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

CIVIL ACTION No. HBC 216/2020

BETWEEN	**WALT SMITH INTERNATIONAL (FIJI) LIMITED** a limited liability company having its registered office at Royal Palm Road, Navutu, Lautoka **PLAINTIFF**
AND	**DAVID BARRICK** whose current address and/or whereabouts and/or location is not known to the Plaintiff **FIRST DEFENDANT**
AND	**ISIRELI RAMANO** Barrister & Solicitor trading as and in the business name and style of MIQ Lawyers, of Lot 39 Sikeli Place, Laucala Bay, Suva **SECOND DEFENDANT**
APPEARANCES :	Mr W Pillay for the Plaintiff Mr C Young for the First Defendant No appearance for the Second Defendant
DATE OF HEARING :	28 October 2020
DATE OF JUDGMENT :	15 February 2021

DECISION

1. This judgment relates to three interlocutory applications in these proceedings. I apologise for the delay in issuing this decision.

Background

2. There is some background to the current proceedings. In brief, the first defendant, Mr Barrick was employed from 2015 by the plaintiff company as its Livestock & Aquaculture Manager. However, for latter part of his employment at least, because the directors of the plaintiff were living overseas, Mr Barrick was in day to day control of the operations of the company, which is engaged in the capture/recovery and export of live fish, and corals. He was also the main point of contact between the directors and the plaintiff, and the directors trusted him, and depended and relied on him to manage the company in their absence, and to report as required on matters related to the company's business.

3. In October/November 2018 Mr Barrick gave notice that he wished to resign his position with the plaintiff. He apparently intended to return to the United States,

where he was originally from. It seems at the time he resigned that he was owed a substantial amount for unpaid wages, holiday pay and other amounts, and the plaintiff (via its director Mr Walt Smith) negotiated – apparently amicably - an arrangement whereby the amount owed to Mr Barrick (which was not at that stage in dispute) would be paid to him in instalments over coming months. Initially these instalments were paid on time as agreed.

4. It seems that after Mr Barrick left the plaintiff's employment, the directors of the plaintiff learned of information that caused them to become dissatisfied with Mr Barrick's performance when he was working for the company. The plaintiff stopped making the agreed payments, and eventually Mr Barrick, through his solicitors, issued a statutory demand pursuant to section 515 Companies Act 2015 claiming the outstanding amount of $57.000 due under the arrangement the parties had made. Although the plaintiff company made an application under s.516 of the Act to set aside the statutory demand, that application was made outside the time limits allowed by the section, and was in any case made on a misconceived basis, and was dismissed in my decision dated 7th August 2020 (HBM 51/2019), leaving Mr Barrick free to issue a winding up petition against the plaintiff company, which in due course he did.

5. The present proceedings were commenced by the plaintiff company in September 2020 by Writ of Summons. On 18 September 2020 the Court issued an interim injunction on the ex parte application of the plaintiff, restraining the first defendant from advertising or progressing the winding up petition he had filed, pending further order of the court. The hearing that took place before me on 28 October 2020 dealt with three applications relating to this proceeding and the orders made ex parte. They are:

   i. an application by the plaintiff (effectively to extend the orders made ex parte), that the statutory demand issued by the first defendant dated 9 October 2019 be stayed or suspended, and/or that the first defendant be restrained from issuing or advertising or otherwise pursuing any winding up petition or proceedings arising from the statutory demand, pending further order of the court.
   ii. an application by the plaintiff for an order that Mr Chen Young and his law firm (Young & Associates) may not act for the first defendant against the plaintiff
   iii. an application by the first defendant to strike out various paragraphs of the affidavit of Walter Laurence Smith filed on 15 September 2020 (in support of the plaintiff's ex parte application for an injunction).

   None of these applications affect the second defendant, Mr Ramano, who took no part in the hearing on 28 October.

