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

Winding Up Cause No. 8 of 2018

IN THE MATTER of **MILLENIUM PLANT COMPANY FIJI LIMITED** with registered office at Lot 21, Nasilivata Road, Namaka Industrial Subdivion, Namaka, Nadi and the registered postal address id P.O.Box 10554, Nadi Airport.

AND

IN THE MATTER of the Companies Act.

BETWEEN : **MOHAMMED SAHIQ & SONS LIMITED** a limited liability company with registered office at Masimasi, Sabeto.

CREDITOR

A N D : **THE MILLENIUM PLANT COMPANY (FIJI) LIMITED** with registered office at Lot 21, Nasilivata Road, Namaka Industrial Subdivision, Namaka, Nadi and the registered postal address is P.O.Box 10544, Nadi Airport.

RESPONDENT

Before : Master U.L. Mohamed Azhar

Counsels : Ms. A. Swamy with Vreetika for the Contributory
Mr. I. Tikoca for the Creditor

Date of Ruling : 10.12. 2021

RULING

01. This is an application by a contributory of the above named respondent company, Abinesh Ronald Kumar (the Contributory), pursuant to, among others, sections 531 and

553 (1) of the Companies Act 2015. The summons is supported by an affidavit sworn by the said Contributory and seeks the following orders:

1. That the leave be granted to the Contributory Abinesh Ronald Kumar to institute the within application,
2. That order that the Winding-up Order pronounced on 11th October 2018 be permanently stayed,
3. Cost of this application be costs in the cause, and
4. Such other further relief as this Honourable Court deems just and fair.

02. The factual background of the matter is that, the Respondent Company owed a sum of $ 103,449.11 to the creditor and the Applicant Company over a commercial transaction. The Applicant Company then served the statutory demand pursuant to section 515 of the Companies Act on the Respondent Company. The Respondent Company neither complied with the statutory demand, nor did it apply to set aside the same. The Applicant Company then brought the petition for winding up after expiry of 21 days form service of the said statutory demand on the Respondent Company. The Applicant Company complied with the Rules of Winding Up and the Respondent Company did not oppose the application in terms of section 15 of the Winding Up Rules 2015. This court, having satisfied with the application, ordered to wind up the Respondent Company.

03. The contributory then filed the instant summons seeking an order to stay the said winding up order and allow the Respondent Company to operate. The summons was opposed by the Applicant Company and the affidavit in opposition was filed. The contributory replied to the affidavit in opposition and filed an affidavit. At hearing of the summons both counsels tendered their written submission in addition to their oral submission. Considering the grounds for stay and the facts of this matter, the court suggested the counsels for the contributory to consider the payment of total debt which paved way to the application for winding up. The counsels agreed for the same and there were several adjournments on basis that the Respondent Company would pay the debt to the Applicant Company. However, the Respondent Company failed to pay the debts and finally the counsel too informed the court that there were no instructions from the company.

04. The courts established the doctrine that, if a creditor cannot get paid without winding up the debtor company, it is *ex debito justitiae* that he should have a winding up order. Irvine CJ in **Re Concrete Pipes and Cement Products Ltd** [1926] VLR 34 explained the development of this doctrine at page 38 as follows:

> The right of the petitioning creditor, where he has established any of the grounds for winding up set out in sec. 137 of *the Companies Act* 1915, is said to be *ex debito justitiae*. The expression first appears in this connection in the judgment of Lord Selborne in *In re Western Canada Oil etc. Co. [1873] 17 Eq., 1 at page 6,* where he says –"I entirely agree with the doctrine of Lord Cranworth: that if a creditor cannot get paid without winding up, it is *ex debito justitiae* that he should have a winding-up order." The reference is to the judgment of Lord Cranworth in *Bowes v. Hope Life Insurance and Guarantee Co. [1865] 24 Ch. D., 259 at p. 265.* At page 402 His Lordship stated:-"I agree with what has been said, that it is not a discretionary matter with the Court when a debt is established and not satisfied to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity."

