IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Companies Action No. HBE 10 of 2023

IN THE MATTER of the **GREEN ACE VALLEY SUPPIES & ELECTRICAL PTE LIMITED** a limited liability company having its registered office at Tulalevu, Sigatoka, Fiji

IN THE MATTER of an Application for leave to oppose the winding up application pursuant to Section 529 (1) (b) Companies Act 2015

BETWEEN: **GREEN ACE VALLEY SUPPIES & ELECTRICAL PTE LIMITED** a limited liability company having its registered office at Tulalevu, Sigatoka, Fiji

DEBTOR

AND: **GOKAL INTERNATIONAL LTD** a limited liability company having its registered office in Hong Kong.

CREDITOR

Counsel	:	**Debtor: Ms Ben. S**
	:	**Creditor: Mr Patel. A**
	:	**Supporting Creditor: Ms Krishma .K**
Date of Hearing	:	**15.06.2023**
Date of Judgment	:	**10.07.2023**

Catch words

Leave to oppose winding up- Section 529 (1) and (2) of Companies Act 2015- mandatory requirement – grounds to oppose-material to prove solvent- wide and narrow interpretation- not making an application to set aside demand notice-no presumption of insolvency similar to Australian Corporations Act 2001- deemed insolvency in terms of section 515 (a)- sum less than statutory minimum required – statutory limitation to discretion-Sections 512,513,514, 516,528 of Companies Act 2015- Section 459 C, 459 S of Australian Corporations Act 2001

Reference

1. Law of Company Liquidation by McPherson & Key(4th Edition)(Sweet and Maxwell, 2018)

2. Understanding Company Law (16th Edi)(2012) by Phillip Lipton et al (Thomson Reuters)
3. *Bank of Western Australia Ltd v Scotia Downs Pty Ltd* [2011] FCA 1302 (16 November 2011)
4. *Ewen Stewart& Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No. 2)* [2011] NSWSC 113 (15 February 2011)
5. *Soundwave Festival Pty Limited v Altered State (W.A.) Pty Limited (No 1)* [2014] FCA 466 (12 May 2014)

JUDGMENT

INTRODUCTION

1. This summons was filed by the debtor Company (the Company) within a winding up action seeking leave to oppose winding up. The Petitioner- Creditor (the Petitioner), filed a petition for winding up the Company for alleged arrears of payments of four specific invoices issued in 2019 for a total sum of USD 76,977. 30.11.2022 a statutory demand was issued by the solicitors for the Petitioner. The facts material for 'solvency' of the Company in terms of Section 529 (2) of Companies Act 2015 is required to be submitted in this application. This is to prevent grounds, which are not material for solvency being relied to oppose an action for winding up. The grounds for opposing the winding up cannot be dealt in detail at leave stage, as it is a matter for final hearing, if leave is granted. Petitioner's alleged debt was disputed. Petitioner had allegedly made errors in the said invoices dispatched in 2019 and stated that 'corrected' invoices were dispatched on or around 26.3.2021. According to the Company by this time all outstanding payments relating to the said four invoices were fully settled and goods released from customs. The company produced Telegraphic Transfers (TT) and Customs Declarations that shows payments made against specific invoices through TTs. The Petitioner denies these documents and also payments, but unable to state why for more than two years kept silent about goods supplied and or how the official documents such as Customs Declarations were erroneous.

2. The Petitioner relied on legal fiction as to 'unable to pay its debts' in terms of Section 515 (a) of Companies Act 2015 to institute winding up action. Insolvency is presumed from the inability to pay a debt over $10,000. The central point is the existence of debt exceeding $10,000, before the liability of the Company and its refusal.

3. The Petitioner cannot avail the benefit of the same legal fiction as to Section 515(a) of Companies Act 2015, when there was no certainty as to a debt exceeding $10,000. This goes to *locus* of the Petitioner and also with the application Section 514(1) of Companies Act 2015 the grounds for seeking opposition was material for 'solvency' of the Company, which is a requirement in terms of Section 529(2)

of Companies Act 2015. As there are 'grounds material to proving that the Company is Solvent', leave is granted.

