

**IN THE HIGH COURT OF FIJI AT SUVA**  
**COMPANIES JURISDICTION**

**Companies Action No:- HBE 60 of 2021**

**IN THE MATTER** of a Statutory Demand dated 16 November 2021 taken out by **AUTOCARE (FIJI) PTE LIMITED** a private company having its registered office at 131 Mead Road, Suva against **CREATIVE DISTRIBUTORS PTE LTD** a private company having its registered office at 150 Nailuva Road, Suva and served on 16 November 2021.

**-A N D-**

**IN THE MATTER** of an application by **CREATIVE DISTRIBUTORS PTE LTD** a private company having its registered office at 150 Nailuva Road, Suva for an order setting aside the Statutory Demand pursuant to Section 516 of the Companies Act 2015.

**BETWEEN** : **CREATIVE DISTRIBUTORS PTE LTD** a private company having its registered office at 150 Nailuva Road, Suva

Applicant

**A N D** : **AUTOCARE (FIJI) PTE LIMITED** a private company having its registered office at 131 Mead Road, Suva

Respondent

**Appearance** : Mr. Siddiq Koya with Ms. Joana Takali for the Applicant  
Mr. Subhas Parshotam with Mr. Emmanuel Kumar for the Respondent

**Hearing** : Thursday, 23<sup>rd</sup> June 2022 at 2.30pm

**Decision** : Monday, 05<sup>th</sup> September 2022 at 2.30 p.m

## DECISION

### (A) INTRODUCTION

[1]. By Originating Summons filed on 25.11.2021 the applicant Creative Distributors PTE Ltd **[CDP]** seeks to set aside a creditor's statutory demand [the demand] dated 16.11.2021 issued by Autocare [Fiji] Pte Limited **[ACP]**. The demand stated that CDP owed ACP the amount of FJ\$389,300.72 described as follows:

*“\$389,300.72 being the sum due and owing in respect of fuel supplied by the Creditor to the company over the period of 18 February 2020 to 31 July 2021.*

[2]. CDP, the debtor company contends that there is a genuine dispute as to the amount of the debt for the purposes of Section 517(1)(a) of the Companies Act, 2015 on the following grounds. [Reference is made to paragraph (8), (15) (a) to (h), (16) and (17) of the affidavit in support of Manish Sharma, a Director of the applicant company sworn on 23.11.2021.]

8. *The Respondent despite pleading the monies owed failed to file a Counter-Claim in Lautoka High Court Civil Action No. HBC 219 of 2021.*

15. *The demand made by the Respondent under the Statutory Demand is disputed by the Applicant as follows: -*

(a) *The Respondent was well aware that it has double charged for the supply of fuel to the Applicant. The Respondent's own employee has admitted through email dated 19 May 2020 that there were errors from the Respondent's side and advised an updated statement will be sent to the applicant. The Respondent till date has failed to provide the Applicant with an updated statement.*

*Annexed hereto and marked with the letter “G” is copy of email dated 19 May 2020 sent at 3.06 pm from the Respondent's employee to the Applicant.*

(b) *The Applicant on 1 June 2020 wrote to the Respondent's Director Mr. Kalpesh Patel and advised him that there is an error on the Respondent's side and further stated that the Respondent's Driver*

*or another person who was looking after the Respondent's fuel supplies had created false invoices.*

*Annexed hereto and marked with the letter "H" is a copy of letter dated 1 June 2020 from the Applicant to the Respondent.*

*(c) The Respondent had delivered fuel on certain days at the Applicant's premises after 5pm knowing that all fuel delivered was to be done between 8 am and 5 pm. The Applicant's designated workers who were authorized to receive the fuel Supplied were not at work after 5 pm.*

*(d) The Applicant also advised the Respondent that fuel was being supplied without Local Purchase Orders being issued by the Applicant. The Applicant further stated that it will not pay for fuel supplied without Local Purchase Orders been issued.*

*(e) The Applicant in its letter dated 10 June 2020 wrote to Mr. Kalpesh Patel and advised him that the Respondent is not to deliver fuel after 5 pm and payments for fuel delivered without Local Purchase Orders will not be paid.*

