IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

COMPANIES JURISDICTION

WINDING UP ACTION NO.11 OF 2020

IN THE MATTER of **JARAD HOLDINGS PTE LIMITED** a limited liability company having its registered office at c/ - Aliz Pacific, Level 8, BSP Life Centre, 3 Scott Street, Suva, P.O. Box 2475, Government Buildings, Suva, Fiji.

A N D

IN THEMATTER of the Companies Act 2015.

BETWEEN : **MOBILE CRANE HIRE SERVICES PTE LIMITED** a limited liability company having its registered office at 22 Sautamata Street, Lautoka, Fiji.

APPLICANT

A N D : **JARAD HOLDINGS PTE LIMITED** a limited liability company having its registered office at c/ - Aliz Pacific, Level 8, BSP Life Centre, 3 Scott Street, Suva, P.O. Box 2475, Government Buildings, Suva, Fiji.

RESPONDENT

Appearances : **Mr Krishnil Patel for the applicant**
Mr Ravikant Singh for the respondent

Hearing : **Wednesday, 19th August, 2020 at 9.00am**

Decision : **Friday, 30th October, 2020 at 9.00am**

D E C I S I O N

(01) On 08th June, 2020 the applicant, Mobile Crane Hire Services Pte Limited **["MCHS"]** applied to this Court for an order for the winding up of the respondent, Jarad Holdings

Pte Limited **["JH"]** on the ground of insolvency under Section 513 (c) of the Companies Act 2015.

(02) MCHS's winding up application relies on a creditor's statutory demand dated 21-01-2020. The "MCHS" claimed that "JH" was indebted to it in the sum of FJ$70,575.00.

(03) The statutory demand dated 21-01-2020 under Section 515 of the Companies Act, 2015 was served upon "JH" demanding the sum of FJ$70,575.00.

(04) The demand stated that the "JH" owed "MCHS" the amount of FJ$70,575.00 described as follows;

> *"Sum of FJ$70, 575.00 (Seventy Thousand Five Hundred Seventy Five Fijian Dollars) and interest at a monthly rate of 1.04% thereon, being debt due and owing as at 19 November 2019 by you to the Creditor in respect of goods and/or services sold and/or delivered to you on credit at your specific request."*

(05) No application was made by "JH" to set aside the demand within 21 days of its service on "JH", in which application may be brought to set aside a creditor's statutory demand under section 516 (1) of the Companies Act, 2015. "JH" also did not comply with the demand by paying or securing or compounding the debt to "MCHS's reasonable satisfaction within that period.

(06) On 08-06-2020, "MCHS" applied to wind up "JH" relying on the failure by "JH" to comply with the statutory demand.

The advertisement for the winding up application was published in the newspapers on 24-06-2020. After the publication of the winding up advertisement, a part payment of FJ$47,878.00 was made by "JH" and the balance of FJ$22,697.00 which is in dispute has been deposited in the trust account of the Solicitors for "MCHS".

(07) On 10-07-2020, "JH" filed summons seeking leave to oppose the winding up application on a ground it could have, but did not, rely on to set aside the demand, namely that there is a genuine dispute as to the debt the subject of the demand. Specifically, "JH" seeks to oppose the winding up application on the ground that it is not, and was not as at 21-01-2020, indebted to "MCHS" on account of the debt claimed in the demand.

(08) "JH" relied on an affidavit of its "Group Financial Controller", Mr Navin Kamlesh sworn on 09-07-2020 in support of the application for leave, and also on the supplementary affidavit of Mr Navin Kamlesh sworn on 10-07-2020.

(09) "JH" contends that a dispute exists as to the debt claimed by "MCHS" on the basis set out in paragraphs 19-24 of Mr Kamlesh's affidavit sworn on 09-07-2020. "JH" also contends that it was clearly solvent on the basis set out in paragraphs 25-36 of the affidavit.

