IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Companies Action No:- HBE 26 of 2022

IN THE MATTER of **PLUMBING & PROPERTY SERVICES PTE LTD** a company incorporated in Fiji and having its registered office at 25 Auckland Street, Vatuwaqa in the Republic of Fiji ("the Company")

-A N D-

IN THE MATTER of the Companies Act 2015

Appearance : Mr. Abhay Singh for the Applicant Creditor
Ms Bolameke Qioniwasa for the Respondent Debtor

Hearing : Monday, 15th August, 2022 at 9:30am

Decision : Thursday, 6th October 2022 at 9:00am

DECISION

(A) INTRODUCTION

[1]. On 25.05.2022 the Applicant Creditor Sambhu Lal Construction (Fiji) Ltd **[SLC]** applied to this court for an order for the winding up of the respondent debtor Plumbing & Property Services Pte Ltd **[PPS]** on the ground of insolvency under Section 513 (c) of the Companies Act, 2015.

[2]. SLC's winding up application relies on a creditor's statutory demand dated 16.03.2022. The 'SLC' claimed that 'PPS' was indebted to it in the sum of FJD 329,

355.36. The statutory demand dated 16.03.2022 under Section 515 of the Companies Act was served on 'PPS' demanding the sum of FJD 329,355.36.

[3]. No application was made by 'PPS' to set aside the demand within 21 days of its service on 'PPS', in which application may be brought to set aside a creditor's statutory demand under Section 516(1) of the Companies Act, 2015. 'PPS' also did not comply with the demand by paying or securing or compounding the debt to 'SLC's' reasonable satisfaction within that period.

[4]. On 25.05.2022 SLC applied to wind up 'PPS' relying on the failure by 'PPS' to comply with the statutory demand.

[5]. The advertisement for the winding up application was published in the newspaper and Government of Fiji Gazette on 11.06.2022.

[6]. The Deputy Registrar on 01.07.2022 issued the '**Full Compliance Certificate**' pursuant to Rule 19(2)(a) of the Winding Up Rules. It says that the rules for winding up have been fully complied with by 'SLC'.

[7]. On 07.06.2022 'PPS' filed summons pursuant to Section 529(1) of the Companies Act 2015 seeking leave to oppose the winding up application on a ground it could, but did not, rely on to set aside the demand, namely that there is a genuine dispute as to the existence of the debt and/or the amount of the debt. [the subject of the demand]

[8]. 'PPS' relied on an affidavit of its General Manager 'Sera Nicholls' sworn on 07.07.2002 in support of the application for leave to oppose the application for winding up. Sera Nicholls deposed inter alia that;

> *4. I am advised by my Solicitors that we have a genuine dispute between the Company and the Respondent about the existence or amount of a debt to where the demand relates and we have filed Statement of Defence & and Counter Claim on 19th January 2022 and served the same on 15th March 2022. I attach herewith and mark "A" copy of the Statement of Claim and Counter Claim.*
>
> *5. I also advised by my Solicitors that there was no reply to the said Defence nor Statement of Defence to the Counter Claim filed or served on us by the Applicant.*

6. *That I was served with the Statutory Demand and took it to my Solicitor but we were out of time in making an application to set aside the demand.*

7. *That we seek leave of the Court to file our opposition to the winding Up application as we need to prove to the Court that we are solvent and we are still trading as a Company which was hired by the Applicant to finish the Project at the Fiji National University in which the Applicant still owe outstanding debt to our company.*

8. *I have not been served with any Default Judgment which the Applicant has relied on in this Winding Up application and I have also been advised by my Solicitors that no service of the same was effected on them.*

9. *I have been advised by my Solicitor that the Statutory Demand was an abuse of process and the same was highlighted to the Applicant's Solicitor via a letter dated 11th April 2022 and where 2 recent High Court cases were highlighted which Clearly states that without arbitration issuance of Statutory Demand was legally untenable hence there was legal impediments to proceed with winding up action. However, there was no reply from the Applicant Solicitor, I attach and mark "B" herewith copy of the said letter.*

10. *I have been advised by my Solicitors that we have genuine dispute about the existence or the amount of a debt to which the demand relates and if we are not granted leave of the Court to oppose the application of winding up, it will be prejudicial and have a detrimental effect on our Company.*

(B) THE LEGISLATIVE PROVISIONS

[9]. Section 529 of the Companies Act 2015 provides;

Company may not oppose application on certain grounds

529. – *(1) In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court to oppose the application on a ground –*

a). that the Company relied on for the purposes of an application by it for the demand to be set aside; or

b). *that the Company could have so relied on, but did not so rely on (whether it made such an application or not).*

The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the Company is solvent.

[Emphasis added]

[10]. Section 529 is analogues to Section 459s of the Australian Cooperation Act 2001.

