IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBM 29 OF 2022

BETWEEN: **WESTBUS (FIJI) PTE LIMITED** a limited liability company having its registered office at Nadi Back Road, Nadi.

APPLICANT

A N D: **BSP FINANCE (FIJI) PTE LIMITED** a private limited company and a registered financial institution having its registered office at Level 12 BSP Suva Central Building, Suva.

RESPONDENT

Appearances:	Ms. Radhia for the Applicant
	Ms. Singh K. for the Respondent
Date of Hearing:	12 January 2023
Date of Ruling:	07 March 2023

RULING

INTRODUCTION

1. Before me now is a Summons dated 29 July 2022, filed on the same day, seeking leave to appeal to the Fiji Court of Appeal an Order made by this Court on 15 July 2022.

2. The Summons is filed pursuant to section 12(2)(f) of the Fiji Court of Appeal Act and Rule 16(a) of the Court of Appeal Rules and the inherent jurisdiction of the Court.

3. It is supported by an affidavit of Vijendra Kumar sworn on 28 July 2022.

4. The decision which this Court made on 15 July 2022, and for which the applicant seeks leave to appeal, was where I had dismissed the application to set aside the statutory demand on the basis of the argument that the application, while it was filed within the twenty-one days stipulated under sections 516(2), 516(3)(a) and(b) of the Companies Act 2015, was served outside the twenty-one day period.

5. I did note in my written Ruling at paragraph 4 that:

> "Ms. Ravia (sic.) concedes that the application was filed within the twenty-one days stipulated but was served outside the time in question. She leaves all to the Court's discretion. Do I have a discretion?

6. I then went on to do as follows:

   (a) I examined section 516(2), 516(3)(a) and 516(3)(b) and concluded that the effect of these provisions is to make it mandatory that an application to set aside a statutory demand – and the founding affidavit in support – must be filed and served within twenty-one days of the service of the statutory demand.
   (b) notably – because Ms. Radhia had conceded that the application to set aside statutory demand was served outside the twenty-one day period, I did not see fit to revisit the dates and to compute the time myself.
   (c) instead – I simply took Ms. Singh's argument, and Ms. Radhia's concession, as the basis to presuppose that the application to set aside statutory demand was indeed served outside the twenty-ne day period – and accordingly – applied the law and then dismissed the application with costs

7. I see now that the main point of appeal is that I had erred in the computation of time.

AFFIDAVITS

8. In his affidavit, Kumar deposes as follows:

   (a) the statutory demand was served on **03 July 2022**
   (b) twenty-one days to file an application to set aside statutory demand begins from **04 July 2022**
   (c) therefore – the final day to file and serve application to set aside statutory demand was **24 July 2022**.

9. In the affidavit in opposition sworn by Sanjeet Narsey on 05 September 2022, he deposes inter alia as follows:

   (a) Statutory Demand issued on 27 May 2022
   (b) Statutory Demand served on 02 June 2022
   (c) application to set aside statutory demand filed 23 June 2022

10. I do note that Kumar appears to be confused about the dates He deposes at paragraphs 7 and 8 of his affidavit:

> "The Statutory Demand was served on the **3rd day of July 2022** and 21 days to file an application to set aside the Statutory Demand starts from the 4th day of July 2022.

Computing the time, the final day to file and serve the Statutory Demand was the 24th day of July 2022".

WAS THE APPLICATION TO SET ASIDE STATUTORY DEMAND SERVED ON TIME?

11. I do note also that all the other dates which Kumar talks about in his affidavit are July dates. He does not mention any June or May date as Narsey does – and yet – the Notice of Originating Motion To Set Aside Statutory Demand which I had dismissed was filed on 23 June 2022.

12. This leads me to prefer Narsey's evidence that the Statutory Demand in question was actually served on 02 June 2022. Computing the time, the twenty-one days would have expired on 23 June 2022 – which was the day when the application to set aside statutory demand was actually filed.