Preliminary matters

6. In this decision I will deal first with the applications referred to in subparagraphs 5(ii) and (iii). Although, strictly speaking, the application to disqualify Mr Young and his firm from acting for the first defendant has more significance than being merely preliminary to the applications decided in this decision (since it will affect how the first defendant conducts his defence to the substantive proceeding also), it is convenient to deal with it first.

7. The basis for the application to disqualify Mr Young and his firm is that Mr Young has previously acted for the plaintiff. The information provided by Mr Smith's affidavit (filed on 20 October 2020) in support of this application is as follows (the paragraph numbering is from Mr Smith's affidavit):

> 1. *Young & Associates are the former solicitors of the Plaintiff.*
> 2. *There is a close connection between Mr Chen Young and the Plaintiff and it directors and shareholders.*
> 3. *At one point in time Chen Young was to be a shareholder of the Plaintiff and/or hold shares of the Plaintiff as Trustee. Now shown to me and marked as WLS-21 is a copy of a letter Chen Young wrote to the Plaintiff and me setting out him acting as trustee for/of the shares in the Plaintiff for me.*
> 4. *Subsequent to that Young & Associates have acted for the Plaintiff in a number of matters spanning from 1999 to 2012. Now shown to me and marked as WLS-22 are copies of letters and bills from Young & Associates evidencing the same.*
> 5. *All bills of Young & Associates were paid in full.*
> 6. *Young & Associates and Chen Young have an intimate knowledge of the Plaintiff and its business operations.*
> 7. *The directors and shareholders of the Plaintiff confided in/with Chen Young.*

The affidavit goes on to record the fact that, after the commencement of these proceedings the plaintiff's present solicitors wrote to Mr Young inviting him to recuse himself from acting for the first defendant. Mr Young responded to that letter saying there was no conflict. That remains his/the first defendant's position.

8. The Rules of Professional Conduct & Practice (Schedule to the Legal Practitioners Act 2009) provide as follows in connection with the issue of conflicts of interest, and acting against former clients:

> ***CHAPTER 1—RELATIONS WITH CLIENTS***
>
> *1.1 A practitioner shall not abuse the relationship of confidence and trust with a client.*
>
> *1.2 A party shall not act for more than one party in the same matter without the prior consent of all parties.*
>
> *1.3 On becoming aware of a conflict of interest between clients a practitioner shall forthwith*
>
> *(a) advise all clients involved in the matter of the situation;*
>
> *(b) continue acting for all clients only with the consent of all clients and only if no actual conflict has occurred;*
>
> *(c) decline to act further for any party where so acting would disadvantage any one or more of the clients.*
>
> *1.4 Information received by a practitioner from or on behalf of a client is confidential and shall not be communicated to others save with the client's consent or where so required by law.*
>
> *1.5 Where a practitioner has received information from or on behalf of a client, a practitioner shall not thereafter act for another client in circumstances where the*

practitioner's receipt of such information may result in detriment to the first mentioned client.

There is no doubt that these rules have been devised for the benefit and protection of clients, rather than solicitors. They reflect the position taken by the courts, in particular the decision of the House of Lords in **Bolkiah v KPMG** [1998] 1 All ER 517, in which Lord Millet, giving the principal decision, said, after discussing the different rationales that had previously been suggested as the basis for the courts' jurisdiction for disqualifying a solicitor from acting:

> *Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.*
>
> *Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case*

After then discussing the different tests adopted in a variety of other jurisdictions Lord Millet concluded:

> *In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.*
> *... Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party.*

9. It will be clear from these words, both in the Rules and in the decision of the House of Lords, that while the rule is for the protection of the client, it will apply only where that protection is shown to be necessary. The rule is not to be used to provide a means for a former client to frustrate its opponent's choice of solicitor, and so slow down, or add to the expense of litigation. The initial burden for the client seeking the protection of the court is to show that its former solicitor is in possession of information of the sort described in Lord Millet's speech in the words underlined.