FACTS

4. An application by way of summons dated 14.4.2023 was filed, within the winding up proceedings, by the Company, seeking leave to oppose winding up in terms of Section 529 of Companies Act 2015.

5. The time period for determination of winding up, is six months in terms of section 528(1) of Companies Act 2015. Though the court can extend the said time period in my mind this is the last resort in special circumstances and not the order of the day. At this moment I cannot see a reason for extension of the time period.

6. Winding up petition was filed on 28.2.2023 and the application seeking leave was filed on 14.4.2023 and it was heard on15.6.2023. Considering the delay on the part of the Company which was significant when one consider the date of statutory demand which was dated 30.11.2022 and served to the Company, stay was not granted, but the hearing was fast tracked.

7. Petitioner has indicated four invoices issued during July to September, 2019 and the total sum due from said invoices were USD 76,977.91 for the goods supplied by the Petitioner.

8. The Company does not deny the purchase of items from the Petitioner for commercial purposes, but state that all of them were settled and evidence of that were presented in following manner,

   a. Invoice No 16335 dated 9.7.2019, according to the statutory demand was for $30,176.56.
   According to the Company, Custom Declaration, dated 13.8.2019, the payment was from TT and the sum paid was USD 16,416.18.(Annexed as 6 to affidavit in support of summons) Neither party produced full invoice. The company produced only one page of invoice 16335 annexed SK5

   b. Invoice 16345 dated 3.8.2019 is for a sum of USD 27,505.65 in terms of the statutory demand.
   Annexed as SK 7 and SK8 are invoice no 16345 issued by Petitioner dated 3.8.2019 and a customs declaration dated 17.9.2019 respectively. According to customs declaration, payment of USD 17,049.62 was paid through TT.
   Petitioner stated that the corrected invoice was dispatched indicating there was an error on the invoice. If so when and how it was done not clear.

   c. Invoice No 1651 dated 20.8.2019 was for USD 9,738.70 according the

statutory demand.
Annexed SK3 is the invoice for the same number and date but amount stated therein is $7,424.50 and proof of the total remittance is found in SK4 for the same amount.
Petitioner stated that corrected invoice was dispatched.

d. Invoice No 16362 is for USD 9,557.00 and dated 4.9.2019, according to the statutory demand.

   The Company in the affidavit in support of summons had annexed SK 9, an even numbered invoice issued by the Petitioner for a sum of 7,526.40 on 4.9.2019 and the proof the payment annexed as SK 10, of the consignment through a TT for USD 7,526.40 on 28.11.2019
   According to Petitioner the correct invoice was for USD $9,557.00

ANALYSIS

9. At the outset the dispute between the Petitioner and the Company relate not to the refusal of payment for the goods supplied, as the Company had allegedly made payments relating to the invoices issued. The company refuse any payments but fail to explain why such goods were allowed to be released from customs.

10. On the evidence presented to me at this moment payments were made by the Company on the invoices issued by the Petitioner, and the goods were also released accordingly, but for some unknown reason 'corrected' invoices were issued subsequent to goods being released, after full settlement of the invoices issued at that time.

11. If the goods were not paid fully before the release of the same from the customs there was risk of retention of the same. Goods were released in 2019 and this action filed four years after that.

a. The Scope of Section 529 of Companies Act 2015

12. It is not my effort at this stage to find uncontroverted dispute as to the alleged debt, but to find preliminary observation on available facts for consideration of the grounds for objections for winding up, in terms of Section 529(1) and (2) of Companies Act 2015.

13. In *Bank of Western Australia Ltd v Scotia Downs Pty Ltd* [2011] FCA 1302 (16 November 2011) Murpy J held the scope of analogous, Australian

Corporations Act[1], as

> 'It is impossible on the basis of the material to determine the dispute on the facts or decide the merits of the dispute, and the Court is not required to do so. On hearing an application for leave under s 459S the Court is only required to give preliminary consideration to the basis for disputing the debt. It does not resolve questions of fact nor determine where the merits lie.'

