining summary judgment under s 16(2)(a)(i) including those provisions which exclude reliance on a cross-claim, or the raising of a defence, in ss 16(4)(b)(i) and 16(4)(b)(ii) respectively.

Do the 'roll-back' provisions apply?

182 For the sake of completeness, we consider whether, contrary to the conclusion we have expressed, there is the potential for a concurrent operation between s 553C of *the Corporations Act* and ss 16(2)(a)(i) and 16(4)(b) of the BCISP Act.

183 The *Corporations Act* contains a statement within pt 1.1A that it is not intended to exclude or limit the concurrent operation of any law of a State or Territory where the laws are capable of operating concurrently: s 5E.[221] This reflects an intention that *the Corporations Act* is not intended to 'cover the field', that is, it is not intended to provide an exhaustive statement of the law on each matter with which it deals. Of course, this still allows for direct inconsistencies to arise of the type we have concluded arises here. Part 1.1A also provides for the *Corporations Act* to yield to State and Territory laws if certain conditions are met: s 5G. These have been described as 'roll back' provisions.[222] The question becomes one of

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217 See [107] above.

218 See [171] above.

219 See [107] above.

220 Reasons [69].

221 The significance of such a statement in Commonwealth legislation was commented upon at [146] above.

222 *Loo v Director of Public Prosecutions* (2005) 12 VR 665, 676 [22].

considering whether the 'roll back' provisions apply to avoid the direct inconsistency we have otherwise recognised as arising.

184 Part 1.1A relevantly provides:

> **5E Concurrent operation intended**
>
> (1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> (2) Without limiting subsection (1), the Corporations legislation is not intended to exclude or limit the concurrent operation of a law of a State or Territory that:
>
> (a) imposes additional obligations or liabilities (whether criminal or civil) on:
>
> (i) a director or other officer of a company or other corporation; or
>
> (ii) a company or other body; or
>
> (b) confers additional powers on:
>
> (i) a director or other officer of a company or other corporation; or
>
> (ii) a company or other body; or
>
> …
>
> (4) This section does not apply to the law of the State or Territory if there is a direct inconsistency between the Corporations legislation and that law.
>
> Note: Section 5G prevents direct inconsistencies arising in some cases by limiting the operation of the Corporations legislation.
>
> …
>
> **5G Avoiding direct inconsistency arising between the Corporations legislation and State and Territory laws**
>
> *Section overrides other provisions of the Corporations legislation*
>
> (1) This section has effect despite anything else in the Corporations legislation.
>
> *Section does not deal with provisions capable of concurrent operation*
>
> (2) This section does not apply to a provision of a law of a State or Territory that is capable of concurrent operation with the Corporations legislation.
>
> Note: This kind of provision is dealt with by section 5E.
>
> *When this section applies to a provision of a State or Territory law*
>
> (3) This section applies to the interaction between:
>
> (a) a provision of a law of a State or Territory (the ***State provision***); and
>
> (b) a provision of the Corporations legislation

(the ***Commonwealth provision***);

only if the State provision meets the conditions set out in the following table:

Conditions to be met before section applies [operative]		
Item	**Kind of provision**	**Conditions to be met**
1	a pre-commencement (commenced) provision	(a) the State provision operated, immediately before this Act commenced, despite the provision of: (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); that corresponds to the Commonwealth provision; and (b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by: (i) regulations made under this Act; or (ii) a law of the State or Territory.
2	a pre-commencement (enacted) provision	(a) the State provision would have operated, immediately before this Act commenced, despite the provision of: (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); that corresponds to the Commonwealth provision if the State provision had commenced before the commencement of this Act; and (b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by: (i) regulations made under this Act; or (ii) a law of the State or Territory.
3	a post-commencement provision	the State provision is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)

Conditions to be met before section applies [operative]		
Item	**Kind of provision**	**Conditions to be met**
4	a provision that is materially amended on or after this Act commenced if the amendment was enacted before this Act commenced	(a) the State provision as amended would have operated, immediately before this Act commenced, despite the provision of: (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); that corresponds to the Commonwealth provision if the amendment had commenced before the commencement of this Act; and (b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by: (i) regulations made under this Act; or (ii) a law of the State or Territory.
5	a provision that is materially amended on or after this Act commenced if the amendment is enacted on or after this Act commenced	the State provision as amended is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)

Note 1: Item 1—subsection (12) tells you when a provision is a pre-commencement (commenced) provision.

Note 2: Item 1 paragraph (a)—For example, a State or Territory provision enacted after the commencement of the Corporations Law might not have operated despite the Corporations Law if it was not expressly provided that the provision was to operate despite a specified provision, or despite any provision, of the Corporations Law (see, for example, section 5 of the *Corporations (New South Wales) Act 1990*).

Note 3: Item 2—subsection (13) tells you when a provision is a pre-commencement (enacted) provision.

Note 4: Item 3—subsection (14) tells you when a provision is a post-commencement provision.

Note 5: Subsections (15) to (17) tell you when a provision is materially amended after commencement.

State and Territory laws specifically authorising or requiring act or thing to be done

(4) A provision of the Corporations legislation does not:

(a) prohibit the doing of an act; or

(b) impose a liability (whether civil or criminal) for doing an act;

if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

...

External administration under State and Territory laws

(8) The provisions of Chapter 5 of this Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.

…

Other cases

(11) A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:

(a) the provision of the Corporations legislation; and

(b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation.

Note 1: A provision of the State or Territory law is not covered by this subsection if one of the earlier subsections in this section applies to the provision: if one of those subsections applies there would be no potential inconsistency to be dealt with by this subsection.

Note 2: The operation of the provision of the State or Territory law will be supported by section 5E to the extent to which it can operate concurrently with the provision of the Corporations legislation.

Pre-commencement (commenced) provision

(12) A provision of a law of a State or Territory is a ***pre-commencement (commenced) provision*** if it:

(a) is enacted, and comes into force, before the commencement of this Act; and

(b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Pre-commencement (enacted) provision

(13) A provision of a law of a State or Territory is a ***pre-commencement (enacted) provision*** if it:

(a) is enacted before, but comes into force on or after, the commencement of this Act; and

(b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Post-commencement provision

(14) A provision of a law of a State or Territory is a ***post-commencement provision*** if it:

(a) is enacted, and comes into force, on or after the commencement of this Act; and

(b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Provision materially amended after commencement

(15) A provision of a law of a State or Territory is ***materially amended after commencement*** if:

(a) an amendment of the provision commences on or after the commencement of this Act; and

(b) neither subsection (16) nor subsection (17) applies to the amendment.

