IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 22 of 2024

BETWEEN	:	**SOLAR ENERGY SOLUTIONS (FIJI) PTE LTD** **Plaintiff**
AND	:	**BSP FINANCE (FIJI) LTD** **Defendant**

Counsel	:	**Mr R Singh for the Plaintiff** **Mr S Kumar for Defendant**
Hearing	:	**21 June 2024**
Judgment	:	**14 March 2025**

JUDGMENT

(Application to set aside statutory demand)

[1] The Plaintiff received a substantial loan from the Defendant in 2019 in order to purchase a truck. From the outset, the Plaintiff was in default of repayments on the loan and only a year later the truck was repossessed and sold. The proceeds of the sale were paid toward the loan but $93,082.33 remained outstanding.

[2] In January 2024, the Defendant served a statutory demand on the Plaintiff for the outstanding debt. The Plaintiff instituted the present proceedings seeking to have the statutory demand set aside. The Plaintiff contends that there is a genuine dispute over the debt.

Background

[3] In early 2019, the Plaintiff approached the Defendant for a loan to purchase a new Mitsubishi Fuso Truck for its business. The price of the truck was $170,000. The Plaintiff was contributing $17,000 and sought a loan for the remaining amount of $153,000.

[4] A Letter of Offer was made by the Defendant to the Plaintiff on 25 February 2019 offering to provide a loan for $153,000. There were additional costs payable by the Plaintiff such as stamp duty ($2,808) and interest ($48,690) making a total amount to be repaid of $204,498. The term of the loan was five years, with repayments of $3,408.31 per month, and a final payment of $3,407.71. The payments were to be made on the first of each month.

[5] A Bill of Sale was executed on 27 February 2019, the mortgage property being the truck. The conditions of the Bill of Sale were standard, and included:

i. The payment obligations at clause 3.2 required the Plaintiff to make the repayments as per the agreement, ie each month on the first of the month.

ii. Clause 5 set out the consequences for any default on payments, and included surrendering the mortgaged property. Clause 5.2(d) allowed the Defendant to *'deal with the mortgage property as if we own it to the extent permitted by law, (such as relocating it, leasing it or selling it in any way and to any person as we think fit)'*.

[6] According to the bank statement for the Plaintiff's account, which was set up for the loan, the first payment of $3,408.31 (which was required to be made on 1 April 2019) was not made until 11 April 2019. The second payment due on 1 May 2019 was not made until 20 May 2019, and the third payment on 1 June 2019 was not made until 28

June 2019. The Plaintiff was in default from the outset and incurred default interest on these late payments. The defaults continued throughout the rest of 2019 – payments were made late, the Plaintiff did not pay the full amount, and cheques were dishonoured. Eight payments were dishonoured between July 2019 and February 2020. By early 2020, the Plaintiff was well behind on its repayments, and, as such, the Defendant acted on 17 February 2020 to repossess the truck.

[7] It was obvious that the Defendant intended to sell the truck to recover its unpaid loan. There were communications between the parties, some of which are produced in this proceeding. On 12 June 2020, Manish Deo, Director of the Plaintiff company, emailed Shiraz Narayan (from BSP Finance) to advise:

> *Pl [please] advise me the valuation obtained for the truck.*
>
> *I bought the truck for 175k, plus accessories of 5k, total value of 180. Just used less than a year, and mileage around 20k.*
>
> *Considering the above and depreciation @20%, will bring the value to 144k. The sale of the vehicle has to be around this figure. I will not pay anything personally if the bank proceeds to sell at 93k, which is ridiculous.*
>
> *Pl send me valuation report from Nivis Motors or other reputable genuine truck resellers to assess the correct value.*
>
> *I don't get why the bank would depend on valuation from Sakura Cars.*
>
> *During this time of crisis the bank is giving 7 days to clear areas of 20k. This is just absurd.*
>
> *Pl think clearly and take a good stance, as I have already paid 45k, including deposit. I will not be able to pay any more.*

[8] It appears that the truck was sold by tender on 24 July 2020 for about $93,000. The amount owing at the time of repossession was $177,717.61, and the amount owing prior to the sale in July was $178,403.43 - the circumstances surrounding the tender and the

sale price are not disclosed in the documents available to the Court. With the reduction of the proceeds from the sale of the truck, the amount owing by the Plaintiff in July 2020 was $85,403.43.[1]

[9] The Defendant was subsequently in communication with the Plaintiff to recover the outstanding balance. On 21 July 2022, the Defendant's solicitors wrote to the Plaintiff's solicitors, the former advising:

> *Kindly advise on your client's position, as we have instructions to institute further proceedings in the High Court.*

[10] The Plaintiff's solicitors responded on 28 July 2022, requesting copies of several documents including the loan contract and copies of documents in respect to the tender sale - it does not appear that all these documents were supplied to the Plaintiff.

[11] The next development appears to have been service of a statutory demand dated 11 January 2024 requiring the Plaintiff to pay the amount of $93,082.33 within 3 weeks of the date of service. The statutory demand was served on the Plaintiff on 15 January 2024.