14. Supreme Court of New South Wales in *Ewen Stewart& Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No. 2)* [2011] NSWSC 113 (15 February 2011) held,(Per White J)

> 'If the debt is genuinely disputed, and if leave is given under s 459S allowing the defendant to dispute the debt on the hearing of the winding-up application, that may itself be a sufficient basis for dismissing the winding-up application. Hence, on the application under s 459S the court is to give what Austin J called a "preliminary consideration "of the defendant's basis for disputing the debt.'

15. So, the finding at this moment is limited to this application on the available evidence at this time, and limited for the purpose of interlocutory application. The court is not required to make a finding as to whether the alleged debt is genuinely disputed, though a higher burden is required as a ground to oppose, than a low threshold.

16. The legislative intention is to restrict grant of general discretion in the application seeking leave to oppose, by imposing mandatory precondition in Section 529(2) of Companies Act 2015, which is discussed later.

b. Solvency of the Company

17. A company can be wound up, by court, if it is insolvent in terms of Section 513(c) of Companies Act 2015. This is application of legal fiction for the purpose of winding up application in terms of Section 515(a) of Companies Act 2015.

18. The word 'insolvent' is defined in Section 514 of Companies Act 2015. A 'Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable'[2].

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[1] Section 459 S of Australian Corporations Act 2001 is the same as Section 259 (1) and (2) of Companies Act 2015, but there are no presumption of insolvency contained in Section 459 C of Corporations Act 2001.
[2] Section 514 (1) of Companies Act 2015

19. By the same token, if it is unable to pay all its debts when they become **due and payable**, it is to be considered as insolvent.[3] In such a situation court cannot allow evidence to adduce that company is solvent, through financial accounts or any other manner. Once a legal fiction is created in law, that can only be rebutted by proving that the requirements for legal fiction, are absent or it is not applicable. If not an absurd situation can arise as legally 'deemed' fact, will be disputed through evidence making utility of 'deemed' provision a superfluous.

20. If there is no debt, or even if there is a debt, but it is neither due nor payable, such an instance cannot be considered as insolvent, and are examples where legal fiction cannot be applied. This is not the same as accepting a company deemed insolvent and there after allowing it to be refuted by, evidence. In any event solvency of an entity cannot be easily determined from annual accounts without further analysis, which is entirely not the scope of this proceeding.

21. There is no need for a company to be always able to settle all its debts. As long as debt is manageable the company cannot be considered insolvent. This is very tall order for highly leveraged entities such as financial institutions and they will never be able to settle all or even fraction of its debts at a particular instance. What is important to note is that a company should be able to honour its debts when they are due and payable. So the emphasis is on ability to pay debt as and when they are due, in terms of law.

22. It is important that all the three requirements such as existence of debt, that it was due and it was payable, should be at the time of statutory demand was issued for winding up in terms of Companies Act 2015. Apart from the above, the debt should also be above the stipulated sum under the Act, for legal fiction to be applied.

23. Section 515(a) of Companies Act 2015, creates a legal fiction and according to that, a company is deemed unable to pay its debts if a creditor serves a notice of debt exceeding $10,000 in terms of said provision and the company was unable to settle the debt, to the reasonable satisfaction of such creditor.

24. It is a misconception that any party can serve a company for an assumed debt of over $10,000 and failure to honour such can lead to winding up of the company. If so, it can lead to abuse of process, in order to obtain money that due and payable, and or less than statuary minimum of debt which clearly against the principles of recovery of debt, from winding up or notice of winding up.[4]

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[3] Section 514(2) ibid

[4] 'In practice, winding up proceedings are clearly used for debt collecting purposes although formally the courts criticize such purpose, and where the strategy is not successful a creditor can be hit with an adverse costs order' Law of Company Liquidation by McPherson & Key(4th Edition)(Sweet and Maxwell, 2018) p 83 (3-002)

25. The Petitioner cannot avail the legal fiction as to the 'insolvency' of the Company unless there existed a debt, exceeding $10,000 and it was due and payable on demand.

26. When debts are disputed winding up is not a method to abandon the dispute through fear of winding up, using legal fiction of insolvency.

