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

CIVIL ACTION No. HBM 57/2019

IN THE MATTER of SMAK WORKS PTE LIMITED a limited liability company having its registered office at Nadi Back Road, Nadi.

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

BETWEEN **SMAK WORKS PTE LIMITED** a limited liability company having its registered office at Nadi Back Road, Nadi

APPLICANT

AND **TOTAL (FIJI) PTE LIMITED** a limited liability company having its registered office at Suva, Fiji.

RESPONDENT

APPEARANCES : Mr V Chandra for the Applicant
Mr S Fatiaki for the Respondent

DATE OF HEARING : 28 August 2020

DATE OF JUDGMENT : 22 September 2020

DECISION

1. This is an application (commenced by originating motion) under section 516 Companies Act 2015 to set aside a statutory demand dated 25 November 2019 but apparently received by the applicant company on or about 2 December 2019 (see subsequent discussion about service etc) requiring payment of $144,562.32 together with interest thereon at 2% per month (the amount of which was not set out) which the demand notice said was

> *... the amount due and owing to the Creditor for Account No. 509916.*

The demand was issued by Sherani & Co, the authorised agent and solicitors for the Creditor, Total (Fiji) Pte Limited.

2. The application (and affidavit in support by Mr Kavitesh Prabhaker) was filed on 20 December 2019, but not served on the respondent, as the applicant's counsel acknowledges, until 6 February 2020, which is more than 21 days after the applicant acknowledges receiving the statutory demand.

3. In written submissions for the applicant, counsel acknowledges that because of the service outside the 21-day period following service of the statutory demand the application is out of the time prescribed by section 516 Companies Act 2015. As has been held in a number of cases in Fiji and Australia (whose legislation on this aspect of company law appears to have been the model for the current Fiji Act), compliance with the time limits under s.516 goes to jurisdiction[1]. An application that is not filed and served within 21 days after the date of service of the statutory demand is not an application under the section, and the Court has no jurisdiction to hear and allow the application.

4. Nevertheless, the applicant submits, section 517(5) Companies Act provides an additional basis for setting aside a statutory demand that is not subject to time restrictions set out in s.516. I discuss this submission in more detail below.

5. Also raised by the applicant, some of which it seeks to have determined as preliminary issues, were the following matters:

   i. whether failure to serve the statutory demand on the registered office of the company is fatal to the validity of the statutory demand,
   ii. whether an affidavit filed for the respondent company by its Vice President Finance & Corporate Affairs is defective for failing to provide written evidence of his authority from the company to make the affidavit, and so should be struck out or disregarded.
   iii. An alleged dispute as to the applicant's liability for the amount claimed.

Evidence

6. In support of its application an affidavit was sworn, as noted above, by Mr Kavitesh Prabhakar, who says he is *one of the directors* of the applicant company. He annexes an authority which I note (since the company is asking the court to be pedantic about such matters) is signed by the company under seal, the affixing of which is witnessed by only one of the directors, contrary to s.53 Companies Act 2015. The authority purports to authorise Mr Prabhakar to:

> *... swear affidavits, give evidence, represent the Company in the proceedings in Court, all matters that require the attendance of the Company being usual, necessary and incidental to proceedings in Court or as required on advice by the Company's solicitors, and to issue instructions to Solicitors on behalf of the Company.*

   Of course, Order 5, rule 6 High Court Rules makes it clear that a body corporate may not begin or carry on proceedings in the High Court except by a barrister and solicitor, and this authority would be ineffective if it were relied on for that purpose.

7. In his affidavit Mr Prabhakar says:

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[1] **David Grant & Co. Pty Ltd v Westpac Banking Corporation** [1995] HCA 43, (1995 184 CLR 265, **South Pacific Marine Ltd v PriceWaterhouseCoopers** [2019] FJHC 118; HBE07 / 2019 (21 February 2010), **Skyglory Pte Ltd v Bhawna Ben (trading as Bharat Indenting House)** [2019] FJHC 891, HBC 191 / 2019 (13 September 2019), **Walt Smith International (Fiji) Ltd v Barrick** [2020] FJHC 634.