05. It is the ability of a company to pay the debt, as and when it becomes due and payable, that matters at this point in time and not its wealth. A wealthy company may be commercially insolvent if it is unable to pay its debt even though it has more investments which are not realizable as and when the debt becomes due and payable. The only consideration to determine the solvency of a company in terms of section 514 of the Companies Act 2015 is its ability to pay debts when they become due and payable. If a company is unable to pay its debts the public interest requires such company to be wound up, irrespective of its surplus of assets which are non-realizable as and when the debts becomes due and payable, to avoid the risk and prejudice to those with whom such company will do business in future. This is the rationale for the court to develop the above mentioned doctrine that, it is *ex debito justitiae* that the creditor should have a winding up order if his undisputed debt is not paid.

06. Conversely, the law of every system gives wide discretion to the court to stay such winding up orders on such terms and conditions as it thinks fit. Similarly, the section 553 (1) of Companies Act 2015 confers discretionary power on the court to stay all proceedings in relation to winding up of a company, at any time after an order for winding up. The section reads:

> Power to stay winding up
>
> **553** (1) The Court may, at any time after an order for winding up, on the application either of the liquidator or the Official Receiver or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

07. This jurisdiction of the court could only be invoked by the Liquidator or the Official Receiver or any Creditor or Contributory of the company. The underlying reason is to avoid the costs of unsuccessful applications falling on the general body of creditors when it is made payable by the company. Pennycuick V.C. in **Practice Note (Winding Up Order: Rescission)(No. 2)** [1971] 1 W.L.R. 757 said:

> After discussion with other judges of the Companies Court, I have the following further statement to make with regard to applications to discharge winding up orders: see *Practice Note (Winding up Order: Rescission)* [1971] 1. W.L.R. 4. Applications to rescind winding up orders will henceforward only be entertained if made (a) by a creditor, or (b) by a contributory, or (c) by the company jointly with a creditor or with a contributory. In the case of an unsuccessful application the costs of the petitioning creditor and of the supporting creditors will normally be ordered to be paid by the creditor or the contributory making or joining in the application. The reason for this direction is that if the costs of an unsuccessful application are made payable by the company, they fall unfairly on the general body of creditors.

08. The courts, in exercising the discretion conferred on them with reference to staying proceedings under an order for the winding-up of a company, adopted and acted upon the principles laid down in cases involving rescinding a receiving order or annulling an adjudication in bankruptcy against an individual. In those cases the courts refused to act upon the mere assent of the creditors, and considered not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large. Buckley J in **In re Telescriptor Syndicate, Limited** (1903) 2 Ch. D. 174 followed the principles laid down by the Court of Appeal in *In re Hester* (22 Q.B.D. 632), *In re Flatau* ([1893] 2 Q.B. 219) and *In re Taylor*. ([1901] 1 K.B. 744) and adopted an analogical approach in winding up companies for insolvency. He said at pages 180 and 181that:

> Where application is made in bankruptcy to rescind a receiving order or to annul an adjudication, the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality ad to the interests of the public at large. The mere consent of the creditors is but an element in the case. In *In re Hester* (1) some trenchant observations of Fry L.J. will be found on the idle notion that the Court is bound by the consents of the creditors. The Court has to exercise a discretion. It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the

county: see *In re Hester* (22 Q.B.D. 632); *In re Flatau* ([1893] 2 Q.B. 219); *In re Taylor*. ([1901] 1 K.B. 744) I am here asked to exercise an analogous jurisdiction, and I may say that it is in my opinion desirable that so far as possible the Court should not assume a different attitude or act upon a different principle in the winding-up of a company and in the bankruptcy of an individual.

09. The above approach has been followed in other jurisdictions as well. Gillard J followed the same approach in **Re Mascot Home Furnishers Pty Ltd. (In liquidation), Re Spaceline Industries (Australia) Pty Ltd (In liquidation)** [1970 V.R 593. In the meantime, the courts directed that, the discretionary power of the court to revoke or vary an order of winding up at any time before it is perfected is one that ought to be exercised with great caution. Megarry J in his **Practice Note (Winding Up Order: Rescission)(No. 2)** [1971] 1 W.L.R. 4 stated that:

> In recent years, applications to rescind a winding up order before it has been drawn up have become increasingly common. Owing to the great increase in the number of such orders it often happens that some time elapses before the order can be drawn up. The making of the order, however, affects all creditors of the company, and gives the Official Receiver authority to act forthwith; and in the circumstances the inherent power of the court to revoke or vary an order at any time before it is perfected is one that ought to be exercised with great caution. Accordingly, although the matter is one for the discretion of the court in each case, application to rescind a winding up order will not normally be entertained by the court unless it is made within three or four days of the order, and is supported by an affidavit of assets and liabilities. If an application is made later than this, the affidavit should also establish the exceptional circumstances relied upon as justifying the application.

