

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBE 47 OF 2024

BETWEEN: **TRADE AIR ENGINEERING PTE. LIMITED**
APPLICANT

AND: **CUSTOMBILT SHEETMETAL CO. PTE. LIMITED**
RESPONDENT

Appearances: Mr. Roopesh Singh for the Applicant.

Mr. Mohammed Saneem for the Respondent.

Date/Place of Judgment: Wednesday 12 March 2025 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

RULING

(Setting Aside Statutory Demand Notice under Companies Act 2015)

A. *Catchwords:*

COMPANIES ACT 2015: setting aside statutory demand notice – application brought by modified Form D1 of the Companies (Winding Up) Rules 2015 – respondent’s application to strike out for want of proper initiating process is without merit as I find the use of Form D1 to be proper, there is no substantial miscarriage of justice caused by using Form D1- if there was wrong use of procedure, it does not affect the jurisdiction of the court- statutory demand set aside on the basis that there is genuine dispute as to whether there is a debt due and owing to the respondent on the basis that the applicant company claims non-performance of the contract on time and as expected- the respondent’s admission that there was delay but that it was due to the fault of the applicant company as it did not make progress payments is a triable issue which needs another proceedings to determine.

B. *Legislation:*

1. *Companies Act 2015 (“CA”): s. 517(1) (a).*
 2. *Companies (Winding Up) Rules 2015: Rules 5 (2); and 116 (1).*
 3. *High Court Rules 1988 (“HCR”): O.2 R1; and O.5 R. 3.*
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The Application

1. The applicant company has filed an application to set aside the statutory demand dated 28 October 2024 in the sum of \$96,920.26 issued against it on the grounds that there is a genuine dispute on whether there is a debt due and owing to the respondent company.
2. The respondent's claim arises out of a contractual relationship between the parties for works to be carried out in the FHL Tower. The applicant says that the respondent has delayed the works and there is defective workmanship which gives rise to the issue of whether the sums claimed by the respondent is in fact due and owing. The application is opposed.

Law and Analysis

3. The following two issues require determination:
 - (i) ***Does this court have jurisdiction to hear the application for setting aside of the statutory demand as an originating summons has not been filed to move the court?***
This issue was raised by Mr. M. Saneem, counsel for the respondent.
 - (ii) ***Is there a genuine dispute between the applicant company and the respondent company about the existence or amount of the debt to which the demand relates? S. 517(1) (a) of the CA.***
4. I will deal with the preliminary issue first. Mr. Saneem's argument is that since the right initiating process has not been filed to move the court, I do not have jurisdiction to entertain the application. He says that the applicant company should have filed an originating summons under Order 5 Rule 3 of the HCR as there is no specific form provided for, under the *Companies (winding Up) Rules 2015*, to bring an application for setting aside of a statutory demand notice .
5. Before I go to Order 5 Rule 3, let me clearly state that in this particular scenario, even if the process to bring the application is wrong, it does not have the effect of impacting on the jurisdiction of this court.
6. This court derives jurisdiction under the Companies Act 2015 to hear an application for setting aside of a statutory demand. How the application is to be brought is merely a mode to invoke that jurisdiction.

The filing of the application in the correct form does not grant the court jurisdiction. That is vested in the court by virtue of the substantive legislation, the CA.

7. What needs to be determined is whether the proper initiating process has been used by the applicant company, and if not, whether the wrong choice of the initiating application is a mere irregularity or does it nullify the proceedings before me?
8. Let me answer the concern: *is there a procedural flaw in this proceeding?* Order 5 Rule 3 of the HCR states:

“Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorized to be made by some other means...”

9. What follows from Order 5 Rule 3 is whether the *Companies (Winding Up) Rules 2015* expressly requires or authorizes the application for setting aside of the statutory demand to be made or begun by any specific form or means?
10. The *Companies [Winding Up] Rules 2015* does not expressly provides for or requires how the application for setting aside of the statutory demand should be made. Mr. Singh has used Form D1 in Schedule 2 and modified it to properly reflect that it is an application for setting aside of a statutory demand.
11. Form D1 is a prescribed Form in Schedule 2 for winding up applications. Although Form D1 is not specifically for an application for setting aside of a statutory demand, it has been modified to reflect the nature of proceedings before the court and what the respondent company is faced with.
12. The respondent has been fully made aware of what is before the court and has had a complete chance of responding to the application. The Form D1 does not misguide the court or the respondent and since there is no substantial miscarriage of justice, the bringing of the proceedings vide a modified Form D1 does invalidate the proceedings: **Order 2 Rule 1 of the HCR and Rule 116(1) of the Companies (Winding Up) Rules 2015.**
13. In any event, Rule 5(2) (b) of the *Companies (Winding Up) Rules 2015* gives this court powers to direct that the procedure adopted by the applicant company to bring the application to set aside the statutory demand is the proper procedure. I find that the modified Form D1 used by Mr. Singh to bring the

application to set aside the statutory demand to be proper in the circumstances. It provides clear and precise information about the nature of the application and the Act under which the application is filed. It is an easy and convenient way of informing the respondent and the court about the specific nature of the case.

14. Now in respect of the substantive issue, let me first of all outline how the contractual relationship between the parties came about. Trade Air Engineering is involved in the business of engineering services. It specializes, amongst other activities, in the construction and implementation of air conditioning solutions. It says in its affidavit, that in the past, it has undertaken major contracts and works.

