

**RE HERBERT CONSTRUCTION CO (FIJI) LTD (HBF0009 of 2010L)**

HIGH COURT — CIVIL JURISDICTION

5 TUILEVUKA–M

9 March 2012

10 **Corporations — winding up — injunction — setting aside statutory demand — whether clear, persuasive grounds established for grant of injunction — whether debt genuinely disputed — presumption of insolvency — balance of convenience — Companies Act ss 221, 224**

15 The applicant sought to set aside statutory demand raised by its creditors and further, to restrain them from commencing winding up proceedings. The applicant alleged that the creditor’s claim was disputed, which could not be determined by a winding up petition. As an alternative, the applicant sought that the creditors be ordered to proceed with their claim by way of Writ of Summons.

**Held –**

20 There is no substantial ground for disputing the debt that is enough to support the granting of an injunction. The presumption of insolvency under s 221 of the Companies Act (Cap 247) will prevail until it is properly rebutted at the hearing of the petition. The balance of convenience lies in favour of refusing the injunction and in allowing winding up proceedings to continue.

Application dismissed. Winding up petition adjourned.

25 **Cases referred to**

*Aleems Investments Ltd v Khan Buses Ltd* [2011] FJCA 4; *BW Holdings Ltd v Sinclair Knight Merz Fiji Ltd* [2008] FJCA, cited.

30 *Mitchell Keil* for Stone Designs International Ltd in HBE 09/10 & 69/10.

*Babu Singh & Associates* for Benson Electrical (Fiji) Ltd in HBE 42/10.

*Gordon & Co* for Mahesh Enterprises in HBE 47/10

35 *Reddy Barristers & Solicitors* for Road Sealing Services Ltd in HBE 132 of 2010.

*Mitchell Keil* for Trade Supplies.

*In House Legal Counsel* for FIRCA.

40 *In House Legal Counsel* for FNPF.

*In House Legal Counsel* for Carpenters Fiji Ltd.

**Calanchini M.**

45 **BACKGROUND**

[1] Herbert’s Construction Co (Fiji) Ltd (“*HCCFL*”) was the general contractor engaged by the original developers of the Natadola Bay Resort Project (“*project*”) to oversee all construction work. There are several winding up petitions pending against HCCFL. Most of these are of various entities who  
50 allege that they are owed monies by HCCFL on account of subcontract work they have performed towards the project.

[2] I set out below the petitions that are pending in this court against HCCFL. Ideally, there should only be one petition with every other creditor filing a *Notice of Intention to Appear in Support of Petition*<sup>1</sup>.

5	Action No.	Petitioner & Debt Alleged	Supporting Creditors & Debt Alleged
	HBE 09/10	Stone Designs International Ltd \$33,248.57 (see below)	Trade Supplies Ltd \$9,409.15.
10	HBE 42/10	Benson Electrical (Fiji) Ltd \$136,967.55 being amount due and owing for electrical services for Natadola Golf Clubhouse Project.	Fiji Revenue & Customs Authority \$3,400,578.08 (three million & four thousand five hundred and seventy eight dollars and eight cents).Fiji National Provident Fund\$152,557.44
15	HBE 47/10	Mahesh Enterprises \$36,526.07 being the amount owing by HCCFL in respect of invoices 6470, 6477, 6479 and 6484.	
20	HBE 69/10	Stone Designs International Ltd \$33,248.57 being the amount for the supply of stone tops, vanity stone tops, basins and drink trays.	Note: In this case, the application was actually filed by Herbert's Construction Co (Fiji) Ltd to restrain Stone Designs from presenting a Winding Up Petition following the statutory demand issued. The application was dismissed.
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30	HBE 132/10	Road Sealing Services Ltd \$18,578.25 being the total amount due and owing claimed in respect of work in process for the contract of applying a 2 coat Bitumen Chip Seal through purchase order No. 3020-1234 dated 11.01.10.	Carpenters Fiji Ltd \$148,631.83 being for account no. 294262-01\$30,692.69 being for account no. 345208-01\$25,245.51 being for account no. 898814-01
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40	HBE 22/11	Bluescope Lysaght (Fiji) Ltd\$17,766.24 being the sum owing for goods sold and delivered to the Company.	