10. Master Lee QC in **Re Warbler Pty Ltd** (1982) 6 ACLR 526, having considered several of authorities, enlisted number of factors to be considered in exercising this discretion. However, these factors should not limit the wide discretion of the court into rigid principles. Santow J **Dubolo Pty Ltd v Codrington Investment Corporation Pty Ltd** (1998) 26 ACSR 723 cautioned against regarding Master Lee's list as in any sense a series of rigid principles. Master Lee QC himself acknowledged that these factors are not intended to be exhaustive. He stated that:

> "From the various authorities, it seems that on an application for a stay, the following principles emerge:—

1. The granting of a stay is a discretionary matter, and there is a clear onus on the applicant to make out a positive case for a stay: In Re: Calgary and Edmonton Land Co. Ltd. (In liq.) (1975) 1 W.L.R. 355 at pp. 358/9 per Megarry J. See also s.243 of the Act.

2. There must be service of notice of the application for a stay on all creditors and contributories, and proof of this: Re South Barrule State Quarry Co. (1869) 8 Eq. 688; re Bank of Queensland Ltd. (1870) 2 Q.S.C.R. 113.

3. The nature and extent of the creditors must be shown, and whether or not all debts have been discharged: Krextile Holdings Pty. Ltd. v. Widdows (supra); Re Data Homes Pty. Ltd. (supra).

4. The attitude of creditors, contributories and the liquidator is a relevant consideration: s.243(1), Calgary and Edmonton Land Co. Ltd. (supra).

5. The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding-up is sought: In re a Private Company (1935) N.Z.L.R. 120; Re Mascot Home Furnishers Pty. Ltd. (1970) V.R. 593 at p. 598.

6. If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should he given: Re Telescriptor Syndicate Ltd. (supra).

7. The general background and circumstances which led to the winding-up order should be explained: Krextile Holdings Pty. Ltd. v. Widdows (supra).

8. The nature of the business carried on by the company should be demonstrated, and whether or not the conduct of the company was in any way contrary to "commercial morality" or the "public interest": Krextile Holdings Pty. Ltd. v. Widdows (supra); Re Data Homes Pty. Ltd. (supra).

The foregoing matters are not intended to be exhaustive....."

11. In this matter the Contributory founded his summons for stay on two grounds, and they are:

a. The Applicant-Creditor failed to comply with the order of the court dated 11.10.2018 made by the Deputy Registrar of this court after compliance hearing, and

b. The Applicant-Creditor wrongfully sought the winding up of the Respondent Company, when in fact the Creditor had done work for and sent invoice for the same to another company, namely **MEL Creations Pte Limited**.

12. The application for winding up the Respondent Company was taken up by the Deputy Registrar of this court on 11.10.2018 and he made the following orders:

a. That the creditor to file his supplementary affidavit of service by close of business today the 11th of October 2018,
b. That the creditor to advertise on the local newspaper the Winding Up action against the Respondent by Friday the 12th day of October 2018 and
c. That the application for winding up has been granted and the matter is adjourned to the 25th day of October 2018.

13. The first ground of the Contributory is that, above orders (a) and (b) made by the Deputy Registrar were not complied with by the creditor. On perusal of the record it reveals that, the supplementary affidavit of service was filed on 11.10.2018 at 3.30 pm. It is further revealed that, the creditor's advertisement appeared on the local newspaper on 12.10.2018. Accordingly, the case record itself is evident that, the creditors duly complied with the orders made by the Deputy Registrar on 11.10.2018 and therefore, the first ground for stay is misconceived and fails.