Preliminary Objection – irregular service

5. *That on or about the 2nd day of December 2019 I was informed by a staff that there was a Statutory Demand dated 25th November 2019 on behalf of Total (Fiji) Pte Limited pasted at the Applicant's yard at Arolevu, Nadi. Annexed hereto and marked as annexure "KP 02" is a copy of the Statutory Demand.*
6. *That I am advised by my solicitors and I verily believe that the Respondent ought to have served the notice at the registered office of the Applicant as this is a requirement under the Companies Act 2015.*
7. *That I checked and enquired whether a bailiff or anybody else in that regard had tried to serve the Applicant at the registered office.*
8. *That I was advised that no Statutory Demand by the Respondent was served on the directors and/or pasted at the registered office.*
9. *That the Applicant is an established trucking company in Nadi and as such the registered office of the Applicant is well known as several other legal documents have been previously served at the registered office.*
10. *That I am advised by my solicitors and I verily believe that the service of the Statutory Demand is irregular.*

The Dispute

11. *That the Respondent, Total (Fiji) Pte Ltd vide the Statutory Demand … claims the sum of $144,562.32 … being for purchase of fuel on credit basis.*
12. *That the respondent has failed to disclose full particulars of the debt alleged.*
13. *That the Applicant is attending to reconcile the individual filling to ascertain the true debt about as the total invoices the Applicant has in its possession amount to approximately $90,000.*
14. *That it is prudent for the Applicant to reconcile the invoices as the Directors had only authorised credit purchase totalling to a sum of $100,000.*
15. *The Applicant at all material times disputes the debt claimed by the Respondent. The Respondent has not presented with the Statutory Demand any documentary evidence to show how it had reached the calculation of $144,562.32 …*
18. *The Applicant Company is solvent and able to pay its debt.*

8. In response to the application an affidavit by Mr Erwin Budojo sworn on 18 March 2020 was filed by the respondent. Mr Budojo says that he is the Vice President Finance & Corporate Affairs of the respondent company. It is this affidavit that the applicant objects to on the basis referred to above. In response to the applicant's evidence about irregular service Mr Budojo annexes a copy of the applicant's notice to the Registrar of Companies of the location of its registered office. This states:

> *SMAK WORKS LIMITED hereby gives you notice, in accordance with section 110 of the Companies Act, that the registered office of the Company is to be situated at Nadi Back Road, Nadi, and the registered postal address is PO Box 2212, Nadi.*

As Mr Budojo goes on to say in his affidavit, the Nadi Back Road is 8 kilometers long. The bailiff who attempted to serve the statutory demand at the registered office was not able to locate it. Hence a copy of the notice was posted on the window of the applicant's principal place of business, at Aerolevu, Nadi. In a further attempt at service the respondent's solicitors sent a copy of the demand by registered mail to the registered postal address of the applicant company (as shown in the Companies Register above). The letter was sent on 10 December 2019.

9. As to the issue of the disputed debt, Mr Budojo annexed to his affidavit copies of respondent's solicitors initial letter of demand dated 15 October 2019, the applicant's response dated 31 October 2019, and copies of the invoices and supporting details showing how each invoice is calculated (numerous refueling transactions on various dates at various locations, categorised by the particular authorisation card used – presumably by an employee of the applicant to whom the card was issued - for each transaction). The applicant's response letter is particularly enlightening: while it says that the applicant had been hampered by a health emergency with its CEO, and a problem with recovering payment from a major debtor, it did not raise any dispute about the amount demanded, and instead promised *a payment plan to clear the dues* by the following week.

