

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 40 of 2020

BETWEEN : INSTANT HOLDINGS PTE LIMITED t/a INSTANT HIRE
SERVICES

1ST PLAINTIFF

RAVI NAND

2ND PLAINTIFF

AND : BANK OF SOUTH PACIFIC LIMITED t/a BANK SOUTH
PACIFIC

1ST DEFENDANT

JYOTIKA LAL

2ND DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. V. Kumar for the Plaintiff
Ms. S. Devan for the Defendant

Date of Hearing : 28 May 2020

Date of Decision : 19 October 2023

DECISION

Statutory demand not set aside – Whether injunction available against winding up proceedings – Section 516, Companies Act 2015

The following cases are referred to in this decision:

- a. *Pacific Civil & Engineering Designs Limited v Nadi Development* [2017] FJHC 499; HBE 17.2017 (7 July 2017)
 - b. *South Pacific Marine Limited v Pricewaterhousecoopers* [2019] FJHC 118; HBE 7.2019 (21 February 2019)
 - c. *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728
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1. The plaintiffs filed a writ of summons seeking an injunction to restrain the first defendant from proceeding with winding up case No.74 of 2019, and asked for special and general damages.
2. The plaintiffs also filed an *ex parte* notice of claim with the writ seeking an injunction restraining the first defendant from proceeding with the winding up application. The application for injunction was supported by an affidavit from Ravi Nand, the second plaintiff. The first defendant appeared after notice was issued. The plaintiffs did not serve summons on the second defendant, against whom no relief has been asked.
3. The dispute concerns a demand by the first defendant on 4 October 2019 for payment of a sum of \$37,386.73. Subsequently, the first defendant filed an application for winding up for the same amount.
4. Mr. Nand's affidavit in support says that the claim against the plaintiffs is a result of the acts of negligence, collusion and fraud by the first and second defendants.
5. The second plaintiff said that the second defendant forged the second plaintiff's signature and obtained the release of funds amounting to \$35,000.00 by getting an enhancement of the first plaintiff's existing overdraft facility.

6. The affidavit states that the first defendant released part of the fixed deposits to the second defendant without the consent of the plaintiffs. These deposits were placed by the company as collateral for financial facilities given by the bank.
7. The second defendant is the former wife of the second plaintiff. Mr. Nand averred that there is an ongoing family dispute between him and the second defendant in the Magistrates Court of Nausori in case number 16/NAU/0002.
8. According to the second plaintiff, the company was unable to take steps to set aside the statutory demand due to the effects of cyclone Tino. Around the same time, it is averred, his wife was admitted to hospital and went through a miscarriage.
9. Counsel for the first defendant raised preliminary issues regarding the plaintiffs' notice of motion. Court issued an interim stay of the proceeding before the master. Subsequently, the winding up matter was transferred to this court.
10. The first defendant raised the following preliminary objections:
 - a) There is a presumption of statutory insolvency if a company fails to set aside a statutory demand and the first plaintiff cannot invoke the jurisdiction of the High Court to raise issues of solvency.
 - b) There is limited scope for the High Court to grant injunctive relief to restrain winding up.
11. The first defendant submitted that if a company wished to set aside a statutory demand it must apply to court under section 516 of the Companies Act 2015 within 21 days of service of the statutory demand. The first defendant submits that the time limit is mandatory, and cannot be extended by court. It is submitted that the company did not comply with the statutory demand or make an application to set it aside.

12. The first defendant referred to the decisions by Amaratunga J in *Pacific Civil & Engineering Designs Limited v Nadi Land Development*¹ and *South Pacific Marine Limited v Pricewaterhousecoopers*² in saying that the time imposed by the statute to set aside a statutory demand must be mandatorily observed.
13. In reply, the plaintiffs submitted that the jurisdiction of this court can be invoked to grant injunctive relief, and that this was a matter in which there was an abuse of the process of court.
14. The Federal Court of Australia decision in *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* is one of several authorities tendered by the plaintiffs.³ The case dealt with the company's failure to set aside the statutory demand under section 459G of the Australian Corporations Law. As a result, the company was presumed to be insolvent. In deciding whether leave should be granted to oppose the winding up, the court considered whether the company met the solvency requirement imposed by section 459 of the Corporations Law. Section 459S has the same wording as section 529 of the Companies Act. The Federal Court did adjourn the matter for 14 days, within which time the company was expected to pay the amount claimed in the statutory demand to avoid being wound up.
15. The statutory demand was served on the plaintiff's registered office on 4 October 2019. An affidavit verifying the application for winding up was filed on 22 November 2019, followed by an application for winding up on 29 November 2019.
16. The plaintiffs say their solicitors filed a notice of appointment on 22 January 2020, and a notice of intention to defend on 17 February 2020. On the same day, the plaintiffs filed a summons for extension of time to file an affidavit in opposition to the winding up application and stay pending the determination of writ action, HBC 40 of 2020. Summons for leave to set aside the statutory demand out of time was filed on 3 March 2020 in the winding up proceeding.

¹ [2017] FJHC 499; HBE 17.2017 (7 July 2017)

² [2019] FJHC 118; HBE 7.2019 (21 February 2019)

³ [1999] FCA 728

17. The Companies Act 2015 provides a comprehensive regime in dealing with insolvent companies. Section 516 of the Companies Act makes provision for a company to apply to court for an order to set aside a statutory demand. The company must set aside the demand within 21 days after it is served.
18. If the company does not make an application under section 516, a presumption may arise that the company is unable to pay its debts and result in its winding up. Section 517 makes provision where there is a genuine dispute of the existence or the amount of the debt or where the company has an off-setting claim.
19. A company that fails to take steps to set aside the demand may yet oppose the winding up with the leave of court.
20. Section 529 of the Act states:
 - (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, 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)

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".

21. The procedure laid down by the statute is to obtain the leave of court, if the company to be wound up wishes to oppose the winding up where it has not complied with the statutory demand. In order to grant leave, the court must be satisfied of the company's solvency in the manner required by the provision.
22. The plaintiffs say that the first plaintiff has filed summons for leave to set aside the statutory demand out of time. The company's position must be aired within that proceeding, and not by independent action. The legislative scheme provides

a framework in which a company's winding up can be opposed in accordance with the requirements to be met.

23. Therefore, the plaintiff's application for injunction is declined.

ORDER

- A. The plaintiff's notice of motion is struck off.
- B. The plaintiffs are to pay the defendants costs summarily assessed in a sum of \$1,500.00 within 21 days.

Delivered at **Suva** this 19th day of **October, 2023**.



M. Javed Mansoor
Judge