IN THE HIGH COURT OF FIJI
AT LAUTOKA
COMPANIES JURISDICTION

Companies HBM Action No. 30 of 2021
IN THE MATTER of a Statutory Demand dated the 20th day of October, 2021 taken out by **NEW INDIA ASSURANCE COMPANY LIMITED** ("the Respondent") against **SMAK WORKS PTE LIMITED** ("the Applicant") and served on the Applicant on the 20th day of October, 2021.

AND

IN THE MATTER of an Application by the Applicant for an Order to set aside the Statutory Demand pursuant to Section 516 of the Companies Act 2015.

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

APPLICANT

AND : **NEW INDIA ASSURANCE COMPANY LIMITED** a limited liability company having its registered office at Suva, Fiji.

RESPONDENT

Date of Hearing : 21 February 2022
Date of Ruling : 27 April 2022
Counsel Appearing : Mr. M. Naivalu on instructions of Prakashan & Associates for Applicant
Mr. N. Kumar for Respondent

RULING

INTRODUCTION

1. This is an application by Originating Summons to set aside a statutory demand. The said Originating Summons was filed on 08 November 2021 by Messrs. Prakashan & Associates for and on behalf of Smak Works Pte Limited (**"SWPL"**) pursuant to section 516 of the Companies Act 2015 and the inherent jurisdiction of this Court. It seeks the following Orders:

   (a) that the Statutory Demand dated 20th day of October, 2021 taken out by the Respondent against the Applicant and served on the 20th October 2021 be set aside.

(b) that the Respondent shall not file any Application for a Winding Up Order under the said Statutory Demand pending the hearing and determination of this Originating Summons.

(c) that the time for the service of this application with respect to the hearing of Relief (2) be abridged to one day.

(d) the Respondent pay the costs of and incidental to this application on an indemnity basis.

2. The application is supported by an affidavit of Kavitesh Prabakhar sworn on 08 November 2021. In summary, Prabhakar deposes that, first, the service of the statutory demand dated 20 October 2021 was irregular. Secondly, Prabhakar deposes that the debt of $39,212.94 stated in the statutory demand is wholly disputed.

3. The Originating Summons and supporting affidavit were both served on 09 November 2021 at the offices of Krishna & Company.

4. On 20 December 2021, Sital Sharma swore an affidavit in opposition. This was filed on the same day.

5. The affidavit in reply of Kavitesh Prabakhar sworn on 18 February 2022, was filed on the same day.

GROUNDS TO SUPPORT AN APPLICATION TO SET ASIDE A STATUTORY DEMAND

6. The normal grounds employed to support an application to set aside a statutory demand are set out in section 517 of the Companies Act 2015. These are:

(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 (section 517(1)(a)).
(b) that the Company has an ***offsetting claim*** (section 517(1(b)).
(c) that there is a defect in the demand, substantial injustice will be caused unless the demand is set aside (section 517(5)(a)).
(d) there is some other reason why the demand should be set aside (section 517(5)(b)).

7. If the current application fails, the statutory demand will prevail. If the statutory demand prevails, then the presumption of insolvency raised by section 515(a) against the applicant company also prevails. This presumption would then enable the respondent, at its election, later, to file winding up proceedings proper.

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

8. In this case, SWPL relies on grounds (a) and (c) in paragraph 6 above.

BACKGROUND TO THE DEBT ALLEGED

9. The background to the debt alleged is based on what I consider to be the common ground between the parties.

10. SWPL is in the trucking business. At some point, SWPL took out several insurance policies for its trucking business. These included some All-Risks Insurance Policies, Workmens' Compensation Policies, as well as a Motor Comprehensive Fleet Policy which insures its entire fleet. These policies are all annexed and marked SS6 in the affidavit in opposition of Sital Sharma sworn on 20 December 2021.

11. These policies were all brokered by Marsh Limited (**"Marsh"**). However, it was New India Assurance Limited (**"NIACL"**) which was the insurer which provided the cover.

12. SWPL and Marsh, apparently, have had a long business relationship which, by all accounts, was good while business was good. However, in 2019, SWPL encountered some financial problems which had an impact on its ability to maintain its premium payments. SWPL then contacted Marsh to advise them of the situation.

13. Marsh then, as a broker and an agent of NIACL, then liaised with NIACL. Out of that, an arrangement was reached whereby NIACL would continue to provide the same cover(s) to SWPL while SWPL was given a payment holiday on the understanding that these missed premiums would be paid later at a convenient time.