(10) Section 529 of the Companies Act, 2015 provides;

> *Company may not oppose application on certain grounds*
>
> ***529.*** *– (1) In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court to oppose the application on a ground –*
>
> *(a) that the Company relied on for the purposes of an application by it for the demand to be set aside; or*
>
> *(b) that the Company could have so relied on, but did not so rely on (whether it made such an application or not).*
>
> ***(2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the Company is solvent.***
>
> [Emphasis added]

(11) Section 529 is analogues to Section 459s of the Australian Cooperation Act 2001.

(12) The matters relevant to an application for leave under this section are whether there is a serious question to be tried on the ground sought to be raised; the sufficiency of any explanation as to why that ground was not raised in an application to set aside the creditor's statutory demand, involving an evaluation of the reasonableness of the debtor's conduct at the time when the application might have been made; and whether the court is satisfied that the relevant ground is material to proving whether the debtor is solvent[1].

Whether a serious question to be tried is established

(13) The first relevant consideration in determining an application for leave under Section 529 of the Companies Act, 2015 is; whether there is a serious question to be tried as to the ground now sought to be raised by "JH".

(14) This consideration is directed to whether "JH" has a seriously arguable case that the debt is the subject of a genuine dispute and does not require a final determination of whether a genuine dispute exists[2]. At section 529 leave stage , all that is involved is a "*preliminary examination*" of the alleged dispute.

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[1] ***Chief Commissioner of Stamp Duties v Paliflex Pty Ltd (1999) NSWSC 15**
***DAG International Pty Ltd v DAG International Group (2005) NSWSC 1036**
***Perpetual Nominees Ltd v N A Investment Holdings Pty Ltd (2011) NSWSC 282**

[2] ***Soundwave Festival Pty Limited v Altered State (W.A.) Pty Ltd (No.1) (2014) FCA 466**
***DAG International Pty Ltd v DAG International Group Pty Ltd (Supra)**

(15) The debt alleged arises out of a construction that was conducted by "MCHS" on the JH's premises in Suva.

(16) "JH" engaged the services of the "MCHS" for pile driving works at JH's property situated in Suva. "MCHS" provided a quotation for the work. "JH" accepted the quotation and raised a purchase order for the works. "JH" engaged "Design Huts" as their Architects to monitor the work.

"MCHS" completed the work in September, 2019. "MCHS" requested for payment of the balance sum of FJ$70,575.00 for the works. The architect raised the final progress payment certificate for the balance sum.

(17) The final progress payment certificate was raised only after confirmation of satisfaction of works by the engineer and the architect.

(18) "JH" had ordered steel beams for pile driving works from a local hardware company, RC Manubhai. There was a shortage of steel beams and a purchase order for the beams was raised by the "JH". "MCHS" supplied 10 steel beams at the work site as per the purchase order. 'MCHS" has supplied 10 steel beams and "JH" paid the price for the 10 steel beams save for vat. Now, "JH" wants to return 5 steel beams since it is surplus to the requirements of "JH".

(19) "MCHS" contends that it has no return policy on steel beams sold. "JH" points out that it was agreed between "JH" and "MCHS" that the steel beams purchased from RC Manubhai would be installed first and if there was a need then the steel beams supplied by "MCHS" would be used. In particular "JH" points out that, if the beams were not required in the construction, these would be returned to "MCHS". "JH" also points out that at the time of the agreement, there was no discussion about a "no return policy".

(20) "MCHS" contends that there is no evidence to prove the arrangement which "JH" is alleging. "MCHS" points out with substantial force, that if the beams are surplus, why did "JH" pay for all 10 beams.

(21) The architect for the construction project issued a final certificate for payment on 19-11-2019. The amount on the final certificate for the balance sum was FJ$70,575.00. A statutory demand dated 21-01-2020 demanding the sum of FJ$70,575.00 was served on "JH" on 03-02-2020.

