**IN THE HIGH COURT OF FIJI AT SUVA**
**COMPANIES JURISDICTION**

**Action No. HBE 02 of 2020**

**IN THE MATTER of an application by the Plaintiff under section 516 of the Companies Act 2015**

**AND**

**IN THE MATTER of the Companies Act 2015**

**BETWEEN:** **DIGICEL (FIJI) PTE LIMITED** a limited liability company having its registered office at Level 3, Digicel House, 5 Vuna Road, Nabua,Suva

**PLAINTIFF**

**AND:** **COVER STORY LIMITED T/A MAI LIFE MAGAZINE** a limited liability company having its registered office at Suva.

**DEFENDANT**

**Counsel** : **Plaintiff: Ms. Muir M**
: **Defendant: Ms Kirti V and Ms. Begg N**

**Date of Hearing** : **1.05.2020**

**Date of Judgment** : **18.05.2020**

## JUDGMENT

### INTRODUCTION

1. Plaintiff filed originating summons on 9.1.2020 seeking setting aside of statutory demand served to them on 19.12.2019 for winding up. The reason for seeking setting aside, was that it was disputed debt. The debt arose from non-payment of two advertisements of in - flight magazine. The magazine is published bi-monthly. Plaintiff's advertisements were published continuously in the said magazine. Though there was no written agreement between the two parties it is understood that each party performed their part without any dispute till last day of February 2019. On the last day of the month of February in 2019, Plaintiff informed the Defendant to "cancel the booking for next month." This is impossible for any magazine but specially so considering the nature of the magazine which

is for inflight reading material, in national carrier available from start of following month. Such a last minute cancellation is illogical, and one cannot assume cancellation unless specifically acknowledged. According to Defendant March-April issue was already printed and was also in flight by the time request for cancellation of advertisement was made. In the said request for cancellation also stated that "April we can get normal booking" indicating their clear intention to continue with the advertising in the following issue. This email from Plaintiff, which is clear and short indicate the nature of the relationship between the parties and everybody seems to know what it meant. Defendant did not replied to this email, to state self-evident fact that it was impossible to cancel an advertisement a day before of issue date of in- flight bi-monthly magazine. Since there was an overdue account for advertisement between the parties, no request was made for payment of the advertisement published in March-April 2019 issue. Defendant complied the request of Plaintiff as to publication of advertisement in the following issue as requested in the email of 28.2.2019. After this, on **5.5.2019**, Plaintiff's Marketing Executive requested to '**cancel contract from this month onwards**'. Said email also asked why they were not informed of the previous advertisements published in March-April and May –June issues and requested to cancel the 'contract' between parties .Accordingly, no advertisement was published as requested from 5.5.2019. Plaintiff now refuses to pay for two advertisements published in the issues of March-April and May – June for year 2019. Defendant had raised preliminary objection to the manner in which this proceeding was instituted in terms of High Court Rules of 1988 read with Companies Act 2015. Despite Defendant not replying to Plaintiff's request on 28.2.2019 not to publish their advertisement on a magazine issue for March-April 2019, it is not a task that can be fulfilled in a commercial dealing as it was *fait accompli.* So Plaintiff cannot refuse to pay for that advertisement whether they want it or not. Their failure to budget cannot be a reason to penalize Defendant. Its failure to reply to said email cannot be used to dispute what is obvious. As to next publication Plaintiff stated that they had a new creation for advertisement. Since Plaintiff had not indicated anything about 'new creation' for subsequent issue but desired to continue with, 'normal booking' there was no genuine dispute as to publication of the advertisement on May-June issue of the magazine. So again there cannot be issue as to payment as price of advertisements are not disputed and remained same for each issue throughout the period. So, the dispute as to the two advertisements was not genuine and not supported by undisputed facts and conduct of the parties. It was not genuine dispute and Plaintiff rely on their own email which was brief. A commercial communication through an email between parties cannot be comprehensive as a legal document but that does not change legal consequences from them. It should be understood with its clear and obvious, meaning and cannot be given strained meaning or interpretations to suit Plaintiff. So any outstanding debt due to advertisements published till cancellation, namely amounts due for advertisements in March-April and May –June 2019 issues are not genuine disputed debts. Plaintiff is estopped from denying having an

arrangement between them to publish their advertisements continuously for a fixed price. A genuine dispute is not stubborn refusal to pay when it is evident that payment is due to their own faults of informing in time.

