IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
COMPANY JURISDICTION

COMPANIES ACTION No. HBM 35 of 2020

IN THE MATTER of a Statutory Demand dated 10th of August 2020, taken out by Praveen Prakash ("the Respondent") against Denarau Waters Pte Limited (formerly GULF INVESTMENTS (FIJI) PTY LIMITED ("the applicant") and served on the Applicant on 11th August 2020.

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 : **DENARAU WATERS PTE LIMITED** (formerly GULF INVESTMENTS (FIJI) PTY LIMITED a limited liability company having its registered office at Unit 01 2A, Commercial Complex, Port Denarau, Nadi, Fiji.

APPLICANT

A N D : **PRAVEEN PRAKASH** of Tamavua, Suva, Fiji, Businessman.

RESPONDENT

Appearances : Mr R. Charan for the applicant
Mr S. Singh for the respondent
Date of Hearing : 24 September 2020
Date of Ruling : 19 October 2020

DECISION

[*setting aside statutory demand*]

Introduction

[01] This is an application to set aside a statutory demand.

[02] The applicant is a company incorporated in Fiji and involved in the business of land development. It has its registered office at Unit 01 2A Commercial Complex, Port Denarau, Denarau Island, Fiji ("*the company*").

[03] The respondent in a businessperson in Fiji.

[04] On 11 August 2020, the respondent served a statutory demand for payment of debt on the company under Section 513, 514 and 515 of the Companies Act 2015 ("*the Com Act*"). The debt specified in the statutory demand is said to be refund of deposit made under a sale and purchase agreement.

[05] The company seeks orders setting aside the statutory demand under Section 516 of the Com Act. The Company contends that it does not have any debt owed to the respondent, that the statutory demand in fabricated and is incorrect, that the deposit paid was to be applied towards the settlement sum for the purchase of the Lot by the respondent and that the company is entitled to a further payment of $900, 000.00 being the balance of settlement sum for the purchase of Lot by the respondent which the applicant will now demand from the respondent.

The demand

[06] The statutory demand is dated 10 August 2020, which was served on the Company on 11 August 2020. It demands from the Company payment of $100,000.00 due and owing as refund of deposit for Lot 6. Denarau Waters under a sale and purchase agreement of 16 July 2016, which the Company has undertaken to refund but without success ("*the debt*").

Background

[07] The background facts as gleaned from the affidavit in support are as follows:

7.1 In July 2016, the company and the respondent entered into an agreement for sale and purchase of Lot number 6, a commercial Lot in a land development project done by the company (*"SPA" or "Agreement"*) and the respondent paid a deposit of $100,000.00 into the company's bank account.

7.2 The deposit was part of the consideration sum, and to be applied towards the reduction of the purchase price at settlement.

7.3 On 15 July 2018, the company sent to the respondent an email and several attachments, advising that the title for the Lot is issued and requesting the respondent to sign and return documents pertaining to the legal transfer of the Lot to his name, for the company's further action in readiness for settlement and transfer of the Lot.

7.4 On 29 March 2019, the respondent through his solicitors, Shelvin Singh Lawyers, sent to the company a letter advising that they are terminating the agreement and seeking for a refund of its deposit and all interest earned on the said deposit purporting that the company was not able to complete the development within 24 months as per clause 3.4 of the agreement and provide the Lot titles in terms with the promised access through Denarau Island.

7.5 On the same day, the respondent, through his solicitors, Shelvin Singh Lawyers also send a Notice to Neel Shivam Lawyers, purporting it to be the stakeholder to the SPA between the parties and advising that the respondent has a dispute with the company and sought for an account of deposit, including interest earned and charges paid on the deposit, and instructing to refrain from any dealings on this account until further directions.

7.6 On 30 August 2019, the respondent's solicitors, Shelvin Singh Lawyers through an email to Neel Shivam Lawyers queried whether the deposit in

respect of the SPA of Lot was held in Neel Shivam Lawyers Trust and by when can this be released to the respondent.

7.7 On 30 August 2019, Shareen of Neel Shivam Lawyers replied that Neel Shivam Lawyers did not hold any deposit monies for the said Lot.

