IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

ACTION NO:- HBE 36 of 2021

IN THE MATTER OF SEA QUEST (FIJI) PTE LIMITED

-AND-

IN THE MATTER of an application by the Applicant under Section 516 and Section 517 of the Companies Act 2015 to set aside the Statutory Demand dated 09.08.21 issued by **DAEMYUNG TUNA FISHING TACKLE CO.LTD**

BETWEEN: **SEA QUEST (FIJI) PTE LIMITED , WALU BAY, SUVA**

APPLICANT

A N D: **DAEMYUNG TUNA FISHING TACKLE CO. LTD** a duly incorporated company in the Republic of Korea having its address at 30 Noksansandan 262-ro 60beon-gil, Gangseogu, Busan, Republic of Korea and of 39 Foster Road, Walu Bay, Suva.

RESPONDENT

Appearance : Mr. Isireli Fa for the Applicant
Mr. Tamiana Low for the Respondent

Hearing : Friday, 3rd June, 2022 at 2:30pm

Decision : Friday, 8th July, 2022 at 9:00am

DECISION

(A) INTRODUCTION

[01]. The matter before me stems from the applicant's summons originally filed on 30.08.2021 seeking the grant of the following orders:

- *That the statutory demand dated 09.08.2021 issued by the respondent against the plaintiff be set aside.*
- *That costs of this application be paid by the respondent on an indemnity basis.*

[02]. The applicant subsequently amended its summons to include the following order:

> *"In the alternative/or if necessary, that the applicant be granted leave to serve the respondent its application to set aside the statutory demand dated 09.08.2021 out of time."*

[03]. The following affidavits have been filed:

- Affidavit in support of Wahid Ali, the General Manager and Director of the applicant sworn on 30.08.2021.
- Affidavit in response of Byoung Chan Kwon, the Director of the respondent sworn on 14.10.2021.
- Affidavit in reply of Wahid Ali sworn on 08.11.2021.

(B) BACKGROUND

[01]. The respondent **[DMT]** is a company based in the Republic of Korea in the business of manufacturing and selling fishing equipment.

[02]. The applicant **(SQL)** is one of the respondents customers in Fiji who purchases items from DMT on credit.

[03]. On 09.08.2021, **DMT** through its solicitors issued a statutory demand under section 515 of the Companies Act demanding a payment from **SQL** in the sum of US $502, 625.48 (Annexure marked KK-3 in the affidavit of Byoung Chan Kwon, sworn on 14.10.2021). DMT claimed that SQL was indebted to in the sum of US $502, 625.48.

[04]. It has been common ground that DMT's statutory demand dated 09.08.2021 under section 515 of the Companies Act was served on SQL on the same date, i.e. 09.08.2021.

[05]. On 26.08.2021, SQL through its solicitor's [Fa & Co] wrote to DMT's solicitors [Munro Leys] informing DMT that the debt claimed is disputed and requested DMT to furnish the particulars of the claim. (Annexure E referred to in the affidavit of Wahid Ali sworn on 30.08.2021). SQL states that it did not receive any response from DMT.

[06]. On **30.08.2021** [on the 21st day after the service of the statutory demand] SQL **filed** an application to set aside the statutory demand dated 09.08.2021. As I said, the statutory demand was served on SQL on **09.08.2021**. The application to set aside the statutory demand had to be **filed and served** on DMT within 21 days after the demand is served, i.e. on or before **30.08.2021** as required by section 516 of the Companies Act, 2015.

[07]. On 31.08.2021 (One day after the 21 day deadline) SQL's solicitors informed the solicitors of DMT that SQL had filed an application to set aside the demand. (Annexure marked KK-4 referred to in the affidavit of Byoung Chan Kwon, sworn on 14.10.2021 is a copy of the letter addressed to DMT's solicitors).

[08]. It has been common ground that DMT was not served with the copy of the summons and affidavit until 15.09.2021 [until 15 days after the 21 day period had expired]. (Annexure marked KK-5 referred to in the affidavit of Byoung Chan Kwon sworn on 14.10.2021 is an acknowledged copy of the back page of the application which shows the date of service.)

[09]. DMT opposed the SQL's application for setting aside the statutory demand and says that the application was not served within 21 days and that there is no genuine dispute over the debt.