[12] The Plaintiff filed the present proceedings on 5 February 2024 by way of an Originating Summons and supporting affidavit from Manish Deo.[2] The relief sought being that the statutory demand is stayed or set aside '*as the alleged debt is genuinely disputed*'.

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[1] I note that the bank statement for the Plaintiff's loan account shows a debit of $7,678.90 on 31 July 2020. It is unclear what this amount was for.

[2] It appears the proceedings were served on the Defendant on the same date.

[13] A supplementary affidavit was filed for Mr Deo on 18 March 2024. The Defendant filed an affidavit in opposition for Anal Sen on 6 May 2024, and an affidavit in reply was filed for Mr Deo on 17 June 2024.

Statutory demand – the legislation and legal principles

[14] The use of a statutory demand is a step in the process for liquidating a company that is not solvent. A company is not solvent if it is unable to pay its debts when they are due and payable.[3] A statutory demand that remains unpaid after the statutory period creates a presumption that the company is unable to pay its debts. It is an avenue for creditors who have genuine concerns over the solvency of the debtor company and the recovery of their debt. The following remarks by Heath JA in *Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd* [2024] FJCA (26 July 2024) are a timely reminder of the purpose and place for statutory demands:

> *38. As I have said, the issue of a statutory demand is (generally) the first step to commence a creditor's proceeding to have the debtor company wound up, with all the consequences that flow from that.[4] A successful setting aside application denies the creditor the ability to rely on non-compliance to create a rebuttable presumption that the debtor company is insolvent. That is important, in the context of a regime which allows the High Court to put a company into liquidation on the grounds of insolvency. A company is solvent "if, and only if, it is able to pay all its debts as and when they become due and payable".[5]*
>
> *39. On occasion, a creditor may issue a winding up petition in respect of a debt for which it has not yet obtained a judgment. All that it needs to do*

[3] Section 514 of Companies Act.
[4] See para **Error! Reference source not found.** above.
[5] Companies Act 2015, Sections 513(c) and 514(1).

is to satisfy the court that it is owed more than the prescribed amount, $10,000. It is open to the debtor company to oppose a winding up application on the grounds that it is solvent. In such circumstances (in the absence of compliance with the statutory demand) the creditor is entitled to rely on the rebuttable presumption. Nevertheless, if the debtor company can adduce evidence to rebut the presumption, no winding up order will be made. Solvency is established by asking whether the debtor is "able" to pay its debts as they fall due; not whether it is "willing" to do so. A creditor met by an unwilling but solvent debtor must exercise remedies of execution to enforce payment of its debt.

[15] Pursuant to s 515(a) a statutory demand is required to be served at the registered office of the debtor company. If the debtor company wishes to apply to set aside the statutory demand it must file and serve the application within 21 days of service of the statutory demand. Section 517 sets out the circumstances where the court may set aside a statutory demand. This includes, where there is a '*genuine dispute*' between the parties *"about the existence* ***or amount of a debt to which the demand relates***".[6] Pursuant to s 518, where a statutory demand has been set aside, it has no effect.

[16] As to what constitutes a genuine dispute, Mr Kumar has helpfully provided several decisions on the matter, including *Searoad Shipping PTE Ltd v On Call Cranes (Fiji) Limited [2020] FJHC 1075 (11 December 2020)* and *Creative Distributors PTE Ltd v Autocare (Fiji) PTE Ltd [2022] FJHC 566 (5 September 2022)*. In the former, Nanayakkara J provided the following discussion on the authorities (with particular emphasis on the Australian decisions):

(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

[6] My emphasis.

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 [7]. *In* ***Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd*** [8], *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*** [9], *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."*

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[7] Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1999] VicRp 61; [1994] 2 VR 290; (1993) 11 ACSR 362; Eyota Pty Ltd v Hanave Pty Ltd [1994] 12 ACSR 785 at 787; Re UGL Process Solutions Pty Ltd [2012] NSWSC 1256

[8] [1997] FCA 681; (1997) 76 FCR 452 at 464; [1997] FCA 681; (1997) 24 ACSR 353

[9] [2003] NSWSC 728; (2003) 47 ACSR 100

(09) *In **Roadships Logistics Ltd v Tree*** [10]*, 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*** [11]

> *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.***
>
> *[Emphasis mine]*

[10] [2007] NSWSC 1084; (2007) 64 ACSR 671
[11] [2016] FCAFC 154, Rares J

(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.

(12) In ***Fitness First Australia Pty Ltd v Dubow*** [12]*, 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 there [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.*

(13) In ***Eyota Pty Ltd v Hanave Pty Ltd*** [13]*, 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*

[12] [2011] NSWSC 531
[13] (1994) 12 ACSR 785; (1994) 12 ACLC 669

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....