(22) On 24-03-2020, the architect has issued a revised progress payment certificate. The architect says that the final certificate has overlooked certain deletions totaling FJ$30,797.00. The architect alleges that the piles were not driven to their depth.

(23) "MCHS" posed the question how did the architect certify the progress payment certificate for the balance works? "MCHS" contends that the architect will only certify on satisfaction of completion works. "MCHS" alleges that to do so in absence would render the architect negligent.

(24) "MCHS" submits that a genuine dispute as to the existence of the debt must exist at the time of service of the statutory demand. Mr Patel, Counsel for MCHS drew my attention to the decision of **Fitness First Australia Pty Ltd v Dubow[3], Spencer Constructions Pty Ltd v GAM Aldrige Pty Ltd[4] and Eyota Pty Ltd v Harave Pty Ltd[5].**

(25) "MCHS" contends that "JH" has failed to produce any convincing evidence which could support its assertion that the dispute which it is raising now did in fact exist prior to service of the statutory demand.

(26) "JH" referred to the letter dated 19-02-2020 which was sent after the service of the statutory demand as the evidence of the dispute. **"JH" conceded that there was no correspondence with a date prior to the service of the statutory demand which evinces that the debt was in dispute.**

(27) **"JH" says that it could not have disputed the amount on the demand until the architect had amended its initial final certificate.**

(28) "MCHS" alleges that "JH" after receiving the demand persuaded their architect to raise issues to avoid paying the balance sum.

(29) It is apparent that the accuracy, or otherwise, of "MCHS" allegation could only be determined in a contested factual hearing with the benefit of cross-examination.

(30) I am prepared to accept for the purposes of the application under Section 529 of the Companies Act, 2015, it is sufficient for me to say that in my opinion, there is a plausible argument to be made for the JH's contention (see paragraph 28 above), to put it another way, the JH's case is not so hopeless that I should deprive it of the opportunity of developing its case, which, if made out, would eclipse the debt in the statutory demand.

Whether there is a sufficient explanation for the failure to apply to set aside the demand

(31) The Court must balance the legislative policy of preventing disputes about debts from being raised at the winding up stage, against the potentially harsh effect of the 21 day time limit for challenging a statutory demand.

(32) There is some evidence of an explanation for why, there was no application to set aside the demand. That evidence is in the affidavit in support of Mr Kamlesh sworn on 09-07-2020. In his affidavit he states; (Reference is made to paragraph (08) to (18)).

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[3] **(2011) NSWSC 531**
[4] **(2011) NSWSC 531**
[5] **(1994) 12 ACSR 785**

The Debt and Statutory Demand

8. *The alleged debt arises out of a construction that was conducted by the Applicant on the Company's premises in /Suva. Specifically, the address of the construction site is:*

    - *Corner of Viria Road & Millet Street,*
      Vatuwaqa
      Suva.

9. *On or about 3 February 2020 a Statutory Demand against the Company was received at its registered office at c/- Aliz Pacific, Level 8, BSP Life Centre, 3 Scott Street, Suva, Fiji.*

10. *All of the Company's administrative operations are in Suva and all of its officers also reside in Suva.*

11. *On 19 February 2020 the company wrote to the solicitors for the Applicant and advised that the alleged debt was disputed.*

    Annexed marked "B" is a copy of the said letter.

12. *To date, no response has been received from the solicitors for the applicant in respect of our said letter. We assumed that because the solicitors for the Applicant did not reply to our letter, the Applicant had abandoned the statutory demand.*

The Winding up proceedings

13. *It would appear that the Proceedings were filed on 8 June 2020 and the same was served on the Company's registered office on 13 June 2020.*

    Annexed marked "C" is a copy of the e-mail from Ms. Alison Southey of PFK Aliz Pacific to Mr. John Lal in respect of the proceedings.

