IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

[illegible]

CIVIL APPEAL NO. [illegible]

BETWEEN : FAIR DEAL [illegible] JOINT VENTURE LTD.
Applicant

AND : GREYSTONE HOLDINGS LIMITED
Respondent

BEFORE THE HONOURABLE JUDGE OF APPEAL MR JUSTICE JOHN E. BYRNE

Counsel	:	Dr M.S. Sahu Khan for the Applicant P. A. Lowing and S. Nandan for the Respondent
Dates of Hearing & Submissions	:	20th & 27th July 2007, 10th September 2007
Date of Ruling	:	14th November 2007

RULING

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[1] This is an application for a Stay of an Order by Connors J. made in the High Court at Lautoka on the 31st of May 2007 when he rejected a Motion by the Applicant for an Order restraining the Respondent from commencing or

taking any steps for Winding Up proceedings against the Applicant.

[2] The proceedings arose from a Notice issued by the Respondent pursuant to Section 221 of the Companies Act Cap. 247 which provides that a company may be wound up by the Court if inter alia, the company is unable to pay its debts.

[3] Section 221 provides that a company shall be deemed to be unable to pay its debts if a creditor serves on the company a demand requiring payment of the sum due and payment is not made within three weeks. The debt must exceed $100.00. In this case demand was made by the Respondent for the sum of $243,638.00 being money allegedly due and owing to the Respondent for works performed by the Applicant in relation to a written agreement with the Respondent dated the 22nd of August 2006 relating to the construction of various works associated with the augmentation and rehabilitation of the Navakai Sewerage Treatment Plant. The contract sum between the parties was in excess of $1.7 million dollars.

[4] In paragraph 8 of his Ruling of the 31st of May the learned Judge said:

> ***"It would appear that there was no 'formal' agreement entered into between the parties"***
> and yet, as I have stated in the previous paragraph, the Judge referred to the parties apparently entering into a construction agreement.

[5] The two paragraphs are thus contradictory. Either there was a construction agreement or there was no such agreement between the parties. In my Judgment those two paragraphs raise an issue of fact which can be decided only on the hearing of the Petition.

[6] In paragraph 12 of his Ruling, the learned Judge refers to the penultimate paragraph of a letter annexed to a document titled *"Re: Acceptance of Contract Award"* dated the 23rd of August 2006 and executed apparently on behalf of the Respondent by its Managing Director, one Trevor Bloomfield.

[7] The relevant paragraph reads:

> ***"The terms of payment agreed was for Progress Payments on a monthly basis as required by the Principal in payment to you".***

[8] The learned Judge then continues *"there is no reference to the prime contract in the documents and it would appear it may not form part of the contract between these parties".* I have emphasised the last phrase because in my view the Judge's comment clearly raises another issue of fact between the parties – again an obvious trial issue.

[9] Then in paragraph 16 of his Ruling the Judge says that the Plaintiff's (Respondent's) claim against the Defendant (Applicant) as pleaded in the Statement of Claim appears to relate to payments outstanding together with loss of profits on moneys that would have been earned pursuant to the agreement. He then says it is this claim that "appears to form the amount demanded in the notice issued under Section 221 of the Companies Act".

[10] Once more in my view the learned Judge is recognising in these paragraphs that there are issues between the

parties as to the number of payments outstanding and the possible loss of profits which would have been earned pursuant to the agreement.

[11] In paragraph 21of the Ruling the Judge says:

"It would appear that there is in this instance no evidence before the Court that the Defendant (Applicant) is insolvent", yet in paragraph 25 the Judge appears to contradict himself when he says:

"There is no evidence before the Court as to the solvency of the Defendant company apart from mere assertions".

[12] These two statements again appear to me to be contradictory. If, as he says, it would appear that there is no evidence that the Defendant (Applicant) is insolvent, I fail to see how in paragraph 25 he can say there is no evidence before the Court as to the solvency of the Defendant company without then saying that the solvency of the company is a relevant issue for trial and in my opinion another ground for not making a Winding Up order.

[13] The learned Judge then concludes in paragraphs 19 and 20 with these words:

> ***"It is apparent from the evidence that the quantum of the debt allegedly owing by the Defendant to the Plaintiff is in dispute. It is less obvious as to whether the existence of the debt is in fact in dispute".***

[14] If, as the learned Judge says, it appears from the evidence that the quantum of the debt is in dispute, I fail to see how he can then say it is less obvious as to whether the existence of the debt is also in dispute. I would have thought that if the quantum of the debt was in dispute inevitably also the existence of the debt must also be in dispute.

[15] I therefore disagree with the opinion of the learned Judge in paragraph 20 of the Ruling where he says:

> ***"I am of the opinion that the applicant on the motion has failed to satisfy the Court that the debt is disputed as distinct from the quantum of the debt".***

[16] In a second Ruling on the 19th of July 2007 Connors J. stated again that it seemed to him from the evidence of the Respondent (Applicant) that it was the quantum of the debt rather than the debt itself that was in issue. And he then says in paragraph 23 of his second Ruling:

> ***"I cannot be satisfied that the debt as distinct from the quantum of the debt is indeed disputed on substantial grounds".***

[17] In my Judgment the question of whether the debt is disputed on substantial grounds is again a question of fact and evidence, particularly the credibility of written and oral evidence.

[18] In my Judgment, with respect, the learned Judge is here doing what the law does not allow, namely that Chamber applications must not be treated as if they were trial by Affidavits.

[19] The learned Judge in his second Ruling in paragraph 21 quotes part of the decision of Pathik J. in **Vivrass Development Ltd. and Anr v. The Australian New Zealand Banking Group Ltd.** Civil Action No. 290 of 2001 where the Judge quotes from Palmers Company Law at page 7 of his Decision and then says:

"To fall within the general principle the dispute must be bona-fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. "Substantial" means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the ability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company "to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action, or by some other proceedings".

[20] In my Judgment that quotation is relevant here because I have formed the view that there is something which ought to be tried either before the Court itself or in an action or by some other proceedings.

[21] Having said that however, the Judge repeats his statement that he cannot be satisfied that the debt as

distinct from its quantum is indeed disputed on substantial grounds. Again I say that is a question for trial and the assessment of the weight of the evidence before the Court.

[22] Having considered all the very weighty documentary evidence so far on record, I am satisfied that if the Respondent is not restrained and is allowed to proceed with the Winding Up proceedings before the issue of liability is finally determined, the Applicant will suffer irreparable loss and damages. The consequences of Winding Up proceedings are very serious. They include:

i) ***The whole control and management of a company falls into the hands of a liquidator (Sections 234-248 of the Companies Act).***

ii) ***No one will be in a position to commercially deal with the Applicant company for fear of ultimately falling into the category of fraudulent preferences under Sections 313 & 314 of the Companies Act.***

> iii) ***The Bank Accounts of the company will be frozen and the company will virtually cease to be able to carry on business.***

> iv) ***The public at large will get the impression that the company is in some financial trouble.***

[23] I have reached the conclusion that in this case there are triable issues both in fact and in law concerning the debt in question and that accordingly the Applicant should be granted leave to appeal to the Court of Appeal. I mean no disrespect to the industry of counsel by failing to refer to most of the authorities cited by the parties. The law is clear on the question of when a Winding Up petition should be allowed, but in the end whether or not to grant a Stay of an Order for such Winding Up is in the discretion of this Court and I exercise it in favour of the Applicant. The documentary evidence so far before the Court is substantial. I therefore grant the Applicant its costs which I fix at $1,000.00. There will be orders in these terms.

[John E. Byrne]

JUDGE OF APPEAL

At Suva

14th November 2007