IN THE FIJI COURT OF APPEAL
AT SUVA

Civil Appeal No. ABU0038 of 2005

IN THE MATTER OF GOLDENWEST ENTERPRISES LIMITED a Limited Liability Company having its Registered Office at Lautoka, Fiji

AND

IN THE MATTER OF THE COMPANIES ACT 1983

BETWEEN:

GOLDENWEST ENTERPRISES LIMITED a Limited Liability Company having its Registered Office at Lautoka, Fiji

APPELLANT
[ORIGINAL RESPONDENT]

AND

TIMOCI PAUTOGO of Lautoka, Fiji

RESPONDENT
[ORIGINAL PETITIONER]

Appearances:
Appellant: Mr HA Shah
Respondent: No Appearance

Date of Hearing: 7 February 2008
Date of Judgment: 3 March 2008

Coram: Byrne, JA
Scutt, JA

JUDGMENT

1. GROUNDS OF APPEAL

The core issue in this appeal is the exercise of judicial discretion in refusing an adjournment. Generally, appeal courts do not interfere with the exercise of a judge's discretion to grant or refuse an adjournment. However, the Appellant, Goldenwest

Enterprises Limited (Goldenwest), submits that in all the circumstances, this is an appropriate case for intervention by the Court of Appeal.

2. The Grounds of the Appeal are:

1) THAT the learned Judge erred in law and in fact [in] not allowing the Respondent's application for adjournment.
2) THAT His Lordship misdirected himself and did not exercise his discretion fairly in refusing an adjournment application.
3) THAT the learned judge erred in law and in fact in making the Winding Up Order in the face of discredited evidence on behalf of the Petitioner.
4) THAT the Winding Up Order ought not to have been made in all the circumstances of the case.

3. JUDGMENT OF HIGH COURT

On 30 March 2005, the hearing of an application to wind up Goldenwest was scheduled to proceed in the High Court at Lautoka. Although to the knowledge of the parties the date had been set some time before, indeed by agreement between Counsel, 'witnesses who might have given evidence for the company were said to be not available'. The Petitioner, Mr Timoci Pautogo (Mr Pautogo) was, however, present together with his witnesses. Oral evidence was, therefore, given from the Petitioner's side only.

4. In the upshot, the Court made an order for the winding up of Goldenwest.

5. On the first day of the trial, Counsel for Goldenwest sought an adjournment due to the absence in the US of two shareholders and directors, Carol Van and Bill Hong. The adjournment's being refused, the trial proceeded. Counsel for Goldenwest submitted, amongst other matters, that Mr Pautogo had no standing for 'he is no longer a shareholder'.[1] Affidavit evidence to that effect was before the Court, including an annexure (Annexure 'A') being a copy of the Minutes of the Meeting of Directors of 15 January 2001, wherein it is said:

(2) It was pointed out to Timoci Pautogo and Shakil Kumar that they have to pay for their shares in the sum of $50,000 each as they had not paid. They agreed to pay as and when demanded by the Company: Judgment, 5 April 2005, at 2; Court Bk, at 5

6. Nonetheless the Court observed that in addition to that item in the Minutes, the following also appeared:

(3) SALE OF SHARES

It was agreed and resolved that any shareholder wanting to sell his shares must offer the same to existing shareholders first in terms of the articles or otherwise. The other shareholders shall have the first right of refusal if they do not wish to buy the shares offered for sale. In that event [shares] may be sold to any third party. Further it was agreed that if demanded, the shareholders namely Tim Pautogo and Shakil Kumar must pay for their shares. If they are

[1] As the position of Goldenwest is understood, Mr Pautogo was never in fact a shareholder for at least amongst other matters despite a share allocation being issued for him, he did not pay for the shares.

not able to pay then [their shares] should likewise be available for sale to the existing other shareholders who shall have the first right of refusal: Judgment, at 3; Ct Bk, at 6

7. Observing that Mr Pautogo had offered his shares to the other three directors by Solicitor's letter of 12 December 2002, the offer's being declined, and there being 'no other evidence ... offered in respect of [Mr Pautogo's] shareholding', the Court said:

> If that is all there is to it, I have no difficulty holding that he is still a shareholder in the company. The director's Minutes make payment for shares dependant upon a demand or a call and there is no evidence that a demand was ever made, other than the unsupported assertion of Mr Kumar. [Mr Pautogo] has in fact paid nothing for the shares, but that is immaterial to their resale and at their meeting on 15 January 2001 ... the other directors recognized that. In any event, Article 16 of the Company's Articles provides that while the directors may from time to time make calls upon the members in respect of any money unpaid on their shares, the call shall not exceed one-fourth of the nominal value of share or be payable at less than one month from the date fixed for the payment of the last preceding call. As well, each member was entitled to a least fourteen days' notice of time place and amount called. Forfeiture of shares is provided for at Articles 37 to 44, and there is a detailed procedure to be followed for forfeiture upon failure to pay any call. There is no evidence of any such procedure in this case. On the face of it the claim of Mr Kumar is only a loose and unsupported assertion. I find that [Mr Pautogo] was and is a shareholder: Judgment at 3-4; Ct Bk, at 6-7

8. It appears that Mr Pautogo held a salaried position with Goldenwest. However, disputes arose between him and Ms Van and Mr Hong. In addition to other matters including his being refused entry to the premises, Mr Pautogo gave evidence that he:

> ... was paid directors' fees at the first directors' meeting which he thought were $4000. He received no other fees, did not know on what basis the money had been paid to him and had no idea at any time of what profit or loss the company was making or what was the condition of its accounts. These matters were not revealed to him despite his request. He had alleged expropriation of company funds by other directors and had asked for accounts pursuant to the Company's Articles 123 & 124: Judgment, at 5; Ct Bk, at 8

9. Mr Semi Mana also gave evidence. The High Court said that this extended to 'his dealings with Bill Hong and Carol Van which eventually caused him to complain to the Commissioner of Police about their conduct ... However I am not able to see any basis on which his experiences may be used to support a conclusion that it is just and equitable to wind up the company in which [Mr Pautogo] is involved': Judgment, at 5; Ct Bk at 8

10. The High Court considered the applicable law, Counsel for Goldenwest having 'rested his submissions on the facts of the matter ... Counsel for [Mr Pautogo] submit[ting] that the three most common types of circumstance which may justify a winding up order on the just and equitable ground' are:

- Expulsion from office
- Loss of confidence in management

- Deadlock in the management of the affairs of the company

11. Taking into account various authorities, including ***Lock & Anor v. John Blackwood Ltd*** [1924] AC 783; ***Re Rica Goldwashing Co Ltd*** (1879) 11 ChD 36; ***re Martin Coulter*** [1988] BCLC 12, 17c; ***Re Commercial and Industrial Insulations Ltd*** [1986] BCLC 191; ***Re Westbourne Galleries*** [1973] AC 360 (HL) and the text book ***Minority Shareholders' Rights***, Robin Holington, 1990 Sweet & Maxwell, London, UK, the High Court concluded that there was a 'clear case' of a 'just and equitable' ground.

12. The Court said:

> After considering these cases, and the facts in the evidence which I heard, both at length, I have reached the view that [Mr Pautogo] has made out a clear case for the relief which he seeks. He transferred his business activities from his own enterprise into the new company, in expectation of continued successful trading by his participation in a bigger enterprise, a partnership with three others, and the protection of limited liability. Suddenly and for apparently insufficient reason he was unilaterally deprived of that. It is a matter for concern that the remaining directors/shareholders are not interested, it seems, in acquiring his shares. He has been excluded from his own enterprise and there is no word offered by the other three members about what proposals they may have for the company. I conclude that this is a case calling for winding-up of [Goldenwest], with perhaps some degree of urgency.
>
> I order accordingly. I award costs to [Mr Pautogo] in the sum of $1000. Leave is reserved to apply for further relief or directions if needed.

13. STAY AND ISSUES RAISED BY GOLDENWEST

Following the judgment, on 1 July 2005 the High Court heard submissions regarding a Summons for a stay of the orders made on 5 April 2005, pending determination of an appeal.

14. The High Court refused to grant the stay, 'doubt[ing the] jurisdiction to entertain [the] application without the involvement of the liquidator but ... proceed[ing] on the merits, as argued by Counsel'.

