

IN THE HIGH COURT OF FIJI  
AT SUVA

Winding Up Action No. HBE 30 of 2013

IN THE MATTER of EXTREME  
BUSINESS SOLUTIONS (FIJI)  
LIMITED a limited liability company  
having its registered office at 34  
Knolly Street, Suva, Fiji  
**AND**

IN THE MATTER of the Companies  
Act 247

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BEFORE : Acting Master : Vishwa Datt Sharma

COUNSEL : Mr. N.Lajendra : for the Petitioner.  
Ms. K.Singh : for the Respondent.  
Mr. Nandan : for supporting creditor.

Date of Hearing : 26<sup>th</sup> August, 2015  
Date of Judgment : 27<sup>th</sup> October, 2015 at 2.30 pm.

## JUDGMENT

### INTRODUCTION

1. On the outset, it is important that I must mention that the initial winding up proceedings in the within action was brought by UB FREIGHT (FIJI) LIMITED against the Respondent Debtor Company EXTREME BUSINESS SOLUTIONS (FIJI) LIMITED and the debt was settled.

2. Two (2) **Supporting Creditors, Merchant Finance & Investment Company Limited and Formscaff (Fiji) Limited** filed their respective Notice of Intention to appear and support the petition filed by **UB FREIGHT (FIJI) LIMITED**.
3. Subsequently, **FORMSCAFF (FIJI) LIMITED** was granted leave by the court on 05<sup>th</sup> June, 2014 to file and serve a **substituted winding up petition** in place of the **original petitioner, UB FREIGHT (FIJI) LIMITED** on 17<sup>th</sup> June, 2014.
4. The Petitioner, **FORMSCAFF (FIJI) LIMITED** sought for the following orders inter alia;
  - i. *That **EXTREME BUSINESS SOLUTIONS (FIJI) LIMITED** be wound up by the court under the provisions of the Companies Act,*
  - ii. *That the Official Receiver attached to the court be constituted Provisional Liquidator of the affairs of the Company,*
  - iii. *That the cost of the Petitioner be taxed and paid out of the assets of the Company,*
  - iv. *That such further or other order may be made in the circumstances as shall be just.*
5. The application is made pursuant to the *Companies Act [Cap 247]*.
6. Reference is also made to *s. 2(1) and (4) of the interpretation Act Cap 247*.
7. The Winding up Petition was served on the Respondent Company on 18<sup>th</sup> June, 2014 who **opposed the Petition** and filed an **affidavit in opposition**.
8. The Counsel representing the Respondent Company raised an issue that ' if leave has been granted to Formscaff (Fiji) Limited to file a substitute winding up petition, then it needs to be advertised as if it was a new application altogether.

**BACKGROUND FACTS OF THE CASE**

9. The Petitioner is the Lessor of the commercial land and building situated in Certificate of Title No. 8199, Lot 47 on DP No. 1944 ("property").
10. Extreme Business Solutions ("Company") was a tenant of the Petitioner at the property.
11. The Company failed to pay rent for the months of March 2013 and April 2013 at \$4,025.00 per month. The Company failed to pay rent for the months June 2013 to January 2014 (inclusive) at \$4,600.00 per month. The total rent outstanding is \$44,850.00.

Particulars		Amount
March 2013	-	4,025.00
April 2013	-	4,025.00
June 2013	-	4,600.00
July 2013	-	4,600.00
August 2013	-	4,600.00
September 2013	-	4,600.00
October 2013	-	4,600.00
November 2013	-	4,600.00
December 2013	-	4,600.00
January 2014	-	<u>4,600.00</u>
<b>Total</b>		<b><u>\$44,850.00</u></b>

12. As a result of the Company's failure to pay the outstanding rent of \$44,850.00, the Petitioner's solicitors then issued Notice to Distress to recover the outstanding rent. Upon the expiration of the distress period of five days, it was noted that the Company had taken all the valuable items from the property and there was nothing to sell to materialize to recover the outstanding rent. The Company had also vacated the premises.
13. To date the outstanding rent of \$44,850.00 has not been paid.