[10]. On the other hand, SQL says the service could not be effected within 21 day period, because;

(a) The High Court Registry did not return the summons and the affidavit until 10.09.2021.

(b) DMT's solicitor's firm was closed for business due to Covid-19 pandemic and subsequent lockdowns.

[11]. Moreover, SQL says that the debt is genuinely disputed and it has filed Civil Action No: HBC 228 of 2021 against DMT for breach of agreement and unconscionable conduct.

(C) THE LAW

Against this factual background, it is necessary to turn to the statutory provision. Section 516 of the Companies Act, 2015 says;

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.

(Emphasis added)

(D) CONSIDERATION AND THE DETERMINATION

[01]. Counsel for the respondent DMT, Mr. Low submitted SQL's application should be dismissed *in limine* because:

(a) It is without merit and doomed to fail since it was served "out of time".

AND

(b) There is no genuine dispute over the debt. SQL admitted the debt.

[02]. In reply, counsel for the applicant SQL, Mr. Fa submitted:

a). The High Court Registry did not issue the summons until 10.09.2021.

b). Therefore, the applicant [SQL] could not effect service on time.

c). The applicant [SQL] should not be penalized for the lapse on the part of the High Court registry.

d). Furthermore, the service could not be effected because DMT's solicitors firm was closed for business due to Covid-19 pandemic and subsequent lockdown.

e). Order 3, Rule 4 of the High Court Rules permit the court to enlarge the time for the filing or service of any document.

f). The Hon. Chief Justice's directive dated 23.09.2021 clearly sets out that due to Covid-19 pandemic, the reckoning of time for any matters before the High Court is computed from 18.09.2021.

g). Under Rule 3 of the Companies Winding up Rules, 2015 the court may dispense with compliance of all or any of the provisions of the Companies Act.

h). Rule 5 of the Companies [Winding Up] Rules 2015 applies in this matter and the court has the discretion to extend time for service.

i). The respondent DMT will not be prejudiced by the application to extend time for service. Therefore, the objections to the application is baseless.

[03]. Against that, counsel for the respondent, Mr. Low submitted:

a). In a setting aside application, the court's jurisdiction is only involved, if the application is filed and served within 21 days.

b). DMT was not served with the copies of the summons and affidavit until 15.09.2021 which was out of time.

c). Therefore, the application is clearly defective. (the attention of the court is drawn to the decision of the High Court in ***Nawi Island Limited v PricewaterhouseCoopers[1])***

d). On 31.08.2021, DMT's solicitors (Munro Leys) received a letter from Fa & Company, SQL's solicitors informing Munro Leys that SQL had filed the setting aside application. This letter was outside the 21 day time limit and did not attach the application or the affidavit.

e). A debtor cannot blame the registry or other procedures for delay since a copy of the application could have been served with a note to indicate that it is yet to be issued by the registry (the attention of the court is drawn to the following decisions.)

- *My Idea Pte Ltd [Trading as Five Squares] v China Navigation Co Pte Ltd [Trading as Swire Shipping][2]*
- *Extreme Sports Fishing LTD [trading as Extreme Resort] v Green Park Suppliers [Fiji] Pte Ltd[3]*
- *Skyglory Pte Ltd v Bhawna Ben [trading as Bharat Indenting House][4]*

The Court Lacks Jurisdiction [?]

[04]. Section 516 of the Companies Act, 2015 provides:

[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.

[1] [2019] FJHC 119.
[2] [2021]FJHC 220
[3] [2020] FJHC 633
[4] [2020] FJHC 161

*[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.

(Emphasis added)

[05]. As I understand the above statutory provision, an application for setting aside the statutory demand is made only if the requirements of section 516 are met. The compliance with this section goes to the jurisdiction of this court.

[06]. In Fiji, there have been a number of cases where courts have held that the time limits in section 516 are mandatory, and the courts have no power under the Companies Act or under the Companies Winding Up Rules to extend the time for filing an application to set aside the statutory demand, or to waive strict compliance with the time limits set out in that section.

[07]. These include the decisions of Amaratunga J in **South Pacific Marine Ltd v Pricewaterhousecoopers** and **Nawi Island Limited v Pricewaterhousecoopers**[5]. These decisions were followed by Seneviratne J in **Skyglory Pte Limited v Bhawna Ben**[6].

