IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBM 03 of 2021

IN THE MATTTER of **SKY ESTATES PTE LIMITED** a limited liability having its registered office at 4 Tanoa House, Tanoa Residence, Nadi in Fiji.

A N D

IN THE MATTER of the **COMPANIES ACT 2015.**

Appearances:	Ms. Tabuadua S. for the Applicant
	Ms. Choo N. for the Respondent
Date of Hearing:	23 March 2022
Date of Ruling:	24 June 2022

RULING

INTRODUCTION

1. Before me is an Originating Summons to Aside Statutory Demand filed on 10 January 2022 by Lowing Lawyers for and on behalf of Sky Estates Pte Limited (**"SEPL"**).

2. The Originating Summons is filed pursuant to section 516, 517, 518, 520 and 521 of the Companies Act 2015 and Rule 115 of the Companies (Winding Up) Rules 2015, Order 4 Rule 2(c) and Order 3 Rule 4(1) of the High Court Rules 1988 and the inherent jurisdiction of this Court.

3. The application is supported by an affidavit sworn by Manu Prabhakaran (**"Prabhakaran"**) on 09 January 2022.

4. Relcorp (Fiji) Pte Limited (**"RFPL"**), the defendant, has filed an affidavit of Robert Edward Lowres (**"Lowres"**) sworn on 02 February 2022 to oppose the application.

UNCONTROVERTED FACTS

5. The following are the uncontroverted facts:

   (i) SEPL is a limited liability company. Its registered office is 4 Tanoa House, Tanoa Residence, Nadi, Fiji.

   (ii) on 11/06/20, an application was lodged with the Registrar of Companies to register SEPL. As of the date of the hearing of this application, the Registrar was still processing that application.

(iii) SEPL owns a vacant lot on Naisoso Island. The said Lot is legally described as Certificate of Title No. 39981 being Lot 65 on DP 10179 (**"Lot 65"**).

(iv) RFPL is the developer of Naisoso Island. Lowres is the director of RFPL. RFPL also owns the Lot next to SEPL's Lot 65. These Lots share a common border.

(v) on 04/06/20, Lowres sent an email to Prabhakaran attaching a quote for a proposed side boundary fence to be built along the common boundary and inviting Prabhakaran to call and discuss.

(vi) on 20/06/20, Prabhakaran responded to Lowres by return email. He advised that "due to all sorts of global uncertainties", he was deferring plans on developing his lot and was in no position to contribute towards Lowres proposed boundary wall. He then wished Lowres well.

(vii) on 26/06/20, Lowres replied to say that he understood Prabhakaran's situation. He said he was prepared to go ahead and build a fence. He then said: *"all I as is that you write me a cheque for half the cost and post-date it to 30 June next year"*.

(viii) on 13/07/20, Lowres sent Prabhakaran another email to "please call me as soon as possible on (phone number supplied).

(ix) on 14/07/20, Prabhakaran replied reiterating his inability to commit to Lowres proposal due to the "current global crisis and uncertainties"

(x) on 29/09/20, Lowres again emailed requesting Prabhakaran to contact him so they can come to "some arrangement with the fence agreement"

(xi) on 07/10/20, Prabhakaran responded to say his position has not changed and that he was seeking legal advice.

(xii) on 20/01/21, Lowres emailed Prabhakaran to express his disappointment at Prabhakaran's attitude and threatening legal action if no amicable solution is reached. Prabhakaran responded on the same day. He asserted that he never ever once committed himself to an agreement to share the cost of the wall.

(xiii) on 20/08/21, Lowres emailed Prabhakaran to advise that he has instructed his lawyers to take care of the matter. Prabhakaran replied reiterating that he had never once before committed to an agreement to sharing the cost of the fence. Lowres responded saying he had sent Prabhakaran the quote so Prabhakaran can obtain other quotes. Lowres asserted that the Body-Corporate By-Laws requires Prabhakaran to meet half the cost of fencing and that the Design & Build Covenants specify the type of fencing to be built.

(xix) on 21/08/21, Prabhakaran emailed the Body-Corporate seeking clarification on the fencing by-laws. The Body-Corporate Manager responded that the By-Laws does not cover side boundary fencing.

(xx) on 23/08/21, Prabhakaran responded and reiterated that he never once committed to sharing the cost of the fence. Also – he had checked with the Body Corporate which advised that Prabhakaran was under no obligation whatsoever to share in the cost of fencing. He also asks Lowres to "cease and desist what I consider a flagrant breach of my privacy, and act of intimidation and a sequence that amounts to bullying".

