

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Companies Action No. 54 of 2020

BETWEEN: PACIFIC CHUAN SEA FOOD COMPANY (FIJI) LIMITED

APPLICANT

AND: CARPENTERS PROPERTIES PTE LIMITED a limited liability company having its registered office Suva, Fiji Islands trading as MHCC.

RESPONDENT

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL: Mr. Singh. S : For the Applicant  
Mr. Narayan E : For the Respondent

DATE OF DECISION: Tuesday, 16<sup>th</sup> November, 2021 @ 10 am

**DECISION**

*[Application seeking Setting Aside of Statutory Demand pursuant to Sections 516-518 of the Amended Companies Act 3 of 2015]*

**Introduction**

[1] The Applicant, **PACIFIC CHUAN SEA FOOD COMPANY (FIJI) LIMITED** filed an Originating Summons on 13<sup>th</sup> August 2020 and sought for the following Orders-

- i. That the Statutory Demand issued the Respondent against the Applicant on 13<sup>th</sup> August 2020 be set Aside and Dismissed;
- ii. That the said Statutory Demand be stayed pending the hearing and determination of this action;
- iii. Such further and/or other orders as this court deems just and necessary;  
And
- iv. That the Respondent to pay the costs of this application on an indemnity basis to the Applicant.

[2] This application is made pursuant to *Sections 516-518 of the Companies Act of 2015* and the inherent Jurisdiction of the High Court.

[3] The Applicant, **PACIFIC CHUAN SEA FOOD COMPANY (FIJI) LIMITED** maintains that the Statutory Demand dated 28<sup>th</sup> July 2020 is bad and wrong of the Respondent, **CARPENTERS PROPERTIES PTE LIMITED**. The Applicant denies owing the Respondent any monies.

However, the Applicant's contention is that the Respondent owes the Applicant monies for wrongfully holding on to his bond and not releasing his stock and equipment. The Applicant believes that he has a valid dispute to the Statutory Demand as the Lease Agreement with the Respondent has been terminated by the Frustrating Covid-19 pandemic.

The Applicant's principal defence to the claim for rent is that the contract between the parties had lapsed and has become void and unenforceable due to the Pandemic as performance has been frustrated by events beyond the control of the Applicant.

[4] The Respondent, **CARPENTERS PROPERTIES PTE LIMITED** apopped the application and filed an opposing Affidavit.

[5] The Respondent, **CARPENTERS PROPERTIES PTE LIMITED** took the objection in terms of the Lease Agreement entered between the Respondent and the Applicant, that the monthly rental payable per month was \$4,905 (VIP) from 01<sup>st</sup> August 2019 and the rental amount was discounted to \$3,815 (VIP) and further continued until end of the Lease period with the agreed condition that the Applicant operates from the designated premises until the expiration of the Lease. He added that it appears that the Applicant is insolvent and is not able to pay off its lawful debts and its liabilities exceeds its assets.

The Applicant accumulated monthly rental payments and fall into arrears. The Respondent issued the Statutory Demand claiming that the applicant owed to the Respondent the sum of \$ 62,807.62 as rental monies together with accrued interest and costs of \$2000 thereon being monies due and owing on account of rental payments for the period of February 2020 till the balance of the Lease Agreement.

### Determination

[6] The Questions for determination before this court are-

(i) "Whether there is a genuine dispute between the Applicant and the Respondent in terms of the amount of the debt of \$ 62,807.62 to which the Respondent's demand relates? And/or

(ii) "Whether the Applicant has an offsetting claim in terms of wrongfully holding on to the applicant's Bond and not releasing his stock and equipment?"

[7] Section 517 of the Companies Act of 03 of 2015 stipulates the "Determination of an application where there is a Dispute or Offsetting claim", and provides as follows-

*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) The Company has an offsetting claim.*

*517. -(5) The court may also order that a demand be set aside...*

### Genuine Dispute

[8] The issue in this action is to ascertain whether the sum of \$62, 807.62 or part of that excluding \$9800 bond money together with \$32, 700 worth of Applicants equipment in the Respondent possession is genuinely disputed and if so ascertain the undisputed debt that is more than \$10, 000 in terms of section 515 (a) of the Companies Act 2015.

[9] It is not in dispute that the parties entered into a Lease Agreement dated 18 March 2019 for a term of two years tenancy commencing 28<sup>th</sup> February 2019.

[10] The rental payable per month under the Lease Agreement was \$4,905. However, from 01<sup>st</sup> August 2019 the rental amount was discounted to \$3,815 until the MHCC Car Park would re-open and further continued until the end of the Lease period with the agreed condition that the Applicant operates from the designated premise until the expiration of the Lease.

[11] According to the Respondent, the Applicant owed the Respondent a sum of \$62,807.62 together with accrued interests and costs of \$2,000 under the Statutory Demand issued on 28<sup>th</sup> July 2020. This was monies due and owing on account of rental payments for the period of February 2020 till the balance of the Lease Agreement. A Statement of Arrears was furnished to the Applicant.

