IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Companies Action HBE No. 37 of 2024

BETWEEN	:	**JOKHAN REALTORS PTE LIMITED** **Applicant**
AND	:	**WASU SIVANESH PILLAY & RONALD RAJESH GORDON T/A GORDON & CO** **Respondent**
Counsel	:	Mr M Saneem & Ms S Nisha for Applicant Mr W Pillay for Respondent
Hearing	:	4 November 2024
Judgment	:	27 January 2025

JUDGMENT

[1] The Applicant company is in the business of providing real estate services, including property management. The Respondent is a law firm practicing out of a property situated on Vitogo Parade ('the property') which it leases. The Applicant manages the property on behalf of the owner.[1]

[2] The dispute between the parties pertains to the rental monies payable on the lease. The Respondent has delivered a statutory demand on the Applicant seeking reimbursement of rental monies previously paid which the Respondent contends that the Applicant

[1] The Respondent disputes that the Applicant has legal authority to manage the property.

had no authority to receive. The Applicant has brought this proceeding seeking to set aside the statutory demand.

[3] The parties raise multiple issues, including whether the statutory demand has been properly served on the Applicant and whether the Applicant has brought this application within the time prescribed under the legislation.

Background

[4] The Respondent rents the premises at Suit 1, Level 1, 157 Vitogo Parade, Lautoka. It appears that the law firm has been situated here for several decades. The Applicant contends that it is managing this property on behalf of the owner and has been doing so since 2021. It appears that the monthly rental is $1,380.

[5] It appears that a dispute arose between the parties over the signing of a lease agreement culminating in the Applicant issuing a Notice of Termination of Tenancy in or about May 2024. Thereafter, the Respondent refused to pay any further monthly rental monies.

[6] The Applicant filed a claim with the Small Claims Tribunal on 23 July 2024, setting out the circumstances of the Notice of Termination of Tenancy and complaining that the Respondent had failed to make monthly rental repayments since May 2024, the outstanding rental arrears (plus photocopying costs) sought being $4,166. A hearing date was fixed for 6 August 2024 - it appears that the matter has since been transferred to the Magistrates Court and the Respondent has, I understand, filed a defence and counterclaim.[2]

[7] On 13 August 2024, the Respondent attempted to effect service of a statutory demand on the Applicant at its Lautoka office.[3] According to the affidavit of Ronald Rajesh Gordon dated 30 September 2024, filed in opposition to the present application to set

[2] Counsel for the Respondent confirmed the same at the hearing but a copy has not been supplied to this Court.
[3] Pursuant to s 515 of the Companies Act 2015 a statutory demand is required to be served on a company's registered office. According to the records from the Registrar of Companies, the Applicant's registered office is 104 Brown Street, Suva.

aside the statutory demand, he states at paragraph 5 that the statutory demand was hand-delivered to the Applicant at its Lautoka office on 13 August 2024. In addition, the Respondent sent an email to the Director of the Applicant Company on 15 August 2024[4] - the Respondent advised in this email that the statutory demand was delivered on 13 August '*however your office had refused to accept the same*'. The Respondent attached an electronic copy of its statutory demand.

[8] Reginald Manor Kant Jokhan states in his affidavit of 26 August 2024 that he received the statutory demand by email on 13 August 2024. A copy of this email has not been supplied and this statement is at odds not only with Mr Gordon's affidavit but the email of 15 August 2024[5] which only speaks of hand delivering the documents, not emailing them.

