

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 206 of 2012

BETWEEN : **CARPENTERS FIJI LIMITED** a duly incorporated limited liability company having its registered office at corner of Rodwell and Robertson Road, Suva, in the Republic of Fiji.

PLAINTIFF

AND : **COMMUNICATION AND TELECOMMUNICATIONS LIMITED** a duly incorporated company having its registered office at 2 Gorrie Street, Suva.

DEFENDANT

Counsel : **Mr. E. Narayan for the Plaintiff**
Mr. S. Nandan for the Defendant

Date of Hearing : **30th January, 2017**
Date of Judgment : **24th February, 2017**

Catch words - Injunction, winding-up, claim for damages

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this action seeking a permanent injunction restraining the filing of a Winding Up petition and or taking any further action by the Defendant. The Plaintiff also claims that the action of the Defendant violate the Commerce Commission Decree 2010¹, and seeks damages. The Plaintiff is also seeking indemnity cost.
2. Following Facts were agreed between the parties in terms of Minutes of Pre Trial Conference
 - i. The Plaintiff is a limited public company duly incorporated under the Companies Act 1983, Law of Fiji.

¹DECREE No. 49 OF 2010

- ii. The Defendant is a limited liability company duly incorporated under the Companies Act 1983, Laws of Fiji, having its registered office at 2 Gorrie Street, Suva.
 - iii. On or about 16th October 2008, the Plaintiff received Tax Invoice Number 00064 and 00065 amounting to \$38,940.40 which the Plaintiff denied owing through its letters dated 14th October 2011 and 1st November 2011.
 - iv. On or about 18th July 2011 and on 19th August 2011, the Defendant sent to the Plaintiff purported demand notices which the Plaintiff disputed and denied owing to the Defendant through its letter dated 14th October 2011.
3. The Plaintiff called one witness, Mr. Daniel Whippy, the Director of the Plaintiff Company and the Defendant called one witness, Mr. Balbeer Singh, Managing Director of the Defendant, he did not mark documents on behalf of the Defendant to prove the counter claim. There was no 'agreed bundle of documents' tendered and the Plaintiff tendered a bundle of documents and marked only 6 documents out of that, and I will consider only documents marked 'P1-P6' as documentary evidence tendered at the hearing.
 4. Mr. Daniel Whippy has been in the Plaintiff, since 14th April, 1975, except for a short period, and presently he is Director of Plaintiff. It is an admitted fact that on 18th July and also 19th August, 2011 the Defendant, served the Plaintiff demand notices under Section 221 of the Companies Act (Cap. 247)². (see the admitted facts iv above)
 5. The Plaintiff's first 3 prayers are regarding injunction and the prayer 4 is regarding a claim under Commerce Commission Decree 2010. The Plaintiff seeks indemnity cost.

² The Companies Act (Cap 247) was the law which existed at that time. This was subsequently fully repealed by Companies Act 2015 (Act No 3 of 2015) which was gazette on 26th May, 2015 and came in to operation on 1st January, 2016 by a Gazette Notification dated 30th December, 2015

Injunction Against Winding Up

6. There is already, an interim injunction granted by Justice Balapatabendi and it was extended till the final determination of this action. The winding up action was also stayed in the said decision. This order was pronounced *inter partes* on 4th September, 2012 and sealed on 7th September, 2012.
7. The Winding Up action filed by the Defendant was based on the counter claim of the Statement of Defense. For logical reason I would start with the counter claim. If the Defendant is unable to prove the counter claim or part of it as debt owed by the Plaintiff, the injunctive relief sought by the Plaintiff should be granted.
8. So, the burden of proof is with the Defendant to prove the counter claim in the Statement of Claim and failure to prove it on the balance of probability *ipso facto* would result the grant of the injunction as stated in the first two prayers, regarding the alleged debt or any part of the alleged debt. The prayers sought injunction in the following manner:

'An injunction restraining the Defendant Company and or their servants and or their agents from taking into further actions and or presenting any Winding up Petition to the matters stated in the purported winding up notice dated 18th July, 2011 and 19th August, 2011 against the Plaintiff Company.

