

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBM 39 OF 2021**

**IN THE MATTER** of a Statutory Demand dated 6 December 2021 taken out by **KRISHNA & CO** (“**the Respondent**”) against **AIRPORTS FIJI PTE LIMITED** (“**the Applicant**”) and served on the Applicant on 6 December 2021

**A N D:**

**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:**      **AIRPORTS FIJI (PTE) LIMITED** a duly incorporated company having its registered office at AFL Headquarters, AFL Property, Nadi Airport, Nadi Fiji.

**APPLICANT**

**A N D:**      **KRISHNA & CO**, Barristers and Solicitors, having its office at 27 Naviti Street, 1<sup>st</sup> Floor, P O Box 881, Lautoka, Fiji.

**RESPONDENT**

Appearances:      Mr. Haniff for the Applicant  
                         Mr. Patel for the Respondent  
Date of Hearing:      22 August 2022  
Date of Ruling:      19 September 2022

## **R U L I N G**

1. Before me is an application to set aside a statutory demand filed by the law firm of Hannif-Tuitoga for and on behalf of Airport Fiji Limited (“**AFL**”).
2. The statutory demand in question was issued by the Lautoka-based law firm of Krishna & Company. It was served on AFL on the 23<sup>rd</sup> day of December 2021. Below I reproduce the relevant part of the demand notice:

To:      **AIRPORTS FIJI PTE LIMITED**, a duly incorporated company having its registered office at AFL Headquarters, AFL Property, Nadi Airport, Nadi, Fiji.

This Demand Notice is served on you by the Creditor **KRISHNA & CO, Barristers And Solicitors** of 27 Naviti Street (1<sup>st</sup> Floor) P O Box 881, Lautoka, Fiji. ("**the Creditor**").

**Debt:** You owe the Creditor legal professional costs of \$29,250.00 (Twenty-Nine Thousand Two Hundred Fifty Dollars) for legal services provided by the Creditor to you at your request from 27 October 2011 to 20 April 2012 plus Value Added Tax [**VAT**] (at the rate of 15% per annum) and out of pocket expenses (disbursements). In addition, you are required to pay costs of this notice of \$2,000.00 (Two Thousand Dollars).

The total sum owing inclusive of VAT and disbursements as at the date of this notice is **\$38,020.50** (Thirty-Eight Thousand Twenty Dollars and Fifty Cents) (referred to as "**Debt Sum**")/

#### **PARTICULARS OF DEBT SUM**

The Debt Sum is made up as follows:-

Legal Professional Costs	\$29,250.00
VAT at the rate of 15%	\$ 4,387.50
Add disbursement	\$ 2,383.00
Costs of this Notice	<u>\$ 2,000.00</u>
<b>Total Sum</b>	<b><u>\$38,020.50</u></b>

On or around 6 October 2016, Airports Fiji Pte Limited agreed to pay for legal services at a discounted rate. The creditor agreed that the discount would only apply if Airports Fiji Pte Limited paid promptly.

The Creditor **demands** that you pay the Debt Sum to its Solicitors Messrs. Samuel Ram Lawyers or secure or compound for it to the Creditors satisfaction within 21 (twenty-one) days of service of this statutory demand.

Non-Compliance with this Demand will entitle the creditor to present a Petitioner to the High Court to Wind-Up Airports Pte Limited.

If Airports Fiji Pte Limited wishes to avoid a Winding-Up Petition being presented it must, within the period of 21 days after service of this Statutory Demand upon the Company, either:-

1. Pay the Debt Sum, or
2. Seek orders for this notice to be set aside pursuant to Section 517 of the Companies Act 2015.

Any communication in regard to this Demand must be made to:

**Samuel Ram Lawyers**  
Barristers & Solicitor  
P O Box 3318  
Ba, Fiji

Phone: (679) 6671815  
Fax: (679) 6671814  
E-Mail: [samuelram@me.com](mailto:samuelram@me.com)

**REMEMBER!** Airports Fiji Pte Limited has only 21 days after the date of service on it of this document before the Creditor may present a Winding-Up-Petition. Upon presentation of the winding up the creditor will be required to advertise the said petition in the local newspapers and the Fiji Gazette.

