IN THE HIGH COURT OF THE REPUBLIC OF FIJI
(WESTERN DIVISION) AT LAUTOKA

BANKRUPTCY AND WINDING UP CAUSE
No. 32 of 2011

IN THE MATTER OF PEE JAY DEVELOPMENT LTD a limited liability company having its registered office at C/- KPMG, Chartered Accountant,157 Vitogo Parade, Lautoka (The Company)

A N D

IN THE MATTER OF THE COMPANIES ACT 1983

Before: Master M H Mohamed Ajmeer

Counsels:
Mr A Dayal for the petitioner
Mr K Vuataki for the respondent company

Date of Hearing : 19 May 2014
Date of Ruling : 19 May 2014
Date of Reasoning : 18 June 2014

DECISION
[written reasons]

Introduction

[1] On 19 May 2014 after hearing both parties I made orders in terms of the petition for the reasons to be delivered shortly. These are my written reasons for doing so.

[2] **R C MANUBHAI & COMPANY LIMITED** (hereinafter may be sometimes referred to as "the Petitioner") presented and filed on 27 September 2011 a Petition for a winding up order pursuant to section 221 of the Companies Act ("the Act") and prayed for the following orders:

a) That **PEE JAY DEVELOPMENT LIMITED** be wound up by the Court under the provisions of the Companies Act.

b) That such other order be made in the premises as the Court feels is just.

c) That your Petitioner's costs be paid out of the Companies assets or funds in priority to all other claims.

[3] The Petitioner has also filed affidavit of Yangteshwar Permal sworn on 28 September 2011 and filed on 29 September 2011 verifying the petition dated 16 September 2011 and filed on 27 September 2011 (verifying affidavit) with annexure "YP1".

[4] PEE JAY DEVELOPMENT LIMITED, the Respondent Company filed affidavit of one of its Directors in opposition together with annexure "PJ1" - "PJ9" and stated that, on or about 29 November 2007 the Company through its solicitors on a without prejudice basis advised the Petitioner's Counsel that in accordance with their calculation the amount owed was $22,875.46 and that it was willing to settle for that sum.

Factual background

[5] The brief facts of the case are these. The petitioner presented a winding up petition alleging that the respondent Company is truly and justly indebted to the Petitioner in the sum of $65,034.73 (which includes judgment sum of $36,862.13 and interest and other incidental expenses. In March 2010 a default judgment was entered against the respondent company in the sum of $36,862.13 in the civil

action No.331 of 2007 brought by the petitioner. That default judgment was set aside on 17 June 2013 and a judgment by consent in the sum of $22, 875.46 was substituted instead.

Issues

[6] The issue to be determined by the Court is that whether the petitioner is entitled to a remedy under section 213 of the Act.

The law

[7] The Act provides as follows:

> ***213***.*-(1) The winding-up of a company may be either-*
>
> *(a) by the court; or*
>
> *(b) voluntary; or*
>
> *(c) subject to the supervision of the court.*
>
> *(2) The provisions of this Act with respect to winding-up apply, unless the contrary appears, to the winding-up of a company in any of those modes*
>
> ***219***. *The Supreme Court (now the High Court) shall have jurisdiction to wind up any company registered in Fiji.*
>
> ***220***. *A Company may be wound up by the court, if-*
>
> *(a) ...;*
>
> *(b) ...;*
>
> *(c) ...;*
>
> *(d) ...;*
>
> *(e)* ***the company is unable to pay its debts****;*
>
> *(f) the court is of opinion that it is just and equitable that the company should be wound up;*
>
> *(g)... (Emphasis added).*

***235**. For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, **the court may appoint a liquidator** or liquidators* (Emphasis added).

***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 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; or

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

Arguments

[8] Counsel for the petitioner, Mr. Dayal submitted that the respondent company should be wound up as it is unable to pay its debts in that a judgment by consent in the sum of $22, 875.46 had been made in favour of the petitioner and that judgment amount remains unsatisfied.

[9] Mr Vuataki counsel for the respondent company on the other hand contended that the petition must be dismissed, for the petitioner has to issue a new section 221 Statutory Demand Notice based on the judgment sum of $22, 875.46 and to follow procedures laid out for

winding up under the Companies Act. This is, he submitted, to allow or give the company an opportunity to repay the debt if not disputed. He cited the case of **Aleems Investments Ltd v Khan Buses Ltd** [2011] FJCA 4; ABU0036/2009 (24 January 2009).