15. Matters relied upon in seeking the stay were set out in an Affidavit by Ms Van. The High Court said that there was 'very little substantive fact' in it:

> It amounts to a claim that [Mr Pautogo] had misappropriated large sums of money from [Goldenwest] and that if [Ms Van] and [Mr Hong] had not been prevented 'by unforeseen circumstances' from attending the winding up hearing they would have presented evidence that [Mr Pautogo's] removal from being a Director was not unjust. There is actually a Director resident in Fiji. [Ms Van] states also that refusal to grant a stay would put at risk the livelihood of several workers and 'the Company's Status as a viable Company would be seriously jeopardized in the

event the Appeal succeeds'.[2] Nothing more than that ...: Interlocutory Ruling, 5 August 2005, at 2; Ct Bk, at 17

16. The High Court added that an Annexure to the Affidavit 'is a notice of appeal which also is devoid of substantive information'. Nonetheless, said the Court, upon this 'unimpressive evidentiary foundation Mr Shah [Counsel for Goldenwest] has mounted an attractive submission ... concise, based on authorities and logical'. Similarly for Mr Pautogo, 'Ms Khan made submissions that were just as compelling'.

17. Ultimately, in refusing the stay the High Court determined that it was 'not at all satisfied that there is merit in the stay application or in the appeal'.

18. SUBMISSIONS ON APPEAL

For Goldenwest, on appeal it was said that this Court should, in addressing the question of the refused adjournment, have reference to ***Re Yates' Settlement Trusts. Yates and Anor v. Paterson and Ors*** [1954] 1 All ER 619 in considering the reasons put forward by the High Court. Counsel for Goldenwest observed that His Lordship said:

> On the day of the hearing the witnesses who might have given evidence for [Goldenwest] were said to be not available. I refused an adjournment because the date of this Hearing had been fixed by agreement of counsel upon their appearance for that very purpose and there had already been adjournments going back to September 2003: Judgment, at 2, Ct Bk at 4

19. This, Counsel said, is not the correct test. Rather, the test which 'should have [been] applied is not whether the hearing date was fixed by agreement or not, but whether any '***irreparable prejudice***' ... would be caused to [Goldenwest as] Respondent ...'. Further, it was said, the test is not 'that there had been adjournments in the matter previously', but again, whether any '***irreparable prejudice***' would accrue to Goldenwest. For both propositions, Counsel cited ***Davies v. Pagett*** (1986) 10 FCR 221: Appellant's Submissions, 13 March 2007, p. 3

20. By reference to the Court Record, Counsel observed that the record of the proceedings shows the matter as being set down for hearing on 23 April 2004, but there is no record of what occurred. The record of proceedings on 21 May 2004 at 2.15pm indicates that the hearing date 'seems to have been vacated because it seems that the parties agreed to file submissions': Ct Bk, p. 49; Written Submissions, p. 3

21. Counsel for Goldenwest then noted another hearing date 'was set down for 16th July 2004, but then again it seems to have been adjourned on that day as the parties were trying to resolve the matter': Written Submissions, p. 3

22. By reference to this history, Counsel for Goldenwest submitted:

> The crucial point is that at none of those times when the matter was adjourned previously it seems to have been adjourned through any fault of [Goldenwest]. All the times it seems to have been adjourned with agreement of both parties, so how

[2] It appears that what is meant here is that if the stay is not granted, then even if the appeal succeeds Goldenwest will have been placed in a position of jeopardy, implying that recovery may be difficult despite any success in the appeal.

can there be any prejudice to the Respondent. If any '***irrepairable prejudice***' would have been caused to [Mr Pautogo] then ... Counsel for [him] would have been objecting vigorously each time the matter was ... adjourned for whatever reason. And His Lordship could have adjourned the matter and awarded costs for the day to [Mr Pautogo] because the cost of appearing at the Hearing would have been the only prejudice (if any) that would have been caused to [Mr Pautogo] on the day: Written Submissions, p. 3

23. Counsel for Goldenwest said that in the interests of justice, in accordance with principles of fairness and extending to Goldenwest the right to be heard, an adjournment should have been granted as: 'A short adjournment would not have prejudiced anyone': Written Submissions, p. 3

