IN THE HIGH COURT OF FIJI
AT LAUTOKA
COMPANIES JURISDICTION

Winding Up No. 3 of 2011

IN THE MATTER OF BLUE TURTLE WATERSPORTS LIMITED a limited liability company having its registered office at Level 3, Aliz Centre, Martintar, Nadi, Fiji.

-AND-

IN THE MATTER of the **COMPANIES ACT**

-AND-

IAN DAVID WILKINSON of PD 37, Denarau, Nadi, Businessman.

1st Respondent

ROBERT HAL O'DELL of P.O Box 8199, Tamuning, Guam 9631, Realtor.

2nd Respondent

Solicitors — Lowing & Associates for the Petitioner
Faiz Khan Lawyers for the Respondents

EXTEMPORE RULING

BACKGROUND

[1]. I will circulate the revised ruling on this matter later in the week, which will set out in detail the affidavits filed in this matter.

[2]. Blue Turtle Watersports Limited is a limited liability company having its registered office at level 3, aliZ Centre, Martintar, Nadi. It was incorporated in December 2006 under the Companies Act (Cap 247). The petitioner, Stephen Mallerich, was a minority shareholder. He was unlawfully removed as director at some point in time and following that, he was refused information and financial statements pertaining to the affairs of the Company and was not allowed to partake in the operational and financial affairs of the company.

[3]. On 02 March 2011, Mallerich petitioned the court for various orders to redress the oppression that he alleges he was suffering in the company. Although the petition did not state which provisions of the Company Act it relied on, I dealt with it in accordance with section 212 of the Companies Act (Cap 247) which is the provision cited by Mr. Lowing in his written

submissions. Orders were made during the course of these proceedings to serve the petition on all the other shareholders. Section 212 states as follows:

> **212**.-(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself); or, in a case falling within subsection (2) of section **173**, the Attorney-General, may make an application to the court, by petition, for an order under this section.
>
> (2) If, on any such petition, the court is of opinion-
>
> (a) that the company's affairs are being conducted as aforesaid; and
>
> (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;
>
> the court may, with a view to bringing to an end the matters complained of, **make such order as it thinks fit**, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.
>
> (3) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power, without the leave of the court, to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.
>
> (4) A certified copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within 14 days after the making thereof, be delivered by the company to the registrar, for registration; and, if a company makes default in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.
>
> (5) In relation to a petition under this section, section **345** shall apply as it applies in relation to a winding-up petition.

OBSERVATIONS

[4]. Section 212 provides relief to members where those in control of the company exhibit conduct that is oppressive. Quite simply, conduct that is "oppressive" will be the same as abusive or wrongful conduct. "Oppressive" has nothing to do with whether or not sound business or commercial decisions are being made. That is still the prerogative of the board. Nor is "oppressive" in any way concerned about whether the

petitioner or some other member is being outvoted. The norm, after all, is that decisions in corporate administration are taken by the majority.

[5]. Rather, what the courts are concerned with under section 212 is whether those in control are running the affairs of the company in such a way which offends basic principles of fairness which a member is entitled to expect.

[6]. In this case, Stephen Mallerich had complained that he had been unlawfully removed from his position as director and consequently, was excluded from management and even deprived of information about the company in circumstances where the respondents and other shareholders are clearly preferring their own interests.

[7]. I eventually made Orders in December 2012 to the effect that Mallerich be restored to a position of directorship and that all shares of the Respondents be transferred to him at the nominal value of $1-00.

APPLICATION NOW BEFORE ME

[8]. About a year later on 20 November 2013, Mallerich filed an application to this court for various costs and damages. I deal with these under each heading below. The application is supported by an affidavit of Mallerich sworn on 11 November 2013. The summons was called before Mr. Justice Weeratne on 04 December 2013. On that date, Weeratne J gave the Respondents 21 days to file their affidavit in Opposition and the Petitioner to file an Answer 14 days thereafter. Thereafter, the parties were to file their written submissions by 27 January 2014. He then adjourned the case to 27 January 2014. However, Weeratne J has since left the bench and the country.

[9]. The matter came before me on 03 March 2014 when the respondents asked for a further 21 days to file and serve an affidavit in opposition. I granted them that time and also 21 days thereafter to the petitioner to file and serve an answer. I then adjourned the case to 09 May 2014 for Ruling.

[10]. However, on 24 April 2014, Faiz Khan lawyers, who are on record for the respondents, filed a summons to cease acting as barristers and solicitors for the respondents. The application was made returnable on 09 May 2014. I note that it has not been served on the respondents. The affidavit

in support of Sonam Chand which basically states that the firm of Faiz Khan Lawyers have attempted several times to contact the Respondents but to no avail.

ARE THE PETITIONERS ENTITLED TO INDEMNITY COSTS?

[11]. In general, an award costs on whatever basis is made to compensate the person in whose favour it is made rather than to punish the person against whom the order is made (see **Allplastics Engineering Pty Ltd v Dornoch Ltd [2006] NSWCA 33 at [34]**). Similarly, indemnity costs are compensatory and not punitive. In the circumstances of this case and considering the manner in which this case has proceeded, I am of the view that the petitioner is entitled to indemnity costs.

