

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

CIVIL ACTION No. HBM 30/2020

IN THE MATTER of BIRONDA (FIJI) PTE LIMITED a limited liability company having its registered office in Sigatoka.

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

BETWEEN **BIRONDA (FIJI) PTE LIMITED** a limited liability company having its registered office at Level 1, Sigatoka Club, Sigatoka Town
APPLICANT

AND **JAMEEL AL-KHALID** of 13 Frangipani Avenue, Liverpool, 2170, NSW Australia
RESPONDENT

APPEARANCES : Mr S Krishna for the Applicant
Mr AJ Singh for the Respondent

DATE OF HEARING : 19 February 2021

DATE OF JUDGMENT : 23 March 2021

DECISION

1. This is an application by Bironda (Fiji) Pte Limited (commenced by originating motion) under section 516 Companies Act 2015 to set aside a statutory demand dated 5 August 2020 and served on the applicant company on the same date, requiring payment of \$270,000 being

... the amount due and owing by the Company to the Creditor for refund of purchase price paid for a cancel (sic) sale of property ("the Debt").

The demand was issued by Anil J Singh Lawyers, the authorised agent and solicitors for the Creditor, Jameel Al Khalidi. An earlier, identical but undated statutory demand had previously been served on the company, but the respondent acknowledged that that notice was abandoned and replaced by the notice served on 5 August.

2. The originating summons was filed on 6 August 2020, and was supported by an affidavit of Shanil Naidu, a director of the applicant company sworn on 4 August. In his affidavit Mr Naidu says that there is no dispute that the company owes the

respondent the amount claimed, but he says that the amount claimed was not due and payable at the time of the demand, and hence cannot be the basis for a statutory demand. Mr Naidu explains:

- The company owns a subdivision development, and by a written agreement for sale and purchase dated 16 April 2018 sold a section in the subdivision to the respondent for \$450,000, which amount the respondent paid in full.
- The respondent later changed his mind about purchasing the property, and the parties entered into a second agreement on 18 March 2019 revoking the earlier agreement. In terms of this second agreement the company was to repay the full purchase price:

Upon selling the said property

(i.e. the section that the respondent had agreed to purchase).

- The Revocation of Sale & Purchase Agreement document entered into recorded that the sum of \$180,000 was in fact to be paid immediately (and there is no suggestion that it was not so paid), leaving the balance of \$270,000.
- Mr Naidu's affidavit went on to provide some evidence about the efforts of the company to resell the property.

3. In an affidavit in reply to the application sworn on 26 August 2020, the respondent Mr Al-Khalidi says that:

- the sale and purchase agreement dated April 2018 was not a genuine purchase by him, but was essentially to document/record an investment by him in the company's development scheme.
- The sale and purchase agreement (prepared, he says, by the company's solicitor without him having the opportunity to seek independent legal advice) was to be security for his investment.
- The amount he paid to the company in terms of this arrangement was \$AUD337,000.
- After delays with the project, he lost confidence in the arrangement, and told the company he wanted his money back. Between December 2018 and January 2019 he received \$120,000 in repayments, but the company did not pay any more, and kept 'making excuses'.
- Eventually he ran out of patience and came to Fiji (from his home in Australia) to see what was going on. When he got to Fiji he was approached by the police, who said that Mr Naidu had made a complaint to them (it is not clear what the complaint was about). He explained to the police what was happening and the police took no further action, but instead issued a warning to Mr Naidu.
- This prompted Mr Naidu to take Mr Al-Khalidi back to his solicitor, who prepared the second agreement recording the arrangement for repayment when the section was sold.
- Again he was not told to get independent legal advice, and he did not realise when signing the agreement that it provided for payment only when the property was sold. This second agreement includes the following provision:

... as agreed, the parties hereby indemnify Ravneet Charan Lawyers from any suit arising out of the said agreement.

- The sale and purchase agreement and the later revocation agreement were 'sham' documents prepared to deceive him, and should have no legal effect.
4. There is no explanation from any of the parties of the discrepancy in amounts said to have been paid to and repaid by the company. The respondent says he paid \$AUD337,000 to the company, and that he has been repaid \$120,000 (which I assume to have been paid in Fiji currency). It may be that the amounts recorded in the Revocation agreement reflect the Fiji dollar equivalent of the amounts paid in Australian currency, another possibility is that the figure of \$450,000 includes an element of interest, but all this is mere speculation in the absence of clear evidence one way or the other. It seems to be agreed by all parties that the outstanding amount payable by the company to the respondent is \$FJD270,000, but it is by no means clear how the parties arrived at this figure.