[11]. The matters relevant to an application for leave under this section are whether there is a serious question to be tried on the ground sought to be raised; the sufficiency of any explanation as to why that ground was not raised in an application to set aside the creditor's statutory demand, involving an evaluation of the reasonableness of the debtor's conduct at the time when the application might have been made; and whether the court is satisfied that the relevant ground is material to proving whether the debtor is solvent[1]

(C) WHETHER A SERIOUS QUESTION TO BE TRIED IS ESTABLISHED

[12]. The first relevant consideration in determining an application for leave under Section 529 of the Companies Act 2015 is whether there is a serious question to be tried as to the ground now sought to be raised by "PPS".

[13]. This consideration is directed to whether "PPS" has a seriously arguable case that the debt is the subject of a genuine dispute and does not require a final determination of whether a genuine dispute exists[2]. At section 529 leave stage all that is involved is a "*preliminary examination*" of the alleged dispute.

[14]. The statutory demand related to a sum of FJD 329,355.36. The debt the subject of the statutory demand was said by 'SLC' to be owing, due and payable by 'PPS'. The issue between 'SLS' and 'PPS' arises out of a sub-contract. SLC is the

[1] Chief Commissioner of Stamp Duties v Palifer Pty Ltd (1999) NSWSC 15
DAG International Pty Ltd v DAG International Group (2005) NSWSC 1036
Perpetual Nominees Ltd v N A Investment Holdings Pty Ltd (2011) NSWSC 282
[2] Soundwave Festival Pty Limited v Altered State (W.A) Pty Ltd (No.1) (2014) FCA 466
DAG International Pty Ltd v DAG International Group Pty Ltd (Supra)

contractor and 'PPS' is the sub-contractor. SLC claimed that the necessary work did not proceed as it should have. SLC claimed the work carried out by 'PPS' was performed defectively and negligently, resulting in considerable loss to SLC. SLC claim that it had suffered loss and damage in an amount of FJD 329,355.36.

[15]. The general background and circumstances which led to the winding up application are set out in SLC's statement of claim filed in HBC 182/2021. SLC pleads inter alia that:

> *3. That the Plaintiff had entered a contract with Fiji National University (herein after will be referred as **"FNU"**) to construct a three-storey building situated at Fiji Maritime Academy, Nasese, Suva.*
>
> *4. On 8th October 2018, the Plaintiff and the Defendant entered a Sub-Contract to carry out and complete the Hydraulic Services in respect of the proposed three-storey building for FNU in the sum of $206, 900.00 (Two hundred Six thousand Nine hundred dollars (VIP).*
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> *9. That after executing the sub-contract, the Defendant mobilized to the construction site.*
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> *10. That on the 14th May 2019, the Defendant thereafter raised its first progressive claims of the works carried by the Defendant Company vide invoice No: 3117/19 in the sum of $24, 912.00 (VIP) and 004/19 in the sum of $33,995.00(VIP) being the total claim of $58,907 VIP respectively.*
>
> *11. That on the 27th May 2019, the Project Superintendent assessed the Defendant's claim together with the Plaintiff's claim and Plaintiff's other subcontractors claim. At that material time the Project superintendent the sum of $26, 112.76 payable to the Defendant.*
>
> *12. At all material time before the assessment and after assessment, the Plaintiff in good faith made three payments to the Defendant as follows:-*
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> | | |
> |---|---|
> | *15/3/18* | *$800.00* |
> | *15/5/19* | *$10,000.00* |
> | *27.6.19* | *$ 13,756.86* |
> | ***Total*** | ***$24,556.86*** |

13. *On the 30th July2019, the Defendant raised its second progressive claim of the works carried by the Defendant Company claiming a total sum of $22,743.00 (VIP).*

14. *While the Defendant's 2nd Progressive claim was pending for assessment by the Project Superintendent, on the 13th August 2019, the Defendant lodged its 3rd Progressive claim wherein they claimed a further sum of $6,660.99 by attaching an Invoice No. 3164/19, without any breakdown specifically stating for which works such claims were raised.*

15. *That on the 29th August 2019 the Project Superintendent assessed the Defendant's 2nd progressive claims, the Plaintiff claim and Plaintiff's other subcontractors' claims wherein the Project Superintendent assessed a sum of $7,196.69 payable to the Defendant.*

16. *That on the 16th day of September 2019, the Plaintiff paid the Defendant the sum of $6,327.94 despite having not fully satisfied with the works carried out by the Defendants and/or its servants and agents.*

17. *That on the 25th September 2019, the Project Superintendents assessed the payment of $1,186.94 payable to the Defendant. At that material time, the Plaintiff did not pay any moneys to the Defendant as the works were not done satisfactorily or Defendant failed to rectify the defects pointed out to them.*

