

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
COMPANIES JURISDICTION

WINDING UP CAUSE NO. HBE 10 OF 2020

IN THE MATTER of DEVELOPMENT CORPORATION (SOUTH PACIFIC) LIMITED having its registered office at HLB Crosbie & Associates, Top Floor, HLB House, 3 Cruickshank Road, Nadi Airport.

A N D

IN THE MATTER of the Companies Act.

Appearances : Mr S. Deo with Mr R. Charan for the applicant
Mr V. Sharma for the respondent

Date of Hearing : 23 July 2020

Date of Ruling : 28 October 2020

DECISION

[winding up]

Introduction

[01] This is an application for winding up.

[02] On 20 May 2020, Padarath Window System Pte Limited (*“the applicant”*) made an application for a winding-up order under provisions of the Companies Act 2015 (*“Com Act”*) seeking the following orders:

1. *that Development Corporation (South Pacific) Limited may be wound up by the Court under the provisions of the Companies Act 2015;*

2. *that a liquidator be appointed to conduct the winding up and for such further or other order as may be just.*

[03] The Deputy Registrar of this court has filed a certificate of compliance under the Companies (Winding Up) Rules 2015, R 19 (2) (a). This certificate essentially confirms that:

- (a) The application has been advertised in a newspaper and published in the gazette;
- (b) The statutory affidavit and affidavit of service has been properly filed;
- (c) The written consent of the liquidator has been filed; and
- (d) The applicant has properly complied with these rules in relation to the application for a winding up order.

[04] It will be noted that there was dispute about the compliance with R 19 (2) (a).

[05] Initially, Development Corporation (South Pacific) Limited, the respondent company did not file an affidavit in opposition. Instead, on 25 June 2020, it did file a summons to set aside and dismiss of the winding up application together with a supporting affidavit made by Angus Pattie, the Construction Manager of the respondent company. However, the respondent company did not pursue that application. The court then made order that the affidavit in support filed along with that application should be treated as the affidavit in opposition to the winding up application subject to the right of the applicant company to file an affidavit in reply. Accordingly, the applicant company filed an affidavit in reply made by Anit Padarath, the Director of the applicant company.

[06] At the hearing, I heard oral submissions advanced by both parties.

The ground for winding up

[07] The applicant company applies to this court for a winding-up order against the respondent company on the grounds that:

1. *The Company was indebted to the petitioner for the amount of \$48,115.88 being the outstanding amount due and owing as per the services rendered for fabrication, supply*

and installation of aluminium joinery on Lot 6 and Lot 7 of the Fantasy Project of land at Fantasy Island in Nadi.

2. *On 24 January 2020, the petitioner served on the company a statutory demand signed on behalf of the applicant requiring the company to pay the amount of \$48,115.88 being the outstanding amount due and owing as per the services rendered for fabrication, supply and installation of aluminium joinery on Lot 6 and Lot 7 of the Fantasy Project of land at Fantasy Island in Nadi.*
3. *The company failed for three weeks after service of the demand to pay the amount or to secure or compound for it to the reasonable satisfaction of the applicant.*
4. *The company is unable to pay its debts.*
5. *The applicant believes that there is no genuine dispute as to the existence or amount of the debt. The company has neither responded to the statutory demand nor made any attempts to set aside the same.*

Respondent's opposition

[08] The respondent company in its converted affidavit in opposition states that:

- a) *The respondent engaged the applicant to carry out an aluminium doors and windows installation contract ("the works"). The works were in relation to two buildings situated in Lot 6 in Fantasy Island, Nadi.*
- b) *Whilst the aluminium for the first building was supplied correctly. The aluminium for the second building supplied as far as the colour of the material was not as agreed to initially (the wrong colour was due to the applicant's wrong application of the agreed to colour). After our complaint and subsequent negotiations, the parties agreed to utilize a different colour subject to a discount of \$30,000.00 in favour of the respondent. I was involved in the negotiations and I clearly remember the applicant through its director Mr Anit Padarath confirming the \$30,000.00 discount.*
- c) *When the respondent issued a payment claim No. 5 dated 21 February 2018, we noticed that the discount only took into account an amount of \$22,199.80 as opposed to the agreed \$30,000.00 as stated in paragraph 6(b) of the affidavit above.*