10. In the decision of the Fiji Court of Appeal in **RC Manubhai & Co Ltd v Herbert Construction (Fiji) Ltd** [2014] FJCA 175 the court applied the following test from **World Medical Manufacturing Corp v Phillips Ormonde & Fitzpatrick Lawyers (a firm)** [2000] VSC 196:

> *[i]* *Is the former supplier of services whether it be a solicitor, accountant or a patent attorney or some other person providing services, in possession of information provided by the former client which is confidential and which the former client has not consented to disclosure?*
>
> *[ii]* *Is or may the information be relevant to the new matter in which the interest of the other client is or may be adverse to his own?*
>
> *[iii]* *If the answers to the first two issues are yes, then is there a risk which is real and not merely fanciful nor theoretical that there will be disclosure?*
>
> *[iv]* *If there is that risk then the evidential burden which is heavy, rests upon the provider of the services to establish that there is no risk of disclosure and this may be established in exceptional cases by the provision of a 'Chinese wall' but this is rarely of sufficient protection.*
>
> *[v]* *Should a permanent injunction be granted?*

and added an additional question to be asked in Fiji:

> *Is there a nexus between the cause of action together with the claim contained in the Statement of Claim of the new client and the confidential information he might be said to be in possession through his relationship with the former client that could be regarded as material and might be detrimental to the former client?*

11. In the present case Mr Young last acted for the first defendant in 2012, 8 years ago. A review of the invoices issued by his firm to the company, and correspondence between them in the 13 years between 1999 and 2012 (annexed to Mr Smith's affidavit) suggests that the only matter which bears any similarity to the present proceedings is a matter (commencing in 1999 but not heard and decided until March 2006) where Mr Young acted for the company in opposing a winding up of the company after the service of a statutory demand. It seems from the copies of correspondence, invoices and the court's decision to dismiss the winding up petition annexed to Mr Smith's affidavit that an issue about service of the statutory demand arose in that case also, and the plaintiff company objected then – as it does now – to the manner of service. Counsel's submission for the plaintiff say *there can be no dispute that in defending such proceedings confidential information would have been disclosed to Mr Young,* but there is no explanation, even in the submissions, of what confidential information is said to have been imparted at that time that might now be made available by Mr Young to the first defendant in breach of the plaintiff's right to confidentiality. When I asked counsel, in the course of his submissions, to point to what information belonging to the plaintiff had been or was at risk of being used by Mr Young in acting for the first defendant, he was unable to identify anything, or say anything beyond the assertion that *there must be something.* It is not immediately obvious to me what confidential information that was relevant to a winding up of the company that was commenced in 1999, and determined in 2006, might be relevant to the present winding up proceedings.

12. Taking into account the careful wording used by Lord Millet in **Prince Bolkiah**, and in the decision in the **Phillips Ormonde** case in Australia about the thresh-hold requirement that the former solicitor has confidential information belonging to his former client that *is or may be relevant* to the new matter in which he is acting, I do not presently see any basis to disqualify Mr Young from continuing to act for the first defendant. The issues raised in the plaintiff's current claim relate to a period (2015-2018) when Mr Young was not acting for the plaintiff, and concern the non-performance of the first defendant's contractual obligations under an employment agreement, and defamation said to have been committed by the first defendant (via Facebook posts critical of the plaintiff and its directors). The plaintiff has not identified any information belonging to the plaintiff, that is or might be known to Mr Young, that is relevant to its current claims against the first defendant, or might be used by the first defendant to answer the plaintiff's claim.

13. That is not to say that such evidence may not emerge in the course of the proceedings. In that event I would expect either that Mr Young will recognize that he needs to withdraw from acting for the first defendant (noting that it is a breach of the rules of professional conduct for him to act for the first defendant in circumstances where his earlier receipt of information about the plaintiff means that doing so may result in disadvantage to the plaintiff), or that the plaintiff will be entitled to make a fresh application to disqualify Mr Young. Whether, in the meantime, Mr Young feels able to continue acting, or the first defendant wishes him to do so, is a matter for them.

