

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

CIVIL ACTION No. HBM 16/2020

IN THE MATTER of CHALLENGE ENGINEERING PTE LIMITED

AND IN THE MATTER of an application for an order setting aside a statutory demand pursuant to s.516 Companies Act 2015

BETWEEN

CHALLENGE ENGINEERING PTE LIMITED a limited liability company having its registered office at 22 Sautamata Street, Lautoka

APPLICANT

AND

NAISOSO ISLAND BODY CORPORATE LIMITED a limited liability company having its registered office at R Patel Lawyers, Barristers and Solicitors, 77 Cakabou Road, Suva.

RESPONDENT

APPEARANCES : Mr K Patel for the Applicant
Ms P Low for the Respondent

DATE OF HEARING : 3 August 2020

DATE OF JUDGMENT : 14 August 2020

DECISION

1. This is an application under s.516 Companies Act 2015 to set aside a statutory demand served by Naisoso Island Body Corporate Limited on the applicant company Challenge Engineering Pte Limited.

The law

2. The relevant sections of the Companies Act dealing with statutory demands are sections 515-521 of the Act. These sections provide:

Definition of inability to pay debts

515 *Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed to be 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 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; or*
- (b) *if during or after a period of 3 months ending on the day on which the winding up application is made—*

- (i) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the Company is returned unsatisfied in whole or in part;
- (ii) a Receiver or Manager has been appointed, of Property of the Company was appointed under a power contained in an instrument relating to a Floating Charge on such Property; or
- (iii) it is proved to the satisfaction of the Court that the Company is unable to pay its debts, and, in determining whether a Company is unable to pay its debts, the Court must take into account the contingent and prospective liabilities of the Company.

Division 3—Application to Set Aside a Statutory Demand

Company may apply

- 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.

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.

Effect of order setting aside Statutory Demand

- 518** A Statutory Demand has no effect while there is in force an order setting aside the demand.

Dismissal of application

- 519** Unless the Court makes, on an application to set aside a Statutory Demand, an order setting aside the Statutory Demand, the Court is to dismiss the application.

Order subject to conditions

- 520** An order setting aside a Statutory Demand may be made subject to such conditions as the Court considers fit.

Costs where Company successful

- 521** Where, on an application to set aside a Statutory Demand, the Court sets aside the demand, it may order the person who served the demand to pay the Company's costs in relation to the application.

3. Where, as here, the application is based on an asserted dispute as to the amount said to be owed, the cases establish that the role of the court is not to decide the dispute, but rather, to determine whether there is one. If there is a genuine dispute as to the whole amount for which the statutory demand has been issued, or a claim by the company against the creditor which it is entitled to set off against the amount demanded, the demand should normally be set aside, leaving the parties to other avenues to resolve that dispute. If the dispute is as to part only of the amount demanded, as section 517(4) (supra) makes clear, the court should determine the substantiated (i.e. undisputed) amount owed, and vary the demand to that amount. In that case the varied demand will remain in effect as from the date that it was served, and may be relied on as the basis for a winding up petition.
4. It is clear that in deciding whether there is a 'genuine dispute' in terms of s517(1)(a) the court is not required to embark on an exploration of the merits of the respective parties' cases. In **Fitness First Australia Pty Ltd v Dubow** [2011] NSWSC 531 Ward J cited **Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)** [2003] NSWSC 896 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 [it] 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.

And in **Eyota Pty Ltd v Hanave Pty Ltd** (1994) 12 ACSR 785 McLelland CJ said on the same issue:

... 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 ...

This application

5. The application is dated 4 May 2020 (although it appears to have been filed in the High Court only on the 1st May 2020). In support the applicant has filed an affidavit dated 1st May 2020 by Suresh Bhai, a director of the applicant company. This refers to a statutory demand which was served on the applicant on 16 April 2020. The applicant has also filed affidavit evidence showing that the application to set the demand and the affidavit in support were served on the respondent company on 5 May 2020, i.e. within 21 days after the date of service of the statutory demand, in compliance with the strict time limits prescribed in section 516 Companies Act 2015.
6. The applicant here, Challenge Engineering Pte Ltd, owns 6 vacant lots (lots 1-5 and lot 29) in the residential development of Naisoso Island, near Nadi. As owner of the lots the applicant is a member of the respondent, Naisoso Island Body Corporate Ltd which is responsible for managing the development, and as such is liable for body

corporate levies/member contributions levied by the respondent on each of the lots. The member contributions payable by the applicant on the six lots owned by the applicant for the quarters commencing 1 July 2019, 1 October 2019 and 1 January 2020 totals \$123,722.34. There is no dispute about this calculation, but the applicant has failed to pay, hence the statutory demand for this amount, plus interest at 22.5% per annum for the time the member contributions have been overdue.