*Annexed hereto and marked with the letter "I" is copy of letter dated 10 June 2020 from the Applicant to the Respondent.*

*(f) On 12 June 2020, the Applicant wrote to Mr. Kalpesh Patel and advised him that the supply of fuel does not match the Applicant's general account and banking reconciliations. The amount of fuel supplied did not balance with the sales.*

*Annexed hereto and marked with the letter "J" is a copy of letter dated 12 June 2020 from the Applicant to the Respondent.*

*(g) On 9 August 2021, the Applicant wrote to the Respondent requesting invoices, statements, payment details, remittance, delivery copies and Local Purchase Order copies for the supply of fuel, recharge cards and rent. Till date the Respondent has failed to provide the information requested by the Applicant.*

*Annexed hereto and marked with the "K" is a copy of letter dated 5 August 2021 from the Applicant to the Respondent.*

*(h) On 19 August 2021, the Applicant once again wrote to Mr. Kalpesh Patel and advised him that the Applicant has placed a stop payment on the cheques it had issued in respect of the fuel supplied. The Applicant also gave reasons as to why a stop payment was enforced.*

*Annexed hereto and marked with the letter "L" is a copy of letter dated 19 August 2021 from the Applicant to the Respondent.*

16. *I have been advised by the Applicant's Solicitors that the Respondent ought to have filed a counter-claim in Lautoka High Court Civil Action No HBC 219 of 2021 as it has pleaded in its Statement of Defence that the Applicant owes substantial monies to the Respondent and should not have issued a Statutory Demand.*

17. *I have been further advised by the Applicant's Solicitors that the Statutory Demand amounts to an abuse of process and that the Respondent ought not be allowed to proceed with a Winding Up Application based on the dispute in respect of the sum demanded by the Respondent and the abuse of process when the Respondent issued the Statutory Demand and failed to file a Counter-Claim.*

[3]. The application is strongly opposed by ACP, the creditor company.

[4]. The parties have filed two (2) affidavits for consideration:-

- *The affidavit in support of Manish Sharma, a director of the applicant company sworn on 23.11.2021 and filed on 25.11.2021.*
- *The affidavit in opposition of Kalpesh Patel, the Managing Director of the respondent company.*

**(B) THE LEGISLATIVE PROVISION**

[5]. Under Section 515 (a) of the **Companies Act, 2015** a Company must be deemed unable to pay its debts;

(a) *If a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000.00 or such other prescribed amount then due, 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.*

(b) .....

(i)

(ii)

[6]. An application under Section 516 to set aside a statutory demand must be made on one or more of the following grounds;

(i) *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; [Section 517(1) (a)].*

(ii) *That the Company has an off-setting claim. [Section 517(1) (b)].*

(iii) *That because of a defect in the demand, substantial injustice will be caused unless the demand is set aside. [Section 517(5) (a)]*

Or

(iv) *There is some other reason why the demand should be set aside. [Section 517(5) (b)].*

[7]. An order setting aside the demand will render the demand of no effect. [Section 518].

**(C) CONSIDERATION AND THE DETERMINATION**

[8]. “ACP” is demanding a payment of \$389, 300.72 being the sum due and owing in respect of fuel supplied by “ACP” to “CDP” for the period 18.02.2020 to 31.07.2021.

[9]. What is the basis of the asserted dispute as to the amount of the debt? [Reference is made to paragraph (8), (15) (a) to (h), (16) and (17) of the affidavit

in support of Manish Sharma, a director of the applicant company sworn on 23.11.2021]

8. *The Respondent despite pleading the monies owed failed to file a Counter-Claim in Lautoka High Court Civil Action No. HBC 219 of 2021.*

15. *The demand made by the Respondent under the Statutory Demand is disputed by the Applicant as follows: -*

(a) *The Respondent was well aware that it has double charged for the supply of fuel to the Applicant. The Respondent's own employee has admitted through email dated 19 May 2020 that there were errors from the Respondent's side and advised an updated statement will be sent to the applicant. The Respondent till date has failed to provide the Applicant with an updated statement.*

*Annexed hereto and marked with the letter "G" is copy of email dated 19 May 2020 sent at 3.06 pm from the Respondent's employee to the Applicant.*