14. The second preliminary matter, raised by the first defendant, is that certain paragraphs of Mr Smith's affidavit of 15 September 2020 should be struck out pursuant to Order 41, rules 5 & 6 High Court Rules, which provide:

> ***Contents of affidavit (O.41, r.5)***
> *5(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
> *(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*
>
> ***Scandalous, etc., matter in affidavit (O.41, r.6)***
> *6. The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.*

The present applications are interlocutory applications, so rule 5(2) applies to allow assertions of belief, but of course even these must be supported (with an explanation of the source of and basis for the belief stated) before they can be admissible evidence. Normally statements of opinion/belief are admissible only if presented by a witness giving expert evidence. In **Dawasumu Transport Ltd v Tebara Transport Ltd** [2015] FJCA 45 Calancini P suggested that in the case of such affidavits, non-compliance with the requirements of Rule 5(2) would in most cases affect weight rather than admissibility. Rather than striking out paragraphs in an affidavit that offend these rules, the court has an option to simply ignore them (per Scott J in **Peter J.B Stinson v Miles Johnson** (unreported) 25 July 1996 HBC 326/94S).

15. The first defendant identifies no fewer than 61 paragraphs of Mr Smith's affidavit of 15 September 2020 as offending against these rules. Mainly the complaint is that the affidavit simply repeats the allegations that are contained in the plaintiff's statement of claim. It almost goes without saying, that a statement of claim does not (or should not) normally contain evidence. It consists of assertions of fact that the plaintiff expects later to prove (with evidence). An example from the statement of claim illustrates the point made by the first defendant. The plaintiff asserts that it made payments to the first defendant by mistake, the mistake being that the first defendant had performed - or was not in breach of -his employment contract and so was entitled to the payments of salary and holiday pay. Paragraphs 35-37 of the statement of claim say:

> *35. The Plaintiff became aware of the mistake after 14 June 2019.*
> *36. The First Defendant holds the sum of $2,431.81 mistakenly paid to him by the Plaintiff as paid annual holidays on 3 December 2018 on constructive trust and/or as a constructive trustee for the Plaintiff.*
> *37. The Plaintiff is entitled to a return of the mistaken payment of $2,431.81 mistakenly paid to the First Defendant by the Plaintiff on 3 December 2018.*

While it seems, in the admitted absence of evidence and submissions, somewhat improbable that payment of salary and holiday pay that are due to an employee can be said to be made 'by mistake', when it is later found that the employee was in breach of contract (rather than the employer having a claim for damages for breach of contract), that is a matter for trial. I readily accept that, except perhaps for paragraph 35 (as to which any evidential content is palpably incomplete – how and in what manner did Mr Smith become aware of the 'mistake', and what were the facts of which he then became aware) the statements quoted above from the statement of claim are not evidence, and repeating them in an affidavit does not make them so. Paragraphs 36 & 37 are, if anything, submissions, and so should not be included in either a statement of claim or an affidavit.

16. However, not all the complaints made by the first defendant are justified. For example, paragraphs 48 and 49 appear to be perfectly acceptable statements of evidence as follows:

> *48. From 5 December 2018 the Plaintiff and the First Defendant commenced negotiations ... on what monies were owed by the Plaintiff to the First Defendant considering also what monies were owed by the First Defendant to the Plaintiff.*
> *49. As at 3 December 2018, the First Defendant was owing monies to the Plaintiff for ... items taken by the First Defendant from the Plaintiff's property for which the First Defendant agreed to pay the Plaintiff but did not pay for ... .*

These statements are also very clearly incomplete, and as such are not by themselves particularly convincing, but they are certainly evidence of what the plaintiff says took place, and as such can be answered by the first defendant.

17. I have a great deal of sympathy with the first defendant when faced with having to respond to affidavits such as this. Does one take the risk of ignoring the

unsubstantiated assertions and submissions (and have it suggested that you have admitted them), or is it better to descend into the same errors, and file a response that is itself a submission or pleading? In this case the first defendant has already filed an affidavit in response, and I am inclined, rather than take the time and effort to analyse and deal with each of the 61 paragraphs complained of by the first defendant, and strike them out if they offend the rules, to ignore them to the extent that they do not contain admissible and relevant evidence.