- d) *Apart from the issue of the wrong amount of discount being applied by the applicant, subsequent, inspections carried out by the respondent on the subject buildings revealed there were substantial defects in the works done by the applicant, inter alia, the following major defects were noted:*
- i. *Jamming of sliding doors and security screen rollers;*
 - ii. *Rollers breaking upon movement, and*
 - iii. *Sealant applied around the glass attached to the doors and screens were leaking.*
- e) *The respondent complained to the applicant (through its workers and director) of the defective works and the applicant agreed to carry out remedial works from March to June 2017. The respondent caused inspection to the remedial works on the buildings and it was revealed that the works did not remedy the defects. This was informed to the applicant on 15 June 2017, and was put on notice in the event they were not able to carry out the said remedial works, the respondent would engage an alternate contractor.*
- f) *The applicant's workers visited the building site around June 2017, for 3 days. However, they failed and/or neglected to carry out the said remedial works to our satisfaction. The respondent called the applicant's director to carry out the remedy. Mr Padarath represented to the respondent that the applicant will return to the building site. However, the applicant failed and/or neglected to return to the building site to carry out the works.*
- g) *The respondent at this stage had no other option as the project had to be completed. Therefore, it had to engage an alternate contractor to carry out the remedy works, as potential tenants were demanding to move in to the building. The totalled costs for engaging an alternate contractor was in the sum of \$13,321.98.*
- h) *The applicant demanded a total sum of \$48,115.88, which includes:*
- i. *\$12,557.40 as retention sum.*
 - ii. *Arrears in performance of the contract in the sum of \$30,071.48; and*
 - iii. *The sum of \$5,467.00 for installation of air conditioner covers.*

i) *The retention was not paid as the respondent had a right to the amount pending satisfactory completion of the works.*

j) *The respondent made the following payment in respect of the contract:*

<i>Initial contract sum (VIP)</i>	<i>\$251,548.00</i>
<i>Less discount</i>	<i>\$ 30,000.00</i>
<i>Actual contract sum (VIP)</i>	<i>\$221,548.00</i>

Less payments

<i>1st August, 2016</i>	<i>\$ 56,809.77</i>
<i>30th November, 2016</i>	<i>\$ 40,550.46</i>
<i>16th February, 2017</i>	<i>\$ 50,000.00</i>
<i>28th March, 2017</i>	<i>\$ 30,000.00</i>
<i>13th April, 2017</i>	<i>\$ 20,000.00</i>
<i>21st February, 2018</i>	<i>\$ 10,000.00</i>
<i>12th February, 2018 (Tax payment)</i>	<i>\$ 10,520.46</i>
<i>Total payments (VIP)</i>	<i>\$217,880.69</i>

Retention of \$11,467.41 has not been paid and payment is disputed as remedial works by an alternate contractor equated to \$13,321.35.

k) *The applicant owes the respondent a sum of \$1,853.94 for breach of contract (subtracting amount paid to the alternate contractor with the retention amount).*

The law

[09] The Com Act, by section 513, provides the circumstances in which a company may be wound up by the court. That section provides:

“Circumstances in which company may be wound up by the court

513 A company (which where applicable in this Part includes a foreign company) may be wound up by the court, if—

(a) the company has, by special resolution, resolved that the company be wound up by the court;

(b) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(c) the company is insolvent;

(d) the court is of opinion that it is just and equitable that the company should be wound up;

(e) 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."

[10] Section 514 differentiates between solvency and insolvency. It says:

"Solvency and insolvency

514 (1) 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.

(2) A company or foreign company which is not solvent is insolvent."

[11] Definition of inability to pay debts is given in section 515, which sets out that:

515 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 ("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.