(16) A provision of a law of a State or Territory is not ***materially amended after commencement*** under subsection (15) if the amendment merely:

(a) changes:

(i) a reference to the Corporations Law or the ASC or ASIC Law, or the Corporations Law or the ASC or ASIC Law of a State or Territory, to a reference to the Corporations Act or the ASIC Act; or

(ii) a reference to a provision of the Corporations Law or the ASC or ASIC Law, or the Corporations Law or ASC or ASIC Law of a State or Territory, to a reference to a provision of the Corporations Act or the ASIC Act; or

(iii) a penalty for a contravention of a provision of a law of a State or Territory; or

(iv) a reference to a particular person or body to a reference to another person or body; or

(b) adds a condition that must be met before a right is conferred, an obligation imposed or a power conferred; or

(c) adds criteria to be taken into account before a power is exercised; or

(d) amends the provision in way declared by the regulations to not constitute a material amendment for the purposes of this subsection.

(17) A provision of a law of a State or Territory is not ***materially amended after commencement*** under subsection (15) if:

(a) the provision as amended would be inconsistent with a provision of the Corporations legislation but for this section; and

(b) the amendment would not materially reduce the range of persons, acts and circumstances to which the provision of the

> Corporations legislation applies if this section applied to the provision of the State or Territory law as amended.

185 *The Corporations Act* only yields when specific conditions are met (s 5G(3)) and we do not consider that here any of the conditions are met.

186 The BCISP Act was assented to on 14 May 2002 and came into operation on 31 January 2003: s 2(2). The *Corporations Act* came into operation on an earlier date, namely, 15 July 2001. The relevant State provisions (s 16(2)(a)(i) and s 16(4)(b) of the BCISP Act) are therefore not pre-commencement (commenced) provisions as they did not operate immediately before the operation of *the Corporations Act*: s 5G(12).[223] They are not pre-commencement (enacted provisions) because they were not enacted before the commencement of the *Corporations Act*: s 5G(13). Rather, the State provisions are post-commencement provisions in that they were enacted, and came into force, after the commencement of *the Corporations Act* and have not been materially amended (s 5G(14), ss 5G(15)-(17)). Section 5G does not apply, however, because the State provisions do not satisfy the condition prescribed in item 3 of the Table in that they have not been declared by a law of the State to be a Corporations legislation displacement provision.

187 The 'roll back' provisions of *the Corporations Act* are not applicable here.[224] There is no need to revisit the finding of inconsistency.

Conclusion on s 109 inconsistency

188 In our view, s 16(2)(a)(i) and ss 16(4)(b)(i) and 16(4)(b)(ii) of the BCISP Act are inconsistent with s 553C of the *Corporations Act*, and they are invalid (that is, inoperative) to the extent of that inconsistency. The judge was correct in finding that there is an inconsistency.

189 We consider that the finding of inconsistency also provides independent additional support for the narrow construction we have adopted,[225] that is, independent of the text and

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223 Nor do they satisfy the conditions in (a) and (b) of Item 1 of the Table in that they did not operate despite the provision of the Corporations Law of the State at the time.

224 See *Loo v Director of Public Prosecutions* (2005) 12 VR 665, *HIH Casualty & General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610.

contextual considerations we examined above. This is because s 6 of the *Interpretation of Legislation Act 1984* (Vic) directs that every Victorian Act is to be construed so as not to exceed the legislative power of the State of Victoria but is to be interpreted as a valid provision to the extent to which it is not so in excess. As we have concluded that s 16(2)(a)(i) and ss 16(4)(b)(i) and 16(4)(b)(ii) of the BCISP Act are invalid with respect to their application to a company in liquidation, they ought be construed, alongside the other relevant provisions in pt 3 of the BCISP Act as inapplicable to companies in liquidation (that is, persons in respect of whom a winding-up order has been made). The narrow construction, which we adopted above for other reasons, is also to be favoured because it preserves the validity of the BCISP Act.

190 Having arrived at a finding of inconsistency, we consider that s 79 of the *Judiciary Act* is of no assistance to Façade.[226]

191 The practical effect of the finding of inconsistency is that where a company is being wound up and there is a 'mutual dealing', so that s 553C of the *Corporations Act* is enlivened, an application for summary judgment should be dismissed. We consider that the judge was correct to dismiss the application having satisfied himself that Multiplex had a counterclaim and that it intended to advance it.

Conclusion on grounds 1—4

192 We conclude that grounds 1–4 of the grounds of appeal should be rejected.

***Section 553C(2) of the* Corporations Act**

193 With respect to proposed grounds 5–7 of the application for leave to appeal, we note at the outset that the application of s 553(2) does not strictly arise given that the construction of the BCISP Act we have arrived at suffices to defeat Façade's claim in any event. Nevertheless, as the issue was fully argued, we proceed to address the issue. We will firstly address proposed ground 6, and then turn to proposed grounds 5 and 7.

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225 See [90] above.

226 See [92]–[98] above.

194 The proposed grounds are as follows:

> 5. The learned trial judge erred in finding (at [97]–[98] of the judgment) that the time for assessing notice of [Façade's] insolvency for the purpose of s 553C(2) of the *Corporations Act* was 7 September 2011 (being the date of the Subcontract), and not when the debts which [Multiplex] sought to set off were incurred.
>
> 6. The learned trial judge erred in referring to [Multiplex's] counterclaims for costs to complete the Subcontract works and liquidated damages (at [66] of the judgment) without referring to [Façade's] additional variation claims made under the construction contract (and not under the BCISP Act).
>
> 7. The learned trial judge's finding (at [100] of the judgment) that s 553C(2) of the *Corporations Act* did not preclude the set-off proposed by [Multiplex] interfered with the well-established statutory regime and its underlying principle of *pari passu*, by which creditors of a company in liquidation are allowed to, and required to, share rateably in the available assets.

Proposed ground 6

195 Façade's complaint was two-fold. First, it said that its case at trial was that it had not breached the Subcontract, but rather that Multiplex had repudiated the Subcontract, and so Multiplex had no entitlement to claim liquidated damages. The judge did not make any findings in relation to this aspect of Façade's case. Nor did he make any findings about the strength of Multiplex's counterclaims. Instead, he set out Multiplex's alleged counterclaims and concluded that he was satisfied that there were 'potential claims' of the kind foreshadowed.[227]

196 Further, Façade submitted that it had additional variation claims against Multiplex which were put to the judge but which were not considered in the judgment. Façade referred to three possible set-off scenarios and the balance falling due to either Façade or Multiplex in each.[228] Those scenarios put the variation claims on Façade's part at up to $2,243,324, although in the second and third scenarios it contemplated that Façade may fail to establish all of its variations in which case the amount would fall to $734,324.

197 Multiplex submitted in response that there was no need for the judge to assess the additional variation claims put forward by Façade. The additional variations claims were set

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227 Reasons [69].

228 See [125] above.

out in the affidavit of John Stuart Potts sworn on 18 November 2014, and Façade had only sought to rely upon that affidavit for the purposes of a stay application which did not proceed. Further, Façade had not requested that the judge carry out an assessment of the additional variations claims. In those circumstances, Multiplex submitted that it is not open for Façade to now pursue proposed ground 6.