**FACTS**

2. The Plaintiff filed its Originating Summons and Affidavit in Support on 9.1. 2020, seeking to set aside the Defendant's Notice of Demand and Notice of Intention to Wind Up, dated 16.12. 2019 and served on the Plaintiff on 19.12. 2019.

3. This application is brought pursuant to sections 516 and 518 of the Companies Act 2015 and Companies (Winding up) Rules 2015.

4. The Plaintiff filed an affidavit in Support along with the originating summons and there is no affidavit of service to ascertain the date of service of them to Defendant. There was no objection raised at the hearing regarding late service of them hence it was not an issue between the parties.

5. The amount stated in the statutory demand was $32,700.

6. According to Plaintiff 's affidavit in support at paragraph 6;

   a. There was one invoice that was undisputed (i.e indicating one payment of $10,900 was undisputed and accordingly paid after service of statutory demand)
   b. Ms. Aarti Singh had informed and deponent believed that payments for two consecutive advertisements in March-April and May-June 2019 issues of magazine were disputed.
   c. An email provided by said Ms Aarti had cancelled booking for March-April 2019 issue
   d. Said email that cancelled advertisement in March –April issue is annexed as PP3

7. Said email dated 28.2.2019 (sent at 3.34PM) stated:

   "Please cancel the booking for next month as we have budget constraints and we can't cater magazine cost for next month. April we can get normal booking."

8. There was no reply said email and there was lull of events till 5.5.2019 where Ms Aarti Singh had emailed and indicated that she thought that advertisement in Mach –April issue was cancelled.

9. In the said email Plaintiff also cancelled **'contract from this month onwards'** indicating that agreement to publish advertisements continuously on the said bi-monthly magazine ended on 5.5.2019.

10. Accordingly, said cancelation of contract between the parties was acknowledged on 7.5.2019 and no advertisement published.

## ANALYSIS

11. Section 516 of the Companies Act 2015 allows the Court to set aside a statutory demand and Section 517 of Companies Act 2015 deals with the scope of such application and Section 518 of Companies Act 2015 deals with the effect of setting aside order. They are as follows;

> *"516.—(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.*
>
> Determination of application where there is a dispute or offsetting claim
>
> *517.—(1)This section applies where, on an application to set aside a Statutory Demand, the Court is satisfied of* ***either or both*** *of the following—*
>
> *(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;*
>
> *(b) that the Company has an offsetting claim.*
>
> *(2)The Court must calculate the substantiated amount of the demand.*
>
> *(3)If the substantiated amount is less than the statutory minimum amount for a Statutory Demand, the Court must, by order, set aside the demand.*

*(4)If the substantiated amount is at least as great as the statutory minimum amount for a Statutory Demand, the Court may make an order—*

*(a) varying the demand as specified in the order; and*
*(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the Company.*

*(5)The Court may also order that a demand be set aside if it is satisfied that—*

*(a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or*

*(b) there is some other reason why the demand should be set aside.*

Effect of order setting aside Statutory Demand

*518.A Statutory Demand has no effect while there is in force an order setting aside the demand."*

12. In terms of Section 516(2) an application for setting aside a statutory demand can only be made within 21 days after demand was served.

13. In the affidavit in support Plaintiff stated that statutory demand was served on to them on 19.12.2019 in paragraph three, and this paragraph was admitted by the Plaintiff in the affidavit in opposition. So this application seeking setting aside was filed within 21 days.

14. Section 516(3)(b) of Companies Act 2015 also makes it mandatory to serve the application seeking setting aside within 21 days from service of statutory demand.

15. Since there was no affidavit of service it is not clear as to fulfilment of that mandatory requirement in terms of Section 516(3) (b) of Companies Act 2015. This was not raised as an objection by Defendant, hence it is not an issue in this action.

**Preliminary Objection**

16. Defendant at the outset of the hearing raised a preliminary objection as to failure to comply with Order 7(3) of High Court Rules of 1988 by the Plaintiff. For this counsel for Plaintiff said that this application was not made in terms of Order 7(3) of High Court Rules but in terms of Section 516(3) of Companies Act 2015 and also in terms of Companies (Winding Up) Rules.

17. An application for setting aside of statutory demand is no longer an inherent right of a debtor company that is subjected to discretion of court. It is a statutory right of a party granted by Section 516(1) of Companies Act 2015. There is no specific procedure set out in Companies Act 2015 or Companies (Winding Up) Rules under that.

