

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0014 OF 2001S  
(High Court Civil Action No. 0234D of 1998L)

BETWEEN:

TREASURE ISLAND LIMITED

*Appellant*

AND:

RUPS INDUSTRIES LIMITED

*Respondent*

Coram:

Tompkins JA, Presiding Judge  
Davies, JA  
Ellis, JA

Hearing:

Monday, 11th November 2002, Suva

Counsel:

Mr. R.A. Smith for the Appellant  
Mr. A. Tikaram for the Respondent

Date of Judgment: Friday, 15<sup>th</sup> November 2002

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JUDGMENT OF THE COURT

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This is an appeal from an order of a Judge of the High Court of Fiji dismissing an application by the appellant, Treasure Island Ltd. ("Treasure"), for an order that the respondent, Rups Industries Ltd. ("Rups"), be restrained until judgment in proceedings 0234D/1998L from presenting any petition under the Companies Act Cap.249 to wind up Treasure or advertising any petition which may have been issued in respect of any debt alleged to be due by Treasure to Rups.

Treasure is the proprietor of the Treasue Island Resort. In 1997, it engaged Rups to renovate villas and bures in the Resort. A price per dwelling was agreed. By March 1998, the work was completed or almost completed.

On 6 April 1998, Rups sent a "Confirmation Request" to Treasure which stated inter alia:

**"This is a request for confirmation of your account with us which had a balance owing of \$333,660 as at 31 March 1998. If the balance agrees with your records, please sign the letter in the space provided below....."**

The Accountant for Treasure, Mesake Talaboko, signed the Confirmation Request under a line which read:

**"THE BALANCE SHOWN IS CORRECT."**

He returned the document to Rups.

Treasure made a further payment of \$33,660 on 1 April 1998 and a payment of \$7,748 on 21 May 1998. The evidence does not suggest that any significant complaint about the work was made.

In early July 1998, Treasure engaged a building expert, Mr J A Ferguson, who had been involved in the original construction of the Resort, to report upon the work done by Rups.

Section 221 of the Companies Act provides inter alia:

*"221 . A company shall 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 \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; "*

On 16 July 1998, Rups served notice under s.221 on Treasure demanding payment of \$300,000.

On 31 July 1998, after receiving a report from Mr Ferguson, Treasure instituted proceedings 0234D/1998L claiming damages of \$524,990 for faulty and incomplete work less \$292,252, the sum which remained unpaid off the specific price. In those proceedings, Rups has lodged a defence and counter-claim for \$275,340, which takes into account a sum of \$24,600 which Rups concedes should be allowed off the balance.

In these proceedings, Treasure sought an injunction restraining Rups from proceeding on its s.221 notice. The trial Judge dismissed the notice holding that, in the words "set off and counter claim", which were used in the statement of claim and in an affidavit by Treasures' Accountant, Mr Talaboko, it was implicit that "the defendant (Rups) is owed the monies." His Honour held that, "The dispute is therefore not as to the existence of the debt."

His Honour applied Anglian Sales Ltd. v. South Pacific Manufacturing Co. Ltd. [1984] 2 NZLR 249 in which it was held that, where a debt is established, a court ought not to stay winding up proceedings merely because the debtor has or alleges it has a counterclaim exceeding the debt. At pp.251-2, Woodhouse P. and McMullin J. said:

*"As already observed, the Courts have invoked an inherent jurisdiction to stay winding-up proceedings where the debt upon which such proceedings are founded is the subject of genuine dispute. Where then the petitioner is unable to show that he had the status to present a winding-up petition as a "creditor" under s.219(1) of the Companies Act 1955, or that there has been a "neglect" by the company to pay, the Court may intervene to prevent the serious harm which is likely to follow from the presentation and advertising of the petition. But the right to have a winding-up petition determined, being a right conferred by statute, ought not be taken away except where the existence of that very statutory right itself is seriously challenged; that is, where the challenge can on appropriate grounds be made to the petitioning creditor's status as such. If a challenge were allowed in circumstances short of this, the Court would in effect be refusing to give effect to the very right which the statute has conferred upon a creditor to have the petition itself considered. In bringing his petition the creditor is doing no more than asserting the right which the statute entitles him to do. In our opinion a creditor's right in this respect ought not to rest simply on the balance of convenience considerations which may be relevant to an application for an interim injunction. Something more than that is required."*

In the present case, however, the existence or non-existence of a debt by Treasurer to Rups is the issue in proceedings 0234D/1998L. The principles of equitable set-off have operation and all adjustments which must be made for or against each party will be taken into account in the calculation of the sum ultimately found to be due. See Hanak v. Green [1958] 2 QB 9.

Spry on Equitable Remedies, 1st ed. at 166, puts the principle in these terms:

*“What generally must be established is such a relationship between the respective claims of the parties that the claim of the plaintiff has been brought about by, or has been contributed to by, or is otherwise so bound upon with, the material breach of the rights of the defendant that it would be unconscionable that he should proceed without allowing a set-off.”*

In the present case, the claims made on each side are so bound up that it would be unjust and unconscionable not to allow by way of set-off any adjustments which the Court considers ought to be taken into account.

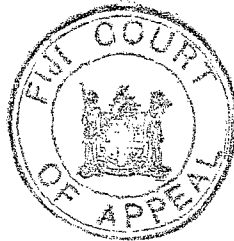
The position is, therefore, that the issue as to whether or not there is a debt due by Treasurer to Rups is an issue raised between the parties in proceedings 0234D/1998L. It would be an abuse of process for Rups to raise that same issue in other proceedings by lodging or proceeding with a petition to wind-up Treasurer. Before raising the issue in winding up proceedings, Rups should obtain judgment on its counterclaim in proceedings 0234D/1998L, or establish that any sum due on the claim will not extinguish the counterclaim.

Proceedings 0234D/1998L cannot be disregarded. The course of events may suggest an inference that the proceedings were not initiated by Treasure in good faith. However, that question has not been formally raised. It was not decided by the trial Judge and is not before this Court.

The simple position is that the issue as to whether a debt is owed by Treasure to Rups or vice versa is raised for determination in proceedings 0234D/1998L. It would be an abuse of process for Rups to raise the identical question by relying on its s.221 notice in winding-up proceeding.

The orders made by the trial Judge should therefore be set aside. In lieu thereof it should be ordered that Rups Industries Limited be restrained until judgment in proceedings 0234D/1998L or further order from presenting any petition under the Companies Act Cap.249 to wind up Treasure Island Limited or advertising any petition which may have already been issued in respect of any debt alleged to be due to Rups Industries Limited by Treasure Island Limited. Liberty to apply to terminate the order is reserved in the event that circumstances change or Treasure Island Limited fails to prosecute its claim in proceedings 0234D/1998L promptly and efficiently. The respondent should pay the costs below which are fixed at \$1,000 and the costs of the appeal fixed at \$1,000.

*[Signature]*  
Tompkins JA, Presiding Judge



*[Signature]*  
Davies, JA

*[Signature]*  
Ellis, JA

Solicitors:

Munro Leys, Suva for the Appellant  
Messrs. Tikaram and Associates, Suva for the Respondent