14. On 5 June 2014 the Court granted leave for Formscaff (Fiji) Limited ("Formscaff") to be substituted as Petitioning Creditor in place of UB Freight.
15. On 16 June 2014 the Substituted Winding up Petition was issued from the High Court Civil Registry and served on the Company on 18 June 2014.
16. The Company filed its Affidavit in Opposition on 14 July 2014 ("said Affidavit") and the Petitioner filed its Affidavit in Reply on 4 December 2014 ("Reply").
17. The Respondent Company in his Affidavit in Opposition denied owing the sum of \$44,850 to the Petitioner, and further disputed owing any debt to the Petitioner.
18. The Company further stated that the Petitioner has failed to provide and to outline the particulars of the alleged debt and for what services has the Petitioner rendered to the Respondent Company for which the Company has failed to pay.
19. The Respondent Company alleged that the Petitioner owed money to the Respondent Company and is in debt which the Petitioner is well aware of and provided details of the same at paragraphs 4 (i) to (vii) which I will discuss later in my determination hereunder. (*Underline is mine for deliberation*).

## ISSUES

20. In this case there are **two (2) issues** to be dealt with-
  - (i) *Whether the substitute winding up petition filed by Creditor Formscaff (Fiji) Limited should be advertised as in normal winding up cases? AND*
  - (ii) *Whether the Respondent Company Extreme Business Solutions (Fiji) Limited be wound on the substitute winding up application by creditor Formscaff (Fiji) Limited?*

## THE LAW

21. *Section 220* of the *Companies Act* [Cap 247] ("the Act") states that a company may be wound up if it is unable to pay its debt.

22. The Definition of inability to pay the debt has been defined under *section 221* of the Companies Act, where it states that;

*"A company shall be deemed to be unable to pay its debts-*

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter; neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*
- (b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or*
- (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company".*

23. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd* the onus is on the Petitioner to establish that the Company is **unable to pay its debt**. Justice Pathik stated:

This Petition is brought on the ground that the Company is unable to pay its debts. I find that such is the situation here. **The creditor has to prove a negative, that negative being that the Company cannot pay its debts.**

24. As stated in *section 221 of the Act*, a company is deemed to be *insolvent* (unable to pay its debt) if it fails to pay its debt within 3 weeks of the creditor issuing a statutory demand. Justice Pathik went on to state (in *Arjun* [supra])

No question of statutory demand arose in *GLOBE* (supra) but the *Companies Act Cap. 247* have provided for certain situations where deemed inability to pay debts arises. Even if the company can show that it is able to pay its debts, it will do no good whatsoever. If the situation exists, it is deemed unable to pay its debts whether or not that is in fact correct.

It was so held in *CORNHILL INSURANCE PLC v IMPROVEMENT SERVICES LTD and OTHERS* (1986 1 WLR p.114) as follows:-

"Held, refusing the application, that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company's insolvency and present a petition for its winding up."

25. Rule 32 of the *Companies (Winding up) Rules* deals with the *substitution of creditor* or contributory for withdrawing petitioner and states as follows-

32.-(1) *When a petitioner for an order that a company be wound up by the court or subject to the supervision of the court is not entitled to present a petition, or, whether so entitled or not, where he either-*

- (a) fails to advertise his petition within the time prescribed by these Rules or such extended time as the registrar may allow; or*
- (b) consents to withdraw his petition, or to allow it to be dismissed or the hearing of it to be adjourned, or fails to appear in support of his petition when it is called in court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned;*  
*or*
- (c) if appearing, does not apply for an order in the terms of the prayer of his petition,*

*the court may, upon such terms as it may think fit, substitute as petitioner any creditor or contributory who appears to the court to have a right to present a petition, and who is desirous of so doing.* (Underlining mine for emphasis)

## ANALYSIS and DETERMINATION

### *(First Issue)*

26. First issue before me is "*whether the substitute winding up petition filed by Creditor Formscuff (Fiji) Limited should be advertised as in normal winding up cases?*"
27. Reference is made to the Supreme Court case- *In re Chaz Lumber Ltd [1985] FJSC 14; [1985] 31 FLR 55 (27 September 1985)* where Cullinan J.

**Held:** The substituted creditor, if any, may not merely adopt the original petitioner's petition. The original petitioner, having withdrawn, "the Court cannot even look at the petition which has not been 'opened' and can know nothing about it" (Per Jessel M.R. in *In re Patent Cocoa Fibre Company* (1876) 1 Ch.D. 617). A supporting creditor cannot adopt a petition no longer in (i.e. if it ever was) evidence before the Court.

A substituted petitioner must, if he wishes to rely of the provisions of section 221(a), serve upon the Company the necessary statutory demand in respect of the debt due to him.