(b) *The Applicant on 1 June 2020 wrote to the Respondent's Director Mr. Kalpesh Patel and advised him that there is an error on the Respondent's side and further stated that the Respondent's Driver or another person who was looking after the Respondent's fuel supplies had created false invoices.*

*Annexed hereto and marked with the letter "H" is a copy of letter dated 1 June 2020 from the Applicant to the Respondent.*

(c) *The Respondent had delivered fuel on certain days at the Applicant's premises after 5pm knowing that all fuel delivered was to be done between 8 am and 5 pm. The Applicant's designated workers who were authorized to receive the fuel Supplied were not at work after 5 pm.*

(d) *The Applicant also advised the Respondent that fuel was being supplied without Local Purchase Orders being issued by the Applicant. The Applicant further stated that it will not pay for fuel supplied without Local Purchase Orders been issued.*

- (e) *The Applicant in its letter dated 10 June 2020 wrote to Mr. Kalpesh Patel and advised him that the Respondent is not to deliver fuel after 5 pm and payments for fuel delivered without Local Purchase Orders will not be paid.*

*Annexed hereto and marked with the letter "I" is copy of letter dated 10 June 2020 from the Applicant to the Respondent.*

- (f) *On 12 June 2020, the Applicant wrote to Mr. Kalpesh Patel and advised him that the supply of fuel does not match the Applicant's general account and banking reconciliations. The amount of fuel supplied did not balance with the sales.*

*Annexed hereto and marked with the letter "J" is a copy of letter dated 12 June 2020 from the Applicant to the Respondent.*

- (g) *On 9 August 2021, the Applicant wrote to the Respondent requesting invoices, statements, payment details, remittance, delivery copies and Local Purchase Order copies for the supply of fuel, recharge cards and rent. Till date the Respondent has failed to provide the information requested by the Applicant.*

*Annexed hereto and marked with the "K" is a copy of letter dated 5 August 2021 from the Applicant to the Respondent.*

- (h) *On 19 August 2021, the Applicant once again wrote to Mr. Kalpesh Patel and advised him that the Applicant has placed a stop payment on the cheques it had issued in respect of the fuel supplied. The Applicant also gave reasons as to why a stop payment was enforced.*

*Annexed hereto and marked with the letter "L" is a copy of letter dated 19 August 2021 from the Applicant to the Respondent.*

16. *I have been advised by the Applicant's Solicitors that the Respondent ought to have filed a counter-claim in Lautoka High Court Civil Action No HBC 219 of 2021 as it has pleaded in its Statement of Defence that the Applicant owes substantial monies to the Respondent and should not have issued a Statutory Demand.*

17. *I have been further advised by the Applicant's Solicitors that the Statutory Demand amounts to an abuse of process and that the Respondent ought not be allowed to proceed with a Winding Up Application based on the dispute in respect of the sum demanded by the Respondent and the abuse of process when the Respondent issued the Statutory Demand and failed to file a Counter-Claim.*

[10]. "ACP" in the answering affidavit disputed the material allegation of "CDP". Its version of facts are (Reference is made to paragraph (7)(a) to (f), (10), (11), (12), (13) and (14) of the affidavit in opposition of Kalpesh Patel, the Managing Director of the respondent creditor sworn on 26.05.2022]

7. (8) *I note the contents of the paragraph and say as follows:*

(a) *The action filed by the Applicant in the Lautoka High Court is different from these proceedings. The Lautoka High Court proceedings are regarding a landlord (Autocare Holdings Pte Limited) and tenant (the Applicant) dispute.*

(b) *This proceeding (the present action) was instituted by the Applicant (Creative Distributors Pte Ltd) on a Statutory Demand that was taken out by the Respondent (Autocare (Fiji) Pte Ltd) dated 16/11/21 and served on the Applicant, the application being one for an Order to have the Statutory Demand set aside.*

(c) *The Respondent in the present action has been named as a Defendant in the Lautoka proceedings. The Lautoka action has been premised on the allegation by the Applicant that it is unsure as to who the Landlord is — whether it is Autocare Holdings Pte Ltd or whether it is Autocare (Fiji) Pte Ltd (the Respondent in the current proceedings).*

