

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Action No. 213 of 2020

IN THE MATTER of an application
by the Plaintiff under section 516 of
Companies Act 2015

AND

IN THE MATTER of the
Companies Act 2015

BETWEEN: OCEANIA BUSINESS & CONSULTANCY SERVICE LIMITED a
limited liability company having its registered office at Malolelei House,
Nukuwatu, Lami, Suva.

PLAINTIFF

AND: CARPENTERS FIJI PTE LIMITED a limited liability company having
its registered office at 34 Rodwell Road, Suva.

DEFENDANT

Counsel : Plaintiff: Ms. Muir. M
: Defendant: Mr. Narayan. E

Date of Hearing : 02.09.2020

Date of Judgment : 09.10.2020

JUDGMENT

INTRODUCTION

[1] This is an application to set aside statutory demand notice in terms of Section 516 of Companies Act 2015. According to Applicant the alleged debt of \$40,000 stated in the statutory demand is disputed. The Applicant had issued a cheque for \$40,000 and had

also requested time to arrange funds through overdraft or trade finance for clearance of that amount. Plaintiff had sought proof of debt to be submitted to bank in order to obtain trade finance, as quicker method to clear debt. This clearly indicate Plaintiff was having issues relating to clearance of their cheques. The amount stated in the Statutory Demand is part of sum due for a consignment of goods delivered overseas. At the time of delivery of the consignment, Plaintiff had not paid for the goods and in order to clear the goods Bill of Lading (BOL) was released on the request of the Plaintiff to settle the payment from thirty days. Now it is more than eighteen months from delivery of consignment. So Plaintiff is estopped from denying the sum stated in BOL. Both BOL and cheque are negotiable instruments and instruments used for trade. The payment for consignment was due before delivery of goods before release of BOL, but release was on the assurance to pay thirty days. Again Plaintiff issued a cheque for \$40,000 as part payment and sought further time and information to obtain funds to their account from bank, and did not do so. In the circumstances there is no genuine dispute as to the payment of the value of consignment. Plaintiff cannot create a dispute over payment due for the consignment stating expiry dates of the items as they were provided with the information as far back in February, 2019. Plaintiff had offered Defendant meat, but this was a separate transaction and payments were separate. Defendant's payment for said transaction was refunded by Plaintiff, indicating payments were separate and there was no claim for set off and or genuine dispute as to the debt.

FACTS

- [2] Plaintiff had filed affidavit in support of the originating summons and also an affidavit in reply. Defendant had filed an affidavit in opposition. Documents and emails contained in the said affidavits are not disputed.
- [3] Plaintiff had purchased a consignment containing a brand of biscuits from Defendant. The price and expiry dates were submitted on 26.2.2019. Goods were shipped and BOL was retained by the shipper, who is the Defendant as the payment for the goods were not settled.

- [4] Plaintiff requested BOL to clear the consignment without payment for price agreed between the parties. The said request was to pay 'thirty days from BOL.
- [5] Defendant forthwith released the BOL relating to the consignment through a Telex and the goods were accordingly released without payment for the price agreed between the parties
- [6] Plaintiff paid a part payment of \$15,000 of the total value of consignment, but remaining part which was more than \$40,000 was not paid.
- [7] As the second part of the payment a cheque for \$40,000 was issued in favour of Defendant, but this was not presented for clearance as funds were not made available through an overdraft.
- [8] Plaintiff had requested more time to obtain funds trade finance as approval for overdraft facility was taking time.
- [9] Plaintiff had also requested and obtained, documentation for proof of debt relating \$40,000 in order to arrange trade finance from Bank.
- [10] Defendant had also sought some meat from Plaintiff and a sum of \$90,000 was paid for that but said transaction did not eventuate as there was fluctuation of price before shipment.
- [11] As the said sum paid by Defendant for meat was later refunded through a cheque and this cheque was cleared.

ANALYSIS

- [12] Section 516 of the Companies Act 2015 allows the Court to set aside a statutory demand. It states the procedural requirements.

“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.”

[13] There is no objection as to the procedure adopted in this case and any failure of above provisions. Applicant had filed this action on 17.7.2020 and statutory demand is dated 27.6.2020 and admittedly received by Applicant on 1.7.2020. There is no affidavit of service to ascertain when it was served but there was allegation of late service, hence it is presumed that Applicant had complied with the above mentioned requirements.

