

IN THE HIGH COURT OF FIJI
AT SUVA

Companies (Winding Up) Action No. HBE 07 of 2015

IN THE MATTER of INDEPENDENT
FREIGHT STATION LIMITED

A N D

IN THE MATTER of THE COMPANIES
ACT 1983, Section 221.

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Emmanuel Narayan : for the Petitioner
: Ms. Ulamila Fa : for the Respondent

Date of Hearing : 20th April, 2016
Date of Judgment: 13th July, 2016

RULING

[Winding up petition pursuant to Companies Act 1983, section 221]

INTRODUCTION

1. The Petitioner, **Sun (Fiji) News Limited** instituted this winding up proceedings against the debtor company, **Independent Freight Station Limited** seeking the following orders inter alia;
 - i. *That Independent Freight Station Limited be wound up by the court under the provisions of the Companies Act.*
 - ii. *That the costs of the Petitioner be taxed and paid out of the assets of the Company.*
 - iii. *That the Official Receiver attached to the court be constituted Provisional Liquidator of the affairs of the Company.*

- iv. *Alternatively that such other order may be made in the premises as shall be just,*
2. The Company opposes the petition on the basis that the debt is disputed.
3. Both parties relied on the affidavit evidence filed in these proceedings. These are:
- a. *The original Affidavit of Vineeta Mala Verifying the Petition filed on 24th February, 2015;*
- b. *The Affidavit of Rony Chan opposing the petition filed on 17th March 2015; and*
- c. *The original Affidavit in reply of Vineeta Mala filed on 20th May, 2015.*

BACKGROUND

4. The Petitioner, Sun (Fiji) News Limited had an unwritten agreement for storage of Fiji Sun's bales of old newspapers with the Respondent Company, Independent Freight Station Limited.
5. The Respondent Company gave an initial quotation of \$450 per month but upon negotiation agreed to invoice Sun (Fiji) News Limited for \$690 VIP per month for storage services.
6. Sun (Fiji) News Limited stored its bales of newspapers at the Respondent Company's Warehouse in Walu Bay, Suva.
7. After expiry of 3 months storage time, Respondent Company advised Sun (Fiji) News Limited to uplift the bales of newspapers which were left outside in an open area and due to bad weather, newspapers were damaged.
8. This proceedings is based on the claim payable in lieu of damage to the Petitioner's property/Chattels as at July, 2013.

Service of the Statutory Demand Notice

9. On 26th September, 2014, the Petitioner issued a Demand Notice ("**s.221 notice**") to the Company pursuant to section 221 of the Companies Act ("**the Act**") for the payment of the debt.
10. The s.221 notice was served on the Company at its registered office situated at Lot 1, Tamavua-i-wai Road, Walu Bay, Suva on 29th September, 2014.

11. Despite service of the s.221 notice, the Company made no payments.

Service of the Petition and Affidavit Verifying Petition

12. The Winding-up Petition ("the Petition") was presented to Court on 23rd February, 2015.
13. The Winding-up Petition was finally listed to be heard before the Master of the High Court on Wednesday 20th April, 2016, at 11.30 am, for the Petitioner or his barrister and solicitor to appear for the purposes of rule 28 of the Companies (Winding Up) Rules, 1983.
14. The Affidavit of Vineeta Mala Verifying Petition was sworn on 18th February, 2015 and on 24th February, 2015, Affidavit of Vineeta Mala Annexing Affidavit of Vineeta Mala Verifying Petition was filed.
15. On 25th March 2015, Affidavit of Service by Basilisa Naigalu was filed verifying service of the Winding-up Petition and Affidavit Annexing Affidavit Verifying Petition at the Company's registered office and principal place of business.

Advertisement of the Petition

16. The Petition was duly advertised in the *Fiji Sun* newspaper on Friday 04th March, 2015, and in the Republic of the Fiji Islands Government Gazette (No. 14, Volume 16) on 06th March, 2015.

Memorandum of Due Compliance

17. On 22nd July, 2015, the Petitioner's Memorandum of Due Compliance was filed pursuant to rule 28 of the Companies (Winding Up) Rules and the High Court Practice Direction No. 2 of 1986.

THE LAW

18. **Section 220** of the Companies Act [Cap 247] ("**the Act**") states that a company may be wound up if it is unable to pay its debt.¹
19. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd*² the onus is on the Petitioner to establish that the Company is unable to pay its debt. Justice Pathik stated:

This Petition is brought on the ground that the Company is unable to pay its debts. I find that such is the situation here. **The creditor has to prove a negative, that negative being that the Company cannot pay its debts.**

(my emphasis)

20. As stated in **section 221** of the Act, a company is deemed to be insolvent (unable to pay its debt) if it fails to pay its debt within **3 weeks** of the creditor issuing a statutory demand.³ Justice Pathik went on to state (in *Arjun* [supra])

No question of statutory demand arose in *GLOBE* (supra) but **the Companies Act Cap. 247** has provided for **certain situations where deemed inability to pay debts arises**. Even if the company can show that it is able to pay its debts, it will do no good whatsoever. **If the situation exists, it is deemed unable to pay its debts whether or not that is in fact correct**. It was so held in *CORNHILL INSURANCE PLC v IMPROVEMENT SERVICES LTD and OTHERS* (1986 1 WLR p.114) as follows:-

"Held, refusing the application, that **where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company's insolvency and present a petition for its winding up.**"

(my emphasis)

¹ Section 220(e)

² [1994] FJHC 219; [1994] 40 FLR 260 (11 November 1994)

³ Section 221(a)

Disputed debt

21. Where the debt is disputed, the Company must prove that the dispute is on substantial grounds. Justice Pathik in *Arjun & Sons* [supra] stated:

The Company says that the debt alleged is disputed. **To be able to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds'** *Re Lympne Investments Ltd* [1972] 2 All ER 385).