[9] The statutory demand itself requires setting out. It is addressed to the Applicant company, '*a limited liability company having its registered office at 1 Selbourne Street, the Fiji Club Building, corner of Tower Street, Suva, Fiji, and having its branch office at Office No. 8, Popular Building, 42 Vidila Street, Lautoka, Fiji*'.[6] The body of the document reads in part:

> ***TAKE NOTICE*** *that* ***WASU SIVANESH PILLAY*** *and* ***RONALD RAJESH GORDON*** *trading As Gordon & Co of Suite 1, Level, 157 Vitogo Parade, Lautoka* ***HERBY DEMANDS*** *from you the sum of FJD $49,680* ***[Forty Nine Thousand Six Hundred and Eighty Dollars only]*** *exclusive of interest and costs being the sum due and owing by you to* ***WASU SIVANESH PILLAY*** *and* ***RONALD RAJESH GORDON*** *trading as Gordon & Co for payments of money received without authority and/or authorization as required under section 54 and 55 of the Real Estate Agents Act 2006, the full details and particulars of which have been provided to you and/or are well known to you and/or ought to be known to you together with legal costs in the sum of $650* ***[Six Hundred and Fifty Dollars]***.

[4] Annexure RMKJ4 of the affidavit of Reginald Manor Kant Jokhan dated 26 August 2024.
[5] Ibid.
[6] It is noteworthy that the Respondent was aware that the Applicant's Lautoka office was not its registered office although has not correctly identified the registered office.

YOU ARE HEREBY REQUIRED *to pay the sum of FJD $49,680....*

TAKE NOTICE *that the Companies Act 2015 entitles* ***WASU SIVANESH PILLAY*** *and* ***RONALD RAJESH GORDON*** *trading as Gordon & Co to present an application for the winding up of* ***JOKHAN REALTORS PTE LIMITED*** *to the High Court of Fiji upon the grounds that* ***JOKHAN REALTORS PTE LIMITED*** *is unable to pay its debts or that it is insolvent or that it is just and equitable that it should be wound up.*

UNLESS THEREFORE *the above amount together with solicitors costs is paid within 21 days (Twenty One Days) of the date of the service of the notice given you* ***WASU SIVANESH PILLAY*** *and* ***RONALD RAJESH GORDON*** *trading as Gordon & Co intends to present an application to Wind up* ***JOKHAN REALTORS PTE LIMITED*** *without further notice to you.*

[10] The statutory demand was accompanied with a lengthy 8-page letter from the Respondent dated 12 August 2024 setting out the basis for the amount allegedly owed by the Applicant. In short, the Respondent questioned the Applicant's authority to collect rent from the Respondent – the Respondent's position being that the Applicant did not have proper authority from the owner of the property occupied by the Respondent. A number of questions are posed to the Applicant for its response, including information on its authority to collect the rent. The amount identified as being a debt owed by the Applicant to the Respondent, being $49,680.00, is the amount of rental monies the respondent claims it has paid to the Applicant over the years.

Present proceedings

[11] On 26 August 2024, the Applicant filed the present Originating Summons to set aside the statutory demand with a supporting affidavit.[7]

[7] Being the affidavit by Mr Jokhan dated 26 August 2024.

[12] The High Court registry released the documents on 4 September 2024.[8] On the same date at 10.04am, prior to the release of the documents, the Applicant's solicitors emailed a letter to the Respondent informing them of the application to set aside the statutory demand and advising that they were awaiting issuance of the documents by the High Court. The same day, after the High Court registry had released the documents to the Applicant, its solicitors emailed copies of the documents to the Respondent at 4.06pm. The physical documents were served on the Respondent on 6 September 2024.

[13] The Respondents filed an affidavit in opposition on 2 October 2024, being the affidavit by Mr Gordon dated 30 September 2024. Mr Jokhan executed an affidavit in reply for the Applicant on 16 October 2024.

Respective positions of the parties

[14] The Applicant seeks to set aside the statutory demand on the basis that:

i. The statutory demand has not been properly served on its registered office as required under s 515 of the Companies Act 2015.

ii. The Applicant is solvent.

iii. There is a genuine dispute between the parties regarding the alleged debt.

[15] The Respondent's position is as follows:

i. They argue that the statutory demand was properly served.

ii. The Applicant has failed to serve its setting aside application within the requisite 21 days under s 516 of the Companies Act and, therefore, there is no jurisdiction for this Court to entertain the application.

iii. There is no proper basis to set aside the statutory demand even if the application by the Applicant has been properly made.

[8] The return date on the documents being 11 September 2024.