18. *On the 14th October 2019, the Defendant raised its 4th progressive claim for a sum of $14,990.80 by attaching an Invoice No. 3192/19, again without any breakdown specifically stating for which works such claims were raised.*

19. *That on the 6th November 2019, the Plaintiff paid Defendant the sum of $7,478.90 and on 14" November 2019 another sum of $7,478.90.*

20. *THAT on the 21st November 2019, the Temo Consultants inspected all Sub-contractors' works including the Defendant wherein they identified or pointed defects on the works of the Defendant.*

21. *On 21th November 2019, the Superintendents communicated to Plaintiff's Project Manager vide Instruction No. 177 declaring or pointing the defective works done by the Defendant.*

22. *That on the 19th November 2019, despite the Defendant's 4th claim not been assessed the Defendant raised its 5th claim in the sum of $6,376.50 for works carried at FNU site.*

23. *That on the 27th November 2019, the Project Superintendent assessed the Defendants 4th claim inclusive of the Plaintiff, and the other subcontractors wherein a sum of $14,985.19 was assessed to be paid to the Defendant.*

25. *That despite the fact of the matters stated in paragraph 22 above, the Plaintiff in good faith paid the Defendant a sum of $6,057.67 on the 18th December 2019.*

26. *That on the 14th January 2020, the Project Superintendents assessed the progress claim of the Plaintiff together with its subcontractors wherein a sum of $6,528.19 was assessed to be paid to the Defendant.*

27. *That on the 8th January 2020, the Defendant raised its 6th progressive claim to the Plaintiff for a sum of $3,648.07 vide invoice No. 3259/20 without giving details of the works carried out at the construction site.*

28. *That the Plaintiff having not satisfied with the works carried by the Defendant at the FNU Construction site paid a sum of $3,648.07 on the 7th February 2020 in good faith.*

29. *That on the 25th February 2020, the Project Superintendents assessed the works of the Plaintiff together with its subcontractors inclusive of the Defendant wherein a sum of $7,492.57 was assessed to be paid the Defendant.*

30. *That on the 25th May 2020, the Defendant raised its 6th progressive claim against the works carried by the Defendant at the FNU construction site for a total value of $2,402.00*

31. *That on the 28th May 2020 Temo Consultants acknowledged the defects in respect of the Defendant together with other subcontractors including Defendant's previous defects that were not remedied.*

32. *That by a payment certificate issued on the 29th June 2020, the Superintendent assessed a total sum of $7,774.49.00 for all works carried by the Defendant at the construction site.*

33. *That the Plaintiff did not pay the Defendant any monies since the works carried by the Defendant were still defective or previous defects were not rectified.*

34. *That on the 22nd June 2020, the Defendant raised its 7th progressive claiming in the sum of $41,359.00 to the Plaintiff for the works carried at the FNU Construction Site.*

35. *That on the 30th July 2020, the Project Superintendents assessed the claims of the Plaintiff together with its subcontractors including the Defendant wherein they assessed a sum of $4,975.32 to be paid to the Defendant.*

36. *That based on its contract with FNU and sub-contract with the Defendant, the Plaintiff held on the above payments due to previous defects and breach of the sub- contract.*

37. *That the Plaintiff though his agents and servant issued numerous emails, notices advising the Defendant of their failure to perform the contract and/or to rectify the defects as identified by the Superintendent which was communicated to the Defendants vide a Services Defect Report, but, however they failed and/or neglected to rectify the defects despite repeated reminders.*

38. *That the Superintendent issued a total of 10 Project Managers Instructions identifying the defective works carried by the Defendant at the construction site to which the Defendant failed and/or neglected to rectify the same in timely manner and/or failed to rectify the defects.*

40. *That due to the Defendant's numerous defects, continuous failure to rectify the defects, failure of Performance on Certain areas within the*

building and also outside the building that impeded the Plaintiff to carry out further works to reach completion of the said FNU building.

41. *By the reasons of the delays caused by the Defendant together with other subcontractors without any Plaintiff's fault whatsoever, Fiji National University imposed Liquidated Damages against the Plaintiff for a sum of $2,000.00 per day of delay making a grand total of $820,000.00 (Eight Hundred and Twenty Thousand Dollars).*

42. *That due to the matter complained above, the Plaintiff was prevented from the installation of ceiling in wet areas of the building, and many other parts of the building, whereby the Defendant together with other 3 subcontractors caused the Plaintiff to incur loss by a penalty of Liquidated Damaged imposed by Fiji National University.*

Particulars of Loss incurred due to the defects and failure to rectify defects by the Defendant

Total number of delays caused by the Defendant	*447 days*
Liquidated Imposed on Plaintiff to be apportioned With other subcontractors ($2,000/5)	*$400.00/day*
Total Delays cost	***$178, 800.00***