14. However, at some point in time, NIACL decided to give SWPL the following two options:

    (i) cancel the insurance policies
    (ii) salvage the policies and then enter into a payment options

15. SWPL by an email dated 01 February 2019, opted for option (ii) above. However, barely three weeks later, on 21 February 2019, SWPL again sent an email to NIACL seeking cancellation of the policies and:

    "Kindly advise my owings (sic) *calculated at* (sic) *a pro-rata basis"*

16. It was upon this development when NIACL proceeded to calculate SWPL's "owings" on a pro-rata basis and arrived at the figure of $39,212.94 as stated in the statutory demand in question.

17. The applicant's main contention is that there is no privity of contract between the applicant and the respondent. Therefore, the debt alleged by the respondent is disputed.

18. At paragraphs 14 to 21 of the affidavit of Kavitesh Prabhakar sworn on 08 November 2021, he deposes as follows:

> *14. The Applicant Company had sought and secured a Comprehensive Motor Insurance Policy from its broker, Marsh Limited. Attached is a copy of the Certificate of Currency issued by Marsh Limited and email correspondence is annexed as annexure marked **"KP 3".***
>
> *15. It is understood that the Insurance Policy was underwritten by the Respondent Company. However, all account and credit terms, invoices, statements, payments and dealings were made specifically between the Applicant Company and Marsh Limited.*
>
> *16. This particularly means that there has never been any direct transaction between the Applicant Company and the Respondent Company and till date has never issued an invoice, Statement or Receipt to the Applicant Company. This essentially indicates that the Applicant Company does not have any owings to the Respondent Company.*
>
> *17. We do acknowledge that sometime in December 2018, after the Applicant Company had put forth a claim for insurance for a motor vehicle accident, the Respondent advised Marsh Limited that it sought 50% of the premium to be paid.*
>
> *18. On January, 2019, vide its broker, Marsh Limited, an arrangement to pay the same was made by the Applicant Company with the Respondent Company. As required by the Respondent Company, a sum of $10,000 was paid and balance was to be paid by the end of February, 2019.*
>
> *19. On 21 February, 2019, the Applicant Company via email advised, authorized and instructed the Respondent Company to cancel the policy. The same was confirmed via email by the Respondent's Office. The copies of emails is annexed here in and marked as annexure "**KP 4".***
>
> *20. That at all material time, the Respondent Company is fully aware that the Applicant Company had cancelled the Policy and does not owe any debts to the Respondent.*
>
> *21. That as per the Applicant Company's records, the premium was prepaid to Marsh Limited and upon cancellation of the policy was entitled to a Refund which ought to have been calculated at a pro-rata basis, which till date remains unpaid.*

SERVICE

19. Prabhakar deposes in his affidavit that the statutory demand was never served at the registered office of the company which is situated at the Nadi Back Road. In fact, the official records at the Companies Office simply state that the company's registered address is:

Nadi Back Road

20. I accept the submissions of Krishna & Company for the Respondent which relies on the ruling of Stuart J in **Smak Works Pte Ltd v Total (Fiji) Pte Ltd** [2020] FJHC 781; HBM 57.2019 (22 September 2020) where the same applicant had raised the exact same arguments about service in a similar application to set aside the statutory demand of another creditor.

21. In the above case, Stuart J started by discussing the Court of Appeal decision in **Ontime Printing Ltd v National MBF Finance Ltd** (unreported) Fiji Court of Appeal 1 December 2000, ABU 0063/97 where the court opined that service by registered post did not fulfill the requirement of section 221 of the old Companies Act which required that the demand be "left at the registered office of the company".

22. Stuart J then went on to consider with favour the Court of Appeal decision in **Aleems Investments Ltd v Khan Buses Ltd** [2011] FJCA 4 where the issue was examined in more depth as follows:

> 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."

23. The Court of Appeal went on to approve Scott J's approach on appeal as follows:

> [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."
>
> 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

24. Stuart J preferred the approach in **Aleems** as follows:

> ... 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 kilometer 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.

PRIVITY OF CONTRACT

25. The applicant's main contention is that there is no privity of contract between the applicant and the respondent. Therefore, the debt alleged by the respondent is disputed.

26. The applicant's argument raises the question whether Marsh, as an insurance broker, is an agent for the insurer or the insured?

27. This question would typically arise in a situation where an agent of an insurer was involved in preparing a proposal which contains incorrect information but where the agent of the insurer allegedly was aware of the "incorrectness" but still – inserted it in the proposal – and which proposal the proposer (insured) had signed without reading the "incorrectness" (see for example **Bawden v London Edinburgh & Glassgow Assce Co** [1892] 2 QB 534; **Biggar v Rock Life Assce Co Ltd** [1902] 1 KB 516.

28. In the situation which has arisen here, Marsh would have been instrumental, as agent (whether for SWPL or NIACL) in facilitating the cementing of an insurance contractual relationship between SWPL (insured) and NIACL (insurer).