**DATED** this 6<sup>th</sup> day of December, 2021

Signed for and on behalf of the Creditor

**SAMUEL RAM LAWYERS**  
**SOLICITOR FOR THE CREDITOR**

3. The debt of \$36,000-00 (thirty-six thousand dollars) asserted in the demand, plus the \$2,000 (two thousand dollars) costs of the notice, pertain to outstanding legal fees allegedly owing by AFL to Krishna & Company for legal services rendered between 27 October 2011 to 20 April 2012.
4. Mr. Hanif submits that the debt in question is barred under the Limitation Act 1971. Section 4(1)(a) of the said Act provides inter alia that actions founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.
5. Mr. Hanif submits that, since the debt alleged arises out of a contract of service, any recovery action pursuant to it is caught under section 4.
6. Mr. Hanif also draws attention to the lack of clarity and confusion in the figure which is the subject of the statutory demand. He highlights the following in his submissions:
  - (a) the original Bill of Costs dated 18<sup>th</sup> April 2012 is annexed to the affidavit of Nilesh Kumar and marked **NK4**.
  - (b) according to the said Bill of Costs, the total sum owing for services rendered between 27 October 2011 to 20 April 2012 is \$17,000.
  - (c) when the said Bill of Costs was first served on AFL, AFL did question the figure of \$17,000 as being far too excessive. The letter which AFL sent in this regard is annexed to the affidavit of Naushad Ali marked **NA-1**. I reproduce the said letter below;

8 May 2011

Shailend R. Krishna  
Krishna & Co.  
27 Naviti Street  
Lautoka

Dear Mr. Krishna

I acknowledge receipt of your bill of cost dated 18<sup>th</sup> April 2012 for case number 370 of 2005L.

*We are not satisfied with the quantum of the bill. Upon perusal we can see they were three court attendees of about three hours, few letters written and mostly letters and correspondences received from the other solicitor. It appears that a maximum total of 10 hours of work is justifiable.*

*We are also not sure as to why the three volumes of documents given by the other solicitor was photocopied and given to us in mid-April weeks after stop work order was given to you and the decree putting to end this case was passed by cabinet. Furthermore you had been advised earlier that the decree was a possibility and AFL had lost all faith in the Court process with obvious delay tactics by the other side. We therefore do not understand your letter that states lot of hours had to be spent on this case for mostly receiving letters, writing a few and three court appearances.*

*We await your response.*

*Yours sincerely,  
Naushad Ali  
GENERAL MANAGER FINANCE & IT*

- (d) as is clear from the above, from the outset, AFL did dispute the debt of \$17,000 claimed with regards to Krishna & Company's legal attendances between 27 October 2011 to 20 April 2012.
  - (e) Krishna & Company did nothing to address AFL's queries about the said Bill of Costs.
  - (f) it appears that the principal of the law firm did have a compromise with the then CEO of AFL (the late Faiz Khan) about the debt.
  - (g) however, the details of that arrangement is not clear.
  - (h) it appears that nothing came out of that arrangement. This means that – as far as AFL is concerned, AFL is still questioning the \$17,000 raised in Krishna & Company's initial Bill of Costs.
  - (i) so, while that issue remains unresolved all these years, Krishna & Company then serves AFL the Demand Notice in question on 6<sup>th</sup> of December 2021.
  - (j) *prima facie* – the said Demand Notice is based on unsettled legal fees for attendances by Krishna & Company between 27 October 2011 to 20 April 2012.
  - (k) however, the debt alleged on the said Demand Notice has more than doubled in amount to \$36,000 from the \$17,000 initially claimed – and which has always to this day been disputed by AFL.
7. In the affidavit of Sanjana Mishra filed for and on behalf of AFL, is annexed marked **SM3** an email dated 08n December 2021 sent by AFL to Samuel K. Ram. This email captures AFL's position upon being served with the Statutory Demand. The email reads as follows:

*Dear Mr. Ram*

*I refer to the above demand notice that we have received from your office on 6<sup>th</sup> of December.*

*We would like to understand what are the details of these claims. There has been no correspondences on this issue for the last 7 years and we have now received a demand notice.*

*Please provide us full details such as instructions, claims and outcome of the cases that Krishna and Sons were handling. Once we receive the full details then we will review further.*

*Thanks.*

8. When there was nothing forthcoming from Samuel K. Ram, AFL's Solicitors again sent the following email:

*Mr. Ram*

*We act for Airport Fiji Pte Limited ("AFL"). We have been handed your firm's Secretary Demand Notice under Section 515 of the Companies Act with instructions to respond. Please direct all further communication on this matter to our office.*

*Your Demand Notice is for legal services provided by Krishna & Company from "27 October 2011 to 20 April 2012". Then you say in the Demand Notice: "On or around 6 October 2016, Airports Fiji Pte Limited agreed to pay for legal services at a discounted rate. The Creditor agreed that the discount would only apply if Airports Fiji Pte Limited paid promptly."*

*Three immediate issues arise from your Demand Notice.*

*First, if the legal services were provided in April 2012, any claim for payment for those services must now surely be statute barred under the Limitation Act.*

*Secondly, you say that the bill would have been discounted if AFL paid promptly – we know that no payment was made so there has not been an agreement at any discounted rate. Or if there was an agreement, it must have lapsed since payment has not been made. So we are stuck with the services provided in April 2012.*

*Lastly, AFL wrote to you on 8 December 2021 seeking particulars of the amount claimed. AFL has yet to receive a response.*

*In the circumstances, we think it is only proper that you withdraw the Demand Notice and proceed with your Client's claim by way of writ. A Section 515 is clearly the inappropriate vehicle in which to collect this debt.*

*As you know, the law once a Demand Notice is served is onerous on the company receiving the Demand Notice. The law deems a company to be insolvent if an application is not filed and served with 21 days of the Demand Notice being served. So AFL pretty much needs to prepare an application to set aside the Demand Notice in the next few days.*

*Please can you advise of your position in view of what we have said above urgently.*

*Thank you.  
Feizal*

9. Still, Samuel K. Ram did not respond to the above. This caused AFL's Solicitors to send the following email on 16<sup>th</sup> December 2021;

*Mr. Ram*

*We spoke on Monday by telephone. You advised that you will respond by Wednesday afternoon of your positions. We have not heard from you.*

*Please advice of your position. We are getting to the point that we will have file the setting aside application.*

*Thank you.  
Feizal*

10. Despite AFL's solicitors' lawyers attempt to get an explanation from Samuel K. Ram's office as to how the \$36,000-00 claimed in the Statutory Demand was arrived at – considering that the initial \$17,000 in the Bill of Costs was disputed years ago when it was first raised – Samuel K. Ram's office did not bother.
11. Section 516 of the Companies Act provides:
  - (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.
12. The normal grounds employed to support an application to set aside a statutory demand are set out in Section 517. These 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)).
13. Does AFL genuinely dispute the debt?
14. In **Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd** [2020] FJHC 1025; HBM 36.2020 (11 December 2020), Mr. Justice Jude Nanayakarra 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).

15. Mr. Haniff highlights that AFL is a solvent corporate statutory body which has assets, and an income stream, which far exceeds the meagre \$34,000 claimed in the statutory demand or the \$17,000 in the initial Bill of Costs.
16. Considering the background to this case, I agree that there is a genuine dispute to the debt alleged in the Statutory Demand and in the initial Bill of Costs. Accordingly, I grant Order in Terms of AFL's application. Costs to AFL which I summarily assess at \$1,500 (one thousand five hundred dollars only).



.....  
Anare Tuilevuka  
**JUDGE**  
Lautoka

**19 September 2022**