43. *That because of the defective works by the Defendant and/or its servants and agents and having negligently failing to rectify for over the period which seriously affected the Plaintiffs works as ceiling installation was subject to approval of all subcontractors works.*

44. *By the reasons of the matters aforesaid, the Plaintiff was compelled to incur additional loss and expenses.*

***Particulars of Loss**.*

a).	*Payments of Insurance*	*$2,533.00*
b).	*Attendance*	*$14,900.00*
c).	*Office Overheads*	*$6, 198.40*
d).	*Site Security*	*$ 7,450.00*
e).	*Progressive Reporting*	*$4,917.00*

f).	*General Maintaining of Site*	*$ 24,734.00*
g).	*Performance Bond Interest*	*$ 11,994.50*
f).	*Protection of all works*	*$ 7,450.00*
	Total	***$80,176.90.***

45. That the Plaintiff was also compelled to rectify defects caused to the building due to poor workmanship of the Defendant employees wherein the Plaintiff incurred additional loss.

Particulars of loss due to rectification of Defendant Works

a).	*Chasing of walls and floor of wet area to redirect the pipes to its correct location*	*$1,500.00*
b).	*Refinishing including tiling, plaster and painting*	*$2,500.00*
c).	*Wet area piping works done by SLCL*	*$2,200.00*
d).	*Excavation for sewer line trenching works by SLCL*	*$5,500.00*
e).	*Redirecting Fire Hose Reel outlet to its correct location by chasing of painted wall*	*$500.00*
f).	*Finishing the wall by plastering and applied paint*	*$1,000.00*
	Total	***$13,200.00***

[16]. 'PPS' says that there is a genuine dispute between SLC and PPS about the existence of the debt. Furthermore, 'PPS' relies on an alleged counterclaim to oppose the application for an order that it be wound up. PPS exhibited to its affidavit sworn on 07.07.2022, its Statement Defence and the Counter-claim filed in Civil Action No. HBC 182/2021. In its Statement of Defence and Counter-claim, 'PPS' pleaded inter-alia that:

(3) Further, the Plaintiff was given plenty of opportunities over a period of two (2) years to undertake remediation work. However, there has been failure recorded on each and every inspection undertaken by Architectural Services and structural engineer companies. This was communicated to

the Plaintiff. It is only right and fair that the Plaintiff redo the specific work skillfully and professionally as expected of such a company.

(7) The Defendant admits to the content of paragraph 7 of the claim and states that the Project Engineer was satisfied with the work carried out and signed accordingly to confirm that the work done by the Defendant has been carried out satisfactorily.

(10) The Defendant admits to the contents of paragraphs 10, 11 and 12 of the Claim and further states that it is evident from the total amount paid to the Defendant for this particular period is $1,555.90 lesser that the amount assessed by the Project Superintendent that was to be payable to the Defendant. From the onset, the Plaintiff was not fully complying with Contract Payment under Article 1 of the Subcontract Agreement dated 8th October 2018.

(11) The Defendant partially admits to the content of Paragraphs 13, 14, 15 and 16 of the Claim and States that the Plaintiff has repeatedly underpaid the Defendant in comparison to the assessed sum calculated by the Project Superintendent. The Plaintiff had paid the Defendant $868.75 short of the actual assessed sum payable to the Defendant. The Defendant denies that works carried out by the Defendant was not fully satisfactory as the Project Superintendent has signed off the work as satisfactory thus the payment was payable to the Defendant.

(12) The Defendant admits the contents of paragraph 17 of the Claim in so far as the Project Superintendent assessment for the amount to be paid to the Defendant and further States that the Plaintiff is using the unsatisfactory work as a cover up to its deliberately avoiding making payments to the Defendants and several other subcontractors.

(14) The Defendant denies the content of paragraph 20 of the Claim and says that the Plaintiff's conduct of engaging Temo Consultant was a delaying tactic used to prevent paying the Defendant and other sub-Contractors for the work completed and authorized to be paid by the Project Superintendent.

(17) The Defendant in reply to paragraph 24 of the Claim states that the Defendant had stopped attending work at the site a few weeks before Christmas 2019 because no payments were received from the Plaintiff

and this was verbally agreed in the meeting with the Plaintiff's managing director at the Plaintiff's Mead Road site.