14. The Contributory elaborated his second ground for stay and stated that, the Applicant Creditor was dealing with another company, namely "MEL Creations Pte Limited" and the Respondent Company did not have any dealing with the Creditor. The Contributory further stated that, the Creditor supplied soapstone to "MEL Creations Pte Limited" and sent the invoices to that company. The Respondent Company did not have any dealing with the Creditor. The Contributory further stated that, the dealing was to supply and compacting of soapstone; however, the creditor invoiced for supply and did not compact the soapstone provided. Obviously the Contributory disputes the existence of the debt between the Respondent Company and the Creditor. The Contributory submitted some of the invoices issued by the Creditor to "MEL Creations Pte Limited" to support his position that, no debt was existed between the Creditor and the Respondent Company. On the other hand, the Creditor relies on the email conversation between the Director of

Respondent Company and the Director of Applicant Creditor who deposed the affidavit in opposition in this matter. The e-mail is marked as **"MSS 2"**. It is evident from the said e-mail that, there were some dealing between the Applicant Company and the Respondent Company. However, the question is whether this court can now examine the existence of debt between the Applicant Company and the Respondent Company at this proceeding. A brief note on the process of winding up by the court is necessary to answer this question.

15. The ever-increasing complexity of human affairs warranted creation of legal persons – the companies - and the every system of law regulates their rights and duties. Thus the company law then developed and regulates the relationship of the companies between (a) participants (members) in the company, (b) the company and the state and (c) the company and those who deal the company. It is in this third category the companies laws of every system regulate the matters relating to solvency/insolvency of the companies when it comes with the debts of the companies. The companies may be wound up by the court, when they are insolvent.

16. The most common circumstance in which a company is wound up by the court is insolvency of the company. The section 513 (c) of the Companies Act 2015 provides that, a company may be wound up by the court if the company is insolvent. A company is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable according to section 514 (1) of the Companies Act 2015. The first circumstance in which a company must be deemed to be unable to pay its debts is its failure to pay debt in a sum exceeding $ 10,000 or other prescribed amount due, within 21 days (3 weeks) of service of a demand requiring payment (Statutory Demand). If a company is served with a statutory demand for debt exceeding $ 10,000, it should, within 3 weeks, either pay the amount demanded, or apply to the court for an order setting aside the said statutory demand as required by section 516 of the Companies Act 2015. If an application is made under section 516, the court is bound to determine whether there is a genuine dispute between the company and the creditor and or whether the company has an offsetting claim. This is required by section 517 (1) which reads as follows:

> 517.—(1) This section applies where, on an application to set aside a Statutory Demand, the Court is satisfied of either or both of the following—
>
> *(a)* that there is a genuine dispute between the Company and the respondent **about the existence or amount of a debt** to which the demand relates;
>
> *(b)* that the Company has an offsetting claim. (Emphasis added).

17. This is the only occasion where the court can examine the disputes and other claims between the company and the creditors in relation to existence and amount of a debt. If a company fails to pay the demanded amount and also to seek order setting aside the statutory demand within the stipulated time, then the company must be deemed to be unable to pay its debt. If it is unable to pay its debt it is insolvent. This allows the creditor to present the petition to wind up the company on the ground of insolvency. Once this stage passes, the burden shifts to those who oppose the winding up or seek to stay winding up order to satisfy the court that, the company is solvent. The only concern after this stage is the solvency of the company and not the dispute between the creditor and the company. For this reason, a company cannot, without the leave of the Court, oppose an application for winding up on the ground relating to setting aside a statutory demand, if the application for winding up relies on failure by the company to comply with a Statutory Demand (see: section 529 (1) of the Companies Act 2015). The court too cannot grant leave to do so unless it is satisfied that the ground is material to proving the company is solvent (see: section 529 (2) of the Companies Act 2015).

18. This shows that, once a company fails to apply to the court to set aside a statutory demand within 21 (3 weeks) of service of it, it cannot raise the dispute about existence and amount of the debt. In this case, the statutory demand was duly served at the registered office of the Respondent Company. The creditor advertised the winding up action in the local newspaper as required by the statutory provisions governing winding up proceedings. However, the Respondent Company neither applied to the court under section 516, nor did it oppose the application for winding up under section 229 of the Companies Act 2015. Therefore, the Contributory cannot raise the question about the existence of debt at this stage when he applies for stay of winding up order which was made on the ground of insolvency.

