

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

COMPANIES JURISDICTION

HBM ACTION NO. 36 OF 2020

IN THE MATTER of a **Statutory Demand** dated 07th August 2020 issued by **ONCALL CRANE (FIJI) LTD**

A N D

IN THE MATTER of an application by **SEAROAD SHIPPING PTE LIMITED** for an Order setting aside the **Statutory Demand** dated 7th August 2020 pursuant to Section 516 of the Companies Act 2015.

BETWEEN : **SEAROAD SHIPPING PTE LIMITED** a limited liability company having its registered office at 211 Ratu Sukuna Road, Suva, Fiji.

APPLICANT

A N D : **ON CALL CRANES (FIJI) LIMITED** a limited liability company having its registered office at ¾ Leonidas Street, Lautoka, Fiji.

RESPONDENT

Appearances : **Mr. Simone Valenitabua for the applicant**
Mr Iqbal Khan for the respondent

Hearing : **Monday, 05th October, 2020 at 2.30pm**

Decision : **Friday, 11th December, 2020 at 9.00am**

DECISION

[A] INTRODUCTION

- (01) By application filed on 28-08-2020, the applicant, Searoad Shipping Pte Limited, [SSL] seeks to set aside a Creditor's Statutory Demand issued by On Call Cranes (Fiji) Ltd [OCC] dated 07-08-2020. The Demand stated that the 'SSL' owed 'OCC' the amount of \$158,000.00 described as follows;

*The sum of \$158,000.00 [One Hundred and Fifty Eight Thousand Dollars] being the amount due and owing by **SEAROAD SHIPPING PTE LTD** to **ON CALL CRANES (FIJI) LTD** in respect to dishonoured cheque No. 893907, 893905 and 893908, particulars of which are well known to **SEAROAD SHIPPING PTE LTD.***

- (02) "SSL" contends that there is a genuine dispute as to the relevant debt for the purpose of Section 517(1)(a) of the Companies Act, 2015 and also relies on a off-setting claim for the purpose of Section 517(1)(b) of the Companies Act for the application to set aside the Demand.
- (03) The application is opposed by the Respondent Company.
- (04) The parties have filed two (02) affidavits for consideration. They are;
- (A) The affidavit of Mr George Patterson, the Managing Director of the applicant company, in support, sworn on 20-08-2020.
 - (B) The affidavit of Mr Rahmat Ali, the Director of the respondent company, in opposition, sworn on 03-09-2020.

[B] THE LAW

- (01) Under Section 515(a) of the Companies' Act, 2015, a Company must be deemed unable to pay its debts
- (a) *If a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000.00 or such other prescribed amount then due, has served on the company, by leaving it at the registered office of the Company, a demand requiring the Company to pay the sum so due (Statutory Demand) and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the Creditor within 3 weeks of the date of the Notice.*

(b)

(i)

(ii)

(02) An application under Section 516 to set aside a statutory demand must be made on one or more of the following grounds;

(i) 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; [Section 517(1)(a)].

(ii) That the Company has an off-setting claim. [Section 517(1) (b)].

(iii) That because of a defect in the demand, substantial injustice will be caused unless the demand is set aside. [Section 517(5)(a)]

or

(iv) There is some other reason why the demand should be set aside. [Section 517(5)(b)].

(03) An order setting aside the demand will render the demand of no effect.[Section 518].

[C] **CONSIDERATION AND THE DETERMINATION**

(01) The applicant is a registered company formed to provide barging services within Fiji and the Pacific Region to cater exclusively for the increased demand for carriage of bulk and break-bulk cargos.

(02) The applicant had purchased a crane from the respondent for the sum of \$220,000.00 in mid-December, 2019 on credit. On the 14th February, 2020 the applicant had given four post-dated cheques totaling \$220,000 towards the purchase price.

PARTICULARS

(a) The first payment was made by the applicant on the 14th February, 2020, for the sum of \$50,000.00 by HFC Cheque No. 893905 which was dishonoured on 19th February, 2020 and;

(b) The second payment was made by the applicant on the 20th March, 2020 for the sum of \$50,000.00 which was cleared;

- (c) The first payment of \$50,000.00 received on the 14th February, 2020 was re-banked 30th March, 2020 which was again dishonoured on the 1st April, 2020;
- (d) The third payment was made by the applicant on the 17th April, 2020 for the sum of \$70,000.00 by HFC Cheque No. 893907 which was dishonoured on 21st April, 2020; and
- (e) The fourth payment was made by the applicant on the 22nd May, 2020 for the sum of \$50,000.00 by HFC Cheque No. 893908 which was dishonoured on 26th May, 2020;

[Annexure “RA-1” are copies of the said dishonoured HFC cheque nos. 893907, 893905 and 893908].