13. So – while the filing was on time – was the application also served on time?

14. As I have said, the effect of 516(2), 516(3)(a) and 516(3)(b) is to impose a mandatory requirement that the application to set aside – and the supporting affidavit – must both be filed and served within twenty-one days. In this case, the application should also have been served on 23 June 2022. Instead, it was served the day later – on 24 June 2022 – according to the affidavit of service of Adi Remonasiga Litiana sworn on 29 June 2022 and filed on 05 July 2022.

LEAVE TO APPEAL REFUSED

15. On the above basis, I refuse to grant leave to appeal. In refusing leave, I am maintaining the position that the requirement to file and serve within twenty-one days is mandatory. In my view, to pursue this by appeal serves no purpose except to delay the inevitable – which is the winding up proceedings proper.

16. Having said that, it is still open to Westbus, at the winding up proceedings proper – to avoid a Winding Up Order on other grounds – which I discuss below.

THE OTHER GROUND

17. There is yet another interesting angle to this case. It appears that the creditor which had issued the statutory demand, BSP Finance (Fiji) Pte Limited – is a secured creditor.

18. The affidavit of Narsey sets out the following:

    (a) The Statutory Demand in question was issued in respect of the sum of $1,470,705.78 (one Million Four Hundred Seventy Thousand Seven Hundred

Five Dollars and Seventy Eight Cents) which Westbus (Fiji) Pte Limited owes BSP.

(b) The debt relates to three loan accounts which Westbus has with BSP -namely Loan Account No. L10411, Account No. L10824 and Account No. L10552.

19. In the Affidavit of Vijendra Kumar sworn on 22 June 2022, he deposes inter alia that he had given up a mortgage over his property namely CT 16233 being Lot 16 on DP 4068 as security for the loan on Account Number L11552.

20. The question this raises is whether or not it is open to a secured creditor to institute winding up proceedings over a secured debt?

21. In **Vivrass Development Ltd v Australia and New Zealand Banking Group Ltd** [2002] FJHC 245; HBC0290d.2001s (15 February 2002), Pathik J reasoned as follows in considering the same issue.

22. Section 222 of the old Companies Act provided that any creditor may petition the Court to wind up a Company. This definition includes a secured creditor holding a mortgage (**Halsbury's Law of England 4th Ed. Vol 7 para 10037**). A secured creditor wishing to present a petition must:

> ....in his petition, either attach that he is willing to give up his security for the benefit of his creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated; in the same manner as if he were an unsecured creditor.
> **(Halsbury's Law of England 4th Ed Vol 3 para 318)**

23. Section 223(1) of the old Companies Act 1947 (equivalent to **section 523 of the new 2015 Act**) would appear to allow a secured creditor to present a winding up petition even though it holds a security instrument over the debt in question.

24. In **Ram Dutt Prasad (f/n Madho Prasad) and Australia and New Zealand Banking Group Limited** (Civil Action No. HBC 0121/99) Scott J had noted that a mortgagee may present a winding up petition **"so long as part of the mortgage debt remaining unpaid"** and **"may pursue any or all of the remedies available to the mortgagee at the same time"** and **"may concurrently sue for payment on a covenant in the mortgage to pay principal and interest, for possession of the mortgaged property and for foreclosure".**

25. However, the Court has a discretion whether to allow the secured creditor to wind up a debtor company.

26. While the law does not preclude a mortgagee as secured creditor from presenting a winding up petition, it (mortgagee) is already in a **"strong and independent position with wide**

powers" under the mortgage. A winding up really serves no useful purpose for the it (mortgagee).