27. What is important is not the value of demand exceeds $10,000 but rather there was in law, a debt of $10,000, due and payable at the time of demand notice was issued to the company. This 'debt' and failure to honour it to the satisfaction of creditor, is the crux of the deemed 'insolvency' of the Company.

28. As much as a company cannot refuse to pay its debt obligations, they are not to be compelled to pay debts that were not due or payable, on the threat of winding up.

29. Neither the fact that statutory demand was over $10,000, nor failure to make a setting aside of statutory demand in terms of Section 216 of Companies Act 2015, makes any presumption as to the insolvency of the Company, in terms of Companies Act 2015.

30. The fact that the Company had not filed an application for setting aside statutory demand, may be a relevant fact, in an application to oppose winding up, but even if there is no satisfactory explanation , that does not create presumption that the Company was insolvent.(this issue is fully discussed in this judgment, later). It is not determinative, of this application.

31. Winding up in terms of Section 513 of Companies Act 2015 is a discretionary remedy of the court, but this is generally exercised in favour of Petitioner if the condition precedent to winding up are fulfilled.

32. In this application for winding up there are reasons for further considerations as to Petitioner having a debt of over $10,000 on the available, admitted evidence, presented at this stage.

33. Even if there was a debt and that debt was less than $10,000, no legal fiction as to insolvency can be attached, so that the Company was able to prove that it was 'solvent' as it cannot be deemed unable to pay its debt.

34. Having an at least a debt more than $10,000 is the *locus standi* of Petitioner to seek winding up, hence the objections and or facts raised by the Company is material for its 'solvency' in terms of Section 514 and 515 (a) of Companies Act 2015.

35. This is a matter that needed further examination by court at hearing, but this ground alone is sufficient to grant leave for the Company to file objections to winding up in terms of Section 529 of Companies Act 2015 as it had satisfied the two prone requirements for seeking leave to oppose.

c. Material Ground to Prove the Company Solvent

36. At leave stage the Company should not prove a conclusive fact, though the burden is more than an 'arguable' or a ground with 'some conviction for success'. A weak ground for opposing winding up to delay winding up, cannot fulfill the mandatory precondition.

37. This is a burden of proof that court needs to apply carefully in the exercise of its discretion, subject to mandatory precondition, not on technical interpretation of Section 529 of Companies Act 2015, in any "narrow" or "broad interpretation", but considering all the circumstances of case.[5] Such a technical approach had created uncertainty in Australia as to 'narrow' or 'broad' approach.

38. In my opinion, what is required for obtaining leave of the court, is a ground that will also prove that the company is 'solvent' in relations to legal fiction created in terms of Companies Act 2015.

39. This excludes technical objections as grounds such as some defects in winding up procedure which are immaterial to the 'solvency' of the Company. These are some obvious grounds that do not address the 'solvency' issue of the

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[5] Federal Court of Australia in Soundwave Festival Pty Limited v Altered State (W.A.) Pty Limited (No 1)[2014] FCA 466(Per Wigney J)

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There appears to be a dispute in the authorities concerning s 459S(2) about the appropriate test to be applied in determining whether the relevant ground (the dispute concerning the debt) is relevant to the solvency of the company seeking to oppose the winding up application. On the one hand, there are various authorities which are said to adopt a strict or narrow approach: *HVAC Construction (Qld) Pty Ltd v Energy Equipment Engineering Pty Ltd* [2002] FCA 1638; (2002) 44 ACSR 169 at [53]; *Grant Thornton Services (NSW) Pty Limited v St. George Wholesale Distributors Pty Limited* [2008] FCA 1777 at [19] (***Grant Thornton***); *Deputy Commissioner of Taxation v Neo Rock Pty Limited* [2009] FCA 129 at [9]; *Perpetual Nominee Ltd v NA Investment Holdings Pty Ltd* [2011] NSWSC 282. This approach is said to require an applicant for leave under s 459S to prove that for a dispute concerning the debt to be material, it must be "the difference between solvency and insolvency", or "pivotal", "crucial" or "determinative" of solvency. That would require proof that if the disputed debt exists then the company will be insolvent, and that if the debt does not exist then the company will be solvent.