24. Whilst acknowledging the grant or refusal of an adjournment lies within the discretion of the Court, in the Court of Appeal Counsel for Goldenwest said that discretion was 'not exercised fairly and justly'. This submission was based upon the following contentions:[3]

- The Appellants were away overseas;
- That was the first time since the Petition was filed that the Appellants on their motion only asked for an adjournment;
- Counsel for the Respondent made no objection to the application for adjournment;
- There was no severe prejudice to the Respondent with a short adjournment, who could have been compensated by way of costs: Written Submissions, p. 4

25. As well, events of the morning of the hearing of 30 March 2005 are raised by Goldenwest as supporting the appeal. In Written Submissions (by reference to the Court Record, Ct Bk, p. 54) Counsel noted that on 30 March 2005 the Petition was struck out for non-appearance of Mr Pautogo and his Counsel. The Petition was reinstated later that day by the Court constituted again by His Lordship, the matter proceeding to hearing:

> ... after the Petition was struck out ... [Goldenwest's] Counsel could simply have gone away and that would have served their purpose. Then [Mr Pautogo's] Counsel would have had to make a formal application for reinstatement and by then the Appellants would have returned for the hearing. But [Goldenwest] acted in the interest of justice and fair play on the day: Written Submission, p. 4

26. The Court Record (as set out in the Ct Bk, pp. 9-11) shows:

> **BEFORE HON. JUSTICE FINNIGAN**
> **Wednesday 30th March 2005 at 9.12am.**
>
> No appearance from the petitioner
> Mr HA Shah for the respondent
>
> Winding Up Petition
> Respondent opposes saying applicant has no locus standi

[3] Together with the contentions set out below as to the Petition's having been struck out and reinstated: Written Submissions, pp. 3-4.

Petition struck out for non appearance.

Costs to petitioner $500-00.[4]

Finnigan J.

BEFORE HON. JUSTICE FINNIGAN
Wednesday 30th March 2005 at 9.00am[5]

Ms Khan for the Petitioner
Mr HA Shah for the Respondent

Ms Khan: I had asked Mr Khan to have it stood down and apologise. Please reinstate by consent.

Court: Cannot reinstate at whim – what reason?

Ms Khan: Would be an unfair breach to have to file formally.

Court: This is your application, formal application would be against res judicata.

Ms Khan: Court has not risen so … res judicata. Order 2 Court has a discretion.

Court: Why exercise my discretion. A Reason?

Ms Khan: We may appeal.

Court: Do not make that submission: your client will give you any instructions.

Ms Khan: 2 witnesses are here.

Court: Adjourn 15 for you to find arguments for reinstated. Not any of the above.

Finnigan J.

10.43 Minority shareholder application to wind up.

Ms Khan: Now not shareholder and would have no right to commence new proceedings – reinstatement is his only remedy.

Classic example – client should not suffer from counsel's lateness.

Delay of 15 minutes would only have shortened the 2 hours allowed.

[4] It would appear that this is an error in the record and that costs on that occasion were awarded to the respondent.
[5] It seems more likely that '9.00am' is an error and that the record should read '10.00am'.

No prejudice to respondent.

No disrespect to Court.

[Mr] Shah: No submissions. No objections.

Court: Governed by principle while both Order 13. White book page 136, 138.[6]

Renewed application with one good reason.

Reinstated.

Order for costs vacated.

Finnigan J.

27. Regarding these exchanges and the outcome, Counsel for Goldenwest submits that there is what 'seems is a slight bias' on the part of the Court as 'when it came to exercising his discretion with respect to [Mr Pautogo]'s application he had no hesitation in reinstatement however when it came to [Goldenwest]'s application for adjournment it was refused. Specially when for the adjournment [Mr Pautogo] could have been compensated by way of costs (which ironically [Mr Pautogo]'s Counsel did not even ask for when [Goldenwest]'s Counsel asked for the adjournment): Written Submissions, p. 4