- (03) The debt is said to arise in respect of the dishonoured HFC cheque numbers 893907, 893905 and 893908. All three post-dated cheques were dishonoured by the bank with the endorsement “refer to drawer”.
- (04) The applicant says that it stopped payments because the crane was not of merchantable quality and there were defects in the crane supplied by the respondent. In support of this allegation, the applicant produced in evidence the followings;
 - Land Transport Authority defect order dated 25-08-2020.
 - Defect list compiled by Mr Joseph Albert, Tow Master dated 28-05-2020.
 - Crane report break down from 31-01-2020 to 28-03-2020.
- (05) In particular, the defect list compiled by Mr Joseph Albert, dated 28-05-2020 says;

Thursday 28 May 2020

On Call Crane – Defect List

1. *Need all side mirrors*
2. *Lights needs to be fixed in general*
3. *Air leaking badly as it takes a lot of time to fill air and after few brakes air Drops*
4. *Oil leaks from some pump fitting and hydraulic hose needs to be changed*
5. *Lifting pump needs to be serviced*
6. *All controls needs to be operation from inside cabin as stabilizer controls are operated from outside (inside one not in operation)*
7. *The stabilizer control needs to be checked and fixed properly as it is by passing, at present works with very high rep speed*

8. Oil, air, temperature gauges not working
9. 2 tyres need to be changed.
10. The main lifting crane is not working as it seems like the drum is locked.
11. Only auxillary fly lifting crane working which can lift 2-3 ton.

Notes

- 1 tyre almost deflated
- Only 2 x 1.2 ton bulka bags can be lifted per move

*(sgd) Joseph Albert
Tug/Tow Master
28.05.2020*

(06) In reply, the respondent says;

- The applicant did not at any point in time complained or raised any issues in relation to the merchantable quality of the crane supplied by the respondent.
- After the service of the Statutory Demand, the applicant in compliance, made two payments to the respondent. (The respondent adduced no evidence)

Whether a genuine dispute is established for the purposes of Section 517(1)(a) of the Companies Act, 2015?

(07) Section 517(1)(a), of the *Companies Act* provides that a creditor's statutory demand may be set aside when the Court is satisfied that there is a genuine dispute about the existence or amount to which that demand relates. The concept of a "genuine dispute" is well established in the case law. That test has been variously formulated as requiring that the dispute is not "plainly vexatious or frivolous" or "may have some substance" or involves "a plausible contention requiring investigation" and is similar to that which would apply in an application for an interlocutory injunction or a summary judgment¹: In *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd*², the Full Court of Federal Court held, a "genuine dispute" must be bona fide and truly exist in fact, and the grounds for that dispute must be real and not spurious, hypothetical, illusory or misconceived.

¹ *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1999] VicRp 61; [1994] 2 VR 290; (1993) 11 ACSR 362; *Eyota Pty Ltd v Hanave Pty Ltd* [1994] 12 ACSR 785 at 787; *Re UGL Process Solutions Pty Ltd* [2012] NSWSC 1256

² [1997] FCA 681; (1997) 76 FCR 452 at 464; [1997] FCA 681; (1997) 24 ACSR 353

- (08) In *CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd*³, Barrett J helpfully summarized the principle as follows:

“The task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found, upon the hearing of its s 459G application, that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that on rational grounds indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.”

- (09) In *Roadships Logistics Ltd v Tree*⁴, Barrett J similarly observed that:

“Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor on rational grounds that indicates an arguable case on the part of the company it must find that a genuine dispute exists even where any case, even apparently available to be advanced against the company seems stronger.”

- (10) In *MNWA Pty Ltd v Deputy Commissioner of Taxation*⁵

The Commissioner has rights and duties in relation to the recovery of taxation liabilities of taxpayers, including those available under Pt 5.4 of the Corporations Act. But, that does not mean that he is free to resort to those despite having promised, or made representations to, or entered into an arrangement with, a taxpayer that he would proceed differently, as a result of which the taxpayer altered his, her or its position. The question of whether a contract or an arrangement was made and, if so, on what terms or whether the Commissioner, in fact, acted “in good faith” in accordance with cl 5.3 in the three deeds or for an improper purpose or unconscientiously, in my opinion, was one that, in the circumstances, could only be resolved in other substantive proceedings and not in the applications under s459G.