14. *The proceedings were not brought to the company's attention until 22 June 2020 by an email from PKF Aliz Pacific which acts as our registered office.*

15. *Before this, the company continued to assume that the Statutory Demand by the Applicant's solicitors had been abandoned.*

The application

16. *It is only after the proceedings were brought to our attention on 22 June 2020 that the Company became aware of the proceedings and has instructed its solicitors to oppose the same.*

17. *I am informed by the solicitors for the Company and verily believe that there are strict timelines for the filing of an Affidavit in Opposition to the proceedings.*

18. *I am also informed by the solicitors for the Company that the Company should have taken steps to obtain an order to set aside the Statutory Demand. However, because we had written to the solicitors for the Applicant on 19 February 2020 and there was not further reply from them, we did not take any further steps in respect of the Statutory Demand.*

(33) Mr Kamlesh evidence was challenged. Mr Kamlesh evidence is that "JH" assumed that "MCHS" had abandoned the statutory demand since there was no response to their letter dated 19-02-2020 by "MCHS".

(34) I cannot accept that evidence as an explanation for the purposes of the present proceedings. I do consider the explanation so deficient an explanation as to disqualify "JH" at the threshold. Mr Patel points out and I accept, that after receipt of the letter, "MCHS" Manager, Mr Krisheel Reddy had engaged in correspondence by way of emails with the "JH" Director and the architect on the issue of amended progress payment certificate. The emails are dated 25-02-2020 and appears as annexure KR-4 in "MCHS" affidavit in opposition. In my opinion, the contents of the email clearly indicate that "MCHS" had the intention to pursue the statutory demand.

(35) The explanation lacks cogency, because even believing it for a moment, it is not to be assumed that companies can simply ignore a perfectly comprehensible statutory demand requiring action within 21 days on the basis that a letter has been sent to the creditor advising "to take the beams back" and alleging "variation in the depth of pile drive". Its lack of cogency, weighed with other factors, tells against the application.

(36) Moreover, the demand emphasizes, in a part of the demand that;

> *You are required to pay the debt in cash or by way of bank cheque within 21 days from the date of service of this Notice on you, to its Solicitors, Krishnil Patel Lawyers.*
>
> ***TAKE FURTHER NOTICE*** *that the Companies Act 2015 entitles the Creditor, to present a petition for Winding Up of your Company to the High Court of Fiji upon the ground that your Company is insolvent and unable to*

pay its debts and that it is just and equitable that your Company would be wound up.

***UNLESS** therefore the debt is paid forthwith it is intended to present a petition to wind up your Company without further notice.*

(37) Even when "MCHS" emphasized in the demand that "*unless the debt is paid forthwith, it is intended to present a petition to wind up...company* ***without further notice***" and even after the expiry of the demand, "JH" did nothing for another 16 days from the date of the advertisement for the winding up application which was published in the newspaper, i.e, 24-06-2020.

(38) I am not satisfied that Mr Kamlesh's evidence provides an adequate or satisfactory explanation for why no step was taken to set aside the demand. If the kind of inattention, want of care, inactivity and lack of urgency displayed by "JH" could provide a satisfactory explanation for a failure to comply with or set aside a statutory demand, the statutory scheme in relation to statutory demands would be significantly undermined.

Is the dispute concerning the debt material to "JH" 's solvency

(39) By the time an application for leave under Section 529 of the Companies Act is made, the company will be presumed to be insolvent and will have the burden of proving that it is not. The onus is squarely placed upon "JH" to rebut the presumption of insolvency that follows from an unmet statutory demand not set aside. Furthermore, in order to satisfy the threshold requirement of a court granting leave under section 529 the court must be satisfied that the ground, here that the debt upon which the statutory demand is based, is pivotal to the JH's solvency.

(40) I should first refer to the applicable legal principles before turning to the evidence adduced as to the matter. There is a dispute in the authorities about the appropriate test to be applied in determining whether the relevant ground (the dispute concerning the debt) is relevant to the solvency of the company seeking to oppose the winding up application.

