VIVRASS DEVELOPMENT LTD and 5 Ors v AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD

HIGH COURT — CIVIL JURISDICTION

PATHIK J

15 February 2002

[2002] FJHC 245

Mortgages and securities — debts — injunction — disputed debt — secured mortgagor exercising winding-up and mortgagee sale — whether dispute based on substantial grounds to prevent windingup — whether petition for windingup valid while holding securities — whether mortgagee allowed to windup — Companies Act 1985 Cap 247 ss 222, 223(1).

Plaintiff companies sought an injunction restraining Defendant bank, its agent and servants from windingup. Plaintiffs alleged that the sum of $3.3 million was raised by P1 and paid to Defendant who discharged the securities, hence the debt was extinguished. Defendant alleged that the $3.3 million that was paid was part of the debt secured under mortgage which was discharged upon payment of the said sum.

Held — (1) P1 has given a mortgage as security and the other Plaintiffs have signed as guarantors. To proceed by way of a petition to wind up the Plaintiffs was an option open to the secured creditor despite the fact that it holds security documents and could exercise its power of sale under them.

(2) It is in the court's discretion to allow the secured creditor to wind up the companies. The mortgagee should stick to its rights under the mortgage. Defendant as mortgagee is free to exercise its power of sale under the security it holds against P1. It cannot proceed by way of petition to wind up and also while holding security by way of mortgage exercise its powers under the mortgage.

Injunction dismissed against P1 but allowed on P3 – P6.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; *Avery v Worldwide Testing Services Pty Ltd* (1990) 2 ACSR 844; *Birmingham Citizens Permanent Building Society v Caunt* [1962] CH 883; *Mann v Goldstein* [1968] 1 WLR 1091; *Re David Lloyd, Lloyd v David Lloyd & Co* (1877) 6 Ch D 339; *Re London and Paris Banking Corporation* (1874) LR 19 Eq 444; *Re Longdendale Cotton Spinning Company* (1978) 8 Ch D 150; *Re Wanser* [1891] 1 Ch 305; *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197; *Samuel Keller (Holdings) Ltd v Martins Bank* [1971] 1 WLR 43, cited.

Bateman Television Ltd v Coleridge Finance Co Ltd [1969] NZLR 794; *Commissioner of Inland Revenue v ANZ Banking Group* FCA Civ App No 56/1984S; *Cornhill Insurance Plc v Improvement Services Ltd and Ors* [1986] 1 WLR 114; *Offshore Oil NL v Investment Corporation of Fiji Ltd* Civ App 29/84; *Ram Dutt Prasad v Australia & New Zealand Banking Group Ltd* Civ Act HBC 0121/99; *Re Aro Co Ltd* [1980] 1 All ER 1067; *Re Liverpool Civil Service Association, Ex parte Greenwood* (1874) LR 9 Ch App 511; *Re Lympne Investments Ltd* (No 00250 of 1971)[1972] 1 WLR 523 at 527; *Re Tweeds Garages Ltd* [1962] 1 Ch p 407; *Strong v Carlyle Press* [1893] 1 Ch 268, considered.

A. K. Singh for *G. P. Shankar* for the Plaintiffs

S. Lateef and *B. Narayan* for the Defendant

Decision

Pathik J. By this writ action commenced by the Plaintiffs, the winding-up petitions numbers HBE 72–76 by the Defendant against the Plaintiffs are opposed.

Application and orders sought

Under this action by summons dated 27 June 2001 the Plaintiffs (hereinafter called the Plaintiffs) have applied for an injunction restraining the Defendant its agent and servants from proceeding with winding-up petition Nos HBE 72–76 of 2001 and/or advertising them and/or obtaining winding-up order and that all petitions be stayed until further order of the court. An affidavit sworn by Asish Narayan, the company secretary, on 27 June 2001 has been filed in support, together with other affidavits sworn by him on 12 July, 16 July and 23 August 2001.

