

IN THE HIGH COURT OF FIJI  
AT SUVA

Winding Up Action No. HBE 24 of 2016

IN THE MATTER of WESTERN WRECKERS  
LIMITED a limited liability company having its  
registered office situated at 34 Belo Street, Samabula,  
P O Box 4096, Samabula, Suva in the Republic of Fiji.

A N D

IN THE MATTER of the Companies Act  
2015

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Kunatuba - for the Petitioner  
: Mr O'Driscoll - for the Respondent Company.

Date of Ruling : 28<sup>th</sup> June, 2017

RULING

*[Application for winding up pursuant to Section 513 (c)  
of the Companies Act 3 of 2015 ('the Act')]*

## INTRODUCTION

1. This is Bank of the South Pacific's ("the Petitioner") petition to wind up Western Wreckers Limited ("the Company") on the basis that it is unable to pay its debt.
2. The Company opposes the petition on the basis that the debt is disputed; Company is solvent and running Company, which can pay its just debts. Further, the amount of the claim by the Petitioner should be either vastly reduced or finalised if the Petitioner had correctly executed its securities rather than discharging same without realising their value.
3. The parties relied on the affidavit evidence filed in this proceeding. These are:
  - (a) The original Affidavit of Kevin Yuen Verifying the Petition filed on 11<sup>th</sup> November, 2016;
  - (b) The Affidavit of Mohammed Hanif opposing the petition filed on 18<sup>th</sup> January, 2017; and
  - (c) The original Affidavit in reply of Kevin Yuen filed on 07<sup>th</sup> March, 2017.

## BACKGROUND

4. The Directors of the Respondent Company signed a Letter of Offer of Finance Facility on behalf of the Respondent Company, with the Applicant on 08<sup>th</sup> October, 2012 for loan facilities provided to the Respondent by the Applicant.
5. The Respondent defaulted in their loan repayments and Demand Notices were issued. On 18<sup>th</sup> November, 2015 the Applicant wrote to the Respondent giving them time to finalise the sale of their properties and to divert proceeds into the loan accounts in arrears held by the Applicant. Also, in the interim, the Respondent Company was to make instalments Of \$5,000 per month commencing 30<sup>th</sup> November, 2015. This Agreement was entered into on a 'without prejudice basis'.
6. Although the Respondent Company was to direct proceeds from the sale of the properties to the Applicant, this was not done. The Respondent Company was left paying \$5,000 per month in its attempt to reduce the balance owed to the Applicant.
7. The debt allegedly owed to the Applicant were as follows:
  - (a) Loan Account No. 8660924 \$135,919.30
  - (b) Cheque Account No. 7885713 \$548,638.02

8. The Respondent Company accepts that there had been loans taken from the Petitioner on various occasions and to satisfy the repayments of those loans various securities and Guarantors were put in place, only some of which have been realised.
9. A Demand Notice was issued against the Respondent Company on 23<sup>rd</sup> March, 2016.
10. The Respondent failed to pay the money owed and hence filed a Winding up Petition against the Respondent Company.

SERVICE of the STATUTORY DEMAND NOTICE

11. On 23<sup>rd</sup> March, 2016, the Petitioner issued a Demand Notice ("s.515 notice") to the Company pursuant to section 515 of the Companies Act ("the Act") for the payment of the debt.
12. The Applicant's Solicitors, through registered mail on 23<sup>rd</sup> March, 2016 sent to the Company the s. 515 Demand Notice at its registered office situated at 34 Belo Street, Samabula, and/or P. O. Box 4096, Samabula, Suva in the Republic of Fiji.
13. Prior Demand Notices were issued to the Company and the following are also noted from the Affidavit in Reply of Kevin Yuen-
  - Demand Notice issued on 17<sup>th</sup> February, 2014- The Respondent responded via letter dated 28<sup>th</sup> February, 2014. The Applicant and the Respondent entered into a 'without prejudice' Payment Agreement dated 13<sup>th</sup> March, 2014;
  - Demand Notice issued on 29<sup>th</sup> June, 2015 and 06<sup>th</sup> August, 2015 respectively. The Applicant and the Respondent entered into a 'without prejudice' arrangement on 18<sup>th</sup> November, 2015 whereby the Respondent was to make monthly deposits of \$5,000 till settlement of the debt through the sale of their property. The Respondent later via email dated 09<sup>th</sup> March, 2015 that 'settlement of sale of Nausori property has been done but no balance funds from the sale was directed to us.....in the meantime we will continue with the monthly repayment of \$5,000". This led the Petitioner to issue the Demand Notice dated 23<sup>rd</sup> March, 2016 to the Respondent and thereafter to the Guarantors on 14<sup>th</sup> April, 2014.
14. The Company submitted through its written submissions that a Demand Notice had previously been issued by the Petitioner to the Company on 16<sup>th</sup> October, 2011 to recover the sum due at that time of \$984,518.66 with interest at 13.5 % per annum. After this demand, some of the securities had been sold to repay some of the outstanding loan amount. From 2011 until 15<sup>th</sup> December, 2016 there had been no further demand notice received by Western Wreckers Limited, which was the date the Petition was served without notice of demand having been given to the registered office prior to the Petition and as such the