29. Marsh is generally understood to be a firm of insurance brokers. This fact appears to be acknowledged by both parties. As a broker, I imagine that Marsh's work would, *inter alia*, entail soliciting for clients and assisting them in finding the best policy cover to suit their personal or business requirements from the range available from various insurance underwriters. Generally, a broker as such acts as a middleman between the proposer (later insured) and the insurance company (insurer). The broker as such uses his knowledge and market and industry experience to evaluate and assess the unique insurance needs of an intended proposer and then finds the best coverage and value and may also be engaged later to assist in making a claim on the policy.

30. As the Fiji Court of Appeal alluded to recently in **Pacific Agencies (Fiji) Ltd v Kant** [2021] FJCA 114; ABU09.2018 (3 June 2021), an agent is one who is employed for the purpose of brining his principal into a contractual relationship with a third party and who does not enter into a contract on his or her own behalf.

In Yeung Kai Yung v Hong Kong & Shanghai Banking Corp [1980] 2 All ER 599 (PC) at 604, Lord Scarman said, "The true principle of the law is that a person is liable for engagements even though he is acting for another unless he can show by the law of agency that he is to be held to have expressly or impliedly negative his personal liability". In **Austrac Rail P/L v Hunter Premium Funding Limited** [2001] NSWSC 654 Santow J said, "Where an agent in making a contract discloses both the existence and the name of a principal on whose behalf the agent purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party". The learned counsel submitted that all the plaintiff's dealings were with the defendant and not with PFL. Further there is no evidence that the defendant informed the plaintiff at any time that he was making the contract on behalf of PFL.

31. Even though a broker may earn commission from the insurer, which commission is usually deducted from premiums received, at common law, the general position is that an insurance broker represents the insured. Hence, where premium is paid through the broker, as allegedly happened in this case when SWPL paid premium to Marsh, Marsh would deduct its commission and then sends the remaining portion to NIACL.

32. However, in Fiji, legislative intervention may have slightly overtaken the common law position.

33. Section 2 of the Insurance Act 1998 defines an agent as:

"agent means a person who-

(a) as representative of an insurer, carries on the business of channeling, soliciting, or procuring insurance business for the insurer for or in expectation of payment by way of commission, allowance, return or other remuneration; and

(b) is licensed under section 43 (1) to carry on such business;

34. Sections 4 and 5 then provide:

Liability for conduct of agents and employees

4.—(1) This section applies to any conduct of an employee or agent of an insurer-
(a) on which a person in the circumstances of the insured could be reasonably expected to rely; and
(b) on which the insured in fact relied in good faith.
(2) An insurer is responsible, as between the insurer and insured, for the conduct of an employee of the insurer in relation to any matter relating to insurance, whether or not the employee acted within the scope of his employment.
(3) If a person is the agent of one insurer only, the insurer is responsible, as between the insurer and the insured, for the conduct of an agent of the insurer in relation to any matter relating to insurance, whether or not the agent acted within the scope of the authority granted to the agent by the insurer.

(4) If a person-

(a) is the agent of one insurer in respect of one class or classes of insurance business; and

(b) is the agent of another insurer in respect of another class or other classes of insurance business, the provisions of this section do not operate-

(c) so as to make the insurer in paragraph *(b)* responsible for the conduct of the agent in respect of the class or classes of insurance business of the insurer in paragraph *(a)*; or

(d) so as to make the insurer in paragraph *(a)* responsible for the conduct of the agent in respect of the class or classes of insurance business of the insurer in paragraph *(b)*.

(5) If a person is the agent of more than one insurer and the person engages in any conduct relating to a class of insurance business in which the person is not the agent of any of those insurers, the insurers are jointly and severally liable for that conduct, as between themselves and the insured, despite the fact that the agent acted outside the scope of the authority granted by any of the insurers.

(6) If a person (the Principal agent) is an agent of an insurer and the principal agent appoints a second person (the sub-agent) to act as agent of the principal agent, then for the purpose of determining the ultimate responsibility of the insurer under this section the actions of the sub-agent are to be the actions of the principal agent irrespective of whether-

(a) the insurer and principal agent have an agreement which forbids the principal agent from appointing a sub-agent; or

(b the sub-agent acted outside the scope of his authority.

(7) The responsibility of an insurer under subsection (2), (3), (4), (5) or (6) extends so as to make the insurer liable to an insured in respect of any loss or damage suffered by the insured as a result of the conduct of the agent or employee.

(8) Subsections (2) to (7) do not affect any liability of an agent or employee of an insurer to an insured.

(9) An agreement, in so far as it purports to alter or restrict the operation of subsections (2) to (7), is void.

