IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **MISC NO. 1/2013**

IN THE MATTER of the Companies Act 1955 of New Zealand (as applied in the Cook Islands by the Companies Act 1970-71)

BETWEEN **PAULA LINEEN** of Rarotonga

Petitioner

AND **VAITAMANGA HOLDINGS LIMITED** a duly incorporated company having its registered office at Rarotonga, Cook Islands

Respondent

Dates of Hearing: 19 and 22 March 2013

Counsel: Mr C Little for the Petitioner
Mrs T Browne for the Respondent

Judgment: 22 March 2013

JUDGMENT OF HUGH WILLIAMS J

[FTR 14:36:36]

[1] On its face this is a straightforward petition for the winding-up by the Petitioner of the Respondent company on the ground of its failure to comply with a Section 218 notice served on it. In fact, as outlined by counsel who have been acting for the parties involved in this proceeding for a lengthy period, the background is much more complicated than that.

[2] The formal position is that the petition was issued on the 11th January 2013. It followed the service on Vaitamanga Holdings of a Section 218 notice dated 10 December 2012. It is, of course, trite that a company which fails to comply with the terms of a Section 218 notice served on it is deemed at law to be unable to pay its debts. That is the situation which Vaitamanga should have recognised in subsequent dealings with the Petitioner.

[3] The amount owing under the Section 218 notice, $20,971.40, was in fact paid into Court very shortly before the petition was set down to be called on 19 March 2012. However, once it was accepted that the sum claimed under the notice had in fact been paid into Court the petition was discontinued save as to costs. And it is with the issue of costs that this judgment is concerned.

[4] Initially Mr Little, counsel for Mrs Lineen, sought indemnity costs totalling with disbursements $3,081.45. But between the date on which the petition was initially called and the date set down for submissions on costs, 19 and 22 March respectively, Mrs Browne for Vaitamanga had filed full submissions on the costs issue and as a result Mr Little resiled somewhat from his client's initial application to the point where in his submission, an award of 80 percent of the solicitor and client costs of the Petitioner was warranted.

[5] Mrs Browne in her submissions set out some of the background of the matter in support of her submission that the award for costs should only be $867.00. She made some submissions about disbursements and VAT.

[6] The Court only has the sketchiest outline, all as provided by counsel, of the disputes between these parties, it seems that the principal parties, the Petitioner and the Director of Vaitamanga, are octogenarian sisters who have been in dispute over the rentals which Vaitamanga Holdings receives for many years and may be in dispute over those issues in the years to come.

[7] Mrs Browne's submissions set out something of the history of the lease and sublease which underpin the question of costs in this case. She said that the terms and conditions of the lease were those normally applicable, namely $1.00 a year with 10-yearly reviews, and that the lease was assigned to Vaitamanga in July 1997. As a result of the Property Law Amendment Act 1997 the ground rental under the lease was required to be reviewed every five years and on the latest review, a decision of the Court dated 24 September 2012, the rental was fixed at $5,242.85 per annum backdated to 2005. The total arrears were then nearly $42,000 of which the Petitioner was entitled to half.

[8] Mrs Browne points to clause 8 of the lease which gives the lessor power of re-entry in the case of default and apparently suggested that course of action – merely one of a battery of remedies available to the Petitioner – should have been followed in this case.

[9] From service of the s 218 Notice, in late 2012 followed by the filing of the petition, there were negotiations between the parties essentially for payment of some part of the arrears in a lump sum and payment of the balance on a deferred payment basis. The negotiations were inconclusive as the parties were unable to agree on all the terms of the suggestion compromise, hence the issue of the petition and the ultimate payment of the sum due, apparently, in part, borrowed.