(41) On the one hand, there are authorities which are said to adopt a strict or narrow approach[6]. This approach is said to require an application for leave under Section 529 to prove that for a dispute concerning the debt to be material, it must be "the difference between solvency and insolvency", or "pivotal", "crucial" or "determinative of solvency". That would require proof that if the disputed debt exists then the company will be insolvent, and that if the debt does not exist then the company will be solvent.

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[6] ***HVAC Construction (Qld) Pty Ltd v Energy Equipment Pty Ltd (2002) FCA 1638**
***Grant Thornton Services (NSW) Pty Limited v St. George Wholesale Distributors Pty Ltd (2008) FCA 1777**
***Perpetual Nominee Ltd v N A Investment Holdings Pty Ltd (2011) NSWSC 282**
***Switz Pty Ltd v Glowbind Pty Ltd (2000) NSWCA 37**
*** Web Wealth Pty Ltd v helimount Pty Ltd (2006) FCA 1376.**

Swift Pty Ltd v Glowbind Pty Ltd (supra) is usually seen as the origin of the "strict" or "narrow" approach.

(42) On the other hand, there are authorities that are said to favour a broad or less strict approach[7]. This approach is said to be that the disputed debt need not be determinative of the company's solvency. Rather, materiality will be established if there is evidence that the company would ***undoubtedly*** be insolvent if the debt was owed, as well as evidence that it "might be" solvent if the debt is not owed.

(43) In Ewen Stewart, White J put the test in the following terms;

> *In short, the existence or non-existence of the plaintiff's debt is not material to proving that the company is solvent where the company claims it is solvent, even if it owes the debt. It does not follow that all questions of a company's solvency are to be advanced to the stage at which leave is sought under s459S, so that a company must then establish by the fullest and best evidence that it is solvent if it does not owe the disputed debt. A finding of the existence or non-existence of the debt will be pivotal to a decision on solvency at the s 459S stage, if the company might be found to be solvent if the debt does not exist. That would establish materiality for the purposes of s 459S(2).*

Even the more generous approach adopted by White J seems to require that, to establish the materiality of a finding of the existence or non-existence of the debt under Section 529 of the Companies Act, 2015 there must be a ***possibility*** that the relevant company would be found to be solvent if the debt did not exist.

(44) At the Section 529 stage, the company is not required to lead the "fullest and best evidence" of its solvency. It is unlikely that the materiality requirement in Section 529 can be satisfied by mere assertion of solvency or by conjecture about what further evidence concerning solvency might be led at the hearing of the winding up application.

(45) In considering what is meant by the "solvency" of a company, the Full Court of South **Australia in Powell & Anor**[8] said (at pp 600 -601):

> *(1) Whether or not a company is insolvent at a given point in time is a question of fact to be determined by the trial judge. Expert evidence may be of assistance, but it is not conclusive:* ***Sandell v Porter*** *(1966) 115 CLR 666 [at 670-671]* ***(Sandell).***
>
> *(2) The conclusion of insolvency must be derived from a proper consideration of the company's financial position, in its entirety, based on*

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[7] ***Radiancy (Sales) Pty Limited v Bimat Pty Limited (2007) NSWSC 962**
***Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No.s) (2011) NSWSC 113**

[8] **(2001) 37 ACSR 589**

commercial reality. Generally speaking, it ought not to be drawn simply from evidence of a temporary lack of liquidity: ***Sandell Pegulan Floor Coverings Pty Ltd v Carter*** *(1997) 24 ACSR 651. Regard should be had not only to the company's cash resources immediately available, but also to moneys which it can procure by realisation by sale, or borrowing against the security of its assets, or otherwise reasonably raise from those associated with, or supportive of, it. It is the inability, utilising such resources as are available through the use of assets or which may otherwise realistically be raised to meet debts as they fall due which indicates insolvency: cf Sandell at 670; ...*

(3) ...

