

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

COMPANIES ACTION NO. HBM 02 OF 2020

IN THE MATTER of a Statutory Demand dated 27 January 2020 taken out by **Lal Patel Bale Lawyers** (“the Respondent”) against **Emei Capital Limited** (“the Applicant”) and served on the Applicant on 27 January 2020.

AND

IN THE MATTER of an application by the Applicant for an Order setting aside the Statutory Demand pursuant to **Section 516 of the Companies Act**.

BETWEEN : **EMEI CAPITAL LIMITED** a limited liability Company having its registered office at 14 Marina Point, Denarau, Nadi.

APPLICANT

AND : **LAL PATEL BALE LAWYERS** situated at Suite 1, Level 1, 11 Namaka Lane, Nadi, Fiji.

RESPONDENT

Appearances : Mr R. Singh with Ms A. Swamy for the applicant
Mr I. Tikoca for the respondent

Date of Hearing : 16 July 2020

Date of Ruling : 27 July 2020

R U L I N G

[setting aside a statutory demand]

Introduction

- [01] This is an application made under section 516 of the Companies Act (*“the Act”*) for setting aside a statutory demand.
- [02] By its application supported with the affidavit of Jacinta Tupou Chong Ravai sworn and filed on 17 February 2020, EMEI CAPITAL LIMITED (*“ECL”* or *“the applicant”*) seeks to set aside the statutory demand notice against it in the sum of \$90,497.77.
- [03] The application is resisted by Lal Bale Patel Lawyers (*“the respondent”*). The respondent has filed an affidavit of Renee Devina Sina Lal in opposition sworn on 1 July 2020 and filed on 2 July 2020.
- [04] At the hearing, both parties orally argued that matter, and they have filed their respective written submissions as well.

Background

- [05] The applicant engaged the respondent to represent it in Civil Actions HBC 252/17 and HBC 253/17. The parties signed the Terms of Engagement dated 26 December 2017 (*“ToE”*). The ToE states:
- i. Winding up proceedings to be stayed and setting aside of statutory demand discounted fees as discussed \$15,000.00 + vat & disbursements.*
 - ii. Defence of the High Court Civil Action 252 of 2017 – discounted fees as discussed \$45,000.00 + vat & disbursements.*
 - iii. Defence of the High Court Civil Action 253 of 2017 – discounted fees as discussed \$45,000.00 + vat & disbursements.*
 - iv. Stay of current proceedings – fee waived as discussed.*
 - v. Caveat Registration – agreed fees \$2,555.00 + vat and disbursement as discussed.*

vi. Injunction application – agreed fees \$37,545.00 + vat and disbursements.

- [06] The total cost under the ToE agreed between the parties was \$145,100.00 + vat and disbursements.
- [07] The applicant has paid the full sum under the ToE in the sum of \$111,531.08 being legal cost with vat and disbursements.
- [08] Dispute arose between the parties about the fees chargeable under the ToE. The applicant challenged that the sum of \$40,514.85 was not part of the ToE. A clause of the ToE runs as follows:

“We note that the parties agree that should this matter be settled prior to the filling of a statement of defence in Civil Action Nos. 252 and 253 then only the retainer listed below shall be chargeable. In the event that these matters proceed the fixed fees quoted above are chargeable”.

- [09] The respondent issued the statutory demand notice against the applicant in the sum of \$90,497.77. Thereafter, the applicant had paid the undisputed sum of \$49,928.92, which was under the fee agreement between the parties. The applicant disputes the balance sum of \$40,568.85 on the ground that it was not agreed under the fee agreement. The applicant applies to this court to have the statutory demand notice set aside.

Legal framework

- [10] Section 516 of the Companies Act 2015 (“Com Act”) provides:

“516 (1) A company may apply to the court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

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

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

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

[11] Section 517 of the Com Act states:

“Determination of application where there is a dispute or offsetting claim

517 (1) This section applies where, on an application to set aside a statutory demand, 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.

(2) The court must calculate the substantiated amount of the demand.

(3) If the substantiated amount is less than the statutory minimum amount for a statutory demand, the court must, by order, set aside the demand.

(4) If the substantiated amount is at least as great as the statutory minimum amount for a statutory demand, the court may make an order—

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(5) The court may also order that a demand be set aside if it is satisfied that—

(a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or

(b) there is some other reason why the demand should be set aside.”

[12] Section 79 of Legal Practitioners Act 2009 (“LP Act”) says:

79 (1) Every practitioner shall be entitled to sue for and recover the practitioner’s costs pursuant to any agreement made in accordance with the provisions of this Part, or in the absence of such agreement in accordance with the schedules of fees

established by regulation pursuant to this Part, together with any proper disbursements, in respect of services rendered whether as a legal practitioner.

(2) It shall not be necessary for a practitioner to have such costs taxed prior to instituting proceedings for recovery of those costs. In the absence of taxation no claim may be made by the practitioner for any costs which are, pursuant to such agreement or the appropriate schedule of fees, as the case may be, left to the discretion of the taxing officer.