There is no need in the case of substitution to represent or re-advertise the amended petitioner, it has already been presented, advertised and all interested persons notified. Costs thereof will be saved. The rule allowing substitution operates to reduce costs and to conserve the assets of the company, as the remedy of winding up:-  
"ensures for the benefit of the creditors as a whole and the costs of the petition fall upon the assets available for distribution amongst the creditors as a whole."

(per Pennycuik J, *In re Bostels* (1968) Ch. 346). Rule 32 operates not so much for the convenience of a supporting creditor, but for the interests of all creditors as a whole."

28. Bearing in mind the abovementioned case, there is no need in the case of substitution to re-advertise the amended petition or to re-advertise the petition has already been presented and advertised and all interested parties have already been notified. Ultimately, therefore, rule 32 of the Companies (winding up) Rules operates not so much for the convenience of a supporting creditor as in the interests of all the creditors as a whole.

### *(Second Issue)*

29. Second issue is "*whether the Respondent Company Extreme Business Solutions (Fiji) Limited be wound on the substitute winding up application by creditor Formscuff (Fiji) Limited?*"

30. The Counsel representing the Debtor Company has **vigorously denied the debt of \$44,850 as claimed**, and sought for an explanation as to what services were rendered by the Petitioner that is alleging a debt of **\$44,850**.

31. In the Company's Affidavit in Opposition, at paragraphs 4 (i) - (v) he stated that the Petitioner is owing money to the Respondent Company of which he is very well aware of and adds-

- (i) THAT sometimes in November 2012, my company and the Petitioner entered into a Sale and Purchase Agreement to purchase my Property comprising of certificate of Title Number 8199, Lot 47 on DP 1944 situated at 47 Howell Road, Suva in the consideration sum of \$690,000.00VIP;
- (ii) THAT due to Petitioner not able to obtain the loan in the consideration sum of \$690,000.00VIP, the Petitioner requested to settle the consideration sum in two modes of payment of \$530,000.00 and \$160,000.00 and until to date I have not received any confirmation from the Petitioner or its solicitors who were acting for the petitioner at that time as to when will the sum of \$690,000.00 will be fully settled.
- (iii) THAT I and the Petitioner both agreed to the arrangements of two modes of payment and a separate agreement was made to settle the sale of the property;
- (iv) THAT the arrangement with the Petitioner was that I will be using the said premises without paying any rent until the Petitioner clears the whole sum of \$690,000.00 and after the Petitioner clears the whole sum of \$690,000.00, then I will start paying rent the Petitioner in the sum of \$3,500.00 per month for next three months or until I will vacate the said premises or enter into a tenancy agreement with the Petitioner.
- (v) THAT until to date the Petitioner has failed to clear the full settlement sum and in return the Petitioner served me a Distress of Rent and locked the premises and ceased most of the goods which I state that the Petitioner was wrong in doing this."

32. In reply to above at paragraphs (i)-(iv), the Petitioning Creditor at paragraph 6 of its Reply stated as follows-



- (i) 'Paragraph 4 (i) is admitted in that we purchased the property from the Company for the consideration sum of \$690,000.00 on or around November 2012.
- (ii) In reply to paragraph 4 (ii) I say we obtained finance from Westpac Banking Corporation for \$530,000.00 towards the purchase price. Annexed hereto and marked as "B" is a copy of Mortgage No. 769560 in favour of Westpac Banking Corporation.
- (iii) Further \$40,000.00 was paid to Neel Shivam Lawyers on 4 February 2013. Annexed and marked as "C" is a copy of Receipt No. 3034 and Bank Cheque No. 729560 confirming the same.
- (iv) It was agreed between the Company and the Petitioner that we would make payments of the outstanding \$120,000.00 purchase price of the property directly to Auto Care (Fiji) Ltd whom the Company owed money. Annexed hereto and marked as "D" is a copy of letter dated 6 October 2014 confirming the same.
- (v) In reply to paragraph 4 (iii) I say that the above arrangement at (c) above was made at Neel Shivam Lawyers and Mr Neel Shivam is well aware of this.
- (vi) In reply to paragraph 4 (iv) I say that after the settlement of property it was agreed that the Company would continue to occupy space on the property and pay rent of \$3,500.00 plus VAT per month for two months and later to \$4,600.00 until they moved out.
- (vii) In reply to paragraph 4 (v) I say that settlement has been done, property transferred to our company and all outstanding rates have been paid by our company.'