37 On the other hand, there are authorities that are said to favour a broad or less strict approach: *Radiancy (Sales) Pty Limited v Bimat Pty Limited* [2007] NSWSC 962; (2007) 25 ACLC 1216 at [64]; *Ewen Stewart* at [31]-[48]. This approach is said to be that the disputed debt need not be determinative of the company's solvency. Rather, materiality will be established if there is evidence that the company would undoubtedly be insolvent if the debt was owed, as well as evidence that it "might be" solvent if the debt is not owed. In *Ewen Stewart*, White J put the test in the following terms (at [48])"

Company. It is illogical to dismiss an application for the winding up of the company for technical grounds, if the company is already insolvent. The purpose of winding up based on 'deemed' insolvency will be lost if such grounds are considered to grant leave in terms of Section 529 of Companies Act 2015.

40. It would be futile for me to give interpretation to what is meant by 'material'. It simply means consideration of all the factors including and not limiting to mandatory precondition contained in Section 529(2) of Companies Act 2015. A ground that is immaterial to prove 'solvency' fails at the outset.

41. The apparent reason for providing such a mandatory precondition is to prevent an insolvent company from relying on some immaterial, technical defect on the winding up procedure and to delay order for winding up. A company having a debt over statutory minimum cannot dispute a part of debt and refuse entire debt, in statutory demand. In such an instance undisputed debt needs to be settled if that part is above statutory minimum. If not such grounds, will not remove the legal fiction of insolvency of the company, and will not satisfy mandatory statutory precondition contained in section 529(2) of Companies Act 2015.

42. Legislature had granted six months' time period for the determination of winding up, in terms of Section 528 of Companies Act 2015. Though it can be extended within six month period for 'special circumstances' in terms of section 528(1) (a) and (b). Expiration of six month period without an extension of time under Section 528(1) of Companies Act 2015 or final determination, is fatal to the application for winding up. So, the intention of the legislative scheme is to prevent delay, and this is a consideration for an application in terms of Section 529 of Companies Act 2015, this was considered in this application where directions were given to file opposition and matter is fixed for hearing without delay.

43. Without prejudice to above, I have discussed the law relating Section 529 of Companies Act 2015, and applications of analogous Section 459 S in Australian Corporations Act 2001, as there are some material differences in the application, though the two sections are identical. Australian Corporations Act 2001 created mandatory presumption of insolvency, which is absent in Fiji legislation.

d. Sections 459 S, 459 C of Australian Corporations Act 2001- Presumption as to insolvency.

44. Federal Court of Australia in *Soundwave Festival Pty Limited v Altered State (W.A.) Pty Limited (No 1)* [2014] FCA 466 (12 May 2014) held that scheme

under relevant parts of their Corporations Act 2001 can 'operate harshly' even when there are arguable grounds for disputing the debt of statutory demand. This harshness is somewhat mitigated in Companies Act 2015 by not adopting Section 459 C as to presumptions as to debt, contained in Corporations Act 2001.

45. Though Section 529 of Companies Act 2015 and Section 459 S in Australian Corporations Act 2001 are identical, the application of that significantly differs, due to absence of presumption of 'insolvency', in Fiji.

46. Section 529 of Companies Act 2015 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.**" (emphasis is mine)

47. The starting point in the interpretation of Section 529 of Companies Act 2015 is that when the winding up is based on insolvency and failure to pay a debt in terms of Section 515(a), that company cannot oppose, the winding up, without obtaining leave from court.

48. This is to prevent delay and also abuse of process by insolvent company to delay winding up or to frustrate the petitioning creditor in a despite attempt to delay the inevitable winding up.

49. It should also be logical to think that company's right to be heard is now qualified one, as it was granted a statutory right to come before court in terms of Section 516 of Companies Act 2015 to set aside statutory demand.

50. One would expect, a prudent and solvent company would utilize this provision, in order to prevent further proceedings by the creditor who served statutory demand, through an advertisement in local newspapers and also in gazette in terms of law.

51. Though such an expectation, is reasonable and logical, considering the consequences of publication of winding up and damage to its reputation through notice to public, this may be subjective, considering local context.