Injunction

18. The plaintiff's application for an interim injunction to restrain Mr Barrick from continuing with his winding up petition (as he would normally be entitled now to do), is founded on two contentions:

    i. That it has counterclaims against Mr Barrick, and is entitled to have the opportunity to set off against the amounts that it has hitherto agreed are payable to him for arrears of salary and holiday pay, the damages that will be awarded on those claims (which it says exceed any amount payable to Mr Barrick).
    ii. That the opportunity to do so should not be denied because of its failure to obtain the setting aside of Mr Barrick's statutory demand because:
        (a). the statutory demand was never served on the company
        (b) the company is solvent
        (c) There is a serious question to be tried on the above issues, and the balance of convenience favours the plaintiff, which, if the injunction is denied will likely be wound up, thus – effectively – denying it the opportunity to pursue its claims.

19. Dealing first with the plaintiff's claims against the first defendant, these are respectively based on:

    i. the alleged payment by mistake. The plaintiff says that it agreed in December 2018 to pay Mr Barrick an amount which I understand to be arrears of salary and holiday in the mistaken belief that Mr Barrick was not in breach of his contract. In fact, the plaintiff says, Mr Barrick was not entitled to the salary the plaintiff had been paying him because he had not worked the hours he was required to, or performed he work he was required to do, and so he had been overpaid, and the plaintiff is entitled to its money back, and does not owe any of the arrears or holiday pay it agreed to pay. Instead, Mr Barrick is holding the salary and payments he has received from the plaintiff (to the extent that they exceed what he was entitled to) under a constructive trust for the company.
    ii. Mr Barrick has breached of his contract of employment with the company by failing to perform the duties he was contractually obliged to carry out, and by his breach has caused the company loss of business, and the company is entitled to $632,770.66 from him for damages (loss of sales) for those breaches.

iii. Mr Barrick defamed the company and its directors (who I note are not parties to the claim) and the company is entitled to an unspecified amount of damages for that defamation.

20. These alleged claims are not, in my view, the types of claim that would entitle an employer to refuse to pay its employee salary and holiday pay due to him under the employment contract. Part 6 of the Employment Relations Act 2007 provides for the Protection of Wages. Section 42 sets out the objects of Part 6 as follows:

> *42. The objects of this Part are –*
> *(a) to ensure the payment of wages at set intervals is safeguarded, that authorized deductions are effected and the relevant details required by law are provided;*

and s.47 sets out the permitted deductions from wages that an employer is entitled to make:

> *Authorised deductions from wages*
> *47(1) An employer may—*
> *(a) deduct from the wages of a worker an amount due by the worker in respect of any tax or deduction imposed by law or ordered by a court;*
> *(b) with the written consent of the worker, deduct an amount due by the worker as a contribution to a provident fund, school fund, pension fund, sports fund, superannuation scheme, life insurance or medical scheme, credit union, trade union, co-operative society or other funds or schemes of which the worker is a member and must on behalf of the worker pay the amount so deducted to the person empowered to collect amount or entrusted with the management of the fund, scheme, trade union or cooperative society;*
> *(c) make deductions from the wages of a worker to the extent of an over-payment made during the immediately preceding 3 months by the employer to the worker by the employer's mistake; or*
> *(d) make deductions at the request in writing of the worker—*
> *(i) in respect of articles or provisions purchased on credit by the worker from the employer;*
> *(ii) in respect of charges for the cost of accommodation, fuel or light supplied by the employer and used by the worker; or*
> *(iii) in respect of food or victuals cooked, prepared and eaten on the employer's premises.*
> *(2) The price or cost which the employer charges a worker for articles or provisions must not exceed the lowest price at which the employer would sell articles or provisions retail to a member of the public.*
> *(3) The total deduction in respect of accommodation, boarding, fuel and light must not exceed 15% of the worker's wages in respect of one wage period, and 5% for accommodation or board.*
> *(4) If—*
> *(a) an employer makes a loan to a worker;*
> *(b) the total amount of the loan has been paid by the employer to the worker in cash or by cheque; and*
> *(c) a memorandum of the transaction has been made and signed by or on behalf of both employer and worker providing for the repayment of the loan by one or more instalments, the employer may deduct from the wages due to the worker the instalments at the times set out in the memorandum.*
> *(5) Any deductions made under subsection (1) and other deductions permitted by this Promulgation must not be, in a wage period, more than 50% of the wages due to the*

