

In the Matter of FIJI INDUSTRIAL AND PLATING COMPANY
LIMITED (IN LIQUIDATION)

[SUPREME COURT, 1963 (MacDuff C.J.), 18th December, 1962, 3rd January,
1963]

Civil Jurisdiction

Company—liquidation—petition for continuance of voluntary winding up under supervision of the Court—Court's duty as between creditors—Companies Ordinance (Cap. 185) ss. 174, 222 (1) (c), 227 (1) and (3), 235 (1) and (4), 253.

Petition that a voluntary winding up be continued but subject to the supervision of the Court, dismissed on the ground that to grant the petition might have the result of depriving the objecting creditor, who asserted a preferential claim for rent, of a legal right which had already accrued to him.

Venner's Electrical Cooking and Heating Appliances Ltd. v. Thorpe [1915 2 Ch.D. 404, and *In re Great Ship Co.* 4 D.J. and s. 69, applied.

Petition pursuant to s. 253 of the Companies Ordinance.

McFarlane for the petitioner.

Falvey for the objecting creditor.

MACDUFF C.J. [3rd January, 1963]—

This is a petition in respect of the liquidation of Fiji Industrial and Plating Company Limited (hereinafter referred to as "the Company"). The petition is presented by Mr. S. G. Gould who has been appointed the liquidator of the company and prays—

"1. That the voluntary winding up of Fiji Industrial & Plating Company Limited may be continued but subject to the supervision of this Honourable Court.

2. Or that such other Order may be made in the premises as to the Court shall seem just."

This petition has been presented pursuant to the provisions of section 253 of the Companies Ordinance (Cap. 185 Laws of Fiji) which reads:

"253. When a company has passed a resolution for voluntary winding up the court may make an order that the voluntary winding up shall continue but subject to such supervision of the court, and with such liberty for creditors, contributories or others to apply to the court, and generally on such terms and conditions, as the court thinks just."

The facts relied on to give the Court jurisdiction are set out in the petition as follows:—

"5. On the 8th day of September, 1962 at a meeting at your petitioner's offices at which all three shareholders of the company were present it was unanimously resolved that because of its debts the company be wound up voluntarily and that your deponent be appointed liquidator."

Presumably this resolution was intended to come within the provisions of section 222 (1) (c) of the Ordinance although the actual wording of the resolution has not been made available to the Court nor has it been shown that the resolution was an extraordinary resolution in accordance with the Company's Articles of Association. However, it is clear that since the provisions of section 227 (1) of the Ordinance could not have been complied with the winding up, by virtue of subsection (3) of that section, was a "creditors' voluntary winding up".

The winding up therefore, came within the provisions of sections 234 to 242 (inclusive) of the Ordinance. In this regard the petitioner states—

"7. On the 21st day of September, 1962 at a meeting of creditors held at your deponent's offices at which were present representatives of all creditors of the Company it was unanimously resolved—

- (a) That the Company's appointment of Sydney George Gould as liquidator be confirmed:
- (b) That the liquidation be carried on under the supervision of the Court:
- (c) That the liquidator take all steps necessary to prevent the Bailiff from taking further action under the distress for rent."

The Court has been supplied with a copy of the minutes of that meeting from which it would appear that there is a mis-statement by the petitioner in that there were not present at that meeting representatives of all creditors of the company.

However it is admitted that neither the meeting of the company nor the meeting of creditors was summoned in accordance with section 235 (1) of the Ordinance nor were the provisions of section 235 (4) complied with. It is contended for the petitioner that these are irregularities which do not affect the validity of the resolutions passed. In view of what I have to say later I prefer to express no opinion on this contention.

I now come to the real basis of objection by the objecting creditor—Banno Oceania Limited—that the application is not bona fide because it is the intention of the liquidator to defeat the rightful claim of that company in recovering the sum of £245 arrears of rent for the premises occupied by the said company at Walu Bay, Suva from the 1st day of March, 1962, to the 30th day of September, 1962. Paragraph 6 of the petition refers to the facts out of which this objection arises in these words—

"6. On the 10th day of September, 1962 the Landlord Banno Oceania Limited by its Bailiff, Ram Dulare (son of Tej Dass) entered and distrained upon the plaintiff company's goods and chattels at the premises at Walu Bay and the said goods and chattels were impounded."

The evidence given by the petitioner does not quite accord with the facts outlined in this paragraph. It would appear that the bailiff did not enter and distrain nor did he impound the said goods. Again I propose to express no opinion on the legal implications of the action taken by the bailiff or statements made to him by the liquidator since these may be in issue in another action. It will suffice to say that the objector Banno Oceania Ltd. firmly contends that on the circumstances, as they exist at the moment, it has a claim to payment of its rent in full as against the other creditors.

On those facts I now consider the merits of the present petition. The reason for the petition is that it is just and equitable that the voluntary winding up be continued subject to the supervision of the Court. The

reason given by the petitioner in his evidence was that there was some doubt at the creditors' meeting as to his authority to preside on behalf of the one director of the company and it was for this reason that the creditors agreed that the winding up be under supervision of the Court. Counsel for the petitioner however, referred to section 174 of the Ordinance which reads—

“ 174.—(1) Where before the presentation of a petition for the winding up of a company by the court a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.”

and submitted that the order prayed in this instance would have the effect of validating the irregularities which have occurred throughout this winding up. I am doubtful whether that would be the effect of such an order since this is not a petition for the winding up of a company by the Court. Again I do not consider it necessary to decide this question on the present petition.

The Court was very properly referred by counsel for the petitioner to the remarks of Lord Cozens-Hardy M. R. in *Venner's Electrical Cooking and Heating Appliances Ltd. v. Thorpe* [1915] 2 Ch.D. 404 in which the facts were rather similar to those out of which the present objection arises. It was however, an application for an injunction to restrain the landlord made by the liquidator. The Master of the Rolls quoted with approval and applied the principle enunciated by Turner L. J. in *In re Great Ship Co.* 4 D.J. and S. 69 that—

“ The true question therefore is, what circumstances ought to influence or guide the Court in the exercise of that discretion. In my judgment the Court, in dealing with a question thus dependent on its discretion, is bound to look at the legal rights of the parties, and at the interests not of one class of creditors only, but of each particular class of creditors who may be affected by the decision at which it shall arrive. I think, with all deference to the Master of the Rolls, that there is nothing in this Act of Parliament which gives to the general creditors of this company any right to have their interests consulted in preference to the interests of the particular creditor whose case may come before the Court. I think it is the duty of the Court to hold an even hand between the interests of all the parties, and I take this section to have been introduced into the Act of Parliament very much with a view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company.”

With those remarks I would respectfully agree.

Applying that principle to the present case an order made on the present petition may have the result of depriving the objecting creditor of a legal right which has already accrued to him. He has the right at present of going to the courts to establish that right. If I make the order prayed it is quite possible that he will be deprived of that right. In those circumstances I do not consider that it be just or reasonable that I grant the order prayed. Petition is dismissed. The petitioner is to pay the objector's taxed costs.

Before I leave this matter I think I should refer to an estimate by the liquidator that he hoped to pay the creditors 5s. to 6s. in the pound providing the claim of the objector did not have to be paid in full. On his own figures after deducting the costs of liquidation I would be surprised if the dividend reached 3s. in the pound.

Petition dismissed.

Solicitors for the petitioner: *Grahame and Co.*

Solicitors for the objecting creditor: *Cromptons.*