Petition should be deemed as irregular for non-compliance of the Rules. Further repayments were being made after the Agreement with the Petitioner on time up until it became clear to the Company that the Petitioner was releasing securities such as guarantees and collateral mortgages without reference to the Company and is questionable and possibly fraudulent circumstances.

15. Despite service of the s.515 notices, the Company defaulted in their loan repayments. On 18<sup>th</sup> November, 2015 the Applicant wrote to the Respondent giving them time to finalise the sale of their properties and to divert proceeds into the loan accounts in arrears held by the Applicant. Further, in the interim, the Respondent Company was to make instalments of \$5,000 per month commencing 30<sup>th</sup> November, 2015. The proceeds from the sale of the properties were not done in terms of the Agreement entered into the parties on a 'without prejudice' basis, the Company was left paying \$5,000 monthly in its attempts to reduce the balance amount owed to the Applicant.

#### SERVICE of the PETITION and AFFIDAVIT VERIFYING PETITION

16. On 11<sup>th</sup> November, 2016, the Winding-up Petition ("the Petition") was presented to the Court.
17. The Winding-up Petition was listed to be heard before the Master of the High Court on Monday 15<sup>th</sup> May 2017, at 10:00 am, for the Petitioner or his barrister and solicitor to appear for the purposes *Section 513 and 523 of the Companies Act*.
18. The Affidavit of Kevin Yuen Verifying Application for Winding Up (Statutory Affidavit) was deposited on 25<sup>th</sup> October, 2016.
19. On 17<sup>th</sup> January 2017, Affidavit of Service by Pita Tamani Kaisawa was filed verifying service of the Winding-up Petition and Affidavit Annexing Affidavit Verifying Application for Winding Up at the Company's registered office at 34 Belo Street, Samabula, Suva.

#### ADVERTISEMENT of the PETITION

20. The Petition was duly advertised in the *Fiji Times* newspaper on Thursday 12 January 2017, and in the Republic of the Fiji Islands Government Gazette (No. 4, Volume 18) on Friday 13<sup>th</sup> January, 2017 respectively.

MEMORANDUM of DUE COMPLIANCE

21. On 12<sup>th</sup> January, 2017, a certificate signed by the Court Registrar was issued and sealed on 16<sup>th</sup> January, 2017 pursuant to *rule 19 (1) of the Companies (Winding Up) Rule, 2015* and the *High Court Practice Direction No. 2 of 1986*.

THE LAW

22. *Section 513 of the Companies Act 03 of 2015* ("the Act") provides for cases in which a Company may be Wound by Court. *Section 513 (c) of the Act* herein is the relevant section for Court to consider in determining this application before court-  
"A company may be wound up by the Court," if the Company is Insolvent."
23. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd*<sup>1</sup> 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)

24. In terms of *section 515 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. 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)

<sup>1</sup> [1994] FJHC 219; [1994] 40 FLR 260 (11 November 1994)

DISPUTED DEBT

25. Where the debt is disputed (as in this case), 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)

26. Justice Pathik had a similar view in *Vivross Development Ltd v Australia and New Zealand Banking Group Ltd*<sup>2</sup>. 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)

27. The Company doesn't completely dispute the debt of the Petitioner but is asking that the same be mitigated on the basis that-
- (a) There have been loans taken from the Petitioner on various occasions and to satisfy the repayments of those loans various securities and Guarantors have been placed, some of which have been realised;

<sup>2</sup> [2002] FJHC 245; HBC0290d.2001s (15 February 2002)

