

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

CIVIL APPEAL NO. ABU0074 OF 2007S
(High Court Civil Action No. HBE40 of 2005L)

BETWEEN: PRAVEENA'S BP SERVICE
 STATION LIMITED

Appellant

AND: FIJI GAS LIMITED

Respondent

Coram: Byrne, JA
 Powell, JA
 Hickie, JA

Hearing: Monday, 27th October 2008, Suva

Counsel: V. Mishra for the Appellant
 M. Chan for the Respondent

Date of Judgment: Thursday, 6th November 2008, Suva

JUDGMENT OF THE COURT

- [1] On 5 October 2007 Jitoko J dismissed an application by the appellant for a permanent stay on a winding up order made on 28 October 2006.
- [2] There were two grounds upon which the application was made, namely that the debt (a sum of \$19,798.77) was disputed and secondly that service of the Amended Winding Up Petition had not been effected on the appellant.

[3] The trial judge was satisfied that service was effected on the registered office of the appellant on 5 September 2005 and that the moneys were owed.

The Disputed Debt

[4] At the hearing of the appeal on 27 October 2008 counsel for the appellant handed up two documents being a letter dated 23 October 2008 from the appellant's solicitors to the Official Receiver and a faxed reply from the Acting Deputy Official Receiver dated 24 October 2008 which reply confirmed that *"the Official Receiver has received sufficient funds from your office including our fees and costs and under the circumstances the office have no objection to the application for an Order to Stay the Winding Up proceedings."*

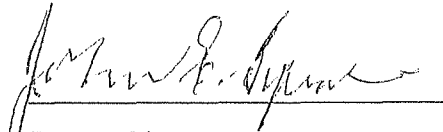
[5] Counsel for the respondent had not been furnished with a copy of these documents until the appeal hearing commenced. The appellant's position was that the moneys that the respondent alleged were owing had now all been paid, albeit under protest.

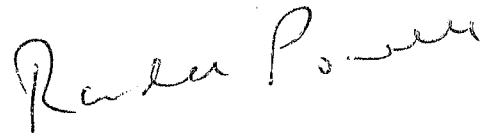
[6] The respondent's counsel needed to obtain instructions as to whether indeed all moneys owing to it had now been paid and whether the respondent would therefore not oppose the winding up proceedings being stayed. The respondent was given time at the conclusion of the day to provide further written submissions on this and the second ground. The respondent did so in submissions dated 3 November 2008 which acknowledged that all the moneys owing have been paid to the Official Receiver.

Service of the Petition

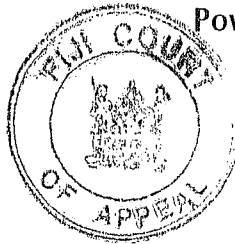
[7] The first Winding Up Petition contained a section 221 Notice dated 31 May 2005 which Notice it said had been served on the company on 6 June 2005. The Petition was filed on 5 July 2005.


- [8] An Amended Winding Up Petition contained a section 221 Notice dated 18 August 2005 which Notice it said had been served on the company on 26 July 2005. The Petition was filed on 25 August 2005.
- [9] Counsel for the appellant made much of the Amended Petition and the obvious error it contained, namely the Notice could not have been served on 26 July because the Notice was only created on 18 August.
- [10] Counsel for the respondent acknowledged this mistake and demonstrated that 26 July 2005 referred to the date of service on an intermediate Notice dated 19 July 2005 which, the Court Record shows, the company acknowledged receiving on 6 August 2005. The Court Record establishes that leave to amend the Petition was given on 24 August 2005.
- [11] The appellant's point about date error was not taken at the trial and in view of the now academic nature of the appeal the Court is not minded to consider the point. See *Vimal Constructions v. Joinery Works* [2008] ABU0093 of 2006S.
- [12] The winding up order will be stayed. However in view of the late payment to the official receiver and the failure to notify the respondent of the payment prior to the appeal means that the appellant must pay the respondent's costs of the appeal.
- [13] The orders of the Court are:
1. The Winding-Up Order is stayed
 2. The appeal is otherwise dismissed
 3. The appellant to pay the respondent's costs of the appeal which the Court fixes at \$2,500


Byrne, JA



Powell, JA




Hickie, JA

Solicitors:

Mishra Prakash and Associates, Lautoka for the Appellant
Chan Law, Suva for the Respondent