IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court, Lautoka]

CIVIL APPEAL NO. ABU 058 OF 2022
[Lautoka Action Number HBM 26 of 2021]

BETWEEN : **D MEGHJI PTE LIMITED**
Appellant

AND : **FIJIAN HOLDINGS LIMITED**
Respondent

CIVIL APPEAL NO. ABU 059 OF 2022
[Lautoka Action Number HBM 25 of 2021]

BETWEEN : **J MEGHJI PTE LIMITED**
Appellant

AND : **FIJIAN HOLDINGS LIMITED**
Respondent

Coram : **Jitoko, P**
Morgan, JA
Dobson, JA

Counsel : **Mr. D. R. Patel for the Appellants**
Mr. V. Filipe for the Respondent

Date of Hearing : **01 July 2024**
Date of Judgment : **26 July 2024**

JUDGMENT

Jitoko, P

[1] I have read the judgment in draft of Dobson, JA and I am in complete agreement with his reasonings and conclusion.

Morgan, JA

[2] I have read and concur with the reasoning and conclusions of the judgment of Dobson, JA.

Dobson, JA

Introduction

[3] These appeals are from a High Court ruling that declined an application to stay statutory demands served on the appellants by the respondent.[1] Given the extent to which resort to legal proceedings can halt or slow the progress of commercial dealings, it is unsurprising that the Judge took a robust view of the competing merits. The essential question on the appeal is whether it was appropriate for the Judge to do so.

The parties, and source of the debt

[4] The appellants have substantial businesses, including in the liquor and tourism industries. Relevantly to the present appeal, they are two of four shareholders in Cloud Investments Pte Limited (CIPL). The respondent is the third of those shareholders and R C Manubhai Holdings Limited is the fourth. CIPL was to pursue a business venture involving a substantial commercial lease. In an agreement concluded on 25 October 2018, the shareholders agreed that the respondent would pay $1,192,443.05 to secure the lease, with the other three shareholders reimbursing it for their proportional parts of that sum "… at a mutually agreed date".

[5] Following a meeting of shareholders on 13 April 2021, the respondent wrote to the three other shareholders purporting to rely on an agreement they had reached at the meeting that day, requesting payment by 31 May 2021 of the contributions those other shareholders were to make to CIPL's expense in securing the lease. That letter attached a schedule calculating interest on the amount from 1 November 2018 up to

1 HBM 26/2021 and HBM 25/2021

31 March 2021. The Manubhai shareholder paid, including the interest component, as requested in the respondent's letter.

[6] The appellants resisted paying on the ground that a date for payment had not been mutually agreed. Once the statutory demands were issued, they also took the point that there was no agreement for the remaining shareholders to pay interest to the respondent on the amount it had paid on CIPL's behalf, so that the inclusion of interest in the amount claimed in the statutory demands meant that the demands were invalid or otherwise unenforceable.

The appellants' counterclaim

[7] The grounds for resisting the statutory demands included the appellants' claim that they had a set-off or counterclaim against the respondent for a larger amount than that demanded from them.

[8] That counterclaim arises in the conduct of another business of which the appellants and the respondent are the shareholders, namely Ritam Investments Pte Limited (Ritam). Ritam was involved in tourism ventures but was under financial pressure, apparently caused by COVID-related downturns, so the appellants funded on Ritam's behalf payments of some $2.6 million. The appellants claimed that the respondent was liable for 30 per cent of that amount (matching its shareholding in Ritam), amounting to $783,843.90.

[9] On 2 February 2021 (some months before payment was sought by the respondent for the funding of CIPL's liabilities), the appellants wrote to the respondent reciting the circumstances in which they had funded Ritam's obligations and requesting reimbursement for what they claimed was the respondent's share of those costs.

[10] The respondent acknowledged that request in an email the same day that began:

> As mentioned previously and as noted in the shareholder agreement [the respondent] has a responsibility to Ritam Investment and would honour any debts in that respect. [Record, volume 1, page 256]

That email went on to make what appear to be qualifying statements limiting the scope of what those obligations assumed by the respondent might be. After the respondent's 13 April 2021 request for payment of the appellants' share of amounts the respondent had paid on behalf of CIPL, the appellants made the point that dialogue was required to agree a date for payment of their admitted liability in respect of CIPL and urging the respondent to enter into discussions, clearly contemplating some form of set-off of the two claims.

[11] The respondent declined to engage, calling the appellants' claims variously "insincere" (24 June 2021), "without any legal basis and is unjustified" (19 July 2021) and "bogus and lack legal basis" (24 August 2021). Requests from the appellants for the respondent to explain its reasons why their claims were rejected were not responded to with any substantive reasons.

