

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

WINDING UP ACTION NO.: HBE 12 of 2018

**IN THE MATTER** of **HELIPRO (FIJI) LIMITED** a limited liability company having its registered office at Paul McDonnell Lawyers, 1<sup>st</sup> Floor, Anderson Fong and Son Building, Main Street, Savusavu in Fiji.

**AND**

**IN THE MATTER** of the Companies Act

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**APPEARANCES/REPRESENTATION**

**APPLICANT** : Ms R Lal [Lal/Patel/Bale Lawyers]  
**RESPONDENT COMPANY** : Mr R Singh [Parshotam Lawyers]  
**JUDGMENT OF** : Acting Master Ms Vandhana Lal  
**DELIVERED ON** : 07<sup>th</sup> February 2019

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**JUDGMENT**

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

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1. In this proceeding, Good Livin' Pty Limited, applies to have Helipro (Fiji) Limited wound up insolvency. The application is based on failure to comply with a statutory demand pursuant to Part 39 of the Companies Act 2015.
2. On 30 August 2018, I had made orders by Consent for the company to file and serve its Opposition in 14 days. However the company only filed one on 3 October 2018. Solicitors for the Applicant had endorsed consent for late filing.

As per the 30 August 2018 order, the Applicant was to file its Affidavit in Reply in 14 days. Hearing was schedule for 28 November 2018.

3. On 28 November 2018 Ms. Lal made an application for adjournment. Her client was in United States of America (USA) and they could not get their Affidavit in Reply filed within the requisite time frame.

I found that counsels consenting to late filing of document by other party to which they have to respond to do so at their own risk especially in cases where hearing dates are assigned.

After deliberating on the application, following orders were made:

- i. *Applicant to file and serve its reply to the opposition in 14 days (due on 12 December 2018);*
- ii. *21 days thereafter parties to file and serve their written submission (due on 7 January 2019).*

4. I note neither party have complied with the above orders of the court.

Hence I shall proceed to determine the application on the Application for winding up with Affidavit Verifying and the Affidavit in Opposition.

5. The company has filed its Notice of Intention to appear on the application and opposes the application on following grounds;

- a) *That the company has had no contractual dealings with the Applicant;*
- b) *That the Company's dealings were with **Trivest International Limited** and it appears that the Applicant is an investment vehicle of **Trivest International Limited** but not having any privity with the Company;*
- c) *That the claim on which the Applicant has founded its Application for a Winding Up Order against the Company is disputed by the Company;*
- d) *That the Company did not receive notice of the Statutory Demand dated 4 December 2017 on which the Applicant has founded its Application for a Winding Up Order against the Company;*
- e) *That the Company did not receive notice of the Application for Winding up taken out by the Applicant and issued by the Chief Registrar of the High Court on 28 March 2018 until it was advertised in 'The Fiji Sun' newspaper issue of 27 April 2018;*
- f) *That as at the date of this Notice, the Company is not aware whether the Application for Winding up has been advertised in 'The Fiji Gazette';*
- g) *That the advertisement in the newspaper (The Fiji Sun) has been published less than 14 days before the hearing of the application*

*when Rule 12 (1) of the Companies (Winding Up) Rules require that the advertisement be published in a newspaper and in the Gazette not less than 14 days before the hearing.*

6. In its affidavit verifying application for Winding up Albert Bertini states:  
Good Livin' is a creditor of Helipro

Helipro was incorporated in Fiji on 10 August 2012.

He further alleges that Helipro was since December 2016 indebted to Good Livin' for a sum of USD\$25,000 for advances made at the company's request.

A statutory demand notice was served on the company on 4 December 2017.

However despite service, the Company failed to pay the amount or secure or compound for it to the reasonable satisfaction of the Applicant.

7. Good Livin' alleges that Helipro is unable to pay its debt and that there is no genuine dispute to the debt.
8. In his Affidavit in Opposition, Graeme Hedge the Company Secretary and Chief Executive Officer states that Good Livin' is not known to Helipro as Helipro never had any contractual dealings or any dealings with Good Livin'. There is no privity between Good Livin' and Helipro giving rise to the alleged debt.

Helipro denies making any requests for advances from Good Livin' as they never knew any entity by that name existed.

Helipro is a foreign company and not registered in Fiji.

Office of Paul McDonnell lawyers was closed in February 2016. Mr. McDonnell had provided an affidavit to this effect which was filed on 18 May 2018.

On or about the time the monies were allegedly advanced to Helipro, Helipro was in the process of purchasing a helicopter through Eckhart Helicopter Sales an American Company from an American based hospital called Trevor Corporation.

Mr. Albert Bertini is also a Director of Trivest Investment Limited who was also interested in a helicopter. Hence, Mr. Bertini approached Helipro to help facilitate this for him.

The purchase agreement dated 1 October 2015 is between Trevor Corporation DBA Eckhart Helicopter Sales and to Trivest International Limited to purchase one Agustin 109C helicopter.