(d) *The Respondent's position is simple in that Autocare Holdings Pte Ltd is the Landlord and that Autocare (Fiji) Pte Ltd is the fuel supply company.*

(e) *Further, the Statutory Demand is based on goods (in this case, fuel) sold and delivered by the Respondent to the Applicant over a period of time and totaling \$389,300.72 at the time the Statutory Demand was taken out and served. The Applicant is in the*



*business of selling fuel at retail and the Respondent is in the business of supplying fuel at wholesale (in addition to being a retailer of fuel as well). The Statutory Demand is based on the ground of the Applicant's inability to pay its debt.*

*(f) There is no connection between the Lautoka proceedings and the present action.*

10. *(15)(a) I note the contents of this paragraph and deny that the Respondent doubled charged the Applicant for the fuel supplied. In the email dated 19/5/20, there is no admission that invoices were doubled charged for all the fuel supplied to the Applicant.*

11. *(15)(b) I note the contents of the paragraph and say that I am not aware of this letter and deny receiving it. There is also no acknowledgement of this letter dated 1/06/ 20 being received by the Respondent. There is no email confirmation of the dispatch of this letter to the Respondent nor is there any email confirmation of the receipt of this letter by the Applicant.*

12. *(15)(c) and (d) I note the contents of these paragraph and say as follows:*

*(a) The Respondent at times did supply fuel to the Applicant without a Local Purchase Order but the Applicant had accepted these supplies without any fuss or complaints.*

*(b) Payments were made for these supplied fuels without a Local Purchase Order.*

*(c) The deponent has failed to provide evidence to suggest that fuel were not be accepted without a Local Purchase Order or the Applicant had objected to the supply of fuel by the, Respondent.*

*(d) At all material times, the Applicant sold the fuels that were supplied by the Respondent and requested for more supply.*

*(e) If the Applicant had so many issues with the supply of the fuel without a Local Purchase Order and/or the timing of the delivery fuels, it could have stopped to order and/or refused to, accept fuel*

*from the Respondent to address these issues first before resuming business with it each other.*

*Annexed hereto and marked "B" is a copy of the Statement of Account dated 31/7/21 for the - fuel supplied to the Plaintiff.*

- (f) *The deponent made representations for me to keep to two undated but signed cheques for \$75,000.00 (each) and he will inform me when to date and deposit the cheques. To date, the deponent has failed to inform me when to proceed to deposit these cheques.*

*Annexed hereto and marked "C" is a copy of those cheques.*

- (g) *The deponent also provided me 5 cheques of \$10,000.00 each. By letter dated 7/04/21, BSP Bank informed us that one of the cheques was dishonored while the Applicant informed us to stop from depositing the remaining cheques.*

*Annexed hereto and marked "D" is a copy of those un-cleared cheques.*

*Annexed hereto and marked "E" is a copy of the letter from BSP Bank.*

13. (15)(e) *I note contents of the paragraph and say that I am not aware of this letter and deny receiving it. There is no acknowledgement of this letter date 6/20 being received by-the Respondent. There is no email confirmation of the dispatch of this letter to the Respondent nor is there any email confirmation of the receipt of this letter by the Applicant.*

14. (15)(f) *I note the contents of the paragraph and say that I am not aware of this letter by the Plaintiff dated 12/06/20 in the said Affidavit. I further say as follows:*

- (a) *There is no acknowledgment by the Applicant to show that this letter was received by the Respondent. There is no email confirmation of the dispatch of this letter to the Respondent nor is*

*there any email confirmation of the receipt of this letter by the Applicant.*

- (b) A review of this letter (being Annexure J of the said Affidavit - which the Respondent did not receive) shows that the deponent admits in paragraph 2 that the statements provided by me for the fuel supplied are “almost correct”.*
- (c) The deponent further admits that it was the Applicant’s staff that had breached protocols at the service station and “played with the figures”.*
- (d) I repeat paragraphs 12(f) and (g) of this Affidavit.*
- (e) (15)(g) and (h) I note the contents of these paragraphs and say that I am not aware of this letter and deny receiving it. There is no acknowledgement of this letter dated 1/06/20 being received by the Respondent. There is no email confirmation of the dispatch of this letter to the Respondent nor is there any email confirmation of the receipt of this letter by the Applicant. There were no further follow ups by the Applicant to this letter, if the matter was of such urgency.*