198 In our view, ground 6 is misconceived. The issue before the judge was whether Façade could obtain judgment for the outstanding amounts under Payment Claims 18 and 19 pursuant to the BCISP Act. Multiplex's alleged cross-claims only arose in respect of the possible application of s 553C of the *Corporations Act*. The judge was not required to engage in a thorough assessment of, and make specific findings regarding, those cross-claims. He simply needed to be satisfied that there was sufficient evidence to indicate that s 553C could be engaged. The judge so found, and this then led to the discussion of whether s 553C(2) applied and whether a constitutional inconsistency arose between s 553C and the BCISP Act.

199 So much was accepted by counsel for Façade in submissions before the judge. Counsel had stated:

> One thing that my friend and I are not seeking is that Your Honour adjudicate the contractual claims and cross-claims. This is a case about my client's rights under the Act.

200 Later, in referring to the affidavit of John Stuart Potts dated 18 November 2014, which detailed the additional variation claims raised by Façade, counsel for Façade stated that the affidavit was relied upon only in relation to the issue of the stay. Later again, counsel for Façade stated that Façade was not asking the judge to decide on the 'voluminous material' about the cross-claims, and that: 'I will make the concession, for the purposes of analysis, that there is an arguable case that is being raised. I say that it's weak.'

201 In these circumstances, Façade cannot now dispute the primary judge's finding that Multiplex had possible cross-claims such that s 553C of the *Corporations Act* may be engaged. That is the basis on which the judge proceeded. Given the nature of the proceeding before the judge and the way in which the submissions unfolded, it is understandable that the

discussion of Multiplex's proposed cross-claims in the judgment is brief, and that the judge did not delve into whether Façade had its own additional variation claims that could counterbalance the cross-claims. Such matters, as expressly conceded by Façade, were not matters that the judge needed to decide. Ground 6 cannot be made out.

Proposed grounds 5 and 7

Parties' submissions

202 Under ground 5, Façade submitted that the amounts that Multiplex sought to set off — that is, the costs of completion and liquidated damages — could be distinguished from the types of amounts in question in the cases relied upon by the judge. In *Grapecorp*[229] and *JLF Bakeries*,[230] the amounts were fees which regularly fell due in the course of the relevant agreement, and were premised upon performance of the contract in the ordinary course. In contrast, the amounts sought to be set off by Multiplex were premised upon defaults under the Subcontract which were not matters expected in the ordinary course of the performance of the Subcontract[231] and could not be said to have been incurred when entering into the Subcontract. Therefore, the relevant time for the purposes of s 553C(2) was when Multiplex accrued its entitlements to completion costs and liquidated damages — that is, upon Façade's breach — by which time Multiplex had notice of Façade's insolvency.

203 Façade also submitted that Multiplex received credit from it for the purposes of s 553C(2) when Façade performed work under the Subcontract and submitted a payment claim for that work.

204 In response, Multiplex submitted that the authorities support the judge's finding that the notice or knowledge of Façade's insolvency must be considered at the date on which the Subcontract was executed. Multiplex relied upon *Grapecorp*, *Old Style* and *JLF Bakeries*.[232]

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229 (2012) 265 FLR 33.

230 (2007) 64 ACSR 633.

231 Counsel for Façade observed in the hearing before this Court that the High Court has rejected the distinction made between a primary obligation to perform under a contract and a secondary obligation to pay damages. Counsel cited *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

232 Multiplex also referred to *Re National Express Group Australia (Swanston Trams) Pty Ltd; Thiess Infraco (Swanston) Pty Ltd v Smith* [2004] FCA 1155 [8]–[16] in its written submissions. However,

205 Multiplex analysed separately Façade's entitlement to payment under the Subcontract on the one hand, and Multiplex's entitlement to damages for breach by Façade on the other. In relation to the former, Multiplex submitted that the cases of *Grapecorp* and *JLF Bakeries* establish that each fresh performance of a regular obligation during the life of the contract is not the provision of credit. Rather, the provision of the credit occurs at the date of entry into the Subcontract. In relation to the latter, Multiplex submitted that it is not apt to describe the accrual of a claim for damages for breach as the 'giving of credit' by Multiplex to Façade. A claim for damages for breach of contract is not a claim of the kind picked up s 553C(2). Even if it was, the provision of credit would have occurred at the date of the Subcontract.

206 Multiplex submitted that the purpose of s 553C(2) is to deny set-off to persons who voluntarily take the risk of engaging in dealings with a company that they know to be insolvent. In contrast, a person who enters into a contract with another long before that second person's insolvency has no such choice when indications of insolvency later appear but performance under the contract continues.

207 Multiplex submitted that the construction urged by Façade, whereby a breach of contract and the consequent accrual of a claim for damages would amount to the giving of credit for the purposes of s 553C, would severely limit the operation of the provision. It would mean that any party to a contract seeking to rely on s 553C to set off a counterclaim for breach of contract would not be entitled to do so if the breach occurred after the other party's insolvency.

208 Under ground 7, Façade submitted that to allow the set-off claimed by Multiplex would be contrary to the *pari passu* principle and would operate unfairly to the general body of creditors. In response, Multiplex submitted that s 553C was intended to create a statutory exception to the *pari passu* principle; Façade's position misunderstood the statutory regime created by pts 5.6 and 5.7 of the *Corporations Act*.

Analysis

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those passages were concerned with whether a future breach of contract could be proved as a contingent claim in bankruptcy. That is a different question to the issue under consideration.

209 The rationale for s 553C was stated by the High Court in *Gye v McIntyre*, which considered the cognate provision (s 86) in the *Bankruptcy* Act:[233]

> It has often been pointed out that the object of set-off in bankruptcy is … 'to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate'. Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in bankruptcy could insist upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar on the whole of the debt owed by the bankrupt to him. … To the extent necessary to achieve that legislative purpose of 'substantial justice' to the parties, it is established by authority that a provision such as s 86 of the Act should be given 'the widest possible scope' …
>
> On the other hand, 'substantial justice' requires that the operation of set-off in bankruptcy be confined within limits which protect the creditors of the bankrupt from being disadvantaged by a set-off being allowed in circumstances where debts, credits or other dealings have not been genuinely mutual as a matter of substance … or where, after bankruptcy or notice of an act of bankruptcy, a debtor of the bankrupt has bought up liabilities of the bankrupt at a discount for the purpose of setting them off against his own indebtedness … In so far as manipulation of set-off by a debtor of the bankrupt to avoid payment to the trustee is concerned, s 86(2) provides protection in a case where the relevant steps have been taken before bankruptcy but after notice of an available act of bankruptcy.[234]

210 There are a number of authorities that address the question that arises under s 553C(2) in the present proceeding. In *Shirlaw v Lewis*,[235] the defendants were the receivers of a corporation, AHM. AHM and the second plaintiff, Petty Cash, had entered into an agreement for AHM to sell a nightclub business to Petty Cash. Petty Cash was given a licence to conduct the nightclub business until completion. Clause 5.12 of the agreement allowed AHM to terminate that licence in certain circumstances, upon which AHM would repossess the business and purchase all of Petty Cash's goods and saleable stock used in the conduct of the nightclub business. Petty Cash failed to complete and breached various terms of the agreement. AHM retook possession of the nightclub on 13 March 1991, and also took possession of liquor stock in the club, previously owned by Petty Cash. AHM continued to operate the nightclub until May 1991, and in the course of doing so it sold some or all of this liquor stock.

