IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Winding Up Cause HBE No. 52 of 2019

IN THE MATTER OF RPA GROUP (FIJI) LIMITED a duly registered liability company having its registered office at Shop 3, Fiji Muslim League, Lakeba Street, Samabula, Suva.

AND

IN THE MATTER of the Companies Act, 2015

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. G. O' Driscoll for the Applicant
: Mr. F. Haniff for the Respondent

Date of Hearing : 30 March 2020
Date of Decision : 18 May 2020

RULING

COMPANY LAW: WINDING UP Leave to set aside statutory demand – stay of winding up proceeding – sections 524 and 529 of the Companies Act – section 459S of the Australian Corporations Act 2001 – burden of satisfying court to obtain leave – the evidentiary threshold – reasons for failing to set aside statutory demand – absence of evidence by the applicant – serious question to be tried – materiality of ground to prove solvency - Order 29 Rule 1 (1) and (3) of the High Court Rules 1988

The following cases are referred to in this ruling:

a. In the Matter of Touchwood Pacific Pte Limited Winding Up Action No. HBE 32 of 2018
b. Britten Norman Pty Ltd v Analysis & Technology Australia Pty Ltd [2013] NSWCA 344
c. Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (no.2) [2011] NSWC 113
d. Ace Contractors and Staff Pty Ltd v Westgarth Development Pty Ltd [1999] FCA 728
e. Tony Innaimo Transport Pty Ltd v Skyroad Logistics Pty Ltd [2018] FCA 1134 (3 August 2018)
f. Chief Commissioner Stamp Duties v Paliflex [1999] NSWSC 15 (4 February 1999)
g. *Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No.2) [2011] NSWSC 113*
h. Soundwave Festival Pty Ltd v Altered State (WA) Pty Ltd (No.1) [2014] FCA 466
i. In the Matter of Vangory Holdings Pty Ltd [2015] NSWSC 546
j. Perpetual Nominees Ltd v NA Investment Holdings Pty Ltd [2011] NSWSC 282

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1. This is the second summons filed in this action by the respondent, RPA Group (Fiji) Limited, to set aside the statutory demand notice dated 29 May 2019. This was filed on 21 February 2020, seeking leave under section 529 of the Companies Act 2015 (the Act), to set aside the statutory demand, and to stay all further proceedings under section 524 of the Act.

2. Prior to that, the respondent, by summons filed on 5 September 2019, sought a stay of the action and to restrain the winding up of RPA Group (Fiji) Limited until the hearing and determination of its application, which was made under section 524 of the Act. That initial application was dismissed, after a hearing by this court, on 24 April 2020.

3. This application relied upon the affidavits of Ronesh Kumar filed on 5 September 2019 and 12 September 2019, and the second supplementary affidavit by him dated 6 December 2019 and filed on 21 February 2020. Thereafter, a third

supplementary affidavit was filed on 25 March 2020, a day prior to the hearing on 26 March 2020. Counsel for the applicant objected to the reception of the affidavit, as it had not been served on him. Thereafter, counsel for the respondent, Mr. Haniff, submitted that he wished to amend the application. The hearing was, thereupon, adjourned to 30 March 2020. Mr. O' Driscoll raised the question of costs for the adjournment, which I will address in this ruling.

4. The point raised by the respondent – whose application is not supported by any other creditor or contributory – involves the discussion of principles that appear not to have been considered at length in relation to section 529 of the Act previously. At the outset, counsel conceded that the respondent did not take the necessary steps to set aside the statutory demand pursuant to section 516, and, therefore, it was necessary to make this application in terms of section 529 of the Act.

5. Section 529 of the Act states:

(1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the court, oppose the application on a ground –

(a) that the company relied on for the purposes of an application by it for the demand to be set aside; or

(b) that the company could have so relied on, but did not so rely on (whether it made such an application or not)

(2) *The court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent*.