[08]. As to the time limits in section 516, Amaratunga J in the case of **South Pacific Marine Ltd v Pricewaterhousecoopers** (supra) said:

18. "The compliance of Section 516(3) of Companies Act 2015 is mandatory due to two reasons. First, the use of language 'only if' makes it mandatory. The grammatical meaning of the said provision is that requirements are indispensable. Secondly, if it is not mandatory, the alleged debtor company, could use this provision of setting aside of the Statutory Demand, to postpone or delay winding up action. The legislature had prevented it through usage of restrictive language. Purposive interpretation of section 516(3) of Companies Act 2015 makes it mandatory."

[5] [2019] FJHC 118, 119
[6] [2019] FJHC 891

19. If 21 day time is not applied to service of application and affidavit, a debtor may delay the winding up action of the creditor, without a valid ground. This can be done by filing an action for setting aside of the winding up notice but delay the service of the same application to the creditor, so that they will be kept searching for the grounds of the application for setting aside of Statutory Demand or they will be in two minds to proceed with the winding up action. Statutory Demand is required to give 21 days' period or debtor company to settle it, or to face winding up action. So it is nothing but fair, to give same time period to serve an application for setting aside of Statutory Demand.

[09]. I am convinced that the above interpretation is correct. I should therefore adopt the interpretation and follow the decision.

[10]. In '**Skyglory Pte Ltd v Bhawna Ben**' (supra) the court responded as follows to a submission that the court has the power to enlarge or abridge time prescribed by law and a formal defect will not invalidate the proceedings:

"The learned counsel for the applicant relying on Rules 115 and 116(1) of the Companies (Winding up) Rules 2015 submitted that the court has the power to enlarge or abridge time prescribed by law and a formal defect will not invalidate the proceedings.

Rule 115 of the Companies (Winding up) Rules 2015 provides:

> *"The Court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing or taking any proceedings."*

On a careful reading of rule 115 it appears that under the said rule the court has power to extend or abridge time prescribed by the rules or by an order of court. There is nothing in this rule to say that the court has power to extend the time prescribed by the Companies Act 2015.

Rule 116(1) of the Companies (Winding Up) Rules 2015 provides:

> *"No proceedings under the Act or these Rules are invalid by reason of any formal defect or any irregularity, unless the Court before which any objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or*

irregularity and that the injustice cannot be remedied by any order of that court."

Originating summons seeking to have the statutory demand set aside was filed on 12th June 2019. The file was sent to me by the Civil Registry on 17th June 2019. I directed that the matter be mentioned on 18th June 2019 and sent it back to the Registry on the same day. The learned counsel for the applicant submitted that the Registry released it on 18th June 2019 and it was served on the respondent on 21st June 2019. Since the court has already made order refusing to accept the contents of the affidavit filed on 19th August 2019 as evidence, there is no material before this court to ascertain as to when the Court Registry released the papers filed by the applicant for service. The submission of the learned counsel made at the hearing is not evidence.
The question is whether the failure to serve the application to set aside the statutory demand falls within the meaning of irregularity under rule 116 of the Companies (winding up) Rules 2015.

In the South Pacific Marine Ltd v Pricewaterhousecoopers (supra) it was also held:

There is 21 day time period to settle the debt and if not the creditor can take steps for winding up. The same time period is given for debtor to seek setting aside of Statutory Demand. These time periods are mandatory provisions contained in Section 516 of Companies Act 2015. Accordingly the preliminary objection is sustained and the action is struck off for non-compliance of the mandatory provision contained in Section 516(3) of Companies Act, 2015.

What section 516 of the Companies Act 2015 says is an application is made in accordance with section 516 only if it is filed and served within 21 days of the service of the statutory demand. It is therefore, clear that, as observed by Amaratunga J. in the above case the provisions are mandatory and failure to comply such provisions is not a mere irregularity. For this reason, I am of the view that the applicant cannot rely on rule 116 of the Companies (Winding Up) Rule 2015 to circumvent the difficulty in not complying with the statutory provision.

[11]. Section 516 of the Companies Act governs winding up of companies in insolvency. The Winding Up Rules 115 and 116 (1) are general Rules dealing with irregularities. It is a general rule of statutory interpretation that the provisions of an Act will generally take precedence over the provisions of subsidiary legislation

such as Rules and Regulations. Besides, the strong and the striking language in section 516 of the Companies Act itself required the conclusion that there is no power by virtue of Rules 115 and 116 (1) to extend the time limits contained in section 516.