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233 See [164] and n 187 above.

234 (1991) 171 CLR 609, 618-619 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See [106] above.

235 (1993) 10 ACSR 288 ('*Shirlaw*').

211 A liquidator was later appointed to Petty Cash and the liquidator brought proceedings against AHM claiming damages for conversion of the liquor stock. The issue arose whether AHM's debt to Petty Cash in respect of the liquor stock could be set off against Petty Cash's liability to AHM for breach of contract.[236] Hodgson J of the New South Wales Supreme Court stated that the case involved 'mutual dealings which were undertaken in the first instance through the contract for the sale of the business, well in advance of any question of insolvency or liquidation.'[237] The events that subsequently occurred — the breaches by Petty Cash which led to AHM repossessing the business and taking the liquor stock — were 'the crystallisation of mutual obligations arising from these pre-liquidation dealings'.[238] In so far as any credit was given, Hodgson J considered that this occurred at the date of entry into the agreement, and not when AHM took possession of the liquor stock.[239]

212 In *Old Style*,[240] the respondent, Microbyte, had granted the applicant, Old Style, a licence to use a machine owned by Microbyte. The licence agreement required Old Style to pay Microbyte $4000 per month in licence fees. At some time after the agreement commenced, Old Style successfully sued Microbyte for damages for breach of contract. Microbyte subsequently went into liquidation.

213 Old Style lodged a proof of debt for its damages claim against Microbyte. The liquidators accepted that Old Style could set off its damages claim against licence fees which fell due for payment to Microbyte before the commencement of the liquidation. However, the liquidators submitted that set-off could not occur against licence fees falling due for payment after the commencement of the liquidation. One of the arguments raised by the liquidators was that Old Style had notice of Microbyte's insolvency before the first instalment of post-liquidation licence fees fell due for payment. Hayne J rejected this argument. He accepted that there was

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236 The relevant set-off provision was s 86 of the *Bankruptcy Act 1966* (Cth). At the time that *Shirlaw* was decided, s 553C had not yet been inserted into the *Corporations Law*. However, s 86 of the *Bankruptcy Act* applied by virtue of s 553(2) of the *Corporations Law*. As mentioned, s 553C, when introduced, was modelled on s 86 and in substance was the same as that provision.

237 *Shirlaw* (1993) 10 ACSR 288, 295.

238 Ibid.

239 Ibid 296.

240 [1995] 2 VR 457.

post-liquidation performance of the contract, but held that this mere fact was not legally significant.[241] Hayne J identified the mutual dealings which gave rise to the set-off as the making of the licence agreement and its breach, and both of these occurred before liquidation, and at a time when Old Style did not have notice of Microbyte's insolvency. Therefore, s 553C(2) did not apply.[242]

214 In *JLF Bakeries*,[243] the plaintiff had operated a bakery business as a franchisee of the defendant. The franchise agreement provided that if it was terminated, the defendant would have an option to purchase the plaintiff's fixtures, fittings, plant and equipment. Upon exercise of the option, ownership of the property would pass immediately to the defendant, but the purchase price would not need to be fixed and paid until later. After an administrator was appointed to the plaintiff, the defendant terminated the franchise agreement and exercised its option to purchase the plaintiff's fixtures and fittings. The price of the property was later determined to be $67,500. The plaintiff was subsequently wound up. The defendant lodged a proof of debt for $166,376.42, comprising the outstanding debt under the loan agreement, rent arrears, royalties and advertising expenses. The question at issue was whether the defendant could set off this amount against the $67,500 it owed to the plaintiff for the exercise of the option.

215 The plaintiff submitted that s 553C(2) of the *Corporations Act* precluded set-off. The plaintiff's argument was that because the option allowed the defendant to acquire the plaintiff's fixtures and fittings without immediately paying the purchase price, the defendant had received credit from the plaintiff upon the exercise of the option. At that date, the plaintiff was already in administration and had abandoned its business, so the defendant had notice of the plaintiff's insolvency.

216 In deciding *JLF Bakeries*, White J discussed *Old Style* and *Shirlaw*. He regarded the facts before him as being closely analogous to the facts in *Shirlaw*. He concluded:

> Section 553C should be given its widest possible scope: *Gye v McIntyre* … To do so

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241 Ibid 464.

242 Ibid.

243 (2007) 64 ACSR 633.

> is consistent with a purposive construction of the section of avoiding injustice where the liquidator can demand 100c in the dollar from the defendant on its exercise of the option, although the defendant will receive no dividend in the liquidation from the much larger debt owed to it, arising from the same dealings in connection with the leasing of the bakery premises and granting of the franchise. The purpose of s 553C(2) is to exclude a right of set-off where the creditor, in its dealings with the company, has notice of insolvency, or where the debtor manipulates the right of set-off, after notice of insolvency, to avoid payment: *Gye v McIntyre … Law v James*. No such purpose would be advanced by holding that credit was received when the option was exercised.
>
> In my view, credit was given by the plaintiff and received by the defendant when the franchise agreement was entered into, albeit contingently on the termination of the franchise agreement and exercise of the option. At that time, the defendant did not have notice of the plaintiff's insolvency.[244]

217 Finally, in *Grapecorp*,[245] the plaintiff and defendant had entered into a management agreement in January 2008. Under the agreement, the defendant provided cultivation, maintenance, harvesting, processing, marketing and selling services in relation to vines and grapes at a particular vineyard. Under the agreement, the defendant would receive the proceeds of sale of grapes and was obliged to pay net proceeds to the plaintiff. The plaintiff was required to pay a management fee to the defendant in monthly instalments. Administrators were appointed to the plaintiff in April 2009, and liquidators were appointed in June 2009.

218 During the period February to December 2009, the defendant had collected $2,831,796.87 from the sale of grapes harvested from the vineyard, but only paid $475,313.48 to the plaintiff. The plaintiff sued to recover the difference. The defendant claimed that it had a right of set-off under s 553C of the *Corporations Act*, and in particular that the amount sued for by the plaintiff could be set off against the expenditure incurred by the defendant in performing services on the vineyard. Most of those services were carried out after the plaintiff's insolvency. The plaintiff argued that the defendant was precluded by s 553C(2) from claiming the benefit of a set-off under s 553C(1).

219 In *Grapecorp*, Sifris J considered the cases of *Old Style* and *JLF Bakeries* and concluded that, consistently with those authorities, in the case before him, any notice or knowledge of the plaintiff's insolvency had to be considered at the date on which the management

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244 *JLF Bakeries* (2007) 64 ACSR 633, 643–4 [41]–[42] (citations omitted).

245 (2012) 265 FLR 33.

agreement was executed. Since there was no suggestion that the plaintiff was insolvent in January 2008, his Honour concluded that s 553C(2) did not operate to preclude the set-off sought by the defendant.

