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

Civil Appeal No. 51 of 2006
(Winding Up Action No. 36 of 2004L)

BETWEEN:

VIMALS CONSTRUCTION AND JOINERY WORKS

(In Liquidation)

Appellant

AND

BIMAL PRAKASH

Applicant

AND

VINOD PATEL & COMPANY (LAUTOKA) LIMITED

Respondent

Mr. S. Maharaj for the Appellant and the Applicant
Ms. N. Khan for the Respondent

DECISION

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[1] As is revealed by the inordinately lengthy chronologies contained in the papers this essentially straightforward litigation has became almost hopelessly confused as a result of a multiplicity of applications, affidavits and rulings, several changes of solicitors, failures to follow the proper procedures and what appears to be an unnecessarily confrontational approach by the

parties. For the purpose of this Ruling only a general outline of the more important stages of the proceedings will be attempted.

[2] On 10 August 2004 the Respondent presented a winding up petition in the High Court at Lautoka. The Respondent claimed that the Appellant (the company) owed it $54,420.50 in respect of the supply of building materials for which it had not been paid. Notice was given that if the sum claimed was not paid within 21 days, together with $262.50 in legal costs the Court would be moved to wind up the company.

[3] On 14 January 2005 the claimed sum not having been paid, the Court, after hearing counsel for the petitioner, counsel for the company and counsel for two supporting creditors ordered the company be wound up, that the petitioners costs assessed at $500 be paid out of the Company's assets and that the Official Receiver be appointed Provisional Liquidator of the Company's affairs.

[4] Under the provisions of Section 271 of the Companies Act (Cap 247) an appeal lay to the Court of Appeal against the order for winding up. The Notice of Appeal was required to be filed within six weeks of the winding up order being perfected on 25 January 2005 (see Court of Appeal Rules – Rule 16 (b) and Order 59 r1 A (5) of the English Supreme Court Practice). No appeal has been filed against the order for winding up.

[5] On 13 December 2005 the Respondent filed a summons in the High Court pursuant to the provisions of Sections 324 and 325 of the Companies Act. In its summons the Respondent sought:

(a) A declaration that the Applicant, Bimal Prakash and another director of the Company Jitendra Sen had been "knowingly a party to the carrying on of the business of said company with intent to defraud creditors of the company and for other fraudulent purposes and that they are severally and jointly responsible without any limitation of liability for the debt" owing to the Respondent "amounting to $54,420.50"; and

(b) An order for the payment by the Applicant and Jitendra Sen to the Respondent of the sum of "$54,420.50 together with interest at the rate of 15% from the 12th day of August 2003 to the date of payment"; and

(e) An order for costs in favour of the Respondent "on a client solicitor" basis.

[6] On 22 March 2006 the High Court granted the declarations and orders sought. It also awarded indemnity costs against the Applicant and Jitendra Sen. In addition to these orders the Court made orders restraining either the Applicant or Jitendra Sen from disposing of or dealing with two properties at Kuata Street Lautoka which were apparently held in the names of either the Applicant of the company.

[7] In his ruling the Judge acknowledged that in reaching his conclusions he had relied solely on untested affidavits and the answers to certain interrogatories filed by the Respondent and

that there had been "a lack of real participation in the proceedings by the directors of the company".

[8] On 18 May 2006 the Applicant filed a summons in the High Court seeking:

(a) An order that the winding up order dated 14 January 2005 be "rescinded and set aside";

(b) An order that the declarations made on 22 March "be set aside, rescinded and struck out";

(c) An order for "specific discovery of [all] ... documents which give rise to the sum of $54,420.50 – the sum claimed under the winding up proceedings".

[9] On 22 May 2006 the High Court dismissed the application to set aside the order for winding up. It took the view that there had been no formal defects or irregularities in the winding up proceedings and that the Applicant had not shown that he had any standing to set aside the winding up order. The court also noted that although an appeal had been presented to this Court, the Appellant did not seek an order setting aside the winding up order.

[10] The first ground of appeal in the present appeal is that the High Court erred in refusing to set aside the order for winding up made on 14 January 2005. Counsel did not address me on the relevance of Section 252 of the Companies Act to an application to set aside an order for winding up. I was not referred to any provision which permits the High Court to set aside (other than

under the "slip rule") an order made by the court after a hearing inter partes. As previously noted, there is no appeal pending or indeed any application for leave to appeal against the winding up order itself. Given the provisions of Section 334 (1) of the Companies Act it is not clear to me that the company is still in existence and that any appeal on its part is still possible.

[11] The High Court also dismissed the application to set aside or rescind the declaratory orders made on 22 March. The Court stated that:

> "Those orders were made following a hearing in which [the Applicant] was represented and sought to take no active part. Those orders are the subject of the appeal to the Court of Appeal".

The third application (paragraph [8] (a) above) was also dismissed.

[12] The basis of the appeal referred to by the High Court is that the High Court erred in granting the declarations that the Applicant and Jitendra Sen had defrauded their creditors and had erred in ordering them to pay the Respondent the sum claimed from the company together with interest. Broadly, the complaint is that the High Court failed to observe the rules of natural justice in reaching its conclusions on the basis of contested affidavit evidence alone.

[13] On 25 May 2006 the Applicant again moved the High Court seeking leave to appeal against all the orders made by the High

Court on 22 May and seeking a stay of the orders made on that occasion.