27. The Fiji Court of Appeal in **Commissioner of Inland Revenue and ANZ Banking Group** (Civil Appeal No. 56 of 1984s at p.12 et seq. of the judgment) has said that **"mortgagees are outside the purview of the winding up"**:

> Apart from this statutory provision there are a line of cases which in our opinion make it clear that mortgagees are persons entirely outside the purview of the winding up.
>
> **In re David Lloyd, Lloyd v. David Lloyd & Co**. [1877] UKLawRpCh 247; (1877) 6 Ch. D. 339 James L.J., at p.345 said:
>
> > A mortgagee is to my mind ..... an independent person and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent .....
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> **In re Longdendale Cotton Spinning Company** [1878] UKLawRpCh 100; (1978) 8 Ch.D. 150 at 154 Lord Jessel M.R. said:
>
> > The mere fact that a winding up order has been made makes no difference and does not confer upon the company the right of preventing a mortgagee from realising his security; and for that proposition I have the authority of the Court of Appeal in **In re David Lloyd & Co**., an authority which emphatically negatives the existence of any such right.
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> A statement to like effect in more general terms fell from Kay L.J. in **Strong v. Carlyle Press** [1892] UKLawRpCh 189; (1893) 1 Ch. 268 at p.276:
>
> > We must treat the mortgagees as being persons outside the winding up.
> >
> > And in the same case, at p.274, Lindley L.J. said:
> >
> > > The mortgagees here are prima facie the holders of valid mortgages; they claim under deeds which have not been impeached. On the face of them they are quite regular and there is no reason at present for saying that they are in any degree invalid. Under these circumstances the mortgagee says My interest is in arrears. I want a receiver. If he holds valid debentures and his interest is in arrear, he is entitled to a receiver, and he has got an order for a receiver. Now the fact that the mortgagor is a company, which has since been ordered to be wound up, does not in any way affect the rights of the mortgagee. (Our emphasis).
>
> There are also modern statements to like effect. In **In re Aro Co. Ltd**. (1980) 1 All E.R. 1067 Templeman L.J. delivering the judgment of a Court of Appeal comprising Stephenson and Brandon L.J.J. and himself, said:
>
> > A secured creditor is in a position where he can justly claim that he is independent of the liquidation since he is enforcing a right not against the company but to his property

- see re David Lloyd & Co. a case under the predecessor to section 231. A striking illustration of the principle is to be found in **Re Wanser** [1890] UKLawRpCh 160; (1891) 1 Ch. 305) under the same section. A landlord of Scottish property began proceedings after a winding up order for sequestration of the company's goods on the premises in order to answer for future rent. North J. allowed the sequestration to continue, being satisfied that under Scottish law the landlord was a secured creditor at the date of commencement of the winding up, and therefore in the same position as a mortgagee.

For these reasons, since the defendant Bank as mortgagee is not affected when a company is wound up as it is a mortgagee, why should it have an advantage over unsecured creditors by itself wanting to wind up the Company? In the exercise of the Court's direction on the facts, the mortgagee should stick to its rights under the mortgage.

28. Having noted that, I observe that, at paragraphs 25 to 28 of the affidavit of Vijendra Kumar sworn on 22 June 2022, that Westbus had made arrangements with BSP to settle the debt of $785,452-00.

HOW MIGHT WESTBUS USE THE ABOVE TO AVOID A WINDING UP ORDER?

29. I am of the view that the proper channel for Westbus is to come by way of section 529(1) and(2) of the Companies Act 2015.

30. Section 529 (1)(a) of the Companies Act 2015 precludes a company from using any of the normal grounds employed to support an application to set aside a statutory demand which are set out in sections 517 - to oppose a winding up application, unless the court has granted leave under section 519(2).

31. The court will only grant leave if it is satisfied that the ground is material to proving that the company is solvent. In other words, if the ground will assist the company in rebutting the presumption of insolvency already raised by the failure to set aside the statutory demand.

Company may not oppose application on certain grounds

529.—(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.

32. The normal grounds employed to support an application to set aside a statutory demand under sections 517 are:

(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 (section 517(1)(a)).
(b) that the Company has an ***offsetting claim*** (section 517(1(b)).
(c) that there is a defect in the demand, substantial injustice will be caused unless the demand is set aside (section 517(5)(a)).
(d) there is some other reason why the demand should be set aside (section 517(5) (b)).

CONCLUSION

33. Application seeking leave to appeal is refused. Costs to the Respondent which I summarily assess at $1,000-00 (one thousand dollars only).

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka

07 March 2023