220 In the present proceeding, the relevant amounts that are alleged to constitute the 'mutual credits, mutual debts or other mutual dealings' for the purposes of s 553C(1) are:

(1) amounts outstanding under Payment Claims 18 and 19 claimed by Façade;

(2) costs to complete claimed by Multiplex pursuant to cl 44.6 of the Subcontract and liquidated damages claimed by Multiplex pursuant to cl 35.6 of the Subcontract.

221 In relation to (a), Façade submits that Multiplex 'received credit from' Façade when Payment Claims 18 and 19 were submitted; that is, on 23 August 2012 and 27 September 2012 respectively. In relation to (b), Façade submits that (assuming Multiplex's claims are established) Multiplex 'gave credit to' Façade when its rights under cls 35.6 and 44.6 accrued because of Façade's alleged breaches of the Subcontract.

222 Turning to the amounts due under Payment Claims 18 and 19, *Old Style* and *Grapecorp* are directly applicable. Under the Subcontract, Façade was required to submit payment claims on a monthly basis.[246] The service of payment claims by Façade on Multiplex for work done by Façade in the relevant month was very much part of the ordinary course of the Subcontract. The mere fact that performance occurred after entry into the Subcontract is not legally significant. The relevant dealing giving rise to the payment claims was the entry into the Subcontract, which occurred on 7 September 2011. That was the date on which it could be said that Multiplex received credit from Façade in respect of the construction work that Façade was required to carry out and for which it was required to issue payment claims.

223 As to the costs to complete and liquidated damages, Façade submitted that the date on which Multiplex's entitlement to completion costs and liquidated damages accrued should be taken to be the date of Multiplex 'giving credit' to Façade. Façade relied upon the argument that breaches of a contract should not be regarded as matters expected in the ordinary course

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246 See above at [6].

of the contract. Therefore, breaches of contract gave rise to dealings involving the receiving or giving of credit under s 553C(2).

224 Façade's argument is contrary to *Shirlaw* and *JLF Bakeries*. In *Shirlaw*,[247] AHM's entitlement to take possession of Petty Cash's liquor stock only arose upon the termination of the agreement between AHM and Petty Cash due to the latter's breaches of the agreement. Hodgson J nonetheless identified the relevant mutual dealing between the parties for the purposes of s 553C as the entry into the contract for the sale of the nightclub business. AHM's taking possession of the liquor stock was pursuant to a contractual obligation arising out of that pre-liquidation dealing. Therefore, the date for the giving of credit was the date of entry into the agreement.[248] Similarly, in *JLF Bakeries*,[249] the defendant's recourse to the option to purchase the plaintiff's fixtures only arose upon the termination of the agreement. The plaintiff had argued that the defendant had received credit from the plaintiff when the defendant exercised its option. White J rejected that argument and held that the defendant had received credit from the plaintiff when the franchise agreement was entered into, 'albeit contingently on the termination of the franchise agreement and exercise of the option.'[250]

225 We observe that in *Old Style*,[251] Hayne J referred to both the making of the agreement and its breach as dealings giving rise to the set-off.[252] However, as Old Style did not have notice of Microbyte's insolvency at either of those times, Hayne J was not required to consider whether the breach did indeed constitute a giving or receiving of credit for the purposes of s 553C(2).

226 In our view, Multiplex is correct to submit that the language of s 553C(2), referring as it does to the giving of credit to or the receiving of credit from the insolvent company, is not apt to apply to defaults under a contract that result in one party accruing rights to recover under the contract. While such a breach impacts on rights under the contract, those consequences

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247 See above at [210]–[211].

248 (1993) 10 ACSR 288, 296.

249 See above at [214]–[216].

250 (2007) 64 ACSR 633, 644 [42].

251 See above at [212]–[213].

252 [1995] 2 VR 457, 464.

are within the contemplation of the contract. Façade is correct to state that the law expects contracts to be performed. But in circumstances where the contract has specified how costs and damages are to be assessed upon breach (here, relevantly, in the form of cls 35.6 and 44.6), it seems artificial to say that the breach is a new dealing that involves the giving or receiving of credit. Rather, in this case, the entry into the Subcontract by Façade and Multiplex involved the mutual giving and receiving of credits between the parties, most of which were contingent on future events contemplated by the Subcontract, such as the performance of construction work, the issuing of payment claims, the failure to complete on time and the like.

227 This conclusion is supported by the underlying rationale for s 553C, which, as explained by the High Court in *Gye v McIntyre*,[253] is to do substantial justice between the parties where there are genuine mutual debts, credits or dealings between one party and an insolvent company. Section 553C(2) exists to prevent a debtor of the insolvent company from taking steps after having notice of insolvency to manipulate the set-off to unfairly benefit the debtor at the expense of the company's creditors. In the case of a party who has entered into a contract with a company that later becomes insolvent and breaches the contract, substantial justice would suggest that set-off should be available to the first party. If the party was not on notice of indications of insolvency at the time of entry into the contract, they would be unfairly disadvantaged if, because of a breach by the insolvent company over which they have no control, they suffer loss and are precluded from setting off their existing debts to the company against that loss. Allowing the set-off where the breach of contract by the insolvent company has occurred after indications of insolvency have arisen does not controvert the principle underlying s 553C(2), which is to prevent debtors of insolvent companies from manipulating the set-off to unfairly benefit from it.

228 The judge was correct to find that the time for assessing notice of Façade's insolvency for the purposes of s 553C(2) was the date of the Subcontract. Proposed ground 5 cannot be made out. As a consequence, we also reject proposed ground 7. As Multiplex points out, s 553C is intended to create an exception to the *pari passu* principle. The general principle of

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253 See above at [209].

pari passu cannot override statutory provisions.

229 Consequently, Multiplex is not excluded from relying upon s 553C by reason of the exception in s 553C(2).

The email of 5 October 2012

230 Proposed ground 8 of the application for leave to appeal is that the judge erred in finding that Multiplex's email of 5 October 2012 satisfied the requirements of a payment schedule for the purposes of s 15(2) of the BCISP Act.

231 The conclusions we have reached on the other grounds of appeal mean that Façade is not entitled to enter summary judgment pursuant to the BCISP Act, regardless of whether the 5 October 2012 email constitutes a payment schedule. However, in so far as necessary and as the parties argued ground 8 before us, we will set out our views on the matter.

Parties' submissions

232 Façade relied on three arguments for why the 5 October 2012 email did not constitute a payment schedule. First, the email did not indicate the amount of the payment Multiplex proposed to make, and therefore did not satisfy s 15(2) of the BCISP Act. Secondly, the email did not purport to operate as a payment schedule. This was demonstrated in two ways: the email contested the validity of Façade's payment claim, and it suggested that a payment schedule would be issued upon certain matters being addressed by Façade. Thirdly, contrary to s 15(3) of the BCISP Act, the email did not state the reasons for paying Façade less than the amount in the payment claim. The only reason given in the email was that the payment claim was not valid but this was not a reason that was pursued. Façade argued that the email was 'a holding position only', and submitted that this could not constitute a payment schedule.