The issues

[13] The issues raised in this application include:

- (i) Whether the applicant has *locus* to institute this setting aside application.
- (ii) If the applicant has *locus* to institute this setting aside application against the respondent, whether the setting aside application is in compliance with section 516 of the Companies Act 2015.
- (iii) If the applicant's setting aside application is in compliance with section 516 of the Companies Act 2015, is there a genuine dispute of debt or an offset claim requiring the setting aside of the statutory demand under section 517 of the Companies Act.

Discussion

Locus issue

[14] The respondent raises a preliminary issue that the applicant has no *locus* to make an application to set aside the statutory demand notice in that it is submitted that: all evidence before the Court in support of the setting aside application through the Ravai affidavit has been by Emei Capital Investment Limited who has not engaged nor demanded by the respondent as required by statute.

[15] The Com Act, 516 (1) says that a company may apply to the Court for an order setting aside a statutory demand served on the company.

- [16] It is true that a company that has been served with a statutory demand could apply to the court to set the statutory demand.
- [17] In this instance, the statutory demand was served on Emei Capital Limited. The application is made by Emei Capital Limited. The caption of the application states so. However, the issue raised by the respondent was that the authority to Ravai (who has sworn the affidavit in support on behalf of the applicant company) to swear the affidavit in support has been given by Emei Capital Investments Limited on its letterhead.
- [18] This objection was not taken by the respondent until the hearing on 16 July 2020, albeit the application was served on 3 March 2020. The respondent has raised the objection on the hearing day after responding to the affidavit and after taking step. The respondent had accepted the payment of undisputed debt subsequent to this application. Further, the respondent had also received payments from Emei Capital investment Limited before filing this application.
- [19] The respondent did not make any application to strike out the affidavit if it is defective, before the hearing and before taking steps in the proceedings. Since the respondent had acted upon, they had waived their right to raise that objection based on defective affidavit. I would, therefore, reject the preliminary issue raised in respect of *locus* of the application to make this application.

Service out of time

- [20] Another objection raised by the respondent was that the application was served out of time.
- [21] The Companies Act, 516(2), states that an application may only be made within 21 days after the demand is so served, and subsection 3 of that section sets out that an application is made in accordance with this section only if, within those 21 days (a) an affidavit supporting the application is filed with the Court; and (b) a copy of the application, and a copy of the supporting affidavit on the person who served the demand on the company.
- [22] It is to be noted that section 516 requires that the application to set aside a statutory demand is to be made and served within 21 days after the demand is so served.

- [23] The statutory demand was served on the applicant company on 28 January 2020. The applicant company filed its application with an affidavit supporting the application on 17 February 2020. It was issued by the court registry on 18 February 2020. However, the application was served on the respondent on 3 March 2020.
- [24] It is not in dispute that the application to set aside together with the supporting affidavit was filed within 21 days.
- [25] The statutory demand was served on the applicant on 28 January 2020. The 21 day time limit for service of the application on the respondent expired on 18 February 2020. The applicant served the application on 3 March 2020, which is 13 days out of time after expiration of 21 day time limit.
- [26] The respondent submits that the applicant has served their application for setting aside the statutory demand out of time and accordingly their application should be struck out for non-compliance with the prescribed statutory requirements.
- [27] The applicant company explains the reason why it was served on the respondent out of time as follows:
- i. *As to the issue of the application being served out of time, this Honourable Court would note from the Court record, that the application was filed within 21 days period as per Section 516 of the Companies Act 2015. However, the said application was only issued and released to the Applicant's solicitors on 18 February 2020, which was placed in the applicant's solicitors city agents folder and the applicant's solicitors were never informed that the application has been issued and is listed for 21 February 2020.*
 - ii. *The said application was set for first call on 21 February 2020, before the Master of the High Court and as per the Court record this Honourable Court would note that the Master of the High Court did not sit on the said day and neither there was any appearance by the applicant or the applicant's solicitors on the said date and the matter was adjourned to 17 March 2020, by the High Court.*
 - iii. *The applicant's solicitors only became aware of the application being called, after 21 February 2020. Thereafter, the applicant's solicitors was only able to re-date*

the application after the Court registry approved on the letter dated 26 February 2020, requesting for the re-date of the application as Master of the High Court did not sit on the said date and there were no directions for the re-date of the application.

- iv. That upon the re-date of the application for 17 March, 2020 and release of the application from the registry the said application was served on the respondent on 3 March 2020.*
- v. On 17 March 2020, the respondent raised the issue of late service and the Master of the High Court gave time to applicant to advise the court on the said issue and the matter was adjourned. Thereafter the matter was called before Justice Nanayakkara and this Honourable Court will note again from the Court record that the respondent raised the said issue however failed to file any application under Order 2 Rule 2 of the High Court Rules.*
- vi. The applicant's solicitors on the same day explained to the High Court as the reasons why the service was not done with 21 days and thereafter Justice Nanayakkara had confirmed to both the parties that the service was no more an issue in this application.*
- vii. However, the respondent is still raising the said issue that due to service been out of time, the application should be struck out.*

[28] When the matter was first called on for hearing on 2 July 2020, Ms Swamy counsel for the applicant informed the Court that late service would not be an issue and that Justice Nanayakkara had confirmed to both parties that the service was no more an issue in this application. Further, she sought further 14 days to sort out the matter as the applicant had paid the undisputed debt of \$49,982.92. This was not objected to by Mr Tikoca counsel for the respondent. Accordingly, the vacated the hearing, allowed the respondent to file and serve an affidavit in response before 3.30 pm that day (2 July 2020), granted 7 days thereafter to the applicant to file and serve an affidavit in reply, if necessary and adjourned the hearing till 16 July 2020.

