

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

**Action No. HBC 333 of 2018**

**IN THE MATTER** of a Statutory Demand dated 12<sup>th</sup> October 2018 taken out by **MY**

**GROUP LIMITED t/a METROMIX CONCRETE (FIJI)** (“the Respondent”)

against **RAGHWAN CONSTRUCTION COMPANY LIMITED**

(“the Applicant”) and served on the Applicant on

16<sup>th</sup> October 2018.

AND

**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

**RAGHWAN CONSTRUCTION COMPANY LIMITED** a limited liability company

having its registered office at 17 Bulei Road, Laucala Beach Estate, Suva.

**APPLICANT**

AND

**MY GROUP LIMITED T/A METROMIX CONCRETE (FIJI)** a limited liability company

having its registered office at Lot 24, Wailada, Lami.

**RESPONDENT**

**Counsel** : Mr E. Narayan with Ms K. Singh for the Applicant  
Mr N. Sharma for the Respondent

**Date of Hearing** : 23<sup>rd</sup> January, 2019

**Date of Judgment** : 31<sup>st</sup> January, 2019

**JUDGMENT**

- [1] The applicant filed the present application pursuant to section 516 of the Companies Act 2015 to have the statutory demand served on him by the respondent.
- [2] The applicant is a construction company and the respondent company had been supplying concrete mix to the applicant. As per the statement of account tendered by the respondent as at 30<sup>th</sup> November, 2016 the applicant owed the respondent \$150,042.60.
- [3] Section 517 of the Companies Act 2015 provides:

- (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.
- (2) The Court must calculate the substantiated amount of the demand.
- (3) If the substantiated amount is less than the statutory minimum amount for a Statutory Demand, the Court must, by order, set aside the demand.
- (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.

[4] The position of the applicant is that there is a genuine dispute between the applicant company and the respondent company.

[5] It is common ground that the respondent took out a statutory demand and served it on the applicant in the year 2016 and when the applicant paid \$74,627.60 on 30<sup>th</sup> November, 2016 the statutory demand was set aside of consent. The present claim of the respondent is based on the transactions took place between the parties from 23<sup>rd</sup>

February, 2014 to 30<sup>th</sup> November, 2016. There is no explanation offered by the respondent for accepting \$74,627.60 and consenting to set aside the statutory demand. If, in fact, the amount due was very much more than that as claimed by the respondent there was no reason for the respondent to accept a lesser amount and terminate the proceedings.

- [6] When the court posed this question to the learned counsel he informed court that at that time the parties were pursuing a settlement. However, it is important to note that what the counsel's submissions made in court cannot be considered as evidence.
- [7] The applicant's position is that certain consignments delivered by the respondent were rejected and some of them were used but later removed, which fact has not been denied by the respondent.
- [8] The applicant also states that the sum claimed by the respondent did not reflect the payments already been made and the amount stated in the statutory demand includes higher price and also the charges for the rejected consignments.
- [9] It is also pertinent to note that there is no uniformity in the amounts charged for the concrete supplied by the respondent. In some invoices the Rate is given as \$213.04 whereas in certain other invoices it is given as \$300.00 and \$256.52. For these reasons the exact amount cannot be ascertain summarily by looking at the statement of account and some of the invoices attached to the affidavits. This shows that there is a genuine dispute between the parties as to the amount in fact due to the applicant and it could only be decided in a trial proper after adducing evidence.
- [10] Winding up proceedings are not recovery proceedings. The court, before making the winding up order must also be satisfied that the company is unable to pay the statutory minimum which is \$10,000.00. In the instant matter, from the affidavits filed it shows that the applicant company refusing to pay the amount claimed by the respondent company not because it does not have means to pay amount claimed but because it challenges the amount claimed by the respondent. When the earlier statutory demand was served on the applicant it had promptly paid \$74,627.60 which was accepted by the respondent and at that time the respondent had not disputed the amount paid but after almost two years it served another statutory demand, as I understand from the

respondent's own statement of account, claiming that the applicant does not have means to pay the balance sum.

- [11] The Supreme Court of New South Wales in the case of **In the matter of Country Spring Water Company Pty Ltd** [2013] NSWSC 1660 cited the following passage from the decision in **CGI Information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Limited** [2003] NSWSC 728; (2003) 47 ACSR 100:

“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 section 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 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.”

- [12] From the above I am of the view that there is a genuine dispute between the parties as to the amount claimed by the respondent.

- [13] For the reasons set out above I make the following orders.

**ORDERS**

1. The Statutory demand dated 12<sup>th</sup> October, 2018 is set aside.
2. The respondent is ordered to pay the applicant \$3000.00 as costs of this application.

Lyone Seneviratne,

**JUDGE**

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