(21) *The Defendant in reply to paragraphs 26, 27 and 28 of the Claim states that the Plaintiff is stating the procedures followed as per the Contract where by the Defendant is compensated for the legitimate claims agreed and paid. It is evident that the Plaintiff is failing to comply with the full payment of the assessed and agreed amount payable to the Defendant for the work already carried out and certified by the Project Superintendent, thus the Plaintiff is not acting in good faith as claimed.*

(23) *The defendant cannot comment on contents of paragraph 31 of the Claim as it has no knowledge but state that the plaintiff's conduct of engaging Temo Consultants was a tactic used to further delay the payments to be done to the defendant and other sub-contractors.*

(27) *The Defendant denies the content of paragraph 36 of the Claim and states that the Plaintiff has been breaching the condition of the contract by not fully paying the Defendant the assessed amount agreed by the Project Superintendent continuously. In holding back the payment due and owing to the Defendant is a further breach of contract. The Plaintiff is using the work defect issue as an excuse and delay tactic to avoid making payments to the Defendant and other sub -Contractors. The Defendant also repeat paragraph 18 of the within Statement of Defence.*

(28) *The Defendant denies the content of Paragraph 37 of the Claim in so far as the Defendant's failure to perform the contract and/or rectify the defects. The Defendant had so communicated to the plaintiff the issue of money owed for the hydraulic service rendered to the Fiji National University, project, excluding a retention sum of $13,800. A Demand Notice dated 13th August 2021 was addressed to the Managing Director of the Plaintiff company.*

(32) *The Defendant denies the contents of Paragraph 41 of the Claim and states that it was the Plaintiff's fault and breach of contract that caused the delay and further repeats the contents of paragraphs 28, 29 and 30 Of the Within Statement of Defence.*

(35) *The Defendant denies the contents of Paragraph 44 of the Claim and states that the additional loss and expenses incurred by the Plaintiff was*

solely due to its breach of contract in failing to fully pay the assessed amount due to the Defendant continuously, Causing delay to the project.

(39) The Defendant denies the content of paragraph 48 (numbered 32) of the Claim and states that the Plaintiff had breached the terms of contract when not fully compensating the Defendant for the work carried out and for legitimate claims that were agreed to be paid to the Defendant. The Project Superintendent had assessed and certified amounts payable to the Defendant as per the work done. The Plaintiff failed to comply with the payments to the Defendant and it is only right that the Defendant claims to be compensated for the work already carried out.

In the Counter-Claim 'PPS' pleaded inter-alia that:

(7). The Plaintiff continuously failed to comply with making payments to the Defendant as per the assessed amount and even withholding payments which is a breach of the Subcontract Agreement clause in Article 1.

Particulars of Breach

a) The Defendant submitted claims totaling $138,000.00 (VIP) to the Plaintiff on 28th August 2020 for payment in accordance with the sub-contract.

b) The retention cost is also included in the claim submitted.

c) The Plaintiff has only paid the sum of $67,021.54 (VIP) as at 9th April 2021 .

d) The Plaintiff owes the Defendant the sum of $57,178.46 (VIP).

Particulars of Claim

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i)	*Total claim as per HLK Assessment*	*138,000.00*
ii)	*Less retention*	*13,800.00*
		124.200.00VIP
iii)	*Less payments*	*59,746.54*
iv)	*Less payments for sewer pump*	*7,275.60*
		67,021.54VIP
	Total Due	***$57,178.46 VIP***

(8) The Plaintiff in failing to pay the Defendant the amount due and owing as stated above in paragraph 7 herein has breached terms and conditions of the sub contract dated 8th October 2018 and despite requests and reminders, including demand in writing for payment, the Plaintiff has failed and / or neglected to pay the Defendant the sum particularized in the preceding paragraph.

[17]. It is clear from the Statement of Defence and Counter-Claim that there is in fact a dispute. I do not accept the submissions of SLC that there is indeed no dispute between the parties. **I am satisfied that there is a genuine dispute between the parties with respect to the monies allegedly owing**.

(D) WHETHER THERE IS A SUFFICIENT EXPLANATION FOR THE FAILURE TO APPLY TO SET ASIDE THE DEMAND

[18]. The court must balance the legislative policy of preventing disputes about debts from being raised at the winding up stage, against the potentially harsh effect of 21 day time limit for challenging a statutory demand.

[19]. In paragraph (6) of the affidavit in support sworn on 07/09/02022 Sera Nicholls says:

(6) *"That I was served with the statutory demand and took it to my solicitor but we were out of time in making in application to set aside the demand."*

[20]. I cannot accept that as an explanation for the purposes of the present proceedings.

[21]. It has been common ground that 'SLC' served the statutory demand on 16.03.2022. Any application to set it aside had to be filed and served on SLC within 21 days, i.e., on or before 06.04.2022.

[22]. The statutory demand emphasizes, in a part of the demand that:

AND FURTHER TAKE NOTICE that in the event that the company neglects within twenty-one (21) days after service of this notice upon it to pay the sum demanded or to secure or compound for it to the satisfaction of SAMBHU LAL CONSTRUCTION (FIJ) LTD a limited liability company having

its registered office at Tavulomo, Savusavu, will entitle SAMBHU LAL CONSTRUCTION (FIJI) LTD under Section 515 of the Companies Act 2015 to present a petition to the High Court of Fiji for the winding-up of the Company upon the grounds that the company is unable to pay its debts.