An injunction restraining the Defendant to and or their servants and their agents in manner whatsoever advertising (including but not limited to advertisement in the daily newspaper and the Fiji Gazette any Winding up Proceedings that may have been filed in the High Court.'

9. The Defendant's counter claim is for a sum of \$38,930.40 for services and goods supplied, in the usual cause of business. The Defendant had failed to submit documents to prove that Plaintiff had requested for such services and that they provided such services for that value and that they were not paid by the Plaintiff hence an outstanding debt to the Defendant. First, there should be some contract between the Plaintiff and the Defendant regarding the supply of the service and or goods to the said value or part of the said value to create a debt against the Plaintiff.

10. The Document marked P1 was for \$8,460.00 and this was an invoice issued on 16/10/2008 and it was issued to the Lautoka Electric Co. Ltd. This company was allegedly a sub-contractor who was engaged by the contractor for a building owned by the Carpenters Properties Limited, a subsidiary of the Plaintiff. The said contractor who allegedly engaged the Latoka Electric Co. Ltd is not a party to this action. No debts arise from the said invoice to the Defendant from the Plaintiff.
11. The Document 'P2' was an invoice issued to Carpenters Properties Limited and this was not issued to the Plaintiff. Admittedly, some payments were made by the Plaintiff on behalf of the said subsidiary of the Plaintiff. The 'P2' was issued on 16/10/2008 for a sum of \$30,470.00. This sum was never paid, as Defendant failed to produce Local Purchase Order or even a quotation addressed to the Plaintiff. It can be understood that a sum of this nature needs proper documentation for disbursement for internal financial management. For the same reason it had requested documentation for the payment.
12. The Defendant failed to produce even a single communication requesting for such services from the Plaintiff. The Defendant's oral evidence was that it was a request of the Project Manager. It is unlikely that such an amount of service would be provided without any documentary evidence for a request or for quotation supplied and approved by the Plaintiff.
13. The Defendant could not have sought winding up of the Plaintiff even if the 'P2' debt was due to them, as the invoice indicated a different entity. Limited liability companies have legal personality distinct from the parent company. Carpenters Properties Ltd was only a subsidiary of the Plaintiff and any unsettled debt of the subsidiary cannot be a 'debt' of the Plaintiff without piercing the corporate veil. This fundamental concept was reaffirmed in UK Supreme Court in *Prest v Petrodel Resources Limited and Others* 2013 3 WLR 1 in the following manner (Lord Sumpton)

In Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627 the House of Lords held that documents of a subsidiary were not in the "power" of its parent company for the purposes of disclosure in litigation, simply by

*virtue of the latter's ownership and control of the group. These principles are the starting point for the elaborate restrictions imposed by English law on a wide range of transactions which have the direct or indirect effect of distributing capital to shareholders. **The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law.** As Robert Goff LJ once observed, in this domain "we are concerned not with economics but with law. The distinction between the two is, in law, fundamental": *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 64. He could justly have added that it is not just legally but economically fundamental, **since limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them.**' (emphasis is mine)*

14. Document 'P2' was issued to Carpenters Properties Limited, and not to the Plaintiff. The reason that Plaintiff paid some of the debts of its subsidiary could not be a valid reason to file Winding Up action against the Plaintiff. The debt due to a subsidiary Carpenters Property Limited could be paid by any company, including the parent company, due to various reasons, but if such entity refuse to pay, such a company cannot be called as 'indebted' as required by the Section 221(a) of the Companies Act (Cap 247)³. If such an interpretation is given commercial transactions would be in jeopardy, as limited liability companies have separate existence, the basis on which others are entitled to deal with them in the commercial activities.
15. In any event 'P2' would prove only a sum of \$30,470.00 was invoiced, but whether it was requested and accepted is not proved. It is an abuse to claim the sum stated in the demand, including the sum contained in the invoice 'P1' as it was never issued to the Plaintiff and or its subsidiaries but to Lautoka Electric Co. Ltd.
16. This shows the conduct of the Defendant that from the inception, they did not have sufficient material to justify sending a demand notice under Section 221 of the Companies Act⁴, to trigger Winding Up of the Plaintiff. The Winding Up of a company

³ Ibid.