7.8 On the same day, the respondent through his solicitors Shelvin Singh Lawyers forwarded the email reply from Shareen of Neel Shivam Lawyers to Ashwini and Madhu of the company, requesting return of deposit monies paid under the SPA, to their Trust Account by Monday, 2 September 2019.

7.9 On 6 March 2020, the respondent through its solicitors, Shelvin Singh Lawyers further emailed to the company notifying that they were now filing proceedings for refund of deposit given that the company had not refunded the monies as requested.

7.10 On 8 July 2020, the respondent's solicitor, Mr Shelvin Singh, spoke with Mr Ananth Reddy of the company on a phone call and requested for an update on the email trail seeking refund of the deposit.

7.11 On the same day, the respondent's solicitor, Shelvin Singh Lawyers, sent a further email, making reference to the call conversation between Mr Singh and the company (Mr Reddy) and requested for a reply to their deposit refund request.

7.12 On 14 July 2020, the Director of the company, Mr Reddy replied to the respondent's solicitor, Mr Singh seeking more time to resolve and respond as the staff who could appropriately handle the query was not at work for some time.

7.13 On or about 22 July 2020, the Director of the company, Mr Reddy replied to the respondent's solicitor, Mr Singh's further follow up email, advising that the company was okay to proceed with the refund however, would require some time to pay the sum.

7.14 The respondent's solicitor replied to the company's email advising the applicant to submit a payment plan and he will take instructions from his

client and prepare Deed of Settlement and release for the Lot and the deposit paid.

7.15 Subsequently, the company's Director Mr Reddy replied to the respondent's lawyer Mr Singh's email and advised that he aimed to have a proposed plan submitted by the end of the following week. He further apologized on the delays with this matter which was due to shortage of staff given the COVID-19 environment as it is currently common with all businesses in Denarau.

7.16 In the meantime, the respondent served a statutory demand on the company. The company seeks to have set it set aside.

Power to set aside statutory demand

[08] Under Section 516 of the Companies Act, a company may apply to the court for an order setting aside a statutory demand served on the Company. As such an application may only be made within 21 days after the demand so served. 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.

[09] By section 517 of the Companies Act, the court may set aside a statutory demand. That section provides:

> *"Determination of application where there is a dispute or offsetting claim*
>
> *517—(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." (Emphasis added)

The issue

[10] The question before me is whether there is a genuine dispute between the company and the respondent about the existence or amount of the debt to which the demand relates and/or whether the company has an offsetting claim.

The test

[11] There is plethora of cases on the test to be applied in an application to set aside a statutory demand. These cases have established investigations, *"a real and not spurious, hypothetical, illusory or misconceived* "and *"perception of genuineness (or lack of it)"* (see *Mibor Investments Pty Ltd*) (1994) ACSR 785, *Spencer Constructions PTY Ltd v G & M Aldridge Pty* [1997] FCA 681; and *Re Morris Catering (Aust) Pty Ltd* (193) 11 ACSR 601).

[12] The Federal Court of Australia [Gleeson J] in *Tekno Auto Sports Pty Ltd v Jenkins* [2014] FCA 774 (25 July 2014) said [at paragraph 18]:

"18. These tests, applied in the context of a summary procedure where it is not expected that the court will embark on any extended inquiry, mean that the task faced by a company challenging a statutory demand on the "genuine dispute" ground is by no means at all a difficulty or demanding one. The 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."

Discussion and consideration

Is there a genuine dispute as to the existence or amount of debt to which the demand relates?

[13] In order to answer the question raised in these proceedings, I will apply the test relevant to an application to set aside a statutory demand that the court does not engage in any form of balancing exercise between the strengths of competing contentions. In that endeavour, I will see whether there is any rational ground which indicates an arguable case on the part of the company. If I see any rational ground indicating an arguable case on the part of the company, I must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger. Basically, I propose to apply the test set out by the Federal Court of Australia in *Tekno Autosports Pty Ltd (above).*

[14] In July 2016, the company and the respondent entered into a sale and purchase agreement whereby the respondent agreed to purchase a commercial Lot numbered 6 in a land development project done by the company for a purchase price of $1m ("*SPA*").

[15] The respondent paid a deposit of $100,000.00 upon execution of the SPA. The respondent paid the deposit directly into the company's bank account. The deposit was part payment towards the purchase price and the balance purchase price of $900,000.00 was to be paid at settlement.

