IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

HBM 40 OF 2021

IN THE MATTER of a Statutory Demand dated 6 December 2021 taken out by **AGODA COMPANY PTE LTD** ("the Respondent") against **TOUR MANAGERS (FIJI) PTE LIMITED** ("the Applicant") and served on the Applicant on 7th December 2021.

A N D:

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

BETWEEN: **TOUR MANAGERS (FIJI) PTE LIMITED** a limited liability company having its registered office at Akiko House, Votualevu, Nadi, Fiji.

APPLICANT

A N D: **AGODA COMPANY PTE LTD** of 30 Cecil Street # 19-08 Prudential Tower, Singapore.

RESPONDENT

Appearances: Ms. Tavakuru for the Applicant
Ms. Kumar for the Respondent
Date of Hearing: 12 July 2022
Date of Ruling: 16 September 2022

RULING

1. On 23 December 2021, the Applicant, Tour Managers (Fiji) Pte Limited (**"TMPL"**) filed an Originating Summons pursuant to section 516 of the Companies Act seeking the following orders:

    (a) that the Statutory Demand dated 06 December, 2021 taken out by the Respondent against the Applicant and served on 07 December, 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 pays the costs of and incidental to this application on an indemnity basis.

2. The said summon is filed pursuant to section 516 of the Companies Act 2015. It is supported by an Affidavit of Praneet Prakash sworn on 23 December 2021.

3. The Respondent Company (**"Agoda"**) has filed an affidavit of Jibran Bugvi in opposition to the Summons. Mr. Bugvi states his address as:

1/47, Hyde, Soi 13, Sukhumvit, Bangkok.

4. Bugvi's affidavit was sworn and notarized in Bangkok. It was filed in Lautoka on 11 February 2022. Notably, a scan copy of the said affidavit was annexed to an earlier affidavit of one Luisa Bakani sworn on 04 February 2022 and filed 07 February 2022.

5. The affidavit in reply of Praneet Prakash sworn on 08 July 2022, was filed on 14 July 2022.

6. On 15 August 2022, the Applicant filed a *Summons to Fix Security for Costs* pursuant to Order 23 Rule 1 (a) of the High Court Rules 1988. I note that the said *Summons to Fix Security for Costs* was filed whilst the matter was adjourned for submissions and later Ruling.

7. The was set for hearing on 12 July 2022. However, on the said date, that hearing was vacated on the application of one of the parties and by consent of the other. I then directed (1) the Plaintiff to file and serve an affidavit in response in 7 days and (2) the parties to file and serve submissions in 28 days, and (3) adjourned the matter to 16 September 2022 for ruling on submissions.

8. The Respondent did file submissions on 09 August 2022. As for the Plaintiff, instead of filing submissions, it filed the *Summons to Fix Security for Costs* on 15 August 2022. This Summons is supported by an affidavit of Praneet Prakash sworn on 03 August 2022 and filed on 15 August 2022.

9. I refuse to deal with the application for security for costs. In my view, it is an abuse of process, for the following reasons:

   (i) the application was filed pursuant to Order 23 Rule 1(a) of the High Court Rules 1988.
   (ii) an application for Security for Costs under Order 23 Rule 1 of the High Court Rules 1988 is usually applied for by a Defendant.
   (iii) the application was also filed well after the hearing was vacated by consent and after directions for the filing of submissions and a ruling date set.

10. As for the application to set aside statutory demand, only the Respondent has filed submissions. The Applicant has not bothered to file any submissions.

11. The Respondent has raised a preliminary objection against the Affidavit in Reply of Praneet Prakash. The objection is that the jurat in the said affidavit was not properly administered and executed. However, the Court copy appears to be in order. I will say no more on this.

12. The Respondent also raises an issue about the application being made under section 516 of the Companies Act. According to the Respondents, the application should have been made under section 517 of the Companies Act. Section 516(1) provides that a company may apply to the Court for an Order setting aside a Statutory Demand served on the company.

13. Section 516 provides as follows:

> 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.

14. Clearly, section 516 (3) envisages an application being made "under this section". That speaks for itself and I speak no more on this.

15. 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)).

16. Clearly, in this case, the applicant relies on ground (a).

IS THERE A GENUINE DISPUTE ABOUT THE DEBT?