18. Rule 4(1) of Companies (Winding Up) Rules 2015, states;

> *"4(1) Except as otherwise provided in the Act, the Regulations and these Rules, the general practice of the court, including the practices and procedure in Chambers, applies with any necessary modifications to the matters to which these Rules apply."*

19. If there is no procedure provided in terms of Companies Act 2015, or the Rules of winding provided in the Companies Act 2015 Rule 5 of Companies (Winding Up) Rules 2015 applies and the court can decide whether the procedure adopted was proper.

20. Plaintiff had instituted this action by way of originating summons, hence estopped from arguing that Order 7 rule 3 of the High Court Rules 1988 has no application to them.

21. Plaintiff had instituted this action by way of originating summons so the obligation to fulfil the requirements in terms of High Court Rules 1988 cannot be circumvented. So the Plaintiff is required to comply with Order 7 rule 3(1) of High Court Rules 1988.

22. Plaintiff had not complied with Order 7 rule 3(1) of High Court Rules 1988, but I am not inclined to dismiss this application for said technical noncompliance, adopting the path of least resistance.

23. The reasons not striking out the originating summons are:

    a. Plaintiff relied on Section 517 (1) of Companies Act 2015 and in that there are two specific instances where setting aside of statutory demand can be made by the party, and they are, to have genuine dispute of the debt and or to have an offsetting claim and there was no ambiguity as to Plaintiff's application was on the basis of genuine dispute, hence the basis of originating summons and orders sought are clear and there is no ambiguity. It should also be noted at the hearing and affidavits all dealt with that issue and everybody knew what to answer and issues before the court.

    b. Defendant had not sought striking out of the originating summons on the said irregularity in terms of Order 2 rule 2(1) of High Court Rules 1988. This also

substantiate above position that there was no prejudice and or ambiguity as to the basis of the originating summons and orders sought in that.

24. For above reasons I overrule the preliminary objection and consider the merits of this case.

25. Defendant relied on decision of Justice P. Nawana (as his lordship then was) in *Reddy v India Sanmarga Ikya Sangam* [2012] FJHC 1389; Action 163.2012 ( decided on 29 October 2012) where it was held that compliance of Order 7 rule 3 of High Court Rules 1988 is mandatory . Said decision can be distinguished as the claims in the said case were not clearly stated and scope of such an application was wide unlike narrow window of opportunity available in terms of Section 517(2) of Companies Act 2015. There is no ambiguity as to the cause of action and relief sought by Plaintiff, hence no prejudice to parties. Companies Act 2015 sets out minimum requirements for such an application for setting aside of statutory demand in Section 516(2), and Plaintiff had fulfilled that requirements. These are mandatory requirements as phrase 'only if' is used in Section 516(3) of Companies Act 2015. Hence, when a party had fulfilled said mandatory requirements and there is no prejudice to Defendant and there is no ambiguity as to the action and reliefs sought, court has a discretion to allow originating summons irrespective of failure to comply with Order 7 rule 3(1).

**Genuine Dispute**

26. The basis of the application of Plaintiff to set aside statutory demand is that the debt stated in the said statutory demand is genuinely disputed. In terms of Section 517(1) and 517(2) of Companies Act 2015, if the Court is satisfied that there is a genuine dispute about the existence or the amount of a debt, the Court is required to calculate the undisputed amount of the statutory demand, and if the amount is less than the statutory minimum, the Court must order the statutory demand to be set aside.

27. The basis of the said requirement is that if the debt is genuinely disputed there may not be a debt hence Defendant cannot be considered as a creditor, who can seek winding up in terms of Section 515(a) of Companies Act 2015.