The Defendant Bank (hereinafter called the Defendant) has filed affidavits in reply sworn 10 August 2001 by Christopher Robin Griffiths, head of the Defendant Bank, and an affidavit sworn the same date by Haroon Akhtar Ali, the operations manager of the Defendant.

Plaintiffs' submission

Mr G P Shankar sets out the background to the matter in his written submissions. He says that P1's debt to Defendant is disputed on very substantial grounds and therefore he says injunction should be granted and that the petitions be dismissed. He says that the sum of $3.3 million in question was raised by P1 and paid to Defendant which discharged the securities hence the debt was extinguished.

Mr Shankar submits that on the authorities that he has referred to, the petition against P1 is bound to fail because the debt has been paid and security discharged. The winding-up petition is not designed to resolve the dispute. The Defendant is estopped from proceeding with the petitions. Alternatively, counsel says that by accepting $3.3 million and discharging the securities, the Defendant has waived its claim to any balance.

Counsel says that here the provision was that in consideration of the first Plaintiff performing its obligation to pay the said amount; the securities were to be discharged by the Defendant.

Mr Shankar says that the Defendant's debt is secured by way of a mortgage and in respect of that P2–P6 are the guarantors. He says that it is oppressive, unconscionable, unjust and unfair for Defendant to hold the securities and at the same time to wind up the company; the Defendant has other remedy, namely, to realise the security. Therefore, he says, that on liberal construction of s 223 (which deals with power of court on hearing petition) of the Companies Act there ought not to be a winding-up order because it is not just and equitable. He submits that it is not that the Plaintiff is unable to pay its debts but it is the Defendant which by holding the securities has disabled the Plaintiffs from paying the debts. He submits that if the Defendant releases the security, and the petition is adjourned for 6 months the Plaintiff would be able after the economy of this country is restored and investors or financiers have confidence in Fiji, the Plaintiff would be able to raise funds, whether by loan or sale, to pay off the debts.

Counsel prays that the petition be either adjourned for 6 months or stayed on the basis that the Defendant should forthwith release and discharge the security.

Defendant's submissions

The Defendant says that $3.3 million that was paid was part of debt secured under mortgage No 378302 which was discharged upon payment of the said sum. The P1 in this Action No 290 of 2001 makes a substantial claim against the Defendant. The P1 in its affidavits in reply has raised completely new allegations in that it denies being liable for $800,000 which formed part of the bridging facility provided to it by the Defendant. It also alleges that after the $3.3 million settlement the balance debt was to be transferred to Laucala Beach Timber Hardware Ltd (the P3).

The other Plaintiffs, together with P1 are associated companies under the banner of Vishnu Prasad Group of Companies. Counsel says that these Plaintiffs are not disputing the debt at all but they are trying to restrain the winding up only on the grounds that the Defendant holds securities in respect of the alleged debt.

The Defendant denies that it agreed to accept the said amount as full and final settlement of all its claims against P1 or discharge all its securities. The Defendant was not in a position to discharge all its claims and securities against P1 since at the time of the said settlement P1 owed approximately *$229,672* in its Term Loan Account and $490,796 in its Temporary Overdraft Facility.

In the said affidavit in reply of Haroon Ali is set out the story regarding the payment of $3.3 million. Ali says that he was personally involved in Bridging Loans Facility (BLF) mentioned in Griffiths's affidavit and that was in respect of the construction of Laucala Beach Plaza Development (the project). That $3.3 million between P1 and the Bank was only in respect of the said BLF. At that time the Plaintiff had other loan accounts with the Bank in respect of which the Bank continued to hold other securities of P1 and had only agreed to discharge the said mortgage No 378302 over CT No 24128. The Bank did not at any time agree to discharge all the securities of P1 or release it for all debt obligation or other moneys owing to the Bank. The cross guarantee will remain a security. The P1 subsequent to the settlement of BLF made several promises to repay its remaining debts but to date the same remain outstanding. Mr Ali says that the BLF and the project are separate matters which have nothing to do with the amounts claimed by the bank in this action as they relate to the P1's other loan accounts which accounts have not been settled to date.