233 Multiplex submitted that in assessing whether a document constitutes a payment schedule, emphasis should be placed on 'speed and informality', and the courts should not adopt an 'unduly critical viewpoint'.[254] Multiplex submitted that the appropriate avenue for contesting

the validity of reasons given in a payment schedule for withholding payment is the adjudication procedure under s 18 of the BCISP Act. Multiplex submitted that the judge was correct in his analysis of the 5 October 2012 email. It relied upon the cases of *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd*,[255] *Protectavale*,[256] *Multiplex Constructions Pty Ltd v Luikens*,[257] and *Springs Golf Club Pty Ltd v Profile Golf Pty Ltd*.[258]

Analysis

234 There have been a number of cases that have considered the adequacy of payment schedules. It is instructive to consider the circumstances of and decisions in those cases.

235 In *Luikens*,[259] the plaintiff entered into a subcontract with the second defendant for the latter to carry out certain works. The second defendant submitted a payment claim to the plaintiff pursuant to the NSW Act, and the plaintiff responded with a payment schedule. The second defendant then applied for adjudication of the payment claim, and the first defendant was appointed to adjudicate the dispute. The first defendant delivered a determination in favour of the second defendant. The plaintiff commenced proceedings seeking orders quashing the first defendant's determination for error of law on the face of the record and for jurisdictional error.

236 Much of the decision in *Luikens* concerned issues not relevant to the present matter, such as whether the first defendant's determination was amenable to relief in the nature of certiorari and the extent of the first defendant's jurisdiction. However, Palmer J did consider the issue of the adequacy of the plaintiff's payment schedule in relation to two items of work claimed by the second defendant.

237 In respect of the first item of work, the plaintiff's payment schedule had only given one reason for rejecting the second defendant's claim — that the claim was contractually barred

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254 Multiplex's written submissions [40], citing *Protectavale* [2008] FCA 1248 [11].

255 [2004] NSWSC 1232 ('*Barclay*').

256 [2008] FCA 1248.

257 [2003] NSWSC 1140 ('*Luikens*').

258 [2006] NSWSC 344 ('*Springs Golf Club*').

259 [2003] NSWSC 1140.

— but in its adjudication response, the plaintiff sought also to rely on the fact that the second defendant's claim was overinflated having regard to what was allowed by the contract. Section 14(3) of the NSW Act at the relevant time was identically worded to s 15(3) of the BCISP Act, requiring the respondent to a payment claim to indicate reasons for withholding payment. Section 20(2B) of the NSW Act provided that a respondent to a payment claim could not in its adjudication response rely on any reasons for withholding payment unless those reasons were included in the payment schedule. The plaintiff sought to overcome this provision by arguing that s 14(3) of the NSW Act did not apply in its case, or alternatively that it had given sufficient reasons in its payment schedule by simply saying that the second defendant's claim was 'rejected'.

238 Palmer J did not accept the plaintiff's arguments. He observed:

> For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is 'withheld': the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.[260]

239 In respect of the second item of work, the second defendant had claimed the value of the work at $334,401. The plaintiff asserted that there had been an agreement between the plaintiff and the second defendant that the work would be awarded to another subcontractor in order to alleviate delay. The plaintiff asserted a right to set-off against the second defendant's claim the amount the plaintiff had paid to the other subcontractor. The plaintiff's payment schedule had indicated this in very truncated form. The summary on the front page of the schedule had stated 'Back charges/contra charges/scope deletions (BC1-BC16)'. In the attachment to the summary, under the heading 'Back charges/contra charges/scope deletions', the plaintiff had written: 'BC1 Deletion of southern tenancies wall panels (by others)', and then two figures representing the amounts of the deductions claimed by the plaintiff and second defendant ($434,010 and $334,401 respectively).

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260 *Luikens* [2003] NSWSC 1140 [70].

240 Palmer J held that the adjudicator had erred in determining that the payment schedule had not sufficiently indicated the plaintiff's reasons for withholding payment for this item of work. He observed:

> A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.
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> …
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> Section 14(3) of the Act, in requiring a respondent to 'indicate' its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word 'indicate' rather than 'state', 'specify' or 'set out', conveys an impression that some want of precision and particularity is permissible as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.[261]

241 Palmer J held that while the statements in the plaintiff's payment schedule had been somewhat cryptic, having regard to the second defendant's familiarity with the industry and the history of the building project, they were sufficient to indicate to the second defendant the reason for non-payment of its claim.[262]

242 The principles stated by Palmer J in *Luikens* were endorsed by the NSW Court of Appeal in *Clarence Street Pty Ltd v Isis Projects Pty Ltd*, albeit that that case concerned the validity of a payment claim rather than a payment schedule.[263]

243 In *Barclay*,[264] the plaintiff as subcontractor and defendant as principal were parties to a construction contract. The plaintiff served a payment claim on the defendant. The payment claim included an amount for variations, an amount for costs incurred as a result of extensions of time, and an amount for works under the contract. The defendant claimed to

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261 Ibid [76], [78].

262 Ibid [79].

263 (2005) 64 NSWLR 448, 455 [31] (Mason P, Giles and Santow JJA agreeing).

264 [2004] NSWSC 1232.

have responded to the payment claim by a letter which stated:

> Further to ongoing communications between us concerning Progress Claim No 13 and the EOT claim it is apparent that the Parties are in Dispute under Clause [sic] 30 and 40. Pursuant to clause 25A of the building Agreement it is considered appropriate that we refer the matter to the Independent Certifier nominated in the Agreement for an assessment and determination of the matters detailed below.
>
> **Progress Claim No 13 — Issue of Variations not Agreed**
>
> Variation Numbers [list of numbers] are in dispute with the Principal and Superintendent [sic] view being that these Variations formed part of the Contractors [sic] Design & Construct Risk, and that the proper procedures for lodgement and assessment of Variations have not been followed and that as such payment by the Principal of these Variation Claim [sic] made up to Progress Claim No 13 and in any future claims is not required.
>
> **EOT and Associated Costs Claim and Liquidated Damages**
>
> It is the view of the Principal and the Superintendent that the Claim made is invalid for the reasons detailed in their correspondence to the Contractor dated 12 May 2004 pursuant to Clause 33.2 and Clause 35.5 of the Agreement. An assessment by the Independent Certifier is required, in the first instance, to identify if the EOT and associated costs claim submitted by the Contractor has been made in accordance with the Agreement. Should the Independent Certifier determine that the claim has been lodged in accordance with the Agreement an assessment on the detail of the Claim should be undertaken.
>
> It is the view of the Superintendent and Principal that Liquidated Damages in the amount of $145,000 are due and payable by the Contractor. The Independent Certifier is to assess the liability of the Contractor for payment of Liquidated Damages.
>
> We will deliver over the course of the next two days copies of all correspondence and associated information to the nominated Independent Certifier …[265]

244 The letter did not expressly state the amount that the defendant proposed to pay, and nor did it expressly state that the defendant proposed to pay nothing to the plaintiff.[266]

245 The plaintiff submitted that the letter did not satisfy the requirements for a payment schedule set out in ss 14(2)(b) and (3) of the NSW Act, which are the same as the requirements in ss 15(2)(b) and (3) of the BCISP Act. These are the requirements to indicate the amount of payment that the respondent proposes to make, and to indicate reasons for withholding payment.