28. In the case of ***Raghwan Construction Co Ltd v My Group Ltd (trading as Metromix Concrete (Fiji))*** **[20191 FJHC 29; HBC333.2018 (31 January 2019),** Seneviratne, J stated as follows in his judgment setting aside the statutory demand:

> *"[10] Winding up proceedings are not recovery proceedings. The court, before making the winding up order must also be satisfied that the company is unable to pay the statutory minimum which is $10,000.00. In the instant matter, from the*

*affidavits filed it shows that the applicant company refusing to pay the amount claimed by the respondent company not because it does not have means to pay amount claimed but because it challenges the amount claimed by the respondent. When the earlier statutory demand was served on the applicant it had promptly paid $74,627.60 which was accepted by the respondent and at that time the respondent had not disputed the amount paid but after almost two years it served another statutory demand, as I understand from the respondent's own statement of account, claiming that the applicant does not hove means to pay the balance sum.*

*[11] The Supreme Court of New South Wales in the case of In the matter of Country Spring Water Company Pty Ltd [2013] NSWSC 1660 cited the following passage from the decision in CGI information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Limited [2003] NSWSC 728; (2003) 47 ACSR 100:*

*'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 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."*

29. Winding up process is not suitable for recovery of genuinely disputed debts. If debt is *bona fide* disputed such debts are not suitable for recovery through winding up actions. What is genuine dispute, depends on the circumstances of the case though the threshold is low. It should always be genuine dispute.

30. There is no obligation on courts to find whether debtor company is in a position to pay a sum exceeding $10,000 to allow winding up. In contrary, if the debt is more than $10,000 and there is no genuine dispute or set off there is a statutory right for a party to seek winding up action. There is a legal fiction created that such refusal to pay is deemed insolvent of the debtor company. (See Section 515 of Companies Act 2015).

31. *Re Caybridge Shipping Co SA* [1997]1 BCLC 572 Oliver LJ held that unwilling debtor can state that the facts are disputed, hence that winding up process is not suitable. This is not a suitable ground to be considered as genuine debt.

32. A stubborn debtor without a genuine dispute as to debt can refuse payment and such disputes may be due to financial reasons, mala fide, due to animosity between parties or any other reason. So it is the court that should determine whether there the dispute or refusal to pay is genuine. This depends on the undisputed facts of the case. Though the threshold is low, it cannot lose its character of genuineness. Legislation had used word 'genuine' without meaning and it should be given due consideration by courts.

33. In *Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 it was held that mere assertion of dispute is not sufficient to prevent winding up, but prima facie case is needed.

34. What is paramount consideration for setting aside of statutory demand is that the dispute of debt is genuine. This depends on the undisputed facts. Plaintiff cannot create a dispute out of undisputed and admitted facts. Plaintiff is estopped from denying a contract between the parties through their own communications and also actions.

35. The amount stated in the statutory demand is $ 32,700 and this is sum due, regarding three advertisements at fixed rate of $10,900. There was an account in regard to advertisement of Plaintiff with Defendant and balance of that varied at different times and remained at $32,700 as at 1.5.2019.

36. Out of that sum, $10,900 was paid after service of statutory demand hence the remaining debt is $21,800.

37. The issue in this action is to ascertain whether the sum of $21,800 or part of that is genuinely disputed and if so ascertain undisputed debt is more than $10,000 in terms of Section 515(a) of Companies Act 2015.

38. Plaintiff is granted statutory right to set aside demand notice if the genuinely undisputed sum is over $10,000.

39. In any commercial dealing disputes between parties are not uncommon, but this does not mean all the disputes are genuine and meritorious. This is specially so when a party is served with statutory demand for winding up.

40. Since the relationship between the parties had broken before statutory demand is served the genuineness of the dispute is essential ingredient for debtor company to seek setting aside of statutory demand.

41. Any dispute as to debt by debtor company will not qualify to set aside statutory demand served in terms of Companies Act 2015. In other words any disputed debt will not qualify to set aside statutory demand.

42. A party should not allow to set aside statutory demand on liquidated sum which is more than $10,000. Even in a dispute or setting off of the debt, court needs to calculate undisputed sum. (See Section 517(3) and 517(4) of Companies Act 2015). So there is a task entrusted with court to ascertain genuineness of the disputed debt.

43. This task depends on the type of facts available at this juncture and the court has discretion to determine genuineness of the dispute from undisputed facts.

44. Plaintiff had requested cancellation of their advertisement with in flight magazine of March-April issue, but this was requested only on last day of February evening. Any person would know that this cannot be done.

45. Plaintiff tries to create a mountain out of mole hill, on the fact that 28.2.2019 was not replied in negative. Does that make their failure to inform cancellation of advertisement any better? Undisputed facts in this case show that Plaintiff was too late to cancel their advertisement in the magazine on 28.2.2020.

46. It is self-evident that Plaintiff needs to pay for said advertisement. The sum is liquidated amount and there is no dispute as to that amount of $10,900.