Counsel submits that in the last four-and-a-half years P1 has made no attempt to neither clear its debt nor update the arrears on its account as a sign of good faith in its negotiations on repayment of its debt. It had not at any stage neither denied its outstanding debt nor made any such claims of breach of duty against the Defendant. By raising all this now, it is only for the purposes of causing delay to wind it up.

Mr Lateef says that P2 has already been wound up. As far as the other Plaintiffs are concerned, counsel says that the fact that the Defendant holds securities on their alleged debts does not bar it from instituting winding-up proceedings for recovery of their debts.

Mr Lateef submits that the Defendant tried to sell the properties on two occasions via Mortgagee Sale but it has not been successful in obtaining an acceptable price. Therefore it decided to apply to wind up the companies on the basis that they are insolvent.

The issue

The issue for the court's determination is whether on the affidavit evidence, the Defendant ought to be allowed to proceed with the winding-up petitions against the Plaintiffs or whether the Defendant be restrained from doing so particularly in the face of the allegation that the debt in question is disputed on substantial grounds.

As ordered, both counsel made written legal submissions and I found them very useful.

Consideration of the issue

(A) Is the dispute based on substantial grounds to prevent winding-up?

Let me at the outset consider whether in law the dispute is based on substantial grounds to prevent a winding-up order being made.

As borne out by the said affidavits and submissions of counsel, the facts are that on 19 June 2001 separate winding-up petitions were filed in the High Court Registry by the Defendant against each of the Plaintiffs except P2 to wind up the companies (the Plaintiffs). The petition is Nos HBE 72–76 of 2001, namely against Suva Towers Limited, Laucala Beach Holdings Limited, Laucala Beach Timber and Hardware Limited, Laucala Beach Services and Stores Limited, Vivrass Development Limited respectively.

Then a week later on 27 June 2001 the Plaintiffs filed the Writ of Summons herein being this Civil Action No 290 of 2001 against the Defendant claiming an injunction preventing the Defendant from proceeding with the said winding-up petitions on the basis that there is a substantial dispute as to the alleged balance debt.

Mr Shankar submits that no relief is sought by or on behalf of P2 [Burgess (Fiji) Limited] because no winding-up petition has been presented against it in this action; but the Defendant Bank had through its solicitors called for tenders to sell certain properties of P2 under mortgage. Similarly, tenders to sell the properties under mortgage owned by P4 (Laucala Beach Holdings Limited) have been called.

The Plaintiffs instituted this Civil Action No 290 of 2001 by writ of summons opposing the said petitions and sought certain declarations. In the case of P1 it seeks a declaration that the petition No HBE 76 of 2001 against P1 is an abuse of court process, unlawful and wrong in view of offer and acceptance by the Defendant of $3.3 million in full settlement and release and discharge of the said mortgage No 378302. In respect of P3–P6 a declaration is sought in that the petitions are an abuse of court process, oppressive, unfair and unconscionable having regard to the securities held by the Defendant. However, the main order that the Defendant seeks is an injunction restraining the Defendant from proceeding with the winding up of the said companies.

The Plaintiffs are saying that after the payment of $3.3 million all the security documents should have been discharged and the *first plaintiff* released from liability so that it can pay off the balance debt by raising finance.

After reading Mr Ali's affidavit in reply, I find that P1's balance debt is secured, for the Defendant holds security documents. Also the other Plaintiffs are the guarantors in respect of the same debt and cross-guarantees have been signed by them.

The question therefore is whether the debt is disputed on substantial grounds. If so, whether the court ought to grant the relief sought by the Plaintiffs.

It is a general principle that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the court and should be dismissed with costs (Palmer's Company Law, Vol 3, at 15.214 and cases cited therein). In Palmer (ibid), on the principles involved it is further stated:

> To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. A Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company Ato bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.

In *Offshore Oil NL v Investment Corporation of Fiji Ltd* Civ App 29/84, FCA at 15 (unreported), Barker JA said:

> The law is clear that there is a discretion in a Court seized of a winding-up petition, to decline to hear the petition where the debt is contested on substantial grounds.