10. In an affidavit in reply by Mr Prabhakar dated 17 July 2020 he refers to the location of the registered office as follows:

> *The respondent is well aware of the Applicant's registered address. It is at my home in Nadi Back Road. The Respondent has been dealing with the Applicant for quite some time now. It is a surprise that the issue regarding registered office is coming up now when the Respondent had every opportunity to carry out its due diligence before dealing with the Applicant. In fact the Respondent is now giving excused towards irregular service.*

He also complains that the respondent's invoices/statements are 'ambiguous and generalised' and that it is impossible to establish from them:

> Whose account it is
> Who filled the fuel
> Which vehicle fuel was filled in
> Who signed off on the Transaction.

The Law

11. The relevant parts of sections 515 - 517 Companies Act 2015, dealing with statutory demands, provide:

> *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; ...*
>
> *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.*

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. As to the need to provide details of the registered office, sections 109 of the old Companies Act (cap 247) – under which the applicant company was originally registered - provides:

109(1) A company shall, as from the day on which it begins to carry on business or as from the fourteenth day after the date of its incorporation ... , have a registered office and a registered postal address to which all communications and notices may be addressed.

In the 2015 Companies Act section 50 states:

50(1) A Company must have a Registered Office in Fiji, and communications and notices to the Company may be addressed to its Registered Office.

(2) Where a Company changes the address of its Registered Office, it must Lodge a notice of the change of address of its Registered Office with the Registrar not later than 14 days after the date on which the change occurs.

(3) The notice must be in the Prescribed Form.

(4) A notice of change of address takes effect from the later of—

(a) the seventh day after the notice was Lodged; or

(b) a later day specified in the notice as the date from which the change is to take effect.

(5) A Company must display its name prominently at every place at which the Company carries on business.

(6) A Company must also display its name and the words "Registered Office" prominently at its Registered Office.

(7) The Registered Office of a Public Company must be open to the public for a minimum of 3 hours each Business Day between the hours of 9am and 5pm and must display its opening hours prominently at its Registered Office.

13. The Prescribed Forms in the Companies Regulations 2015 for notifying the Registrar of the location of the registered office are forms A2 (for registration of a new company), and form A11 (for a change of details). Both of these forms require the following details of the registered office:

Level / Office building

Street number & street
Town/City
Island.

14. The parties have referred me to conflicting Court of Appeal decisions on the issue of whether the requirement in s.515 Companies Act for service of a statutory demand on the registered office is an essential pre-requisite of a valid statutory demand, or is merely directory. In **Ontime Printing Ltd v National MBF Finance Ltd** (unreported) Fiji Court of Appeal 1 December 2000, ABU 0063/97 the court said, on appeal against the making of a winding up order against the company/appellant that had been made in the High Court four years before the appeal was heard:

> *We are satisfied that the respondent's attempt to prove service of the notice under s.221 [Companies Act (cap 247)] by registered post does not satisfy the requirement of that section, that it be left at the registered office of the company. The direction is quite specific and does not allow for any other method. Accordingly it was not entitled to the presumption that the appellant was unable to pay its debts, and it was thrown back to the other grounds relied on in its petition, namely that it was insolvent and/or unable to pay its debts, and that in the circumstances it was just and equitable that it be wound up. To the extent that Sadal J relied on there having been proper service of the notice under s221 (and this is not at all clear from his brief judgment), his conclusion that the appellant was unable to pay its debts must be suspect.*

However, the Court went on to conclude that the winding up order had been properly made in the High Court, because there was evidence that the company was insolvent, and no evidence was provided by the company to show otherwise.

15. In contrast the decision of the Court of Appeal in **Aleems Investments Ltd v Khan Buses Ltd** [2011] FJCA 4 examined the issue in more depth and made the following ruling:

> *26. There is a problem in Fiji in leaving a Notice, or other legal document, at the registered office of the company, or by leaving it at the registered postal address. In **B W Holdings v. Graham Eden and Associates** [2000] FJHC 3, Mr Justice Scott held that service to a post box was in the circumstances proper service under Section 391(1) of the Companies Act and that B W Holdings was entitled to Judgment in Default of Appearance or Defence, Mr Justice Scott said:*
>
> > *In Fiji's circumstances where there is a notoriously high failure to comply with a detailed requirements of the Companies Act and where prosecutions for such failures are virtually unknown, I am firmly of the opinion that these provisions of the Companies Act should be read permissively. The purpose of these provisions is to provide the way in which service should ordinarily be effected on companies. Where, as here, the Company has not fully complied with Section 110(1) the fundamental question is whether the service, as in fact effected, will have reached the Company's Management."*
>
> *27. The Court of Appeal approved this approach on appeal:*
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> > *[Mr Justice Scott] held that the Resident Magistrate was correct in concluding that the appellant was properly served with the writ. We do not consider that the High Court made any error of law in coming to this conclusion."*
>
> *28. In this case I find that the Notice served by fax on 19th February 2009 under Section 221 of the Companies Act to the Secretary and the Directors, Khan Buses Limited Navutu Industrial Subdivision, Kings Highway, P O Box 6549, Lautoka was good service although not left at the Khan Buses Limited's registered office. Out of caution the letter should also be left at the registered office. However, if the document in all the circumstances relating to the company to be served was likely to be immediately*

received by the Secretary and Directors of the company as was the case here, then the rule can be read permissively and service of the Notice accepted as lawful. In my judgment the fact that the letter was immediately received tends to prove that the method chosen was in all the circumstances likely to be successful.

Analysis

i. Service on the Registered Office

16. Both the decisions of the Court of Appeal referred to in paragraphs 14 and 15 above were decided under the previous Companies Act (cap 247), rather than the present Act. But the wording of s221 of the previous Act, and s515 of the current Act are substantially identical on this issue, and there is no reason to suppose that the wording of s515, when the present Act was passed in 2015, was intended to change the law as it had been applied in the Court of Appeal some years previously. Given the issues mentioned by the Court in **Aleems** as to compliance in Fiji with the requirements of the Act in relation to registered offices (which of course are also reflected in the present case) I prefer to rely on that decision than the earlier, perhaps obiter, decision in **Ontime Printing.** I acknowledge the argument that given the strictness of the time limits prescribed by s516, the requirements of s515(a) should also be applied strictly. However, given the degree of non-compliance in this particular case by the applicant, and the brazen impudence of the applicant here suggesting it is in some way the fault of the respondent that it couldn't locate the applicant's registered office along the 8 kilometre length of the Nadi Back Road (there is no evidence from the applicant that it has complied with the other requirements of section 50(5)-(7) as to distinctive signage, opening hours etc. at the registered office), I am inclined to conclude that a company in the circumstances of the applicant is not, having become aware of the service of a statutory demand, entitled to complain about defective service under s515 when it has brought about that situation by a failure – perhaps deliberate - to comply with the requirements of the Act in notifying and maintaining its registered office. Different considerations might apply where the notice is not only not delivered at the registered office, but the debtor company does not become aware of the service at all. In that circumstance I would readily accept that no deemed insolvency under s515(a) arises, and any winding up petition based solely on that ground should not succeed. But that is not the case here. It is clear that the directors of applicant company became aware of the notice on 2 December 2019, and no one is suggesting that an application filed and served within 21 days of that date should be treated as out of time.

ii. Defective affidavit in opposition

17. None of the affidavits filed by either party in connection with this application are models to be admired. O.41, r.5 High Court Rules states:

> *Contents of affidavit (O.41, r.5)*
>
> *5(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
>
> *(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*