17. As to whether or not there is a genuine dispute , Nanayakarra J on **Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd** [2020] FJHC 1025; HBM 36.2020 (11 December 2020) said as follows at paragraph 7:

> **Whether a genuine dispute is established for the purposes of Section 517(1)((a) of the Companies Act, 2015?**
>
> (07) Section 517(1)(a), of the *Companies Act* provides that a creditor's statutory demand may be set aside when the Court is satisfied that there is a genuine dispute about the existence or amount to which that demand relates. The concept of a "genuine dispute" is well established in the case law. That test has been variously formulated as requiring that the dispute is not "plainly vexatious or frivolous" or "may have some substance" or involves "a plausible contention requiring investigation" and is similar to that which would apply in an application for an interlocutory injunction or a summary judgment : In ***Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd***, the Full Court of Federal Court held, a "genuine dispute" must be bona fide and truly exist in fact, and the grounds for that dispute must be real and not spurious, hypothetical, illusory or misconceived.

(08) In ***CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd*** , Barrett J helpfully summarized the principle as follows:

> *"The task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found, upon the hearing of its s 459G application, that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that on rational grounds indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."*

(09) In ***Roadships Logistics Ltd v Tree*** , Barrett J similarly observed that:

> *"Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor on rational grounds that indicates an arguable case on the part of the company it must find that a genuine dispute exists even where any case, even apparently available to be advanced against the company seems stronger."*

(10) In ***MNWA Pty Ltd v Deputy Commissioner of Taxation***

> *The Commissioner has rights and duties in relation to the recovery of taxation liabilities of taxpayers, including those available under Pt 5.4 of the Corporations Act. But, that does not mean that he is free to resort to those despite having promised, or made representations to, or entered into an arrangement with. a taxpayer that he would proceed differently, as a result of which the taxpayer altered his, her or its position.* ***The question of whether a contract or an arrangement was made and, if so, on what terms or whether the Commissioner, in fact, acted "in good faith" in accordance with cl 5.3 in the three deeds or for an improper purpose or unconscientiously, in my opinion, was one that, in the circumstances, could only be resolved in other substantive proceedings and not in the applications under s459G.***

(11) It is important to remember that the threshold criteria for establishing the existence of a genuine dispute to the debt is a low one.

18. In ***Fitness First Australia Pty Ltd v Dubow***, the Court dealt with an application under section 459G of the Corporations Act 2001 (Cth) which is identical in terms to section 516 of our Companies Act 2015. Ward J stated:

> *.....the court does not determine the merits of any dispute that may be found to exist, but simply whether these [sic is such a dispute and the threshold for that is not high. In Edge Technology Pty Ltd v Lite-on Technology Corporation [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J said at [45]):*
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> *The threshold presented by the test to set aside a statutory demand does not however require of the plaintiff a rigorous and in-depth examination of the evidence relating to the plaintiff's claim, dispute*

or off-setting claim.....Hayne J in Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] Vic Rp 61; [1994] 2 VR 290.

19. In ***Eyota Pty Ltd v Hanave Pty Ltd***, McLelland CJ explained that "genuine dispute" means:

> *....a plausible contention requiring investigation, and raises much of the same sort of considerations as 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. This 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]" (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.*
>
> *But it does mean that, except in such an extreme case[i.e. where evidence is so lacking in plausibility], a court required to determine whether there is a genuine dispute 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..... In Re Morris Catering Australia it was said the essential task is relatively simple – to identify the genuine level of a claim....*

20. In ***Fitness First*** (supra) at 127, Ward J cited ***Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)*** 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 (sic) 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 contention.* ***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.***
> *[Emphasis mine]*

And later, at 132:

> ***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).*

21. I have considered the affidavits filed and the submissions handed up by counsel. It is clear to me that the alleged debt which is the subject of the statutory demand is asserted on the basis of an Agreement between the parties. The parties refer to the said Agreement as the AGP Agreement. That is an acronym for Advance Guarantee Program which I understand captures the nature of their business

arrangement. The said Agreement was purportedly terminated by the Respondent due to an alleged material beach by the Applicant. The Applicant however asserts that the Agreement is still afoot.

22. While there is a material difference between the parties as to whether or not the Agreement is terminated or is still afoot – how that issue is decided has a bearing ultimately on whether or not the sum of $23,608.95 – which is the subject matter of the statutory demand in question – should or should not be refunded by the Applicant to the Respondent.

23. I am of the view that there is a genuine dispute in this case between the parties. I grant Order in Terms of the Application. Costs to the Applicant which I summarily assess at $800-00 (eight hundred dollars only).

Anare Tuilevuka
JUDGE
Lautoka

16 September 2022