6. Counsel for the respondent referred to the decision in *In the Matter of Touchwood Pacific Pte Limited*[1] in support of his proposition that leave to oppose the winding up is necessary if the company has failed to take steps under section 516 of the Act to set aside the demand. That is plain from a reading of section 529 of the Act.

[1] Winding Up Action No. HBE 32 of 2018

7. The respondent insisted that there was no debt to be paid by the company to the applicant; that the company was clearly solvent and that in the circumstances this was a proper case in which to grant leave in terms of section 529 of the Act.

8. Counsel drew the court's attention to section 459S of the Australian Corporations Act 2001, which is similar to section 529 of the Act and relied upon several decisions of Australian courts in support of his contention. In exercising their discretion, the courts in those decisions have considered the basis for disputing the debt, the reason for not raising the issue of indebtedness and the reasonableness of the party's conduct and whether the dispute of the debt is material to proving that the company is solvent. It was contended that the threshold for establishing a 'genuine dispute' by the courts in those cases were at a very low level. That contention is not entirely correct as will be presently seen. At this point, however, a consideration of the facts may be apt prior to considering the principles used in the Australian decisions.

THE DEBT AND ITS DISPUTE

9. The claimed debt that led to the winding up application has its genesis in an agreement dated 17 March 2017 (the Mycon Agreement) between Pacific Marine & Civil Solutions and RPA Group (Fiji) Ltd for the purchase of two motor vessels and certain equipment for a consideration of $1,308,000.00 inclusive of Value Added Tax (VAT). RPA Group (Fiji) Ltd paid a deposit of $500,000.00 on 29 & 30 March 2017, and the balance $808,000.00 was to be paid in 13 installments, of which $62,153.00 was paid by pre-dated cheques, and these were delivered to the applicant on the same day the deposit was paid. Of these, 7 cheques were presented for payment, totaling a sum of $435,076.95. This left a balance of 372,923.10 owed to the applicant as at 8 October 2017.

10. Payment details became obscure, the respondent makes out, after the company entered into another contract sometime between December 2017 and February 2018 with Pacific Marine & Civil Solutions for the hire of an excavator for $25,000.00. In December 2018, there was another contract to salvage the applicant's sunken barge for the sum of $45,000.00. In consideration of these services, the respondent contends, the total of $70,000.00 was to be deducted from the amount owing to the applicant under the Mycon Agreement. A further

sum of 112,796.33 was credited to the sum owing to the respondent by an associate company of the applicant, Pacific Buildings Solutions. This is referred to in the email dated 11 May 2018 sent by Mr. Shan Ali to the respondent, who conceded that the total sum owed to the applicant as at 11 May 2018 was $244,626.77. The applicant and the respondent entered into a sub-contractor agreement on 28 September 2018 for the refurbishment of the jetty at the Walu Bay shipyard in Suva; the payment of $280,419.77, the respondent declares, was to be by contra with dues under the Mycon Agreement.

11. The respondent's contention is that dues to the company under the jetty refurbishment contract extinguished its debt to the applicant. It contended that there were several arrangements between the respondent, the applicant and the applicant's associate – Pacific Building Solutions – on the understanding that certain payments would not be charged. Hence, the respondent asserted, no debt was owed by the company to the applicant.

12. The respondent admitted to receiving the demand notice of 29 May 2019 on 6 June 2019. Its in-house legal counsel, by reply dated 27 June 2019, sought a breakdown of the sum of $325,239.94 demanded from the company, and indicated that an equipment purchased from the company would be returned due to issues with it. She requested a reconciliation of accounts to be followed by a payment plan. The letter stated the amounts owed to the company by Pacific Building Solutions. According to the respondent, Pacific Building Solutions responded by email dated 8 July 2019 by increasing the outstanding amount to $381,000.00. This was replied by the respondent on 23 July 2019. The winding up proceeding commenced thereafter by application for winding up filed on 5 August 2019.