I have underlined what I think are the important words from this rule. Affidavits are a means to provide evidence in support of or opposition to a claim or application. Evidence must be admissible, and while hearsay evidence is admissible in civil proceedings (s3 Civil Evidence Act 2002), it is important, whether it is presented by affidavit or orally at trial, that it be identified as such (s4 Civil Evidence Act). O.41, r.5(2) quoted above reinforces this point. It allows statements of information or belief (which are inevitably hearsay, since they are not *facts ... of [the deponent's] own knowledge)* only in interlocutory proceedings, and only then when the sources and grounds of the information or belief are stated. Opinion evidence is generally inadmissible, except when it is given by an expert (i.e. someone with more than a layperson's knowledge or experience of a particular field or discipline), on a matter that it relevant to an issue in dispute. The exceptions allowed by r.5(1) above, related to Orders 14 (summary judgment applications generally) and 86 (summary judgment for specific performance) relate to the specific nature of those applications (essentially interlocutory, where there is a requirement for a statement of belief by the applicant/plaintiff as to the absence of a defence). Such evidence, for it to have value, must also comply with the requirements of r.5(2), i.e. include material setting out the basis for the belief. None of these rules permit what is often seen in affidavits in both interlocutory and substantive proceedings; i.e. submissions/arguments or pleadings as to law or facts dressed up as statements of belief. Examples of this type of 'evidence' from this application appear in paragraph 4 of Mr Budojo's affidavit:

> *... I am legally advised by the Respondent's solicitors ... and verily believe that the Applicant's application for setting aside of the Respondent's statutory demand dated 25th November 2019 is defective, out of time and in noncompliance with the mandatory provisions of the Companies Act 2015.*

and in paragraph 4 of Mr Prabakhar's affidavit in reply:

> *In response to paragraph 4 of the Affidavit in Opposition I have been advised and verily believe the same to be true that the arguments raised are legal in breach of the High Court Rules relating to Affidavits.*

This type of 'evidence' is not evidence at all, has no value to the court and is 'embarassing'. While I accept that, given the absence of any provision in the Rules for filing a notice of opposition to a summons or application setting out the basis on which it is to be opposed, a statement of some sort in the respondent's affidavit in

opposition may be the only manner in which a legal argument can be flagged, this notice is more correctly stated directly as a fact (e.g. *The respondent opposes the application on the following basis;...*) than dressed up as a statement of belief or opinion based on legal advice. There is no reason at all for a similar statement in reply, except where, as here, there is an argument that the affidavit in opposition is in some way inadmissible (although in this case that argument/submission is not flagged in Mr Prabhakar's affidavit in reply, and there has been no complaint about its absence).

18. The applicant argues that Mr Budojo's affidavit is in admissible because it does not have attached to it written evidence of the authority that he claims to have from his employer to make the affidavit. In support of that submission I have been referred by the applicant's counsel to a decision by (then) Master Nanayakkara in **Ali v Merchant Finance & Investment Company** [2016] FJHC 863. Counsel for the applicant did not refer me, as he should have, to the more recent decision of Master Mohamed Azhar in **Pillay v Barton Ltd** [2018] FJHC 599 relied on by the respondent. In this latter decision the Master undertook a very thorough analysis of the law relating to the need for a written authority to be provided for person to make an affidavit on behalf of a company (bearing in mind that the company cannot itself make an affidavit or otherwise give evidence, since – having no intellectual capacity of its own - it cannot 'know' anything except via the knowledge of those who work in or for the company and can and should provide that evidence first hand – see O.41, r.1(4)). The Court in **Pillay** found that *there is nothing in the High Court Rules or the Companies Act 2015 that requires a written or ostensible authority from a company for a deponent who deposes an affidavit on behalf of that company.* Nor can I see any reason why there should be. O.41, r.1(4) appears to be the only rule that specifically addresses the form and contents of an affidavit. It provides:

> (4) *Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.*
>
> *In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the deponent's place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any.*

The reasoning behind the need to state whether a deponent is a party to the proceeding, or is employed by a party, seems to be merely so that a party receiving such an affidavit, or a party against whom such evidence is given at trial, knows who is giving evidence against it and in what capacity (see the decision of Gates J (as he then was) in **Buckley v Sutton** [2002] FJHC 302). Provided this rule is complied with, and the evidence is within the personal knowledge of the deponent and is relevant to the issue, I cannot see why impediments should be put in the way of that evidence by requiring written authority from a company, where it would not be required in a situation where a person employed by an individual provides the same evidence.

