

**IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION**

WINDING UP ACTION NO.: HBE 32 of 2018

**IN THE MATTER** of **TOUCHWOOD  
PACIFIC PTE LIMITED** a limited liability  
company having its regarded office at  
Nabukavesi Queens Highway, Navua.

**AND**

**IN THE MATTER** of the Companies Act  
2015.

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**APPEARANCES/REPRESENTATION**

**APPLICANT** : Mr J Serulagilagi [MC Lawyers]  
**RESPONDENT** : Mr Romano [MIQ Lawyers]  
**JUDGMENT OF** : Acting Master Ms Vandhana Lal  
**DELIVERED ON** : 03 October 2019

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**JUDGMENT**

[Winding Up by a Creditor of a Company in Insolvency]

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**Application**

1. This is an application by China Railway First Group (FIJI) Limited [the Applicant] under section 513(3)(c) of the Companies Act 2015 [the Act] to wind up Touchwood Pacific PTE Limited [the Respondent] on the basis of insolvency.
2. A presumption of insolvency arises from the Respondent's failure to comply with a statutory demand dated 16 April 2018. The quantum of debt is \$27,203 [Twenty Seven

Thousand Two Hundred and Three Dollars] being sum owing for the hire of machineries by the Respondent from the Applicant's Plant and Machinery Hire Department.

3. The winding up application was commenced on 24 August 2018. On 03 December 2018, the 06 months period for determination of the application was extended pursuant to section 528 of the Act.
4. On 22 October 2018, the Respondent filed an affidavit opposing the application.
5. A reply was filed by the Applicant on 17 February 2018.

#### **Opposition**

6. The grounds for opposing the application can be summarised as follows:
  - i. *There was breach of contract by the Applicant by not providing operators for the bull dozer and excavator caterpillar. As a result of which the work was not done for three (3) weeks from 20 January 2017 to 21 February 2017.*
  - ii. *Pursuant to Clause 2.1 of the contract the renting period for the machine was from 20 January 2017 to 20 February 2017. The Applicant has without just reason charged the Respondent for extra 11 days up to 28 February 2017.*
  - iii. *The Applicant had influenced the Respondent to enter into the said contract without allowing the Respondent to get independent legal opinion. The initial agreement was for the rental rate to be calculated at an hourly rate whilst in operation at work site.*

#### **Can the Company dispute the debt?**

7. Rule 9 of the Companies (Winding Up) Rules [the Rules] provides that an application for winding up must be supported by a statutory affidavit verifying the application. Said

affidavit is prima facie evidence of the facts stated on it. The Affidavit must set out the facts that are material to, and justify the making of a Winding Up order [Rules 10 (1)].

As stated earlier, debt is sum owing for the hire of machineries by the Respondent from the Applicant's Plant and Machinery Hire Department

8. Section 529 of the Act reads:

*(i) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the court, oppose the application on a ground –*

*a. That the company relied on for the purposes of an application by it for the demand to be set aside; or*

*b. That the company could have so relied on, but did not so rely on (whether it made such an application or not).*

*(ii) The court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent.*

9. The Respondent did not take the step of applying to set aside the statutory demand pursuant to Section 516 of the Companies Act.

10. Neither has the Respondent sought leave pursuant to Section 529 of the Companies Act to oppose the application on a ground it may have relied upon in an application to set aside the statutory demand.

11. I do not find the Respondent has a legitimate basis to dispute the debt the subject of the Plaintiff's statutory demand.

12. For these reasons the ground of opposition need not be considered further.

**Is the Respondent Company Solvent?**

13. The test for solvency is found in section 514 (1) of the Companies Act which reads”

*“A company or foreign company is solvent if, and only if, it is able to pay all the debts, as and when they become due and payable”.*

Sub section 2 in turn states that;

*“A company or foreign company which is not solvent is Insolvent”.*

14. A company is said 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 \$10,000 or such other Prescribed Amount then due, has served on the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due (“Statutory Demand”) and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or*

(b) *if during or after a period of 3 months ending on the day on which the winding up application is made—*

(i) *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;*

(ii) *a Receiver or Manager has been appointed, of Property of the Company was appointed under a power contained in an instrument relating to a Floating Charge on such Property; or*

(iii) *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 must take into account the contingent and prospective liabilities of the Company.*

#### **Principles covering assessment of solvency of a debtor company**

15. There is a presumption of insolvency by reason of the company's failure to comply with the statutory demand. Hence the onus is on the company to prove that the company is solvent.
  
16. Hayne J. in **Commonwealth Bank of Australia v. Begonia Pty Limited** [1993] 11 ACLC 1075 at 1081 stated that to discharge the onus the Court should ordinarily be presented with "the fullest and best" evidence of its [company's] financial position.
  
17. Weinberg J. in **Ace Contactors & Staff Pty Limited v. Westgarth Developments Pty Limited** [1999] FCA 728 (1 June 1999) laid out the relevant legal principle which it thought it was established by authorities governing operation of Section 459 of the Australia Corporations Law:
  - i. *The Respondent is presumed to be insolvent and as such bears the onus of proving its solvency; Elite Motor Campers Australia v. Leisureport PT4 Limited (1996) 22 ACSR per Spender J; ... ..;*
  
  - ii. *In order to discharge that onus the court should ordinarily be presented with the "fullest and best" evidence of the financial position of the respondent; Begonia [Supra].*
  
  - iii. *Unaudited accounts and unverified claims of ownership or valuation were not ordinarily probate of solvency. Nor are bad assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared; Commissioners Simionato Holdings Pty Ltd [1997] FCA 125 .....;*

- iv. *There is a distinction between solvency and is a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due must be considered in determining solvency: Rees v. Bank of New South Wales [1964] HCA 47; [1964] III CLR 210.....;*
- v. *The adoption of a cash how test for solvency does not mean that the extent of the company's assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account: Sandwell v. Porter [1966] HCA 28; [1966] 115 CLR 666 at 671 per Barwick C.J. ....;*
- vi. *The question of solvency must be assessed at the date of the hearing. However this does not mean that future events are to be ignored: Leslie v. Howship Holidays Pty Limited [1997] 15 ACLL 459.;*
- vii. *It is not abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, or because there may be an alternate means available to the applicant to vindicate its rights: Elite Motor Campers Australia v. Leisureport Pty Limited [Supra].*


18. Turning to the Affidavit filed by Mohammed Imran Qamer a Director of the Respondent Company, the Respondent's current assets is estimated in sum of \$FJD10,000,000.00 including stock, resources, local and overseas markets [paragraph 21 of the affidavit in opposition].

19. Apart from the above statement there are no evidence to support the company's content that is solvent.
20. There are no audited balance sheet to disclose its assets, liabilities and net assets. Neither is there any audited profit and loss statement disclosed or tax returns.
21. In absence of such documents it is impossible for this court to accept the claim that the company is solvent.
22. Hence the respondent has not discharged the onus of display the statutory presumption of insolvency.
23. Further I find the company has not provided to this court sufficient/good reason to exercise its discretion in granting an order under Section 523 of the Act.

#### Final Orders

24. In the circumstances following orders are made:
  - i. Touchwood Pacific Pte Limited be wound up pursuant to 513(3)(c) of the Companies Act 2015;
  - ii. The Official Receiver is appointed as the provision liquidator of the company; and
  - iii. The Respondent pays to the Applicant cost of this application which cost is summarily assessed at \$1,000.



  
Vandhana Lal [Ms]  
Acting Master  
At Suva.