The Court still has power in its discretion to make an Order on disputed debts as in *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 794 Judicial Committee, it was held:

> The general rule is that an order for winding up will not be made on disputed debt but a Judge has discretion to make a winding up order on disputed debts which is not reviewable unless exercised on a wrong principle or the Judge included or omitted consideration of a relevant fact or was wholly wrong. (Emphasis added)

Here securities are held by the Defendant, although as alleged the sum of $3.3 million had been paid but there is a balance left which is not denied by the Plaintiffs.

It is open to the Defendant to exercise its powers of sale under the securities held by it but it now wants instead to wind up the said companies. It did exercise its power of sale of 1st Plaintiff's property but was unsuccessful.

On the affidavit evidence I accept Ali's statement that upon payment of $3.3 million mortgage No 378302 over CT No 24128 was discharged. I further accept that the balance was still left and that is why the Defendant is not releasing the other securities. The said sister companies have guaranteed the payment of the amount owing by the first plaintiff.

In one breath P1 is saying that the debt is disputed and on the other it wants the securities released so that it can raise finance to pay off the debt or that the petition be stayed for 6 months allowing for the country's economic climate to improve. It is noticed that the other Plaintiffs as guarantors are not denying or disputing the alleged balance debt. In the statement of claim in the writ in item 14.3, P1 says by reason of the Defendant's breach and negligence the Plaintiff has suffered substantial loss and damages as stated therein amounting to in part the sum of $3,096,853. The said damages that P1 is claiming shows that it has a counterclaim against the Bank. The fact that there is this alleged counterclaim does not prevent the Bank from exercising its power of sale under the securities held by it. It was so held in *Samuel Keller (Holdings) Ltd v Martins Bank* [1971] 1 WLR 43 and *Birmingham Citizens Permanent Building Society v Court* [1962] CH 883 followed.

This petition is brought on the ground that the Company (P1) is unable to pay its debts. I find that such is the situation here. The creditor has to prove a negative; that negative being that the Company cannot pay its debts.

It was held in *Cornhill Insurance Plc v Improvement Service Ltd and Ors* [1986] 1 WLR 114 as follows:

> *…refusing the application, that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company's insolvency and present a petition for its winding-up. (Emphasis added).*

The existence of debt is sufficient to present a winding-up petition. In *Re Tweeds Garages Ltd* [1962] 1 Ch 407 at 408 where the company admitted the existence of a debt to the petitioner but disputed the amount of the debt alleged in the petition, it was held:

> *That the only qualification required of the Petitioner was that it was a creditor; and that, where there was no doubt (and there was none here) that the petitioner was a creditor for a sum which would otherwise entitle it to a winding-up Order, a dispute as to the precise sum owed was not a sufficient answer to the petition. [Emphasis added.]*

This case certainly is not one for the grant of an injunction as prayed. The following paragraph from the judgment of Harman J in *Cornhill* (above) quoting from *Ungoed*-Thomas J in *Mann v Goldstein* [1968] 1 WLR 1091 at 1096 is apt and sums up the situation very well whilst setting out the correct test in approaching matters of this nature:

> *When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt.*

In this case it appears to me that although the Company says it is solvent it has chosen not to pay the debt, and the following words of Harman J in *Cornhill* (above) apply to this case also:

> *In my view in such circumstances the creditor was entitled to (a) threaten to and (b) in fact if it chose to present a winding-up petition …*

I find that there is no bona fide dispute on substantial grounds; the dispute alleged has been based on very insubstantial and flimsy grounds.