Decision

[16] The following issues arise for determination in this case:

i. Whether the statutory demand was properly served on the Applicant in accordance with s 515 of the Companies Act 2015?

ii. If so, whether the Applicant has filed and served its setting aside application within the requisite 21 days under s 516 of the Companies Act? If not, does the Court have discretion to enlarge the time and, if so, should the Court exercise its discretion here?

iii. If the application to set aside the statutory demand is properly before the Court, has the Applicant established a basis for the Court to set aside the statutory demand?

Was the statutory demand properly served on the Applicant?

[17] Section 515 of the Companies Act reads:

> *Unless the contrary can be proven to the satisfaction of the court, a company must be deemed to be 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;[9]

[18] Section 515(a) expressly requires the creditor to serve the statutory demand on the company '*by leaving it at the registered office of the company*'. The Respondent does not dispute that the Applicant's registered office is 104 Brown Street, Suva. They also do not dispute that the statutory demand was not left at the Applicant's registered office.

[19] Nevertheless, the Respondent argues that it's delivery of the statutory demand on 13 and 15 August 2024 satisfies the requirements under s 515. The Respondent appears to suggest that they were unaware of the Applicant's registered office and that the Applicant is at fault for not recording its registered office on its web page. The Respondent is a law firm and will be aware that the details of a company's registered office is available to the public from the Registrar of Companies. I, therefore, do not accept this explanation by the Respondent.

[20] The Respondent's main argument, however, is that there was '*effective informal service*' on the Applicant as per the delivery on 13 and 15 August. The Respondent relies on the Australian decision of *Advanced Mining & Civil Pty Ltd. v Wescat Plant Hire Pty Ltd* [2016] WASC 413. The Supreme Court of Western Australia (Acting Master Strk) was considering whether there was effective service of a statutory demand by the creditor and endorsed the principle of effective informal service. One of the principles being, '*where a document, not served in a prescribed mode, comes to the attention of the sole director of a company it will be presumed, unless a strong case to the contrary is shown, that the director is the responsible officer and that service is good*'.[10] The Respondent says that the statutory demand came to the attention of the sole director of the Applicant, being Reginald Manor Kant Jokhan, on 13 and 15 August 2024 and thus the company had been effectively served.[11] The Respondent points out that the purpose of service is to make the party aware of a matter and there can be no question that this occurred with the delivery made.

---

[9] My emphasis.
[10] At 60.
[11] There are, in fact, two directors of the Applicant, the other director being Reginald Ravikant Jokhan – who is also the Secretary of the company.

[21] Counsel argues that the equivalent of s 515 in Australia is similarly worded. I am not satisfied that that is correct. It appears that the regime considered by the Supreme Court of Western Australia is as contained in their Corporations Act 2001. The provisions pertaining to winding up and the use of a statutory demand can be found at Part 5.4 of that legislation. A creditor is required to serve the demand on the company but unlike s 515(a) of Fiji's Companies Act, there is no reference to service involving leaving the statutory demand at the company's registered office. Indeed, Acting Master Strk expressly noted at 58 that section 459G *'does not deal with what is service'*. Section 459E specifies the legal requirements for a statutory demand, emphasizing that the same is required to be served on the company but again providing no details as to what constitutes such service. Certainly, I am unable to find in the Australian legislation the words that are used at s 515(a), ie *'by leaving it at the registered office of the company'*.

[22] Furthermore, not only is there an absence of the material words found under s 515(a) but, unlike Fiji's Companies Act 2015, the Corporations Act 2001 contains a definition at s 109X of service on a company. It is evident from a reading of *Advanced Mining & Civil Pty Ltd. v Wescat Plant Hire Pty Ltd* that Acting Master Strk placed reliance on the wording of s 109X for that court's determination as to what amounts to service of a statutory demand in that jurisdiction. Section 109X(1) provides:

> *(1) For the purposes of any law, a document may be served on a company by:*
>
> *(a) leaving it at, or posting it to, the company's registered office; or*
>
> *(b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or*
>
> *(c) if a liquidator of the company has been appointed--leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or*
>
> *(d) if an administrator of the company has been appointed--leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC; or*

(e) if a restructuring practitioner for the company has been appointed--leaving it at, or posting it to, the address of the restructuring practitioner in the most recent notice of that address lodged with ASIC.