28. In this Court it is said in 'the interest of justice' and 'fair play' on the occasion of the striking out Counsel for Goldenwest 'did not object to the Petitioner's Counsel's application for reinstatement ...' hence, the unfairness and lack of justice in the adjournment's being refused. To return to the point earlier made by Counsel for Goldenwest:

> ... after the Petition was struck out earlier on the day of the hearing, [Goldenwest]'s Counsel could have simply gone away and that would have served their purpose. Then [Mr Pautogo] would have had to make a formal application for reinstatement and by then the Appellants would have returned for the hearing ...: Written Submissions, p. 4

29. ADJOURNMENTS & THE LAW

It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. It is further universally accepted that an appeals court should be loath to overturn the trial court's exercise of discretion as to the grant of an adjournment or its refusal, except upon good reason. This principle is stated in various ways, each nonetheless confirming it:

> A trial court's decision on request for adjournment will not be reversed absent a clear showing that the trial court erroneously exercised its discretion: ***State v.***

[6] The reference to the White Book may be to the principle that 'unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure': ***Evans v. Bartlam*** [1937] AC 473, 480, per Atkin LJ; ***Grimshaw v. Dunbar*** [1953] 1 QB 408, at 416, per Jenkins LJ; and ***Hayman v. Rowlands*** [1957] 1 WLR 317; [1957] 1 All ER 321.

Elliot, 203 Wis. 2d 95, at 106; 551 NW 2d 850, at 854 (Ct. App.)(1996); ***Re Joshua GH, A Person Under the Age of 18***, Wis. Ct Apps, Dst I, No. 99-1357(1999)

The granting of an adjournment is in the absolute discretion f the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed: ***Go Pak Hoong Tractor and building Construction v. Syarikat Pasir Perdana*** (1982) 1 MLJ 77; ***Ayer Molek Rubber Company Berhad (1292-P) v. Mirra SDN BHD (153829-A)*** (2007)(Company Winding-up No: D2-28-14-2006) High Court of Malaysia at Kuala Lumpur, 12 December 2007)

... adjournments of cases fixed for hearing are not obtainable as a matter of course but may be granted or refused at the discretion of the court ... The exercise of this discretion, however, is a judicial act against which an aggrieved party may lodge an appeal, but since it is a matter or discretion, an appellate court will be slow to interfere with it ... It would however appear that in order to succeed in an appeal against such exercise of discretion, the appellant shall satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant: ***Okeke v Oruh*** (1999) 6 NWLR (Pt 606) 175, at 188; ***Unilag v Aigoro*** (1985) 1 NWLR (Pt 1) 143; ***Alsthom v. Saraki*** (2005) 1 SC (Pt 1) 1; ***Caekey Traders Ltd v. Gen. Motors Co Ltd*** (1992) 2 NWLR (Pt 222) 132; ***George v. George*** (2001) 1 NWLR (Pt 694) 349; ***Nigerian Telecommunications PLC v. Chief SJ Mayaki*** Ct App. Lagos, 2006 (12 April 2006), at 6

This Court is well aware that it must be very slow to interfere with the discretion of the trial judge on such a question as an adjournment of a trail or, as in this case, the refusal to grant one. It will only do so in very exceptional circumstances where it appears that the result of the order to refuse the adjournment would be to defeat the rights of the affected party altogether and to cause an injustice to one or other of the parties: ***Sookdeo v. Ali and Ali*** Ct App. Rep. Trinidad & Tobago, 2001 (18 May 2001), at 2

30. In the present case, does this Court have power to review and reverse the exercise of that power?

31. In ***Re Yates' Settlement Trusts. Yates and Anor v. Paterson and Ors*** [1954] ChD 618 the English Court of Appeal said 'yes'. Evershed MR was clear both on the discretion of the Court, and the power of an appeal court to oversee a lower court's exercise of that power:

There is, I think, no doubt that, if a judge adjourns a case, just as if he refuses an adjournment of a case, he has performed a judicial act which can be reviewed by this court, though I need not say that an adjournment, or a refusal of an adjournment, is a matter prima facie entirely within the discretion of the judge. This court would, therefore, be very slow to interfere with any such order, but, in my judgment, there is no doubt of the jurisdiction of the court to entertain appeals in such matters: at 621