The High Court ruling

[12] The Judge rejected the appellants' contention that the agreed amount was not due and payable because the parties had yet to agree on a date for its payment. The literal application of that provision in the shareholder agreement was seen as unworkable as it could enable the debtor to postpone payment indefinitely, thereby being unjustly enriched merely by refusing to agree on a date for payment.

[13] The Judge considered a term could be implied in order to give business efficacy to the contract, to the effect that:[2]

> … if, after the first attempt, the parties are unable to reach agreement on a date by which the debt is to be repaid, the debt should then become due and payable immediately and entitle [the respondent] to seek recovery.

[14] Alternatively, the Judge applied cases where the absence from the loan contract of a stipulation as to the date for repayment was to be treated as a loan that was repayable immediately.[3]

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2 Ruling at [24].

3 Citing *Ogilvie v Adams* [1981] VR 1041 at 1043, *Drinkwater v Caddyrack Pty Ltd (No 3)*, SC NSW 3970/96, [29 November 1991] at [9], *Gleeson v Gleeson* [2002] NSWSC 418.

[15] The Judge did not address the appellants' argument that there was no agreement to pay interest, the amount of which had been claimed in the statutory demands.

[16] On the appellants' counterclaim, the Judge took the view that there was no tenable basis on which shareholders who had met obligations on behalf of Ritam could compel contributions to such costs from the remaining shareholder. This was on the basis that shareholders cannot be rendered liable for a company's debts on the basic company law principle in *Salomon v Salomon & Co*.[4] The Judge noted that the appellants could not rely on a shareholder agreement containing a commitment by the respondent to contribute proportionately to payments the appellants made on behalf of Ritam, in contrast to the circumstances of the respondent's claim against the appellants in respect of their shareholdings in CIPL.

[17] The Judge therefore dismissed the prospect of a tenable counterclaim and for all these reasons dismissed the appellants' application to set aside the statutory demands.

The limited purpose of statutory demands

[18] If a creditor wishes to pursue the winding up of a debtor company under Part 39 of the Companies Act 2015 (the Act) by reason of the company's insolvency, the usual means of proving its state of insolvency is by serving a statutory demand under s 515 of the Act for the amount of an undisputed debt. Non-compliance with a statutory demand for a period of three weeks is, generally at least, sufficient evidence of the debtor's insolvency.

[19] There are frequent references in cases challenging the issue of statutory demands that they should not be used as a debt collection device. That is, that a creditor should not misuse the pressure imposed on a debtor by service of a statutory demand to force a debtor to compromise a genuine dispute over a contested liability in order to avoid the harm to reputation and expense and effort of defending winding up proceedings. For the appellants, Mr Patel cited cases recognising these limitations on the use of statutory demands:

[4] Salomon v Salomon & Co (1897) AC 22.

(a) From *Bironda (Fiji) Pte Ltd v Al-Khalid*:[5]

> 6. …."the role of the court is not to decide the dispute, but rather, to determine whether there is one."
>
> 7. …the court is not required to embark on an exploration of the merits of the respective parties' cases.
>
> 8. The primary purpose of the statutory demand procedure is to test whether a company is solvent, and therefore should be wound up, or not. It is not a debt collection process, although of course it can be and is frequently used as a means to extract payment from a solvent company that is reluctant to pay; if there is no genuine dispute it is usually cheaper and easier to simply pay the amount demanded, so establishing that the company is not insolvent. The procedure is not intended or designed as a means of resolving disputed facts,…

(b) From *In re Aggressor Fiji Ltd*:[6]

> The purpose of statutory demands is frequently misunderstood.
>
> Its prime purpose is to act as a foundation for winding up a company's affairs. It is in effect a summary process that must be treated with care. It is not a debt collection procedure. If the debt is doubtful the procedure should not be used, rather, the petitioner should first prove his debt by obtaining judgment then based on that court order present a statutory demand.
>
> If a creditor is told by a company against which it has served statutory demand that the company disputes the demand then the petitioning creditor proceeds against that company at it peril.

[20] Both of those judgments cited Australasian authorities to similar effect.

[21] The process of issuing statutory demands is a common feature in solvency regimes throughout much of the Commonwealth and in the United Kingdom. The authorities are redolent with comments that its legitimate use is confined to cases in which a creditor has concerns about the solvency of a debtor and issues a statutory demand to evidence the debtor's inability to pay. Experienced insolvency practitioners do well

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5 Bironda (Fiji) Pte Ltd v Al-Khalid [2021] FJHC 181.
6 In re Aggressor Fiji Ltd [2005] FJHC 48.

to adopt the approach that a statutory demand should be deployed where the debtor cannot pay but are used at a creditor's peril in cases where the debtor will not pay.