47. Plaintiff had on 28.2.2019 indicated that they only wish to cancel in magazine issued on following month hence there was no indication of cancellation of advertisement in May-June 2019 issue.

48. Isn't it obvious for parties who had worked for a considerable time that publication of advertisement cannot be cancelled on a request made on the evening of day before its issue date. This is an obvious fact to Plaintiff and if they had any doubts they could have requested the status without waiting till 5.5.2019 to send an email.

49. Plaintiff's email of 28.2.2019 clearly indicates that both parties knew that Plaintiff's advertisements are published continuously and Plaintiff required to cancel only one advertisement in the magazine issued in following month.

50. Both parties knew that kind of request cannot be fulfilled on the day before issue date of in flight magazine which would have been circulated in the airline to be available from next day.

51. Plaintiff is estopped from denying that there was no agreement between the parties to publish their advertisements in the said magazine continuously for fixed rate of $10,900.

52. Email of 28.2.2019 also indicated that the request for cancellation was **only for one issue** and **assured their commitment to advertising with Defendant** in the said magazine with a booking in April.

53. This indicates that though Plaintiff was requesting a cancellation of their advertisement due to budgetary constraints, they are keen to continue with their usual advertising booking in the subsequent issue after March-April 2019 issue.

54. Having done so Plaintiff now seeks to dispute both payments for March-April and May – June 2019 advertisements without merits, which is simply not a dispute that can qualify as genuine.

55. It should be borne in mind if the dispute is not genuine, the application for setting aside fails.

56. In my mind Plaintiff is estopped from denying an agreement between the parties as to publication of advertisements at a fixed rate of $10,900 continuously. The reason for seeking cancellation speaks for itself that there was such an agreement between the parties.

57. Plaintiff's email of 5.5.2019 sought 'cancellation of contract' between parties from that date and there were no advertisements of Plaintiff published in the said magazine and the debt accrued up to 5.5.2019 cannot be considered as genuinely disputed.

58. Plaintiff in the written submissions state that their request for cancellation of advertisements was not honoured till 7.5.2019. This is an incorrect statement. First there was no request for cancellation of 'contract' of advertisements in the magazine till 5.5.2019. This was the first instance that such a request was made and it was promptly complied. In contrast 28.2.2019 email only seek cancellation of advertisement in the immediate issue which was already printed and distributed by that time.

59. Plaintiff had also raised an issue as to new artwork being available for publication but their email of 28.2.2019 did not indicate such a thing. Plaintiff sought to continue advertising with Defendant.

## CONCLUSION

60. Annexed **"PP3"** to the Plaintiff's Affidavit in Support, the Plaintiff had requested for cancellation of its advertising in the Defendant's magazine on 28 .2. 2019, on the basis that due to budget constraints the Plaintiff could not cover the cost of that advertisement. The reason for cancellation was given and confined to one issue only. This is clear from seeking resumption of advertising with Defendant thereafter. In a commercial transaction such as this it is clear that one party to a continuous relationship, (i.e contract) cannot *ex parte* cancel advertisement on 28.2.2019 evening for March-April issue of magazine, which is due to issue on next day.

61. The Defendant did not respond to that email, but that did not make initial delay in the request for cancellation any different. Plaintiff's contention that, because the Defendant did not inform their inability to cancel they should not pay for advertisement is without merits. Such a contention would mean penalising Defendant due to delay in cancellation by Plaintiff. Plaintiff argues that failure to respond to cancellation request on 28.2.2019 deprived them of budgeting for expenses. This again conflict with their own email which stated that request for cancellation of advertisement was due to their failure to budget. Request for cancellation cannot be considered as cancellation unless that was confirmed, by Defendant. The absence of written contract does not change the nature of debt as it was liquidated sum and cancellation was requested only on 5.5.2019. Since Plaintiff was keen to continue advertising with Plaintiff even on 28.2.2019, there was no error on their part to publish their advertisement in May-June 2019 issue. So application for setting aside of statutory demand is struck off. Cost of this application is summarily assessed at $1,000.

## FINAL ORDERS

a. Originating summons filed on 9.1.2020 seeking setting aside of statutory demand of the Defendant is struck off.
b. Cost of this application is summarily assessed at $1,000.

**Dated at Suva this 18th day of May, 2020.**

HIGH COURT OF FIJI

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**Justice Deepthi Amaratunga**
**High Court, Suva**