32. ***Hinckley's case*** [1940] 4 All ER 216 was cited, wherein Farwell, J. said that if the judge 'took the course of adjourning a particular case, his decision to do so would be subject to appeal in the Court of Appeal'. Romer, LJ continued by noting that Farwell, J. had gone on to say: 'I think that that is a correct statement of procedural law, and I do not think anything has been said to cast any doubt on it': at 622

33. In ***Re Yates' Settlement Trusts***, an adjournment was granted. However, as Evershed MR observes, the principle as to the discretion of the Court's adjourning a matter extends similarly to the discretion of the Court's refusing an adjournment, just as the power of an appeal court extends both to reviewing the grant of an adjournment and to reviewing the refusal of an adjournment.

34. In ***Re Yates' Settlement Trusts*** the question was whether the Court should have granted an adjournment where there were two cases ahead of that with which the Court was dealing, which dealt with the same or similar issues. In the one, ***Re Downshire's Settled Estates*** [1953] 1 All ER 103, the determination was that the court had jurisdiction to approve a scheme similar to that in ***Re Yates' Settlement Trusts***. In the other, ***Re Chapman's Settlement Trusts*** [1953] 1 All ER 103, in similar circumstances the decision had gone on appeal, with no outcome as yet. The Court in ***Re Yates' Settlement Trusts*** granted the adjournment on the basis that it should await the House of Lords decision on appeal in ***Re Chapman***.

35. The English Court of Appeal said the adjournment should not have been granted:

> The law has been settled by this court in ***Re Downshire***, and the judge should have applied the law as there laid down without any misgivings as to what the House of Lords may hereafter say. I do not think that the plaintiffs should be sent away for an indefinite period, especially when it is not known whether the settlor [whose life is of considerable importance in the proposed scheme] will live so long: at 622, per Lord Denning, MR

36. That is, serious disadvantage or injustice would or could have resulted to the party seeking to uphold the proposed scheme, for the risk was that the settlor would die before the House of Lords' decision. Once dead, the scheme could not be revived or upheld, whatever the House of Lords' decided.

37. Generally, this is the principle covering courts' discretion to adjourn or not to adjourn. If refusal to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it, an adjournment should be granted. If it is not, an appeal court has power – and one might say a duty – to redress the wrong by allowing an appeal against the denial of the adjournment: ***Gasparetto v. Sault Ste-Marie*** [1973] 2 OR 847 (Div. Ct); see also ***Jim Patrick v. United Stone*** (1960) 21 DLR (2d) 189 (Sask. CA)

38. An objecting party is compensated by costs – unless the adjournment would cause irreparable damage to it. Then a court must weigh up the competing interests and consequences ruling according to the fairness and justice of the particular case.

39. Counsel for [Goldenwest] also drew the Court's attention to ***Dick v. Piller*** [1943] 1 All ER 627 where in a part-heard matter, Counsel for one of the parties applied for a further adjournment on grounds that the Defendant's evidence 'was essential for the proper determination of the case', however he 'was too ill to attend'. There was no objection from the Plaintiff's Counsel and a medical certificate was provided together with an assurance from Counsel that an Affidavit from the medical practitioner could be obtained that day. The adjournment application was refused. No Affidavit was produced, and a refusal to adjourn met a fresh application made at the conclusion of the Plaintiff's case.

40. The appeal court agreed that the Defendant had been deprived of a fair hearing.[7]

41. In ***Dick v. Piller*** in issue was whether the appeal was on a point of law or fact. It was a question of law, said the Court, for by refusing the adjournment the judge 'caused a serious miscarriage of justice, and ..., in doing so, rejected the first principle of law, for he deprived the defendant of his very right to be heard before he was condemned': at 628

42. There is, however, a requirement that there be no 'fault' on the part of the party seeking the adjournment: ***Piggott Construction v. United Brotherhood*** (1974) 39 DLR (3d) 311 (Sask. CA) In this regard, Goldenwest's position is that there is nothing in the record to support the proposition that it was at fault in any of the delays or what may be perceived to be delays in bringing the matter to trial: there is nothing on the record to show that it was 'at fault' in earlier adjournments. As to the proposition that Goldenwest could be considered dilatory in that the hearing date had been set in advance, by consent between Counsel, so that any failure of witnesses to be present indicated 'fault', Goldenwest's response is – as set out above – that when on the day Counsel for Mr Pautogo failed to appear Goldenwest could have taken advantage of the striking out of the Petition but did not do so. Hence, it should not now, and should not on the day of the trial, be held 'at fault' in light of its cooperation and not standing in the way of Mr Pautogo's right to be heard and to put his case.