246 In deciding *Barclay*, McDougall J adopted the approach taken by Palmer J in *Luikens*.

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265 Ibid [9].

266 See *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd* [2004] NSWSC 716 [5].

McDougall J regarded the approach in *Luikens* as being 'consistent with the evident intention of the legislature, that entitlement to progress payments should be resolved expeditiously, that this be done with a minimum of formality and expense.'[267] Applying that approach, he found the letter to be a valid payment schedule. On whether the letter satisfied the requirement that a payment schedule indicate the amount of payment, McDougall J observed that it was clear from the defendant's letter, read as a whole, that the defendant proposed to pay nothing to the plaintiff.[268] On whether the defendant had satisfied the requirement to indicate the reasons for withholding payment, the plaintiff had argued that the letter had not given adequate reasons, because it had only raised concerns with some of the variations in the payment claim, but nonetheless purported to withhold payment altogether. McDougall J rejected this argument, observing that:

> [Section] 14(3) requires in substance that the respondent to a payment claim indicate in its payment schedule its reasons if it proposes to pay less than the claimed amount. The subsection is not concerned with the adequacy or sufficiency of those reasons. (There may be a limiting case where what is indicated cannot in any real sense of the word 'reasons' be described as reasons, but this is not such a case, and I therefore do not propose to consider that question.) If the reasons are inadequate, the claimant will no doubt proceed to adjudication. In that event, the respondent will be limited, in its adjudication response, to the reasons given in the payment schedule (s 20(2B)).[269]

247 In relation to the claim for costs associated with the extensions of time, McDougall J noted that the defendant's letter referred to an earlier letter, which had given two reasons for rejecting those costs. His Honour was of the view that 'it is legitimate to read the two letters together; and … when this is done, [the defendant] gave reasons for not accepting this aspect of the payment claim.'[270]

248 Multiplex also relied upon the decision in *Springs Golf Club*.[271] That case was decided on the basis that judicial intervention in an adjudication determination was not warranted. However, Rein AJ did consider, in obiter, whether a letter from the plaintiff to the first defendant constituted a payment schedule. The letter referred to a previous meeting between

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267 *Barclay* [2004] NSWSC 1232 [13].

268 Ibid [17].

269 Ibid [26].

270 Ibid [28].

271 [2006] NSWSC 344.

the parties, listed various items in dispute and the amount claimed by the plaintiff under each one, and noted that at the meeting, the plaintiff had offered the first defendant $30,310.00 'as last and final payment'. Rein AJ considered that letter sufficiently indicated the amount the plaintiff proposed to pay the first defendant, and sufficiently indicated reasons for why the plaintiff was withholding payment.

249 In *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*,[272] the first respondent subcontractor submitted an invoice to the applicant listing amounts for three items. The applicant responded to the invoice by an email. The email confirmed receipt of the invoice, but indicated that the applicant declined to accept the invoice and suggested that the parties meet on site 'to clarify the situation and to find a solution for both sides'. The email noted a number of complaints relating to the first item in the invoice (additional labour expended on original works), including the use of unskilled workers, the lack of suitable tools and the poor way in which materials were stored on site.

250 One of the issues considered by Chesterman J in *Minimax* was whether the applicant's email constituted a payment schedule under the Qld Act. Chesterman J observed:

> The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule … from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description. To constitute a payment schedule the applicant's email of 14 December had to:
>
> (i) identify the payment claim to which it related, and
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> (ii) state any amount which the recipient of the payment claim proposed to make in response to it.
>
> (iii) Importantly, if that amount is less than the amount claimed the payment schedule … must state why it is less.
>
> If these three criteria are satisfied the document will be a payment schedule. How they are expressed, with what formality or lack of it, and with what felicity or awkwardness, will not matter.[273]

251 Chesterman J held that the first of the two requirements he had set out were clearly satisfied. The statement in the email that the applicant did not accept the first respondent's

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272 [2007] QSC 333 ('*Minimax*').

273 Ibid [20]–[21].

invoice 'can only mean that it did not propose to make any payment pursuant to it.'[274] However, Chesterman J was not satisfied that the requirement to indicate reasons for withholding payment was satisfied. The complaints raised by the applicant's email all related to the first item in the invoice. No reasons were given for withholding payment for items two and three, notwithstanding that the applicant had indicated that it would not accept the invoice in its totality. The email was therefore incomplete if it was intended to be a payment schedule.[275]

252 In *Protectavale*,[276] the subcontractor had submitted to the principal an invoice for works purportedly carried out pursuant to the construction contract between them. The solicitor for the principal responded saying that the subcontractor owed the principal damages for breach of contract exceeding the amount in the invoice; that the invoice was not a payment claim since it related to a final rather than progress payment; and that the invoice contained inadequate and incomplete information. The subcontractor subsequently submitted to the principal a revised invoice. The solicitor for the principal again responded, referring to the previous correspondence between the parties and requesting confirmation that the subcontractor would not seek to enforce under the BCISP Act the claim made in its invoice.

253 Finkelstein J found that the subcontractor's invoice did not constitute a valid payment claim. In obiter, he also considered whether, if his conclusion about the validity of the payment claim was incorrect, the principal had served a valid payment schedule. The principal had sought to rely on its various communications in aggregate to constitute a payment schedule. Finkelstein J rejected this approach, stating:

> One purpose of a payment schedule is to articulate the reasons for withholding payment or offering to pay less than the claimed amount with a degree of precision and particularity to apprise the contractor of the case it will have to meet if it decides to pursue an adjudication: *Multiplex Constructions* [2003] NSWSC 1140 at [69]-[70]. Another purpose is to set the limits for an adjudicator if there is to be a dispute about the claim. In my view a payment schedule cannot artificially be constructed out of a series of documents by showing that those documents in combination contain all the necessary information required of a payment schedule. It also should be evident that, viewing the matter objectively, it was intended that the documents constitute a payment schedule. That is not the position here.[277]

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274 Ibid [23].

275 Ibid [28].

276 [2008] FCA 1248.

254 Here, the issues to be considered are whether the 5 October 2012 email satisfied the requirements in ss 15(2)(b) and (3) of the BCISP Act, and, more broadly, whether the email constituted a payment schedule in circumstances where it did not purport to be one.