[12]. Section 459 G in the Australian Corporation Law is identical to section 516 of Fiji's Companies Act, 2015.

[13]. The following passage from the decision of Gummow J in the **David Grant & Co Pty Ltd v Westpac Bank Corporation**[7] interpreting the identical wording of section 459 G of the Australian Corporations Law is illuminating;

> *In providing that an application to the court for an order setting aside a statutory demand "may only" be made within the 21 day period there specified and that an application is made in accordance with s459G only if, within those 21 days, a supporting affidavit is filed and a copy thereof and of the applications are served, subsections (2) and (3) of s459G attach a limitation or condition on the authority of the court to set aside the demand. In this setting, the use in s459G(2) of the term 'may' does not give rise to the considerations which apply were legislation confers upon a decision-maker an authority of a discretionary kind and the issue is whether 'may' is used in a facultative and permissive sense or an imperative sense. Here the phrase 'an application may be made only within 21 days 'should be read as whole. The force of the term 'may only' is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s459G. An integer or element of the right created by s459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in the **Crown v McNeil** [1922] HCA 33, it is a condition of the gist in s459G(1) that subsection (2) be observed and, unless this is so, the gist can never take effect. The same is true of subsection (3).*
>
> *This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word 'only' in s459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter and that to treat s1322 as authorizing the court to extend the period of 21 days specified in s459G would deprive the word 'only ' of effect.*

[7] [1995] HCA 43

SQL cannot blame the registry for the delay in issuing the summons

[14]. In the '**Skyglory**' decision the court responded as follows to a submission similar to the submission in this case, that the service of the application occurred after the 21 day period only because the High Court delayed the release of documents.

> *The applicant submits that the delay was due to the Registry releasing the documents for service after the expiration of the period of 21 days. The applicant should have known that the 21 days period prescribed by the statue is to file and serve the application. However, the applicant filed its application to have the statutory demand set aside on the 19th day. It should have given sufficient time for the Registry to attend to the matter and release it for service within the period prescribed by the Act."*

[15]. In '**Extream Sport Fishing Ltd v Green Pak Supplies (Fiji) Pte Limited'**[8] the court responded as follows to a plea from the bar table that service of the application occurred after 21 day period only because the High Court delayed the release of the document.

> *"I agree that the responsibility is on the applicant and its advisors to ensure that the time limits are complied with, but would add the following related comments. First, because an application under s.516 is an originating (rather than interlocutory) motion/application O.8., r.3(4), which provides:*
>
> > *Issue of the notice of an originating motion takes place upon its being sealed by an officer of the Registry.*
>
> *appears to require that it is filed before it can be served. Hence, solicitors responsible for the conduct of such an application need, when preparing and filing the application, to allow themselves time for service after the motion is processed by the court staff and allocated a hearing date. Second, if the advisors don't themselves understand the mandatory nature of the time limits set out in s.516 there is little chance that they will be able to impress on the court staff the importance of releasing the application for service within the time prescribed."*

[8] [2020] FJHC 633

[16]. In **Nawi Island Limited v Pricewaterhousecooper** [supra] the applicant had filed its application within the 21 day time frame but served the application 1 day out of time. Amaratunga J dismissed the setting aside application because the applicant did not comply with the mandatory time frame.

[17]. In the case before me it has been common ground that DMT served the statutory demand on 09.08.2021. Any application to set it aside had to be filed and served on the respondent within 21 days, i.e. on or before 30.08.2021. The application to set aside the demand was filed on the **last day**, i.e. 30.08.2021. The summons and the affidavit was not served on the respondent until 15.09.2021. The applicant SQL blames the High Court registry for not releasing the summons and the affidavit on the very same day for service. In my view, it is illogical to blame the High Court registry because:

- *The applicant SQL should have given sufficient time for the High Court Registry to process the summons and release it for service within the statutory time limit instead of filling the application on the last day of the 21 day period.*

- *A copy of the summons and the affidavit could have been served on the respondent with a note to indicate that it is yet to be issued by the registry.*

[18]. In paragraph (21) and (22) of the written submission filed on behalf of SQL, it is alleged that:

