

IN THE HIGH COURT OF FIJI  
WESTERN DIVISION AT LAUTOKA  
COMPANIES JURISDICTION

HBM CAUSE NO. 32 OF 2018

IN THE MATTER OF  
LIFESTYLE PACIFIC (FIJI)  
PTE LIMITED having its  
registered office at Lot 1,  
Nadakia, Denarau Road,  
Denarau, Nadi.

AND

IN THE MATTER OF  
COMPANIES ACT 2015

**Appearances** : Mr E. Sailo for the applicant  
Mr N. Kumar with Ms S. Sonika for the respondent  
**Date of Hearing** : 09 November 2020  
**Date of Decision** : 25 November 2020

# DECISION

*[on oppression]*

## Introduction

[01] This is an application for relief from oppression.

[02] By his application filed 31 October 2018, the applicant seeks the following orders:

- a) *That Alick George Richard Wallis purchase all shares held by the applicant in the company at a price of \$10.00 per share or at another price the court determines; or*

- b) *That the company be wound up under Companies Act 2015; and*
- c) *That such further or other as may be just, including an order that the respondent pay the costs of and incident to this application.*

[03] The respondent opposes the application.

[04] At the hearing, counsel representing both parties informed the court that they will rely on their respective affidavits and written submissions. There was no oral hearing.

### **Background**

[05] Lifestyle Pacific (Fiji) Pte Ltd, the respondent (the “*company*” or the “*respondent*”) is registered company in Fiji. It was incorporated on 6 December 2016.

[06] Antonio Catanzariti, the applicant (the “*applicant*”) is a member/shareholder of the company by virtue of 10,000 shares in the company. The applicant alleges that it was agreed between the respondent and him (applicant) that the applicant will have 50% share in the company.

[07] The other member of the company is Alick George Richard Wallis who holds 90,000 shares in the company (the “*respondent*”).

[08] The applicant alleges that the respondent’s conduct in operating the company is oppressive or unfairly prejudicial or contrary to the interest of the applicant. On that basis the applicant seeks relief from the court.

### **Legal framework**

[09] Sections 176 and 177 of the Companies Act 2015 (“*Com Act*”) are relevant to this application. Both sections fall under Part 16 of the Com Act. Part 16 deals with members’ rights and remedies for oppressive conduct of affairs of a company.

[10] Section 176 provides:

*“Grounds for court order*

*176(1) The court may make an order under section 177 if—*

(a) the conduct of a company's affairs;  
(b) an actual or proposed act or omission by or on behalf of a company; or  
(c) a resolution, or a proposed resolution, of members or a class of members of a company,  
is either —

(i) contrary to the interests of the members as a whole; or  
(ii) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

(2) For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company."

[11] Com Act, section 177, sets out orders the court can make

*"Orders the court can make*

177 (1) The court can make any order under this section that it considers appropriate in relation to the company, including an order —

- (a) that the company be wound up;
- (b) that the company's existing articles of association be amended or repealed;
- (c) to regulate the conduct of the company's affairs in the future;
- (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
- (e) for the purchase of shares with an appropriate reduction of the company's share capital;
- (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
- (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
- (h) appointing a receiver or manager of any or all of the company's property;
- (i) restraining a person from engaging in specified conduct or from doing a specified act; or
- (j) requiring a person to do a specified act.

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply —

- (a) as if the order were made under Part 39; and
- (b) with such changes as are necessary.

(3) If an order made under this section repeals or modifies a company's articles of association, or requires the company to adopt articles of association, the company does not have the power under section 46(7) to change or repeal the articles of association if that change or repeal would be inconsistent with the provisions of the order, unless—

(a) the order states that the company does have the power to make such a change or repeal; or

(b) the company first obtains the leave of the court."

## The evidence

### *Applicant's affidavit in support*

[12] The applicant in the affidavit in support states:

- a) He is a member/shareholder of Lifestyle Pacific (Fiji) Pte Ltd (*the company*) and has 10,000 shares in it. He says that it was agreed between the respondent and him that he will have 50% share in the company.
- b) The company was incorporated in Fiji as a company having share capital on 6 December 2016.
- c) The other member is Alick George Richard Wallis who holds 90,000 shares in the company.
- d) Since the incorporation of the company, the respondent has not filed annual report with the Registrar of the company.
- e) The respondent has not given him any moneys profited by the company since its operation.
- f) The respondent has refused and is refusing to hold Annual General Meeting and/or any meeting with him (applicant) despite several requests.
- g) He has invested almost \$100,000.00 towards the company including air fares for the respondent and him (applicant) together with accommodation and meals but in return he (applicant) has not received any profit from the company since its incorporation.

- h) He has also lent cash and advance to the respondent but the respondent has refused and/or neglected to pay the moneys that he (applicant) had advanced.
- i) He arranged a meeting at Crows Nest Resort, Sigatoka on 17 July 2017, but the respondent refused to provide any information about the company stating that his (respondent) solicitors has advised him the meeting is illegal.
- j) The respondent removed him (applicant) as a Director without any company resolution and/or giving any prior notice to him. He came to know about it after a company search on 29 August 2018.