[Emphasis mine]

³ [2003] NSWSC 728; (2003) 47 ACSR 100

⁴ [2007] NSWSC 1084; (2007) 64 ACSR 671

⁵ [2016] FCAFC 154, Rares J

- (11) It is important to remember that the threshold criteria for establishing the existence of a genuine dispute to the debt is a low one.
- (12) In *Fitness First Australia Pty Ltd v Dubow*⁶, the Court dealt with an application under section 459G of the Corporations Act 2001 (Cth) which is identical in terms to section 516 of our Companies Act 2015. Ward J stated;

.....the court does not determine the merits of any dispute that may be found to exist, but simply whether these [sic is such a dispute and the threshold for that is not high. In Edge Technology Pty Ltd v Lite-on Technology Corporation [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J said at [45]]:

The threshold presented by the test to set aside a statutory demand does not however require of the plaintiff a rigorous and in-depth examination of the evidence relating to the plaintiff's claim, dispute or off-setting claim.....Hayne J in Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] Vic Rp 61; [1994] 2 VR 290.

- (13) In *Eyota Pty Ltd v Hanave Pty Ltd*⁷, McLelland CJ explained that “genuine dispute” means:

....a plausible contention requiring investigation, and raises much of the same sort of considerations as the “serious question to be tried” criterion which arises on an application for an introductory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to genuine dispute, every statement in an affidavit “however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be not having “sufficient prima facie plausibility to merit further investigation as to its [truth]” (cfEng Me Young v Letchumanan [1980] AC 331 at 341), or “a patently feeble legal argument or an assertion of fact unsupported by evidence”: cfSouth Australia v Wall(1980) 24 SASR 189 at 194.

But it does mean that, except in such an extreme case[i.e. where evidence is so lacking in plausibility], a court required to determine whether there is a genuine dispute should not embark upon an enquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute..... In Re Morris Catering Australia it was said the essential task is relatively simple – to identify the genuine level of a claim....

⁶ [2011] NSWSC 531

⁷ (1994) 12 ACSR 785; (1994) 12 ACLC 669

- (14) In Fitness First (supra) at 127, Ward J cited Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)⁸ saying:

Barret J noted that the task faced by a company challenging a statutory demand on genuine dispute grounds is by no means a difficult or demanding one – a company will fail in its task only if the contentions upon which (sic) seeks to rely in mounting the challenge are so devoid of substance that no further investigation is warranted. The court does not engage in any form of balancing exercise between the strengths of competing contention. If there is any factor that on reasonable grounds indicates an arguable case it must find a genuine dispute exists even where the case available to be argued against the company seems stronger.

[Emphasis mine]

And later, at 132:

A genuine dispute is therefore one which is bona fide and truly exists in fact and that is not spurious, hypothetical, illusory or misconceived. It exists where there is a plausible contention which places the debt in dispute and which requires further investigation. The debt in dispute must be in existence at the time at which the statutory demand is served on the debtor (*Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd [1997] FCA 681; (1997) 76 FCR 452; Eyota*).

- (15) What is the basis of the asserted dispute as to the existence of the debt? Mr George Patterson in his affidavit in support deposed that; (Reference is made to paragraph (5), (6) and (7) of the affidavit).
- (5) *SSL has an offsetting claim against the defendant for special damages and general losses to be assessed in excess of the plaintiff's statutory demand amount, for negligent supply of equipment not of merchantable quality adequate to service the plaintiff's vessel for the purpose it was hired for. The plaintiff had to hire alternative means of carnage due to substantial defects noted in the crane supplied by the defendant. The defendant acted irresponsibly, unreliably and in a dubious manner by supplying crane it knew or ought to have known to be defective and not fit for purpose. A copy of a bundle of documents that the plaintiff will rely on at the hearing of this application containing records of defects, down times, orders issued by the Land Transport Authority and log of timelines is appended hereto marked "A3".*
- (6) *The defendant had neither supplied proper fit for purpose crane in a competent, responsible and non-negligent manner, nor assigned its mechanics or engineers to repair the crane in a timely manner*

⁸ [2003] NSWSC 896

therefore the plaintiff says that it should not comply with the Statutory Demand.