(4) It is not appropriate to base an assessment on the prospect that the company might be able to trade profitably in the future, thereby restoring its financial position. The question is whether it, at the relevant time, is able to pay its debts as they become due – not whether it might be able to do so in the future, if given time to trade profitably: ***Sheahan v Hertz Australia Pty Ltd*** *(1995) 16 ACSR 765 at 769 [****Bank of Australasia v Hall*** *(1907) 4 CLR 1514-1528].*

(46) The honourable Justice Besanko in the Federal Court of Australia in ***Web Wealth Pty Ltd v Helimount Pty Ltd***[9] cited with approval a decision of Weingberg J in ***ACE Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd***[10]. In that matter Weinberg J said (excluding from the citation the authorities to which His Lordship referred):

The authorities which govern the operation of s 459G of the Corporation Law seem to me to establish the following propositions:

The respondent is presumed to be insolvent and as such bears the onus of proving its solvency: ...

In order to discharge that onus the Court should ordinarily be presented with the "fullest and best" evidence of the financial position of the respondent: ...

Unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative of solvency. Nor are bald assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared: ...

There is a distinction between solvency and a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short

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[9] **[2006] FCA 1376**
[10] **[1999] FCA 728**

time, at least to the extent of meeting all its debts as and when they fall due, must be considered in determining solvency: ...

The adoption of a cash flow test for solvency does not mean that the extent of the company's assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account: ...

The question of solvency must be assessed at the date of the hearing,. However, this does not mean that future events are to be ignored: ...

It no abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, or because there may be alternative means available to the applicant to vindicate its rights: ...

(47) The Full Court of New South Wales had cause to consider s 459S of the Corporations Act **in the matter *of Switz Pty Ltd v Glowbind Pty Ltd*[11].** In that matter Spigelman CJ reviewed S 459S and the authorities at the time. His Lordship says in paragraphs 53 – 56 of his judgment, with which the other members of the Court agree.

[53] By the time an application by s 459S is made, the company will be presumed to be insolvent and will have the burden of proving that it is not. In my opinion s 459S(2) directs attention, in part, to what it is that the company intends to prove and how it intends to prove it. If the company is not prepared to contemplate the possibility that its assertion of solvency is subject to qualification, then court cannot be "satisfied" of the mandatory precondition in s 459S(2). An objective element is introduced by the word "material" but that can only be determined after identifying the company's contentions.

[54] If, as here, the company intends to prove that it is solvent whether or not a debt is payable, then with respect to the ground based on dispute about the debt, the test of materiality to it "proving" its solvency, cannot be satisfied.

[55] The process of proving solvency is not some kind of forensic game. Solvency is a matter peculiarly within the knowledge of the company. The primary source of information on the solvency of the company must be the company itself.

[56] It may well prove to be the case that whether or not a particular debt is owing is material, indeed crucial, to a company being able to establish its solvency. However, if the company itself is not prepared to mount a case which contemplates that as a possibility, then it is not open to the court to

[11] **(1999-2000) 33 ACSR 723**

be "satisfied" in the sense required by s 459S(2) on the basis that the company should be protected from itself. As I have said, the fact that the company does intend to so contend would not determine the issue of whether the disputed debt is "material", let alone whether leave should be granted under s 459S(1)...

(48) The evidence of solvency relied on by "JH" is largely contained in the affidavit in support of Mr Navin Kamlesh sworn on 09-07-2020.