33. Upon perusal of the documentary annexures within the **Petitioner's Affidavit in Reply** to the Respondent's Affidavit in Opposition in terms of the above (i)- (iv), there is conclusive evidence that the Petitioner has provided documentary evidence to court in order to support those payments amounting to \$690,000. Reference is also made to the **Petitioner's Affidavit In Reply** at paragraph 10 which states "*the Company has been paid the sale price of \$690,000*" as follows-

(a) *Paid the sum of \$530,000;*

(b) *Paid the sum of \$40,000, received by Neel Shivam Lawyers (Annexure 'C' refers);*

*(c) By having its debt of \$120,000 to Auto Care (Fiji) Ltd, taken over by the Petitioner (as confirmed by annexure 'D').*

34. There is no doubt that the Petitioner has fully accounted for the payments of the purchase price of \$690,000, with documentary evidence as stated hereinabove.
35. A demand notice was initially served onto the Respondent Company dated 21<sup>st</sup> February, 2014. The law required the Company to pay the sum so due and the Company had 3 weeks time to pay the debt after service of the statutory demand. The Company neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the Petitioning Creditor.
36. The Court discussed *Section 221 in re Comsol Fiji Ltd HBE0048.2007L (25 March 2009)* and said:

"[23] It is a deeming provision. That is if a company owes debt of at least \$100, and a demand is made but the company neglects to pay the same within 3 weeks of the date of demand, a presumption of inability to pay arises. But it is a presumption which can be rebutted.

[24] Hence, when a demand is made the company must act swiftly to dispute the debt or pay the same in order to negate the imposition of the said presumption. Furthermore, if the company opts to dispute the debt it must do so on substantial grounds. The test for a disputed debt was aptly stated in *Palmer's Company Law Vol.13* as follows:-

**"To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided."**

37. Where the debt is disputed (as in this case), the Company must prove that the dispute is on substantial grounds. Justice Pathik in *Arjun & Sons* [supra] stated:

*"The Company says that the debt alleged is disputed. To be able to succeed in a case of this nature, the Company has to prove that the dispute is on "substantial grounds." Re Lympne Investments Ltd [1972] 2All ER 385.*

38. Justice Pathik had a similar view in *Vivass Development Ltd v Australia and New Zealand Banking Group Ltd [2002] FJHC 245, HBC 0290d, 2001s (15 February, 2002)-*

*"The question therefore is whether the debt is disputed on substantial grounds. If so, whether the court ought to grant the relief sought by the Petitioner.*

*It is a general principle that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of process of the court and should be dismissed with costs (Palmer's Company Law Vol. 3 15.214 and cases cited therein). In Palmer (ibid), on the principles involved, it is further stated-*

*"To fall within the general principle the dispute should be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.*

39. The Company has failed to adduce sufficient evidence to establish a *prima facie* case which satisfies the court that *there is something which ought to be tried either before the court itself or in an action, or by some other proceedings, let alone any evidence to establish its solvency.*

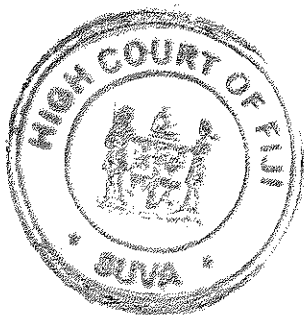
## CONCLUSION

40. The case before this court is a simple one. The evidence clearly indicated that a debt is owed by the Company to the Petitioner. The Petitioner issued a statutory demand which the Company failed to satisfy within 3 weeks of its issue. The Petitioner has complied with the requirements of the Act and the Rules. There is no evidence before this court to indicate the Company is solvent or that it is able to pay its debt.

41. In my conclusion, I make following orders that;

- i. That the substituted winding up Petition is in order and need not be re-advertised.
- ii. That the substituted winding up petition filed by the Petitioner on 10th of June, 2014 is hereby granted.
- iii. That the Official Receiver be constituted as the Provisional Liquidator of the Company in terms of the procedures provided for within the Companies law.
- iv. The Petitioning Creditor is awarded a sum of \$750 costs of this proceeding, assessed summarily.

Dated at Suva this 27<sup>th</sup> of October, 2015.



  
.....  
VISHWA DATT SHARMA  
ACTING MASTER HIGH COURT, SUVA

CC: *Mr. Nilesh Lajendra of Lajendra Law, Suva.*

*Ms. K. Singh of Diven Prasad Lawyers, Suva.*

*Mr. Nandan of Nandan Reddy Lawyers, Suva.*