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

CIVIL ACTION No. HBM 51/2019

IN THE MATTER of Section 515(a) Companies Act 2015

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

BETWEEN **WALT SMITH INTERNATIONAL (FIJI) LIMITED** a limited liability company having its registered office at Royal Palm Road, Navutu, Lautoka

APPLICANT

AND **DAVID BARRICK** currently of the United States of America, and formerly of Drasa Dam Road, Lautoka.

RESPONDENT

APPEARANCES : Mr W Rosa for the Applicant
Ms Vanua for the Respondent

DATE OF HEARING : 23 July 2020

DATE OF JUDGMENT : 7th August 2020

DECISION

1. This is an application by the applicant Walt Smith International (Fiji) Limited under section 516 Companies Act 2015 to set aside a statutory demand served on the company by the respondent David Barrick.

2. The application (by Notice of Motion) was dated and filed in the High Court at Lautoka on the 7 November 2019. In support of the application is an affidavit by the applicant's director, Walt Smith sworn on the same date. Annexed to Mr Smith's affidavit is a copy of the statutory demand, apparently served on the applicant company on or about the date of the demand, i.e. 9 October 2019. The demand seeks payment of the sum of $57,000 (plus legal costs on the issue of the demand) which is said to be the *agreed salary due and owing by the company to the Creditor [Mr Barrick] from 1st February 2019 to 4th October 2019.*

3. The affidavit of Mr Smith 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.

4. 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.*

5. Compliance with this section goes to jurisdiction. An application is 'made' only if the requirements of s.516 are met. I do not accept that this only becomes an issue if it is raised by the respondent, and that if the creditor does not raise the issue of timely filing and service the court somehow has jurisdiction to set aside the statutory demand. Because of the wording of s.516 an application that is not filed and served within the time limits prescribed is not 'made', i.e. there is no application that the court has jurisdiction to deal with, whatever might otherwise be the merits of the application.

6. 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.

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.

7. As the High Court of Australia holds in that 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 rules 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 take precedence over the provisions of subsidiary legislation such as Rules and Regulations.

8. 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.

9. 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 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. In response to the application and affidavit of the applicant the respondent has filed two affidavits:

i. by the respondent David Barrick himself, in which he replies at some length to the affidavit of Mr Smith,
ii. by Ricky Singh (a solicitor at Young & Associates, solicitors) referring to the date of service of the statutory demand issued by Mr Barrick, and the date of service of the applicant's application to set aside the demand.

12. The affidavit of Mr Singh shows that the statutory demand was served on the applicant company on the 9th October 2019, i.e. the date of the statutory demand, while the applicant's application to set it aside was served at the Lautoka offices of Young & Associates on the 8th November 2019. There has been no challenge to what is said in this affidavit. This means that in terms of section 516(3) Companies Act the application to set aside the statutory demand had to have be filed and served on or before 30 October 2019 (i.e. 21 days after 9 October). Hence the applicant's application, filed on 7th November and served on 8th November 2019 was out of time.

13. Although this disposes of the current application, it may be helpful to comment briefly on the matters raised by the applicant in its application to set aside the statutory demand. As Gummow J in **David Grant** (supra) explained, addressing the possibility of injustice arising from the strictness of the prescribed time limits:

> *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.

(Although 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).

14. Although the application by Walt Smith International (Fiji) Ltd refers only to defects in the statutory demand (i.e the third of the possible grounds for challenge listed in paragraph 3(ii) above), the affidavit filed in support refers also to:

- a dispute about whether a creditor who is an individual is entitled to use the statutory demand procedure,
- an argument that the statutory demand is defective in its description of what the amount claimed is for.
- a suggestion that because Mr Barrick is claiming money owed to him under an employment contract this must be dealt with under the Employment Relations Act 2007.
- a suggestion that the amount claimed is in dispute, or that the applicant has a counterclaim against Mr Barrick arising from breaches of his employment contract.

15. The first of these bases for opposing a winding up is I think totally misconceived. While the statutory demand procedure is available only where the debtor is a company, any creditor of a company, whether a natural person, another company, a government department or any other entity that is indisputably owed money by a company is entitled to utilise the statutory demand procedure.

16. As to the second, while section 517(5)(a) Companies Act makes it clear that defects in the statutory demand may be a basis for setting aside a demand, this will be the case only if those defects create substantial injustice for the company. This is likely to occur only when the defects are such that the company is genuinely in doubt about what the demand relates to, or about what it is required to do to satisfy the demand, and so is unable to effectively contest the amount sought. Nothing that has been said in evidence in this case suggests that the applicant is in any doubt about what is demanded and why.

17. The third issue is not unrelated to the first; the statutory demand and winding up procedure under the Companies Act 2015 is available to test the ability of a company to pay a debt that is due, and if it cannot pay, as a means to wind the company up so that it can no longer trade (to the disadvantage of other potential creditors). How and for what purpose the debt became due is not an issue. If it is due and unpaid the statutory demand and winding up processes can be used. There is no reason why an employee cannot use the procedures to recover unpaid wages owed to him/her by a company employer. It may be that any dispute about whether wages/salary is owed has to be dealt with under employment law, but until such a genuine dispute is established by evidence an employee is as entitled to payment of

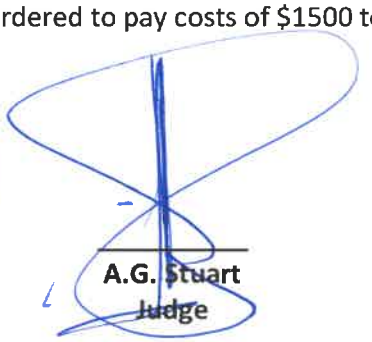
amounts due as any other creditor of the company, and can utilise the same procedures as are available to any other creditor to recover payment.

18. As to the fourth item referred to in paragraph 13, if there is a dispute about payment of the amount claimed, the onus is on the company/applicant, in the first instance at least, to explain to the court and the creditor the basis of that dispute, and to show that it warrants either the setting aside of the statutory demand, or – if matters have progressed beyond that stage – the conclusion that non-payment is justified and does not reflect on the company's solvency. In the present case the evidence tends to show that at the time he resigned from the company in December 2018 the applicant readily agreed to pay an agreed amount in satisfaction of claims by Mr Barrick to unpaid salary, and that payment was to be made in instalments. At some later time the applicant defaulted in payments due under this agreement, and only at that point, nearly a year after the payment agreement was reached, was there a suggestion that Mr Barrick was in breach of the now terminated employment contract, and that the company was entitled to recover losses arising from his breach. Given the unlikelihood that the company would in the first place have agreed to pay Mr Barrick if it had some basis for disputing his claim, or for seeking compensation from him which off-set his claim, any alleged dispute that is now raised will require much better evidence from the company than it has so-far provided.

19. I make the following orders:

i. The application dated 7 November 2019 to set aside the statutory demand dated 9 October 2019 is dismissed.

ii. The applicant is ordered to pay costs of $1500 to the respondent.



A.G. Stuart
Judge

At Lautoka this 7th August, 2020

SOLICITORS:
MIQ Lawyers, Nasinu – Applicant
Young & Associates, Lautoka – Respondent.