52. The reputation of the company and also obtaining timely legal advice and reluctance for litigation and other factors (such as uneconomical to litigate) may not always prefer, every company to file an application for setting aside of demand notice in terms of Section 516 of Companies Act 2015.

53. This provision also stipulates strict requirements such as to file such an application within 21 days from service of statutory demand, and also service of a copy of the application to the creditor, within the same time period.

54. These are mandatory provisions and strict compliance is required, and due to this a company may not be able to file an application to set aside statutory demand. These were made mandatory with a purpose behind it.

55. This is mandatory as debtor who is served with statutory demand in terms of Section 515(a) of Companies Act 2015, is given three weeks from service to pay the sum for reasonable satisfaction of the creditor, and if not the creditor can take steps to wind up the company, taking advantage of legal fiction created by Section 515 (a) of Companies Act 2015.

56. The company does not have a right to oppose winding up by creditor, unless court grants leave to oppose in terms of Section 529 of Companies Act 2015, and this is a statutory provision that requires some mandatory preconditions.

57. Even if a company had already made an application to set aside statutory demand in terms of Section 516 of Companies Act 2015, such a company is not precluded from opposing winding up, only because same grounds were relied to set aside statutory demand and they were not successful, but only if such grounds are material to prove solvency of the company.[6]

58. So whether the company had already sought setting aside of statutory demand or not, it is required to satisfy statutory precondition contained in Section 529(2) of Companies Act 2015 to obtain leave to oppose winding up.

59. At the hearing, seeking leave to oppose winding up there are no additional restrictions imposed on the court, irrespective of an earlier unsuccessful application in terms of Section 516 of Companies Act 2015. The only restriction is that the ground for dispute should be 'material' to prove

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[6] Section 529 (1)(a)

solvency, and this is mandatory, precondition considering the language used in Section 529(2) of Companies Act 2015.

60. The fact that the Company had not sought to set aside statutory demand, is not to be used as to create any presumption as to 'solvency' of it, when exercising discretion regarding 'leave to oppose' winding up. It can be relevant fact but not determinative for this application.

61. When the court exercising discretion, in terms of Section 529 of Companies Act, one cannot be on driving seat and impose presumption as to insolvency only because company did not or could not make an application within 21 days to set aside statutory demand.

62. As I stated earlier, there may be reasons for not exercising such a course, due to circumstances of case, or not being successful earlier to set aside statutory demand, as some facts were not available at that time, hence not presented earlier.

63. Court should apply mandatory precondition, but in that process be careful to interpret what is 'material for prove the company is solvent'. This in no way a path to impose any presumption on the solvency of the Company, or close the path of a solvent company , from opposing a debt that was not due and payable or fictitious or bogus or uncertain claim or at the extreme end a non-existent debt.

64. The Company cannot rely on technical non compliance of winding up procedure or similar ground to oppose winding up, as such a ground is clearly 'immaterial to prove the Company is solvent'. So, such grounds are shut out from being used to delay winding up application.

65. Even if there is a dispute as to the amount of debt, but undisputed debt is above the minimum statutory requirement, such a ground cannot be considered as 'material to prove the Company solvent' in terms of Section 529(2) of Companies Act 2015.

66. In my mind when a legal fiction creates a position, such as 'insolvency' of a company in terms of Section 515 (a) of Companies Act 2015, the Company cannot attack, the legal fiction to disprove, or rebut that position, unless the legislation that created legal fiction allows it. The only way to overcome this is by proving that such legal fiction does not apply or factors required for legal fiction not applicable due to some reason.

67. If contextual meaning is given to 'proving that the Company is Solvent' in Section 529(2) of Companies Act 2015, the solvency is to be interpreted in

terms of Section 514(1) read with Section 515(a) of Companies Act 2015. In this manner what is material for proving the Company solvent, is not their financial status, but a ground that is material to eliminate legal fiction of 'insolvency' in Section 515(a) and Section 514(1) of Companies Act 2015, such as absence of any debt, debt is below statutory minimum amount but not technical defects in winding up process.

68. It is hard for any court to formulate all such instances, but sufficient to state court's discretion is subject to mandatory statutory requirements.