19. There is of course the situation where a person with a limited or derivative knowledge of facts is chosen to give evidence on a matter either out of convenience, urgency or – I suspect, particularly in cases involving non-compliance with time limits – because the solicitors preparing such evidence don't want to tell their clients why it is necessary. This type of case has been referred to often by the courts in Fiji, which have deplored the practice of having law clerks, receptionists, legal executives and others swear affidavits in support of interlocutory applications seeking leave to appeal etc. A very recent decision dealing with this issue is that of the Chief Justice sitting alone as President of the Supreme Court in **Paul v Director of Lands** [2020] FJSC 3. That case dealt with a particularly egregious example of a litigation clerk in the employ of solicitors for a would-be appellant (seeking leave to appeal) commenting on the perceived deficiencies in a decision of the Court of Appeal. Instead of merely annexing a draft notice setting out the grounds of appeal the affidavit included statements of belief by the clerk that the Court had 'wrongly construed', 'failed to take into account', and 'disregarded' certain evidence before it. The Chief Justice commented:

> *This Court finds it quite outrageous that [... a] Senior Litigation Clerk has blatantly criticized a decision delivered by the Court of Appeal and stated that the Court of Appeal erred in many respects.*

It is also outrageous, as the Chief Justice noted, that the solicitors who employ the unfortunate law clerk, should put him in that position. I would add that if the affidavit is at all contentious it would put in jeopardy the ability of the firm to continue acting in the litigation. How can a solicitor claim to be unconflicted when the evidence of its own employees is put into question in the proceedings? The Supreme Court went on to suggest the following guidelines for the swearing of affidavits by third parties, including law clerks / legal executives / litigation clerks:

> *(i) must be authorised in writing by that party to depose such Affidavits;*
> *(ii) must depose as to why that party and if a Company then why its director or authorized officer cannot depose the Affidavit;*
> *(iii) must not depose Affidavits on basis of information or belief but depose facts the deponent has knowledge of those facts except where:*
> *(a) Affidavit is in support of or in opposition to Application for Summary Judgment;*
> *(b) Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;*
> *(c) Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of HCR.*
> *(iv) may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.*

20. With respect, I read this decision as spelling out (again and with emphasis), rather than purporting to change, the practice in relation to the use of affidavits for such applications. In particular paragraph (ii) of these guidelines makes it clear that the 'third parties' to whom the guideline is addressed are not directors or authorized officers of a company, but are instead people with a more remote connection to the

company who are giving evidence not on the basis of their personal knowledge of the facts stated, but relying on the exceptions referred to in O.41, r.5. The requirement for written authorization for law firm employees (the same must surely apply to employee solicitors) addresses the conflict issue. If a party has authorized the making of an affidavit by the person concerned it cannot then complain about the contents of the affidavit in a way that creates a conflict with its own solicitors.

21. In the present case Mr Budojo explains in his affidavit that he is the 'vice president finance and corporate affairs' of the respondent company, and that he is authorized by the respondent to make the affidavit on its behalf. He says that, except where he states otherwise, the facts stated in the affidavit are *within my own knowledge and that acquired by me as custodian of the files.* In my view this affidavit complies with the High Court Rules and is not deficient in any way other than the issues referred to in paragraph 17 above (i.e. the same deficiencies as the applicant's affidavits also suffer from). In my view the affidavit of Mr Budojo is able to be filed and relied upon.

iii. Genuine dispute as to liability

22. In case I am wrong in these findings, or in the view that I have taken as to the strictness of the time limits in s516 of the Act, I have also considered whether the applicant has established that it has a 'genuine dispute' as required by s.517 about *the existence or amount of a debt to which the [respondent's] statutory demand relates.*