#### STONE DESIGNS INTERNATIONAL LTD(SDIL)

[3] SDIL was the first to present a petition. Unlike other petitioners, SDIL does not claim to be a subcontractor of HCCFL. Rather, SDIL's petition is founded on a debt it alleges is owed to it by HCCFL on account of certain invoiced goods delivered to HCCFL. These goods comprise of various stoneware<sup>2</sup> fittings to accessorize the bathroom and vanity facilities in the Natadola Bay luxury units.

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1. See r 29 of the Companies (Winding Up) Rules).  
2. Stone tops and drink trays.

The debt alleged is \$33,248.57 inclusive of VAT<sup>3</sup>. This is the balance remaining following some part payments against the original debt of \$78,962.63<sup>4</sup>.

### HCCFL'S POSITION

5 [4] HCCFL is adamant to fend off and derail every petition to wind it up. Against every petition filed, the company has responded with an application to either restrain or to strike out the proceedings. The affidavits filed in support of HCCFL's applications invariably assert three key arguments. First is HCCFL's  
10 assertion that it is solvent and is able to pay its creditors. Second is HCCFL's argument that it cannot pay its subcontractors and/or suppliers until it is paid by Natadola Bay Resort Ltd ("*NBRL*"). And third is HCCFL's submission that every arrangement it may have entered into with each creditor is now frustrated by the effect of the *Natadola Bay Development Decree 2010*.

15 [5] What I have to consider now is HCCFL's application to set aside SDIL's statutory demand and to restrain SDIL from commencing winding up proceedings.

[6] Incidentally, SDIL's petition (*HBE 09 of 2010*) is now consolidated with HCCFL's Originating Summons (*HBC 69 of 2010* -see table above). In the latter  
20 case, HCCFL is seeking a declaration that SDIL's claim is a disputed one which cannot be determined by a Winding Up Petition or, alternatively, that SDIL be ordered to proceed with its claim by way of Writ of Summons.

### 25 ANALYSIS

[7] On many occasions, the Courts have granted an injunction to either restrain the presentation of a petition, or to restrain further proceedings on a petition that is already afoot. Invariably, the injunction will only be granted if the debt alleged is genuinely disputed. *Section 224* of the *Companies Act (Cap 247)* gives this  
30 Court power to stay or restrain winding up proceedings at any time after the presentation of a petition and before a winding up order is made where any other suit or proceeding against the company is pending.

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3. However, according to Stone Designs, it has supplied all items ordered by HCCFL. Russell Baumann's affidavit in opposition exhibits a tax invoice of Stone Designs to HCCFL to the amount of \$78,962.63 inclusive of VAT for various services rendered and items supplied to HCCFL including drink trays and drain holes.

45 4. On the above tax invoice (see footnote 2 above), are some handwritten minutes which record the following four payments by HCCFL to Stone Designs on the invoice-account:

- \$20,000 paid on 10 July 2009.
- \$5,737.81 paid on 01 September 2009.
- \$9,976.25 paid on 30 September 2009.
- \$10,000 paid on 01 December 2009.

50 The balance that remains on Stone Designs' invoice account for HCCFL after the above payments is \$33,248.57. This is the same debt that Stone Designs alleges in its petition.

[8] The Fiji Court of Appeal in *Aleems Investments Ltd v Khan Buses Ltd* [2011] FJCA 4; ABU0036.2009 (24 January 2011)<sup>5</sup> and in *BW Holdings Ltd v Sinclair Knight Merz Fiji Ltd* [2008] FJCA<sup>6</sup> sets out the following principles to guide the courts when confronted with such an application.

5 [9] A creditor whose debt is undisputed and who cannot obtain payment is entitled *ex debito justitiae* (ie as a matter of right) to a winding up order<sup>7</sup>. This is a statutory right conferred by s 221 of the Companies Act (Cap 247).

10 [10] Because an Affidavit Verifying Petition<sup>8</sup> establishes prima facie the contents of a petition, it also establishes a prima facie right to a winding up order. And because an application to restrain further proceedings on a petition is potentially intrusive on that prima facie right, the law puts the onus heavily on the company to justify the injunction.