43. STRENGTH OF APPELLANT'S CASE

In refusing the stay pending appeal of his decision that the Petition against Goldenwest should be granted, His Lordship formed a view adverse to Goldenwest's chances on appeal. There was 'very little substantive fact' in Ms Van's Affidavit in support of the stay, he said. Furthermore, the contention by Ms Van that winding up put at risk 'the livelihood of several workers' and the company's status as viable was equally seen as unmeritorious by His Lordship: 'Nothing more than that ...' and a Notice of Appeal that was 'devoid of substantive information': Interlocutory Ruling, 5 August 2005, at 2; Ct Bk, at 17

44. On the other hand, Goldenwest had no chance to put its case in the trial. It was entirely precluded from doing so because its witnesses Ms Van and Mr Hong were absent and no adjournment was granted enabling them to be there – both to give evidence, and to instruct. Counsel for Goldenwest ran the first half of the case – its testing of matters put

[7] Similarly in ***McCahill v. State*** HCF, Criminal Appeal No. 43 of 1980; ***Chand v. State*** HCF, Criminal Appeal No. AAU0056 of 1999S, it has been held in criminal matters that the discretion to adjourn must be exercised judicially so that the rights of the parties are not defeated and that no injustice is done to one or other of the parties.

by Mr Pautogo – without the advantage of having Goldenwest's shareholders and directors present, albeit they were under direct attack in Mr Pautogo's case. It was not only their absence as witnesses that impeded the running of the case for Goldenwest, however proficient Counsel may have been and however diligent in mounting what case he could in their absence. Their absence during Mr Pautogo's examination in chief and, importantly, his cross-examination cannot have been other than a disadvantage the impact of which cannot be assessed with any precision because of that very absence. That is, Goldenwest being a company, at least one of the directors/shareholders ought to have been present 'as' Goldenwest. As it was, Counsel was without 'in person' instructions in this crucial part of the case.[8]

45. Counsel for Goldenwest cites ***Watson v. Briscoe*** (1965) NZLR 35 in support of the proposition that albeit the:

> .. existence or otherwise of a serious defence to the action in which ... judgment has been obtained is one of the matters to be considered when the Court is invited to set aside ... a judgment [by default], but lack of an affidavit disclosing the facts on which the defence is based is not an insuperable bar to the exercise of the Court's discretion in favour of the defendants': at 35

46. The absence of oral evidence from Goldenwest's side, and 'in person' instructions during the running of the case, arguably impacted on the Court's decision of 5 April 2005 and orders sealed on 15 April 2005 consequent upon that decision.

47. For Goldenwest, particular aspects of His Lordship's judgment are adverted to, such as the comment relating to the status of Mr Pautogo as a shareholder with standing to bring the Petition, or otherwise. Summing up what was before the Court on this aspect, His Lordship said, as earlier noted: 'No other evidence was offered in respect of the Petitioner's shareholding. If that is all there is to it, I have no difficulty holding that he is still a shareholder in the company ...': at 3; Ct Bk, at 6

48. This encapsulates the very problem Goldenwest seeks to highlight before this Court: there was, or was likely, other evidence ***available*** to be 'offered' – but it was not available at the date of the hearing because those who might offer it were overseas, and no adjournment was granted to enable them to be present to provide it. Further, had they been present then their instructions to Counsel may have better illuminated the oral evidence given by Mr Pautogo, so as to challenge the Court's assessment made upon his evidence in chief and cross-examination without the benefit their presence may have given.