69. Australian Corporations Act 2001, had created a compulsory presumption,[7] but Fiji had left such provisions, indicating a clear deviation on that issue of presumption. Without considering this distinction application of Australian cases for the excise of discretion for leave to oppose cannot be done.

70. So in my mind though legal provision contained in Section 529 of Companies Act 2015 and Section 549 S of Corporations Act 2001, are identical, the burden of the Company in order to seek leave in Fiji is quite different from similar provision under Australian Corporations Law, due to the absence of compulsory presumption under statute in Australia.

71. Though Section 259 is verbatim, reproduction of section 459 S of Corporations Act 2004 of Australia there were additional presumptions contained in Section 459 C[8] in Corporations Act 2004 which is not part of Companies Act 2015.

72. Federal Court of Australia in _Bank of Western Australia Ltd v Scotia Downs Pty Ltd_ [2011] FCA 1302 (16 November 2011) held,

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[7] '459C **Presumptions to be made in certain proceedings**

(1) This section has effect for the purposes of:

(a) an application under section 234, 459P, 462 or 464; or

(b) an application for leave to make an application under section 459P.

(2) **The Court must presume that the company is insolvent** if, during or after the 3 months ending on the day when the application was made:

(a) **the company failed (as defined by section 459F) to comply with a statutory demand**; or

(b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or

(c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or

(d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or

(e) a person entered into possession, or assumed control, of such property for such a purpose; or

(f) a person was appointed so to enter into possession or assume control (whether as agent for the charge or for the company).

(3) **A presumption for which this section provides operates except so far as the contrary is proved** for the purposes of the application'(emphasis added)
(ohttp://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ca2001172/s1.5.1.html?context=1;query=corporations%20act;mask_path=)

[8] Ibid Section 459 C (2)(a) of Corporations Act 2001 of Australia

"Having failed to set aside the statutory demand under s 459G the defendants are presumed to be insolvent and as such bear the onus of proving their solvency: s 459C(2) and (3). In order to discharge this onus the Court should ordinarily be presented with the fullest and best evidence of the financial position of the defendants."

73. So in Australia there is statutory presumption, when the court exercises discretion to consider leave to oppose winding up.[9] When it comes to seek leave to oppose Australian entities have to rebut the presumption, hence the burden is more. This is not the position in Fiji in terms of Companies Act 2015.

74. So, it is unsafe to apply the scope and or burden in relation to Section 459 S of Corporations Act of Australia, to Fiji though Section 529(1) and (2) of Companies Act 2001 is identical to said Australian provision.

75. The court need to consider Australian cases with regard to applications seeking leave to oppose with due consideration as to this pivotal deviation in Fiji Companies Act 2015 from Corporation Act 2001 of Australia.

76. The Petitioner at the hearing submitted the issue of presumption that can be drawn from failure to set aside statutory demand, there are two local cases[10] to my knowledge and Petitioner had relied on one. Both these cases had relied on Australian case law and applied them. I cannot see that the absence of compulsory presumption in Fiji as opposed to Australian Corporations Law, was brought to the attention of court in those cases, or considered in said judgment.

77. Hence, I respectfully distinguish those two decisions and ratio of said two actions, and deviate from those in order to give interpretation to Section 529(2) of Companies Act 2015, in the light of any presumptions as to insolvency of the Company under Companies Act 2015.

78. Due to presumptions contained in Australian Corporations Act 2001, a totally different factors are needed to be considered to rebut a presumption of solvency created by Australian Corporations Law, which was left out specifically in Companies Act 2015.

79. Australian Corporations Act statutorily created a mandatory presumption of insolvency, in terms of Section 459 C (2)(a) of Corporations Act 2001[11], when

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[9] Understanding Company Law (16th Edi)(2012) by Phillip Lipton et al (Thomson Reuters)

[10] *Mobile Crane Hire Services Pte Ltd v Jarad Holdings Pte Ltd* [2020] FJHC 902; HBE11.2020 (30 October 2020) and *RPA Group (Fiji) Ltd, In re* [2020] FJHC 325; HBE52.2019 (18 May 2020)

[11] See foot note 7

an entity is served with statutory demand and it was not complies with. There is no such statutory provision in Fiji.

