

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

Winding Up Action No. HBE 40 of 2022

**IN THE MATTER** of an Application for Leave to Oppose a Winding Up Application in  
Winding Up cause No 40 of 2022.

BETWEEN

**ENGINEERED DESIGNS PTE LIMITED** a limited liability company incorporated in Fiji  
having its registered office at Office 1-3, Flagstaff Plaza, Bau Street, Suva

**APPLICANT**

AND

**WG INTERNATIONAL REAL ESTATE CO (FIJI) PTE LIMITED** a limited liability company  
incorporated in Fiji having its registered office at 193, Queen Elizabeth Drive, Suva.

**RESPONDENT**

**Counsel** : Ms. P. Nand for Applicant  
Ms. L. Bogitini for the Respondent (Debtor) Company  
Ms. P. Verma & Mr. T. Ravuniwa for Supporting Creditors

**Date of the Hearing** : 11<sup>th</sup> April 2023

**Ruling Delivered on** : 28<sup>th</sup> April 2023

## RULING

[1] The Respondent filed this Summons for Leave to Oppose a Winding Up Application filed by the Applicant. In the Summons the Respondent states that there is a genuine dispute between the parties on the amount of debt to which the Statutory Demand relates. And that would be material to prove that the Respondent Company is solvent.

[2] Section 529 of the **Companies Act No 3 of 2015** provides;

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.

- [3] In the Affidavit sworn by Julian Yuen, Operations Manager for the Respondent states that he has been authorised by the company to depose facts on behalf of the company and provides a letter of authority signed by its Director Mr. Ding Liang. In the Affidavit the Respondent states that the Company has invested money into the construction of 30 storied WG Friendship Plaza which is forecasted for completion in 2024.
- [4] The Respondent's position is that they engaged the services of the Applicant to provide project management on the WG Friendship Plaza project. There has been a Short Form Agreement between the parties for this purpose signed on 04.08.2020. On 24.12.2020 the Applicant submitted the first four invoices for the months of September to December. On 24.12.2020 the Respondent made a payment of \$10,000. However the Respondent states that they failed to understand why a receipt of July was issued to them by the Applicant when the actual engagement commenced from 04.08.2020. According to the Respondent there was minimal work taken place during the time due to the Covid 19 related restrictions in the country.
- [5] On 29.01.2021 the Respondent made another payment of \$10,000 to the Applicant. On 12.11.2021 the Applicant had issued a statement of outstanding invoices amounting to \$150,000. The Respondent states that these invoices were not substantiated by the Applicant and the Respondent will only settle invoices once they are substantiated. The Respondent further states that when the Applicant issued the statement amounting to \$150,000 they failed to include the \$20,000 payments made by the Respondent.
- [6] The Respondent issued a notice to terminate the engagement with the Applicant. The Applicant accepted the same and informed the Respondent that they have discontinued their services as at 29.11.2021 however they will formally withdraw from the agreement once all overdue payments are settled.
- [7] Later the Respondent retracted from their earlier suggestion and requested the Applicant to continue with their services. On 06.01.2022 the Applicant issued another letter to the

Respondent with proposed scope of works and conditions of engagement. The Respondent states that they made a payment of \$5000 to the Applicant on 04.03.2022.

- [8] On 22.04.2022 the Applicant issued a Demand Notice on the Respondent and left it at the Respondent's registered office which had been sold since 2020. The email sent by the solicitors in regards to the Demand Notice has been overlooked by the Respondent. The Respondent states that they were unaware of the Demand Notice until the publishing of the newspaper notice. The Applicant published the notice of Winding Up in the newspaper on 30.09.2022. On 13.10.2022 Respondent's solicitors uplifted copies of the notice from the High Court Registry. And on 17.10.2022 the solicitors have written to Applicant's solicitors requesting copies of work carried out by the Applicant in order to review.
- [9] The Applicant's Director Vijay Krishnan in his Affidavit in Opposition states that their company is not contractually obligated to substantiate their invoices. According to him the Applicant carried out work from 30.04.2020 until 04.08.2020 and that was the basis for July 2020 payment deduction of \$10,000. The second payment of \$10,000 by the Respondent had been considered as the payment for August 2020. The only other payment of \$5000 by the Respondent has been deducted and reflected in the Demand Notice.
- [10] In reply the Respondent states that they admit the discussions on the consultancy works prior to 04.08.2020. However the verbal conversations between the parties did not state that the Applicant would charge the Respondent prior to August 2020. The Respondent states that they were of the view that work prior to 04.08.2020 was done as a part of ongoing working relationship as the Applicant has previously assisted the Respondent Company.
- [11] **Chief Commissioner Stamp Duties v Paliflex** [1999] NSWSC 15 has been cited more frequently in Fiji's jurisdiction where the Supreme Court of New South Wales considered

the question of leave to oppose the winding up of the company, and deliberated upon the genuineness of the debt. The court laid down three considerations in exercising its discretion under section 459 (1)[4]:

(a) A preliminary consideration of the defendant's basis for disputing the debt which was the subject of the demand;

(b) An examination of the reason why the issue of indebtedness was not raised in an application to set aside the demand, and the reasonableness of the party's conduct at that time; and,

(c) An investigation of whether the dispute about the debt is material to proving that the company is solvent.