The law

5. The relevant sections of the Companies Act 2015 dealing with statutory demands are sections 515-521. 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.*

6. Where the application is based on an asserted dispute, whether as to the amount said to be owed, or (as here) whether the amount is 'due', or on some other basis, 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 the demand should normally be set aside, leaving the parties to other avenues to resolve that dispute.
7. 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 contentions. 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:

[The expression 'genuine dispute'] 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" or "a patently feeble legal argument or an assertion of facts unsupported by evidence".

But it does mean that, except in such an extreme case [ie, where evidence is so lacking in plausibility], a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to 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 ... (citations omitted).

8. The primary purpose of the statutory demand procedure is to test whether a company is solvent, and therefore should be wound up, or not. It is not a debt collection process, although of course it can be and is frequently used as a means to extract payment from a solvent company that is reluctant to pay; if there is no genuine dispute it is usually cheaper and easier to simply pay the amount demanded, so establishing that the company is not insolvent. The procedure is not intended or designed as a means of resolving disputed facts, hence the attitude of the courts as demonstrated by the extracts quoted above. An application to set aside a statutory demand is made by originating summons or application supported by affidavits. If these affidavits disclose a factual dispute, the process does not allow for the clear articulation (e.g. by a statement of claim) of what the scope of the dispute is, and without that, without discovery, and without cross-examination of witnesses, it is simply not practicable to try to use it to determine a case on its merits. More importantly, the issue of whether a company is solvent or not should be decided quickly, i.e. within weeks rather than months, because the consequences for business and society of having an insolvent company continuing to trade, and of a solvent company trading under threat of being deemed insolvent, are serious both for those who deal with the company concerned (i.e. continue to supply goods and services on credit), but also for those who are engaged in running the company.

Analysis

9. As counsel for the respondent correctly submits, there is no issue in this case about whether the applicant owes the money demanded to the respondent. It admits that it does. But section 515 (see above) deems a company to be insolvent only where *a creditor ... to whom the company is indebted in a sum ... then due*, serves a demand that is not complied with. The basis for the company's application to set aside the statutory demand is that there is a genuine dispute, not whether the company owes the amount claimed, but whether the amount claimed is currently due for payment. Section 514 of the Act defines solvency as follows:

Solvency and insolvency

514(1) *A company ... is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable.*

(2) *A company ... which is not solvent is insolvent.*

and s.515 is a mechanism for determining quickly and efficiently whether a company is insolvent. If the payment demanded by the respondent is not 'due', non-compliance with a statutory demand is meaningless, because there is no immediate obligation to pay it, and therefore the non-payment is not, by itself, an indication of solvency.

10. On the question of whether payment is due the company relies on the revocation agreement of 18 March 2019, which stipulates that the amount acknowledged to be owed by the company is payable only *upon selling the property*. On the face of it this is a complete answer to the notice; until the property is sold, the company is not obliged to repay the money. The respondent, while acknowledging that he signed the revocation agreement, argues that it should be ignored, but to sustain that argument requires the court to accept the respondent's evidence/arguments that the circumstances whereby the respondent signed this agreement involved fraud and deception on the part of the company and its officers. The company of course disputes this version of events, and the court cannot resolve the dispute without pleadings, discovery, hearing evidence, cross-examination, submissions etc. The fact, even assuming it can be established, that the original agreement for sale and purchase was a device for the provision of security for a loan, rather than a genuine sale, does not necessarily mean that the amount outstanding is immediately payable. Similarly, the absence of competent and independent legal advice – again assuming that can be proved – may entitle the respondent to a claim against the solicitor, but it does not necessarily mean that the agreements entered into are invalid. Certainly, these are not matters that can be decided on an application to set aside a statutory demand.
11. I am satisfied that the company has established that there is a genuine dispute in terms of s.517(1)(a) Companies Act about the existence of a debt to which the demand relates. To be clear, the demand relates to a debt that is said to be 'due'. The company's dispute is about whether the debt is 'due', and given the provisions of the revocation agreement, I accept that that dispute is genuine. If the respondent wishes to challenge the validity of the revocation agreement he will need to do so in separate proceedings.

Orders

12. I therefore make an order pursuant to section 517 Companies Act 2015 setting aside the statutory demand dated 5 August 2020 served by the respondent on the company.

13. The company is entitled to costs against the respondent on this application, which I fix summarily at \$1000.00.



At Lautoka this 23rd day of March, 2021

SOLICITORS:

**Krishna & Co, Barristers & Solicitors, Lautoka for the applicant
Anil J Singh, Barristers & Solicitors, Nadi for the respondent**