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

HBM 33 of 2021

IN THE MATTTER of a Statutory Demand dated 01 November 2021 taken out by **CR ENGINEERING PTE LIMITED** against **INTERNATIONAL SHOP FITTINGS (FIJI) PTE LIMITED** and served on 03 November 2021

A N D

IN THE MATTER of an application by **INTERNATIONAL SHOP FITTINGS (FIJI) PTE LIMITED** for an Order setting aside the Statutory Demand pursuant to Section 516 of the **COMPANIES ACT 2015.**

BETWEEN : **INTERNATIONAL SHOP FITTINGS (FIJI) PTE LIMITED** a limited liability company having its registered office at Lot 1 Wekamu Industrial Sub-division, Nadi.

APPLICANT

AND : **CR ENGINEERING PTE LIMITED** a limited liability company having its registered office at Lot 3, Navutu Industrial Sub-division, Lautoka.

RESPONDENT

Appearances : Mr. J. Sharma for the Applicant
Mr. Charan for the Respondent
Date of Hearing : 29 March 2022
Date of Ruling : 18 July 2022

RULING

INTRODUCTION

1. Before me is an Application For Setting Aside Statutory Demand filed on 24 November 2021 by Janend Sharma Lawyers for and on behalf of International Shop Fittings (Fiji) Pte Limited (**"ISFFPL"**).

2. The said Notice is filed pursuant to section 516 of the Companies Act 2015 and under the inherent jurisdiction of this Court.

3. The application is supported by an affidavit sworn by Mr. Anil Chandra (**"Chandra"**) on 24 November 2021.

4. CR Engineering Pte Limited (**"CREPL"**) is the defendant. It has filed an affidavit of Ms. Anita Singh (**"Singh"**) sworn on 21 December 2021 to oppose the application.

BACKGROUND

5. Chandra deposes as follows in his affidavit:

   (a) On 24 April 2019, CREPL provided a quotation to ISFFPL for the supply, fabrication, sandblasting, priming and erection/installation end to end of some structural steel at CREPL's jobsite at Northern Press Road in Nadi.
   (b) CREPL (as per Chandra himself) made it clear and specified to CREPL that the steel must be properly treated and protected from rust for longevity.
   (c) During negotiations, CREPL said that the high costs of works (more than $5,000 per tonne) was due to the work to be done to sandblasting and priming.
   (d) And so, upon further negotiations, it was agreed between the parties that CREPL will supply, fabricate, sandblast, prime with Resene Coating, and erect/install end to end the structural steel in question.
   (e) The agreed price for all this was $74,000-00.
   (f) So, ISFFPL awarded the contract to CREPL
   (g) It was an essential term of the agreement that the structural steel should be treated via sandblasting and priming so the steel would not rust.
   (h) CREPL proceeded to carry out the contracted works at ISFFPL's jobsite and invoiced ISFFPL accordingly.
   (i) ISFFPL has paid a total of $74,000-00 to CREPL in seven installments in seven months between 17 July 2019 to 11 February 2020.
   (j) There were some extra works carried out by CREPL for which ISFFPL had raised a Variation Purchase Order No. 01025 in December 2019 and which CREPL had carried out and invoiced ISFFPL accordingly. This entailed an additional $48,000 of work.
   (k) At some point, ISFFPL discovered that the steel which was installed by CREPL had begun to rust.
   (l) ISFFPL then notified CREPL of the problem. CREPL inspected the works and verified the rusting and also asked Resene to inspect. Apparently, Resene had supervised the sandblasting and surface preparation and application of the Resene primer on the steel.
   (m) Despite the complaint raised by ISFFPL, CREPL has not rectified the defect. ISFFPL estimates the total cost of rectification at $232,000-00.
   (n) The issue of the Statutory Demand and the engagement of the Winding Up proceedings is an abuse of process.

6. Singh deposes as follows in her affidavit:

   (a) The central issue in this case is whether CREPL was responsible under the agreement to apply the protective coating on the steel structures prior to installation.

(b) Before CREPL had submitted its quotation to ISFFPL, CREPL had suggested to ISFPPL that the scope of work be expanded to include protective coatings based on Resene's recommendations in terms of Resene's Specification for Structural Painting Steel.

(c) The said Specifications had been given to CREPL by Resene on Resene's request prior to CREPL's quotation to ISFFPL – for the purpose of ISFFPL's job.

(d) ISFFPL did indeed request for the steel to be properly treated and primed. That was what CREPL did.

(e) **Priming** only provides a short term protection from corrosion. For a more long term protection, a **special protective coating** is required.