> "*The application to set aside the Statutory Demand was not returned to the High Court Registry until 10.09.21, but service could not be effected because Messrs. Munro Leys was closed for business. Eventually, contact was able to be made with Messrs. Munro Leys who received the document on 15.09.21.*
>
> *In light of the above, it is quite clear that despite the Plaintiff's best efforts, no service could have been effected of the application to set aside if the High Court Registry did not release the document in time for service, being within 21 days."*

[19]. The court cannot accept SQL's bare assertion that "*the service could not be effected because Munro Leys was closed for business due to Covid-19 pandemic*". It is common ground that on 31.08.2021, DMT's solicitors (Munro Leys) received a letter dated 31.08.2021 from Fa & Company informing Munro Leys that SQL had filed the setting aside application. This letter was outside the 21 day time

limit and did not attach the summons and affidavit. If Munro Leys office was closed due to Covid-19 pandemic, I fail to see how this letter was served instantaneously on Munro Leys on 31.08.2021.

[20]. A copy of the summons and the affidavit with a note to indicate that it is yet to be issued by the Registry should have forwarded through an email to Munro Leys, solicitors for the respondent. The Electronic Transactions [Amendment] Act No. 08 of 2017 has given legal recognition to electronic mails in legal proceedings.

Lack of prejudice

[21]. Mr. Fa, counsel for the applicant urged court that the application for setting aside be allowed to proceed because the applicant's default has caused no prejudice to the respondent.

I cannot accept this. The fallacy of the argument is this. If this principle is followed, a litigant could flout the statutory provision **[section 516 which attached a limitation or condition on the authority of the court]** with impunity, confident that he would suffer no consequence unless and until the other party could demonstrate prejudice.

The fallacy goes even deeper. The complaint made against the matter before me is not about a procedural defect. The case before me stands on an entirely different footing. It is about a statutory provision which attached a limitation or condition on the authority of the court. The language of section 516 is emphatic and requires that any application made under it be made within 21 days after the demand was served.

I remind myself the words of Gummow J in **David Grant** (supra)

> *"In providing that an application to the court for an order setting aside a statutory demand "may only" be made within the 21 day period there specified and that an application is made in accordance with s459G only if, within those 21 days, a supporting affidavit is filed and a copy thereof and of the applications are served, subsections (2) and (3) of s459G attach a limitation or condition on the authority of the court to set aside the demand. In this setting, the use in s459G(2) of the term 'may' does not*

give rise to the considerations which apply were legislation confers upon a decision-maker an authority of a discretionary kind and the issue is whether 'may' is used in a facultative and permissive sense or an imperative sense. Here the phrase 'an application may be made only within 21 days 'should be read as whole. The force of the term 'may only' is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s459G. An integer or element of the right created by s459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in the ***Crown v McNeil*** *[1922] HCA 33, it is a condition of the gist in s459G (1) that subsection (2) be observed and, unless this is so, the gist can never take effect. The same is true of subsection (3).*

This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word 'only' in s459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter and that to treat s1322 as authorizing the court to extend the period of 21 days specified in s459G would deprive the word 'only ' of effect".

Addressing the possibility of injustice arising from the strictness of the time limit prescribed, Gummow Justice in David Grant (supra) said;

" *No doubt, in some circumstances, the new pt5.4 [equivalent of section 516 in Fiji] may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with the perceived defects in the pre- existing procedure in relation to notices of demand. It also may transpire that a winding up application in respect of a solvent company is threatened or made for an improper purpose which amounts to an abuse of process in the technical sense of that term, as explained in Williams v Spautz (1992) HCA 34, (1992) 174 CLR 509.*

General discretion to extend time contained in the High Court Rules or directions of the court - Order 3, Rule 4 of the High Court Rules, 1988

[22]. There is no provision in the Companies Act 2015 which confers a discretion on the court to either extend or enlarge the period of time within which an application to set aside a statutory demand should be made.

[23]. Mr. Fa counsel for the applicant argues that, Order 3, Rule 4 of the High Court Rules,1988 permit this court to enlarge the time for the filing and service of the setting aside application or grant leave to serve out of time. Alternatively, he argued that Rule 5 of the Companies [Winding Up] Rules 2015 confer jurisdiction on this court to extend time for service or grant leave for service out of time.

[24]. Order 3, Rule 4 applies when there is a procedural default in any civil proceedings as to time contained in the High Court Rules or the directions of the court.[9]

The Companies Act mandates a special procedure in Companies Jurisdiction.