(49) In the affidavit Mr Kamlesh says; (paragraph 25 to 36)

> *25. The Company is a property owning company and does not engage in any trading.*
>
> *26. The Company's debt to the ANZ Banking Group Ltd of as at today is approximately $717,000.00. This is secured against property owned by the Company. The debt is covered under 5 separate loan accounts.*
>
> *Annexed marked "H" are copies of the last bank statements that the company has received from the bank. The balances of these accounts are not available to me over the internet and I will endeavour to obtain updated balances from the bank tomorrow and file a supplementary affidavit to reflect the exact amounts owed.*
>
> *27. The repayment to the bank is approximately $25,179.00 per month.*
>
> *28. The Company is not in default in its banking arrangements with the ANZ Bank.*
>
> *29. As at today, the Company has credit funds of $35,787.73 at the ANZ Bank in its operating account. Regular inter-company funds transfers take its place amongst the associate companies.*
>
> *Annexed marked "I" is a copy of the Company's Bank Statement as at today.*
>
> *30. The Company has no creditors other than the usual utility and property creditors. There are no utility on property accounts which remain unpaid except for those incurred in the prior month.*
>
> *31. I have handed a copy of the last set of Financial Statements and Returns of Income to the Company's solicitors and have instructed them that a copy can be handed to His Lordship if the Court so requires. I am not exhibiting a copy to this Affidavit due to the commercially sensitive nature of the information in these accounts.*

32. *The Company's solicitors wrote to the solicitors for the Applicant on 8 July 2020 in an effort to avert the Winding up proceedings. The letter was served on Cromptons, the Suva based agents of the Applicant's solicitors on 8 July 2020.*

33. *Importantly, as the debt remains disputed by the Company and because the proceedings were brought to the attention of the Company very late, the Company has remitted the amount of $22,697.00 to the solicitors through Parshotam Lawyers, the Company's solicitors. The amount remitted is to secure the disputed amount under the Statutory Demand.*

    Annexed marked "K" is a copy of the Parshotam Lawyers Trust Account cheque.

34. *At the time of the making of this affidavit, Krishneel Patel Lawyers had not responded to the Company's solicitors' said letter.*

35. *In the event that Court finds that the alleged debt is legally owed to the Applicant, the monies are easily available for the debt to be cleared.*

36. *The Company is solvent and does not have any other creditors (apart from bank debt) as it is not a trading company.*

    Annexed marked "L" is a copy of the Director's Solvency Resolution of the Company made as at 30 August 2019.

(50) In the supplementary affidavit sworn on 10-07-2020, Mr Kamlesh says; (paragraph (04) to (07))

4. *In my initial Affidavit, I had deposed that the Company's debt to the ANZ Banking Group Ltd is approximately $717,000.00, secured against property owned by the Company and covered under 5 separate loan accounts.*

5. *Upon our request, the ANZ Banking Group Ltd ("ANZ Bank") has furnished us with an update on the details surroundings the separate loan account balances as at 30 June 2020. Importantly, ANZ Bank states that the Company has met all loan repayment to date.*

    Annexed marked "B" is a copy of the letter from ANZ Banking Group Ltd dated 10 July 2020.

6. *Additionally, in my Initial Affidavit, I deposed that I would endeavour to obtain updated balances of the loan accounts from the bank and file*

a supplementary affidavit to reflect the exact amounts owed. The Company has now been able to obtain these updated balances.

Annexed marked "A" are copies of the recent interim statements of the 5 separate loan accounts.

7. *I reiterate paragraph 35 and 36 of my Initial Affidavit to the extent that the Company is solvent and should the Court find that the alleged debt is legally owed to the Applicant, the monies are readily available for the alleged debt to be cleared.*

(51) The evidence of solvency relied on by "JH" was not challenged by "MCHS" in its affidavit in reply. "MCHS" did not make submissions challenging the evidence of solvency relied on by "JH". Therefore, I accept the evidence of solvency.

(52) As for the **liabilities**, Mr Kamlesh asserts in the affidavit that the company has a secured debt with the ANZ Banking Group and the loan account balance as at 30-06-2020 is FJ$ 707,471.35. The annexure marked "B" a copy of the letter from ANZ Banking Group Ltd dated 10-07-2020, is capable of corroborating the company's assertion that the loan repayments have been met without fail.