[23] In Australia, service on a company includes service on the director of the company. Given Fiji has no such provision in the Companies Act, at least counsel has not referred my attention to any such provision, I am reluctant to follow the Australian authorities on the matter unless it can be shown that their legislative picture mirrors that of Fiji. I prefer, instead, to rely on a plain reading of s 515, which is that the Respondent must serve the statutory demand at the Applicant's registered office. It is not an onerous obligation on a creditor. The registered office of the Applicant is 104 Brown Street, Suva. The statutory demand was not left at this address and, as such service, was not effected in accordance with s 515.

[24] As the Applicant has not properly been served with the statutory demand this Court has no jurisdiction to set aside the same. This finding suffices to dispose of the proceeding. However, I do wish to comment on a couple of matters that arose in this case.

Requirement to file application setting aside statutory demand

[25] Section 516 requires a company to file and serve its application to set aside a statutory demand with the High Court within 21 days after the demand is served. If the Respondent's statutory demand had been properly served on 13 August then the 21 days ended on **3 September** while the 21 days will have ended on **5 September** if service occurred on 15 August. The Applicant filed its application on 26 August, within the 21-day time frame. According to both counsel the Applicant was not permitted to serve the documents on the Respondent until the documents had been released by the registry with a return date. The documents were released by the registry on 4 September, after the time had expired for service on the Respondent if the statutory demand was served on 13 August. The Applicant had one day to effect service if the statutory demand was served on 15 August. The documents were emailed to the Respondent on 4 September but not physically delivered until 6 September 2024.

[26] The Applicant accepted that if the statutory demand had been properly served on 13 August then its present application is late. It argues that the Court has discretion under reg 115 of the Companies Regulations 2015 to enlarge the time. The Respondent argues that the Court has no discretion and relies on the decision by the High Court in *Walt Smith International (Fiji) Limited v Barrick* [2020] FJHC 634 (7 August 2020). As the Respondent notes, the High Court determined in no uncertain terms that there is no discretion available for the High Court to accept a late setting aside application irrespective whether the registry has contributed to the lateness by the timing of its release of the documents. It is worthwhile setting out the court's reasoning:

> 5. *Compliance with this section goes to jurisdiction. An application is 'made' only if the requirements of s.516 are met. I do not accept that this only becomes an issue if it is raised by the respondent, and that if the creditor does not raise the issue of timely filing and service the court somehow has jurisdiction to set aside the statutory demand. Because of the wording of s.516 an application that is not filed and served within the time limits prescribed is not 'made', i.e. there is no application that the court has jurisdiction to deal with, whatever might otherwise be the merits of the application.*
>
> 6. *The following passage from the decision of Gummow J in the High Court of Australia in* ***David Grant & Co Pty Ltd v Westpac Banking Corporation*** *[1995] HCA 43 interpreting the identical wording of section 459G the Australian Corporations Law makes the point:*
>
> > 28 *In providing that an application to the court for an order setting aside a statutory demand "may only" be made within the 21 day period there specified and that an application is made in accordance with s459G only if, within those 21 days, a supporting affidavit is filed and a copy thereof and of the applications are served, subsections (2) and (3) of s459G attach a limitation or condition on the authority of the court to set aside the demand. In this setting, the use in s459G(2) of the term 'may' does not give rise to the considerations which apply were legislation confers upon a decision-maker an authority of a discretionary kind and the issue is whether 'may' is used in a facultative and permissive sense or an imperative sense. Here the phrase "an application may be made only within 21 days" should be read as whole. The force of the term 'may only' is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s459G. An integer or element of the right created by s459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in the* ***Crown v McNeil*** *[1922] HCA 33, it is a condition of the gift in s459G(1) that subsection (2) be observed and, unless this is so, the gift can never take effect. The same is true of subsection (3).*
> >
> > 38 *This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word 'only' in s459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter and that to treat s1322 as authorising the*

court to extend the period of 21 days specified in s459G would deprive the word 'only' of effect.

