IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Civil Appeal No. ABU 0044 of 2007]
(An appeal from the Lautoka High Court Action No. HBC 083 of 2007L)

BETWEEN : **FAIRDEAL –SILA JOINT VENTURE LIMITED**

APPELLANT

AND : **GREYSTONE HOLDINGS LIMITED**

RESPONDENT

CORAM : **Byrne, AP**
Calanchini, J.A
Wati, J.A

COUNSEL : **Dr. M.S. Sahu Khan for the Appellant**

: **P.A Lowing and S. Nandan for the Respondent**

DATES OF HEARING : **5th March 2010**

DATE OF JUDGMENT : **27th September 2010**

JUDGMENT OF THE COURT

INTRODUCTION

[1] The appellant appeals from an Order of Connors, J in the High Court at Lautoka on the 31st of May 2007 when he rejected a motion by the appellant for an Order restraining the respondent from commencing or taking any steps for winding-up proceedings against the appellant.

[2] The litigation in the High Court arose from a Notice issued by the Respondent under Section 221 of the Companies Act Cap. 247 which provides that a company may be wound up by the Court if, inter alia, if the company is unable to pay its debts.

[3] Section 221 states that a company shall be deemed to be unable to pay its debts if a creditor serves on the company a demand requiring payment of the sum due of an amount exceeding $100 and payment is not made within three weeks.

[4] The respondent had made a demand on the appellant for the sum of $243,638.00 being money allegedly due and owing to it for works performed by the appellant in relation to a written agreement with the Respondent dated the 22nd of August 2006 relating to the construction of various works associated with the augmentation and rehabilitation of the Navakai Sewerage Treatment Plant. The amount involved in this work was in excess of $1.7million.

[5] Connors, J held that the appellant had failed to satisfy him that the debt, as distinct from the quantum of it, was disputed and therefore dismissed the appellant's motion and ordered it to pay the respondent $1,000.00 costs.

THE LAW

[6] It is well established law that the Courts will not allow themselves to be used as debt collectors by companies who seek to use the provisions of the Companies Act relating to Winding Up as a means of recovering debts allegedly due to them when there are issues of facts and law to be decided before any conclusion of liability to pay has been made.

[7] There are numerous cases on this both in Fiji and overseas. We shall content ourselves with citing only a few of these. We begin with the remarks of Megarry, J in *Re Lympne Investments Limited (1972) 2 All ER 385 S at P. 389* :

> "The effects on a company of the presentation of a winding –up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation or to be kept in suspense over the company's head while that litigation is fought out.....The New Zealand Court
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> of Appeal decision in *Bateman Television Ltd v. Coleridge Finance Co.Ltd. (1969) NZLR.794* provides authority for saying that when a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor within Section 224 of the Companies Act who has the *locus standi* requisite for the presentation of the petition, even if the company is in fact insolvent".

[8] In *Dee Cees Bus Services Ltd. v. Drive Train Engineering Ltd Civil Action No. 262 of 2002,* Pathik, J held that where there is a real dispute turning on questions of fact which required *viva voce* evidence such a dispute cannot properly be decided on a petition. The correct course in such a situation was to strike out the petition whether or not the company was solvent at the time. The Judge further stated that where there was a complex rift of disputed facts and allegations on both sides which cried out for cross-examination it was inappropriate for a claimant to resort to a petition to wind up a company which was his adversary.

[9] In paragraph 8 of his ruling of the 31st of May, Connors, J said:

"It would appear that there was "no formal agreement entered into between the parties" yet, in the previous paragraph, the Judge referred to the parties apparently entering into a construction agreement.

[10] In this Court's view the two paragraphs are thus contradictory. Either there was a construction agreement or there was no such agreement between the parties. Thus in our view those two paragraphs alone raise an issue of fact which can be decided only after a trial.

[11] In paragraph 12 of his Ruling, the Learned Judge referred to the penultimate paragraph of a letter annexed to a document entitled "Re-Acceptance of contract award" dated the 23rd of August 2006 and executed apparently on behalf of the respondent by its Managing Director, one Trevor Bloomfield.

[12] The paragraph reads: "The terms of payment agreed was for Progress Payments on a monthly basis as required by the Principal in payment to you."

[13] The Learned Judge then continued, "There is no reference to the prime contract in the documents and it would appear it may not form a part of the contract between these parties". Here again in our view this is an issue of fact between the parties which can only be decided after a trial.

[14] With respect to the Learned Judge his indecision on this aspect gives rise also to a question of law. For reasons only known to themselves the parties chose not to enter into a formal contract, which, considering the amount involved, is to say the least surprising. The terms on which they agreed are clearly matters for trial which should not be resolved by winding-up proceedings.

[15] In paragraph 16 of his Ruling the Judge said that the "Plaintiff's claim against the defendant as pleaded in the Statement of Claim appears to relate to payments outstanding together with loss of profits on moneys that would have been earned pursuant to the agreement". The Judge said that it is this claim that appeared to form the amount demanded in the Notice issued under Section 221 of the Companies Act.

[16] This again in our judgment raises a triable issue of fact both as to the number of payments outstanding and the possible loss of profits which would have been earned under the Agreement.

[17] In paragraph 21 of his Ruling, Connors, J says: "that it would appear that in this instance, there is no evidence before the Court that the defendant (appellant) is insolvent", yet in paragraph 25 the Judge says: "there is no evidence before the Court as to the solvency of the Defendant company apart from mere assertions".

[18] Again the question of solvency of the appellant is very relevant and clearly a matter of evidence.

[19] In our judgment if, as the Judge stated, it was apparent on the evidence that the quantum of the debt was in dispute we fail to see how logically the Judge could then say that it was less obvious as to whether the existence of the debt was a fact in dispute. We would have thought that if the quantum of the debt is in dispute inevitably also the existence of the debt must be in dispute.

[20] In *Mann and Another v. Goldstein and Another (1968) 2 ALL.E.R 769* Ungoed-Thomas, J considered a number of the authorities on this question. He mentioned with approval the statement of Lord Greene, M.R. in *Re Welsh Brick Industries Ltd (1946) 2 All ER at P. 198* that a bona fide claim was a claim based on some

substantial ground meaning whether or not there was some substantial ground for defending the action.

[21] It must always be remembered that the winding-up of a company invariably brings with it serious consequences because first, the whole control and management of the company then falls into the hands of a liquidator (Sections 234 - 248 of the Companies Act).

[22] Secondly, no one will be in a position to commercially deal with the company for fear of ultimately falling into the category of fraudulent preferences under Sections 313 and 314 of the Companies Act.

[23] Thirdly, the bank accounts of the Company will be frozen and it will thus be unable to carry on the business.

[24] The onus for a company seeking to avoid being wound up is to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried by the Court. Considering the correspondence between the parties and the submissions we consider that there are numerous triable issues in this case which would render it unjust to allow the appellant to be wound up on the evidence so far presented.

[25] One of the main questions requiring decision by the High Court is whether, as Calanchini, J.A stated during the hearing, the principal's contract was part of the contract with the sub-contractor. This question is raised by the correspondence between the parties and in our judgment must be decided by the High Court after a trial.

[26] We therefore uphold the appeal and order the respondent to pay the appellant's costs which we fix at $5,000.00.

Dated at Suva this 27th day of September 2010.

John E. Byrne, A.P

William D. Calanchini, J.A

Anjala Wati, J.A