[16] Thereafter, the parties exchanged email correspondences. On 15 July 2018, the company sent an email and advised that the title for the Lot had been issued and

requested the respondent to sign and return the documents for transfer of the land to his name (*"MR 3"*).

[17] On 29 March 2019, the respondent through his solicitors, Shelvin Singh Lawyers, sent to the company a letter advising that they are terminating the agreement and seeking for a refund of its deposit and all interest earned on the said deposit. The respondent relying on clause 3.4 of the SPA, said that the company was not able to complete the development within 24 months.

[18] In the trail of email correspondences, on 22 July 2020 the company advised the respondent that it was okay to proceed with the refund however, would require some time to pay the sum.

[19] It was argued on behalf of the respondent that since the company had agreed to refund the deposit, there is no genuine dispute as to the existence of the debt. However, it was argued on behalf of the company that the refund would only have become due and payable if the termination of the SPA was accepted by the company.

[20] The company's case raises issues about the terms of the SPA in relation to refund of the deposit upon termination of the SPA, especially by the purchaser, the respondent after service of the settlement notice.

[21] In terms of clause 4.2 of the SPA, the settlement date shall be the date 12 Business days after the date when a CGT Clearance Certificate has been released to the [vendor] in a form and on a basis satisfactory to the vendor.

[22] Clause 8.3 of the SPA deals with the vendor's remedy upon default. It relevantly provides:

> *"If the purchaser does not comply with terms of the settlement notice served by the Vendor then:*
>
> *(a) without prejudice to any other rights or remedies available to the Vendor at law or equity the Vendor may:*
>
> *(i) sue the Purchaser for specific performance; or*
> *(ii) cancel the agreement and pursue or both of the following remedies:*

(aa) forfeit and retain for the Vendor's own benefit the entire Deposit with any accrued interest paid by the Purchaser;
(bb) sue the Purchaser for damages;
..."

[23] The respondent had informed the company that he was terminating the SPA saying that the company was unable to complete the project within 24 months as required by clause 3.4 of the SPA, after the company served a settlement notice on the respondent. It will be noted that the respondent had terminated the SPA after service of the settlement notice on the respondent. The question then arises whether the respondent was entitled to terminate the SPA and claim full deposit. The respondent's position would have been correct if he had terminated the SPA before the service of the settlement notice upon him. If the respondent was so serious about the completion of the project within 24 months, he should have terminated the agreement under vendor's default clause before service of the settlement notice by the company, however he did not do so.

[24] Under clause 8.3 of the SPA, the company has the right to forfeit and retain for the vendor's own benefit the entire deposit with any accrued interest paid by the purchaser, if the purchaser does not comply with terms of the settlement notice served by the vendor.

[25] The settlement notice effectively informs the respondent that the company is ready to perform the agreement upon payment of the balance purchase price of $900,000.00. However, the respondent had terminated the agreement after receiving the settlement notice.

[26] It was also argued on behalf of the company that the company has an offsetting claim (counterclaim if the respondent initiates ordinary civil proceedings) arising out of the unilateral termination of the SPA by the respondent upon service of the settlement notice by the company.

[27] It is obvious from the detailed correspondence between the parties that there was a significant dispute as to the company's liability to fully refund the deposit made by the respondent given the respondent's termination of the SPA following the service of the settlement notice by the company.

Conclusion

[28] Taking into account all of the matters raised on behalf of the company and the respondent, I am satisfied that there is a genuine substantial dispute between the parties as to the company's liability to fully refund the deposit paid by the respondent as part of the purchase price, especially when the SPA has been unilaterally terminated by the respondent after service of the settlement notice by the company. The respondent has, it appears, issued the statutory demand in order to apply pressure to the company to compel payment of the disputed debt. I would, therefore, set aside the statutory demand served on the company on 11 August 2020, with summarily assessed costs of $1000.00 payable to the company by the respondent.

Result:

1. The statutory demand served on the company must be set aside.
2. The respondent shall pay summarily assessed costs of $1,000.00 to the company.

19/10/20

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M.H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka
19 October 2020

Solicitors:
Ravneet Charan Lawyers, Barristers & Solicitors for the applicant
Shelvin Singh Lawyers for the respondent