

IN THE HIGH COURT OF FIJI
AT LAUTOKA
COMPANIES JURISDICTION

WINDING UP ACTION NO. HBE 03 of 2024

IN THE MATTER of **PARMAR'S LAUTOKA PTE LIMITED** a private company having its registered Office at Jay Lal & Co, Chartered Accountants, 21 Tui Street, Marine Drive, Lautoka in the Republic of Fiji.

AND

IN THE MATTER of the Companies Act 2015.

BETWEEN: **ELITE TRAVEL PTE LIMITED**

APPLICANT

A N D: **PARMAR'S LAUTOKA PTE LIMITED**

RESPONDENT

Appearances : Ms. Singh P. for the Applicant
Ms. Khan N. with Mr. Ram for the Respondent
Date of Hearing : 06 August 2024
Date of Ruling : 27 March 2026

R U L I N G

INTRODUCTION

1. Elite Travel Pte Limited ("**Elite**") operates and carries on business as a travel agent. It claims that Parmars Footwear Pte Limited ("**Parmars**") is indebted to it in the sum of twelve thousand, three hundred and forty-two dollars and twenty-five cents (FJD \$12,342.25).
2. The debt is alleged to have arisen from unsettled accounts which accrued from services rendered in the ordinary course of Elite's business as a travel agent.

3. On 25 January 2024, Elite issued a statutory demand for the alleged debt. This was duly served on Parmars.
4. While it is common ground that Parmars' solicitors did write and deliver a letter to Elite on 16 February 2024 disputing the statutory demand, curiously, neither Jadav's nor Sheikh's affidavit annexes any letter of correspondence evidencing such dispute¹.
5. Notably, Parmars did not file any formal application to set aside the statutory demand. Consequently, on 08 March 2024, Elite filed a petition to wind up Parmars. The petition is supported by an affidavit of one Mr. Jesal Jadav ("**Jadav**") sworn on 08 March 2024 and filed herein.
6. An affidavit in opposition of one Ms. Rehana Sheikh ("**Sheikh**") was filed herein on 18 June 2024. This is followed by Jadav's affidavit in reply sworn on 03 July 2024 and filed on the same day.

ISSUES

7. The proceedings present two key questions for consideration. The first is whether it is still open to Parmars to contest the statutory demand in the course of the winding-up proceedings proper. Notwithstanding the answer to that first question, the second is whether or not Parmars has discharged the burden of rebutting the presumption of insolvency in this case.

WHETHER PARMARS MAY PROPERLY CONTEST THE STATUTORY DEMAND IN THE COURSE OF THE WINDING-UP PROCEEDINGS?

8. Section 529 (1) provides in subsections (a) and (b) as follows:

529.—(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).

¹ assuming one was written rather than merely conveyed verbally.

9. Section 529 (2) provides:

(2) 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.

10. Giving effect to the legislative intent behind section 529, and considering that Parma has not sought leave as required under section 529 (1), Parma is precluded from contesting the statutory demand in the winding up proceedings. In other words, without the leave of the Court, Parma cannot now argue that there is a genuine dispute about the debt or that it has an offsetting claim.

DOES PARMA RETAIN A RIGHT NONETHLESS TO REBUT THE PRESUMPTION?

11. If a company is served a statutory demand, it may comply with the demand and pay up the debt stated thereon. Alternatively, it may resist the demand on any of the grounds set out in section 517² of the Companies Act.

12. A statutory demand may only be resisted *vide* an application to set it aside. This must be filed within twenty-one days of the service of the demand³.

13. If, for whatever reason⁴, the statutory demand is not set aside, the demand will then mature into a presumption of insolvency as per section 515 (a)⁵ of the Companies Act.

² section 517 sets out in its various subsections the grounds upon which a company may challenge a statutory demand. These are:

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

³ see section 516(1) and (2) of the Companies Act 2015.

⁴ whether the company failed to file such an application to set the Demand aside, or having filed one, was not successful in doing so.

⁵ section 515 (a) provides:

Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed to be unable to pay its debts—

- a) if a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000 or such other Prescribed Amount then due, has served on the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due (“Statutory Demand”) and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or

14. That presumption of insolvency will prevail until it is rebutted (see **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2024] FJCA (26 July 2024)⁶.at [41] per Heath JA).
15. Given that the presumption of insolvency is raised only when a statutory demand is left unchallenged or standing following an unsuccessful challenge, it would appear that the time to rebut the presumption will accrue only after the presentation or filing of a petition.
16. To succeed in its rebuttal, a company must prove that it is solvent. Because rebutting the presumption of insolvency is part of defending against a winding-up petition and is available as of right, the company does not need special leave to argue solvency. This is different from section 529, where leave is required to raise a genuine dispute about the debt or to rely on an offsetting claim.