"JH" has no other creditors. "JH" is a non-trading company, an asset owning company and deriving rent from its properties.

(53) As for the **assets**, Mr Kamlesh asserts that the company has credit funds of $35,787.73 at the ANZ Bank. Annexure marked "I" is a copy of the company's Bank Statement as at 09-07-2020.

(54) Mr Jan Lal, the sole director of the company asserts that; (annexure marked 'L')

- **The company receives financial support from him and his Group of Companies.**
- **The company has a net asset value of $3,485,590.00.**
- **The company will be able to pay its debts as and when they become due and payable.**

(55) Having regard to the surplus of current assets over current liabilities, [Assets →$3,485,590.00 – Liabilities → $707,471.35 = Surplus →$2,778,118.65] I am satisfied on the evidence adduced on this application that "JH" is solvent.

(56) The threshold issue is whether "JH" has established materiality. The authorities show that "material" means that an applicant, under section 529 , must show that the debt in respect of which it is seeking leave is pivotal to the question of solvency. That is, the defendant must demonstrate that if the debt exists then the company will be insolvent and if the debt does not exist, then the company will be solvent. That is the better reading of the reasons of Spigelman CJ in **Switz Pty Ltd v Glowbind Pty Ltd** (supra). The Full Court of the

Supreme Court of Western Australia in **Bayview holdings Pty Ltd (*in liq*) v Zan Holdings Pty Ltd**[12] adopted a somewhat liberal approach to materiality. Spigelman CJ did not propose to follow the decision in Bayview Holdings (see page 671). A fair reading of the reasons of the Chief Justice is that the proper approach to materiality is the narrow one.

In considering this matter, adopt the narrow test.

(57) The debt in the demand is $70,575.00. A part payment of $47,878.00 was made by the "JH". The unpaid debt of $22,697.00 is under dispute and this amount has been deposited in the trust account of the Solicitors for the "MCHS".

(58) The unpaid debt of $22,697.00 which is under dispute is small. The surplus of company's assets is $2,778,118.65, which far exceeds the balance of $22,697.00. The company is unquestionably solvent. The sole director Mr John Lal asserts that the company is able to pay its debts as and when they become due and payable. The amount disputed, viz, FJ $22,697.00 is **not** greater than the difference between the company's current assets and current liabilities. If this debt is recognized as a liability then that would **not** be a material matter in a consideration of JH's solvency. Then the existence or otherwise of the debt will not be material to the company's solvency. Therefore, the materiality test in Section 529 cannot be satisfied. Therefore, leave will not be granted.

(59) Put another way, having regard to the surplus of current assets over current liabilities (assets →$3,485,590.00 – liabilities → $707,471.35 = surplus →$2,778.118.65), "JH" is solvent whether or not it owes the debt of $22,697.00. In that circumstance, therefore, the existence of the debt is not material matter in proving that the company is solvent. Proof of solvency is likely to be achieved whether the debt exists or not. There is no discretion to grant eave because the ground for disputing the debt was not material matter to prove JH's solvency. It follows that the mandatory pre-condition for the exercise of the discretion under Section 529 of the Companies Act is not satisfied. I would not, in any event, be minded to exercise the discretion to grant leave given the unsatisfactory explanation for why no application was made to set aside the statutory demand.

ORDERS

(1) I decline leave pursuant to Section 529 (2) of the Companies Act, 2015.

(2) I formally dismiss the Summons with costs in favour of the Mobile Crane Hire Services Limited.

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[12] **(unreported , Supreme Court of Western Australia, Ipp, Wallwork and Steytler JJ, 19-10-1998)**

(3) I adjourn the remaining part of the proceedings relating to the winding up of the "Jarad Holdings Pte Limited" to 10th December, 2020 at 2.30pm.

30/10/2020

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Jude Nanayakkara
[Judge]

HIGH COURT OF FIJI
LAUTOKA

High Court – Lautoka
Friday, 30th October, 2020