Subject to what I saw hereafter on the totality of the affidavit evidence before me, I find that there are here no triable issues such as would entitle the Company (P1) to resist the petitions. The following paragraph from the judgment of Megarry J in *Re Lympne Investment Ltd* [1972] 1 WLR 523 at 527 is apt:

> *Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from Re London and Paris Banking Corporation* (1874) LR 19 Eq 444. *The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out. Further,Mann v Goldstein* [1968] 1 WLR 1091, *cited with approval in the New Zealand Court of Appeal in*

Bateman Television Ltd v Coleridge Finance Co Ltd [1969] NZLR 794, *provides authority for saying that when a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor within section 224(1) of the Act of 1948 who has the locus standi requisite for the presentation of the petition, even if the company is in fact insolvent.*

(B) Filing petition while holding security

Having found as above, namely that the dispute is not on substantial ground, the question now arises is whether the Defendant while holding securities from the Plaintiffs is entitled to proceed to present petitions to wind up the said companies. Or is it only proper in law for the Defendant as security holder to exercise its power of sale of the Plaintiff's (P1) properties first, under the security documents held by it before being allowed to petition for its winding up. From the evidence before me it appears that P1 has given a mortgage as security and the other Plaintiffs have signed as guarantors.

The law is that an application to the court for the winding-up a company shall be by petition presented … by any creditor … (s 222 of the Companies Act Cap 247).

As here a secured creditor (which includes a person holding a mortgage is entitled to petition as creditor (Halsbury's Law of England, 4th ed, Vol 7 para 10037).

It is stated in Halsbury's Law of England, 4th ed, Vol 3 para 318.

If the petitioning creditor is a secured creditor, he 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.

In this case to proceed by way of a petition to windup the Plaintiffs is an option open to the secured creditor despite the fact, subject to what I say hereafter, that it holds security documents and could exercise its power of sale under them. Section 223(1) of the Companies Act Cap 247 allows for the making of a winding up order on the Petition of a secured creditor. The section provides, inter alia, that:

On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit but the court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.

In *Ram Dutt Prasad v Australia and New Zealand Banking Group Ltd* (Civ Act HBC 0121/99) Scott J, on the rights of the mortgagee said:

As is well understood a mortgagee so long as part of the mortgage debt remaining unpaid may pursue any or all of the remedies available to the mortgagee at the same time. Thus, the mortgagee may concurrently sue for payment on a covenant in the mortgage to pay principal and interest, for possession of the mortgaged property and for fore-closure.

This proposition would be applicable, I would say, in the case of a mortgagee as here.

(C) Should the mortgagee be allowed to wind up in this case?

It is in the court's discretion whether to allow the secured creditor to wind up the companies.

Although the law allows the mortgagee as creditor to windup a company, I consider that since the mortgagee is in such a strong and independent position with wide powers that a windingup will be useless and serve no useful purpose and if anything, it will intrude into an area reserved for unsecured creditors upon the insolvency of a company. I am justified in my view on this aspect of the matter with the interesting observations of the Fiji Court of Appeal in *Commissioner of Inland Revenue and ANZ Banking Group* (Civ App No 56 of 1984s at p 12 et seq of the judgment) where it is stated (I quote at the risk of being lengthy), inter alia, that mortgagees are outside the purview of the windingup:

> *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) 6 Ch D 339 James LJ, at 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 …*

In *Re Longdendale Cotton Spinning Company* (1978) 8 Ch D 150 at 154 Lord Jessel MR 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 Re David Lloyd & Co, an authority which emphatically negatives the existence of any such right.*

A statement to like effect in more general terms fell from Kay LJ in *Strong v Carlyle Press* (1893) 1 Ch 268 at 276:

> *We must treat the mortgagees as being persons outside the winding-up.*

And in the same case, at 274, Lindley LJ 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 *Re Aro Co Ltd* [1980] 1 All ER 1067 Templeman LJ delivering the judgment of a Court of Appeal comprising Stephenson and Brandon LJJ 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* [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.

The Plaintiffs, other than P1, while not disputing the debt are trying to restrain the winding-up petitions against themselves only on the ground that the Bank holds securities in respect of the alleged debts. The grounds on which P3–P6 rely are that the Defendant should have released the securities so that the Plaintiffs can raise funds on those securities to pay the alleged debts. Therefore they say that the petitions are an abuse of the process of the court, oppressive and amount to unconscionable conduct. Also that the events of 19 May 2000 and subsequent crippling of the economy in Fiji had made it difficult to raise funds.