(f) CREPL had advised ISFFPL before contract that the option of special protective coating was available but at a much higher price. However, this was rejected by CREPL as CREPL was more concerned about saving costs – despite advice from Singh that without the special protective coating, corrosion is inevitable.

(g) If ISFFPL had agreed to the special protective coating, the price would have increased to $7,000 per ton.

(h) The priming which CREPL carried out was done in the presence of Resene in accordance with Resene's specifications and the costs which ISFFPL had agreed to.

(i) Yes, it is an essential term of the agreement between CREPL and ISFFPL that the structural steel be sandblasted and primed. However – the priming is only for short – term protection against rusting. For a long term protection – the special protective coating is required – but at a much higher cost – which ISFFPL had rejected.

(j) Apparently, after CREPL had installed the steel structures, ISFFPL then mounted stainless steel railings on the steel structures which caused some damage on the fabrication.

DEMAND NOTICE

7. Neither of the affidavits filed by the applicant or the respondent annexes a copy of the Statutory Demand Notice in question.

8. However, I gather from a letter dated 19 November 2021 by Janend Sharma Lawyers to Messrs Ravneet Charan Lawyers which is the Reply to the Demand Notice, that the said Demand Notice was dated 01 November 2021 and was duly served on CREPL.

THE LAW

9. Section 516 of the Companies Act provides:

> 516.—(1) A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.
>
> (2) An application may only be made within 21 days after the demand is so served.
>
> (3) 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.

10. The normal grounds employed to support an application to set aside a statutory demand are set out in sections 517 which are:

(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 (section 517(1)(a)).
(b) that the Company has an ***offsetting claim*** (section 517(1(b)).
(c) that there is a defect in the demand, substantial injustice will be caused unless the demand is set aside (section 517(5)(a)).
(d) there is some other reason why the demand should be set aside (section 517(5)(b)).

IS THERE A GENUINE DISPUTE ABOUT THE DEBT?

11. The question is whether or not there is a genuine dispute between the parties. Nanayakarra J's ruling in **Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd** [2020] FJHC 1025; HBM 36.2020 (11 December 2020) provides an excellent discussion of the various tests applied. The key points which I extract from the above to determine whether a genuine dispute is established for the purposes of section 517(1)((a) of the Companies Act, 2015 are as follows:

(a) the threshold criteria for establishing the existence of a genuine dispute is a low one.

(b) the court does not determine the merits of any dispute. Rather, the Court is only concerned with the question - whether there is such a dispute? (**In Edge Technology Pty Ltd v Lite-on Technology Corporation** [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J at [45]); **Fitness First Australia Pty Ltd v Dubow; Mibor Investments Pty Ltd v Commonwealth Bank of Australia** [1994] Vic Rp 61; [1994] 2 VR 290

(c) the threshold for that is not high (see **In Edge Technology**). The Court need not engage in a rigorous and in-depth examination of the evidence relating to the plaintiff's claim, dispute or off-setting claim (**Mibor Investments Pty Ltd v Commonwealth Bank of Australia**).

(d) the threshold rather is similar to 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 (**Eyota Pty Ltd v Hanave Pty Ltd**), or that there are reasonable grounds indicating an arguable case (see **In Fitness First** (supra) at 127, Ward J cited **Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd** (N.2))

(e) as McLelland CJ said in **Eyota**:

> This does not mean that the court must accept uncritically ...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]" (cf **Eng Me Young v Letchumanan** [1980]

AC 331 at 341], or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cf **South Australia v Wall** (1980) 24 SASR 189 at 194.

(f) the task is simply to identify the genuine level of a claim (In Re Morris Catering Australia). As McLelland CJ said in **Eyota**:

> … except in such an extreme case [i.e. where evidence is so lacking in plausibility], a court … 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.....

(g) hence, if a company's claim is so "devoid of substance that no further investigation is warranted" (see **In Fitness First (supra) Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd** (N.2)), or is "plainly vexatious or frivolous", it will fail in establishing that there is genuine dispute.

(h) the court does not engage in any form of balancing exercise between the strengths of competing contentions. Hence, where the company has advanced an arguable case, and even where the case against the company seems stronger, the court must find that there is a genuine dispute ((see **In Fitness First (supra); CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd); Roadships Logistics Ltd v Tree**

(i) 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).

CONCLUSION

12. I am of the view that there is a serious issue to be tried as to whether or not the agreement between ISFFPL and CREPL required CREPL to apply the protective coating on the steel structures prior to installation.

13. This is not the forum to determine this issue. Accordingly, I grant Order in Terms of the Application with costs to the Applicant which I summarily assess at $1,000-00 only.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka

18 July 2022