worker in respect of the wage period except for housing purposes from an approved lender, where the deductions permitted may be up to 75%.

While I accept that the plaintiff may argue differently at trial, it seems to me that these provisions mean that, except as is specifically permitted by the Act, an employer cannot simply deduct from sums otherwise due to its employee amounts that it claims that the employee owes. In so far as the Act permits money paid by mistake to be deducted, section 47(1)(c) appears to permit only the recovery of overpayments made in the preceding 3 months. If this section applies to the plaintiff and the first defendant, the plaintiff is not now entitled merely to deduct from the amounts it has acknowledged were due to the first defendant, amounts that it claims to have overpaid in the previous year. That is effectively what it is trying to do in saying, as it does, that the first defendant is not now entitled to the $57,000 it has agreed to pay him. Still less can the employer argue that possible claims for damages for breach of contract and defamation entitle it to deduct amounts from what is owed to its employee until those claims have been decided. The principle behind these provisions of the Act is that payment of wages or salary to employees for their work is so fundamentally important both as an issue of fairness and for the proper working of society, that there are very limited circumstances which justify the refusal of an employer to pay wages due, or to make deductions from amounts due. Acceding to the plaintiff's argument would give an open licence to employers to use such claims to justify non-payment of wages and salary, while presumably insisting that the employees still have a duty to attend work and do their jobs – that might be termed slavery.

21. In its decision in **Anglian Sales Ltd v South Pacific Manufacturing Co Ltd** [1984] 2 NZLR 249 considered whether a company upon which a statutory demand was issued for an admitted debt, was entitled to raise a counterclaim as a basis for setting aside the demand. The court held that it was not. McMullin J (at p. 252/30 said:

> *It follows that where the existence of the debt on which the petition is founded is unchallenged it cannot be said with the same confidence that the proceedings amount to an abuse of process merely by reason of an alleged counterclaim. Where therefore the debtor, while admitting the debt, advances a counterclaim in attempted answer to a petition, the latter should normally proceed to determination, with the Court retaining a discretion as to whether it ultimately makes a winding up order or not*

22. With this in mind, even if the plaintiff, in a timely way, had applied on the grounds now put forward to set aside the statutory demand, that application would to my mind have been refused – not for the reasons that the application was refused in my decision of 7 August 2020, but on the grounds that the claims raised by the company did not justify the non-payment of the amount claimed by Mr Barrick.

23. If the plaintiff could not have succeeded in setting aside the statutory demand even if it had been properly served, the issue of whether service of the statutory demand on Ms Balou was proper service becomes irrelevant, but since I have heard submissions on the issue, and in case I am wrong in my conclusion above, I will say

something about the issue of service of the statutory demand. Sections 513-515 Companies Act 2015 set out the grounds for a company to be wound up. One of those grounds, as per s.513(c), is that the company is insolvent. Insolvency is defined by s.514 as follows:

> *514. Solvency and insolvency*
> *(1) A company ... is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable.*
> *(2) A company ... which is not solvent is insolvent.*

Section 515 defines 'inability to pay debts':

> *515. 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 ... to whom the company is indebted in a sum exceeding $10,000 ... 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.*