The reference to s.1322 in the above passage refers to a later section of the Corporations Law that permits the court to extend time and otherwise relieve a party of the consequences of strict compliance with aspects of the act.

7. *As the High Court of Australia holds in that case, a power in the same statute to extend time will not over-ride the mandatory nature of the time limits in s459G. Even less so then is it arguable that similar provisions in rules 115 and 116 of the Company (Winding Up) Rules 2015 will allow the court to waive or extend the time limits in section 516. It is a general rule of statutory interpretation that the provisions of an Act will take precedence over the provisions of subsidiary legislation such as Rules and Regulations.*

8. *None of this is controversial or open to serious debate. In Fiji there have been a number of cases where the courts have held that the time limits in section 516 are mandatory, and that the courts have no power under the Rules to extend the time for filing an application to set aside a statutory demand, or to waive strict compliance with the time limits set out in the section. These include the decisions of Amaratunga J in* ***South Pacific Marine Limited v Price Waterhouse Coopers*** *and* ***Nawi Island Limited v Price Waterhouse Coopers*** *[2019] FJHC 119 and 118 (decisions issued simultaneously) which were followed by Seneviratne J in* ***Skyglory Pte Limited v Bhawna Ben*** *[2019] FJHC 891 and -on application for leave to appeal the earlier ruling - [2020] FJHC 161. With respect, I agree with those decisions, and, although it may be tempting fate to say so, cannot see how the conclusions they have reached on this issue might be challenged.*

9. *The strictness of the time limits in s516 need to be better understood by legal practitioners than they apparently are, and more effort taken to ensure that those time limits are adhered to, and the court's and other parties' time is not wasted on applications under s516 that are destined to fail because they are out of time. In the* ***Skyglory*** *decision the Court responded as follows to a submission that service of the application occurred after the 21 day period only because the High Court delayed the release of documents:*

The applicant submits that the delay was due to the Registry releasing the document for service after the expiration of the period of 21 days. The applicant should have known that the 21 day period prescribed by the statute is to file and serve the application. However the applicant filed its application to have the statutory demand set aside on the 19th day. It should have given sufficient time for the Registry to attend to the matter and release it for service within the period prescribed by the Act.

10. *I agree that the responsibility is on the applicant and its advisors to ensure that the time limits are complied with, but would add the following related comments. First, because an application under s.516 is an originating (rather than interlocutory) motion/application O.8., r.3(4), which provides:*

Issue of the notice of an originating motion takes place upon its being sealed by an officer of the Registry.

appears to require that it is filed before it can be served. Hence, solicitors responsible for the conduct of such an application need, when preparing and filing the application, to allow themselves time for service after the motion is processed by the court staff and allocated a hearing date. Second, if the advisors don't themselves understand the mandatory nature of the time limits set out in s.516 there is little chance that they will be able to impress on the court staff the importance of releasing the application for service within the time prescribed.

11. In response to the application and affidavit of the applicant the respondent has filed two affidavits:

i. by the respondent David Barrick himself, in which he replies at some length to the affidavit of Mr Smith,

ii. by Ricky Singh (a solicitor at Young & Associates, solicitors) referring to the date of service of the statutory demand issued by Mr Barrick, and the date of service of the applicant's application to set aside the demand.

12. The affidavit of Mr Singh shows that the statutory demand was served on the applicant company on the 9th October 2019, i.e. the date of the statutory demand, while the applicant's application to set it aside was served at the Lautoka offices of Young & Associates on the 8th November 2019. There has been no challenge to what is said in this affidavit. This means that in terms of section 516(3) Companies Act the application to set aside the statutory demand had to have be filed and served on or before 30 October 2019 (i.e. 21 days after 9 October). Hence the applicant's application, filed on 7th November and served on 8th November 2019 was out of time.