Purchase price is for \$300,000 US Dollars and the purchaser was to pay deposit of \$25,000 in 14 days of execution of the agreement.

This agreement is only signed by the seller.

The arrangement between Helipro and Trivest Investment Limited was:

*Helipro was engaged by Trivest International Limited. It commenced services including arranging for an aviation specialist engineer to inspect the two helicopters for air-worthiness, ensure all log books were in order, disassembling the helicopter and packaging in a container for transportation to Fiji, purchasing specialist tooling for the helicopters, assembling the two helicopters and having them certified by Civil Aviation Authority of Fiji.*

*All this was to be done at Helipro's own cost.*

*Since Insurance was required Helipro arranged for this.*

*In return Trivest International Limited would pay the deposit sum of US\$25,000 each for the purchase of the two helicopters. No monies were to be refunded by Helipro as it was to bear other related cost.*

When the deposit became due and payable, Helipro was contacted by Escrow Account Holders informing them that Good Livin' Pty Limited had deposited US \$50,000 into the Escrow account.

According to Helipro, this was not their concern as this obligation was to be fulfilled by Trivest International Limited. There was no contractual agreement between Helipro and Good Livin' Pty Limited.

On its part Helipro had fulfilled its side of the arrangement with Trivest International Limited.

Claim if any by Good Livin' lies with Trivest and not Helipro.

They further say that they did not receive any demand for US\$25,000 from Good Livin' as it had arrangement with Trivest for the purchase of the two Helicopters.

The Company further alleges that it was never served with a Statutory Demand. It only received information of the Winding Up Application at about 3pm on Friday 27 April 2018.

Helipro contacted one Ryan Fong through its solicitors and were advised someone had approached Mr. Fong in December 2017 asking for Mr. Paul McDonnell office. The person left without leaving any paper.

The Applicant was aware of the Company's place of business and could have served the Statutory Demand on to the place of business when it found out the Registered Office was closed.

Since the Statutory Demand was never brought to the attention of the company, it could not have complied with or disputed the amount within the prescribed three (3) weeks.

Helipro is able to meet its legitimate financial obligation as it is in a healthy financial position.

9. In his Affidavit [in support of an application to file Affidavit in Opposition out of time] Mr Ryan Fong informed that on 6 December 2017 a person came to the building looking for Paul McDonnell.

Mr. Fong informed the person that Mr. McDonnell's Office was closed some time ago and he provided this person with Mr. McDonnell's number.

According to Mr. Fong, this person did not leave any papers with him or at the building.

10. The ground on which the Applicant has made its application for winding up is for non-payment of debt despite serving the Statutory Demand Notice.
11. Section 513 of the Companies Act 2015 outlines circumstances in which company may be wound up by the court and these are:
- *The company has, by special resolution, resolved that the company be wound up by the Court;*
  - *The company does not commence its business within a year from its incorporation or suspends its business for a whole year;*
  - *The company is insolvent;*
  - *The court is of opinion that if it is just and equitable that the company should be wound up;*
  - *In the case of a foreign company and carrying on business in Fiji, winding up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business.*

12. Hence relevant circumstance in this case is "the Company is Insolvent".

13. Section 514 states:

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

14. Section 515 defines inability to pay debts" as follows:

*"Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed 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 ('the 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 ..."*

15. The company alleges it was not served with a Statutory Demand hence they could not comply with it or dispute it in the three (3) weeks requirement.

16. Mr. Albert Bertini in his Affidavit Verifying Application on paragraph 6 states:

*"On 4<sup>th</sup> December, 2017, the Applicant via its lawyers Lal Patel Bale Lawyers served on the Company a demand signed by the lawyers requiring the Company to pay the amount mentioned in paragraph 5, now produced and shown to me and marked with the letters "AB2" is a true copy of the demand for USD\$25, 000.00 [Twenty Five Thousand American Dollars]"*

17. Annexure "AB2" to the Affidavit Verifying Application is a Statutory Demand under Section 515 of the Company Act addressed to Helipro (Fiji) Limited.

Notice was issued by Solicitor for the Creditor Messrs Lal Patel Bale Lawyers.

At the bottom of the back page a name "Ryan Fong" with date 6 December 2017 is handwritten.

18. Mr. Fong had stated the person who came to the premises at Anderson Fong and Son Building on 6 December 2017 did not hand him any document nor did the person leave any document at the premises.

19. There is no Affidavit evidence before this Court by the Applicant to state either wise.

Hence I find the company was not duly served with a Statutory Demand as required under section 515 of the Company Act.

20. Accordingly I find that the Applicant has failed to prove the Company is unable to pay its debts.

21. Further the debt is disputed by the Company as they claim the Applicant was not privy to the arrangement it had with Trivest.
22. The Applicant has not submitted any evidence to show how the debt of USD\$50,000 was incurred.
23. In the circumstance, I find the application for winding up shall fail and is accordingly dismissed.
24. The Applicant shall within 14 days pay the Company cost summarily assessed at \$2,000.



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Vandhana Lal [Ms]  
Acting Master  
At Suva.