**(D) WHETHER A GENUINE DISPUTE IS ESTABLISHED FOR THE PURPOSES OF SECTION 517(1)(A) OF THE COMPANIES ACT, 2015?**

[11]. Section 517(1)(a) of the Companies Act provides that a creditor’s statutory demand may be set aside when the Court is satisfied that there is a genuine dispute about the existence or amount to which that demand relates. The concept of a “genuine dispute” is well established in the case law. That test has been variously formulated as requiring that the dispute is not “plainly vexatious or frivolous” or “may have some substance” or involves “a plausible contention requiring investigation” and is similar to that which would apply in an application for an interlocutory injunction or a summary judgment<sup>1</sup>: In ***Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd***<sup>2</sup> the Full Court of Federal Court held, a “genuine dispute” must be bona fide and truly exist in fact, and the

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<sup>1</sup> Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1999] VICRp 61; [1994] 2 vr 290; [1993] 11 acsr 362; Eyota Pty Ltd v Hanave Pty [1994] 12 ACSR 785 at 787; Re UGL Process Solutions Pty Ltd [2012] NSWSC 1256

<sup>2</sup> [1997] FCA 681; [1997] 76 FCR 452 AT 464; [1997] FCA 681; [1997] 24 ACSR 353

grounds for that dispute must be real and not spurious, hypothetical, illusory or misconceived.

- [12]. In *CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd*<sup>3</sup>, Barrett J helpfully summarized the principle as follows:

*“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 s 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 that 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.”*

- [13]. In *Roadships Logistics Ltd v Tree*<sup>4</sup>, Barrett J similarly observed that:

*“Once the company shows that 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 on rational grounds that indicates an arguable case on the part of the company it must find that a genuine dispute exists even where any case, even apparently available to be advanced against the company seems stronger.”*

- [14]. In *MNWA Pty Ltd v Deputy Commissioner of Taxation*<sup>5</sup>

*The Commissioner has rights and duties in relation to the recovery of taxation liabilities of taxpayers, including those available under Pt 5.4 of the Corporations Act. But, that does not mean that he is free to resort to those despite having promised, or made representations to, or entered into an arrangement with, a taxpayer that he would proceed differently, as a result of which the taxpayer altered his, her or its position. **The question of whether a contract or an arrangement was made and, if so, on what terms or whether the Commissioner, in fact, acted “in good***

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<sup>3</sup> [2003]NSWSC 728; [2003] 47 ACSR 100

<sup>4</sup> [2007]NSWSC 1084; [2007]64 ACSR 671

<sup>5</sup> [2016]FCAFC 154, Rares J

**faith” in accordance with cl 5.3 in the three deeds or for an improper purpose or unconscientiously, in my opinion, was one that, in the circumstances, could only be resolved in other substantive proceedings and not in the applications under s459G.**

[Emphasis mine]

[15]. It is important to remember that the threshold criteria for establishing the existence of a genuine dispute to the debt is a low one.

[16]. In **Fitness First Australia Pty Ltd v Dubow**<sup>6</sup>, the Court dealt with an application under section 459G of the Corporations Act 2001 (Cth) which is identical in terms to section 516 of our Companies Act 2015. Ward J stated;

*.....the court does not determine the merits of any dispute that may be found to exist, but simply whether there [sic] is such a dispute and the threshold for that is not high. In Edge Technology Pty Ltd v Lite-on Technology Corporation [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J said at [45]):*

*The threshold presented by the test to set aside a statutory demand does not however require of the plaintiff a rigorous and in-depth examination of the evidence relating to the plaintiff’s claim, dispute or off-setting claim.....Hayne J in Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] Vic Rp 61; [1994] 2 VR 290.*

[17]. In **Eyota Pty Ltd v Hanave Pty Ltd**<sup>7</sup>, McLelland CJ explained that “genuine dispute” means:

*....a plausible contention requiring investigation, and raises much of the same sort of considerations as the “serious question to be tried” criterion which arises on an application for an introductory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to genuine dispute, every statement in an affidavit “however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be not having “sufficient prima facie plausibility to merit further investigation as to its*

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<sup>6</sup> [2011] NSWSC 531

<sup>7</sup> [1994]12 ACLC 785; [1994] 12 ACLC 669

[truth]" (cf *Eng Me Young v Letchumanan* [1980] AC 331 at 341], or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cf *South Australia v Wall*(1980) 24 SASR 189 at 194.)