Discussion

- [12] By section 513 of the Com Act, the court (High Court) is empowered to wind up a company or a foreign company registered in Fiji on the grounds stated therein which includes '*the company is insolvent*'.
- [13] The applicant has applied to this court to wind up the respondent company on the ground that it is unable to pay its debts.
- [14] It is alleged that respondent company is indebted to the applicant in the sum of \$48,115.88. The applicant served, under section 515 of the Com Act, a statutory demand notice on the respondent company demanding payment of \$48,115.88 within 21 days after the service of the notice. The demand notice had been served to the respondent company on 24 January 2020. However, the respondent company did not pay the amount demanded by the statutory notice within 21 days allowed for the respondent company to settle the debt. Nor did it make an application under section 516 of the Com Act to have the statutory demand set aside.
- [15] The applicant presented his application for winding up on 20 May 2020, some 4 months after service of the statutory demand. The date for hearing of the winding-up application was 3 July 2020. In the meantime, the respondent company filed a summons to set aside and dismiss the winding up application along with a supporting affidavit made by Angus Pattie, the Construction Manager of the respondent company. At the hearing on 3 July, Ms Choo counsel for the applicant raised a preliminary issue that the respondent cannot file a striking out application without filing an affidavit in opposition. After hearing the arguments on the preliminary issues, the court allowed the respondent company to convert its affidavit filed in support of striking out application to an affidavit in opposition, for the respondent had filed an affidavit although in the form of affidavit in support where they states the grounds why the debt is disputed, and provide particulars to demonstrate that the company is solvent. Accordingly, the affidavit filed by the company in support of its striking out

application was treated to be an affidavit in opposition with the right to reply to the applicant. The applicant then filed an affidavit in reply of Anit Padarath, the director of the applicant on 16 July 2020. The hearing was rescheduled for 23 July 2020.

Definition of inability to pay debts

- [16] Definition of inability to pay debts is found in section 515 of the Com Act. Relevantly, paragraph (a) of that section states: *“Unless the contrary can be proven to the satisfaction of the court, a company must be deemed to be unable to pay its debts—if a creditor, ..., to whom the company is indebted in a sum exceeding \$10,000 or such other prescribed amount then due, has served on 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 ...”*
- [17] Indeed, the respondent company did not pay the alleged debt for more than 3 weeks after service of the statutory demand. In the circumstances, the deeming provisions of section 515 (a) of the Com Act will come into operation. This means that the respondent company is deemed to be unable to pay its debts (in this instance the demanded sum was \$48,115.88). The presumption created by section 515 (a) appears to be a rebuttable presumption.
- [18] A company may be wound up by the court under section 513 of the Com Act on the ground that the company is unable to pay its debts (ground (c) in section 515).
- [19] On hearing a winding up application, the court may- (a) dismiss the application; (b) adjourn the hearing conditionally or unconditionally; or make any interim order, or any other order that it thinks fit (see section 523 of the Com Act).

Whether there is a genuine dispute about the existence or amount of the debts

- [20] Had the company applied to the court under section 516 to set aside the statutory demand, the company had the opportunity to satisfy the court that- (a) there is a genuine dispute between the company and the respondent about the existence or amount of the debt to which the demand relates; (b) the company has an

offsetting claim; (c) there is a defect in the demand and (d) there is some other reason why the demand should be set aside (see section 517 of the Com Act).

[21] It is to be noted that the company did not make an application for the statutory demand to be set aside.

[22] Section 529 of the Com Act states:

“Company may not oppose application on certain grounds

529 (1) 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).

(2) 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.

[23] In this case, when I grant leave to the respondent to convert their affidavit in support to an affidavit in opposition, I had considered and satisfied that the ground raised in the affidavit was material to proving that the company is solvent. The grounds offered in the company’s affidavit includes that there is a genuine dispute between the applicant and the company about the existence or amount of the debt, and that the company has an offsetting claim/counterclaim.

[24] On 24 January 2020, the applicant served on the respondent company a statutory notice demanding payment of \$48,115.88, being the outstanding amount due and owing as per the services rendered for fabrication, supply and installation of aluminium joinery on Lot 6 of the Fantasy Project of land at Fantasy Island in Nadi.

