

**IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION**

Action No. HBE 29 of 2016

**IN THE MATTER OF RITZ
INVESTMENT (FIJI) LIMITED** a
limited liability company having its
registered office at 77 Vanua Arcade,
Level 2, Victoria Parade, Suva.

AND

IN THE MATTER of the Companies
Act 2015.

APPEARANCES/REPRESENTATION

APPLICANT : Ms K Singh [Patel Sharma Lawyers]
COMAPNY : Mr S Singh [Shelvin Singh Lawyers]
JUDGMENT OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 14 September 2018

JUDGMENT

[Winding Up by a Creditor of a Company in Insolvency]

Introduction

1. On 28 November 2016, Carpenters Fiji Limited [the Applicant] filed an application for winding up as a creditor for Ritz Investment (Fiji) Limited [the Company].
2. As per the affidavit verifying application for winding up, the company was indebted to the Applicant for the amount of \$142, 191.

On 2 June 2016, the Applicant served on the company a demand requiring the company to pay the said amount.

The company failed to do so; hence the said application for winding up was initiated.

3. An affidavit in opposition was filed on 19 January 2017.
4. According to Mr San Chan Lee, a Company Director, the Company was formed in August 2010.

Sometimes in 2013 there was a change of directors.

The Company provides nightclub and entertaining services and operated as "Vega" nightclub from 2009 to 2013.

Ritz nightclub commenced operations from 2010 to date and "Temptation" Nightclub from March 2012 to date.

The Company began purchasing liquor from Morris Hedstrom City Centre in 2011.

All transaction was dealt with in either cash on delivery basis or dated cheques were issued.

The Company disputes the claim for \$142, 191 as they never had a credit contract with the Applicant.

Upon receipt of the demand notice the company's name Manager Ashwin Prasad had requested for particulars of debt but none was supplied.

As per their accounting records, they do not have any records of any debt. All liquor purchased up to 2012 has been paid for or where the supply involved broken/bad liquor adequate set-off had been provided by the Applicant.

Despite requests made through their Solicitors, the Applicant has failed to provide with copies of local Purchase Orders, Invoices, Supply agreements and any other documents to substantiate the claim.

The company is a solvent company able to pay its debt.

5. In reply to the opposition, the Company stated as follows.

On or about October 2012, the Applicant provided goods to the company.

Payment for said goods were outstanding and despite numerous reminders and demands the Company failed and/or neglected to pay the debt.

The Company accepted delivery of the goods and paid cheques which were dishonoured. A total of 3 cheques got dishonored:

- i. Cheque number 1386 in sum of \$57, 450;
- ii. Cheque number 1407 in sum of \$57, 450;
- iii. Cheque number 1446 in sum of \$58, 730.

Out of this the company only paid \$31, 439.

Law

6. The Applicant relies on ground of insolvency to wind up the company. Section 513(d) allows for a court to wind up a company if the company is insolvent.
7. Presumption of insolvency arises, when a company is unable to pay its debts – section 514 of the Companies Act.

If a creditor, to whom the company is indebted in a sum exceeding \$10, 000 or such other prescribed amount then due, has served on the company by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due (statutory demand) and the company has not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; a company is than deemed to be unable to pay its debts – section 515(a).

Determination

8. The company claims to have made request from the Applicant with copies of local purchase orders etc. they relied on two annexures "SL1" and "SL2".

"SL1" is a letter from the Company's Counsel dated 11 January 2017. The same is written to the Applicant's Counsel some 02 months after the issuance of the winding up application.

"SL2" is an email from the Company's Counsel to the Applicant's Counsel dated 16 January 2017.

9. There is no evidence shown by the Company that upon service of the demand notice, it had requested for particulars of the debt from the Applicant.
10. The statutory demand was served on the company on 02 June 2016. The 03 weeks period within which the company had to satisfy the debt expired on or about the 23 June 2016.
11. The Companies Act allows for a company to set aside a statutory demand served on it.
12. The application should be made within 21 days period after the demand is so served – section 516(2) of the Act.
13. The Company could have filed an affidavit supporting the application and serve a copy of the application and affidavit on the Applicant.
14. It is on the said application to set aside the statutory demand that the Court makes a determination whether there is a genuine dispute between the Company and the Applicant about the existence or amount of a debt to which the demand relates or that the Company has an offsetting claim – section 517.
15. Pursuant to subsection 5, the Court can set aside the demand if it is satisfied that-
- a. Because of a defect in the demand, substantive injustice will be caused unless the demand is set aside; or
 - b. There is some other reason why the demand should be set aside.

16. In the case of **Australian Securities And Investments Commission v Lanepoint Enterprises Pty Ltd 9recs and mgrs apptd** [2011] HCA 18; (2011) 24 CLR, the High Court at page 28 observed that:

"where a demand has not been complied with, the statutory presumption of insolvency applies unless the demand is set aside in proceedings brought for that purpose prior to the hearing of the application for an order to wind up. Unless the demand is rendered ineffective, by an order setting it aside, the company is required to prove to the contrary of the presumption."

17. It is evident that the company had the entirety of 23 June 2016 to take any necessary steps in relation to the statutory demand.

The Applicant had filed the application for winding up on 28 November 2016, well after the expiry of the time for compliance with the statutory demand.

18. It is clear that by the time the matter came for hearing, the demand had well and truly expired unsatisfied.
19. On the issue of solvency of the Company my findings are as follows.

20. In the Matter of Gladstone Mortgagee No1 Pty Ltd [2015] NSWSC 1551 (20 October 2015), the Court when making determination of the Company's solvency observed:

"That definition [solvent] adopts a cash flow test of insolvency which turn upon the income sources available to GMI and the expenditure obligations that it has to meet, rather than a balance sheet test which focuses on the value of its assets and liabilities reflected in its books, although a balance sheet test can provide context for the application of the cash flow test.

.....

Whether GMI is able to pay its debt as and when payable is a question of fact to be determined objectively including the nature of its assets and business, and the court will have regard to commercial liabilities in that regard."

21. Apart from merely stating in the affidavit in opposition [paragraph 20] that the Company is solvent and able to pay its debts; there is no evidence before the Court as to its financial position.

22. My findings are that the Applicant has a standing as a creditor of the Company. There has been a failure to comply with the demand. There were no proceedings initiated by the Company to set aside the demand.

23. On 14 May 2018, my predecessor Master Sharma [as he was then] had extended the time frame within which the Court is to decide the application.

24. The application was filed with the statutory affidavit verifying the application.

25. The application was served on the Company on 03 January 2017 at its registered office and an affidavit of service was filed to that effect.

26. Advertisement was effected in a newspaper and as well as published in the Gazette.

27. In the circumstances a presumption of insolvency arises from the service of the demand and the failure to comply with it, and that presumption of insolvency has not been rebutted.

28. I therefore make following orders:

- i. Order that Ritz Investment (Fiji) Limited be wound up in insolvency under the provision of the Companies Act 2015;
- ii. Order that the Official Receiver is appointed as the provisional liquidator of the Company;
- iii. Further order that the Company pays to the Applicant a cost for this proceeding summarily assessed at \$2000.

29. Ordered accordingly.



.....
Vandhana Lal [Ms]
Acting Master
At Suva.