⁴ Ibid

in terms of 'deeming' provision for a claim that even failed to establish in a writ of summons, is an abuse of process.

17. By document 'P3' the Manager Legal of the Plaintiff had requested particulars, namely Local Purchase Order and Invoice for the said sum stated in the notice dated 19th August, 2011 for Winding Up.
18. No Local Purchase Order or invoice for the sum stated in the Demand Notice was submitted, but 'P2' invoice for \$30,470.00, which was issued to a subsidiary, was attached to the reply. Despite this a letter was written on 7th October, 2011 by the solicitors for the Defendants, indicating their desire to proceed with the Winding Up of the Plaintiff. So, the Defendant had adopted a high risk strategy to recover the alleged debt. (See *Re a company (No 0012209 of 1991)*[1992] 2 All ER 797).
19. The documents marked 'P4' and 'P5' are self-explanatory and this indicates the conduct of the Defendant.
20. So, on balance of probability the counter claim of the Defendant is not proved and struck off and permanent restraining orders for proceeding with Winding Up against the Plaintiff for the alleged debt is granted as prayed in the statement of claim.
21. It should be noted that the case mentioned in the Defendant's submission *Offshore Oil N. L. v Investment Group Fiji Ltd 30 FLR 90* has no relevance to the matter before me as the facts in that case is markedly different from the matter in this case. In that case there was an undisputed debt but the issue was interpretation of the loan agreement and prerequisites of the demand notice. So the debt was not in issue, though the manner in recovery was in issue, as well as interpretation of the loan agreement. In contrast, in the case before me, the Defendant could not prove any debt against the Plaintiff. So the ratio of the said case cannot rescue the Defendants for their action to proceed with winding up, when there was no debt due from the Plaintiff.

The Claim under the Commerce Commission Decree 2010

22. Neither at the trial nor in the Submission the Plaintiff dealt the claim on Commerce Commission Decree 2010. In the paragraph 11 of the Statement of Claim the Plaintiff had claimed damages under Sections 87B, 75, 76 and 77 of the Commerce Commission Decree 2010. I propose to deal with the said claim briefly.

23. The Section 87B of the Commerce Commission Decree 2010 states as follow

“87B. - (1) A creditor, or the agent of a creditor, must not, for the purpose of recovering a trading debt of the creditor -

(a) make any demand for payment without indicating the creditor's identity and the balance owing to the creditor and, if the demand is made by the agent, the agent's identity and authority to make the demand;

(b) demand payment of any amount that the creditor or agent does not honestly believe to be due and owing to the creditor;

(c) persist in demanding payment from a person who has denied liability without making reasonable inquiries to ensure that the demand is based on reasonable grounds;

(d) make any personal calls or telephone calls for the purpose of demanding payment -

(i) on a public holiday; or

(ii) between the hours of 10.00 pm of one day and 7.00 am of the next; or

(e) except as reasonably necessary to determine the debtor's whereabouts, communicate with an employer; acquaintance, friend, relative or neighbour of the debtor (not being a guarantor).

(2) A creditor, or the agent of a creditor; must not, for the purpose of recovering a trading debt -

(a) falsely represent that criminal or other proceedings will lie for non-payment of the debt;

(b) falsely pretend to be authorised in some official capacity to claim or enforce payment; or

(c) falsely represent that a document has some official character that it does not have.

(3) *In this section -*

'agent' includes an employee of a creditor whose main duty of employment is to seek to recover trading debts owed to the creditor.

24. Section 87B of Commerce Commission Decree 2010 heading states as '*Unlawful actions and representations*'. In my judgment the facts of the case do not justify application of Section 87B which was designed for a different purpose altogether, so there is no proof of violation of Section 87B , on the balance of probability.