DETERMINATION

[10] The Petitioner has preferred this petition seeking to wind up the respondent Company on the ground that the Company is unable to pay its debts. The debts comprise as follows:

Judgment Sum	$	36,862.13
Interest at the rate of 13.5% per annum from 17/9/02 to 23/10/07	$	25,372.75
	$	**62,234.88**
Interest at the rate of 4% per annum from 02/3/10 to 16/9/11 (198 days)	$	799.85
Other incidental expenses	$	2,000.00
Total	**$**	**65,034.73**

[11] The petitioner also seeks interest at the rate of 13.5% per annum from 17 September 2011 to the date of payment.

[12] A demand notice pursuant to section 221 of the Act was duly served at the registered office of the respondent company on 25 July 2001. The respondent company had neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the petitioner for longer than 21 days of the service of the notice. In that case deeming provisions of section 221 will apply. Pursuant to that section 221 (a) , a company shall be deemed to be unable to pay its debts, if 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 (the petition in this instance).

[13] The respondent company is a registered company in Fiji under the Act. The Court therefore has jurisdiction to wind up the company (s.219 of the Act). A company may be wound up by the Court on the ground that it is unable to pay its debts (s.220 (e) of the Act).

[14] The Petitioner in its verifying affidavit says that the company is truly and justly indebted to them in the sum of $65,034.73 on account of a judgment,

[15] On 26 June 2012 the respondent company filed an affidavit in response wherein it stated under para 6 that, on or about 29 November 2007, the company through its solicitors on a without prejudice basis advised the petitioner's counsel that in accordance with their calculation the amount owed was $22,875.46 and that, it was willing to settle for that sum. This sum has now been entered as judgment by consent in the civil action No.331 of 2007 brought by the petitioner against the respondent company.

[16] More importantly, the respondent company had, in no uncertain terms, admitted as due part of the debts claimed by the petitioner.

[17] The respondent company had even failed and/or neglected to pay and settle the admitted sum of $ 22,875.46.

[18] In **BW Holdings Ltd –v- Sinclair Knight Merz – Fiji Ltd (2008) FJCA 24; ABU0066.2007S (2 July 2008),** their Lordships John Byrne, JA, Nazhat Shameem, JA, and Andrew Bruce, JA delivering the judgment of the Fiji Court of Appeal stated under paragraph 13 that:

"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".

[19] The above case has direct relevance to the facts of the present case. In the present case seemingly the respondent disputing the quantum claimed by the petitioner had admitted part of the claim as indebted and promised to pay and settle for that amount. If the respondent company wanted to avoid the wounding up they should have first paid off the admitted sum and left the balance of the amount owing, if any in civil action.

[20] The respondent company had neglected to pay even the sum admitted or to secure or compound for it to the reasonable satisfaction of the Petitioner (creditor), despite of the demand notice required under section 221 (a) of the Act. The deeming provisions contained under section 221 (a) of the Act operate against a Company which failed to pay debt demanded within 21 days after service of such notice. In the circumstances, the respondent company could be deemed to be unable to pay its debts, as it failed to pay even the admitted sum included in the notice.

[21] Interestingly, a judgment by consent for the admitted sum has been entered against the respondent company in another civil proceedings brought by the petitioner. In March 2010 a default judgment was entered against the respondent company in the sum of $36,862.13 in the civil action No.331 of 2007.. That was judgment was set aside on 17 June 2013 and a judgment by consent in the sum of $22, 875.46 was substituted instead. It is noteworthy that the default judgment

entered against the respondent company was not wholly set aside. The judgment sum still remains unsatisfied. In the circumstances **Aleems Investments Ltd v Khan Buses Ltd** (supra), is not of assistance for the respondent company's case. In that case it was, inter alia held:

"...Where judgment for the debt on which the petition is presented is reversed before the hearing, the petition will be dismissed. It is an abuse of the process for a petition to be presented on the basis of an unascertained debt which has never been demanded and for which no opportunity to repay has been given..." (Emphasis added).

[22] In the present case the default judgment entered against the respondent was not set aside wholly; a judgment by consent in the sum of $22, 875.46 was entered instead, this sum has been admitted as the amount owed by the respondent company in its affidavit in response and the respondent company had ample opportunity to repay the admitted sum. In addition, the admitted sum is part of the debts already demanded by the petitioner. Therefore **Aleems' case** has no application to the facts of the present case before the court.