[27] The above construction may result in unfairness where the company has filed a timely application under s 516 but the registry does not release the documents to be served until after the 21 days has expired – arguably the same situation that may have arisen here if the Respondent had properly served the Applicant at its registered office on 13 August 2024. Amaratunga J appears to have recognized this when suggesting the following in *My Idea Pte Ltd (trading as Five Squares) v China Navigation Co Pte Ltd (trading as Swire Shipping)* [2021] FJHC 220 (31 March 2021) at 27:

> *Section 516(3)(b) of Companies Act 2015 makes it mandatory not only to file the application within 21 days but also serve the Defendant "A copy of the application , and a copy of the supporting affidavit" .* ***If there was a delay in the registry at least 'a copy of the application 'and other documents filed in the registry could have been served with a note to***

indicate that it was yet to be issued from office, in order to comply with mandatory statutory requirements contained in Section 516 (3)(b) of Companies Act 2015 *and cannot blame the registry or other procedure for time taken, probably due to their own mistake in not following any accepted method of institution of proceeding.*[12]

[28] The authorities produced suggest that the Court has no discretion to enlarge time. I do not need to decide the issue in this case but do wish to express some reservation that on such a construction a party through no fault of their own may lose any opportunity to challenge a winding up petition simply because the setting aside application was released by the Registry after the requisite 21 days had expired.

Substance of application to set aside statutory demand

[29] The Court may set aside a statutory demand where there is a genuine dispute about the existence of the debt.[13] If I had had to determine the substantive application, I would have found in favour of the Applicant on the basis that on the present evidence I am satisfied that there is a genuine dispute between the parties. Further, I am satisfied that the Respondent's use of the statutory demand is an abuse of the process designed for winding up companies.

[30] The use of a statutory demand is a step in the process for liquidating a company that is not solvent. A company is not solvent if it is unable to pay its debts when they are due and payable.[14] A statutory demand that remains unpaid after the statutory period creates a presumption that the company is unable to pay its debts. It is an avenue for creditors who have genuine concerns over the solvency of the debtor and the recovery of their debt. However, as Heath JA emphasised in *Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd* [2024] FJCA (26 July 2024) at [41]:

[12] My emphasis.
[13] Section 517(1)(a) of Companies Act.
[14] Section 514 of Companies Act.

> *...a statutory demand is not a debt collection process. Its sole purpose is to create a rebuttable presumption of insolvency. If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment. Should that occur, any creditor that proceeds in that way (and possibly, in a clear case, its legal advisers)[15] may be at risk of a substantial award of costs to mark the abuse of process.*

[31] Counsel for the Respondent acknowledged that the statutory demand (and the Respondent's accompanying letter of 12 August 2024) was the first communication by the Respondent to the Applicant in respect to the alleged debt – an alleged debt based on inferences drawn that the Applicant does not have authority to collect rental monies on behalf of the Respondent's landlord. There was no earlier demand by the Respondent for this amount. This dispute is, in fact, part of a larger dispute between the parties that is the subject of litigation before the Magistrates Court. It is plainly obvious from the Respondent's letter of 12 August 2024, setting out its basis for the alleged debt that the matter is not straightforward. The fact that the Respondent sets out its position for the debt in an 8-page letter speaks for itself. Of particular concern to the Court is the Respondent's use of the statutory demand. Counsel accepted at the hearing that the Respondent had no evidence that the Applicant was unable to pay its debts and was, in fact, using the statutory demand process to test the Applicant's solvency.

Orders

[32] My orders are as follows:

i. The statutory demand has not been properly served on the Applicant and, therefore, the Court has no jurisdiction to consider the setting aside application. It is therefore dismissed.

[15] ***Hurley v McDonald*** [2002] 1 NZLR 1 (PC) at paras [45]–[47].

ii. While the application is dismissed, the Applicant has been successful and, therefore, is entitled to costs summarily assessed in the amount of $3,000 payable by the Respondent within 14 days.

.....

D.K.L Tuiqereqere

JUDGE

Solicitors:

Saneem Lawyers for the Applicant

Gordon & Co for Respondent