13. There was no explanation by the respondent in its several affidavits as to why it did not respond earlier or take steps timeously to set aside the demand notice of 29 May 2019. The respondent's submission that "RPA did something when it received the demand notice" is bereft of merit, and completely short of the statutory requirement. The absence of an explanation most likely means there was no reasonable justification for the company's failure to act under sections 516 and 517 of the Act.

14. It was submitted on behalf of the respondent that if the disputed debt is taken to exist, the company would be insolvent as the net current assets of $41,361.00 stated in the respondent's 2018 financial statement was considerably less than the debt of $361,329.00, while, on the other hand, the respondent would be solvent if the debt did not exist. A matter of concern is the negative net assets figure of $276,452.00 for the year 2017. The respondent relied on a solvency report provided by APNR Partners annexed to the third supplementary affidavit of Ronesh Kumar filed on 25 March 2020. Whether the solvency report was provided by the company's auditor is not disclosed in the affidavits or the submissions. The respondent did not provide to the court audited financial statements.

15. Relying upon the solvency report, it was contended that the current ratio of 1.12 was indicative of the company's ability to pay its debts. This contention is on the basis that the debt is not included within the company's liabilities. The respondent argued that the net interest cover ratio – which shows the company's ability to meet its interest commitments – and the debt service ratio – which showed the company's ability to meet its current and long term liabilities were favourable, and that the report showed that the company was solvent. Pointing to the profitability of the company, Mr. Ronesh Kumar averred that it had made profits before tax of $956,990.90 and $571,885.00 respectively for the financial years ending 30 June 2018 and 30 June 2019, and that substantial income tax was paid on these profits.

16. The solvency report, however, does not provide an evaluation of the quality of the current assets. Except for a general expression that current assets exceed current liabilities, there is no clear opinion that those current assets could be converted to cash in the short term in order to settle the company's debts. In the absence of audited financial statements, a professional opinion based on an analysis of the stocks, debtors and other receivables and the ability to quickly turn these into cash would have helped the court in making an assessment. The mere assertion of solvency based on the respondent's current ratio may not suffice to establish solvency for the purpose of section 529 (2) of the Act.

17. Section 529(2) provides that leave should not be granted unless the court is satisfied that the ground urged by the company is material to proving that it is solvent. The respondent argued that the non-existence of the debt was material to proving the solvency of the company. A company is solvent if and only if, it is able to pay all its debts, as and when they become due and payable. Unless the contrary can be proven to the satisfaction of the court, a company is deemed to be unable to pay its debts in the situations provided by section 515 (a) & (b) of the Act[2].

S. 529 COMPANIES ACT & S.459S CORPORATIONS ACT 2001 OF AUSTRALIA

18. The decisions of the Australian courts cited by the respondent in regard to matters such as the existence of a genuine dispute and its materiality in proving that the company is solvent are instructive though, contrary to what was made out in submissions, they are not necessarily in favour of the respondent.

19. In *Chief Commissioner Stamp Duties v Paliflex*[3], the Supreme Court of New South Wales considered the question of leave to oppose the winding up of the company, and deliberated upon the genuineness of the debt. The court laid down three considerations in exercising its discretion under section 459 (1)[4]:

(a) A preliminary consideration of the defendant's basis for disputing the debt which was the subject of the demand;

(b) An examination of the reason why the issue of indebtedness was not raised in an application to set aside the demand, and the reasonableness of the party's conduct at that time; and,

(c) An investigation of whether the dispute about the debt is material to proving that the company is solvent.

20. In the New South Wales Court of Appeal decision in *Britten Norman Pty Ltd v Analysis & Technology Australia Pty Ltd*[5], a genuine dispute was considered to

[2] Section 514 of the Companies Act
[3] [1999] NSWSC 15 (4 February 1999)
[4] Corporations Act 2001
[5] [2013] NSWCA 344

have been established if there was "a plausible contention requiring investigation". This, the respondent submitted, raised the same considerations as the serious question to be tried as would apply in the case of an interlocutory injunction, arguing that, likewise, the threshold for the purpose of section 529 (2) of the Act is low.