(14) *In* ***Fitness First*** *(supra) at 127, Ward J cited* ***Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)*** [14] *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***

[14] [2003] NSWSC 896

> ***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).*

[17] The particular principles that I gleaned from the above discussion are as follows:

i. The threshold for establishing a genuine dispute is not demanding or difficult. For example, and "*a company will fail in that task only if it is found, upon the hearing of its ... 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*".[15]

[15] See para (8) of *Searoad Shipping Pte Ltd*.

ii. That said, 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]" ... or "a patently feeble legal argument or an assertion of fact unsupported by evidence*'.[16]

iii. The test may be succinctly summarized in the following terms:

> *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...*[17]

Decision

[18] The Plaintiff's application to set aside the statutory demand is made on the basis that there is a genuine dispute over the amount of the debt. Three reasons are advanced by the Plaintiff, being:

i. The sale price of the truck was well below market value.

ii. The Plaintiff company is solvent.

iii. The Plaintiff challenges the amount of interest charged.

[16] See para (13) of *Searoad Shipping Pte Ltd*.
[17] See para (14) of *Searoad Shipping Pte Ltd*.

[19] I can dispose of the second and third grounds briefly. The Plaintiff appears to be arguing that the only interest for which it is liable is the amount of $48,690 calculated when the loan was offered and made. That is wishful thinking with no basis in reality. If the Plaintiff had made its repayments in line with the loan agreement then its interest liability would have been the said amount. However, the Plaintiff defaulted and is liable to pay interest on the debt until the debt is repaid.

[20] The Plaintiff has provided no evidence that it is solvent. It has failed to pay the alleged debt, or any part of it, since about February 2020, a period of 4 years when the statutory demand was served on it. Before the truck was repossessed the Plaintiff had a 12 month history of failing to make its loan repayments when due and had 8 cheques dishonoured. There was certainly a basis for legitimate concern over the Plaintiff company's ability to pay its debts.

[21] The key issue concerns the sale of the truck for $93,000. The Plaintiff says it was grossly under sold. There are two complaints by the Plaintiff here. The first pertains to the Defendant's pre-sale valuation. The second pertains to the tender process.

[22] In terms of the valuation, the Plaintiff purchased the truck in February 2019 for $170,000. It was new when purchased. The truck was repossessed 12 months later, on 17 February 2020, and sold on 24 July 2020 for $93,000 (54% of the price paid 18 months earlier). About 1 month before the Defendant sold the truck, it appears that the Plaintiff learned of the impending sale for $93,000. In an email to the Defendant on 12 June 2020, Mr Deo described the amount of $93,000 as *'ridiculous'* (and provided reasons for this view). Mr Deo then sought a copy of the valuation that the Defendant had obtained from Sakura Cars but also cautioned that Sakura Cars were not qualified to provide a valuation for truck resellers. Mr Deo implored the Defendant to obtain a valuation from a reputable valuer before selling the truck. The Defendant's officer responded the same day and copied one of their colleagues requesting that that colleague *'please do advise on valuation for unit JX981/L13654'*. It does not appear

that the Defendant supplied the valuation to the Plaintiff or arranged for another valuation before the sale in July 2020.

[23] To date, the Defendant has not supplied a copy of the 2020 valuation. Counsel for the Defendant informed the Court that the Defendant has attempted to locate the valuation to produce the same in this proceeding but has been unsuccessful. The absence of the valuation raises serious questions whether the truck was sold for less than market value and whether the Defendant ought to have sought another, better, valuation before the sale.

[24] As for the tender process, the Defendant's need to protect the privacy of potential buyers must be balanced against the debtor's right to transparency over the sale process employed by the Defendant. Certainly, for the purposes of this proceeding, I would expect the Defendant to satisfy the Court (with production of relevant documents) that the Defendant took reasonable steps to secure the best price for the truck. It has not done so.

Conclusion

[25] The Plaintiff can consider itself fortunate with the present application. It arranged a loan with the Defendant and from the outset defaulted on repayments. It has sought to deflect its defaults by blaming COVID but the defaults and repossession occurred before the pandemic. The Defendant was well within its rights to repossess and sell the truck. It had a wide discretion over the process with which it employed to sell the vehicle.

[26] However, the Defendant also had a duty to mitigate its (and the Plaintiff's) losses and obtain the best price for the truck. The evidence produced in this proceeding falls well short of satisfying this Court that the Defendant obtained the best price in July 2020. While I am satisfied that a debt is owed by the Plaintiff to the Defendant, I am equally

satisfied that there is a genuine dispute over the amount of that debt. The following remarks by Amaratunga J in *Digicel (Fiji) Pte Ltd v Cover Story Ltd t/a Mai Life Magazine* [2020] FJHC 323 (18 May 2020), at 29, apply to the present case:

> *Winding up process is not suitable for recovery of genuinely disputed debts. If debt is bona fide disputed such debts are not suitable for recovery through winding up actions...*

[27] I make the following orders:

i. The Defendant's statutory demand dated 11 January 2024 is set aside.

ii. The Plaintiff is entitled to costs summarily assessed in the amount of $1,500 to be paid by the Defendant within 28 days.

HIGH COURT OF FIJI SUVA

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D. K. L. Tuiqereqere

JUDGE

Solicitors:

Parshotam Lawyers for the Plaintiff

Neel Shivam for the Defendant