[12] The Applicant had accepted the offer from the Respondent on the discounted rental on 11<sup>th</sup> October 2019. It cannot be disputed that the Applicant had paid a sum of \$9,810 for two months' rental as surety deposit.

However, according to the Respondent, the Applicant had sent an email stating that they were temporarily closing due to the Corona Virus risk and they will review their position in two weeks' time.

The Applicant did not wait for two weeks rather sent another email stating that "to keep their staff safe and they face worse business due to COVID-19 virus, they will continue shut Yes Taste Shop".

- [13] The Respondent submitted that under the Lease Agreement, the Applicant is lawfully required to pay rental to the Respondent and without any lawful acceptance of any termination of the Lease by the Respondent, the Applicant was to pay the rental till the expiration of the Lease Agreement.
- [14] The Respondent further submitted to Court that the Applicant has never operated during the pandemic and or after. Therefore, the Applicant is not in a position to assert the impact of COVID-19 to its business. The Applicant chose not to operate and did not ever pay its rental on time nor did it open on time.
- [15] According to the Applicant, **PACIFIC CHUAN SEA FOOD COMPANY (FIJI) LIMITED** admits entering into a Tenancy Agreement with the Respondent. The Agreement included tenancy for 2 years at a monthly rental of \$4,905, reduced to \$3,815 due to the MHCC Car Park being closed since 01<sup>st</sup> August 2019. The Applicant made an advance payment for the bond in the sum of \$9,810 to the Respondent.
- [16] The Applicant has already informed the Respondent that it cannot continue tenancy due to the effects of COVID-19 affecting the operation of the shop. Further, according to the Applicant, he had informed the Respondent that they owe rent for February 2020 and that the Respondent can utilise the bond paid to pay off the said rental dues. The Applicant has equipment worth over \$30,000 locked up inside the shop and is not released by the Respondent. The Respondent is claiming that the tenancy is still alive and not terminated yet claims the full value of the Lease payments even though the term remains unexpired. It is claiming that the Applicant cannot unilaterally terminate the Lease but claims full value of the rental which is not owed.
- [17] The Applicant's contention is that the effect of clause 6.03 within the Lease Agreement does not entitle the Respondent to claim full rental of the value of the term of the Lease unless it takes steps to mitigate its losses and damages. The Applicant's principal defence to the claim for rent is that the contract between the parties had lapsed and has become void and unenforceable due to the pandemic as performance has been frustrated by events beyond the Applicant's control.
- [18] The Applicant told the Court that it no longer operates the shop and hence no longer generates income. The demand by the Respondent for the Applicant to pay the rent due for the Agreement of 2 years is illegal and unconscionable. The Applicant closed the shop on 24<sup>th</sup> March 2020 and informed the Respondent of this closure. The Respondent to date withholds the bond and all the equipment belonging to the shop.
- [19] 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.*

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.

42. Section 517(3) and 517(4) of Companies Act 2015 provides that 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. So, there is a task entrusted with court to ascertain genuineness of the disputed debt.

- [20] The actual debt claimed by the Respondent on the Statutory Demand is a sum of \$62,807.62 together with interest and \$2,000 costs. This claim is disputed by the Applicant. The Applicant deposed this in his Affidavit in Support that he did not owe the Respondent any monies. The Respondent owes him monies for wrongfully holding onto his bond and not releasing his stock and equipment.
- [21] Further, the Applicant in his Affidavit in Support admits owing rental for the month of February 2020 and states that it is covered by the bond/security deposit held with the Respondent.
- [22] However, the Respondent submitted otherwise and stated that the bond is held by the Respondent not to cover for the rent but to cater for the expenses of restoration, which evidentially is not limited to the bond amount with rent.
- [23] Further, the Respondent to date has still not accepted any alleged Notice to Vacate issued by the Applicant. The Lease Agreement still stands, and the Applicant will have to abide by the same.
- [24] Further, since March 2020 until recently, MHCC was either closed during lockdown or has operated on reduced hours and that the Respondent had known that he had closed the shop. On 09<sup>th</sup> July 2020 the Applicant's Lawyers advised MHCC that the Applicant considered its Tenancy Agreement with MHCC terminated from 24<sup>th</sup> March 2020 and that he needed access to the premises to remove his equipment.
- [25] Reference is made to clause 7.02 of the Lease Agreement, the "Force Majeure" clause does not allow for the termination of the Lease Agreement rather suspension only. In this case, the Applicant has terminated the Agreement contrary to what is allowed in terms of clause 7.02 of the Tenancy Agreement.
- [26] Section 6.03 of the Lease Agreement deals with "Unilateral Termination by the Lessee". "in the event of the Lessee vacating the Demised Premises before the expiration of the term then it shall be taken that the Lease has been terminated by the Lessee unilaterally and the Lessee shall forthwith pay to the Lessor a sum equal to the rent and the prevailing service charge and promotional charge of the whole of the unexpired period of the said term as agreed liquidated damages, notwithstanding Section 6.01 above, provided that the Lessor shall refund out of such sum any rent, service charge and promotional charge that it shall receive if the Demised Premises could be let out during the said unexpired period".