21. In regard to the question on materiality, counsel pointed to the decisions of *Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No.2)*[6] and *Ace Contractors and Staff Pty Ltd v Westgarth Development Pty Ltd*[7]. He submitted that in the former, a less stringent approach was followed, and that the evidentiary requirement at the leave stage is not the same as in the winding up inquiry, relying upon *Tony Innaimo Transport Pty Ltd v Skyroad Logistics Pty Ltd*[8] *and Chief Commissioner Stamp Duties v Paliflex*[9].

22. In *Tony Innaimo Transport Pty Ltd v Skyroad Logistics Pty Ltd*[10], the Federal Court of Australia considered the approach taken in several decisions and summarised the legal principles in this way:

(a) The discretion conferred by section 459S is to be exercised cautiously and sparingly and with regard to the purpose of Part 5.4, which is to provide for determination of objections to a statutory demand by an application made timeously under section 459G, rather than at the time of the winding up application;

(b) Nevertheless, it is to be acknowledged that section 459S is the only "safety net" against the potential harsh operation of Part 5.4;

(c) A company seeking leave under section 459S must show that the debt in respect of which it is seeking leave is pivotal to the question of solvency in the sense that it must demonstrate that if the debt exists then the company will be insolvent and, if the debt does not exist, the company will be solvent (see further below);

[6] [2011] NSWC 113
[7] [1999] FCA 728
[8] [2018] FCA 1134 (3 August 2018)
[9] [1999] NSWSC 15 (4 February 1999)
[10] [2018] FCA 1134 (3 August 2018)

(d) *As to the degree of proof on the issue of materiality it is unlikely that the requirement can be satisfied by mere assertions of solvency or as to what might happen in the future; rather, the court must be satisfied on the evidence placed before it that the dispute as to the debt is material to the company's solvency; and,*

(e) *Another issue for consideration is whether there is a serious question to be tried on the ground sought now to be raised*.

23. The requirement of materiality was considered in that case. The wording of section 529 is the same as section 459S, and the Federal Court's view on this requirement is instructive. Explaining the narrow view, which the court adopted in that case, while the broader view has been preferred in other Australian decisions, the court stated that for a debt to be material, it must be the difference between solvency and insolvency, such that *proof* is required if the disputed debt exists, then the company will be insolvent and if the debt does not exist, then the company will be solvent. According to the broad view, the court stated in *Tony Innaimo*, the disputed debt need not be determinative of the company's solvency and that materiality is established where there is evidence that the company would undoubtedly be insolvent if the debt was owed, as well as evidence that it *might* be solvent if the debt is not owed.

24. *Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No.2)*[11], a decision of the Supreme Court of New South Wales, which was referred to by the respondent, followed the broader view. The court formulated the test in this way, "A finding of the existence or non-existence of the debt will be pivotal to a decision on solvency at the s 459S stage, if the company *might* be found to be solvent if the debt does not exist. That would establish materiality for the purposes of s 459S (2)".

25. In terms of section 529 (2) of the Act, the respondent must satisfy the court that the ground it is relying upon is material to proving that the company is solvent. In this proceeding, the ground relied upon is the dispute of the debt, which the respondent claims was extinguished by a contra entry for services rendered to

[11] [2011] NSWSC 113

the applicant and its associate company. The argument being that the company must be deemed to be solvent by excluding the disputed debt from its liabilities and that, if not so excluded, the company could not be considered solvent. That argument is consonant with the approach taken by the Australian courts in the cases referred to in the preceding paragraphs and can be applied with respect to section 529 (2) of the Act.