(xxi) on 24/08/21, Julie Pearce Chairperson of the Body Corporate emailed Lowres and Prabhakaran to confirm that the sharing of costs is not part of the Design and Building Covenants. She suggested that Lowres and Prabhakaran look at the Fencing Act. She urges them to try and resolve their issues and that the Body Corporate is a bystander in their dispute.

DEMAND NOTICE

6. On 26 October 2021, R. Patel Lawyers sent the Demand Notice in question to SEPL. The relevant part of the said Notice reads as follows:

> "We are instructed to demand from you, as we hereby do, the sum of **F$11,018.59 (Eleven Thousand and Eighteen dollars and Fifty-Nine Cents)** being the outstanding debt on your part for the construction of a fence which adjoins the two lots. Full particulars have been supplied and are well known to you.
>
> **TAKE NOTICE** that if the sum of **F$11,018.59 (Eleven Thousand and Eighteen dollars and Fifty-Nine Cents)** is not paid into our chambers within 7 (seven) days from the service of this notice, we are instructed to proceed with legal action against you to recover the amount owing.

REPLY TO DEMAND NOTICE

7. On 10 November 2021, Lowing Lawyers responded by letter to the Demand Notice. The letter highlights the following:

(i) the Demand Notice lacks particulars as to the legal and factual basis of the debt alleged.
(ii) SEPL denies owing the sum claimed in the Demand Notice
(iii) SEPL relies on section 6(2) of the Fencing Act 1955 in support of its position that it is not liable to pay any portion of the cost of erecting a fence

THE LAW

8. Section 516 of the Companies Act provides:

> 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.

9. The normal grounds employed to support an application to set aside a statutory demand are set out in sections 517 which 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)).

IS THERE A GENUINE DISPUTE ABOUT THE DEBT?

10. It is clear to me from the exchange of emails between the parties that there was no agreement between them. The defendant had then gone ahead and built a fence which is in compliance with the standards and specifications of the Design and Building Covenants of the development scheme.

11. Is the plaintiff company liable still notwithstanding the absence of any cost-sharing agreement between the parties and the absence of any provision in the relevant By-Laws to address the issue? This is not the forum to answer this question. However, I am inclined to highlight the relevant provisions of the Fencing Act to address the issue as to whether or not there is a genuine dispute of the debt alleged.

Fencing Act

12. Section 5 of the Fencing Act provides that the occupiers of adjoining properties are liable to contribute equally to the erection of a fence between their lands:

> **5.** Subject to the provisions of this Act, the occupiers of adjoining lands not divided by a sufficient fence are liable to contribute in equal proportions to the erection of a fence between such lands, notwithstanding that such fence may not extend along the whole boundary-line.

13. Section 6(1) of the Act requires that any person desiring to compel any other person to contribute to the erection of a fence may serve him a Notice to Fence. A pro forma of this Notice is provided for in the Second Schedule to the Act. However, section 6(1) says that any other notice "to the like effect" will suffice.

> **6.**-(1) Any person desiring to compel any other person to contribute to the erection of a fence under this Act may serve on him a notice, in this Act referred to as a notice to fence, in the form numbered (1) in the Second Schedule or to the like effect, and shall specify the boundary to be fenced, and the kind of fence proposed to be erected.

14. Section 6(2) provides that if any person erects a fence without serving a Notice to Fence or any other notice to the like effect, the occupier of the adjoining land shall not be liable to contribute.

> (2) If any person erects a fence without serving notice as aforesaid, the occupier of adjoining land shall not be liable to pay any portion of the cost of erecting such fence, but shall not thereby be relieved from liability to pay half the cost of repairs in accordance with the provisions of section **15**.

15. Section 7 provides for how a receiver of a Notice to Fence may object and section 8 makes provision for how a Notice to Fence and a Cross-Notice may be resolved. Section 9 provides that a succeeding occupier is liable to such fence to the same extent as his predecessor was when he relinquished occupation.

Genuine Dispute?

16. The question is whether or not there is a genuine dispute between the parties. 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. 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]" (cf **Eng Me Young v Letchumanan** [1980] AC 331 at 341], or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cf **South 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

17. In my view, there is an issue as to whether or not the emails sent were sufficient to constitute a "notice to the like effect" pursuant to section 7 of the Act. Again, this is not the forum to determine that issue. The Respondent should pursue a civil claim for contribution in the Magistrates Court where this issue will no doubt be raised.

18. Accordingly, I dismiss the application and award costs to the respondent company which I summarily assess at $1,000-00 (one thousand dollars only).

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka

24 June 2022