- [27] The Respondent has informed the Court that the Applicant has failed to handover the keys of the shop leased to him, nor did the Applicant adhere to the relevant exit clause in the contract.
- [28] In light of above, I find that the Applicant had entered into a Lease Agreement with the Respondent on 18<sup>th</sup> March 2019 for a term of two years. He had failed to pay the agreed rental in terms of the Lease Agreement. As a result of his failure, the Applicant has accumulated rental sum owed to the Respondent in the sum of \$62,807.62 for the period of February 2020 till the balance of the Lease Agreement. A Statement of Arrears amounting to \$62,807.62 was furnished to the Applicant.
- [29] Any dispute as to the debt by the Debtor Company, the Applicant herein, will not qualify to set aside the Statutory Demand served in terms of the Companies Act 2015. In other words, any disputed debt will not qualify to set aside the Statutory Demand as sought by the Applicant herein. Further, a party should not allow to set aside the Statutory Demand on liquidated sum which is more than \$10,000, in the current case the amount of debt is \$62,807.62.
- [30] For the aforesaid rationale, I do not find in terms of the evidence before this Court that there is any genuine dispute between the Company and the Respondent about the existence or amount of a debt to which the Demand relates and was accordingly served onto the Applicant.

#### **Offsetting Claim**

- [31] The Applicant in his Affidavit in Support states that he through his lawyers on 09<sup>th</sup> July 2020 advised the Respondent that the Agreement is terminated due to his inability to operate the shop from the effects of COVID-19. Further, he confirms that he owed one month's rental for the month of February 2020 although according to him it is covered by the bond/security deposit held with the Respondent.
- [32] However, the Applicant denied owing any money to the Respondent rather stated that it is the Respondent who is owing him the monies and is holding onto his equipment worth about \$32,700, stock and bond monies of \$9,810. The Applicant has not annexed any list with regards to the value of the equipment, if any, which according to him is worth about \$32,700.
- [33] On the other hand, the Respondent stated that the bond is held by the Respondent not to cover for the rent but to cater for expenses of restoration, which evidentially is not limited to the bond amount withheld.
- [34] On 31<sup>st</sup> July 2020, the Respondent stated that they will not be able to allow to take any of the equipment since the Respondent has not accepted any alleged Notice to Vacate issued by the Applicant. The Lease Agreement still stands, and the Applicant will have to abide by the same and any attempts to remove any items from the premises would be unlawful and in contrary to the Lease Agreement. The Statement with regards to the rental arrears was furnished to the Applicant and a Statutory Demand was served on the Applicant claiming for the sum of rental owed by the Applicant accordingly.
- [35] In a dispute or setting off of the debt, the Court needs to calculate the undisputed sum. Reference is made to Sections 517(3) and 517(4) of the Companies Act 2015. Therefore, there is a task entrusted with the Court to ascertain the genuineness of the disputed debt.

- [36] The Applicant has failed to substantiate any evidence against Respondent alleging that the Respondent owed the Applicant a sum of \$9810 in bond monies together with the value of the equipment worth \$32, 700 held by the Respondent. The bond money which was held by the Respondent is not denied however, the explanation that the Respondent gave court was that the bond money held was to cater for the expenses of restoration which is not limited to the bond amount withheld by the Respondent, accordingly.
- [37] Taking above into consideration, I find that the Applicant does not have an offsetting claim pursuant to Section 517(1) of the Companies Act.
- [38] The application proceeded to hearing with both Counsels furnishing Court with their written submissions. Therefore, the Respondent is entitled to a summarily assessed costs of \$650.

### Conclusion

- [39] For the reasons shown as above, I am not satisfied that there is any genuine dispute between the Applicant Company and the Respondent about the existence of a debt to which the Demand relates.
- [40] Further, I do not find that there is any offsetting of claim against the Respondent as claimed by the Applicant herein.

### Result

- [41] The Applicant's Originating Summons seeking an Order for the dismissal of the Statutory Demand issued by the Respondent dated 28<sup>th</sup> July 2020 and served on the Applicant on 29<sup>th</sup> July 2020 is accordingly dismissed.
- [42] The Applicant to pay the Respondent summarily assessed costs of \$650.

Dated at Suva this 16th Day of November, 2021.



✓  
Vishwa Datt Sharma  
Judge

cc: Shelvin Singh Lawyers, Suva  
Patel Sharma Lawyers, Suva