

IN THE COURT OF APPEAL FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI ISLANDS

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CIVIL APPEAL NO. ABU0063/97

(Lautoka High Court Companies (Winding Up) Cause No. 23 of 1995)

BETWEEN: ONTIME PRINTING LIMITED *Appellant*

AND: NATIONAL MBF FINANCE (FIJI) LIMITED *Respondent*

Coram: The Rt Hon Sir Maurice Casey, Presiding Judge  
The Hon Justice Gordon Ward, Justice of Appeal  
The Hon Justice John E. Byrne, Judge of Appeal

Hearing: 24 November 2000

Counsel: Mr D. Naidu for the Appellant  
Mr G.P. Lala for the Respondent

Date of Judgment: 1 December 2000

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JUDGMENT OF THE COURT

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On 12 October 1995 a petition was presented by the respondent in the High Court at Lautoka for the winding up of the appellant. It was opposed and, after numerous adjournments, heard on 11 July 1996. Evidence was given by the respondent of a debt of \$133,320 arising as a result of the appellant's default in paying monthly instalments of \$6165 plus VAT under a lease agreement of printing machinery made on 16 September 1993, which was repossessed and sold by the respondent in December 1994. At that time the appellant had paid none of the monthly instalments and there was \$75,795 owing under this heading. The indebtedness relied on in the petition was said to be made up of expenses and shortfall in terms of the agreement following a sale of the machinery for \$150,000. At the hearing the

petition was supported by three other creditors claiming to be owed \$1,103, \$27,906 and \$16,955 respectively.

There were affidavits by the appellant's managing director (Dinesh Chand) claiming that his Company had not been served with the s221 notice on which the respondent relied as evidence of the appellant's inability to pay its debts; and that the machinery had been sold at an under-value; and that the figures in the reconciliation accounts in the respondent's supporting affidavit, and interest and other charges were disputed. No evidence was given by the appellant at the hearing, and its counsel cross-examined the respondent's only witness, Mr Fong, who was head of its Recoveries Leasing Division and who had sworn its supporting affidavit. His evidence did not assist the appellant.

Sadal J's decision making the winding up order was not delivered until 10 October 1997. He was satisfied that the appellant had been properly served with the s221 notice, and that it was unable to pay its creditors, and its prospects of doing so in the future were not "very bright". The Company appealed on 5 November 1997 and has been trading throughout, a situation which the Court finds quite unsatisfactory and it was at our insistence that the matter was brought to a hearing.

We are satisfied that the respondent's attempt to prove service of the notice under s221 by registered post does not satisfy the requirement of that section, that it be left at the registered office of the company. This direction is quite specific and does not allow for any other method. Accordingly it was not entitled to the presumption that the appellant was unable to pay its debts, and was thrown back to the other grounds relied on in its petition, namely that it was insolvent and/or unable to pay its debts, and that in the circumstances it

was just and equitable that it be wound up. To the extent that Sadal J relied on there having been proper service of the notice under s221 (and this is not at all clear from his brief judgment), his conclusion that the appellant was unable to pay its debts must be suspect.

There was no explanation for the appellant's default in payment of the monthly rental for the machinery for almost 12 months before it was repossessed and sold by the respondent. While it is alleged that the sale was at an undervalue, the appellant produced nothing in the way of valuation evidence or otherwise to support this contention. Mr Fong said it cost \$250,500 to import, and in cross-examination denied this allegation, and said there had been a valuation. (Perhaps understandably, this was not pursued by appellant's counsel) The respondent was entitled to sell by private treaty, and its failure to give the appellant the option of finding a party able to buy at a higher price under cl 27 of the lease does not invalidate the sale as submitted by counsel: it merely deprived the respondent of a presumption of sale at the best price available. In the absence of evidence supporting a genuine complaint about the sale price we are not prepared to accept this as a valid reason for failing to pay the debt.

The appellant also claimed that it was unable to reconcile the figures in two statements furnished by the respondent, one an offer to transfer the machine to it on payment of \$324,664.70 to cover its cost and clear all liabilities; the other setting out the amount calculated as owing under the defaulted lease and expenses after crediting the sale proceeds and other payments, this being the amount on which the petition was based. They appear to be quite straightforward summaries, and the appellant's management should have been able to check the calculations from the provisions of the lease agreement and from their own financial records. There were repossession and other expenses which they also queried, but these are really insignificant in the light of the total indebtedness involved.

Although Mr Chand claimed in his affidavit that the appellant was solvent and could pay its proper and admitted debts, there were no accounts or financial statements to back this assertion. The lack of conviction in the reasons for non-payment outlined above, taken in conjunction with the appellant's failure to pay rent for the machine, and the supporting creditors' claims of over \$45,000, leave a strong impression of an insolvent debtor merely playing for time. Taking all these matters into account we are satisfied that, at the time the petition was heard, the evidence established that the appellant was unable to pay its debts, and a winding up order was inevitable. Appellant's solicitors have since the hearing of this appeal written informing the Court that the supporting creditors have been paid, but this cannot affect our approach based on the material before the High Court.

**Result**

The appeal is dismissed with costs of \$500 to the respondent together with disbursements to be fixed by the Registrar if not agreed.



*M. Casey*

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 Sir Maurice Casey  
Presiding Judge

*Gordon Ward*

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 Justice Gordon Ward  
Justice of Appeal

*John E. Byrne*

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 Justice John E. Byrne  
Judge of Appeal

**Solicitors:**

Messrs Pillai, Naidu & Associates, Nadi for the Appellant  
 Messrs G.P. Lala & Associates, Suva for the Respondent