[14] On 25 May the High Court heard the application and delivered its ruling. The Court held that the orders which it had made were all final and that therefore leave to appeal was not required. The Court also granted a conditional stay in the following terms:

> "(a) payment into court the sum of sixty five thousand dollars ($65,000).
>
> (b)(1)The mortgage payments with respect to the three parcels of land, the subject of the ruling of 22 May 2006 shall be kept up to date.
>
> (b)(2)The Appellant shall comply with all orders, directions, rules and requirements of the Fiji Court of Appeal.
>
> (c) Upon the Appellant failing to comply with these conditions, the stay shall lapse forthwith.
>
> Costs of this application shall be costs in the cause".

[15] On 11 July 2006 the Respondent filed a motion in this Court seeking dismissal of the appeal on the basis that the grounds filed were "frivolous, vexatious and otherwise bound to fail" and that the Appellant had no right of appeal. The motion was dismissed on 24 August 2006.

[16] On 6 September 2006, the Appellant and Applicant filed a motion in this Court seeking the following orders:

(i) A stay of the winding up proceedings in the High Court;

(ii) A stay of all orders and declarations made by the High Court on 22 March and 22 May 2006;

(iii) Leave to join the Applicant in the appeal as an affected party;

(iv) An order preventing any further dealings by the Respondent with the three properties owned by the Applicant and/or the company; and

(v) An order preventing the Respondents from uplifting the sum of $65,000 paid into court by or on behalf of the company in compliance with condition (a) referred to in paragraph [14] above.

[17] At the hearing of the applications by the Appellant and the Applicant on 5 October 2006 it emerged that yet another dispute had arisen, namely whether the conditional stay granted on 25 May had lapsed as a result of breach. Mr. Maharaj told me that all the conditions had been complied with. Mrs. Khan however suggested that there had been a failure to comply with condition (b2) since Rule 17 of the Court of Appeal Rules had been breached. In support of her contention she referred to an oral ruling delivered by the High Court, apparently in September 2006. A copy of this ruling was, however, not supplied.

[18] Mr. Maharaj offered an undertaking on behalf of the Company and the Applicant not further to deal with the properties mentioned in paragraph [16] (iv) above. This undertaking led to yet further disagreement. Mr. Maharaj suggested that one property had already, and perfectly legitimately, been sold. Ms. Khan suggested that the property had been disposed of in breach of the High Court Orders. Neither contention was supported by any detailed papers placed before me.

[19] Against such an unnecessarily convoluted and confusing background it is not at all easy to grasp the essence of the issues between the parties. In my view however it is possible, at least provisionally, to reach a number of conclusions which assist the determination of this application.

[20] First, in the unexplained absence of any appeal against the winding up order, the likelihood of leave been granted to appeal against the order almost two years out of time seems remote. The unknown status of the company and the provisions of Section 334 of the Companies Act do not assist the company's position. As already noted, it is not clear to me that there is any provision which enables a winding up order granted following a hearing inter partes be set aside by the High Court after the appeal period has expired.

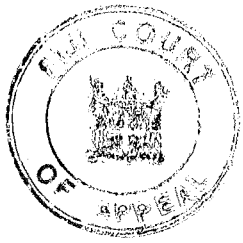
[21] Secondly, by their very nature, proceedings under Sections 324 and 325 of the Companies Act are serious and may have serious consequences. Although Ms. Khan told me that the Judge was aware of Part XV of the Companies (Winding Up) Rules – Cap 247 – S – 23 – and in particular Rules 60 to 64, it seems to me

at least arguable that the process under which the High Court reached its conclusion that the Applicant and his fellow director had defrauded their creditors fell significantly short of the process envisaged by Part XV. While I accept Ms. Khan's submission that the Applicant and his fellow director were represented by Counsel who seems to have acquiesced in the procedure adopted, it seems to me at least arguable that the Court itself should have considered giving the directions specified in Rule 60 (4). In the absence of such directions it is not clear to me that the serious allegations against the Applicant and his fellow director were appropriately investigated.

[22] Thirdly, it is clear to me that the onus of showing that a condition of the stay granted on 25 May had been breached lies on the Respondent. In my view it is arguable that conditions (b) (2) and (c) are unsatisfactorily vague, at least in the absence of any recorded finding by the court that they had in fact been breached. I do not think that I can safely rely on the unverified (and disputed) recollection of what happened and was said some weeks ago in the High Court.

[23] In all the circumstances I am satisfied that the orders of the High Court for the disposal of any properties owned by the Applicant should be stayed and that the Respondent should not proceed any further with their sale. I am also satisfied that the sum of $65,000 paid into Court by the Applicant should remain in court until further order. Ms. Khan did not object to the Applicant being joined as a party to the appeal together with Jitendra Sen and there will accordingly an order to that effect.

[24] As has been seen, the original sum involved in this dispute was approximately $54,000. The process of disposing of the dispute has so far consumed a wholly disproportionate amount of the court's time and generated costs far exceeding the amount claimed. Mr. Maharaj told me that his client was perfectly willing to pay the Respondent whatever sum he was satisfied, after invoices had been produced, he owed. He was not however prepared to pay what he viewed as a grossly inflated sum of indemnity costs. In his view the amount and rate of interest ordered was also unjustified. In my view, given the most unsatisfactory manner in which this litigation has so far progressed, the parties and their legal advisors would be well advised to consider a fresh approach, with a view to reaching an overall settlement.



M.D. Scott
Resident Justice of Appeal

20 October 2006