- [29] The respondent did not file an affidavit in response until the hearing on 2 July 2020. If there was no adjournment of the hearing on 2 July 2020, the respondent would not have had an opportunity to file their affidavit in response.
- [30] It will be noted that on 2 July 2020, the respondent did not indicate that they would be raising the issue out of time.
- [31] The conduct the respondent clearly demonstrates that they were not so serious of the late service. Otherwise, they would have filed a striking out application instead of concentrating on the settlement.
- [32] Therefore, I accept that the late service issue was sorted out before Nanayakkara J. I would, therefore, reject the second preliminary issue that the service was out of time.

Whether there is a genuine dispute of debt

- [33] The statutory demand issued against the applicant company was \$90,497.77 out of this the applicant has paid the undisputed sum of \$49,928.92 to the respondent after the service of the statutory demand and the proceedings were in progress.
- [34] The applicant disputes the balance sum of \$40,568.85 on the ground that it was not agreed under fee agreement. It appears that the applicant disputes the existence of debt of \$40,568.85.
- [35] The basic issue on this application is whether the applicant company has shown a strong enough case to persuade the Court to set aside statutory demand dated 27 February 2020 requiring payment of an alleged debt of \$40,568.85 (initially it was \$90,497.77 and after payment of the undisputed sum of \$49,928.92, leaving unsecured balance of \$40,568.85) served on the applicant by the respondent on 28 February 2020.
- [36] A company must be deemed to be unable to pay its debts, if a creditor 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 a statutory demand requiring the company to pay the sum so due 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 service (see Com Act, s.515(a)).

- [37] It follows that the respondent was entitled to seek to enforce payment of this unsecured debt by service of a statutory demand, which if unsatisfied would lead in due course of the presentation of a winding-up petition.
- [38] In the statutory demand, the respondent claimed that the applicant owed to them the sum of \$90,497.77 together with accrued interest there on being monies due and owing by the applicant for legal services on or about 28 May 2018 to 31 October 2019, by Lal Patel Bale Lawyers, the respondent.
- [39] The alleged debt represented the unsecured balance due under the ToE. The total amount under the ToE was \$145,000.00 plus vat and disbursements.
- [40] It is no longer in dispute that the total sum under the ToE has been fully paid by the applicant.
- [41] The real issue arises out of the settlement instructions. The respondent contended that the settlement instructions were beyond the ligation instructions which were for fixed fees and understood these were additional fees as outlined in the ToE.
- [42] The applicant, on the other hand, argued that the cost [fee] for settlement including preparation of deed of settlement and attending meetings were part of the ToE and it has been fully paid.
- [43] The respondent had asked the applicant to pay the retainer sum of \$79,079.50 to attend the settlement and if the settlement is effected no further charges will be done, however if the settlement fails then the respondent will charge the fixed fees of \$145,000.00 plus vat and disbursements.
- [44] The burden lies on the applicant to establish the existence of a substantial dispute, and the test which the Court applies is similar to that on an application for summary judgment (see *Collier v P & MJ Wright Ltd* [2008] (WLR 643).
- [45] On application to set aside a statutory demand, the Court does not engage in any form of balancing exercise between the strength of competing contentions.
- [46] In *CGI Information Systems and Management Consultants Pty Ltd v APRA Pty Limited*, [2003] NSWSC 728, this case was recently cited by Mutunayagam, J in

Gurbachan Singh's Steel Mills Ltd v Export Freight Services (Fiji) Ltd, it was stated:

"... 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 section 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 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."

[47] Having considered all the materials and contentions presented before me by both parties, I find an arguable case on the part of the applicant company in relation to the alleged charges payable for attending the settlement meetings, and I am satisfied that statutory demand is genuinely disputed on the grounds which appear to me to be substantial and there is a genuine triable issue as to the existence and/or amount of the alleged debt.

Conclusion

[48] For the reasons I have given, I proceed to set aside the statutory demand dated 27 January 2020, served on the applicant company with summarily assessed costs of \$2,000.00 payable to the applicant company by the respondent.

Result

1. The statutory demand dated 27 January 2020, served on the applicant company is set aside.

2. The respondent shall pay the summarily assessed costs of \$2,000.00 to the applicant company.



M.H. Mohamed Ajmeer
27/7/20

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka

27 July 2020

Solicitors:

Patel & Sharma, Barristers & Solicitors for the applicant

Lal Patel Bale Lawyers for the respondent