

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

Winding Up Action No. HBE 40 of 2022

**IN THE MATTER** of an Application for Winding Up **WG INTERNATIONAL REAL ESTATE  
CO (FIJI) PTE LIMITED**

BETWEEN

**ENGINEERED DESIGNS PTE LIMITED** a limited liability company incorporated in Fiji  
having its registered office at Office 1-3, Flagstaff Plaza, Bau Street, Suva

APPLICANT

AND

**WG INTERNATIONAL REAL ESTATE CO (FIJI) PTE LIMITED** a limited liability company  
incorporated in Fiji having its registered office at 193, Queen Elizabeth Drive, Suva.

RESPONDENT

**Counsel** : Ms. P. Nand for Applicant  
Ms. L. Bogitini for Respondent  
Ms. N. Tikoisuva for Supporting Creditor-Trade Pacific  
No appearance for the Supporting Creditor-Williams & Goslings

**Date of the Hearing** : 08<sup>th</sup> June 2023

**Judgment Delivered** : 17<sup>th</sup> July 2023

## JUDGMENT

- [1] The Applicant initiated this action on 31<sup>st</sup> August 2022 for an order pursuant to the **Companies Act 2015** to have the WG INTERNATIONAL REAL ESTATE CO (FIJI) PTE LIMITED wound up. The Application was supported by an affidavit deposed by Mr. Vijay Krishnan Director of Applicant company.
- [2] Mr. Krishnan states that the Applicant was a creditor of the Respondent company which had been incorporated on 11.12.2013. As at 22.04.2022 the Respondent was in debt to the Applicant for an amount of \$145,000 for the services provided. On 06.06.2022 the Applicant had served a Demand Notice on the Responded which they failed to pay or to have it set aside.
- [3] The Applicant has complied with Rule 19 requirements of the **Companies (Winding Up) Rules 2015**.
- [4] On an earlier application by the Respondent the Court in its ruling granted leave for the company to oppose this winding up application.
- [5] Two supporting creditors filed their respective applications in support of the winding up application made by the Applicant. However at the hearing only Trade Pacific Shipping

Agency PTE Limited appeared. Ms. Tikoisuva who represented the supporting creditor informed Court that the Respondent has admitted to the debt and parties have agreed to a payment plan.

- [6] Mr. Julian Yuen Operations Manager of the Respondent Company deposed an affidavit opposing the winding up action. He states that the Respondent has invested money into the construction of 30 storied WG Friendship Plaza, forecasted to complete in 2024.
- [7] He further states that they engaged the services of the Applicant to provide project management on the WG Friendship Plaza project. There has been a Short Form Agreement between the parties for this purpose entered on 04.08.2020. On 24.12.2020 the Applicant submitted the first four invoices for the months of September to December. On 24.12.2020 the Respondent made a payment of \$10,000. However the Respondent states that they failed to understand why a receipt of July was issued to them by the Applicant when the actual engagement commenced from 04.08.2020. According to the Respondent there was minimal work taken place during the time due to the Covid 19 related restrictions in the country.
- [8] On 29.01.2021 the Respondent made another payment of \$10,000 to the Applicant. On 12.11.2021 the Applicant had issued a statement of outstanding invoices amounting to \$150,000. The Respondent states that these invoices were not substantiated by the Applicant and the Respondent will only settle invoices once they are substantiated. The Respondent further states that when the Applicant issued the statement amounting to \$150,000 they failed to include the \$20,000 payments made by the Respondent.
- [9] The Respondent issued a notice to terminate the engagement with the Applicant. The Applicant accepted the same and informed the Respondent that they have discontinued their services as at 29.11.2021 however they will formally withdraw from the agreement once all overdue payments are settled. Later the Respondent retracted from their earlier suggestion to terminate and requested the Applicant to continue with the services. On 06.01.2022 the Applicant issued another letter to the Respondent with proposed scope of works and conditions of engagement. The Respondent states that they made a payment of \$5000 to the Applicant on 04.03.2022.
- [10] The Respondent therefore disputes the debt owed by them.
- [11] On the other hand Mr. Krishnan in states that their company is not contractually obligated to substantiate the invoices. According to him the Applicant carried out work from 30.04.2020 until 04.08.2020 and that was the basis for July 2020 payment deduction of

\$10,000. The second payment of \$10,000 by the Respondent had been considered as the payment for August 2020. The only other payment of \$5000 by the Respondent has been deducted and reflected in the Demand Notice.

- [12] In reply the Respondent states that they admit the discussions on the consultancy works prior to 04.08.2020. However the verbal conversations between the parties did not state that the Applicant would charge the Respondent prior to August 2020. The Respondent states that they were of the view that work prior to 04.08.2020 was done as a part of ongoing working relationship as the Applicant has previously assisted the Respondent Company.
- [13] Thomas J in **Mann v. Goldstein** [1968] 1 WLR 1091 articulated the approach to the winding up action when the debt is disputed. His Lordship stated ‘ I would prefer to rest the jurisdiction on the comparatively simple propositions that a creditor’s petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore to invoke the winding up jurisdiction when the debt is disputed (that is on substantial grounds) or after it has become clear that it is so disputed is an abuse of process of the court’.
- [14] Whether or not the dispute is on substantial ground would be a matter for the Court to decide. In **Re A Company (No.0012209 of 1991)** [1992] 1 WLR 351 it was said that if there is no rational prospect of success a dispute not be viewed as substantial.
- [15] Where there is a bona fide dispute on substantial grounds the petitioner for a winding up order does not have the status of ‘creditor’ so that the petitioner should be dismissed and it does not matter that the company is insolvent; per **Re Wallace Smith & Co Ltd** [1992] B.C.L.C 970.
- [16] I have obtained the following useful text from Hon. Justice Amaratunga’s judgment in **re Pacific Emerging Technologies Limited** [2013] HBE71 of 2012. ‘What is important is to consider the nature of the debt and not the nature of the company as the provision is a deeming provision upon the satisfaction of the criterion therein. Even if the Respondent is solvent is not an issue under this and not a consideration as submitted by the counsel for the Respondent. The dispute of the debt should be so much that there should be a genuine doubt as to the debt as opposed to any amount or other issue. The dispute should be done in good faith and spontaneity of the said allegation is also a factor in the analysis of evidence. A dispute raised as to the debt only when there is imminent winding up has to be examined closely to see whether there was any reason for the delay and in the