(7) *The plaintiff validly disputes the defendant's statutory demand and I am advised by my solicitors believing the same to be true that it would be prudent that the defendant commences civil proceedings against the plaintiff for its claims and consequently the defendant will be given an opportunity to counterclaim for losses and damages caused as pleaded above due to incompetence, negligence and inadequate crane supplied by the defendant by itself, its servants and/or agents causing loss and damage to the plaintiff.*

(16) In reply, Mr Rahmat Ali deposed in his affidavit in opposition. (Reference is made to paragraph (5), (7), (8) and (11) of the affidavit).

(5) ***THAT*** *I further put the plaintiff to strict proof of the allegations so pleaded and further state that, on the 30th day of June, 2020, a notice of Winding Up to the sum of \$170,000.00 was served on the plaintiff to which the plaintiff proceeded to make the following payments;*

(a) *A sum of \$25,000.00 by BSP cheque number 001589 given on the 8th July, 2020 which became dishonoured on the 13th July, 2020; Annexed hereto marked with annexure "RA-2" are copies of the said dishonoured BSP cheque no. 001589.*

(b) *A sum of \$12,000.00 by WBC cheque number 998738 given on the 22nd July, 2020 which became dishonoured on the 23rd July, 2020; Annexed hereto marked with annexure "RA-3" are copies of the said dishonoured WBC cheque no. 008738.*

(c) *A further sum of \$12,000.00 on the 24th July, 2020 which was cleared.*

(7) ***THAT*** *as to paragraph 5 of the said Affidavit in Support, I deny all the allegations contained therein and I further say that the allegations therein are false and misleading and deceptive and I put the plaintiff to strict proof of the allegations pleaded herein and further say:*

(a) *The plaintiff was satisfied with the result of all the tests that were carried out on the crane;*

(b) *That once the plaintiff agreed to the result of the tests, the crane was delivered accordingly in mid-December, 2019;*

(c) *That before the crane was delivered to the plaintiff, it was tested by the plaintiff with all hydraulics and lifting capacities,*

he was fully satisfied as to the fitness and excellent condition of the said crane. After approving and being satisfied the defendant delivered the said crane to the plaintiff which was fully accepted by the plaintiff. The said crane was delivered by the defendant as requested by the plaintiff to Natovi jetty.

(d) *That thereafter the plaintiffs, then loaded the said crane on a barge and it was taken to Kiribati, where the plaintiff and a contract to perform under the Australian Aid Programme.*

(e) *The plaintiff had in their possession the said crane since mid-December, 2019.*

(8) ***THAT** further to our paragraph 7 of this Affidavit in Support, I say that the defendant had acted in a good faith, responsible and reliable during the sale of the crane. The plaintiff had never complained about any defects of the crane to the defendant whilst making any payments.*

(11) ***THAT** as to paragraph 7 of the said Affidavit in Support, I deny the allegations contained therein and further state that as to my knowledge the plaintiff did not at any point in time complained or raised any issues in regards to the defects until such time the first Statutory Demand was served on them. I further say that the plaintiff's application is frivolous, vexatious and scandalous and abuse of process to defeat the defendant's genuine claim.*

(17) To counter this, the applicant adduced no evidence. The applicant filed no affidavit in reply. Mr Rahmat Ali's evidence was not challenged by the applicant. The applicant did not file an answering affidavit to the affidavit in opposition of Mr Rahmat Ali. In that context, I would prefer to adopt the robust approach of the court of appeal in "*Jay Prakash v Savita Chandra*"⁹ and allow my doubts to be submerged. In the court of appeal Judgment in "*Jay Prakash v Savita Chandra*" it was held;

"Of course he did have to respond in our view the cause of events have taken and the consequences, if did not respond, rendered it as matter of prudence that he should reply if indeed he had a reply. And in the circumstances of the case in the absence of a reply, we hold the inference inescapable what the respondent had said to be true."

On the strength of the rule of law enunciated in the aforementioned judicial decision, (as I understand the last words), it is enticing to accept the evidence of the respondent in toto.

⁹ Civil Appeal No. ABU 0037/1985

- (18) A genuine dispute as to the existence of the debt must exist at the time of service of the statutory demand¹⁰.
- (19) **It is apparent that the applicant has never notified the respondent the alleged defects in the Crane supplied by the respondent. Even, after receiving the statutory demand the applicant has never notified the respondent the alleged defects in the crane supplied by the respondent. I fail to see a correspondence with a date prior to the service of the Statutory Demand or after the service of the Statutory Demand which evinces that the debt was in dispute. Till to date, there is no correspondence which evinces that the applicant has raised issues with the respondent in respect of the merchantable quality of the Crane supplied by the respondent. This is some evidence of the lack of bona fides in the applicant's claim that there is a genuine dispute to the debt which requires investigation.**
- (20) In the result, it is sufficient for me to say that there is no plausible argument to be made for the applicant's contention. To put it another way, the applicant's case is hypothetical, illusory or misconceived¹¹. I am not satisfied that there is a genuine dispute between the applicant and the respondent about the existence or amount of the debt to which the demand relates.