24. These sections make it clear that proper service of a statutory demand is a prerequisite for the presumption, if the demand is not satisfied or set aside, that the company is insolvent. This presumption may enable the creditor to wind up the company on the basis that it is insolvent, whether or not that is in fact the case, but a creditor is not entitled to the benefit of this presumption unless it complies with conditions for the presumption to apply. How strictly it must do so is a matter for debate. I have little sympathy for those companies that, having provided vague details on the Companies Register as to the location of its registered office ('Nadi Back Road' is one example that I have encountered recently) complain that a document that has come to the company's attention is nevertheless defective for not having been served in the right place. At the other extreme, surely no-one would argue that a demand was effective where no attempt was made to serve it, but it nevertheless inadvertently came to the attention of an officer of the company. Counsel for the plaintiff suggests that Order 65, rule 3 allows service on a body corporate (I have no doubt that a company is a body corporate) by service either on the registered office, or on an officer such as director, secretary of chairperson, but the opening words of the rule say that this applies only in cases in which *provision is not otherwise made by any enactment* and the words of section 515(a) refer to service of a statutory demand by *leaving it at the registered office of the company.* This is surely a 'provision made by [an] enactment' in the sense used in the rule, and in my view means that O.65,r.3 does not apply. In his decision in **Emhill Pty Ltd v Bonsoc Pty Ltd** [2004] VSC 322 Mandie J held that section 109X of the Corporations Act 2001 (Cth) did not set out the only means of service on a company, and that also effective is:

> *any other means of service which is proved to have brought a document to the actual attention of a company.*

But tempting though it would be to apply this principle, the wording of the Australian Corporations Act 2001 is quite different from that of the 2015 Companies

Act that applies here. I think that the most generous interpretation that could be applied here would require at least a genuine attempt at service on the registered office – there is no reason to confer on a creditor the benefit of the presumption in section 515 if it has not even attempted proper service - coupled with the demand coming to the actual attention of the company. Even then, perhaps acceptance that the demand had been properly served would also require the company to be in some way at fault or responsible for the fact that the attempted service at the registered office was ineffective (e.g. by any lack of precision or accuracy in the address shown in the Companies Register). In suggesting this I need to make it clear that where a statutory demand is shown to have been properly served at the registered office of the company, whether it comes to the attention of the company is irrelevant. It is up to the company, not the creditor, to ensure that documents served at the registered office are brought to its attention, and if they are not it must be the company that bears the consequences.

25. In the present case the affidavit of Ashok Chand (the facts of which are not disputed by the plaintiff) shows clearly that the statutory demand was served at the registered office of the plaintiff by delivering it there to Ms Bulou Nonovo, who was at the registered office. Ms Bulou came out of the premises of the plaintiff at the address that is identified as the registered office, accepted the demand from Mr Chand, and returned to the office. No-one has suggested that this narration is false in any material way. The plaintiff makes much of who or what Ms Bulou is not, but fails to say who she is, why she was there, why she accepted the documents and why she didn't immediately deliver them to someone with appropriate authority. I would have been much more convinced that service was defective if the plaintiff, or Ms Bulou herself, had explained who she is, and what she was doing at the time the document was given to her by Mr Chand, the process server engaged by the first defendant's solicitors. I note that the registered office on the statutory demand is shown only as 'Royal Palm Road, Navutu, Lautoka' and does not refer to any particular building or street number. That is the address at which Mr Chand delivered the notice to Ms Bulou.

26. Clearly information about Ms Bulou's role and status is known to the plaintiff. It is acknowledged that Ms Bulou did, eventually, advise Mr Smith and his solicitor about her receipt of the statutory demand. She was obviously not a passing stranger. Counsel for the plaintiff suggests in his submissions that silence on the part of the first defendant and his advisors as to service on Ms Bulou is 'deafening'. I agree that the silence is deafening, but in my view it is the plaintiff's silence that is more significant than that of the first defendant. The plaintiff has had the opportunity to clarify these matters, but has not done so. I infer from this that the information would not have assisted the plaintiff.