HAS PARMAS DISCHARGED THE BURDEN OF ESTABLISHING ITS SOLVENCY?

17. For clarity's sake, I reiterate that in setting aside a statutory demand, all that a company must establish is that there is a genuine dispute about the debt or that it has an offsetting claim⁷.

⁶ As the Fiji Court of Appeal said in **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2024] FJCA (26 July 2024) at [41], as per Heath JA:

'...a statutory demand is not a debt collection process. Its sole purpose is to create a rebuttable presumption of insolvency.

⁷ In **Creative Distributors Pte Ltd v Autocare (Fiji) Pte Ltd** [2025] FJCA; ABU 002.2023 (29 May 2025), the Fiji Court of Appeal said as follows at paragraphs [13] to [16]:

[13] Under section 517(1)(a), a genuine dispute about the debt's existence or amount can justify setting aside a statutory demand. A genuine dispute must be real and not spurious, hypothetical, illusory or misconceived. The company need not prove the dispute on the balance of probabilities but the dispute must be bona fide and based on real substance yet the court will not conduct a mini-trial at the statutory demand stage. A dispute is genuine if there is a plausible contention requiring investigation—even if the creditor believes the claim is weak. The dispute need not be likely to succeed—only that it is not plainly untenable.

[14] The question is whether the appellant has demonstrated a genuine dispute of the debt. **CGI Information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Limited** [2003] NSWSC 728, states as follows in respect of a genuine dispute:

"..the task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found, upon the hearing of its section 459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that on rational grounds indicates an arguable

18. However, where a company is seeking to prove its solvency in a winding up proceeding in order to rebut the presumption of insolvency, more is required.

19. As the Fiji Court of Appeal noted at paragraph [12] in **Creative Distributors Pte Ltd v Autocare (Fiji) Pte Ltd** [2025] FJCA; ABU 002.2023 (29 May 2025):

[12] A company is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable. A company is insolvent if it cannot pay its debts as and when they fall due in the ordinary course of business. Thus, insolvency is defined in section 514(1) & (2) as the inability to pay debts as they become due and payable – **a cash-flow test rather than a balance sheet test; focus is on liquidity, not asset value which means that solvency refers to commercial solvency, not just asset-rich status – the focus is on liquidity.** This is a widely adopted approach in common law jurisdictions. The court may consider contingent and prospective liabilities when assessing solvency.

(emphasis added)

20. In **Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd** [1999] FCA 728 (1 June 1999), Weinberg J at paragraphs 43 to 47 cited various cases to highlight the type of evidence which Australian courts have required in assessing solvency.

case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.”

[15] In **Roadships Logistics Ltd -v- Tree** [2007] NSWSC 1084 (28 September 2007) Justice Barrett observed as follows in respect of a genuine dispute:

“Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths or competing contentions. If it sees any factor or rational grounds that indicates an arguable case on the part of the company it must find that a genuine dispute exists even where any case, even apparently available to be advanced against the company seems stronger.”

[16] The court does not determine the merits of any dispute that may be found to exist, but simply whether there is such a dispute and the threshold for that is not high. This does not mean that the court must accept uncritically as giving rise to genuine dispute, 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 Mee Yong 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.).

21. At paragraph 47, he appeared to state that a **cash-flow statement or projection** would be highly probative, while a balance sheet and a profit and loss statement are not.

* *No cash flow statement or projections were provided by the respondent notwithstanding the fact that this application to have it wound up had been instituted as far back as December 1998.*

* *The respondent had several opportunities to provide proper accounting records and evidence to support its claim to solvency. It had relied initially upon an unaudited balance sheet, and only later upon an audited balance sheet and profit and loss statement. There were significant deficiencies in each of those sets of accounts. They did not, in any event, establish that the respondent could pay all of its debts as and when they fell due.*

22. Notably, Sheikh's affidavit does not annex any cash-flow statement or cash-flow projection. Nor does it even try to annex any financial statement whatsoever which establishes Parmars' solvency.

23. I agree with Ms. Singh that the onus is on Parmars to prove that it is solvent in order to rebut the presumption of insolvency. It has failed to discharge that burden.

