

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBE 48 of 2022

Changtong Seafood Pte Limited

Plaintiff

v

Donghae Industrial (Fiji) Pte Limited

Defendant

Counsel: Mr Ashneel Nand for the plaintiff
Mr N. Nambiar with Ms D. Prakash for the defendant
Date of hearing: 1st February, 2023
Date of Judgment: 23rd May, 2023

Judgment

1. The plaintiff seeks to set aside a statutory demand of September, 2022, issued by the defendant.
2. The underlying facts are not in dispute. The plaintiff agreed to purchase 100% shares of Fiore Marine Pte Ltd, (FMPL) from Mr Kyeong Yeol Baek, (KYB) for USD \$340,000.00 by an Agreement for Sale and Purchase, (ASP) of 4th February, 2020. The assets of FMPL comprised of a shipping vessel. Subsequent to the ASP, a Deed of Settlement & Indemnity, (DSI) was entered into between KYB and the plaintiff on the same day. The proceeds of the sale was to be paid to the defendant, (its agent) within 12 months. On 7th June, 2022, KYB executed another agreement with the plaintiff incorporating terms of settlement.

3. The plaintiff, in its affidavit in support of its originating summons states that the defendant is not privy to the terms of settlement. The plaintiff further states that it provided KYB with 12 months postdated cheques on every 7th day of the month. Since the defendant accepted late payment and accounted for same, it is assumed that the time frame for late payment for September was accepted. The solicitor, had unknown to the plaintiff prepared the transfer of shares in a sum of \$1,000 rather than in the sum of USD\$340,000. The statutory demand is null and void.
4. The defendant's affidavit in opposition states that the terms of settlement are legally binding on all parties concerned. The plaintiff is privy to the agreement. The Deed of Settlement stipulates that in the event of a default, the entire sum becomes due and payable. Since the plaintiff has defaulted in its payments, the defendant demands the total sum of \$377,409.51.

The determination

5. It is not in dispute that there is a debt owed by the plaintiff arising from the ASP. The question is whether there is a genuine dispute or an offsetting claim on the amount of the debt in terms of section 517 of the Companies Act.
6. Section 517 states:
 - 1) *....where, on an application to set aside a Statutory Demand, the Court is satisfied of either or both of the following—*
 - 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;*
 - b. *that the Company has an offsetting claim.*
 - 2) *The Court must calculate the substantiated amount of the demand*
 - 3) *If the substantiated amount is less than the statutory minimum amount for a Statutory Demand, the Court must, by order, set aside the demand.*(emphasis added)

7. The plaintiff contends that it was a condition subsequent under the DSI for KYB or the defendant to provide a survey certificate and Fiji Fishing license. It stopped making repayments, since these conditions were not met.
8. The defendant's response is that it exercised all due diligence to meet the conditions in the DSI. The Ministry of Fisheries and Forests did not grant the license.
9. The vendors undertook to provide the plaintiff with the survey certificate and Fiji Fishing license within 1 month by clause 13 of the DSI.
10. The plaintiff has filed Civil Action 261 of 2022 against KYB and the defendant for making fraudulent misrepresentations that they would provide the fishing license, which it contends in its supporting affidavit was "*the core reason*" it entered into the ASP.
11. The statement of defence filed in that case states that the licence lapsed "*due to unreasonable delays*" by the plaintiff. The approval of licenses is discretionary to the Ministry.
12. The plaintiff also contends that KYB or the defendant were also responsible for all minor repairs on the vessel in terms of clause 14 of the DSI. It has incurred \$449,215.18 to maintain and carry out minor repairs.
13. Ms Prakash, co-counsel for the defendant pointed out quite correctly at the hearing that there is no evidence of that expense.
14. On the matter of the fishing license, I find that the writ in Civil Action 261 of 2022 was filed on 9th September,2022. The statutory demand of September,2022, (without a date) was admittedly served on 3rd October,2022.
15. The debt was disputed at the time the statutory demand was served.
16. In my view, there is an issue requiring investigation.

17. I am satisfied that the plaintiff has established that there is a genuine dispute in terms of section 517(1)(a) in the light of the provisions of the DSI and the pleadings filed in Civil Action 261 of 2022.

18. In *Fitness First Australia Pty Ltd v Dubow*, [2011] NSWSC 531 Ward J stated as follows:

If there is any factor that on reasonable grounds indicates an arguable case it must find a genuine dispute exists The debt in dispute must be in existence at the time at which the statutory demand is served on the debtor...

*....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] NSW 471: (2000) 34 ACSR 301, Barrett J said at (451):*

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 Investment Pty Ltd v Commonwealth Bank of Australia* [1994] Vic Rp 61; [1994] 2 VR 290. (emphasis and underlining mine)

19. In *Bendio and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd*, [2017] VSCA 51 the Court stated that:

In determining an application under s 459G the court's function is to identify whether a genuine dispute or offsetting claim exists, not to determine any such dispute or claim. This means that the applicant under s 459G is required only to establish a "plausible contention requiring investigation" of the existence of a genuine dispute or claim. The application will fail only if the contended dispute or claim is "so devoid of substance that no further investigation is warranted". The resolution of the application should generally not involve the deciding of disputed questions of fact, but might require the determination of short points of law. (emphasis added)

20. I would also note that the initial agreement provides that any dispute arising out of the ASP would be referred to arbitration.

21. The application to set aside the statutory demand succeeds

22. **ORDERS**

- a. The statutory demand issued by the defendant to the plaintiff is set aside.
- b. I make no order as to costs.

A.L.B. Brito-Mutunayagam

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JUDGE
23rd May, 2023