27. More important than any of these things is the fact that, at the time of the application in November 2019 to set aside the statutory demand, the plaintiff accepted that the demand had been served on the 9th October, and raised no objection or concern at that time about the fact that it had been left with Ms Bolou. The grounds upon which the plaintiff then sought the setting aside of the statutory

demand were unrelated to the issue of service that it now raises. Who-ever she is, the plaintiff obviously accepted at that time that service on Ms Bolou at the registered office (as described by the bailiff, Mr Chand) was service on the company. With this context, the company's protestations now that Ms Bolou was not connected with the company, unexplained as they are, don't persuade me.

28. This, in the final analysis, is fatal to the plaintiff's present application to restrain the first defendant from proceeding with the winding up petition. While I accept the Australian thinking apparent from the **Emhill** case, that non-service of a statutory demand may be different from, and not bound by the time constraints that apply to an application to set aside under section 516, that does not assist the plaintiff here, where its initial response relating to the service of the statutory demand (i.e. its acceptance of service of the demand on Ms Bulou, and failure to challenge Ms Bulou's authority to receive the documents) contradicts the argument it now tries to rely on.

29. This conclusion means that the issues raised by the first defendant about non-disclosure and defective affidavits used in the ex parte application do not need to be decided. The issue of solvency of the company is something that will be determined on the winding up petition if the first defendant chooses to proceed with that, at which time – in terms of section 515 Companies Act 2015 the plaintiff will have the opportunity of trying to prove its solvency, notwithstanding the presumption that arises from its failure to comply with the first defendant's statutory demand. Even if I had found that there was a basis for the company to challenge the service of the statutory demand, for the reasons given related to the status of the debt owed to the first defendant I would likely have concluded that this is not a case in which the court should exercise its discretion to restrain the defendant from pressing for payment of the amount that the plaintiff agreed to pay him. I note in passing that, contrary to the submission by counsel for the plaintiff, I regard that debt as a liquidated amount – although I don't understand why the distinction is important here. Paying the first defendant does not in any way inhibit the plaintiff's ability to continue with its claim, and I do not see why by obtaining an injunction, the plaintiff should effectively acquire security for payment of its counterclaim, forcing the first defendant to take the initiative to progress that proceeding so that he can obtain payment of an amount that the plaintiff, initially at least, agreed that he was entitled to.

30. To be clear, the reasoning set out above about the issue of service of the statutory demand is an analysis for the purpose of deciding whether the court should, in its discretion, extend the injunction made on 18th September 2020 restraining the first defendant from pursuing or advertising the winding up petition. It is not intended to finally decide the service issue itself, which the plaintiff is entitled to prove and argue as a defence in those substantive proceedings, i.e. on the question of whether a deemed insolvency applies. What this decision amounts to is a conclusion that, on the issue of the service of the statutory demand, there is not – applying the **American Cyanamid** formula - a serious issue to be tried that would provide the grounds for the court to injunct the first defendant from proceeding with the

winding up petition. But even if I felt there was a serious question to be tried on that issue, I would nevertheless have discharged the injunction on the balance of convenience issue – I do not accept that the claims now made by the plaintiff against the first defendant entitle the plaintiff to withhold payment of amounts that it had agreed to pay Mr Barrick for his overdue salary and holiday pay.

Conclusion

31. I therefore make the following orders:

i. The application by the plaintiff to disqualify Mr Chen Young and his firm Young & Associates from acting for the first defendant in the winding up proceedings or in these proceedings is dismissed, but without prejudice to the plaintiff's right to raise the matter again should it emerge that Mr Young continuing to so act will or might compromise the plaintiff's right to maintain the confidentiality of information relevant to the proceedings that is known to Mr Young by reason of his having previously acted for the plaintiff.

ii. The first defendant's application to strike out passages from the plaintiff's affidavit is dismissed.

iii. The injunction made on the 18th September 2020 in favour of the plaintiff on its ex parte application of 15th September 2020, is discharged.

iv. Costs are awarded to the first defendant on these applications in the sum of $1500.00 summarily assessed.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 15th day of February, 2021

SOLICITORS:
Gordon & Co, Lautoka, for the plaintiff
Young & Associates, Lautoka for the first defendant