UNLESS THEREFORE the above amount is paid to A.K.SINGH LAW (176/184 Renwick Road, Suva City, Fiji Islands) within twenty one (21) days from the date of service this notice on you; it is intended to present a petition to wind up the Company without further notice or warning.

[23]. I am not satisfied that Ms Sera Nicholl's evidence provides an adequate or satisfactory explanation for why no step was taken to set aside the demand. If the kind of inattention, want of care, inactivity and lack of urgency displayed by 'PPS' could provide a satisfactory explanation for a failure to comply with or set aside a statutory demand, the statutory scheme in relation to statutory demands would be significantly undermined. **I conclude that there is virtually no sufficient explanation in affidavit form for the failure to apply to set aside the demand**.

(E) IS THE DISPUTE CONCERNING THE DEBT MATERIAL TO 'PPS' SOLVENCY?

[24]. By the time an application for leave under Section 529 of the Companies Act is made, the company will be presumed to be insolvent and will have the burden of proving that it is not. The onus is squarely placed upon "PPS" to rebut the presumption of insolvency that follows from an unmet statutory demand not set aside. Furthermore, in order to satisfy the threshold requirement of a court granting leave under section 529 the court must be satisfied that the ground, here that the debt upon which the statutory demand is based, is pivotal to the PPS solvency.

[25]. I should first refer to the applicable legal principles before turning to the evidence adduced as to the matter. There is a dispute in the authorities about the appropriate test to be applied in determining whether the relevant ground (the dispute concerning the debt) is relevant to the solvency of the company seeking to oppose the winding up application.

[26]. On the one hand there are authorities which are said to adopt a strict or narrow approach[3]. This approach is said to require an application for leave under Section 529 to prove that for a dispute concerning the debt to be material, it must be "the difference between solvency and insolvency", or "pivotal", "crucial" or "determinative of solvency". That would require proof that if the disputed debt exists then the company will be insolvent, and that if the debt does not exist then the company will be solvent. **Swift Pty Ltd v Glowbind Pty Ltd** (supra) is usually seen as the origin of the "strict" or "narrow" approach.

[27]. On the other hand there are authorities that are said to favour a broad or less strict approach[4]**.** This approach is said to be that the disputed debt need not be determinative of the company's solvency. Rather, materiality will be established if there is evidence that the company would ***undoubtedly*** be insolvent if the debt was owed, as well as evidence that it "might be" solvent if the debt is not owed.

[28]. In Ewen Stewart, White J put the test in the following terms;

> *In short, the existence or non-existence of the plaintiff's debt is not material to proving that the company is solvent where the company claims it is solvent, even if it owes the debt. It does not follow that all questions of a company's solvency are to be advanced to the stage at which leave is sought under s459S, so that a company must then establish by the fullest and best evidence that it is solvent if it does not owe the disputed debt. A finding of the existence or non-existence of the debt will be pivotal to a decision on solvency at the s 459S stage, if the company might be found to be solvent if the debt does not exist. That would establish materiality for the purposes of s 459S(2).*

[29]. Even the more generous approach adopted by White J seems to require that, to establish the materiality of a finding of the existence or non-existence of the debt under Section 529 of the Companies Act 2015 there must be a ***possibility*** that the relevant company would be found to be solvent if the debt did not exist.

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[3] HVAC Construction (Qld) Pty Ltd v Energy Equipment Pty Ltd (2002) FCA 1638
*Grant Thornton Services (NSW) Pty Limited v St. George Wholesale Distributors Pty Ltd (2008) FCA 1777
*Perpetual Nominee Ltd v N A Investment Holdings Pty Ltd (2011) NSWSC 282
*Switz Pty Ltd v Glowbind Pty Ltd (2000) NSWCA 37
* Web Wealth Pty Ltd v helimount Pty Ltd (2006) FCA 1376.

[4] *Radiancy (Sales) Pty Limited v Bimat Pty Limited (2007) NSWSC 962
*Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No.s) (2011) NSWSC 113

[30]. At the Section 529 stage, the company is not required to lead the "fullest and best evidence" of its solvency. It is unlikely that the materiality requirement in Section 529 can be satisfied by mere assertion of solvency or by conjecture about what further evidence concerning solvency might be led at the hearing of the winding up application.

