

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBM 12 of 2022**

**IN THE MATTER** of a Statutory Demand taken out by **OFFICE TECH FIJI PTE LIMITED t/a SOUTH PACIFIC BUSINESS SYSTEMS** against **JKEVI ENGINEERING (FIJI) PTE LIMITED** and served on it on 25<sup>th</sup> February, 2022.

**AND**

**IN THE MATTER** of an application by the Applicant under Section 516 of the Companies Act 2015.

**BETWEEN:** **JKEVI ENGINEERING (FIJI) PTE LIMITED** a limited liability Company having its registered office at Level 1, Sri Murgan Building, Nadi Back Road (“the Company”).

**APPLICANT**

**AND:** **OFFICE TECH FIJI PTE LIMITED t/a SOUTH PACIFIC BUSINESS SYSTEMS** a company incorporated in Fiji and having its registered office at Shop 5 QBE Arcade, Victoria Parade, Suva.

**RESPONDENT**

Appearances: Ms. Chand for the Applicant  
Mr. Heritage for M. A Khan Esq. for the Respondent  
Date of Hearing: 09 September 2022  
Date of Ruling: 18 October 2022

**RULING**

1. On 15 March 2022, JKeVi Engineering (Fiji) Pte Limited (“JKPEL”) filed an Originating Summons pursuant to Section 516 and 521 of the Companies Act 2015 seeking the following orders:

- (1) that the Statutory Demand issued by the Respondent through its Solicitors under Section 515 of the Companies Act 2015 and served on the Applicant on 25<sup>th</sup> February, 2022 be set aside as the alleged debt is genuinely disputed.
- (2) that all winding up proceedings pertaining to the execution of the same be wholly stayed pending the determination of this application.
- (3) that the Applicant be granted extension of time to file and serve the Originating Summons and the Affidavit in Support, if required;
- (4) that the Respondent pay the Applicant costs of and incidental to the application; and
- (5) such other order as the Court deems just and expedient in the circumstance.

2. The Originating Summons is supported by an Affidavit of Ronald Deo sworn on 15 March 2022. Below are the key facts which Deo deposes in paragraphs 4 to 11:

- (a) JKPEL was served a statutory demand on 25 February 2022 seeking payment of \$178,090.99 together with interest at the rate of 5% on the balance owing and \$10.00 administration fee.
- (b) the alleged debt is dated back to 30 December 2015. However, JKPEL was only registered on 30 July, 2019. As such, JKPEL could not have had any dealings with the Respondent prior to its date of registration.
- (c) JKPEL had no contractual obligations, transactions and/or dealings with the Respondent. Rather, there was another company by the name of J Kevi Refrigeration & Air Conditioning Services Limited (“JKRACSL”) which had dealt with the Respondent.
- (d) JKPEL and JKRACSL are separate entities. The former will not be liable for any dealings of the latter.
- (e) aside from the above, the part of the Demand relating to a debt which allegedly accrued between 30 December 2015 to March 2016, is barred under the Limitation Act.
- (f) JKPEL is a prominent and substantial company. It has been in active business for almost three years now. The company has substantial assets and is not insolvent and is able to pay all its legitimate debts.
- (g) the Statutory Demand threatens JKPEL as it exposes the company to an application for a winding up order if the Statutory Demand is not stayed, even though JKPEL genuinely disputes the debt.
- (h) the Statutory Demand made is untenable and is an abuse of process and is highly irregular.

3. On 11 May 2022, the Respondent filed an affidavit of Rahul Ravnit Rajesh in opposition to the application. The key facts which Rajesh deposes in paragraphs 4 to 13 are:
- (a) the amount of \$178,090.99 stated in the Demand is inclusive of the principal amount owed plus 5 percent interest compounded monthly and a \$10.00 administrative fee per month.
  - (b) this figure is known by and agreed to JKPEL. It is reflected in JKPEL's Account Statement.
  - (c) JKPEL has always represented to the Respondent that they were in fact J Kevi Group. This was reflected in their email correspondence and Purchase Order, Account Statements and receipts.
  - (d) on 26 March 2020 at 4.30pm, JKPEL confirmed via its email [sales@jkgroup.com](mailto:sales@jkgroup.com) that J Kevi Engineering that they will be closing some operation and reduce spread of Covid-19.
  - (e) earlier in 2018, the Respondent received an email from a Mr. Navin Kumar from JKPEL's Sales & Marketing Department. Kumar was discussing repairs to the printers that they had purchased for their Engineering Company. As such they are liable and should be liable for the cost of our service. The same email address mentioned above is again used to confirm that they act for J Kevi Engineering.
  - (f) the Limitation Act does not apply because the last payment they did was by Bred Bank Cheque Number: 1554, 1845 receipted under Receipt Number 13088 and 16003 respectively which was made on 19/09/17 just some 4 years 4 months ago. The accumulated debt for 2015 onwards was paid in 2017.
  - (g) the debt in question are owed by JKPEL for lawful services provided to them.
  - (h) the true financial position of JKPEL cannot be determined form any document filed.

### COMMENTS

4. Section 516 provides as follows:

516.—(1) A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days—

- (a) an affidavit supporting the application is filed with the Court; and
- (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the Company.

5. The normal grounds employed to support an application to set aside a statutory demand are set out in section 517 of the Companies Act 2015. These are:

- (a) that there is a genuine dispute between the Company and the respondent about the existence or amount of a debt to which the demand relates (section 517(1)(a)).
- (b) that the Company has an offsetting claim (section 517(1)(b)).
- (c) that there is a defect in the demand, substantial injustice will be caused unless the demand is set aside (section 517(5)(a)).
- (d) there is some other reason why the demand should be set aside (section 517(5)(b)).

**IS THERE A GENUINE DISPUTE ABOUT THE DEBT?**

6. As to whether or not there is a genuine dispute, Nanyakarra J on **Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd** [2020] FJHC 1025; HBM 36.2020 (11 December 2020) said as follows at paragraph 7:

**Whether a genuine dispute is established for the purposes of Section 517(1)(a) of the Companies Act, 2015?**

(07) 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 : In **Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd**, the Full Court of Federal Court held, a “genuine dispute” must be bona fide and truly exist in fact, and the grounds for that dispute must be real and not spurious, hypothetical, illusory or misconceived.

(08) In **CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd**, 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.”*

(09) In **Roadships Logistics Ltd v Tree**, 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.”*

(10) In ***MNWA Pty Ltd v Deputy Commissioner of Taxation***

*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 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.***

(11) It is important to remember that the threshold criteria for establishing the existence of a genuine dispute to the debt is a low one.

7. In ***Fitness First Australia Pty Ltd v Dubow***, 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 these [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.*

8. In ***Eyota Pty Ltd v Hanave Pty Ltd***, 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 [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....

9. In *Fitness First* (supra) at 127, Ward J cited *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd* (N.2) 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 on the debtor (*Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452; *Eyota*).

## **CONCLUSION**

10. I am of the view that there is a genuine dispute as to which entity is actually indebted to the applicant. I am also of the view that this is hardly the forum to determine the many issues raised in the affidavits. Having said that – the argument that the applicant was not registered at the time the debts were incurred, and therefore could not have been liable for

the debt in question – potentially shifts the exposure over the debt, personally, to all person(s) with whom the respondent dealt with in relation to the transactions involved.

11. Accordingly, the application to set aside statutory demand must succeed. Costs to the applicant which I summarily assess at \$800-00 (eight hundred dollars only).



Anare Tuilevuka  
**JUDGE**  
Lautoka

**18 October 2022**