7. The applicant's explanation for non-payment, and the basis for its application to set aside the statutory demand, is that an arrangement was entered into whereby the developer of Naisoso, Relcorp (Fiji) Ltd, would keep/extend its sales and information office on lot 1 in return for:
 - i. Rental of \$1,000 per month
 - ii. Relcorp was to pay all utility bills
 - iii. The respondent would pay the levies for Lot 1.

8. In support of this explanation the applicant produced in evidence copies of email correspondence between the applicant's director Mr Bhai, and Mr Bob Lowres, who was/is a director of both Relcorp and the respondent. In particular the email correspondence includes an email from Mr Lowres to Mr Bhai dated 19 March 2019 in which Mr Lowres says:

Thank you for making the time to meet to discuss a number of matters regarding the 5 lot subdivision of the apartment site.

1.1 It was noted that Relcorp/NIBCL requested a period of 18 months for the existing sales and information office to remain on the proposed lot 1.

1.2 You commented that it was highly unlikely that you would be developing within the 18 month term requested.

1.3 However you suggested that a 12 month lease be agreed with an option for a further 6 months.

1.4 It was further agreed that a 90 day period be granted at the end of the said lease period for the relocation of the sales office in event that we did not reach agreement for you to acquire it.

2.1 Rental charge for occupation.

Whilst in occupation Relcorp/NIBCL will pay all power, water, septic outgoings associated with running an office on the site.

2.2 We discussed rental of \$1000.00 per month. Which we are agreeable with

2.3 You then said that you wanted Relcorp/NIBCL to pay the new lot 1 body corporate fees which currently stands at \$6200 per quarter.

With respect we would like you to reconsider that request given that your land is dormant and if we were not there you would be paying those fees anyway.

We are recompensing you for basically allowing OUR building to set there for a short term.

2.4 By enabling Relcorp/NIBCL to operate in that location greatly assists the Resort Manager to run his business which is for the overall benefit of all owners on the island.

I can be contacted by phone and email.

Julie Pearce our chairperson arrives today and can easily continue this matter and meet with you. Her local mobile number is ...

9. Mr Bhai responded to this email on the same day, confirming various issues set out by Mr Lowres. In response to what is said by Mr Lowres in paragraph 2.3 of the email above Mr Bhai makes it clear that he is maintaining his request for the respondent to pay the body corporate fees. It is clear from subsequent correspondence attached to the parties affidavits, and from an acknowledgement by counsel for the respondent in the course of the hearing before me, that the sales office has remained on Lot 1 to the present date.
10. When in February 2020 the respondent sought payment by the applicant of the outstanding body corporate levies it was met with the assertion by the applicant that it (the applicant) was owed \$34,786.05 by the respondent. This is the total of the monthly rental at \$1090.00 per month (including VAT), plus the amount of body corporate levies due in respect of Lot 1. This demand was not accompanied by payment of the balance, or any indication by the applicant that it was ready, willing and able to pay the body corporate levies for the applicant's other lots (2-5 & 29). Instead the applicant's proposal, by email of 26 February 2020 was:

Please advise by when the payments [apparently referring to the \$34,786.05 demanded] can be settled so that we can further resolve the outstanding balance for lots 2-5.