[31]. In considering what is meant by the "solvency" of a company, the Full Court of South **Australia in Powell & Anor**[5] said (at pp 600 -601):

> *(1) Whether or not a company is insolvent at a given point in time is a question of fact to be determined by the trial judge. Expert evidence may be of assistance, but it is not conclusive:* ***Sandell v Porter*** *[1966] HCA 28; (1966) 115 CLR 666 [at 670-671]* ***(Sandell).***
>
> *(2) The conclusion of insolvency must be derived from a proper consideration of the company's financial position, in its entirety, based on commercial reality. Generally speaking, it ought not to be drawn simply from evidence of a temporary lack of liquidity:* ***Sandell Pegulan Floor Coverings Pty Ltd v Carter*** *(1997) 24 ACSR 651. Regard should be had not only to the company's cash resources immediately available, but also to moneys which it can procure by realisation by sale, or borrowing against the security of its assets, or otherwise reasonably raise from those associated with, or supportive of, it. It is the inability, utilising such resources as are available through the use of assets or which may otherwise realistically be raised to meet debts as they fall due which indicates insolvency: cf Sandell at 670; ...*
>
> *(3) ...*
>
> *(4) It is not appropriate to base an assessment on the prospect that the company might be able to trade profitably in the future, thereby restoring its financial position. The question is whether it, at the relevant time, is able to pay its debts as they become due – not whether it might be able to do so in the future, if given time to trade profitably:* ***Sheahan v Hertz Australia Pty Ltd*** *(1995) 16 ACSR 765 at 769 [****Bank of Australasia v Hall*** *(1907) 4 CLR 1514-1528].*

[5] [2001] 37 ACSR 589

[32]. The Honourable Justice Besanko in the Federal Court of Australia in ***Web Wealth Pty Ltd v Helimount Pty Ltd***[6] cited with approval a decision of Weingberg J in ***ACE Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd***[7] . In that matter Weinberg J said (excluding from the citation the authorities to which His Lordship referred):

i. *The authorities which govern the operation of s 459G of the Corporation Law seem to me to establish the following propositions:*

ii. *The respondent is presumed to be insolvent and as such bears the onus of proving its solvency: ...*

iii. *In order to discharge that onus the Court should ordinarily be presented with the "fullest and best" evidence of the financial position of the respondent: ...*

iv. *Unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative of solvency. Nor are bald assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared: ...*

v. *There is a distinction between solvency and a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due, must be considered in determining solvency: ...*

vi. *The adoption of a cash flow test for solvency does not mean that the extent of the company's assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account: ...*

vii. *The question of solvency must be assessed at the date of the hearing,. However, this does not mean that future events are to be ignored: ...*

[6] [2006] FCA 1376
[7] [1999] FCA 728

viii. *It is no abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, or because there may be alternative means available to the applicant to vindicate its rights: ...*

[33]. The Full Court of New South Wales had cause to consider s 459S of the Corporations Act **in the matter *of Switz Pty Ltd v Glowbind Pty Ltd*[8].** In that matter Spigelman CJ reviewed S 459S and the authorities at the time. His Lordship says in paragraphs 53 – 56 of his judgment, with which the other members of the Court agree;

[53] By the time an application by s 459S is made, the company will be presumed to be insolvent and will have the burden of proving that it is not. In my opinion s 459S(2) directs attention, in part, to what it is that the company intends to prove and how it intends to prove it. If the company is not prepared to contemplate the possibility that its assertion of solvency is subject to qualification, then court cannot be "satisfied" of the mandatory precondition in s 459S(2). An objective element is introduced by the word "material" but that can only be determined after identifying the company's contentions.

[54] If, as here, the company intends to prove that it is solvent whether or not a debt is payable, then with respect to the ground based on dispute about the debt, the test of materiality to it "proving" its solvency, cannot be satisfied.

[55] The process of proving solvency is not some kind of forensic game. Solvency is a matter peculiarly within the knowledge of the company. The primary source of information on the solvency of the company must be the company itself.

[56] It may well prove to be the case that whether or not a particular debt is owing is material, indeed crucial, to a company being able to establish its solvency. However, if the company itself is not prepared to mount a case which contemplates that as a possibility, then it is not open to the court to be "satisfied" in the sense required by s 459S(2) on the basis that the

[8] [1999-2000] 33 ACSR 723

company should be protected from itself. As I have said, the fact that the company does intend to so contend would not determine the issue of whether the disputed debt is "material", let alone whether leave should be granted under s 459S(1)...

[34]. The threshold issue is whether "PPS" has established materiality. The authorities show that "material" means that an applicant, under section 529, must show that the debt in respect of which it is seeking leave is pivotal to the question of solvency. That is, the debtor must demonstrate that if the debt exists then the company will be insolvent and if the debt does not exist, then the company will be solvent. That is the better reading of the reasons of Spigelman CJ in **Switz Pty Ltd v Glowbind Pty Ltd** (supra). The Full Court of the Supreme Court of Western Australia in **Bayview holdings Pty Ltd (*in liq*) v Zan Holdings Pty Ltd**[9] adopted a somewhat liberal approach to materiality. Spigelman CJ did not propose to follow the decision in Bayview Holdings (see page 671). A fair reading of the reasons of the Chief Justice is that the proper approach to materiality is the narrow one.