ARE THE PETITIONERS ENTITLED TO BE REIMBURSED BY THE RESPONDENTS SOME $35,000-00 FOR HIS INVESTMENT IN THE CATAMARAN RAIKIVI WHICH IS NOW KNOWN AS THE OoLooLoo?

[12]. The catamaran Raikivi was an asset of the company. Essentially, what the petitioner is seeking is to be reimbursed by the respondent of his lost investment. That means that he is seeking this Order as a shareholder/member.

[13]. A company is required by law to maintain its capital. Because of that, it cannot return capital to its members. The policy reason behind such a rule is to protect creditors. Creditors are said to give credit to a company on the faith that its capital will be applied only for the purposes of the business. This means that creditors even have a right to insist that such capital be kept and not returned to the shareholders. As Lord Jessel MR said in **Re Exchange Banking Co (1882) 21 Ch D 519.**

> It follows then that if directors who are quasi trustees for the company improperly pay away the assets to shareholders, they are liable to replace them. It is no answer to say that the shareholders could not compel them to do so. I am of the opinion that the company could in its corporate capacity compel them to do so, even if there were no winding up... directors in each case are to be declared jointly and severally liable and not only jointly liable....
> The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. [He...] gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he

cannot enforce otherwise than by a winding-up order. It follows then that if directors who are quasi trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them...

[14]. In essence, what Mallerich seeks by this Order offends the principles in **Re Exchange Banking Co**.

[15]. Of course, members of a company can obtain a return on their investment but only from profits made in a particular year through dividends. But they cannot get back their contribution except in a winding up of the company and even then, only after creditors and other priority payments have been made in accordance with the scheme under section 312 of the Companies Act (Cap 247). The rules relating to capital maintenance means that, absent profits, a company must not take any steps that in effect return capital to its shareholders.

[16]. In this case, it appears to me that Mallerich is seeking these orders out of his personal concern about his investment in the company. The proper cause, in my view, is for the company to sue the respondent in a separate writ action to recover the lost capital in Raikivi. The rule in **Foss v Harbottle (1843) 2 Hare** 461 is that, because a company has a separate personality from that of its members, a member cannot sue to enforce rights that belong to the company. This is known as the ***`proper plaintiff'*** rule, namely, that the company is the proper plaintiff in respect of any rights that it has. Where a company has rights to be enforced, or is being sued, the usual body that is empowered to decide whether the company should either bring an action or defend the claim is the board of directors in whom the power of management is usually vested.

[17]. There are instances where a member may bring an action on behalf of the company but in such cases, the member will derive his right to sue from the company rather than from the fact of his being a member of the company, hence the term, ***"derivative action"***. Where a member does this, he member is not suing to enforce any rights that belong to him personally and for that reason, the company is usually included as a nominal defendant so that any decision of the court will bind the company as well.

THAT THE RESPONDENTS PAY THE BACK TAX OF THE COMPANY IF AND WHEN REQUIRED BY FIRCA?

[18]. The decision as to whether to pursue the company or the respondent in paying tax arrears (if any) is best left to the Fiji Islands Revenue & Customs Authority. The petitioner should make submissions on the point to FIRCA if and when the need arises. For this court to make the Order sought in this regard is to unduly usurp the powers of FIRCA.

THAT THE RESPONDENTS COMPENSATE THE PETITIONER FOR THE LOSS OF BUSINESS IN THE AMOUNT OF $2,000,000 (2 MILLION DOLLARS)

[19]. I repeat paragraphs 10 to 15 above.

THAT THE RESPONDENTS REIMBURSE THE COMPANY FOR PAYING IAN DAVID WILKINSON'S BACK TAX AND FINE IN THE AMOUNT OF ONE HUNDRED AND ONE THOUSAND EIGHT HUNDRED FORTY FIVE DOLLARS SIXTY TWO CENTS ($101,845.62)

[20]. I am of the view that the proper cause is for the company to institute a separate writ action in this regard seeking the same relief.

THAT THE RESPONDENTS PAY THE COSTS OF THE EQUIPMENT PURCHASED FROM SUB SEA SYSTEM OF THE USA UNDER THE PURCHASE AGREEMENT IN THE AMOUNT OF TWO HUNDRED AND SEVENTEEN THOUSAND DOLLARS ($USD 217,000-00)

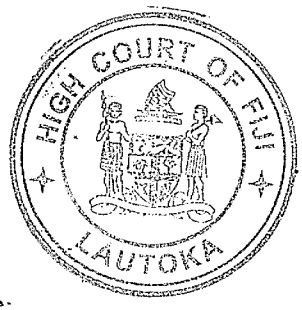
[21]. As above, the company should institute a separate writ action in this regard.

GENERAL DAMAGES

[22]. It is not clear to me whether the petitioner is seeking general damages for and on behalf of the company or for himself personally. In either case, the proper course, in my view, is for either of them to file a separate writ action.

CONCLUSION

[23]. I will now hear submissions by counsel as to how much Stephen Mallerich seeks in indemnity costs.



Anare Tuilevuka
JUDGE
14 May 2014