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5. In *Aleems Investments Ltd v Khan Buses Ltd* [2011] FJCA 4; ABU0036.2009 (24 January 2011), the Fiji Court of Appeal cited the following passage from **Halsbury Laws 4th Edition, 1988 Reissue, Volume 7(2) Companies** at paragraph 1451 (page 1101 and 1102) as providing an accurate summary of the case law:

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**Where a petition has not been presented but is threatened in respect of a disputed debt, an injunction may be granted restraining the presentation. If the debt is not genuinely disputed on some substantial ground, the court may decide this question on the petition, but it will usually dismiss a petition founded on a disputed debt and leave the dispute to be decided in an action. The court may order the amount of the alleged debt to be paid into court.**

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6. In *BW Holdings Ltd v Sinclair Knight Merz Fiji Ltd* [2008] FJCA, the Fiji Court of Appeal said as follows:

**11 In the Court of Appeal, Counsel for the Appellant in his written and oral submissions contended that the crucial issue on appeal was whether the balance of convenience favoured the Appellant so that the injunction should be continued. This characterization of the issues is plainly correct. In this regard, both parties recognize that the principles governing the imposition of an injunction of this type are governed by the leading case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Very properly, counsel for the Appellant has also drawn the attention of the Court to *Bryanston Finance Ltd v de Vries (No 2)* [1976] 2 WLR 41, 52 where it was held that the granting of an injunction restraining the presentation or prosecution of a winding up petition is exercised under the inherent jurisdiction of the court to prevent an abuse of its process. As a matter of principle, interference in the ordinary rights of a person conferred by statute should not be the subject of injunctive relief unless an abuse of process is established. In this regard, clear and persuasive grounds must be established before an injunction may be imposed (my emphasis). In the course of argument, counsel for the Appellant suggested that bad publicity against the party the subject of a winding up order which would ordinarily follow by reason of the fact that there are requirements for publication of aspects of the winding up process could and should be a basis for injunctive relief which interferes with the exercise of ordinary statute-based rights of the party seeking the winding up order. In our view, publicity following a winding up order is an incident of such an order being made. It would seem to follow that, generally speaking, it is difficult to see how possible bad publicity to the company which is the subject of the winding up order could ordinarily be a proper basis for saying that the presentation or prosecution of a winding up order following the failure to pay a statutory demand under s 221 of the Companies Act is an abuse of the process of the court (my emphasis). The judge did not expressly refer to this matter, but had he done so it may well have added weight to the bases upon which he ordered that the injunction be dissolved.**

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7. As per Gibbs J in *In Re Leonard Spencer Pty Ltd* [1963] Qd R 230, 233. See also Irvine CJ in *Re Concrete Pipes & Cement Products Ltd* [1926] VLR 34, 38-39.

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8. which is filed within four days after the petition pursuant to r 25 of the Companies (Winding Up) Rules.

[11] The company may discharge that burden either by showing that it genuinely disputes the debt alleged and/or that the presentation of a petition would be an abuse of process. In this regard, the company must establish clear and persuasive grounds before the court will grant the injunction<sup>9</sup>.

5 [12] At the end of the day, the question to ask is whether the balance of convenience favours the granting of the injunction or not (as per *American Cyanamid* case).

#### THE EVIDENCE

10 [13] Malcolm Andrew Herbert's affidavit in support of HCCFL's application asserts that SDIL "*failed to deliver all stone tops and drink trays as agreed but still wants to be paid for them*". He further deposes as follows:

9. Further, *the parties agreed* that the respondent would only be paid when the work was certified by the applicant's principal, Natadola Bay Resort Ltd and the applicant was paid by Natadola Bay Resort Ltd.

15 10. *The respondent is well aware that the applicant has not been paid by its principal.*

11. Natadola Bay Resort Ltd has refused to certify the work done by Stone Designs and disputes the work claimed to be done by Stone Designs.

12. All contractual matters have been referred to arbitration including the work completed by Stone Designs.

20 13. The applicant cannot pay Stone Designs until the work has been certified by Natadola Bay Resort Ltd.

14. The respondent is wrongly using the statutory demand process as a debt collecting device.

15. The debt is disputed by the applicant. The respondent is well aware that there is a genuine dispute.

25 16. Herbert's Construction is a leading construction company in Fiji.

17. Herbert's Construction is solvent and meets the solvency test under the Companies Act.

18. The company's financial statements are confidential. I have provided a copy of the financial statements to Koyas for the purpose of making them available to the Court on a confidential basis, if required.