Whether the applicant has an off-setting claim

- (21) Off-setting claim means a claim that the applicant company has against the respondent by way of counter-claim, sett-off or cross demand.
- (22) The alternative basis for the demand to be set aside or reduced by reason of an off-setting claim involves a different test. The question is not whether there is a genuine dispute against the off-setting claim. The question is rather whether the off-setting claim can be shown to be "not frivolous or vexatious". **Edge Technology Pty Ltd v Lite on Technology Corporation**¹².
- (23) It must be borne in mind that in an application to set aside the statutory demand, that it is the debt the subject of the statutory demand to which the genuine dispute must relate. However, if in addition, (or instead) an off-setting claim is relied on to reduce or eliminate the amount claimed under the statutory demand, then it is the genuineness of that off-setting claim that matters, not the genuineness of the dispute about that claim.
- (24) The raising of an off-setting claim, unlike the raising of a genuine dispute in respect of a debt, does not in any way challenge the existence of the debt, and **in fact concedes it**. A

¹⁰ **Fitness First Australia Pty Ltd v Dubow (2011) NSWSC 531**
Spencer Constructions Pty Ltd v GAM Aldrige Pty Ltd (1997) FCA 681; (1997) 76 FCR 452

Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785

¹¹ **Panel Tech Industries (Australia) Pty Ltd v Australian Equipment Pty Ltd (No.2) (2003) NSWSC 896**

¹² **(2000) NSWSC 471**

contention that a debt does not exist is not a counter-claim, set-off or cross-demand. Such a contention denies the debt, whereas a counter-claim, set-off or cross-demand **admits it**, but asserts that there is a countervailing liability.

- (25) What concerns me in these proceedings is whether the applicant has shown a genuine offsetting claim for the purposes of Section 517(1)(b) of the Companies Act, 2015. The applicant says that it does have such an offsetting claim and that the amount of that claim exceeds the amount of the Statutory Demand so that the Statutory Demand should be set aside. Mr George Patterson, in paragraph (5) of the affidavit in support deposed that;

*SSL has an offsetting claim against the defendant for special damages and general losses to be assessed in excess of the plaintiff's statutory demand amount, for negligent supply of equipment not of merchantable quality adequate to service the plaintiff's vessel for the purpose it was hired for. **The plaintiff had to hire alternative means of carnage due to substantial defects noted in the crane supplied by the defendant.** The defendant acted irresponsibly, unreliably and in a dubious manner by supplying crane it knew or ought to have known to be defective and not fit for purpose. A copy of a bundle of documents that the plaintiff will rely on at the hearing of this application containing records of defects, down times, orders issued by the Land Transport Authority and log of timelines is appended hereto marked "A3".*

[Emphasis added]

- (26) The applicant has not provided any evidence to the effect that he had to hire alternative crane due to the substantial defects in the crane supplied by the respondent.

The real difficulty in this case is this; what is the amount of the applicant's alleged offsetting claim. A claim for the purpose of Section 517(1) (b) of the Companies Act, 2015 can encompass both a claim for a liquidated sum, such as a contract debt, and a claim for unliquidated damages. Where the case involves a claim for a liquidated sum, the application of Section 517 is relatively easy. The court simply determines whether the cause of action is a genuine one, and if that proves to be the case the amount of the offsetting claim is the amount of the liquidated sum the subject of that claim.

- (27) The position is by no means as easy where the claim is a claim for unliquidated damages and the damages are said to be economic loss suffered by the applicant.
- (28) In the case before me, the claim is a claim for unliquidated damages and the damages are said to be economic loss suffered by the applicant.

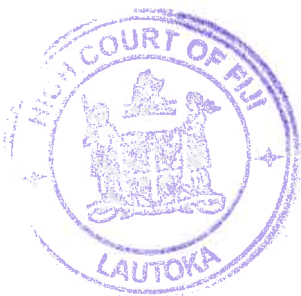
The applicant alleged that the crane it purchased from the respondent was defective. The applicant says that the crane was not of merchantable quality or that it was not fit for its known purpose.

