

IN THE HIGH COURT OF FIJI
AT LAUTOKA
COMPANIES JURISDICTION

Companies Action No. 14 of 2023

IN THE MATTER OF BOAT SHED
HOLDINGS LIMITED

AND

IN THE MATTER of an application to Set Aside
a Statutory Demand pursuant to section 516 and
517 of the Companies Act 2015

BETWEEN : **BOAT SHED HOLDINGS LIMITED** a foreign company registered in Fiji
under section 367 of the Companies Act (Cap 247), having its registered name and
address of its local agent being Hitesh Dip Chandra of 26 Nasoki Street, Lautoka,
Fiji.

Applicant

AND : **TOLL CONSTRUCTION & JOINERY (FIJI) PTE LIMITED** a limited
liability company having its registered office at Lot 18 & 19, Nasilivata Road,
Namaka Industrial, Nadi, Fiji.

Respondent

Counsel : Ms. S. Lodhia for the Applicant
Ms. P. Kumar for the Respondent

Date of Hearing : 02 May 2023
Date of Ruling : 15 September 2023

RULING

INTRODUCTION

1. Before me are two applications. The first is a Summons to Set Aside Statutory Demand “**setting aside application**”) filed by Boat Shed Holdings Limited (“**BSHL**”) pursuant to section of the Companies Act 2015. The second is a Summons to Strike Out the said application (“**striking out application**”) filed by Toll Construction & Joinery (Fiji) Pte Limited (“**TCJPL**”).
2. BSHL’s setting aside application was filed on 17 February 2023. TCJPL’s striking out application was filed on 31 March 2023.

THE STRIKING OUT APPLICATION

3. TCJPL's striking out application is based on the following arguments:
- (i) BSHL has come to Court by way of a Summons. It should have filed an Originating Summons. Order 5 Rule 3 of the High Court Rules 1988 mandates that an application made pursuant to any Act of Parliament must be made by way of Originating Summons.
 - (ii) an application to set aside statutory demand is caught under Order 5 Rule 3 because such an application is made pursuant to the Companies Act 2015.
 - (iii) furthermore, BSHL, in this case, has actually filed two affidavits in support. These are (i) the affidavit of **Peter Rakich** who is a director of BSHL and (ii) an affidavit of **Jason Wayne Gerard**, an Architect.
 - (iv) Order 28 of the High Court Rules 1988 only allows for three (3) affidavits. These are (i) the founding affidavit supporting the application (ii) the affidavit in opposition and (iii) the affidavit in reply. If there is a need to file an additional affidavit, then the prior leave of the Court must be sought (Order 28 Rule 2(6)).
 - (v) the defect involved is not curable by amendment. This is because – if BSHL were to be allowed to amend their process and file a proper Originating Summons, that would offend section 516 of the Companies Act. Section 516 is mandatory in its stipulation that an application to set aside a statutory demand must be made within twenty-one (21) days.

THE RESPONSE TO THE STRIKING OUT APPLICATION

4. Ms. Lodhia responds as follows:
- (i) there are no provisions in the Companies Act 2015 which prescribe the form in which an application to set aside a statutory demand must be made. So, there is no defect in form in the setting aside application.
 - (ii) in any event, even if this is a defect in form, the defect is not fatal. Where an alleged defect has caused no prejudice to the other party, the Court retains a discretion under Order 2 Rule 1 of the High Court Rules 1988 to overlook

COMMENTS

5. Order 2 Rule 1 of the High Court Rules provides as follows:
- 1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
6. I do note that the two affidavits filed in support of the setting aside application were both filed on 09 March 2023 together with the said application. I understand that the Gerard affidavit was filed in order to substantiate Rakich's assertions of there being a genuine dispute about the debt arising

from the construction contract between the parties – and out of which the statutory demand in question arose. I do not see any problem with this.

7. In **Reale Bros Pty Ltd v Reale** [2003] NSWSC 666, Young CJ of the New South Wales Supreme Court took the view that the purpose of the affidavit is to set the boundaries of the case although supplementary evidence can be filed outside the 21 day period if merely to flesh out the first affidavit which is filed within the 21 day period.
8. Wallwork J who delivered the leading judgement in **Energy Equity Corporation Ltd -v- Sinedie Pty Ltd** [2001] WASCA 419 said that, while a supplementary affidavit may be filed later outside the 21-day period, such a supplementary affidavit should only be allowed if it merely expands or fleshes out the grounds already set out in the first affidavit, but not if it raises new grounds not raised in the first affidavit .
9. I have perused Gerard's affidavit. It was filed together with the affidavit of Rakich. I am satisfied that it merely fleshes out what is deposed to in the affidavit of Rakich.

WHAT DO THE AFFIDAVITS IN SUPPORT OF THE SETTING ASIDE DEPOSE?