Therefore, the applicant cannot take refuge in Order 3, Rule 4 of the High Court Rules, 1988 to circumvent the clear and emphatic language in section 516 of the Companies Act, 2015. Besides, it is a general rule of statutory interpretation that the provisions of an Act will generally take precedence over the provisions of subsidiary legislation such as Rules and Regulations.

[25]. Finally, let me turn to the argument based on Rule 3 and 5(1) of the Companies Winding Up Rules 2015. Rule 3 states;

> "*The Court may dispense with compliance with all or any of the provisions of these* ***Rules.***

Rule 5(1) provides;

> ***5 – (1) This section applies if any circumstances arise for which –***
>
> ***(a) No procedure is provided by the Act, the Regulations or these Rules; or***
>
> ***(b) There is doubt in relation to the correct procedure to be adopted.***

[26]. I wish to stress that if the special provisions made by section 516 of the Companies Act, 2015 are to be extended by resort to Winding up Rules 3, 5, 115 and 116 (1) or under Order 3, Rule 4 of the High Court Rules, 1988, the limitations imposed in such clear and emphatic language by section 516 would

[9] Costellow v Somerset (1993)(1) All ER 957 at 960
Mortgage Corporation Ltd v Sanders (1996) FLR 751

be rendered **nugatory**. To be more precise, if the time for the making of an application or serving the application under section 516 of the Companies Act, 2015 is enlarged by the court by resorting to Winding up Rules 3, 5, 115, 116 (1) or under Order 3, Rule 4 of the High Court Rules, 1988 notwithstanding the apparently emphatic wording of section 516, then there is difficulty in giving section 516 **sensible operation**.

[27]. I cannot shut my eyes to the fact that, at the end of the time allowed by the statutory demand for compliance a creditor is entitled to know what rights he has in consequence of non – compliance within that time. In certain circumstances, (where there is an existing application to have the demand set aside) a creditor knows that he must await the outcome of the application; in all other cases he can proceed upon the basis of a statutory presumption of insolvency if he chooses to apply for winding up in insolvency. That scheme is clear and certain and it would be unfortunate if uncertainty is introduced by judicial decision to extend time or leave to file or serve out of time. If the application to serve out of time is to proceed, what then would happen to the established failure to comply with the demand? The demand would lose its status and effect. In the same token, I feel myself constrained to hold that the absence of any provision which expressly deals with the defeasible statutory demand or the consequences of it, adds weight to the conclusion that parliament did not intend that the time could be extended, or leave could be granted to serve out of time. In any event, an extension of time to make an application to set aside the statutory demand or extension of time to serve the application or leave to serve out of time would not make it an application "***made or served in accordance with section 516***" , and therefore the application would not be effective.

[28]. It is important to remember, significantly as I believe, where the meaning of the statutory words are plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. The truth is it would be injurious to public interest if judges, under the guise of interpretation, provide their own preferred interpretation to words of a statute. Suffice to say that in the field of statute law the judge must be obedient to the will of the parliament as expressed in its enactments. The law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the

enactment. Under our constitution, it is parliament's opinion on these matters that is paramount.

[29]. The harsh reality is section 516 does not leave a residual discretion with the court. In these circumstances, despite the forbidding consequences, I find myself unable to grant the orders sought by the applicant. This outcome is unpalatable.

[30]. There is no power to extend the time to file or serve the application to set aside the statutory demand. There is no power to grant leave to serve out of time. This I regard as the inevitable outcome of the statutory provision which is not capable of enlargement. I dismiss the SQL's application for leave to serve out of time and consequently, I dismiss the originating summons to set aside the statutory demand.

ORDERS

[01.] Sea Quest (Fiji) PTE Limited's application to serve the setting aside application out of time is dismissed.

[02]. **Consequently**, Sea Quest [Fiji] PTE Limited's Originating Summons filed on 30.08.2021 and the Amended Summons filed on 15.12.2021 is dismissed.

[03]. Sea Quest [Fiji] PTE Limited is ordered to pay costs of $1500.00 [summarily assed] to Daemyung Tuna Fishing Tackle Co. Ltd within seven [07] days hereof.

Jude Nanayakkara
[Judge]

High Court - Suva
Friday, 8th July, 2022