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

CIVIL APPEAL NO. ABU0066 OF 2007S
(High Court Civil Action No. 211 of 2007L)

BETWEEN:

B.W. HOLDINGS LIMITED

Appellant

AND:

SINCLAIR KNIGHT MERZ FIJI LIMITED

Respondent

Coram: John Byrne, JA
Nazhat Shameem, JA
Andrew Bruce, JA

Hearing: Thursday, 26 June 2008, Suva

Counsel: H. Nagin for the Appellant
N. Khan for the Respondent

Date of Judgment: Wednesday, 2nd July 2008, Suva

JUDGMENT OF THE COURT

---

1 This is an appeal from a decision of Jitoko J given on 11 September 2007 to discharge an *ex parte* temporary injunction which had previously been granted on 18 May 2007 in favour of BW Holdings Ltd to restrain Sinclair Knight Merz Fiji Ltd from presenting and/or prosecuting a winding up petition to wind up BW Holdings Ltd. The decision to dissolve the injunction was delivered *ex tempore*.

2 In the injunction proceedings, BW Holdings Ltd was the Plaintiff in the action and Sinclair Knight Merz Fiji Ltd was the Defendant. In the appeal to the Court of Appeal, B/W Holdings is the Appellant and Sinclair Knight Merz Fiji is the Respondent. The parties are referred to in this judgment as the Appellant and the Respondent respectively.

3 The Respondent through its solicitors issued a winding up notice against the Appellant in the sum of $117,954. The claim was in respect of professional engineering services said to be rendered by the Defendant company to the Plaintiff.

4 The existence of the debt was not challenged by the Plaintiff. The position of the Plaintiff (asserted both in correspondence and before the courts) was that it did not owe $117,954 as asserted by the Respondent but it was prepared to admit that it owed $5,303.29. This assertion by the Plaintiff was not accompanied by any payment to the Defendant of that amount or any amount in respect of the claim by the Respondent.

5 The obvious consequence of the Plaintiff having made such a payment would have been that if the Defendant wished to continue its claim for the balance, it would then have been required to commence proceedings for that balance by way of civil proceedings. On the face of it, if payment by the Plaintiff of the amount admitted to be owed did not occur within the three weeks prescribed by section 221 of the Companies Act then the Appellant would have been exposed to the possibility of winding up proceedings.

6 Instead of paying the money that the Appellant accepted was owed (as opposed to the amount which the Respondent said was owed), the Appellant chose to apply *ex parte* for an injunction to restrain the Defendant from presenting and/or advertising a winding up petition against the Appellant. A temporary injunction was indeed granted. Thereupon, the Plaintiff did precisely nothing to resolve the dispute.

7 In the hearing before Jitoko J on the application to dissolve the temporary *ex parte* injunction, both parties were represented by counsel. Doubtless counsel for the

parties had every opportunity to draw to the attention of that learned judge all by way of law or facts that they thought was necessary or appropriate to continue or dissolve the injunction as the case may be. The learned the judge recited the facts as follows: (Record, p. 4)

> Both parties had agreed to the appointment by the Defendant of a [project] manager for the Plaintiff's road construction work known as the King's Road and Lodoni Road Project. Unfortunately the agreement, reduced to writing, was not signed, although the parties conducted their business generally in accordance with its tenor. The dispute has emerged as to fees for the provision of the supervisor. According to the Plaintiff, their agreement was $20,000 per calendar month. The Defendant claim (*sic*) is $32,000 a Plaintiff has paid only part of the fees owing and admits only to the $5,303.29 as balance, although the details as to how this amount is arrived is not fully disclosed.

8 The learned judge ordered that the injunction be dissolved.

9 The learned judge appears to have based his decision on two grounds:

(1) the Plaintiff's failure to provide an adequate and sufficiently specific undertaking as to damages; and

(2) the fact that the Plaintiff does not dispute the existence of a debt but merely the amount owing on that debt does not provide a basis for restraining winding-up proceedings based on that debt.

10 In this regard, the judge said:

> Quite apart from the apparent inadequacy of the Plaintiff's undertaking as to damages, the paramount issue in this case is whether there exists a debt. In this instance, there is no question of the existence of a debt owed by the Plaintiff to the Defendant. The fact that the exact amount is disputed is irrelevant. The essential fact is that there is a debt owed by the Plaintiff which remains to be paid. It would be a different matter if the Plaintiff had in fact paid the amount that is considered by the Plaintiff as owing.

11 In the Court of Appeal, Counsel for the Appellant in his written and oral submissions contended that the crucial issue on appeal was whether the balance of convenience favoured the Appellant so that the injunction should be continued. This characterisation of the issues is plainly correct. In this regard, both parties recognize that the principles governing the imposition of an injunction of this type are governed