[14] The requirements for setting aside Statutory Demand are contained in Section 517 of Companies Act 2015 and states;

“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.”
(emphasis added)

- [15] In terms of Section 517(1) of Companies Act 2015, before setting aside a Statutory Demand the court must be satisfied that either there is ‘genuine dispute’ as to the existence of debt, or an ‘offsetting claim’. Under this the court is required to calculate the amount of the dispute or offsetting claim and if the remaining amount is more than the statutory requirement under.
- [16] Any dispute between the parties to impending winding up action does not qualify to be considered as a setting aside of the Statutory Demand. It needs to be genuine and if the alleged sum consist of undisputed part and disputed part court must calculate the genuinely disputed amount and deduct the same and ascertain as the ‘substantiated amount’ is more than the minimum amount for a Statutory Demand.
- [17] So the starting point is whether alleged dispute is genuine. Plaintiff had issued a cheque for \$40,000 dated 10.6.2019(see emails annexed JR 8 affidavit in support and JR12 of affidavit in Reply of Plaintiff) for goods worth CIF FJD 56,049.27 as remaining payment for a consignment worth goods received by Plaintiff. Plaintiff had also paid FJD 15.000 for the said consignment.
- [18] The value of consignment was not in dispute on two grounds one is the request of Plaintiff to pays the sum ‘30 days from BOL’, second out of that already paid a part payment of \$15,000. The remaining amount was \$41,049.27.
- [19] Plaintiff in his email of 13.3.2019 annexed as ‘C’ to the affidavit in opposition had admitted that they will pay ‘30 days from BOL’ terms encouraging Defendant to release BOL for the release of goods.
- [20] Before the arrival of goods and clearance by Plaintiff, all the information including expiry dates of the each batch of items were emailed.

- [21] By this time Plaintiff was aware of the expiry dates of the consignments as they were provided with details of that 26.2.2019. So the Plaintiff is denied from admitting the debt as they have more than once had admitted the debt. (See annexed 'C' and cheque for FJD 40,000).
- [22] The effect of setting aside of statutory demand is serious as it is made ineffective from the date of order setting it aside in terms of Section 518 of Companies Act 2015 and states;
- “518.A Statutory Demand has no effect while there is in force an order setting aside the demand.”
- [23] Companies Act 2015, allows any party to seek winding up when the requirements under the same Act is fulfilled. Winding up through Statutory Demand is the most common method of winding up, when debts are not settled. So setting aside of Statutory Demand affects a legal process that will ultimately give notice to all the parties that transact business with the debtor company the financial status as their inability to pay a genuine sum of money.
- [24] Defendant had also accepted an offer submitted by Plaintiff for meat at an agreed price. Defendant paid a sum of \$90,000 for that. Unfortunately, this transaction did not eventuate as the prices quoted in the offer had increased when Defendant paid the sum.
- [25] The money paid for meat by Defendant was refunded by a cheque of \$90,000 which got cleared from Bank.
- [26] Plaintiff has no setting off claim regarding cancellation of meat. The reason for cancellation was Plaintiff's suppliers had increased the prices later.
- [27] There is no claim for a set off against the consignment for biscuits. It needs to be separated from payment for meat by Defendant which was later refunded. So there were

no other concluded transactions between the parties to set off against the sum due from Plaintiff.

- [28] The only concluded transaction between the parties was the sale of biscuits which needs to be settled separately.
- [29] Apart from this, parties had also considered payments separately, from the evidence presented as payment was promised by Plaintiff from thirty days from BOL without any reference to intended meat supply at that time
- [30] So the Plaintiff's claim for failed meat supply is an afterthought. It neither creates a genuine dispute nor a offsetting claim in terms of Companies Act 2015.
- [31] There is no genuine dispute as to the debt of \$40,000 which remains unsettled from the date of clearance of consignment upon the assurance to pay within thirty days from BOL.
- [32] The difficulties that Plaintiff alleges in the sale of the biscuits are business risks that Plaintiff is exposed and not a dispute as to the sum of \$40,000.

CONCLUSION

- [33] Plaintiff had agreed to purchase a consignment of a brand of biscuits. The price was agreed. All the expiry dates of the consignment were also submitted in February, 2019. So goods and its price were agreed and payment was also promised from thirty days from BOL. Then a part payment of \$15,000 made. For the remaining part a cheque for \$40,000 was issued but there were no funds for clearance of the same. Plaintiff allegedly requested for an overdraft for the said amount. Since the overdraft approval was taking time Plaintiff had informed Defendant to provide documents for proof of debt in order to obtain a quicker method as trade finance in order to clear the cheque issued for \$40,000. Plaintiff is estopped from denying said debt of \$40,000. There is no genuine dispute and

or offsetting claim having admitted payment through a cheque for the exact amount stated in the Statutory Demand.

FINAL ORDERS

- [34] a. Application for setting aside is struck off.
b. Originating Summons dismissed and struck off.
c. Cost of this application is summarily assessed at \$1,000.

Dated at Suva this 9th day of October, 2020.



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Justice Deepthi Amaratunga
High Court, Suva