

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBE 40 of 2021

Fortech Construction Pte Ltd
Applicant

v

Trade Air Engineer Pte Ltd
Respondent

Counsel: Mr R. A. Singh for the applicant
Ms P Lal for the respondent

Date of hearing : 2nd November,2021

Date of Judgment: 4th May,2022

Judgment

1. The applicant, in its originating summons filed on 2nd September,2021, seeks to set aside a Statutory Demand of 1 July, 2021, issued by the respondent for the sum of \$97,156.00 on the ground that the debt is genuinely disputed. The Statutory Demand relates to a Bank guarantee given by the respondent to the applicant. The application is made under section 516 of the Companies Act.
2. The applicant was the Contractor and Fiji Airways,(FA) the Principal for the construction works for the Fiji Aviation Academy project (project). The respondent was engaged by the applicant as a sub-contractor to provide, install, and maintain mechanical services for the project till the expiry of the defects liability period under the Construction Contract,(Contract).

3. The applicant's supporting affidavit states further that it is unable to release the performance security, as the works are not to the full satisfaction of FA. The dispute needs to be resolved through the mechanisms in the Contract by arbitration. The Bank Guarantee is not a debt owed to the respondent. It was provided by the respondent as performance security to be released on the conditions stipulated in the Contract. A Completion Certificate has not been issued and FA has withheld payments to the applicant, as it is not fully satisfied with the respondent's work which remains outstanding. The respondent was wound up on 1 April, 2021.
4. The respondent in the affidavit in opposition filed on its behalf admits that FA highlighted issues with its work resulting in FA not allowing the respondent to access the project site since January, 2021 and that the parties have had extensive discussions on FA's alleged dissatisfaction with the works.

The determination

5. The first issue taken up by the applicant is that the Statutory Demand was not served at its registered office.
6. The applicant states that the applicant's Accountants informed them that they had received notices dated 8th July, 2021, and 5th August, 2021, from Post Fiji stating that a letter addressed to them awaits collection. The first notice was not attended as the applicant's office was closed and due to Covid. The Statutory Demand was uplifted by the applicant's staff on 13 August 2021.
7. The respondent contends that service was effected and the applicant acknowledged that it received the demand.

8. In *Aleems Investments Ltd v Khan Buses Ltd* [2011] FJCA 4; ABU0036.2009 (24 January 2011) Marshall JA at paragraphs 26 to 28 stated:

There is a problem in Fiji in leaving a Notice, or other legal document, at the registered office of the company, or by leaving it at the registered postal address. ...

Out of caution the letter should also be left at the registered office. However if the document in all the circumstances relating to the company to be served was likely to be immediately received by the Secretary and Directors of the company as was the case here, then the rule can be read permissively and service of the Notice accepted as lawful. In my judgment the fact that the letter was immediately received tends to prove that the method chosen was in all the circumstances likely to be successful. (emphasis and underlining mine)

9. In my view, in the present case, the mode of service was lawful, as the applicant had due notice of the Statutory Demand upon uplifting same.
10. The applicant contends that there is a genuine dispute on the existence of a debt in terms of section 516. The respondent provided the Bank Guarantee as performance security to be released on the conditions stipulated in clause 4.3 of the Contract.
11. Clause 4.3 titled “**Release of Security**” provides that “*Subject to any claim that it may have, the Principal ... must release the Performance Security in the following manner:*
- a) *once the Certificate of Practical Completion has been issued for Stage, 50% of the Performance Security 10 Business days after the Contract Administrator receives the last of the following:*
 - i. *the final version of the Operation and Maintenance Manual;*
 - ii. *the as-built drawings for the Works; or*
 - iii. *a deed of release in the form set out in Schedule 11;*
 - b) *Once the last Defects Liability Period has expired, the balance of the Performance Security 10 Business Days after all Defects have been completed to the reasonable satisfaction of the Contract Administrator and the Contract Administrator has received a deed of release in the form set out in Schedule 12.*
12. The clause provides the manner in which the performance security must be released.

13. The respondent, in the affidavit in opposition filed on its behalf states that a full checklist of the sub items under the Contract was approved and signed by all three parties. The Contract has been fully performed by the respondent on practical completion, issue of a Warranty Certificate and handing over of the project. FA had no issues with the respondent regarding any aspect of the work. In the circumstances, a Completion Certificate was not necessary. The applicant confirmed that the 12 months defect liability period had been reached and the facilities were fully operational. The respondent states that “ *This meant that there were no requirement to hold on to the practical completion bond*”.
14. The applicant, in its reply states that it did not approve and sign the checklist. The works have not been satisfactorily completed. Practical completion of the Contract has not been completed. A Practical Completion Certificate was not issued pursuant to paragraph 12 of the Contract. The Warranty Certificate is unsigned and undated. The defects liability had been completed, but further works were required to be done.
15. In my judgment, it is evident that the parties are at variance on whether the checklist was signed, issue of practical completion and whether the works have been satisfactorily completed.
16. I agree with the solicitors for the applicant that the winding up procedure is not the correct procedure to resolve a dispute arising out of a construction contract, as stated in their written submissions.
17. Barrett J in *CGI Information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Limited*, [2003] NSWSC 728; (2003) stated:

..the task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found, upon the hearing of its section 459G application, that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions.

If it sees any factor that on rational grounds indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.(emphasis added)

18. In *Fitness First Australia Pty Ltd v Dubow*, [2011] NSWSC 531 Ward J of the SC of NSW at paragraphs 129 to 132 said:

Again it was said that the court's task was not to resolve competing claims but to determine whether there was a genuine dispute concerning the debt or a genuine offsetting claim against the party serving the statutory demand and if so in what amount. It was not necessary, nor was it appropriate, for the court to consider the merits of the dispute or offsetting claim.....

A genuine dispute is therefore one which is bona fide and truly exists in fact and is not spurious, hypothetical, illusory or misconceived. It exists where there is a plausible contention which places the debt in dispute and which requires further investigation. The debt dispute must be in existence at the time at which the statutory demand is served on the debtor. (Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd 1997) 76 FCR 452: Eyota).

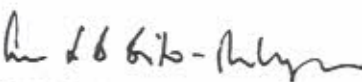
19. McLelland CJ in *Eyota Pty Ltd v Hanave Pty Ltd*, {1994} 12 ACSR 785 at pg 787 said :

There is clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute..... (emphasis added)

20. In my judgment, in the present case there is clearly a “genuine dispute” within the meaning of section 517. In the result, the Statutory Demand is set aside.

21. **Orders**

- a. I set aside the Statutory Demand dated 1st July, 20
b. The respondent shall pay the applicant \$2500.00, as costs summarily assessed.


A.L.B. Brito-Mutunayagam
Judge
4th May, 2022