Interpretation of section 221 of the Act

[23] Let me now turn to the argument that the petitioner has to issue a new section 221 Statutory Demand Notice based on the judgment sum of $22, 875.46. Is a fresh demand notice contemplated under section 221 necessary for the admitted sum?

[24] A decision of Federal Court of Malaysia (FCM) on the similar issue in **Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd** (www. ipsofactoJ.com/appeal/index.htm) [2000] Part 4 Case 9 [FCM] would be of assistance. In that case two questions of law came up before the court for determination. They are:

a. Whether s. 218 (2) (a) of the Companies Act (equivalent of s.221 of our Companies Act) is to be interpreted literally and strictly or widely and liberally.

b. In the event it is the literal and strict interpretation that ought to be adopted, whether the s.218 notice must quantify and specify the exact and actual sum due as at the date of the demand and leave no further sums/amounts to be calculated/quantified or ascertained by the recipient of the notice.

[25] The FCM concluded that:

"For the above reasons, our answer to the two questions posed in the appeal is that s. 218 (2) (a) of the Act should be liberally interpreted. A notice of demand under the subsection need not specify the exact sum due as at the date of the demand. So long the sum due exceeds RM500 and remained unpaid after a demand made without any reasonable explanation to the satisfaction of the court, there is therefore neglect to pay such sum within the meaning of the section". (Emphasis provided).

[26] Returning to the instant case. It is noteworthy that the respondent company filed the affidavit in response and admitted the sum of $22, 875.46 was due. The admitted sum clearly exceeds $100. A company which is indebted in a sum exceeding $100 then due and remain unpaid after the demand notice under s.221 of the Act would be wound up.

[27] In **Re Fabo Pty Ltd** [1989] VicRp 41; [1989] VR 432 (20 October 1988) the Supreme Court of Victoria (Full Court) held that:

"What the subsection [(s364 (1) (a) of the Companies (Victoria) Code, which is similar to our s.221 (1) (a)] does is to provide certain avenues of proof on insolvency by allowing the conclusion of insolvency to be drawn wherever the circumstances are appropriate.

In our opinion, having been called upon to pay an amount including a sum undoubtedly due, the company could be reasonably called upon to pay that sum and to demonstrate the existence of genuine dispute as to its liability in respect of the balance.

> *No circumstance or reason has emerged which would in our view justify the existence of discretion not to make an order that the company should be wound up" (Emphasis provided).*

[28] In the current case the part of the amount included in the demand notice was undoubtedly due by reason of the admission of the respondent company. The demand notice included the admitted sum. Therefore the petitioner may proceed with the winding up proceedings upon the demand notice already served on the respondent. In my view, overstatement in the demand notice will not render such notice invalid. I therefore reject as untenable the argument that the petitioner has to issue a new section 221 Statutory Demand Notice based on the judgment sum of $22, 875.46.

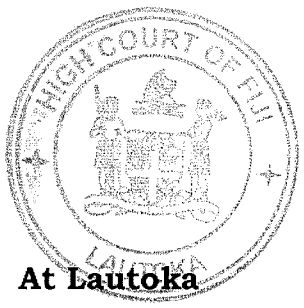
Conclusion

[29] The admission was made in June 2012. It is now about two years after making that admission. The respondent company had ample opportunity to pay out the admitted sum. An undisputed due debt exceeding $100 has remained unpaid after making demand without any reasonable explanation being advanced for this failure to do so. In these circumstances, the respondent company is deemed to be unable pay its debts. The petitioner is entitled to have the respondent company wound up by the court pursuant to section 213 coupled with section 220 (e) of the Act on the ground that it is unable to pay its debts.

[30] For these reasons, I am satisfied that the respondent Company is unable to pay its debts. In the premises, the Petitioner has a right to have the Company wound up by the Court. I therefore make order that the Company be wound up on the ground that it is unable to pay its debts. I also make order pursuant to section 235 of the Act that Official Receiver to be appointed Liquidator of the Company. The costs of the Petitioner of this petition be taxed and paid out of assets of the Company.

Final orders

I. **The Company (PEE JAY DEVELOPMENT LIMITED) be wound up;**
II. **The Official Receiver be appointed Liquidator of the Company; and**
III. **The Petitioner is entitled to taxed costs to be paid out of the assets of the Company;**
IV. **Orders accordingly.**



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M H Mohamed Ajmeer
Master of the High Court

At Lautoka

18/06/14

Solicitors for the petitioner: Samuel K Ram, Barrister & Solicitor
Solicitors for the company: Messrs. Qoro Legal, Barristers & Solicitors