[10] In terms of costs Mrs Browne refers to the decision of Grice J in *Tini v Cook Islands Investment Corporation* which repeated the criteria as to costs appearing in the New Zealand case of *Holden v Architectural Finishes Limited* [1997] 3 NZLR 143. Those factors include the length of the hearing, the amount involved, importance to the issues, the complexity of the case, the time required for preparation, the pursuit of arguments which lack substance, unreasonable refusal to settle, unrealistic attitudes, unreasonable payments into Court and the like. That has been followed by Isaac J in *Maina Traders v Ngaoa Ranginui* 9 February 2013. Similar statements are to be found in the recent decision of the Court of Appeal in *George v Teau* (CA 2/2012 judgment 20 February 2013, para [66] ff). The Court of Appeal's decision also dealt with the circumstances when indemnity costs can be ordered which are granted, in essence, when the parties or counsel have taken actions which the Court of Appeal describes as "reprehensible".

[11] A similar clarification of when increased or indemnity costs may be justifiable is to be found in the New Zealand High Court Rules, Rule 14.6 and following and the commentary in McGechan on Procedure.

[12] Mr Little submitted that the default position is that something of the order of costs of two-thirds should be awarded with the percentage and thus the amount adjusted up and down according to the circumstances of the case. That is a broad

brush approach that can be followed although in *Tini* Grice J said the allowance for fees should be in the wide band of between 20 and 80 percent of the actual fee.

[13] In this case given that this is a dispute of long standing and given that Vaitamanga was facing the service of the Section 218 notice and was thus deemed to be incapable of paying its debts, it is a reasonable stance to take that it ought to have been more accommodating in the early part of the dispute over payment of the amount sought.

[14] Agreement having eluded the parties it was not unreasonable for the Petitioner to serve the Section 218 notice and to pursue winding-up as one of the range of remedies available.

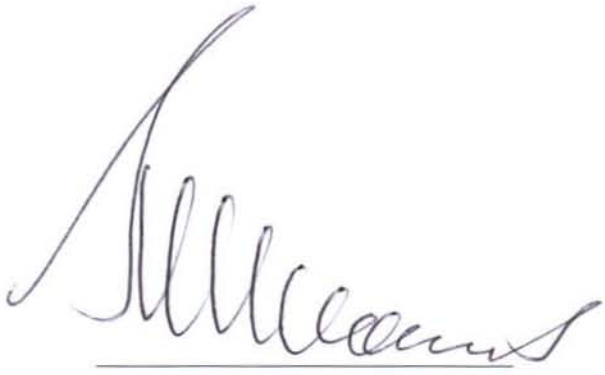
[15] Once the petition had been issued and served it was even more of the case that Vaitamanga should have recognised the difficult legal position in which it found itself and being more generous and less disputatious in terms of meeting the amount due to avoid an Order that it was incapable of paying its debts and should be wound up to be removed from the Cook Islands commercial community. In fact, it is recognised that Vaitamanga had difficulty in arranging and paying the sum demanded but nonetheless it was faced with an order or possibility of an order that might take it out of existence and would certainly result in it being unable to trade. It should have been more open to the question of settlement.

[16] In relation to the invoices of the Petitioner's solicitors the Court allows costs of $250 for the period up to the service of the Petition to wind up. That would seem a fairly standard allowance for that part of the period of the dispute.

[17] For the period from late January to the discontinuance the solicitors fees charged to the Petitioner would appear to have been approximately $3,000. In the Court's view, as already mentioned, Vaitamanga should have adopted a more urgent approach to the resolution of the matter during this period and it would be reasonable in the circumstances to allow costs to the Petitioner of $1,750 for this period.

[18] In the result therefore there will be an order that the Respondent pay the Petitioner the costs of the proceeding which are fixed in the sum of $2,000 together with disbursements as fixed by the Registrar (if remaining in dispute). It should perhaps be observed that the figures quoted for costs are ex-VAT: orders for costs not usually attracting VAT.

[19] There have been problems over the years between these parties in arranging payment and enforcing judgments and accordingly the Court directs payment of the sum allowed for costs and disbursements within three months of today's date.



Hugh Williams, J