EVIDENCE, MATERIALITY & SOLVENCY

26. As discussed in *Tony Innaimo*[12], the applicant must show that the debt in respect of which it is seeking leave is *pivotal to the question of solvency* in the sense that it must demonstrate that if the debt exists then the company will be insolvent and, if the debt does not exist, the company will be solvent. What is important is that this must be shown to the satisfaction of the court. In regard to the degree of proof on the issue of materiality, the court propounded, *that it was unlikely that the requirement can be satisfied by mere assertions of solvency or as to what might happen in the future;* rather, the court must be satisfied on the evidence placed before it that the dispute as to the debt is material to the company's solvency.

27. This leads to the question of proof. The respondent insisted that the threshold to proving solvency is low, and, therefore, very little evidence was required. For this, it relied on the reasoning in *Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd*[13]. Even with the liberal approach in that case, it seems that the court would want some evidence to show that the company would be solvent if the debt did not exist.

28. In *Soundwave Festival Pty Ltd v Altered State (WA) Pty Ltd (No.1)*[14], the Federal Court of Australia took what seemed a similarly liberal approach when it held the view that materiality would be established if the debt was relevant to or had the capacity to have some influence or effect on the company's solvency. However, the Federal Court observed "…..the company that is seeking leave must adduce sufficient evidence concerning solvency to satisfy the court that the existence or otherwise of the debt will be material to the conclusion as to the

[12] Supra
[13] Supra
[14] [2014] FCA 466

company's solvency – that is, that the existence or otherwise of the debt was relevant to, or has the capacity to influence, or have an effect on, that conclusion. If, at the s 459S stage, the company contends and intends to prove that it is solvent if it does not owe the disputed debt, it must lead evidence of its financial position which, if accepted, is capable of satisfying the court of that fact. It is doubtful that the court could be so satisfied on the basis of mere assertion. Nor should the court be required to speculate about what evidence on solvency might be led at the final hearing of the winding up application".

29. The Federal Court went on to state that a company would not necessarily be required to lead the fullest and best evidence of its solvency, but that it was unlikely that the materiality requirement in s 459 (2) could be satisfied by mere assertions of solvency, or by conjecture about what further evidence concerning solvency might be led at the hearing of the winding up application.

30. The adducing of sufficient evidence to satisfy court for the purpose of obtaining leave to set aside a statutory demand was propounded, *a fortiori*, by the Supreme Court of New South Wales in *In the Matter of Vangory Holdings Pty Ltd*[15]. The strict or narrow approach was also evident in *Perpetual Nominees Ltd v NA Investment Holdings Pty Ltd.*[16] These two cases were not referred by either counsel.

31. In *Vangory*, evidence was led on behalf of the company contending that the existence of the debt was material to its solvency, in the sense that the company might be found to be solvent if that debt did not exist. A director and a consultant, who filed affidavits for the company in support of leave, were cross examined on behalf of the applicant. Upon a review of the evidence given by the director, the court gave little weight to such evidence in view of his inability to speak on many of the company's matters, including its finances. The Supreme Court of New South Wales rejected the company's contention "that something might turn up" at the final hearing as to solvency is a sufficient basis to grant the leave sought. The court held that it was not satisfied, on the evidence, that there is any real prospect that Vangory might be found to be solvent even if the

[15] [2015] NSWSC 546
[16] Perpetual Nominees Ltd v NA Investment Holdings Pty Ltd [2011] NSWSC 10

claimed debt did not exist. These cases show that there must be sufficient evidence at the leave stage to satisfy court.

32. Understandably, such evidence need not be at its fullest, and best, in order to establish materiality of a ground for the purpose of solvency. But, there must be sufficient for the court to bite. As laid down in *Tony Innaimo*, the court must be satisfied on the evidence placed before it that the dispute to the debt is material to the company's solvency. To cite an instance of shortcoming, the respondent provided draft accounts in support of its application. Common sense suggests that audited accounts would have been the more acceptable form of financial statements in a proceeding as important as this. The respondent had an obligation to reveal its overall financial position, which it has not adequately discharged for the purpose of this inquiry. There is no suggestion that the company's audited financial statements were unavailable. This must be seen as an omission having a bearing on the respondent's credibility.