But it does mean that, except in such an extreme case[i.e. where evidence is so lacking in plausibility], a court required to determine whether there is a genuine dispute should not embark upon an enquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a 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..... In *Re Morris Catering Australia* it was said the essential task is relatively simple – to identify the genuine level of a claim....

[18]. In *Fitness First* (supra) at 127, Ward J cited *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)*<sup>8</sup> saying:

*Barret J* noted that the task faced by a company challenging a statutory demand on genuine dispute grounds is by no means a difficult or demanding one – a company will fail in its task only if the contentions upon which (sic) seeks to rely in mounting the challenge are so devoid of substance that no further investigation is warranted. The court does not engage in any form of balancing exercise between the strengths of competing contention. **If there is any factor that on reasonable grounds indicates an arguable case it must find a genuine dispute exists even where the case available to be argued against the company seems stronger.**

[Emphasis mine]

And later, at 132:

**A genuine dispute is therefore one which is bona fide and truly exists in fact and that 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 in dispute must be in existence at the time at which the statutory demand is served

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<sup>8</sup> [2003] NSWSC 896

*on the debtor (Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd [1997] FCA 681; (1997) 76 FCR 452; Eyota).*

[Emphasis added]

- [19]. I keep steadily in mind that the threshold is not high and that I need not engage in a rigorous and in-depth examination of the evidence relating to ACP's claim but this does not absolve CDP from the onus of having to adduce evidence that there is a serious issue to be tried or that there is an arguable case.
- [20]. As I understand the authorities cited above, a statutory demand should be set aside where there appear to be factual evidence that may require further inquiry to establish the truth of the matter. I bear in mind that mere disagreement with a statutory demand without particulars, or a mere assertion of a legal argument unsupported by evidence, cannot be counted as a genuine dispute.
- [21]. "ACP" when framing the opposition, disputed the material allegation and the version alleged by CDP. ACP, and in particular their legal advisers drafting and settling affidavit in opposition engaged and immersed themselves with the facts which are disputed, and in so doing, ventilated such disputed facts in the affidavit in opposition filed on 26.05.2022.
- [22]. That said, CDP must file an answering affidavit because there is an onus lies on CDP. CDP did not file an answering affidavit within the stipulated time frame. The applicant CDP failed to file a formal application under order 3, rule 4 of the High Court Rules and seek an order for extension of time. As such in the absence of answering affidavit, the court accepts the veracity of the matters to which ACP has deposed to as an opposition to the setting aside application.<sup>9</sup>
- [23]. CDP contends that there is a genuine dispute as to the amount of the debt for the purposes of section 517(1)(a) of the Companies Act 2015. It will be seen from a reading of CDP's affidavit in support that CDP does not state as to what sum it admits and what sum is in dispute, and I did not hear a word, after listening to the submission of counsel for the applicant CDP as to the sum CDP admits and what sum it is in dispute and it causes me to think that there is no evidence put forward by the CDP as to extent of its dispute.

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<sup>9</sup> HKSAR v Lee Ming Tee, Unreported Hong Kong Court of Final Appeal ; HKIii; (2003) HKCFA 54.

See also, Jai Prakash Narayan v Savita Chandra, Civil Appeal No- 37 of 1985, date of Judgment 08.11.1985