The application to set aside

[22] Section 517 of the Act provides, in material part:

> (1) This section applies where, on an application to set aside a Statutory Demand, the Court is satisfied of either or both of the following—
>
> (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;
>
> (b) that the Company has an offsetting claim.
>
> …
>
> (4) If the substantiated amount is at least as great as the statutory minimum amount for a Statutory Demand, the Court may make an order—
>
> (a) varying the demand as specified in the order; and
>
> (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the Company.
>
> (5) The Court may also order that a demand be set aside if it is satisfied that—
>
> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
>
> (b) there is some other reason why the demand should be set aside.

[23] The phrase "offsetting claim" is not defined in the Act, but the concept is appropriately reflected in the definition in the Australian legislation, and it's scope as described in the Federal Court of Appeal decision in CBS Commercial Canberra Pty Ltd.[7]

> 33 The meaning of "offsetting claim" is defined in s 495H(5):
> ***offsetting claim*** means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).
>
> 34 The test for determining whether there is a genuine offsetting claim is whether the Court is satisfied that there is a serious question to

[7] CBS Commercial Canberra Pty Ltd v. Axis Commercial (ACT) Pty Ltd [2022] FCA 544, 12 May 2022, citing s 495H(5) of the Corporations Act 2001 (CTH)

> be tried or an "issue deserving of a hearing" as to whether a company has such a claim against the creditor: *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601; [2013] NSWCA 344 (Beazley P, Meagher and Gleeson JJA) at [30], citing *Scanhill Pty Ltd v Century 21 Australasia Pty Ltd* [1993] FCA 618; (1993) 47 FCR 451 at 467 (Beazley J, as her Honour then was); *Chase Manhattan Bank Australia Ltd v OSCTY Pty Ltd* [1995] FCA 1208; (1995) 17 ACSR 128 (***Chase Manhattan***) at 136 (Lindgren J) and *Eumina Investments Pty Ltd v Westpac Banking Corporation* (1998) 84 FCR 454; [1998] FCA 824 (Emmett J, as his Honour then was).
>
> 35 The offsetting claim must be bona fide and based on truly existing facts and not a claim that is spurious, hypothetical, illusory or misconceived: *BBB Constructions Pty Ltd v Frankpile Australia Pty Ltd* (2008) 68 ACSR 1; [2008] NSWSC 982 (***BBB Constructions***) at [4] (Brereton J), citing *Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* (2006) 94 SASR 269; [2006] SASC 91 at [47

[24] The threshold issues to be determined on this application included whether there was a genuine dispute over the date for payment of the agreed amount of the appellants' contribution to the respondent's payments that had been made on behalf of CIPL, at a date certain prior to the statutory demands being issued in September 2021. That was not clearly the case on the wording of the shareholder agreement. The Judge felt able to resolve the dispute over whether a date had been fixed by the implication of a term in the contract. That analysis is not a matter safely concluded at a preliminary stage of contested proceedings. The business efficacy test for implication of contractual terms should draw on contested evidence only available at the conclusion of a substantive hearing. The Judge's ruling was made without the benefit of full evidence on the circumstances of the creation of the contract and without the benefit of argument from the parties in light of the evidence on whether the test for an implied term was made out and, if so, what words were to be added to this provision in the contract.

[25] Whilst we identify with the Judge's concern to avoid unjustifiable delay in meeting obligations by a debtor in reliance on a provision that now appears inadequate, that does not justify anticipating a substantive outcome on the issue. At the threshold stage

engaged in the application to set aside, the appellants' dispute is not able to be dismissed as untenable. It is a genuine dispute[8].

[26] The Judge's alternative rationale for upholding the validity of the statutory demands was that the contract did not provide a time for repayment, in which event the common law will treat the loan as immediately repayable. Again, this finding was made without the benefit of full evidence enabling the terms and circumstances of this contract to be compared with the terms of contracts that had been in issue in the authorities relied on to treat the appellants' obligation to reimburse the respondent as a loan immediately repayable.

[27] There may be tenable prospects for such authorities to be distinguished, for example on the ground that this contract does include a formula for determining when the obligation to pay arises. We express no view on such arguments, but cite this example to illustrate the difference between a preliminary assessment of whether a tenable dispute exists over the validity of the demands, and an attempt to substantively resolve such dispute. On this alternative approach as well, we consider that the reasoning for rejecting a tenable ground of dispute in respect of the sums demanded in the statutory demands went beyond the preliminary assessment involved in an application to set aside the statutory demands.

[28] The Judge did not consider the appellants' objection that the demands included interest, when they argue that there was no commitment to pay interest. The point was argued on the appeal. Mr. Filipe's response to it was to rely on Section 517(4) of the Act that empowers the Court on hearing an application to set aside a statutory demand, to vary the amount in the demand. He invited the Court (which has all the powers of the High Court on this point) to vary the amounts in the statutory demands by excluding the sums claimed for interest, if the Court considered there was any tenable argument that the alleged agreement did not cover interest. He made the point without conceding that there was any such tenable dispute.