255 Section 15(2)(b) requires a payment schedule to 'indicate the amount of the payment (if any) that the respondent proposes to make'. It is evident from reading the 5 October 2012 email as a whole that Multiplex did not intend to pay Façade anything in relation to Payment Claim 19 as submitted. The email requested that Façade resubmit documentation, and also stated that Multiplex 'will be in a position' to issue a payment schedule once the identified issues have been addressed — suggesting that Multiplex was not in such a position at the time of sending the email. This was sufficient to 'indicate' to Façade that no payment was forthcoming. In this respect, we adopt the observations of Palmer J in *Luikens* regarding the use of the word 'indicate', which suggests that some lack of precision is permissible as long as the essence of what the respondent is intending to do is sufficiently communicated to the claimant.[278] We note the parallels that can be drawn here between the 5 October 2012 email and the relevant pieces of correspondence in *Barclay*[279] and *Minimax*,[280] both of which did not expressly state that the respondent intended to pay the claimant nothing, but both of which were regarded as sufficiently indicating that the respondent would be paying 'nil' in response to the payment claim.

256 Next, it is necessary to consider whether the 5 October 2012 email satisfied the requirement in s 15(3) that it indicate Multiplex's reasons for withholding payment from Façade. We adopt the observations of Palmer J in *Luikens* that s 15(3) requires reasons to be indicated 'with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent'.[281] Absolute precision is not required, and cannot be expected given the reasonably short period within which a respondent is required to prepare a payment schedule (being at most 10 days).[282] Previous dealings

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277 Ibid [29].

278 [2003] NSWSC 1140 [78].

279 [2004] NSWSC 1232.

280 [2007] QSC 333.

281 [2003] NSWSC 1140 [70].

between the parties form part of the context relevant to deciding whether the reasons have been indicated with sufficient particularity.[283] The concern is to ensure that the claimant has sufficient information to make a decision whether or not to pursue the claim.[284]

257 In this case, the 5 October 2012 email gave two bases on which Multiplex did not consider Payment Claim 19 to be valid (and thus did not propose to pay Façade). The first was that Multiplex regarded Façade's statutory declaration, submitted with the payment claim, to be inaccurate with respect to the third item, which was a declaration that all consultants, suppliers and secondary subcontractors engaged by Façade on the works had been paid in full. The second was that Multiplex was unable to ascertain the extent to which items being claimed for were for materials that were unfixed. Façade submits that these two complaints are inadequate reasons for the purposes of s 15(3) of the BCISP Act. Façade notes that the reasons are ones that Multiplex regarded as going to the validity of the payment claim, which Multiplex now no longer contests. The 5 October 2012 email, Façade argues, is merely a 'holding position'. This is evident from the conclusion of the email, which states that upon Façade remedying the defects identified in the email, Multiplex 'will be in a position to issue [Façade] with a payment schedule'.

258 It is important to note that reasons for withholding payment do not need to be ultimately vindicated to constitute adequate reasons for the purposes of a payment schedule; so much so is evident from the presence of s 21(2B), which permits respondents to add additional reasons for withholding payment at the adjudication stage. As observed in *Luikens* and *Barclay*, given the speed with which payment schedules are expected to be produced, the reasons contained within them should not be over-scrutinised.

259 Nevertheless, the reasons do need to give the claimant an indication of the objections taken to the claims made in the payment claim. In this case, the 5 October 2012 email raised two complaints relating to the general conduct of the Subcontract by Façade, but neither went to any of the particular items claimed in Payment Claim 19. This distinguishes the

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282 BCISP Act s 15(4)(b).

283 *Luikens* [2003] NSWSC 1140 [77].

284 Ibid [70], [78].

circumstances of the present case from the payment schedules in *Luikens*, *Barclay* and *Springs Golf Club*, which were all responsive to the particular claims that had been made, albeit to varying degrees.

260 There is a stark contrast between the reasons given in the 5 October 2012 email and the itemised markdowns on the 'Subcontractor Payment Schedule' sent by Multiplex to Façade on 12 October 2012.[285] Further, the complaints raised in the 5 October 2012 email are procedural hurdles rather than concerns about the substance of the payment claim. They were not reasons for denying the substance of the claims made in the payment claim, but reasons why Multiplex did not intend to pay at that moment. In our view, reasons of this nature do not satisfy the requirement in s 15(3) of the BCISP Act. It would be contrary to the intention of the BCISP Act, which sets short time periods for the issuing of payment claims, payment schedules, adjudication applications, and the like, to allow a respondent to effectively seek to extend the statutory time period under the BCISP Act by raising procedural, but not substantive, reasons for withholding payment.[286]

261 This leads into the final issue raised by Façade in relation to the 5 October 2012 email, namely, that the email did not purport to be a payment schedule. So much may be accepted. As mentioned, it is clear from the terms of the 5 October 2012 email that the email was not intended to be a payment schedule. The email ends by saying that upon Façade remedying the defects identified in the email, Multiplex 'will be in a position to issue [Façade] with a payment schedule'. Façade argues that in these circumstances, the 5 October 2012 email could not be a valid payment schedule.

262 There is no requirement in the BCISP Act that a document must indicate that it is a payment schedule in order to satisfy the s 15 requirements. It is open for regulations to be made to prescribe the form and content of payment schedules, but this has not been done. In these circumstances, and having regard to the fast-paced nature of the regime created by the BCISP Act, and the availability of adjudication procedures to resolve disputes that arise, it

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285 See above at [21].

286 We also observe that the 5 October 2012 email seems to fall well short of the requirements for payment schedules in cl 42.1 of the Subcontract, which called not only for reasons for withholding payment but also 'the calculations employed to arrive at the amount': see above at [7].

would be inappropriate to overlay requirements for payment schedules above and beyond those listed in s 15. We note the comments of Finkelstein J in *Protectavale* that it is a necessary requirement for a payment schedule that 'viewing the matter objectively, it was intended that the documents constitute a payment schedule'.[287] In our view, in answering the question of whether a document constitutes a payment schedule, the focus of the assessment must be on whether the document meets the requirements of s 15. The objective intention of the document may be relevant in making that assessment. In this case, the 5 October 2012 email is not a payment schedule, not because it implicitly disavows that fact, but because it does not give reasons satisfying the requirement in s 15(3) of the BCISP Act.

263 It follows that, if it were necessary to decide, ground 8 should be upheld. However, in light of our conclusions on the other grounds, the making good of this ground does not change the result.

Other matters

264 In its written submissions, Multiplex further relied on the fact that, even if Façade was successful in obtaining summary judgment, the circumstances of the case weighed heavily in favour of a stay being granted. Façade put forward a number of arguments as to why this was not the case. Having regard to the conclusions that we have reached on the grounds of appeal, it is not necessary for us to consider this issue.

Conclusion

265 Façade's proposed grounds of appeal raised a number of substantial questions concerning the construction of the BCISP Act and its interaction with the *Corporations Act*. We would therefore grant leave to appeal in respect of grounds 1–5 and 7. We dismiss the appeal in respect of those grounds. We refuse leave to appeal on ground 6, as that ground did not have a real prospect of success.[288] It is unnecessary for us to decide ground 8.

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287 [2008] FCA 1248 [29].

288 *Supreme Court Act 1986* s 14C.

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