EVEN WHERE THE PRESUMPTION OF INSOLVENCY IS NOT REBUTTED, DOES THE COURT RETAIN A RESIDUAL DISCRETION NOT TO ORDER A WINDING UP?

24. Ms. Khan appears to argue that Elite's statutory demand was still an abuse of process as they had knowledge that Parmars was solvent. She relies on the following comments of Heath JA in **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2024] FJCA (26 July 2024) at [41]:

*'...a statutory demand is not a debt collection process. Its sole purpose is to create a rebuttable presumption of insolvency. **If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment.** Should that occur, any creditor that proceeds in that way (and possibly, in a clear case, its legal advisers) may be at risk of a substantial award of costs to mark the abuse of process*

25. Ms. Khan appears to suggest that the contents of Parma's letter of 16 February 2024 would be sufficient to establish knowledge, as well as the fact that Parmars had loaned a total of \$79,000 to Elite shortly before the statutory demand.

26. It is difficult to comment on what level of actual or circumstantial evidence would be required to establish such “knowledge” in this context.
27. I say the above considering that a Cash Flow statement or Projection and/or other financials are normally considered in assessing liquidity and solvency. Perhaps, if these were, one way or another, made available to Elite at some stage, it would be easier to take a position on “knowledge” in this case.
28. At the end of the day, Parmars did not file any application to set aside the demand nor has it obtained leave under section 529. The presumption of insolvency therefore persists against the company which it has failed to rebut.
29. In **Ace Contractors** (supra), the Federal Court of Australia took the view at paragraph 8 that under section 459A of the Corporations Law, the Court has a discretion not to order a winding up even where insolvency is established.

Even where insolvency is established, the Court still has a discretion not to order a winding up. Section 459A of the Corporations Law provides:

“On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency.

30. However, having said all that, section 523 (1) of the Companies Act does reserve a discretion to the Court. It provides:

On hearing a winding up application, the Court may—

- (a) dismiss the application;*
- (b) adjourn the hearing conditionally or unconditionally; or*
- (c) make any interim order, or any other order that it thinks fit,*

but the Court must not refuse to make a winding up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets or that the Company has no assets.

31. While our section 523 is, indeed, slightly different in wording, I am of the view that it affords a similar level of discretion to the Court as the Australian provision. In the circumstances of this case, I am prepared to say the following:

- (i) the word “may” as it appears in section 523 (1) signifies that the jurisdiction is permissive, not mandatory.
- (ii) the words “on hearing a winding up application” as opposed to “on a finding of insolvency” suggests that the court need not even go to the

extent of making a finding of insolvency before it may exercise the discretion under section 523.

- (iii) hence, an unrebutted presumption of insolvency, or even a finding of insolvency, merely establishes the Court's discretionary power to order winding up.
- (iv) in other words, the unrebutted presumption against Parmars in this case is not necessarily a command to the court to order a winding up and for the dissolution of the company, although, if the evidence was compelling, the court may, rightfully, order so after making a finding of insolvency.

32. The whole point in giving the court the above discretion is to maintain a final tier at corporate rescue and creditor protection. After all, the granting of a winding up order is a last resort.

33. I set out below the factors which Weinberg J took into account in paragraphs 52 to 58 of **Ace Contractors**. In my view, they provide a useful guide:

52 The respondent has not sought to rely upon its alleged cross-claim or counterclaim as the basis for its contention that it is solvent. That claim, which might take many months, or even years, to resolve, does not seem to me to be "material" to proving that the respondent is presently solvent, within the meaning of the term "material" in s 459S(2). The respondent cannot therefore rely on the alleged cross-claim or counterclaim to oppose the application for an order that it be wound up.

53 The matters which I consider to be relevant to the exercise of my discretion to decline to order that the respondent be wound up are as follows:

- * There was an application made to set aside the statutory demand which was dismissed because it was brought several days late. The respondent did at least make some attempt to challenge the demand: **Kekatos v Holmark Construction Company Pty Ltd** (1995) 13 ACLC 1581 at 1582 per Young J.
- * The respondent has failed to persuade me that it is solvent. It is therefore to be treated as being insolvent by reason of the statutory presumption created by s 459C. The evidence, apart from the presumption, does not, however, demonstrate that the respondent is insolvent. The applicant does not contend that the evidence does demonstrate that the respondent is insolvent. Mr. Kelly went no further than to say that, in his opinion, the respondent had failed to discharge the onus which rested upon

it of proving that it was solvent. Notwithstanding the effect which the Court must give to the presumption, and to the company's failure to discharge the onus of demonstrating actual solvency, Westgarth may, in reality, be solvent.