(E) **HIGH COURT OF LAUTOKA CIVIL ACTION HBC 219 of 2021**

[24]. Dealing first with the Lautoka High Court Civil Action HBC 219 of 2021, the difficulty I have in accepting this as a ground for setting aside statutory demand on the basis of abuse of process of law is connected with the **nexus** between the issuance and service of the statutory demand and the pending litigation matter in the Lautoka High Court. What is plain from annexure “B”, a copy of the writ of summons and statement of claim in Lautoka High Court Civil Action No. HBC 219 of 2021 is that it relates to an action which deals with a landlord and tenant dispute. The landlord in that matter is Auto Care Holdings PTE Limited and the tenant is CDP. The applicant CDP is the plaintiff in the Lautoka High Court Civil Action No. HBC 219 of 2021. The respondent ACP is the first defendant and Auto Care Holdings is the second defendant. The cause of action pleaded against “ACP” is fraudulent misrepresentation and inducement. The plaintiff alleges that the first defendant “ACP” made a fraudulent misrepresentation to “CDP” that it is the registered proprietor of the Certificate Of Title No:- 34905 and thereby induced the plaintiff “CDP” to enter into a commercial tenancy agreement for property comprised in Certificate of Title No. 34905. The plaintiff alleges that ACP made the representations fraudulently because ACP is not the registered proprietor of property comprised in Certificate of Title No. 34905. The plaintiff “CDP” has claimed (amongst other reliefs) damages against the first defendant “ACP” for fraudulent misrepresentation and inducement.

[25]. “CDP” is in the business of selling fuel at retail and “ACP” is in the business of supplying fuel at wholesale. The statutory demand stated that CDP owed ACP the amount of \$389, 300.72 being the sum due and owing in respect of the fuel supplied by ACP to CDP for the period of 18.02.2020 to 31.07.2021.

[26]. Having that said, I failed to see a **nexus** between the issuance and service of the statutory demand and the pending litigation matter in the LAUTHOKA High Court. Then how the respondent creditor ACP could be debarred from proceeding with the statutory demand? Therefore, the ground of challenged fails.

**Double charging for fuel supplied and including invoices in the statement of account without providing the invoices.**

[27]. CDP contends that invoices which were paid previously for in the sum of FJD 67,083.38 were appearing in the ACP’s statement of account dated 30.04.2020.



[Annexure marked "G" referred to in the affidavit in support of Manish Sharma sworn on 23.11.2021). CDP further contends that invoice worth FJD 15, 539.80 appearing in the statement of account were not provided to CDP by ACP.

[28]. Counsel for ACP points out, and I accept that:

- The invoices that have already paid and the invoices which were not provided have been taken out from the next statement of account i.e, 31.07.2021 [Annexure B referred to in the affidavit in opposition of Kalpesh Patel, sworn on 26.5.2022].
- No affidavit evidence was adduced by CDP to the contrary.
- Despite CDP's assertion that there is a dispute as to the amount of debt (FJD 389, 300.72) without asserting which sum is disputed, CDP's director Manish Sharma by letter dated 22.05.2022 (Annexure "F" in the ACP's affidavit in opposition) signed, acknowledged and admitted the debt that it owed as at 30.04.2020 amounted to FJD 385, 123.33.
- In the absence of affidavit in reply by the CDP, I fail to see why CDP signed, acknowledged and admitted the debt of FJD 385, 123.33 if there is a genuine dispute as to the amount of debt.
- Despite the assertion that CDP disputes the debt, CDP still made payment for \$27, 937.79 on 16/10/20 and a payment of \$450.00 on 29/1/21. At the time for making these payments, the CDP did not advise of any disputes to the ACP's directors or its agent.
- CDP further made representations to ACP to clear its debts for the supply of fuel by taking the following steps:
  - (a) Informing ACP to keep two undated cheques for 75, 000.00 (each) and they will be informed when the date and deposit these cheques [Annexure C of the respondent's affidavit in opposition].
  - (b) CDP further provided 5 cheques of \$10,000.00 [each]. However these cheques were not cleared and dishonored [Annexure D and E of the respondent's affidavit in opposition.]

(c) CDP does not genuinely disputes about the existence or amount to which the demand relates. In the CDP's affidavit in support (of Manish Sharma) (being Annexure J – letter dated 12/06/20) the deponent admitted that the statements provided by the respondent were also correct.

- In paragraph 3 of annexure “J” CDP says *“it is now certain to me that there are breaches to the protocols of operations at CDL service station by some members of my staff at the site. I am in the process of setting to bottom of this matter and stop once and for all.”*
- Again in the same letter, CDP says at paragraph 5 *“Even after knowing well that my staff may have played around with the figures, I will not be able to legally prosecute them as the system is outdated and will not in anyway assist in holding them accountable”.*
- As correctly pointed, it is plain from annexure “J” CDP is blaming its staff for some apparent misdeeds within its operations and this does not absolve CDP from its liability to make payments to “ACP” for the supply of fuel.
- Therefore, the ground of challenge fails.