30 [14] Russell Baumann's affidavit in opposition asserts that SDIL has duly delivered all items ordered by HCCFL. His affidavit exhibits a tax invoice of SDIL to HCCFL to the amount of \$78,962.63 inclusive of VAT for various services rendered and items supplied to HCCFL including drink trays and drain  
35 holes. This tax invoice bears some handwritten notes which record four payments purportedly made by HCCFL to SDIL on the same invoice-account which reduced the debt from \$78,962.63 to \$33,248.57 (see paragraph [3] above and footnote 4).

[15] Also exhibited in Baumann's affidavit are two delivery dockets of SDIL to  
40 HCCFL which tend to confirm that the items in question were in fact delivered by SDIL and received by HCCFL on 18 April 2009.

#### HAS HCCFL ESTABLISHED A CLEAR & PERSUASIVE GROUND?

[16] The tax invoices and dockets exhibited in Baumann's affidavit do appear  
45 to subdue Malcolm Herbert's assertions that the deliveries in question were never made by SDIL. Herbert merely states that the deliveries in question were never made to HCCFL<sup>10</sup>. When that bare statement is juxtaposed against the thorough documentation in Baumann's affidavit, HCCFL's dispute of the debt does appear to be rather frivolous.

50 9. see *BW Holdings Ltd v Sinclair Knight Merz*.

10. See *Re Lympo Investments Ltd* [1972] 2 All ER 385.

[17] I conclude that HCCFL has not put before me any substantial ground for disputing the debt that is enough to support the granting of an injunction now. But having said that, the related issue of fact of whether or not the deliveries in question were in fact made by SDIL and received by HCCFL must remain open  
5 for determination at the hearing of SDIL's petition. It will be appropriate in my view to allow the parties to call *viva voce* evidence on this point at that hearing.

### COMMENTS

[18] The argument by HCCFL that it cannot pay its creditors and/or suppliers until it is paid by NBRL prompts the question whether the parties did ever agree to that arrangement<sup>11</sup>.  
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[19] None of the affidavits filed exhibits any written agreement relevant to this issue. I suspect there was no written agreement on the point because this was simply a case involving invoices and dockets relating to goods allegedly  
15 delivered by order. Relevant questions that may be asked are: whether the deliveries were in fact made? If so, was it made to HCCFL (the general contractor) or to the then developer?

[20] These questions are best postponed for now until I have heard full arguments at the hearing of the petition where I will allow parties to call *viva voce* evidence also.  
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[21] I also will for now reserve any ruling on whether or not s 9 of the Decree has frustrates any agreement between HCCFL and its creditors such as to relieve HCCFL from any obligation to pay.

### 25 SOLVENCY OF HCCFL

[22] HCCFL is prepared to present its books to court to prove its solvency if the court so requires. HCCFL also asserts that it meets the solvency test under the Companies Act (Cap 247). Whether that means that HCCFL is able to pay its debts as they become due (ie the cash flow test) or that the total value of its assets  
30 is greater than its total liabilities (ie the net assets test) – or both – I am eager to know.

[23] Until it is properly rebutted at the hearing of the petition, the presumption of insolvency under s 221 of the Companies Act (Cap 247) will prevail for now<sup>12</sup>.  
35 This is – yet – another reason why the injunction cannot be granted now to stop the winding up proceedings in this case.

[24] In due course, I will make orders for the filing of an affidavit of assets to exhibit all appropriate documentation to show HCCFL's cash flow status as well as its net assets position. These may be relevant in how I will exercise my  
40 discretion eventually.

### BALANCE OF CONVENIENCE

[25] I believe the balance of convenience lies in favour of refusing the injunction and in allowing winding up proceedings to continue for the above  
45 reasons.

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11. 11 See paragraph 13 above as per paragraph 9 of Herbert's Affidavit.

12. ie Under s 221(a), a company is deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.  
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**ORDERS**

[26] In the final, I dismiss HCCFL's application to set aside the statutory demand by SDIL and to restrain SDIL from commencing winding up proceedings. This winding up petition is now adjourned to 13 March 2012 for  
5 mention when I will give directions for the filing of further affidavits and for leave to the parties call *viva voce* evidence on certain specific issues raised in the affidavits. I reserve any ruling on costs..

*Application dismissed.*

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