*Respondent's affidavit in opposition*

[13] The respondent in his affidavit in opposition states:

- a) On 9 November 2016, he was issued a Foreign Investment Registration Certificate by Investment Fiji for the respondent company.
- b) on 28 February 2017, he received a letter from the Fiji Revenue and Customs Authority notifying that the respondent company being registered for Value Added Tax (VAT) and providing the respondent company's tax identification number.
- c) On 29 March 2018, he obtained a Tax Compliance Certificate confirming that the respondent company has been in compliance with all tax obligations in terms of the lodgement and payment for taxation.
- d) He further applied for a New Investor's Permit and obtained the same via letter dated 26 March 2018.
- e) He has been issued a work permit to reside and work in Fiji.
- f) The applicant was a director and shareholder of the respondent company however he was terminated on 2 August 2017.
- g) The applicant was only allocated 10,000 shares at \$1.00 each.
- h) He personally injected the funds needed to allow the respondent company to start functioning.
- i) No annual reports were submitted as the business was not trading since 6 December 2016.
- j) That there have been no profits generated by the company.

- k) There were meetings between the two of us (applicant and respondent) and also with Anilesh Amitesh Kumar, the other director.
- l) He attended the meeting at Crows Nest Resort, Sigatoka on 17 July 2017, and all information needed was provided to the applicant.
- m) He never acted against the interest of the company nor the applicant.
- n) The applicant was terminated pursuant to a directors meeting because the adverse conduct of the applicant against the other directors and company.

### **Discussion**

- [14] The applicant applies to this court for relief against oppressive conduct of the affairs of the company. He seeks orders for the company either:
- (i) *The respondent buy out all the share held by him (applicant) in the company at a price of \$10.00 per share or at another price that the court determines; or*
  - (ii) *The company be wound up.*
- [15] The applicant makes this application on the basis that he is a member of the company, minority shareholder. An application for an order under s. 177 in relation to a company may be made by a member of the company, even if the application relates to an act or omission that is against-(i) the member in a capacity other than as a member; or (ii) another member in their capacity as member. A person who has been removed from the register of members because of selective reduction of capital can also bring such an application (see Com Act, s.178).
- [16] In this instance, the applicant has made this application as a member of the company and/or removed director of the company against the respondent, another member and managing director of the company.
- [17] It was not in contest that the applicant is member/or shareholder of the company with 10,000 shares of \$1.00 each and that the respondent is other member and director who holds 90,000 shares of \$1.00 each.
- [18] The applicant claims that initially, it was agreed between the respondent and applicant that the applicant will have 50% share in the company.

- [19] The Com Act provides a range of substantive remedies to shareholders in the face of a company's actual or proposed act of mismanagement.
- [20] Here, the situations appear to be a management deadlock in "*quasi-partnership arrangements*"; situations typically involving two business partners controlling a company, each assuming the combined roles of shareholders and directors.

### Minority Oppression

- [21] The remedy against oppression of minority shareholders (oppression remedy) is found in section 176 of the Com Act. This section provides a backbone of substantive rights for protecting an individual shareholder's interests in the face of a company's mismanagement. The oppression remedy gives the court the discretionary power to grant relief in circumstances where an actual or proposed act or omission by or on behalf of a company is either--
- (i) contrary to the interests of the members as a whole; or*
  - (ii) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.*
- [22] In such circumstances, shareholders may have the option of obtaining relief under section 177 of the Com Act provided they can show the conduct or act falls within either "*limb*" of these criteria. The court has the discretion to grant any relief.
- [23] The oppression remedy provides an important safeguard for the rights of an individual shareholder whose interests may be at risk of abuse from the majority shareholders' mismanagement of the company's affairs.
- [24] The appropriate oppression remedy in any given instance can be fashioned according to the needs and circumstances of the parties and business arrangement involved. The order the court may make include:
- (a) that the company be wound up;*
  - (b) that the company's existing articles of association be amended or repealed;*
  - (c) to regulate the conduct of the company's affairs in the future;*
  - (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;*

- (e) for the purchase of shares with an appropriate reduction of the company's share capital;*
- (f) for the company to institute, prosecute, defend or discontinue specified proceedings;*
- (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;*
- (h) appointing a receiver or manager of any or all of the company's property;*
- (i) restraining a person from engaging in specified conduct or from doing a specified act; or*
- (j) requiring a person to do a specified act. (Com Act, s.177)*

[25] The categories of oppressive conduct are not closed and will depend on the specific facts of each case. Oppressive conducts might include:

- a) Misappropriation of company funds or assets;*
- b) Running the company in a party's own interests to the exclusion of (or indifference to) the interests of other shareholders;*
- c) Denial of access to company information or unfair exclusion from participation in the company's management;*
- d) Payment of excessive remuneration to company officers, possibly at the expense of paying dividends;*
- e) Improper diversion of company business to other entities / individuals;*
- f) An improper issue of shares which might include, for example, one that is calculated to achieve a decisive majority shareholding or voting rights in that entity (or, conversely, dilute another party's).*

[26] Both parties claim injecting the fund to allow the company to start functioning. According to the applicant, he had injected more than \$100,000.00 in various ways.