11. The respondents unsurprising response to this was to reject the proposition that the respondent had agreed to pay rent or pay (or waive payment of) the body corporate fees for lot 1. Nevertheless, for the purpose of this application, and taking into account the low bar suggested in the cases referred to in paragraph 4 above, I think that the fact that Mr Lowres was a director of the respondent as well as of Relcorp (Fiji) Ltd, coupled with the fact that his email (set out in paragraph 8 above) refers to Relcorp/NIBCL in a way that suggests that he is authorised to act on behalf of the respondent, provides some basis for an argument that the respondent had agreed to the arrangement proposed by the applicant (i.e. rent of \$1000 per month plus payment/waiver of the body corporate fees for lot 1). As Mr Lowres has himself pointed out in his email, keeping the sales office in its present location is for the overall benefit of all owners on the island, and therefore is in the respondent's interests also. This is consistent with the way his email is expressed to suggest that both Relcorp and the respondent are occupying the offices at lot 1. Furthermore the respondent/Relcorp have chosen to leave the office in place when they could presumably have relocated it somewhere else rather than face the argument now raised by the applicant. While it seems unlikely that the respondent would have been willing to 'pay' rent of – effectively – in excess of \$33,000 per annum for the right to locate its/Relcorp's offices on the vacant lot 1, I cannot on the evidence so far available exclude the possibility that this is the bargain agreed to.
12. I am therefore satisfied that there is a 'genuine dispute', or an offsetting claim, affecting the amount due by the applicant to the respondent as required by s.517(1) Companies Act 2015. The respondent has not provided any basis for the demand for interest at 22.5% per annum, and in the absence of some justification for a rate that so greatly exceeds current interest rates, I also accept that there is also a 'genuine dispute' about whether that interest is payable.


13. But any dispute centred around the arrangements for lot 1 does not affect the fact that the applicant unquestionably owes the body corporate levies for the remaining properties that it owns at Naisoso, which it has made no attempt to pay. Applying section 517 I am satisfied that the substantiated amount of the statutory demand that Naisoso Island Body Corporate Ltd is entitled to make is as follows:

Statutory demand	123, 722.34
Less dispute/set off	<u>34,786.05</u>
	\$88,936.29

14. Section 520 of the Act permits the court, in making an order setting aside a statutory demand, to impose such conditions as the court considers fit. In its application of 4 May 2020 the applicant has asked for orders that the statutory demand be set aside 'unconditionally' and has sought indemnity costs. While I have accepted that there is an arguable dispute as to the body corporate fees for lot 1, and as to the issue of interest, the applicant has not suggested that there is any dispute as to the fees for the other lots, yet it has refused to pay these fees – by far the bulk of what is demanded – either because it cannot do so, or in an attempt to use payment of the uncontested portion as a lever with which to bargain over the issues relating to lot 1. I am not persuaded by the December 2018 statement of financial position provided in evidence by the applicant that it is in fact solvent given the sharp drop in cash assets from March 2018, and the lack of information about the recoverability of receivables and advances to related parties. Therefore the order I am prepared to make setting aside the statutory demand is subject to the conditions set out in paragraph 16 below.
15. On the question of costs the applicant has not provided any evidence or argument that would support its application for indemnity costs, and the application should not have been made, particularly not in the initial application. Had it immediately paid the undisputed portion of the respondent's demand, and had the respondent nevertheless maintained its opposition to the application through to hearing, I would have been inclined to make an order for costs in favour of the applicant, but that is not the situation. Given the non-payment of the undisputed portion of the debt the respondent's statutory demand and its opposition to the current application were entirely justified.
16. Accordingly I make the following orders:
- i. The substantiated amount of the statutory demand issued by the respondent to the applicant dated 7 April 2020 is varied to \$88,936.29
 - ii. Provided the applicant complies with all of the following directions within the time frame stated from the date of this decision, the statutory demand issued by the respondent to the applicant dated 7 April 2020 is set aside:
 - (a). within 14 days from the date of this decision pays \$88,936.29 to the respondent
 - (b). within 21 days from the date of this decision issues proceedings in the High Court or the Magistrates Court seeking from Relcorp (Fiji) Ltd and/or from the respondent payment of the amounts it claims to be

entitled to in respect of its/their continuing occupation/use of lot 1 for the sales office, and pays \$23,886.05 (the amount of the lot 1 levies less the rental agreed to by Relcorp) into that court to be held pending the outcome of those proceedings.

- (c) within 14 days from the date of this decision pays costs of \$1200 to the respondent.



A.G. Stuart
Judge

At Lautoka this 14th day of August, 2020

SOLICITORS:

Krishnil Patel, Solicitors, Lautoka for applicant
Howards Lawyers, Suva for defendant