19. The solvency is more significant and compelling one when a stay of winding up of a company is sought. The public interest requires the courts to wind up hopelessly insolvent companies, and not to allow them to operate. The courts, when exercising the discretion under section 553 of the Companies Act 2015, must be concerned not only with the benefit of the creditors, but also whether it would be safe course to sanction, and conducive to commercial morality and in the interest of the public at large. Exercise of this discretionary power should not be understood as the courts encourage the people to deal with the indebted companies which are unable to pay their debts. Gillard J when dealing the with the similar provision (section 243) in **Re Mascot Home Furnishers Pty Ltd. (In liquidation), Re Spaceline Industries (Australia) Pty Ltd (In liquidation)** (supra) said at page 598 that:

> The court's initial approach should be that hopelessly insolvent companies should be wound up. No countenance should by exercising powers under s. 243 be given to any suggestion that the court was condoning or encouraging persons in our commercial community to carry on business activities in a company which was handicapped by a heavy burden of indebtedness and thereby unable to pay its debts in full at any given period.

20. For this reason it is required that, an application to stay a winding up order should promptly be made with the supporting affidavit detailing the assets and liabilities of the company. In case of a belated application, the affidavit should establish the exceptional circumstances justifying the application (**Practice Note (Winding Up Order: Rescission)(No. 2)** [1971] 1 W.L.R. 4. The affidavit must prove to satisfaction of the court that, the trading operations of the company have been fair and above-board. Buckley J in **In re Telescriptor Syndicate, Limited** (supra) stated at page 182 that:

> It seems to me, therefore, that what I ought to do in this case is this. I do not for a moment say how the facts as regards this company may work out, but I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding up order ought to be stayed. That will not be proved to my satisfaction until is shewn to me that all the facts are as I hope they are- that the trading operations of this company have been fair and above-board.

21. The phrase in section 553 (1) of the Companies Act 2015, which reads as *"on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed"*, denotes that, the applicant for stay must make out a case that carries conviction for the court to exercise its power which is discretionary in nature. Megarry J in dealing with similar provision in section 256 of Companies Act 1948 in **In Re: Calgary and Edmonton Land Co. Ltd. (In liquidation.)** (1975) 1 W.L.R. 355 held at pages 358 and 359 that:

> Quite apart from any authority (and I may mention In Re Telescriptor Syndicate Ltd [1903] 2 Ch. 174) this language seems to me to make it abundantly clear that the jurisdiction is discretionary and that it lies on those who seek a stay to make out a sufficient case for it. In particular, the words "satisfied", "just and beneficial", "satisfaction of the court" and "ought to be stayed" seem to me to indicate that the applicant for a stay must make out a case that carries conviction.

22. In this case before me, the Contributory in his supporting affidavit just stated in two lines that, the company is solvent. The affidavit is obviously silent on the assets and the liabilities of the company. There is no iota of evidence as to how the company has been operating and whether the company has been trading fairly and above-board. Furthermore, the Contributory failed to make out a case to the satisfaction of this court that the winding up order made by this court ought to be stayed. The grounds relied on by the Contributory are misconceived and unacceptable as discussed above. As a result, this court is unable to exercise the discretion conferred on it by the section 553 of the Companies Act 2015 and therefore, the application made by the Contributory ought to be dismissed. Moreover, costs of an unsuccessful application must be paid by the applicant and cannot be allowed to fall unfairly on the general body of the creditors as per the direction of Pennycuick V.C. in **Practice Note (Winding Up Order: Rescission)(No. 2)** (supra).

23. Accordingly, I make the following orders:

a. The stay is refused,

b. The application for stay is dismissed, and

c. The Contributory should, within 14 days from today, pay summarily assessed costs in sum of $ 2,500 to the Creditor.

HIGH COURT OF FIJI
LAUTOKA

U.L. Mohamed Azhar
Master of the High Court

At Lautoka
10.12.2021