[25] The applicant and the respondent entered into a contract for fabrication, supply and installation of aluminium joinery on Lot 6 of the respondent (“the job”)

whereby the applicant agreed to do the job for the total sum of \$221,548.00 (*“the contract sum”*). The initial contract sum was \$251,548.00, which was later reduced by \$30,000.00 on account of discount. The applicant allowed \$30,000 discount because of the colour change. The applicant could not supply the material in the colour the respondent wanted. After the deduction of the discount the contract sum came to \$221,548.00.

- [26] After completion of the job by the applicant, dispute arose over the defective works. The applicant despite numerous reminders did not attend to the remedial works complained of. The respondent engaged another contractor to do the remedial works at the costs of \$13,321.98.
- [27] Subsequently, the applicant issued the statutory demand against the respondent demanding payment of \$48,115.88, which includes retention amount, arrears (this includes \$30,000 discount) and installation of air conditioner covers.
- [28] There was no dispute that the applicant allowed a sum of \$30,000.00 as discount for colour change. Interestingly, counsel for the applicant argued that the discount was conditional; however, he did not explain what was the condition.
- [29] As regards the retention money, the respondent’s evidence was that it had right to retain the retention money pending satisfactory completion of the job, that since the applicant had failed to attend to the remedial works, that it had to engage a different contractor to do the remedial works at the cost of \$13,321.98, which is \$1,853.94 in excess of the retention money, and that the applicant agreed to install air conditioner covers without any additional charges.
- [30] According to the respondent, they had paid a sum of \$217,880.69 towards the contract sum (after deduction of discount of \$30,000). The respondent had given the breakdown of the payment with particulars and dates. The respondent in evidence had stated that it paid a sum of \$10,000.00 to the applicant on 21 February 2018. However, during the hearing, counsel for the respondent agreed that that \$10,000.00 was not paid and it was mistakenly stated as paid. The court then ordered the respondent to make that payment. Accordingly, the respondent had informed the court that they had delivered a bank cheque in the sum of

\$10,000.00 payable to the applicant to the applicant's solicitor's officer on 2 October 2020 and that they are yet to acknowledge receipt of the same.

- [31] The debts demanded in the demand notice comprised of unpaid sum as agreed in the contract for fabrication, supply and installation of aluminium joinery between the parties. Indeed, there has been a dispute about the discount and remedial works.
- [32] On the evidence placed before me, I am satisfied that the debt is disputed on substantial ground. This would mean that there has been a genuine dispute about the existence of the debt.
- [33] I now turn to the issue of insolvency.
- [34] Insolvency is the state of being unable to pay the debts, by a person or company (debtor). Insolvency may arise in two forms: (a) cash-flow insolvency and balance-sheet insolvency.
- [35] In this case, the winding-up application is made on the basis that the respondent company is unable to pay its debt. For this purpose, the applicant relies on the presumption created under section 515 of the Com Act that: *"Unless the contrary can be proven to the satisfaction of the court, a company must be deemed to be unable to pay its debts—if a creditor, ..., to whom the company is indebted in a sum exceeding \$10,000 or such other prescribed amount then due, has served on 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 ..."*
- [36] The respondent company was able to displace the presumption created by section 515 of the Com Act. There is no evidence to suggest that the respondent company is insolvent in either form-cash-flow or balance-sheet.
- [37] Winding up proceedings should not be invoked as a mode of debt recovery. As observed in *Re a company* (No 0012209 of 1991) [1992] 2 All ER 797, the court should

give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Act as an alternative to the RSC 14 procedure (summary judgment).

Conclusion

[38] For the abovementioned reasons, I would conclude that the respondent company had displaced the presumption of inability to pay debt created under section 515 of the Companies Act. This follows that there is no proper basis to seek a winding-up order against the respondent company. I would accordingly dismiss the winding-up application with summarily assessed costs of \$1,500.00 payable by the applicant to the respondent company.

Result

1. Application for winding up dismissed.
2. Applicant shall pay summarily assessed costs of \$1,500.00 to the respondent company.

M.H. Mohamed Ajmeer
28/10/20

.....
M.H. Mohamed Ajmeer

JUDGE



At Lautoka
28 October 2020

Solicitors:

R. Patel Lawyers, Barristers & Solicitors for the applicant
AK Lawyers, Barristers & Solicitors for the respondent