[27] Since the formation of the company, the respondent has refused to provide any information about the company including its income and its financial position. This shows that the respondent has not been transparent towards his conduct of the company's affairs.

[28] The respondent has failed to submit any annual report to the Registrar of the companies since its formation in 2016. The reason given by the respondent for



not submitting the annual report has been that there was no trading since December 2016. It is evident that the company has been unable to commence its business since its incorporation in 2016.

- [29] The respondent was unable to produce any minutes of the meetings. This demonstrates that there were no meetings. The respondent had even refused to convene a meeting despite the several requests made by the applicant. He convened a meeting at the request of the respondent. That meeting was ended abruptly on the respondent's solicitor's legal advice. He did not provide any information about the company to the applicant.
- [30] The respondent submits that the applicant was terminated pursuant to a directors meeting because of the adverse conduct of the applicant against the other directors and the company. The applicant contests that the respondent removed him (applicant) as a director, without any company resolution and/or giving any prior notice to him, and that he came to know about it after a company search done on 29 August 2018. The respondent was unable to submit to court when the directors meeting which resolved to remove or terminate the applicant as a director. The respondent did not even produce to court the minutes of the directors meeting in which the resolution was taken to remove the applicant as a director of the company. On the evidence, I conclude that the applicant was removed as director of the company when he was insisting the respondent to provide financial information of the company improperly and/or illegally.
- [31] The applicant further contends that the company is illegally operating as it has not able to meet the requirement of Investment Fiji. In that, he submits that the Foreign Investment Registration Certificate (obtained on behalf of the company) states that: *"the foreign investor must have at least \$1,000,000.00 in paid up capital in the form of cash from the operational date to be brought fully into Fiji within the 12 months implementation period to undertake constructions activities."*, and the respondent has not complied with it. The respondent did not place any evidence to establish the fact that he had complied with the foreign investment condition or he had applied for extension of implementation period beyond 12 months required by Investment Fiji. In the absence of such evidence, I find that the respondent had failed to comply with the requirement of Investment Fiji that the

foreign investor must have at least \$1,000,000.00 in paid up capital in the form of cash brought fully into Fiji within 12 months from the operational date.

- [32] It is the applicant's concern that he will become liable if the company continues to operate under mismanagement of the respondent as he (applicant) is still a shareholder in the company.

### **Conclusion**

- [33] On the evidence and having been satisfied on the balance of probabilities, I conclude that the respondent's acts or omissions in the management of the company to be oppressive to, unfairly prejudicial to, or unfairly discriminatory against the applicant, a minority shareholder, that the parties are at an irreconcilable deadlock and there is no prospect of the business continuing, that the respondent is running the company in his own interests to the exclusion of the interests of the other shareholder, the applicant, and that the respondent had denied the applicant access to company information or had unfairly excluded the applicant from participation in the company's management.

### **Relief**

- [34] The applicant seeking a winding up order using the oppression remedy. A court will generally view the winding up of a solvent and trading entity as drastic step. The oppression remedy will depend on the specific circumstances in terms of whether a court will exercise its discretion to grant a winding up order.
- [35] It seems like the company (business) has been formed and been dependent on the existence of a relationship of mutual cooperation, trust and confidence between the parties (partners) and those relationships no longer exist. Under these circumstances, the court may exercise its discretion to make the necessary order for the winding up of a solvent and trading company.
- [36] It is significant to note that the company (business) has not been trading since its formation on 6 December 2016. This means the company is not a trading entity.
- [37] I have given careful thought to the merits and suitability of each potential relief that might be available for oppression. The applicant seeks an order for the winding up of the company itself or a mandatory "buy-out" order for the

respondent to purchase the shareholding of the applicant at the rate of \$10.00 each.

[38] The oppression remedies operate to provide valuable safeguards to any shareholder aggrieved by any unfair or prejudicial conduct on the part of a company's management.

[39] Having carefully considered the facts and circumstances in this case, I exercise the discretion vested in me in granting a winding up order as a remedy for the unfair or prejudicial conduct on the part of the respondent's mismanagement of the company. For that purpose, I appoint the official receiver as liquidator. The applicant will be entitled to costs of and incidental to this application.

**Result:**

1. Lifestyle Pacific (Fiji) Pte Limited must be wound up.
2. Official Receiver is appointed as liquidator.
3. The respondent must pay the applicant the costs of and incidental to this application.

*M. H. Mohamed Ajmeer*

25/11/20

M. H. Mohamed Ajmeer

**JUDGE**



At Lautoka

25 November 2020

Solicitors:

Klaw Chambers & Partners, Barristers & Solicitors for the applicant  
Krishna & Co, Barristers & Solicitors for the respondent