23. 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 ...*

24. In this case I am satisfied that the applicant's evidence does not even meet this modest threshold. In the affidavit in support of the application Mr Prabhakar acknowledges that the applicant has in its possession invoices for 'approximately $90,000', and complains that the respondent has not *presented with the Statutory Demand any documentary evidence to show how it reached ... a calculation of $144,562.32.* In Mr Budojo's affidavit in reply he annexes details of every transaction making up the total, but there is no substantive response from the applicant company to this information except for the comments referred to in paragraph 10 above. I do not accept that the applicant is entitled merely to say that it is not satisfied with the information provided. To establish that it has a 'genuine defence' the applicant must show that there is some basis to doubt the accuracy of the respondent's invoices. In the context of a case such as this, where it seems that employees of the applicant are issued with cards to be used when filling the applicant's vehicles with fuel supplied by the respondent, I would expect some evidence to suggest that the system had broken down in some way. Perhaps this might be because people other than the applicant's employees were using the cards and filling their vehicles, or because the employees were using the cards to fill vehicles other than the applicant's vehicles. The evidence for this might be a discrepancy between the amount of fuel supplied in the period in question, compared to that provided in earlier periods, or some other basis for a reasonable suspicion about the accuracy of the respondent's records. No such evidence is stated. Instead the evidence of the applicant's immediate response to the respondent's initial demand for payment (the applicant's letter to the respondent in October 2019) indicates that there is no dispute, but that the reason for non-payment of the account is a difficulty in recovering payment from one of the applicant's clients/customers, or the illness of the applicant's CEO. Nor is there any evidence, apart from the unsupported assertion of Mr Prabhakar, that the applicant is solvent. Bearing in mind that the threshold for the issue of a statutory demand leading to a deemed insolvency under s.515 is only $10,000 I am not persuaded that there is a genuine dispute in this case as to more than $134,000 such that the undisputed balance of the debt owed by the applicant is less than the minimum figure referred to in the section.

Section 517(5) – separate ground for application?

25. It is the applicant's contention that section 517(5) Companies Act (supra at paragraph 11) is an additional ground for setting aside a statutory demand that is not subject to the strict time limitations in s.516. No authority for this proposition has been offered, and nothing has been said in the applicant's submissions by way of analysis of the subsection to persuade me that section 517(5) is not simply an additional basis on which an application complying with section 516 can be allowed. I do not understand why the legislature, having imposed strict time limits for an application raising a genuine dispute as to the amount of or liability for a debt, might be less concerned with time where the basis for a challenge is a defect in the demand creating substantial injustice, or there is some other reason why the demand should be set aside. The reason for urgency in applications under s.516 is surely the public policy concern that companies that have been deemed to be

insolvent should not continue to trade. It is important for commerce generally, and also with regard to the personal liability of directors (who may be in breach of their duties to the company and to others if they trade while insolvent, and may become personally liable for the debts incurred during such period of trading, if unpaid) to quickly resolve challenges to a statutory demand, so that a demand is either set aside (and so does not result in a deemed insolvency) or not (and can be used as the basis for a winding up petition). Furthermore, a reading of section 517 leads I think to a conclusion that subsection (5) is intended to refer to applications under section 516 (i.e. subject to the time limits in that section), and not to different species of application.

Conclusion

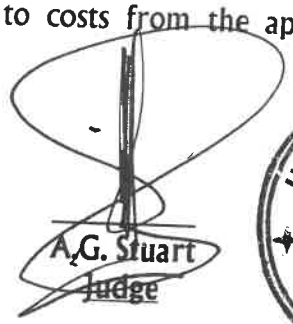
26. For the following reasons I therefore find that the application to set aside the statutory demand dated 25 November 2019 served by the respondent on the applicant cannot succeed:

i. The statutory demand dated 25 November 2019 was served on the applicant on or about 2 December 2019, when the management of the company became aware of it.

ii. The application although filed within 21 days after the date of service, was served after that period and is therefore out of time under s.516 Companies Act 2015. The Court therefore has no jurisdiction to set it aside.

iii. Even if these conclusions are wrong, the applicant has not shown that it has a genuine dispute as to the existence or amount of a debt owed to the respondent.

27. The respondent is entitled to costs from the applicant in the sum of $1500.00 summarily assessed.



At Lautoka this 22nd day of September, 2020

SOLICITORS:
Millbrook Hills Law Partners, Nadi, for the applicant
Sherani Solicitors, Suva for the respondent.