IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBM 26/2020

IN THE MATTER of EXTREME SPORT FISHING LIMITED

AND IN THE MATTER of an application for an order setting aside a statutory demand pursuant to s.516 Companies Act 2015

BETWEEN **EXTREAM SPORT FISHING LIMITED t/a EXTREAM RESORT** a limited liability company having its registered office at 3 Cruickshank Road, Nadi Airport

APPLICANT

AND **GREEN PAK SUPPLIES (FIJI) Pte LIMITED** a limited liability company having its registered office at Malolo, Nadi.

RESPONDENT

APPEARANCES : Ms A Rogers for the Applicant
Ms Vreetika for the Respondent

DATE OF HEARING : 23 July 2020

DATE OF JUDGMENT : 7 August 2020

DECISION

1. This is an application under s.516 Companies Act 2015 to set aside a statutory demand served by Green Pak Supplies (Fiji) Pte Limited on the applicant company Extream Sport Fishing Limited.

2. The application, although dated 3 July 2020 appears to have been filed in the High Court only on the 6th July 2020, although I am assured from the bar by counsel for the applicant, and accept, that it was in fact filed on Friday 3 July.

3. In support of the application was a copy of an affidavit by John Sofianpoulos of Melbourne, Australia, apparently sworn on the same date. I say 'apparently' because what is filed in court is actually a very faint scanned copy of the sworn affidavit (without the annexure referred to in the body of the affidavit). At the time of filing I gave leave to the court to accept the scanned application on the basis that the original would be filed in its place on receipt of it from Australia. No doubt the need for the court staff to refer this issue for direction explains the discrepancy referred to in paragraph 2 above between the date of filing, and the date shown in the court stamp when the application was accepted for filing.

4. The affidavit of Mr Sofianpoulos provides very little information that would enable the court to understand the background to this matter. While I accept that applications of this sort are usually issued under pressure of time it is important that those responsible for preparing these applications keep at the forefront of their minds when doing so the need to satisfy the statutory criteria for such applications, and ensure that these are adequately covered in the supporting evidence. The statutory criteria include:

   i. The requirement in section 516 of the Act that the application is made within 21 days from the date of service of the statutory demand.
   ii. The situations listed in section 517(1) and (5) where the court can set aside a statutory demand:
      - There is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates
      - The company has an offsetting claim
      - There is a defect in the demand such that substantial injustice will be caused unless the demand is set aside
      - There is some other reason why the demand should be set aside.

5. As to the first of these, section 516 provides:

> *(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.*

6. Compliance with this section goes to jurisdiction. An application is made only if the requirements of s.516 are met. If not there is no application that the court has jurisdiction to deal with, whatever might otherwise be the merits of the application. I do not accept that this only becomes an issue if it is raised by the respondent, so that the failure by creditor to raise this issue, whether because of oversight or for some other reason, somehow confers jurisdiction on the court to deal with an application that the company is not permitted to make under s516.

7. The following passage from the decision of Gummow J in the High Court of Australia in **David Grant & Co Pty Ltd v Westpac Banking Corporation** [1995] HCA 43 interpreting the identical wording of section 459G the Australian Corporations Law makes the point:

> *28 In providing that an application to the court for an order setting aside a statutory demand "may only" be made within the 21 day period there specified and that an application is made in accordance with s459G only if, within those 21 days, a supporting affidavit is filed and a copy thereof and of the applications are served, subsections (2) and (3) of s459G attach a limitation or condition on the authority of the court to set aside the demand. In this setting, the use in s459G(2) of the term 'may' does not give rise to the considerations which apply were legislation confers*

upon a decision-maker an authority of a discretionary kind and the issue is whether 'may' is used in a facultative and permissive sense or an imperative sense. Here the phrase 'an application may be made only within 21 days ' should be read as whole. The force of the term 'may only' is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s459G. An integer or element of the right created by s459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in the Crown v McNeil [1922] HCA 33, it is a condition of the gift in s459G(1) that subsection (2) be observed and, unless this is so, the gift can never take effect. The same is true of subsection (3).

28, This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word 'only' in s459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter and that to treat s1322 as authorising the court to extend the period of 21 days specified in s459G would deprive the word 'only ' of effect.

8. The reference to s.1322 in the above passage refers to a later section of the Corporations Law that permits the court to extend time and otherwise relieve a party of the consequences of strict compliance with aspects of the act. As the High Court of Australia holds in this case, a power in the same statute to extend time will not over-ride the mandatory nature of the time limits in s459G. Even less so then is it arguable that similar provisions in sections 115 and 116 of the Company (Winding Up) Rules 2015 will allow the court to waive or extend the time limits in section 516. It is a general rule of statutory interpretation that the provisions of an Act will generally take precedence over the provisions of subsidiary legislation such as Rules and Regulations.

9. None of this is controversial or open to serious debate. In Fiji there have been a number of cases where the courts have held that the time limits in section 516 are mandatory, and that the courts have no power under the Rules to extend the time for filing an application to set aside a statutory demand, or to waive strict compliance with the time limits set out in the section. These include the decisions of Amaratunga J in **South Pacific Marine Limited v Price Waterhouse Coopers** and **Nawi Island Limited v Price Waterhouse Coopers** [2019] FJHC 119 and 118 (decisions issued simultaneously) which were followed by Seneviratne J in **Skyglory Pte Limited v Bhawna Ben** [2019] FJHC 891 and -on application for leave to appeal the earlier ruling - [2020] FJHC 161. With respect, I agree with those decisions, and, although it may be tempting fate to say so, cannot see how the conclusions they have reached on this issue might be challenged. The strictness of the time limits in s516 need to be better understood by legal practitioners than they apparently are, and more effort taken to ensure that those time limits are adhered to, and the court's and other parties' time is not wasted on applications under s516 that are destined to fail because they are out of time. In the **Skyglory** decision the Court responded as follows to a submission, similar to a plea from the bar made in this case, that service of the application occurred after the 21 day period only because the High Court delayed the release of documents:

The applicant submits that the delay was due to the Registry releasing the document for service after the expiration of the period of 21 days. The applicant should have known that

the 21 day period prescribed by the statute is to file and serve the application. However the applicant filed its application to have the statutory demand set aside on the 19th day. It should have given sufficient time for the Registry to attend to the matter and release it for service within the period prescribed by the Act.