25. Section 75 of Commerce Commission Decree 2010 deals with '*Misleading or Deceptive Conduct*' and Section 76 of Commerce Commission Decree 2010 deals with '*Unconscionable Conduct*' and Section 77 of Commerce Commission Decree 2010 deals with '*False or Misleading Representation*', these are all designed to control the conduct of scrupulous business activities against consumers and in my judgment none of them fits to the conduct of the Defendant on the evidence presented to the court. It is suffice to state that the Defendant had abused the process of the court by initiation of Winding Up action by serving Section 221 of the Companies Act⁵. The remedies for such abuse is not damages, but costs. The Plaintiff had not proved any damages due to the actions of the Defendant in serving the notice to wing up.

26. In my judgment the conduct of the Defendant warrant indemnity costs. The Defendant had knowingly instituted a draconian action of Winding Up, even without a single documentary proof of such 'debt' from the Plaintiff.

27. In ***Re a company (No 0012209 of 1991)*** [1992] 2 All ER 797 a party instituted Winding Up action unreasonably and for that an a permanent injunction was granted and at the conclusion held, (per Hoffmann LJ) p800

*'For those reasons the injunction will go. The basis upon which the injunction is granted is that the application is an abuse of the process of the court. I think that it should be made clear that **abuse of the petition***

⁵ ibid

procedure in these circumstances is a high risk strategy, and consequently I think the appropriate order is that the petitioner should pay the applicant's costs on an indemnity basis'. (emphasis added)

28. In the award of indemnity cost there are two procedures, adopted in this jurisdiction and I do not wish to cite cases. It is suffice to state that indemnity cost can be awarded after an inquiry by the Master or a judge or the court can order a 'global sum' as indemnity costs having considered the circumstances of the case. Considering the additional cost to the parties in having a separate inquiry to assess indemnity costs, I prefer the later for its utility and convenience. This method of award would be helpful for case management purpose though that was not the determinant factor to adopt it. I would award a sum of \$10,000 as indemnity costs for this action considering that there was an application for injunction, a purported attempt for a Winding Up and also cost of litigation as this was an action filed in 2012. The indemnity cost should be as near as possible to the actual cost, and considering the inflation and other factors the amount of \$10,000 can be considered as indemnity costs. (For obtaining injunction and also for conducting the action to the completion)

CONCLUSION

29. The Plaintiff had failed to prove the counter claim and there is no proof of alleged debt on balance of probability. In any event there is no evidence that the Plaintiff owed any money to the Defendant. The two invoices (P1 and P2) total to a sum of \$38,930.40 and none is issued to the Plaintiff. Apart from that there was correspondence from the Plaintiff that shows that Defendant abused the process of the winding up against a solvent Plaintiff by serving the demand notice to them. The evidence shows that there was no documentary proof of any debt by the Plaintiff to the Defendant. So the counter claim contained in the statement of defence is struck off. The Plaintiff is granted an injunction as prayed, restraining the Defendant from taking any further action regarding winding up based on the alleged debt or part of that alleged debt. The Plaintiff's claim based on Commerce Commission Decree 2010 is not proved, hence it is struck off. The Defendant had abused the process by initiation of the winding up action by serving


Notice of Demand in terms of Section 221 of Companies Act⁶. An indemnity costs is granted for the abuse of the process by the Defendant in the said action. The Plaintiff is granted an indemnity cost of \$10,000.

FINAL ORDERS

- a. An injunction restraining the Defendant Company and or their servants and or their agents from taking into further actions and or presenting any Winding Up Petition to the matters stated in the purported winding up notice dated 18th July, 2011 and 19th August, 2011 against the Plaintiff Company.
- b. An injunction restraining the Defendant to and or their servants and their agents in manner whatsoever advertising (including but not limited to advertisement in the daily newspaper and the Fiji Gazette any Winding Up Proceedings that may have been filed in the High Court.' (i.e relating to alleged debt or part of it)
- c. The counterclaim of the Defendant is dismissed, and struck off.
- d. The Plaintiff is granted indemnity cost of \$10,000.

Dated at Suva this 24th day of February, 2017




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Justice Deepthi Amaratunga
High Court, Suva

⁶ ibid