

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

ACTION No. HBE 47 of 2010

IN THE MATTER OF FIJI DAILY POST COMPANY LIMITED [IN LIQUIDATION]

AND

IN THE MATTER of the Companies Act.

AND IN THE MATTER of an application by a contributory for a limited stay of the
Winding Up Order.

Counsel : Mr. A. Singh for the Applicant
Mr. P. Chand for the Petitioning Creditor
Ms. N. Ali for the Official Receiver

Date of hearing : 18th April, 2019

Date of Ruling : 29th April, 2019

RULING

(On the Application pursuant to section 553 of the Companies Act 2015)

[1] The applicant Belmont Trading Limited made this application pursuant to section 553 of the Companies Act 2015 seeking the following orders:

1. That Alan Hickling of Melbourne Australia representing Belmont Trading Limited, a limited liability company duly registered new Hong Kong be deemed to be a contributory (hereinafter referred to as the Applicant) for the purpose of section 553(1) of the Companies Act 2015).
2. That the order made on 25th August 2010 winding up Fiji Daily Post Company Limited (in liquidation) be stayed for a limited period to be determined by the court from time to time on the application of the contributory applicant herein.
3. That Fiji Daily Post Company Limited (in liquidation) be permitted and authorised to continue with the court action against Westpac Banking Corporation being HBC 600 of 2005 or in a fresh action as considered appropriate by the contributory.
4. That provision may be made for the costs of the proceedings and security thereof.

[2] Fiji Daily Post Company Limited was ordered to be wound up in winding up action No. 47 of 2010 on an application made by Fiji National Provident Fund.

[3] The winding up order was made on 25th August, 2010. The winding up application came up for hearing on 25th August, 2019 there was no appearance for Fiji Daily Post Company Limited and the court made order for winding up. After nearly nine years Belmont Trading Company claiming to be a contributory made this application pursuant to section 553 of the Companies Act 2015. No explanation has been offered by the applicant for taking such a long time to make this application. The representative of the contributory company was

the Managing Director of Fiji Daily Post Company Limited at the time of making the application for winding up.

[4] Section 531 of the Companies Act 2015 (the Act) provides:

- (1) The Court may, at any time after an order for winding up, on the application either of the liquidator or the Official Receiver or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.
- (2) On any application under this section, the Court may, before making an order, require the Official Receiver to furnish to the Court a report with respect to any fact or matter which are in his or her opinion relevant to the application.
- (3) A copy of every order made under this section must be forwarded by the Company, or otherwise as may be prescribed by regulations made under this Act, to the Registrar, using the Prescribed Form, for registration.

[5] Section 531(1) of the Act confers discretion on the court to stay a winding up order upon proof to the satisfaction of the court that the winding up order ought to be stayed. The burden of satisfying the court is on the party who makes such an application and in this case the contributory, Belmont Trading Limited.

[6] The action No. HBC 600 of 2005 was instituted by Fiji Daily Post Company Limited against Westpac Banking Corporation, Associated Media Limited and Yashwant Gounder claiming damages. The first defendant Westpac Banking Corporation filed summons on 02nd June, 2016 pursuant to Order 25 rule 9 of the High Court Rules 1988 to have the action against it struck out. At the same time the plaintiff filed a summons pursuant to section 531 of the Act seeking leave to continue with the action against the defendants.

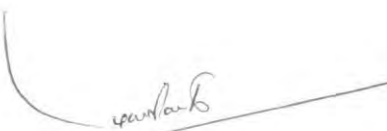
- [7] The learned Master of the High Court by its ruling dated 04th September, 2017 struck out the plaintiff's action against the 1st defendant and also the summons filed by the plaintiff seeking leave to continue the action against the 1st defendant.
- [8] There was another application filed pursuant section 531 of the Act by Fiji Daily Post Company Limited before the High Court which was also dismissed.
- [9] The learned Master of the High Court only struck out the claim against Westpac Banking Corporation. However, Fiji Daily Post Company Limited did not pursue the claim against the other defendants. One of the reliefs prayed for in the present application for leave to continue with HBC 600 of 2005. The action against the 1st defendant was struck out in 2017 and I do not see any appeal preferred against the ruling of the learned Master of the High Court. In paragraphs 46, 47 and 48 of the supporting affidavit Alan Hickling states he instructed the solicitors to appeal the decision of the learned Master of the High Court and set out certain grounds of appeal which are of no relevance to the matter before this court since any application pursuant to section 531 of the Act is not an appeal from a decision of a court.
- [10] If the applicant intends to sue Westpac Banking Corporation it will have to initiate proceedings afresh. In paragraph 19 of the amended statement of claim Fiji Daily Post Company Limited says the 3rd defendant Yashwant Gounder operated the cheque account from 20th June, 2001 to 11th September, 2003. The cause of action, if any, therefore has accrued to Fiji Daily Post Company Limited on 11th September, 2003. Any action arising out of the acts committed during the said period should be brought within six years from the accrual of the cause of action and therefore, any new action brought by Fiji Daily Post Company Limited would be time barred in view of the provisions of the Limitation Act.
- [11] It is also important to note that there is no allegation in the amended statement claim that any of the defendants, especially the 3rd defendant misused or misappropriated any funds of Fiji Daily Post Company Limited. In the affidavit in support in the present application which cannot be considered as pleadings in HBC 600 of 2005, certain amounts have been given as suspect cheques, Counter cheques, cash cheques etc., but Alan

Hickling, who was a director of Fiji Daily Post Company Limited, does not say what happened to this money.

- [12] The other counsel who appeared for the petitioning creditor and the official receiver consented to the application of Mr. Alan Hickling subject to certain terms such as the costs of the application to be borne by the applicant. When a party seeks to exercise discretionary power of the court he must establish to the satisfaction of the court the grounds required for the exercise of such discretion. As I have stated above the applicant Mr. Hickling has not been able to show any ground sufficient for the court to exercise its discretionary power in his favour.
- [13] Finally, the official liquidator cannot place his or her responsibilities towards the creditors on someone else. It is his or her duty to take necessary actions to recover debts, if any, owe to the company.
- [14] For the reasons aforementioned I make the following orders.

ORDERS

1. Application for limited stay of the winding up order is refused.
2. I make no order for costs.



Lyone Seneviratne

JUDGE

29th April, 2019