80. The legislature had done so, for a very good purpose considering business environment other factors such as cost of litigation and access to justice in a small island state such as Fiji and business ethics and factors such as reduction of cost of litigation, absence of adequate expertise to obtain solvency reports from professional entities, etc.

81. Presumptions will invariably require additional evidence to rebut, and this is an additional expense to a solvent company, and may not be viable option for small companies who are threatened with winding up. It may be comparatively expensive effort to obtain an audit report regarding solvency of a company at a particular moment or at the time demand notice, where the threshold is $10,000.

82. Fiji had deviated from Corporations Act 2001 of Australia, as regard to compulsory presumption as to insolvency, and it is unsafe to introduce such thing, expressly omitted by legislation in Companies Act 2015.

83. As stated earlier since 'insolvency' is a legal fiction, removal of such legal fiction will be material to prove that the Company is 'solvent' for the purpose of winding up application by the Petitioner.

84. In Section 529(1) of Companies Act 2015, does not preclude a company from adducing even additional evidence if it could not obtain and or provide such evidence in unsuccessful attempt to set aside statutory demand in terms of Section 516 of Companies Act 2015.[12] This is not to allow the Company to delay or abuse the process, by adopting piece meal approach or on technical ground or dispute an issue that will not reduce the debt below statutorily minimum requirement, as such ground will not qualify mandatory precondition laid in Section 529(2) of Companies Act 2015.

85. In this summons the Company is making objections to method of service of the statutory demand to a Director of the Company. This technical ground will not have any bearing on the 'solvency' hence does not qualify requirement under Section 529(2) of Companies Act 2015.

86. The ground on which the Company seeks to dispute should be material to show that there was no debt, or debt was less than stipulated amount in terms of section 515(a) of Companies Act 2015. Even if there is a dispute as to the

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[12] _Bank of Western Australia Ltd v Scotia Downs Pty Ltd_ [2011] FCA 1302 (Per Murphy J) paragraph 26 held 'The failure to initially put on their best evidence is not so unreasonable that they should now be locked out of relying on these grounds in disputing the debt.'

amount of debt, but the undisputed amount exceeds $10,000 such a ground is not 'material' to prove the company is solvent and will fail the precondition under section 529(2) of Companies Act 2015.

87. The Petitioner and the Company rely on different invoices but they bear the same invoice number and date, neither party had explained how this had happened, hence at this stage there are grounds material to grant leave to oppose.

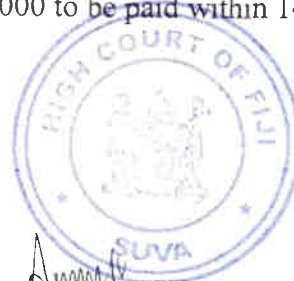
88. As stated earlier in this judgment there is no need to adopt Australian approach, of "narrow" and "wide" interpretation of Section 529(2) of Companies Act 2015[13] which is analogous to Section 459 S of Corporations Act 2001 in Australia. Statutory precondition contained in Section 529(2) Companies Act 2015, is given contextual meaning, to prevent immaterial grounds to prove 'solvency' being used to oppose winding up.

CONCLUSION

89. On the available evidence before the court at this stage it is not clear whether there is a debt of over $10,000 owing to the Petitioner from the Company. This is the crux of deemed insolvency of the Company and leave is granted to the Company to oppose the application and to file affidavit in opposition and a reply to that from the Company. The cost of this application is summarily assessed at $1,000 to be paid within 14 days.

FINAL ORDERS

a. The Company is granted leave to file an affidavit in opposition within 7 days from today.
b. The Petitioner is granted 7 days thereafter to reply.
c. Parties may rely on the material already submitted in order to reduce cost of litigation and reduce waste.
d. The cost of this application is summarily assessed at $1,000 to be paid within 14 days.



Dated at Suva this 10th day of July, 2023.

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Justice Deepthi Amaratunga
High Court, Suva

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[13] See foot note 5