- * The amount claimed under the statutory demand is not great when compared with the profit projected from the completion of the entire project: **Aizen v Essendon Travel (Vic) Pty Ltd** (supra) at 601.
- * If Westgarth were to be wound up at this time this would put at risk a going concern. The interests of other unsecured creditors might also be adversely affected. The appointment of a liquidator would involve considerable cost and delay. It would, in all likelihood, jeopardise the successful outcome of the entire townhouse development.

54 While I accept that it is not in the public interest that an insolvent company should continue trading, this is not a case where actual, rather than presumed, insolvency, has been found.

55 While as a general rule an applicant is entitled to a winding up order against a company which has failed to comply with a statutory demand it may, in appropriate circumstances, be better for the creditors as a whole to allow the company to trade on rather than have the company wound up. The Court has a duty when considering whether to make an order for the winding up of a company to have regard not only to the interests of the applicant creditor, but to the interests of all creditors, particularly those who are unsecured: **Re Presha Engineering (Aust) Pty Ltd** (supra) at 677.

56 Counsel for Westgarth submitted that if I found that the company had not discharged the onus which rested upon it of proving that it was solvent I should nonetheless decline to order that the company be wound up at this stage. He submitted that it would be open to me to adjourn the application for a winding up order, upon suitable terms.

57 Counsel for Ace Contractors accepted that it would be open to me to adjourn the present application for a winding up order for an appropriate period, upon suitable terms. He noted that the respondent had maintained throughout that it was in a position to pay the amount claimed by the applicant in its statutory demand and, if necessary, the additional amounts claimed as well, within a comparatively short time, simply by drawing down on the facility which had been made available by Victorian Securities Corporation Ltd. He submitted that if I were to exercise my discretion in favour of

the respondent, by not ordering that it be wound up, that proposition should be put to the test.

- 58 I propose to adjourn this matter for a period of fourteen days, until 15 June 1999. If before that date the respondent has paid to the applicant the sum of \$112,106.04 (being the amount said to be due and payable to the applicant pursuant to the statutory demand), the application to have the company wound up will stand dismissed. If, on the other hand, that sum is not paid by that time, I will, on 15 June 1999, entertain an application that I order forthwith that the respondent be wound up.

COMMENTS

34. Ms. Khan in this case, had pointed to the fact that Parmars had paid Elite the sum of \$30,000 and \$49,000 at some point shortly before the issuance of the statutory demand in this case. According to Sheikh, those payments were advances to Elite.
35. Elite does not dispute having received those payments. However, it contends that the payments were made on account of various invoices which were raised for Parmars.
36. Ms. Khan highlighted two things about the invoices. Firstly, there are some irregularities in the sequencing of the invoices. This suggests manipulation of the records. It undermines the reliability of Elite's accounts and the integrity of their records – let alone their motives.
37. Secondly, Ms. Khan points out that the majority of the invoices relied upon appear to arise not from ordinary commercial dealings, but from private arrangements involving a named director of Parmars and Elite.
38. She draws attention to the fact that certain invoices are connected to a New Zealand company owned by the said director. These, she argues, reflect an arrangement between Elite and the director/NZ company. They do not concern Parmars.
39. The argument certainly seems tenable.

CONCLUSIONS

40. A finding of insolvency or even a case where no such finding has been declared but the presumption of insolvency has not been rebutted, invokes a discretionary jurisdiction under section 523 of the Companies Act.
41. That jurisdiction calls upon the Court to consider factors which it would not have to consider when deciding whether or not to set aside a statutory demand.
42. As Weinberg J noted in **Ace Contractors**, which there is no reason not to draw from here in Fiji, the Court must weigh the interests of all creditors, the possibility of the company's recovery, whether the winding up process is being misused, and the wider public interest in maintaining trust in business dealings.
43. While a finding of insolvency (or the failure to rebut a presumption of insolvency) gives the Court the power to act, it does not automatically require winding up. The Court must still decide if winding up is the right remedy after balancing all factors.
44. Taking all into account, and using the power available to me under section 523 (1)(a) of the Companies Act 2015, I dismiss the application to wind up. The parties are to pursue their respective claims in the civil court or in the Small Claims Tribunal.
45. Parties are to bear their own costs.



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Anare Tuilevuka
JUDGE

27 March 2026