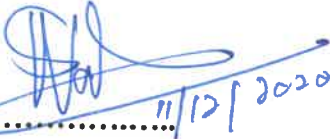
- (29) The applicant had purchased the crane from the respondent in mid-December 2019. The fault was diagnosed on 19.03.2020. The applicant buyer has never notified the respondent regarding the alleged defect in the crane. The applicant has never informed the respondent that it regarded the crane as not being of merchantable quality and that they are rejecting the crane. As I said earlier, the applicant purchased the crane from the respondent in mid-December 2019. A reasonable time has lapsed. I fail to see a correspondence between the parties with a date prior to the service of the Statutory Demand i.e., 07-08-2020 or after the service of the Statutory Demand which evinces that the defect of the crane was complained of. Till to date, there is no correspondence which evinces that the applicant has raised issues with the respondent in respect of the merchantable quality of the Crane supplied by the respondent. The applicant has retained the crane without intimating to the respondent that it is rejecting the crane and sending it back. The applicant deemed to have accepted the crane. Merchantability is to be tested by reference to the condition of the crane at the time of the delivery. In practice, whether the crane was of merchantable quality only arises when, after accepting delivery, the applicant buyer becomes aware of some defect. To that extent, therefore, there will always be an element of latency in any particular defect which is the subject of a claim for rescission. After lapse of reasonable time, the buyer applicant has retained the crane without intimating to the seller respondent that it has rejected the crane. In the circumstances, I consider that the applicant must be deemed to have accepted the crane.
- (30) Furthermore, the applicant has not provided evidence to the effect that it had to hire alternative crane due to the defects in the crane supplied by the respondent. To make matters worse, there is not a word in the applicant's affidavit regarding the amount of the applicant's alleged offsetting claim. The applicant has not put forward a calculation showing that it has suffered an economic loss arising out of the respondent's failure to supply a merchantable crane. The claim made by the applicant was one that was not quantified and all this seem rather strange. How could this court consider what was the amount of the offsetting claim? The applicant has not filed a statement of claim in court commencing proceedings against the respondent for the cause of action presently known to it arising out of the subject matter of the respondent's Statutory Demand and the matters referred to in the applicant's supporting affidavit. The court should be in a position to form some view of the strength of the applicant's claim if the applicant has adduced some evidence and filed a statement of claim to demonstrate that it does have a genuine claim. The applicant has not adduced evidence to enable the court to identify the basis upon which it claims economic loss and the means by which it calculates the economic loss. The alleged economic loss, of course, cannot be determined unless an exercise is done showing what costs and expenses have been incurred by the applicant in hiring an alternate crane. No such exercise is in evidence. No evidence has been adduced by the applicant to enable the court to quantify any amount as being a genuine amount in respect of the total loss said to arise by reason of the respondent's delivery of the crane which had allegedly failed to meet the conditions of merchantability and fitness for its purpose implied by section 16 of the Sale of Goods Act, 1979.

- (31) The “amount of the claim” means the amount claimed in good faith, so long as that claim is not fictitious or merely colourable. See, **Kimel v Missouri State Life Insurance Co**¹³. In my opinion, a genuine offsetting claim for the purposes of section 517(1)(b) of the Companies Act, 2015 means a claim on a cause of action advanced in good faith, for an amount claimed in good faith. “Good faith” means arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful. In a claim for unliquidated damages for economic loss, the court will not be able to determine whether the amount claimed is claimed in good faith unless the applicant adduces some evidence to show the basis upon which the loss is said to arise and how that loss is calculated. Neither calculation nor particulars are set out by the applicant. No such exercise is in evidence. The applicant has not put forward a calculation showing that it has, at the very least, suffered a loss arising out of the respondent’s delivery of the crane which had allegedly failed to meet the conditions of merchantability and fitness for its purpose implied by section 16 of the Sale of Goods Act, 1979.
- (32) Since such evidence is entirely lacking, the court cannot find that there is a genuine offsetting claim for the purpose of Section 517(1)(b) of the Companies Act, 2015. In my view, a ‘claim’ for the purpose of Section 517(1)(b) means not just a cause of action. A genuine cause of action for unliquidated damage is not shown by the applicant.

ORDERS:

- (1) The application to set aside the creditor’s statutory demand is declined.
- (2) I formally dismiss the summons filed on 28-08-2020 with costs in favour of the respondent.
- (3) I award costs of the application to the respondent summarily assessed in the sum of \$1,000.00.




.....
Jude Nanayakkara
[Judge]

High Court - Lautoka
Friday, 11th December, 2020

¹³ 71F (2d) 921 at 924