10. I agree that the responsibility is on the applicant and its advisors to ensure that the time limits are complied with, but would add the following related comments. First, because an application under s.516 is an originating (rather than interlocutory) motion/application O.8., r.3(4), which provides:

> *Issue of the notice of an originating motion takes place upon its being sealed by an officer of the Registry.*

appears to require that it is filed before it can be served. Hence, solicitors responsible for the conduct of such an application need, when preparing and filing the application, to allow themselves time for service after the motion is processed by the court staff and allocated a hearing date. Second, if the advisors don't themselves understand the mandatory nature of the time limits set out in s.516 there is little chance that they will be able to impress on the court staff the importance of releasing the application for service within the time prescribed.

11. As I have noted above, the affidavit of Mr Sofianpoulos provides very little useful information. It does however acknowledge the fact that a statutory demand was served on Extream Sport Fishing Limited on 12 June 2020, although it does not annex a copy of the demand, or say how much the demand was for. It refers to the fact that there was a building contract between his company and Green Pak Supplies (Fiji) Pte Limited pursuant to which Green Pak was to build a house for the applicant company at its property at Nadi for $180,000. The affidavit refers vaguely to delays in completion, defects in construction, and the application of a liquidated damages clause for delay of $50.00 per day. It goes on to say in paragraph 12 of the affidavit:

> *That I am advised by my solicitors and verily believe that the Statutory Demand can be struck out on the following grounds as per section 517 Companies Act 2015, if only application is made within 21 days after being served with the Demand:*
> *(a) 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*
> *(c) The substantiated amount is less than the statutory minimum amount for a Statutory Demand, the Court must, by order, set aside the demand.*
> *(d) Defect in the demand, substantial injustice will be caused unless the demand is set aside; or*
> *(e) There is some other reason why the demand should be set aside.*

12. This of course is true, as far as it goes, and reflects what I have said above in paragraph 4. But the affidavit does not go on to say which if any of these grounds applies, and if so how. The court will not accept a party's bare assertion that grounds exist for setting aside apply to the case. At the very least the affidavit needs to set out the facts relied on for saying that one or other of the factors listed above is applicable here. If there is a dispute about whether an amount is owing the applicant for setting aside the statutory demand will need to provide sufficient

details of the dispute, and the background facts (including evidence that the 'dispute' is not merely a belated response to the demand for payment) to enable the court to judge whether the dispute is one that warrants setting aside the demand. Also the respondent is entitled to know what the applicant is saying about the dispute to be able to respond to it.

13. However, these deficiencies in the applicant's application are immaterial here, because of the more fundamental difficulty, that the application to set aside the demand was not made, as section 516 requires, within 21 day of the demand being served. If – as Mr Sofianpoulos acknowledges – the demand was served on the applicant company on 12 June 2020, any application to set it aside had to be filed and served on the respondent withing 21 days after that date, i.e. on or before 3 July 2020. Even accepting what I was told from the bar, that the application here was filed on 3 July, rather than on 6 July as the court date stamp suggests, that still leaves the issue of service. The applicant's affidavit of service makes it clear that the application and supporting affidavit were not served on the respondent until 9 July, outside the time allowed by section 516(3).

14. Accordingly, the application to set aside the statutory demand is not made within the time prescribed by section 516 and must be dismissed. The respondent is entitled to costs on the unsuccessful application, which I summarily fix at $500.00 (noting that the respondent was not called on to file an affidavit in reply, and did not file written submissions).

15. In closing I refer to the words of Gummow J in **David Grant** (supra) addressing the possibility of injustice arising from the strictness of the time limit prescribed:

> *No doubt, in some circumstances, the new Pt5.4 [equivalent of s516 in Fiji] may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with the perceived defects in the pre-existing procedure in relation to notices of demand. It also may transpire that a winding up application in respect of a solvent company is threatened or made for an improper purpose which amounts to an abuse of process in the technical sense of that term, as explained in* ***Williams v Spautz*** *[1992] HCA 34, (1992) 174 CLR 509. However, in an appropriate case, injunctive relief may then be available to the company in a court of general equity jurisdiction.*

But this passage must be read in light of the comprehensive analysis by William Marshall JA in **Aleems Investments Ltd v Khan Buses Ltd** [2011] FJCA 4 of the law relating to abuse of process in the context of winding up proceedings.

16. In this case, when deciding whether to follow up the statutory demand with a winding up application the respondent will no doubt take into account what it knows of the matters referred to so obliquely in the affidavit of Mr Sofianpoulos, and consider whether it might not be wiser to file a writ of summons claiming the money it is owed, rather than proceed with winding up proceedings. The attitude of the courts to the use of winding up proceedings for leverage to obtain payment for debts that are genuinely disputed is – or should be – well understood, and is likely to

be reflected in an award of costs against a party that is seen to be abusing the court processes in this way.

A.G. Stuart
Judge

At Lautoka this 7th day of August, 2020

SOLICITORS:
Toganivalu Legal, Suva – Applicant
Patel & Sharma, Nadi – Respondent