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[8] This Court has had occasion to consider the approach to be adopted by the High Court when considering an application to set aside a statutory demand as addressed in the judgment in **Biju Investments Pte Limited v Transfield Building Solution (Fiji) Ltd FJCA, ABU014.2021 (26 July 2024)** which appeals were heard in the same session. We adopt the observations made in [38] and [45 to 58] of that Judgment.

[29] Given the existence of the tenable grounds for setting aside the statutory demands, it is unnecessary to decide this point. If no other grounds did exist, then the fall-back position contended for by Mr. Filipe would save the demands if they were otherwise enforceable except for a tenable argument that interest was not payable on the admitted debt.

[30] As to the appellants' claim for contribution from the respondent to the debts they had met on behalf of Ritam, counsel for the parties confirmed that a separate proceeding pursuing that claim is scheduled to go to hearing and the respondent has not sought to strike it out as untenable. The Judge's ruling purports to peremptorily dismiss the claim on the basis that there was no written agreement evidencing the commitment alleged against the respondent.

[31] That analysis cannot be determinative of the appellants' claim. Certainly there are likely to be numerous evidentiary hurdles to clear before liability to contribute to those debts is made out. However, on the preliminary assessment required when considering a challenge to a statutory demand, the prospect of a counterclaim for more than the sum claimed in the statutory demands cannot be dismissed and has sufficient in it to qualify as a tenable or seriously arguable claim.

[32] On this ground as well, we are persuaded that the appellants are entitled to have the statutory demands set aside.

Costs

[33] The Judge ordered the appellants to pay the respondent $1,200 for the unsuccessful application in the High Court. We reverse that order so that the appellants are entitled to one order between them of $1,200 for costs in the High Court.

[34] As to costs on the appeal, the authorities sound numerous clear warnings that issuing a statutory demand for debt collection purposes should not occur and is done at a creditor's peril. When pushed in oral argument, Mr Filipe conceded that there is not a shred of evidence that the respondent had any concern over the ability of the appellants to pay the amount in issue: that means the statutory demands were issued not for the legitimate purpose of establishing the appellants' inability to pay, but

instead to apply pressure for the appellants to pay rather than contest the liability. The appellants should not have been put to the trouble and expense of having to challenge the statutory demands in these circumstances and that is reflected in the costs award of a further $1,500 on both appeals (one award).

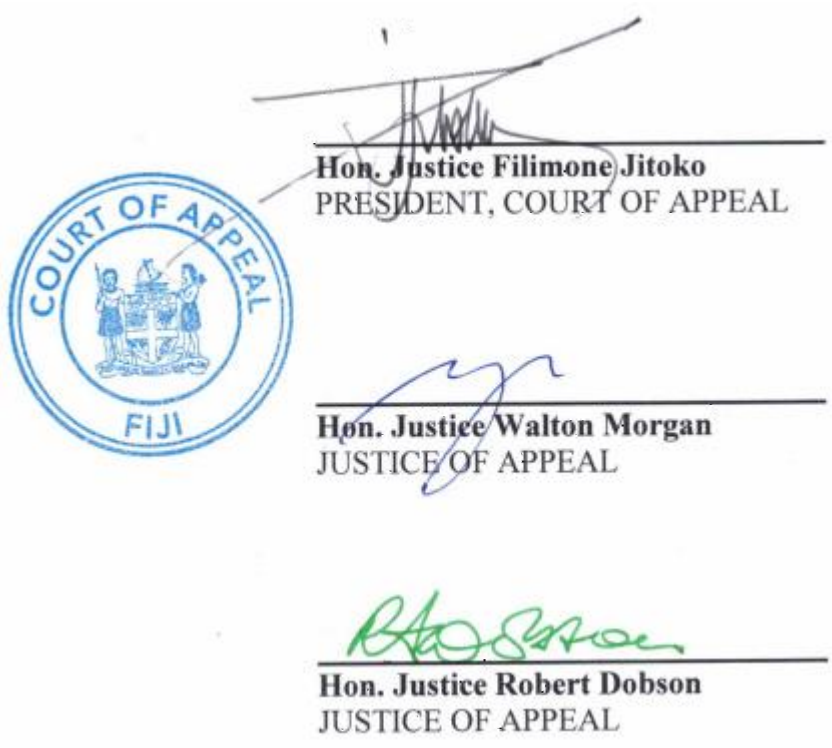
Orders

[35] *We make the following orders:*

(a) the Judge's ruling of 22 September 2022 is quashed;

(b) the statutory demands issued by the respondent against the appellants on 6 September 2021 are set aside;

(c) the respondent must pay to the appellants $1,200 for costs in the High Court and $1,500 for costs on the appeal.



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