[12] In the **David Grant & Co Pty Ltd v Westpac Banking Corporation** (1995) 18 ACSR 225, (at 229) Gummow J acknowledged the Court's statutory discretion under this provision (459S), but in a context which implied that the discretion under s.459S should be used cautiously and even sparingly given the overall policy of Part 5.4.

[13] Hayne J observed in **Texel Pty Ltd v Commonwealth Bank of Australia** (1993) 11 ACSR 535, 537, the discretion under s.459S is there as a 'safety net' in the sense that there are special cases in which a dispute as to the existence of the debt may be litigated at the time of the application for winding up in insolvency, even if there has been no application under s.459G.

[14] It is very clear that, exercising the Court's discretion under section 529 will not have same effect of setting aside the Statutory Demand. Therefore the presumption of inability to pay debts under section 515 (a) will remain on the debtor. Which can be considered detrimental for a company in the commercial world. The duty of the Court in an application under section 529 is to provide the 'safety net' as stated in *Texel Pty Ltd* to the company seeking leave to oppose without defeating the intention of the statute.

- [15] The dispute between the parties of this action arose due to a service delivery agreement. The Respondent states that Short Form Agreement signed by the parties has not given any authority to the Applicant to charge for anything they have done prior to the signing of the agreement. I take note of the letter dated 03.08.2020 attached to the Agreement signed by the Applicant, where it states in the first paragraph ' further to many months of deliberation we are pleased to submit our proposal for the provision of project management services on the above project from now to project completion and delivery'. I am unable to find any affirmative material to support the view that the parties agreed to a July payment based on the Short Form Agreement.
- [16] The Respondent states that the Applicant has failed to include their payment of \$20,000 in the statement of outstanding invoices provided by the Applicant. For the purpose of making an assessment whether to grant leave I am of the view that the Respondent has a plausible argument to be made disputing the sum claimed.
- [17] Secondly the Court would like to examine the reason as to why the Respondent did not apply to set aside the Statutory Demand. In Respondent's affidavit the company states that their registered office was no longer in operation, therefore did not receive the Demand Notice. The Applicant has followed the statutory requirement on service of documents to the Respondent. That is by leaving it at the registered address of the company. The Respondent stated that there has been an email from the Applicant's solicitors, but due to the high volume of the emails, he admitted that he did not pay attention as the solicitor's email was not known to him.
- [18] I have noted that the Applicant's all other correspondences have been addressed to Respondent's site office. But the Applicant or the solicitors did not send a copy of the Demand Notice to the site office. Anyway there is no requirement entrusted by the statute for the Applicant to engage in such manner. However the Respondent may have expected some notification to their site office in the usual practice between the parties.

- [19] I have also noted clause 19 of the Short Form Agreement which states that parties shall attempt to settle any dispute by themselves in good faith failing that by mediation. This action escalated to a Winding Up action without giving any consideration to clause 19. The Respondent may have thought that a dispute would follow settlement and mediation procedures before going in to litigation. This could be a ground for an argument on abuse of process. However at this point, it is sufficient for me to take the view that the acts of Respondent were reasonable in explaining their failure to apply for setting aside.
- [20] The Respondent provides their financial statements for year 2019 compiled by KPMG for internal use. It states that total assets of the Respondent Company valued at \$31,192,363 and it is higher than its liabilities, valued at \$5,318,034. Based on this the Respondent states that the company is able to meet its short term financial commitments. On 13.07.2022 the Respondent was granted permission under the Exchange Control Act for the issue of additional 400 million ordinary shares subject to the bank confirmation for the receipt of \$24,859,223.68 within six months. The Respondent intends to inject this money into the country.
- [21] The Court cannot grant leave under section 529 unless it is satisfied that the ground raised is material to prove that the company is solvent. In other words, an order to wind up a company would be made only when the company becomes an insolvent company [either in actual fact or due to the operation of the presumption in section 515 (a)].
- [22] It should be noted that the 2019 financial statement's cash and cash equivalent assets of the Respondent has significantly declined compared to 2018 and would not be sufficient to meet the debt claimed by the Applicant. If the debt remains the company will be considered insolvent and without it, solvent. Therefore I am of the view that the Respondent has fulfilled the requirement under materiality threshold.

[23] For the foregoing reasons Court makes following orders.

**ORDERS**

1. The Respondent is hereby granted leave to oppose the Winding Up Application.
2. Parties to bear costs.



Yohan Liyanage

**JUDGE**

At Suva on 28<sup>th</sup> April 2023