10. These affidavits highlight the following key points:
 - (i) the dispute between BSHL and TCJPL arises out of a construction contract where BSHL, as client, had engaged TCJPL to construct a high end and high quality residence (“unit”) on Vomo Island.
 - (ii) the unit was to be part of Vomo Island Resort’s accommodation rental pool.
 - (iii) their arrangement was in fact a lump sum contract to the value of FJD\$3,575,241.53.
 - (iv) a New Zealand based architecture company namely Jensen Chambers Young Limited was appointed Engineer under the Contract.
 - (v) the contract was based on New Zealand standards (NZ standard version 3910 conditions for contract building and civil engineering construction)
 - (vi) the contract was governed by New Zealand Law (Clause 1.4.1)
11. Rakich deposes that :
 - (i) TCJPL delayed in construction due to a lack of an appropriate number of workers and lack of appropriately skilled workmen and a high turnover of foremen
 - (ii) there were defects and the work was substandard and not completed to specifications
 - (iii) TCJPL had procurement issues due to its own mismanagement
 - (iv) the work is still not completed to this day.

- (v) a Practical Completion Certificate was granted on 28 march 2023. However, TCJPL has not carried out the necessary rectifications within the stipulated six-month post-completion period
 - (vi) these defects remain unrectified to this day – and TCJPL has not made any arrangement to return to site to rectify the defects
 - (vii) TCJPL’s failure to rectify the defects is a breach of the construction contract
12. At paragraph 12 of his affidavit, Rakich tabulates the chronology of the dealings, within the contract, between BSHL and TCJPL. The table outlines *inter alia* the work done and the payments already made to TCJPL.
13. TCJPL’s statutory demand is based on the Engineer’s Payment Certificate No. 32, and on which TCJPL had invoiced BSHL.
14. The above is seriously disputed by BSHL.
15. Rakich deposes at paragraph 24 of his affidavit that the total costs estimated to rectify the defects left by TCJPL is FJD\$229, 663.89. Rectification work is required mainly on the air-conditioning system and also the pool. This figure is based on estimates obtained from contractors.
16. Rakich also sets out at paragraphs 30 to 34 the reasons why he fears that TCJPL might itself be insolvent.

SERIOUS DISPUTE ABOUT THE DEBT

17. I am of the view that there is indeed a serious dispute about the debt. BSHL has a counter-claim against TCJPL based on the alleged breach of contract by TCJPL as stated above.

ARBITRATION/MEDICATION CLAUSE

18. Although neither Rakich nor Gerard have highlighted this in their affidavits, the building contract in question does contain a mediation/arbitration provisions in clauses 13.3 and 13.4.
19. The issues between the parties appear to me to fall within the ambit of the mediation/arbitration clause.
20. Around the common law world, the issue has been asked on several occasions as to whether a court presented with a winding up petition on a debt which arises out of contract, and which contract contains an arbitration clause, should stay the winding up petition and refer the dispute to arbitration or whether the court should proceed with the winding up.
21. Clearly, there is a discretion upon the court as to whether or not to stay the winding up proceeding or not.

22. There is a view that, if there is a dispute about whether the debt is owed, and the dispute is a genuine or a bona fides dispute, then the winding up petition should be stayed and/or dismissed (Salford Estates (no 2) Ltd v Altomart Ltd [2014] EWCA 1575 Civ; Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2019] SGCA 41) provided that the debtor has taken steps to start arbitration proceedings (Lasmos Ltd v Southwest Pacific Bauxite [2018] HKCFI 426).
23. The other view is that, to dismiss a winding up petition as such is against public policy as it would unduly restrict a creditor's right to petition the court (Davang Marine Shipping Co., Ltd v Asia Master Logistics Ltd HKCFI 311)
24. The common thread between the various approaches appears to be, that before the discretion becomes exercisable at all, the debtor must show either a genuine dispute, or a bona fides dispute, or a substantial dispute about the alleged debt.

CONCLUSION

25. In Fiji, section 517(1) (a) of the Companies Act provides that a statutory demand may be set aside if there is a genuine dispute as to the existence or the amount of a debt. Section 517(1)(b) provides that a statutory demand may be set aside if the company has an offsetting claim.
26. I am satisfied that there is a genuine dispute about the debt in this case and that BSHL has a strong potential offsetting claim.
27. It is against this background that I must now turn to consider whether or not the setting aside application should be struck out and dismissed on account of the fact that it was originated by summons rather than an Originating Summons.
28. In my view, given that I have allowed the affidavits of Gerard and Rakich, and am now cognizant of the facts they depose to therein, and given my conclusion that there is a genuine dispute about the debt, the natural result to flow from that is that the statutory demand must now be set aside and the parties to either consider arbitration and/or mediation or to file a civil claim and counterclaim to resolve their differences.
29. I accept that no affidavit has been filed by TCJPL regarding the alleged breach of the construction contract. I anticipate that any affidavit filed would simply refute the allegations.
30. Having said that, it is my view that the irregularity in the form in which BSHL had instituted the setting aside application – must be held curable under Order 2 Rule 2 of the High Court Rules. In holding this view, I am mindful of, and influenced by the possibility that, given the particular allegations in this case, that if I were to uphold TCJPL's argument, and strike out BSHL's setting aside application, I would have to then be allowing an otherwise genuine dispute about a debt - which could have been mediated or arbitrated upon as contracted to by the parties, to proceed to be the basis of a winding up application. In other words, that would be allowing the statutory demand process to be abused in this case – and to conceal that aspect under the striking out application.

31. In the final, the statutory demand is set aside. The Respondent to pay the Applicant's costs which I summarily assess at \$1,000 - 00 (one thousand dollars only).



Anare Tuilevuka
JUDGE
Lautoka