49. Similarly with the 'loose and unsupported assertion of Mr Kumar' that a demand or a call was made upon Mr Pautogo for payment for the shares issued in his name:

> The director's Minutes make payment for shares dependent upon a demand or a call and there is no evidence that a demand was ever made, other than the unsupported assertion of Mr Kumar ... In any event, Article 16 of the Company's Articles provides that while the directors may from time to time make calls upon the members in respect of any money unpaid on their shares, the call shall not

[8] The adjournment was sought at the close of Mr Pautogo's case.

exceed one-fourth of the nominal value of share or be payable at less than one month from the date fixed for the payment of the last preceding call. As well, each member was entitled to at least fourteen days' notice of time place and amount called. Forfeiture of shares is provided for .. and there is a detailed procedure to be followed for forfeiture upon failure to pay any call. There is no evidence of any such procedure in this case. On the face of it the claim of Mr Kumar is only a loose and unsupported assertion. I find that the Petitioner was and is a shareholder: at 3-4, Ct Bk, at 6-7

50. Again, the problem is that the reason for there being an 'unsupported assertion' of Mr Kumar, or his evidence on this point being 'only a loose and unsupported assertion' may well have been the absence of Ms Van and Mr Hong. That absence could have been ameliorated by an adjournment. Such an adjournment would have placed the Court in a better position vis-à-vis its assessment of the evidence, for that assessment could have been made by reference to *all* the available evidence, not to some of it only, and nor to the bulk of it untested by cross-examination with the benefit of instructions by those intimately connected with the matters in issue.

51. CONCLUSION

This Court has every sympathy with the wish of trial courts to maintain a tight rein on proceedings and to ensure expeditious hearings. This is particularly so if a trial date has been set, or if the history of a matter reveals a litany of delays particularly caused through adjournments. Adjournments by consent between the parties can indicate a lack of preparation and attention to the need for litigation to be conducted in a timely manner. The Court is aware that in too many instances adjournments are or may be sought as a matter of course and that due to the Court's schedule and a mounting number of cases, adjournments may too readily be gained. It is understandable that as an antidote to this, a Court may ultimately be loath to grant an adjournment where otherwise a trial is ready to proceed and the Court has set a firm date after a number of adjournments. At the same time, Courts must be careful to ensure that all the circumstances must be borne in mind and that ultimately expedition is not the sole measure. Justice and fairness are essential features of the consideration for a request for an adjournment.

52. Goldenwest seek an Order that the Winding Up Petition of 23 April 2005 be dismissed with costs. Despite efforts on the part of Solicitors for Goldenwest, Mr Pautogo was unable to be located. He did not appear in this proceeding and was not represented before this Court. Hence, for this Court to grant that Order would be to compound the error originally made in this proceeding, albeit from, this time, the Petitioner's point of view. That would be neither beneficial nor fair, ultimately, to any involved.

53. In the alternative, Goldenwest seek an Order that the Winding Up Petition be heard de novo.

54. In all the circumstances, it appears that the exercise of discretion not to grant an adjournment on the day of the hearing to enable the giving of evidence and provision of instructions by Ms Van and Mr Hong, shareholders and directors of Goldenwest, was unfair and unjust in its denial to Goldenwest of its right to be heard, and procedural fairness generally.

55. To remedy this wrong, Goldenwest should be provided with the opportunity it was denied by the denial of an adjournment. Hence, the proper order is that the Winding Up Petition be heard de novo. The orders of the Court made 5 April 2005 and sealed 15 April 2005 should be wholly set aside.

56. CORAM

The appeal was heard by the Court constituted by two Judges of the Court of Appeal in accordance with section 6 (2) and (3) of the ***Court of Appeal Act*** (Ch 12).

Orders

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court made on 5 April are set aside.
4. A retrial is ordered to take place de novo before another Judge of the High Court.
5. Costs in the amount of $750 as estimated by reference to the amount paid into Court.[9]

.....
John E. Byrne
Judge of Appeal

.....
Jocelynne A. Scutt
Judge of Appeal

Suva
03 March 2008

FIJI COURT OF APPEAL

[9] The sum of $750.00 was proposed by Counsel for the Appellant upon the basis as stated – the amount paid into Court. The Court considers that this is a modest sum by reference to work done in preparation of the appeal, including preparation f the record on appeal; instructing agents in Suva to attend callover dates; appearance in the appeal; and payment to uplift the court record.