THE QUESTION OF LEAVE

33. Mention was made of certain decisions that were classified into the broad and narrow approach to the exercising of discretion on the question of granting leave. The view I take, with respect, is that the discretion to be used will be dictated by the overall circumstances of each case and not by a particular approach. Those circumstances must be assessed in the light of the principles governing the granting of leave to oppose the winding up. As pointed out in In *Tony Innaimo*[17] this discretion must be used cautiously and sparingly, and with regard to the object of the enactment, but nevertheless it is a safety net against the potential harsh operation of the law. In exercising discretion, I am mindful of that and the general principle that an unpaid creditor is *ex debito justitiae* entitled to a winding up order if he proves insolvency, as well as the injunction in section 529(2) of the Act that the court must not grant leave unless satisfied as required by the section.

34. It will be convenient, in this context, to summarise the position in this proceeding in relation to the applicable principles, which were expressed in *Chief Commissioner*

[17] Supra

Stamp Duties v Paliflex[18]. On the evidentiary front, as noted above, the respondent had the potential to do far better, but chose to fall short. That is a peril the respondent has willingly taken. There was no satisfactory explanation regarding the failure to take timely steps to set aside the statutory demand. That does not reflect well on the respondent, especially when, fighting, so to speak, to stay alive.

35. Viewed ordinarily, therefore, the respondent would seem to be in a perilous position. But, there is a lifeline to which it drew attention in submissions. The respondent pointed to the absence of an affidavit from the applicant, and submitted that, therefore, there was no evidence to contradict the respondent's case of the non-existence of the debt and the solvency of the company. The applicant not filing an affidavit – for which it gave no reason – to counter the respondent's assertions must not be seen as displacing the respondent's burden to establish that there is no debt, as asserted in this case (see paragraphs 10-12), and thereby prove solvency; rather, that is a burden that sits squarely upon the respondent as imposed by section 529 (2) of the Act. The absence of the countering affidavit, however, allows the respondent to set up its case of the debt being extinguished by contra entries, by edging across the lower evidentiary threshold in an interlocutory application such as this through the matters averred in its own affidavits.

36. Because of these particular circumstances, and owing in no small measure to the absence of evidence countering the respondent's affidavits, I have concluded, after much deliberation, that the respondent has established, albeit marginally, a question to be tried; that there is a plausible contention requiring investigation. There are matters, in my view, that are in suspense which must be thrashed out at a fuller inquiry so that an unjust outcome may be avoided.

37. In the circumstances, I conclude that the dispute relating to the debt may be material to proving the solvency of the respondent, and, therefore, the respondent is granted leave, in terms of section 529 of the Companies Act, to oppose the application for winding up. The respondent's summons makes

[18] Supra

reference to the setting aside of the statutory demand, rather than to opposing the winding up application, as mentioned in the enactment. But, the applicant made nothing of this, and I shall pay no heed to this technicality. The winding up proceeding will not be stayed.

38. There remains another matter to be addressed: the question of costs. Mr. O' Driscoll raised the matter of costs when the respondent's application was taken up for hearing on 26 March 2020. This was after Mr. Haniff moved to amend the application, and the hearing was adjourned to 30 March 2020. Costs summarily assessed in a sum of $750 would be fair, in my view, to compensate the applicant for prejudice resulting from the adjournment of the hearing. Other than in that respect, the parties will not be imposed with costs relating to this application.

Leave Granted.

Order

a. The respondent is granted leave in terms of section 529 of the Companies Act to oppose the application for winding up.

b. The respondent is directed to pay the applicant costs summarily assessed in a sum of $750.00.

Delivered at **Suva** this **18th** day of **May, 2020**

HIGH COURT CIVIL SUVA

Justice M. Javed Mansoor
Judge of the High Court

O' Driscoll & Company (for the applicant)
Haniff Tuitoga (for the respondent)