15. China Railway Group sub-contracted the applicant to carry out works for Fijian Holdings Pte. Limited. The applicant sub-contracted the respondent to assist with these works. It issued 2 purchase orders for engagement of the respondent, as follows:

(i) *Purchase Order dated 11.09.2023: No. FJ000736 for an amount of \$134,178.35 for supply and installation of Rizer Ductworks; and*

(ii) *Purchase Order dated 20.05.2025: No. SUV 000410 for an amount of \$161,000 for fabrication and installation of level 18 galvanized steel roof ductworks as per measurements taken for complete set.*

16. The applicant says that it has paid the following sum of monies in respect of the purchase orders.

(i) *Purchase Order dated 11.09.2023 - \$127,469.43.*

(ii) *Purchase Order dated 20.05.2025 - \$104,610.00*

17. The applicant's position is that the unpaid monies are because it is now disputing that it owes the respondent any sums of monies as the respondent delayed the works and that there is defective workmanship. It had also retained 5% of the contract price as per the agreement since the works had not been completed.

18. The respondent's position is that there were terms and conditions of payment outlined in the invoice and the applicant company has failed to abide by the terms. The respondent says that the applicant was supposed to make progress payments and it did not. Whenever the respondent company asked for the

payments, the applicant company brought up the issue of delay and poor workmanship. The delay in the progress payment, it was raised, caused the delay in the works which is the making of the applicant company and the respondent company is not liable for it.

19. Mr. Saneem also argued that the applicant accepts that there are monies unpaid on the purchase orders. This is the 5 % retention of the contract price which was not agreed to by the parties. The sum is more than the statutory limit of \$10,000 and as such the statutory demand should not be set aside but allowed to be proceeded with.
20. I have examined the email correspondence from both parties which was attached to their affidavits. It is clear from the emails that there is an ongoing dispute between the parties regarding payments and payments withheld due to delay and defective workmanship. This dispute arose before the statutory demand was issued. The issue has not just been raised to circumvent the demand.
21. The applicant company is asserting delay and poor workmanship and the respondent company says that the delay is due to the making of the applicant as it had not been paying on time.
22. I find that before the legal demand for payment was made, the parties had a dispute to resolve. The dispute was regarding late works, late payments and defective works. Who is correct in asserting its part of the claim is not an exercise that can be resolved in this application.
23. The parties' claims and contentions needs to be resolved by evidence. Some of the issues for the trial are:
 1. *What all works has the respondent carried out under the agreement and the costs of the works carried out? Has this amount been paid?*
 2. *What were the complete terms and conditions of payment?*
 3. *Was there delay in the works carried out by the respondent and was the delay beyond its control?*
 4. *What monetary loss has been suffered by the applicant company due to delay in the works?*
 5. *Were the works carried out by the respondent defective?*
 6. *What is the extent of the defect?*
 7. *What expenditure did the applicant undergo to address the delay and defective works?*
 8. *Is there any amount due and owing by the applicant, and if so, what is it?*

9. Does the respondent owe the applicant any sums of monies due to non-performance of the contract?

24. The above issues are not exhaustive but it needs to be tried. It is not for an application of this nature to resolve it. This proceeding is not meant to make findings of fact. All I can safely say is that there is a genuine dispute between the parties regarding the existence of the debt which needs to be tried. A further investigation on the parties' position is warranted.
25. I do not accept Mr. Saneem's argument that the applicant did not have a right to retain the 5% contract price and since this sum is more than the statutory limit, the application for setting aside should be dismissed. At the time of engagement, the applicant company had made it clear that it will retain 5% of the contract price. This is clearly reflected in the purchase order number FJ000736. It is not as simple as it is asserted that since a sum has been retained, it ought to be paid. It has to be determined on evidence the extent of the losses of the applicant due to the alleged delay and defect.
26. Purchase order number SUV000410 confirms that progress claims has to be inspected and verified by the applicant company before payment. I therefore find that in this proceeding, the applicant company has a right to assert defective workmanship without any independent report. It has a right to raise concerns about defective work before making payments.
27. Mr. Saneem says that the applicant has not complied with the written terms and conditions of the payment. No such terms are produced for the court to see whether there was an obvious breach.
28. Mr. Saneem also argued that the applicant company needed to satisfy me that it is a solvent company. In this proceedings, the focus is on whether the existence of the debt is genuinely disputed. I have attended to that and I find that it is. I need not examine the issue of whether the company is able to pay its debts. The applicant's position is that due to the delay and defect, it is not liable for the amount claimed. I do not find this to be an admission of the debt to any extent as asserted by Mr. Saneem.

Costs

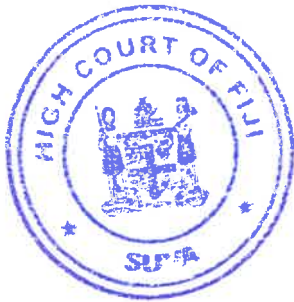
29. On the issue of costs of the proceedings, in light of the dispute between the parties, the issuing of the statutory demand notice under the CA was not a prudent procedure. The respondent company ought to have been aware that it needs to resolve the issues surrounding the alleged non-payment of the contract price. A writ action was necessary to resolve the issue.

30. The respondent's wrong choice of procedure has put the applicant company to costs in bringing this application for setting aside of the statutory demand notice. It ought to pay costs to the applicant company which I will summarily assess to avoid any delay in the proceedings.

Final Orders

31. I set aside the statutory demand dated 28 October 2024 against the applicant company.

32. I also order the respondent to pay to the applicant costs of this proceedings in the sum of \$1,500 within 14 days.



A handwritten signature in black ink, appearing to read "Anjala Wati".

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Hon. Madam Justice Anjala Wati

Judge

12.03.2025

To:

1. ***Messrs Patel & Sharma Lawyers for the Applicant.***
2. ***Saneem Lawyers for the Respondent.***
3. ***File: Suva HBE 47 of 2024.***