absence of that has to be considered as afterthoughts or inventions which do not create any bona fide dispute as necessity is mother of all inventions. The court needs to consider the affidavit evidence and careful analysis of them is needed to consider whether the dispute is made in good faith. The court also has a discretion to wind up a company considering all the circumstances.

**Halsbury's Law 4th Edition, 1988 Reissue, Volume 7(2) Companies** at paragraph 1451 (pages 1101 and 1102) provides an accurate summary of the case law regarding disputed debts in a winding up petition:

A winding up order will not be made on a debt which is disputed in good faith by the company; the court must see that the dispute is based on a substantial ground. A dispute as to the precise amount due is not a sufficient answer to the petition. If there is a genuine dispute, the petition may be dismissed or stayed, and an injunction may be granted restraining the advertisement or publicizing of the petition'.

- [17] The contract document dated 04.08.2020 does not carry a signature of the Respondent. Nevertheless both parties have acted upon the document for several months. One could dispute the written agreement on this basis and a competent Court would be asked to make a determination. Let this be in the backdrop of this case.
- [18] The Applicant's position is that the Respondent has no right to request for substantiating the fees when it becomes due and payable. The learned counsel referred my attention to the clause under 'Professional Fees' where it states 'we propose a flat rate of \$10,000 plus VAT per month up to completion of all works'. Further she states that use of the words 'flat rate' excludes any ability for the other party to request for proof.
- [19] The Respondent states that as soon as the Applicant provides them with the works carried out in each month they are willing to clear the debt.
- [20] I take note of the letter dated 03.08.2020 attached to the Agreement signed by the Applicant, where it states in the first paragraph ' further to many months of deliberation we are pleased to submit our proposal for the provision of project management services on the above project from now to project completion and delivery'. I am unable to find any affirmative material to support the view that the parties agreed to a July payment based on the Short Form Agreement.
- [21] However the Applicant claims \$10,000 for the month of July through the invoice dated 11.11.2020.
- [22] I have also noted the issue dates of the invoices.

- I. Invoices for 2020 July, August - issued on 11.11.2020
- II. Invoices for 2020 September, October, November, December - issued on 24.12.2020
- III. Invoices for 2021 January, February, March - issued on 21.06.2021
- IV. Invoices for 2021 April, May, June, July, August, September, October, November - issued on 12.11.2021

- [23] Clause 8 of the agreement states 'All amounts payable by the client shall be due on the 20<sup>th</sup> of the month following the month of issue of each tax invoice or at such other timing as stated elsewhere in this agreement'. One would expect the invoices to arrive in monthly intervals. It could have assisted the Respondent to verify with the services provided by the Applicant in that particular month. However the above issue dates confirm that invoices were issued in batches which could be difficult to verify.
- [24] Clause 9 of the agreement gives authority for the Respondent to dispute an invoice and to withhold a payment with prompt reasoning to the Applicant.
- [25] Therefore it would be incorrect to interpret the word 'flat rate' to exclude Respondent's right to request for evidence to substantiate the invoices. In my view Clause 9 of the agreement has given authority to the Respondent to dispute an invoice. Thus other party is bound to substantiate their claims.
- [26] The Applicant admits that they have deducted \$10,000 from the \$25,000 payments against the invoice for the month of July 2020. This is a clear contradiction to the agreement. the agreement was entered in August and there was no provision to apply it retrospectively to claim fees.
- [27] Apart from those observations I draw my attention to clause 19 of the agreement where it states 'that parties shall attempt to settle any dispute by themselves in good faith failing that by mediation'.
- [28] It is evident that the Applicant has chosen to overlook this clause to bring an action for winding up. The Applicant has also chosen not to go through normal civil litigation process to claim what was due from the Respondent. There was no explanation provided by the Applicant as to why it did not pursue resolving this dispute between them through mediation.
- [29] Case of **Salford Estates (No2) Ltd v. Alomart Ltd** [2014] EWCA Civ 1575 seemed to suggest that the Courts will exercise their discretion to dismiss petitions when the debt

constituting a foundation to disputed winding up petition falls within the scope of matters parties agreed to have resolved through alternate dispute resolution methods.

[30] In conclusion I am of the view that Respondent's opposition to the debt in the winding up application has been made on substantial grounds. Applicant's failure to invoke the conditions of their own agreement to mediate this dispute provides me a reason to conclude that the application is an abuse of process.

[31] The Court grants following orders.

**ORDERS**

1. Winding-up application hereby dismissed.
2. The Applicant to pay \$1500 (one thousand five hundred dollars) to the Defendant as cost within 14 days.



Yohan Liyanage

**JUDGE**

At Suva on 17<sup>th</sup> July 2023