- (b) The respondent confirms that it was only issued with one (1) Demand Notice on 16<sup>th</sup> October, 2011 and not others as alleged by the Petitioner. To recover the debt, some of the securities had been sold to repay some of the outstanding loan;
  - (c) The service of the Petition was made on the solicitors of the Respondent. The Respondent claimed that such service is defective and as a result the Petitioner should be declared a nullity;
  - (d) Western Wreckers Limited is a solvent and running Company which can pay its just debts and the amount claimed by the Petitioner should be either vastly reduced or finalised if the Petitioner had correctly executed its securities rather than discharging same without realising their values; and
  - (e) This being a summary process and what has been outlined in the Affidavit in Opposition it would be appropriate for the Petitioner to proceed by way of a civil action rather than on this summary process.
28. The evidence however contradicts the Company's assertions. Firstly, there is no real dispute in respect of the existence of the debt. The Respondent has not denied the existence of the debt in his Affidavit in Opposition filed. In fact, the Respondent is trying to avoid and or pay the debt owed as per the **"without prejudice" Agreement** entered into and executed on two (2) occasions between the parties herein on 13<sup>th</sup> March, 2014 and 18<sup>th</sup> November, 2015 respectively. The agreements of 13<sup>th</sup> March, 2014 and 18<sup>th</sup> November, 2015 consistently indicate that a debt is owed by the Company and a resolution reached as to how the arrangements would be met by the Respondent Company. The third paragraph of the Agreement further states that-
- 'As agreed, the Bank will forestall recovery actions as long as the above arrangements are being made. However, the Demand will remain current and will be exercised by the Bank, should there be any breaches to the arrangements...'*
29. These Agreements entered into were made 'without prejudice' but the **Agreement** does confirm that the **Company clearly admits the debt since the arrangements were entered into and executed accordingly**. The Company repeatedly confirmed the debt in its email to the Bank dated Wednesday 09<sup>th</sup> March, 2016 stating **"Settlement of Nausori Property was done...as such no funds came to us and we are left with no option but to continue with \$5,000 monthly repayment to clear our debt with you. We are committed to paying off our debt with you as such we have some free properties in New Zealand which we intend to sell and clear our debt..."**. Again, this tantamount to the arrangement made by the Respondent with the Petitioner that the Respondent will clear his debt with the Bank (Petitioner)..

30. Although the Company appears not to dispute the arrangements made as per the 'without prejudice' Agreements of 13<sup>th</sup> March, 2014 and 18<sup>th</sup> November, 2015, it failed to pay off the outstanding debts as per these arrangements.
31. Therefore, the Company has failed to adduce sufficient evidence to establish a *prima facie* case which satisfies 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 **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** accordingly.
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. Bearing in mind the nature and the circumstances in which the current case was handled by the Respondent, the Petitioner is entitled to a substantial cost in the sum of \$1,500.
35. The Petition was filed on 11<sup>th</sup> November, 2016 and thereafter listed before the Deputy Registrar for compliance and issuance of the Certificate in terms of Rule 19 (1) of the Companies (Winding Up) Rules, 2015. The matter was then listed before the Master for further deliberation of the application. Since the filing and issuance of the Petition, some 7 months has lapsed. Section 528(1) of the Companies Act states that *'an application for a Company to be wound up in Insolvency is to be determined within 6 months after it is made.'*
36. *Section 528 (2) of the Act states that the Court may by order (on such conditions as it considers fit) extend the period within which an application must be determined, but only if-*
  - (a) *'the Court is satisfied that special circumstances justify the extension; and*



(b) *the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires."*

37. The case was heard and concluded on 15<sup>th</sup> May, 2017 and Judgment to be delivered today (28<sup>th</sup> June, 2017).
38. The Court is satisfied that the application after heard was adjourned for preparation of the Judgment to be delivered in this case and therefore this very special circumstances justified the extension till today (28<sup>th</sup> June, 201).
39. For the above reasons, the following orders are made in terms of its Petition.

**ORDERS**

- (i) That Western Wreckers Limited is hereby wound up under the provisions of the Companies Act 3 of 2015;
- (ii) That the Official Receiver is appointed as the Liquidator to the conduct of the Winding Up herein; and
- (iii) That there will an order for costs against the Respondent Western Wreckers Limited summarily assessed at \$1,500 to be paid within 14 days timeframe.
- (iv) Special circumstances justified the extension to the delivery of Judgment to 28<sup>th</sup> June, 2017.
- (v) Orders accordingly

DATED AT SUVA THIS 28<sup>th</sup> JUNE 2017



cc. Lateef & Lateef Suva  
Messrs O'Driscoll & Co., Suva

VISHWA DATT SHARMA  
Master of High Court, Suva