(10) An insurer must not make, or offer to make, an agreement that is, or would be, void by reason of subsection (9).

(11) An insurer who contravenes subsection (10) commits an offence and is liable on conviction to a fine of $10,000.

Payments to intermediaries

5.— (1) If a contract of insurance is arranged or effected by an insurance intermediary, payment to the insurance intermediary of moneys payable by the insured to the insurer under or in relation to the contract, whether in respect of a premium or otherwise, is a discharge, as between the insured and the insurer, of the liability of the insured to the insurer in respect of those moneys.

(2) Payment to an insurance intermediary by or on behalf of an intending insured of moneys in respect of a contract of insurance to be arranged or effected by the intermediary, whether the payment is in respect of a premium or otherwise, is a discharge, as between the insured and the insurer, of any liability of the insured under or in respect of the contract, to the extent of the amount of the payment.

(3) Payment by an insurer to an insurance intermediary of moneys payable to an insured, whether in respect of a claim, return of premiums or otherwise, under or in relation to a contract of insurance, does not discharge any liability of the insurer to the insured in respect of those moneys.

(4) An agreement, in so far as it purports to alter or restrict the operation of subsection (1), (2) or (3), is void.

IS THERE A GENUINE DISPUTE ABOUT THE DEBT?

35. Having said all that, the question I ask now is whether or not there is a genuine dispute between the parties.

36. Nanayakarra J's ruling in **Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd** [2020] FJHC 1025; HBM 36.2020 (11 December 2020) provides an excellent discussion of the various tests applied.

37. The key points which I extract from the above to determine whether a genuine dispute is established for the purposes of section 517(1)((a) of the Companies Act, 2015 are as follows:

(a) the threshold criteria for establishing the existence of a genuine dispute is a low one.

(b) the court does not determine the merits of any dispute. Rather, the Court is only concerned with the question - whether there is such a dispute? (**In Edge Technology Pty Ltd v Lite-on Technology Corporation** [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J at [45]); **Fitness First Australia Pty Ltd v Dubow**; **Mibor Investments Pty Ltd v Commonwealth Bank of Australia** [1994] Vic Rp 61; [1994] 2 VR 290

(c) the threshold for that is not high (see **In Edge Technology**). The Court need not engage in a rigorous and in-depth examination of the evidence relating to the plaintiff's claim, dispute or off-setting claim (**Mibor Investments Pty Ltd v Commonwealth Bank of Australia**).

(d) the threshold rather is similar to the "serious question to be tried" criterion which arises on an application for an introductory injunction or for the extension or removal of a caveat (**Eyota Pty Ltd v Hanave Pty Ltd**), or that there are reasonable grounds indicating an arguable case (see **In Fitness First** (supra) at 127, Ward J cited **Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)**)

(e) as McLelland CJ said in **Eyota**:

> *This does not mean that the court must accept uncritically ...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]" (cfEng Me Young v Letchumanan [1980] AC 331 at 341], or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cfSouth Australia v Wall(1980) 24 SASR 189 at 194.*

(f) the task is simply to identify the genuine level of a claim (**In Re Morris Catering Australia**). As McLelland CJ said in **Eyota:**

> *... except in such an extreme case[i.e. where evidence is so lacking in plausibility], a court ... 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.....*

(g) hence, if a company's claim is so "devoid of substance that no further investigation is warranted" (see **In Fitness First** (supra) **Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)**), or is "plainly vexatious or frivolous", it will fail in establishing that there is genuine dispute.

(h) the court does not engage in any form of balancing exercise between the strengths of competing contentions. Hence, where the company has advanced an arguable case, and even where the case against the company seems stronger, the court must find that there is a genuine dispute ((see **In Fitness First** (supra); **CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd**); **Roadships Logistics Ltd v Tree**

(i) A genuine dispute is therefore one which is *bona fide* and truly exists in fact and that is not spurious, hypothetical, illusory or misconceived. It exists where there is a plausible contention which places the debt in dispute and which requires further investigation. The debt in dispute must be in existence at the time at which the statutory demand is served on the debtor (**Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd** [1997] FCA 681; (1997) 76 FCR 452; Eyota).

CONCLUSION

38. In my view, the applicant has failed to establish that there is a genuine dispute as to the debt alleged. Its argument on service must also fail on the reasoning of Stuart J in **Smak Works Pte Ltd v Total (Fiji) Pte Ltd** [2020] FJHC 781; HBM 57.2019 (22 September 2020) which I adopt in this case.

39. Accordingly, I dismiss the application and award costs to the respondent company which I summarily assess at $1,500-00 (one thousand five hundred dollars only).

HIGH COURT OF FIJI
LAUTOKA

.....
Anare Tuilevuka
JUDGE
Lautoka High Court

27 April 2022