(my emphasis)

22. Justice Pathik had a similar view in *Vivross Development Ltd v Australia and New Zealand Banking Group Ltd*⁴. Justice Pathik stated:

The question therefore is whether the debt is disputed on substantial grounds. If so, whether the Court ought to grant the relief sought by the plaintiffs.

It is a general principle that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs (Palmer's Company Law Vol.3 15.214 and cases cited therein). In Palmer (ibid), on the principles involved it is further stated:

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 liability 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.

(my emphasis)

23. The Company disputes the debt on the basis that

⁴ [2002] FJHC 245; HBC0290d.2001s (15 February 2002)

- a. An oral agreement was entered into between the Petitioner, Sun (Fiji) News Limited and Independent Freight Station Limited whereby Independent Freight Station Limited store old newspapers in their Warehouse for a period of 3 months at the cost of \$450 per month.
 - b. The Petitioner advised that after 3 months of storage, the newspapers were going to be exported.
 - c. During this period of 3 months, Independent Freight Station Limited staff constantly asked the Petitioner as to when the newspapers were going to be exported as it had already been placed in pallets and wrapped ready for shipping.
 - d. After a lapse of 3 months, the newspapers were still in the Respondent's Warehouse and the Respondent had to move it outside as having that many newspapers in the Warehouse had become a fire risk. Petitioner was advised to remove the newspapers.
 - e. Newspapers were kept for an extra 1 month and again Petitioner asked to remove the same as it was becoming a hazard.
 - f. The batches of newspapers were in open area and due to bad weather some batches of newspapers were damaged.
 - g. Instead of the Petitioner removing the newspapers, he wrote to the Respondent Company claiming compensation for the loss of the damaged newspapers.
 - h. The Respondent Company refutes the Petitioner's claim and states that the newspapers still lie in the Respondent Company's yard since the Petitioner has ignored calls to remove the same.
 - i. The Respondent Company denies being indebted to the Petitioner since there was no agreement to keep the newspapers beyond the 3 months period.
24. In terms of the affidavit evidence before this Court, it cannot be disputed by both parties to the proceedings that there was an unwritten agreement for storage of Petitioner's newspapers in the Respondent's Warehouse.
25. These newspapers were placed in pallets and wrapped ready for shipping.
26. After a lapse of 3 months' time, the Respondent Company moved the newspapers outside their Warehouse.
27. According to the Director of the Respondent Company, Rony Chan, having too many newspapers in the Warehouse, became a fire risk and hazard to the workers in the yard.

28. Therefore, the newspaper batches were left in an open area and due to bad weather, some batches of newspapers were damaged.
29. According to the Petitioner, 1475 bales of newspapers were discovered damaged and destroyed but uplifted 1300 bales of newspaper out of the total 2775 bales in the storage. Reference is made to e-mail annexures marked 'A' within the affidavit in reply of Vineeta Mala accordingly.
30. There is evidence that Petitioner paid the monthly storage rental not for consecutive 3 months but for 4 months from July, 2013 to October, 2013 inclusive. Further, reference is also made to the annexures marked 'B' within the affidavit of Vineeta Mala. The invoice numbers and dates on separate invoices is evidence to confirm that the unwritten agreement or the arrangement between the parties were on a monthly basis and not for consecutive 3 months. Therefore, I cannot see any explanation from the Respondent Company, why are they saying that the unwritten storage of newspaper agreement between them was only for a period of 3 months. I find no basis whatsoever.
31. I find that the Company has failed to adduce sufficient evidence to establish a *prima facie* case which would satisfy this Court that *there is something which ought to be tried either before the court itself or in an action, or by some other proceedings*, let alone any evidence to establish its solvency.

CONCLUSION

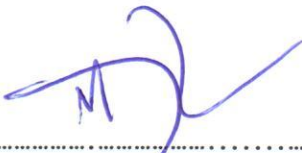
32. The case before this Court is a simple one. The evidence clearly indicates that a debt is owed by the Company to the Petitioner. The Petitioner issued a statutory demand which the Company failed to satisfy within 3 weeks of its issue. The Petitioner has complied with the requirements of the Act and the Rules.
33. The Company has failed to provide any evidence to establish a dispute on substantial grounds. It is insufficient for the Company to simply assert that the debt is disputed. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts.
34. For the above reasons, I make the following orders in terms of the Petition.

ORDERS

- (i) That Independent Freight station Limited is hereby wound up under the provisions of the Companies Act.
- (ii) That the costs of the Petitioner to be taxed and paid out of the assets of the Company accordingly.
- (iii) That the Official Receiver attached to the Court is constituted Provisional Liquidator of the affairs of the Company.

DATED AT SUVA THIS 13TH DAY OF JULY 2016




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VISHWA DATT SHARMA
Master of the High Court
Suva

cc: Patel Sharma Lawyers, Suva
Law Solutions, Suva