[35]. In considering this matter, I adopt the narrow test.

[36]. 'PPS', having failed to set aside the statutory demand served upon it by 'SLC', is presumed to be insolvent. In order to avoid an order that 'PPS' be wound up in insolvency, it must rebut the presumption, and prove that it is solvent. 'PPS' is presumed to be insolvent and as such bears the onus of proving its solvency[10].

[37]. In order to discharge that onus the court should ordinarily be presented with the 'fullest and best' evidence of the financial position of 'PPS'[11].

[38]. The question of solvency must be assessed at the date of the hearing. However, this does not mean that future events are to be ignored[12].

[39]. Sera Nicholls, the General Manager of 'PPS' deposed as follows at paragraph [07] of the affidavit in support sworn on 07.07.202.

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[9] unreported, Supreme Court of Western Australia, Ipp, Wallwork and Steytler JJ, 19-10.1998

[10] Elite Motor Campers Australia v Leisureport Pty Ltd [1996] 22 ACSR 23p per Spander J, Commissioner of Taxation v Simionato Holdings Pty Ltd [1997] 15 ACLC 477 per Mansfield J.

[11] Commonwealth Bank of Australia v Begonia [1993] 11 ACLC 1075 at 1081 per Hayne J.

[12] Leslie v Howship Holdings Pty Ltd [1997] 15 ACLC 459 at 466-467 per Sackville J.

(7). *That we seek leave of the court to file our opposition to the winding up application as we need to prove to the court that we are solvent and we are still trading as a company which was hired by the applicant to finish the project at the Fiji National University in which the applicant still owe outstanding debt to our company.*

[40]. 'PPS' **did not tender** any (1) audited accounts (2) verified claims of ownership (3) valuation of assets (4) bank statements (5) cash flow statement to establish its financial position.

[41]. The presumption of insolvency has not, therefore, been rebutted.

(F) SHOULD THE PPS BE WOUND UP IN INSOLVENCY?

[42]. There is a general principle that a winding up order will not be made on a debt which is bona fide in dispute, provided that the dispute is based on some substantial grounds[13].

[43]. However, 'PPS' is unable without the leave of the court to rely upon the contention that there is a genuine dispute between SLC and PPS as to the existence of the debt. That was a ground which PPS could have relied upon for the purposes of an application by it for the demand to be set aside, had such an application been made within the requisite period. Leave is only to be granted pursuant to section 529(2) of the Companies Act, 2015 where the court is satisfied that the debt in respect of which it is seeking leave is pivotal to the question of solvency. That is, PPS must demonstrate that if the debt exists then PPS will be insolvent. This mandatory pre-condition for the exercise of the discretion under Section 529 of the Companies Act, 2015 is not satisfied by 'PPS'. Therefore, PPS cannot rely on the alleged dispute as to the existence of the debt to oppose the application for an order that it be wound up.

[44]. 'PPS' is presumed to be insolvent unless it proves, to the requisite civil standard, that it is able to pay all its debts as and when they become due and payable. 'PPS' has failed to discharge the onus which rested upon it proving that it is solvent. It is therefore to be treated as being insolvent by reason of the statutory presumption created by the Act.

[13] Mibor Investments Pty Ltd –v- Commonwealth Bank of Australia [1994] 2 VR 290 at 293

[45]. The evidence, apart from the presumption does not, however, demonstrate that PPS is insolvent. It is not in the public interest that an insolvent company should continue trading. In the case before me, rather than presumed insolvency, no actual insolvency has been found.

[46]. As a general rule an applicant is entitled to a winding up order against a company which has failed to comply with a statutory demand.

[47]. The court has a duty when considering whether to make an order for the winding up of the company to have regard not only to the interests of the applicant creditors, particularly those whose are unsecured[14].

ORDERS

[1]. I decline leave pursuant to Section 529 (2) of the Companies Act, 2015.

[2]. I adjourn the remaining part of the proceedings relating to the winding up of 'Plumbing & Property Services PTE Ltd' for a period of fourteen days, until 20th October, 2022.

[3]. If the sum of FJD 329, 355.36 [being the amount said to be due and payable to the creditor pursuant to the statutory demand] is paid by that time, the application to have the company wound up will stand dismissed.

[4]. If on the other hand, that sum is not paid by that time, I will on 20.10.2022 order forthwith that 'Plumbing & Property Services Pte Ltd' be wound up.

Jude Nanayakkara
JUDGE

High Court - Suva
Thursday, 6th October, 2022

[14] Re Presha Engineering (Aust) Pty Ltd [1983] 1 ACLC 675 At 677 Per Murphy J