by the leading case of ***American Cyanamid company v Ethicon Ltd*** [1975] AC 396. Very properly, counsel for the Appellant has also drawn the attention of the Court to ***Bryanston Finance v De Vires*** *(No 2)* [1976] 2 WLR 41, 52 where it was held that the granting of an injunction restraining the presentation or prosecution of a winding up petition is exercised under the inherent jurisdiction of the court to prevent an abuse of its process. As a matter of principle, interference in the ordinary rights of a person conferred by statute should not be the subject of injunctive relief unless an abuse of process is established. In this regard, clear and persuasive grounds must be established before an injunction may be imposed. In the course of argument, counsel for the Appellant suggested that bad publicity against the party the subject of a winding up order which would ordinarily follow by reason of the fact that there are requirements for publication of aspects of the winding up process could and should be a basis for injunctive relief which interferes with the exercise of ordinary statute-based rights of the party seeking the winding up order. In our view, publicity following a winding up order is an incident of such an order being made. It would seem to follow that, generally speaking, it is difficult to see how possible bad publicity to the company which is the subject of the winding up order could ordinarily be a proper basis for saying that the presentation or prosecution of a winding up order following the failure to pay a statutory demand under section 221 of the Companies Act is an abuse of the process of the court. The judge did not expressly refer to this matter, but had he done so it may well have added weight to the bases upon which he ordered that the injunction be dissolved.

12 In the course of the written submissions on behalf of the Appellant, it is contended (paragraph 2.06) that the learned trial judge failed to take and accept that the Appellant's undertaking as to damages was sufficient when the Appellant is a very reputable company and was engaged in multi-million-dollar projects. The Appellant contended that there was sufficient material for the Court to show that the Appellant's business and assets are worth millions of dollars. Two comments may be made about this. First of all, the assertion about reputation, worth and the scope of work undertaken by BW Holdings Ltd is essentially a bald assertion and is vague. This

might be seen in, for example, paragraph 2 of the affidavit in support of the *ex parte* injunction sworn on 14 May 2007, where the plaintiff asserts that it is a substantial company and has been awarded several government contracts. It is one thing to assert that the company is "substantial". It is another to provide evidence of this (absent judicial notice of that fact). The assertion in relation to being awarded several government Road contracts speaks of the past tense. It may be that this is a verbal slip and was meant to include current government Road contracts. Secondly, what was asserted on behalf of the Plaintiff was that it had net assets of many millions of dollars and that it was prepared to give the "usual undertaking" as to damages. Given the absence of any support for those assertions, small wonder it was that the learned judge was unimpressed by any of these assertions. The issue of what was an undertaking which was sufficient was a matter of judgment and discretion for the learned trial judge. Jitoko J took the view, and, in our view, correctly, that this was an unacceptably vague undertaking. However, this was not the primary focus of his decision.

13 The judge focused his decision on the fact that there was no dispute as to the existence of the debt but only as to quantum. This is picked up in grounds 3 and 5 of the grounds of appeal put forward on behalf of the Appellant. The argument of the Appellant before the Court of Appeal was that the judge failed to take into proper consideration that the amount claimed by the Respondent was strongly disputed by the Appellant and such dispute did not give a right to the Respondent to proceed with the winding up proceedings. This proposition is, with great respect to counsel, misconceived in law. That is precisely the right that is given to the Respondent. That right would have been taken away if the Appellant had paid the $5,303.29 to the Respondent. In that event, the Respondent would have been left with a right to proceed to recover the balance of the amount owing in civil proceedings.

14 It goes without saying, that the position would have been fundamentally different if the dispute had been as to the existence of the debt.

15 The learned trial judge had all the facts in front of him and exercised the discretion given to him by the law on well-established principles. The principles which govern appellate interference with the exercise of a discretion are as follows:

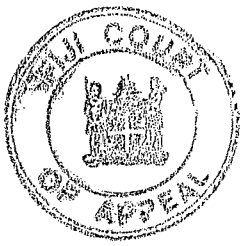
> It must appear that the exercise of discretion was based upon a misunderstanding of the law or of the evidence or upon evidentially unsupported inferences that particular facts existed or did not exist. Alternatively, it must appear that the exercise of discretion miscarried because it was based upon an irrelevant consideration or it failed to take into account a relevant consideration or it was plainly wrong in the sense that it was so unreasonable that it must have proceeded from some undisclosed error of principle or erroneous application of the principle. (***HKSAR v Lee Ming-tee (No 2)*** [2004] 1 HKLRD 513, [2003] HKEC 1061 per Mason NPJ)

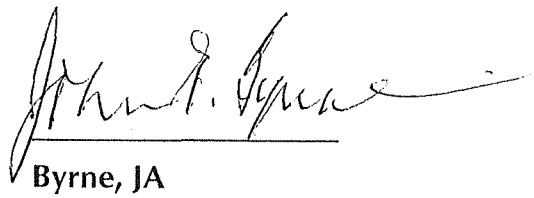
Against that background, with respect, we cannot fault the decision of the learned trial judge to dissolve the injunction.

16 In the result, the Court orders:

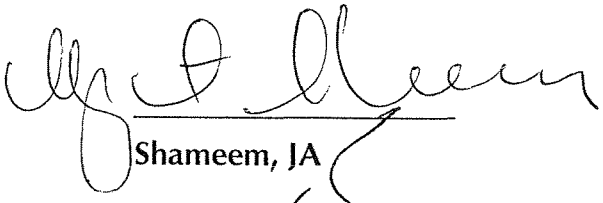
(1) that the appeal be dismissed

(2) the Respondent to have the costs of the appeal fixed at $2,000.





Byrne, JA



Shameem, JA

Bruce, JA

Solicitors:

Sherani and Company, Suva for the Appellant
Yash Law, Lautoka for the Respondent