**Did CDP request for documents to be provided by ACP for reconciliation purpose?**

[29]. CDP placed more emphasis upon some letters allegedly written to ACP to assert that CDP wrote to ACP to resolve various differences between them as to the amount of the debt to which the demand relates. [Reference is made to paragraph 15(b), (c), (e), (f), (g) and (h) of the affidavit in support of Manish Sharma sworn on 23.11.2021].

15. (b) *The Applicant on 1 June 2020 wrote to the Respondent's Director Mr. Kalpesh Patel and advised him that there is an error on the Respondent's side and further stated that the Respondent's Driver or another person who was looking after the Respondent's fuel supplies had created false invoices.*

*Annexed hereto and marked with the letter “H” is a copy of letter dated 1 June 2020 from the Applicant to the Respondent.*

*(c) The Respondent had delivered fuel on certain days at the Applicant's premises after 5pm knowing that all fuel delivered was to be done between 8 am and 5 pm. The Applicant's designated workers who were authorized to receive the fuel Supplied were not at work after 5 pm.*

*(e) The Applicant in its letter dated 10 June 2020 wrote to Mr. Kalpesh Patel and advised him that the Respondent is not to deliver fuel after 5 pm and payments for fuel delivered without Local Purchase Orders will not be paid.*

*Annexed hereto and marked with the letter “I” is copy of letter dated 10 June 2020 from the Applicant to the Respondent.*

*(f) On 12 June 2020, the Applicant wrote to Mr. Kalpesh Patel and advised him that the supply of fuel does not match the Applicant's general account and banking reconciliations. The amount of fuel supplied did not balance with the sales.*

*Annexed hereto and marked with the letter “J” is a copy of letter dated 12 June 2020 from the Applicant to the Respondent.*

*(g) On 9 August 2021, the Applicant wrote to the Respondent requesting invoices, statements, payment details, remittance, delivery copies and Local Purchase Order copies for the supply of fuel, recharge cards and rent. Till date the Respondent has failed to provide the information requested by the Applicant.*

*Annexed hereto and marked with the “K” is a copy of letter dated 5 August 2021 from the Applicant to the Respondent.*

*(h) On 19 August 2021, the Applicant once again wrote to Mr. Kalpesh Patel and advised him that the Applicant has place a stop payment on the cheques it had issued in respect of the fuel supplied. The Applicant also gave reasons as to why a stop payment was enforced.*

*Annexed hereto and marked with the letter "L" is a copy of letter dated 19 August 2021 from the Applicant to the Respondent.*

- [30]. ACP in the affidavit in opposition sworn on 26.05.2022 categorically denied receiving CDP's letters to ACP dated 01.06.2020, 10.06.2020, 12.06.2020, 09.08.2021 and 19.08.2021. It is true that CDP does not disclose email confirmation of the dispatch of letters to ACP. In the absence of an answering affidavit by CDP adducing evidence to the contrary, the court accepts the ACP's argument that there were no differences between the parties as to the amount of the debt. In accordance with **Jones v Dunkel**<sup>10</sup> an adverse inference should be drawn from the fact that CDP did not adduce in evidence email confirmation of the dispatch of letters to ACP by way of an answering affidavit.
- [31]. For all these reasons it is hard for me to accept that a genuine dispute exists as to the amount claimed by the ACP.

### **ORDERS**

01. The application to set aside the creditor's statutory demand is refused.
02. The applicant debtor to pay the respondent creditor's costs of these proceedings summarily assessed in the sum of FJD 1000.00 which is to be paid within Seven (07) days hereof.



  
.....  
**Jude Nanayakkara**  
**[JUDGE]**

**High Court - Suva**  
**Monday, 05<sup>th</sup> September, 2022**

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<sup>10</sup> HCA 8, 101 CLR 298

See also, Australian Securities and Investments Commission v Hellicar (2012) HCA 17