Conclusion

On the whole of the affidavit evidence before me and considering the submissions of counsel, I prefer to accept the Defendant's account of the transactions between the parties to that of the first Plaintiff. As I said before I find that there is no substantial dispute on substantial grounds as to the alleged debt to enable this court to refuse the petition to wind up the companies subject to what I say hereafter. Even if there is some dispute as to debt, the court can still allow the defendant in its discretion to proceed to wind up the Plaintiffs. In this context in *Avery v Worldwide Testing Services Pty Ltd* (1990) 2 ACSR 844 Seaman J (who read the judgment of the court), in dismissing the company's application to restrain the winding-up petition, at p 841 cited with approval an earlier decision of Gibbs J whereby he said:

> *A debt is not bona fide disputed simply because the respondent … says that it is disputed. The Court hearing the petition (or application for injunction to restrain presentation of a petition) can go into evidence to consider whether or not the dispute is bona fide i.e. whether the debt is disputed on substantial ground: Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 *… In every case it becomes necessary for the court to exercise its discretion as how far it will allow the question whether or not the dispute is bona fide to be explored.* [Emphasis added.]

As I have already stated P1 cannot avail itself of the alleged counterclaim to restrain the bank form presenting the petition to wind up the company (P1).

In this case even if the court refuses the injunction, which it will, the first Plaintiff will not be ruined, it has its remedy in damages for the Bank is capable of compensating the 1st Plaintiff for any damages (if any) that may be awarded against it by the court in the substantive action. Therefore in view of the orders which I propose to make, subject to what I say hereafter to restrain the winding up petitions is not justified in the circumstances.

The principles of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 may be applied when deciding whether the petitioner should be restrained by an injunction from advertising a petition as prayed allegedly founded on debt being disputed on substantial grounds. (Palmer's Company Law, Vol 3, p 15.214). Since I have found that the alleged debt is not disputed on substantial grounds the question of granting of injunction does not arise.

As far as the petitions against the Plaintiffs other than first plaintiff are concerned it is clear from the evidence before me that the Plaintiffs 3–6 do not deny their debt as they guaranteed it and the Defendant Bank holds guarantee document to secure the debt. According to counsel, P2 (Burgess (Fiji) Limited)

has already been wound up; and as for P4 (Laucala Beach Services and Stores Limited) the Defendant has already proceeded against it by way of mortgagee's sale.

That leaves the petitions against P3, 5 and 6 to be considered. The 1st Plaintiff's properties had already been subject to mortgagee's sale and an interim injunction once granted in its favour was dissolved.

In the case before me P1's application for injunction is akin to a mortgagor restraining a mortgagee from exercising its power of sale under the security documents it holds.

In summary having held that there is no dispute on substantial grounds which would prevent the presentation of petitions to wind up the plaintiff companies, I have come to the following conclusions that the Defendant as mortgagee is free to exercise its power of sale under the security it holds against P1. It has now chosen to present a winding-up petition. That being the situation, in view of what I have said hereabove in the case of a person holding security, in the exercise of my discretion I do not consider that I ought to allow the mortgagee to be firing two bullets simultaneously or one after the other. In other words it cannot proceed by way of petition to wind up and also while holding a security by way of mortgage exercise its powers under the mortgage. Further, although it is not for me to determine in this action as to how the funds on winding up are to be distributed if I allow the petition to proceed against P1 it is the accepted principle that if one were to follow the principles pertaining to insolvency or bankruptcy laws and Rules the proceeds of insolvency will have to be divided among the creditors of the company. In this regard I refer to the case of *Re Liverpool Civil Service Association, Ex parte Greenwood* (1874) LR 9 Ch App 511 where the headnote reads as follows:

> *A creditor presented a petition for winding-up a company. The company paid a part of the debt, and promised to pay the remainder on a certain day. This was not done, and the creditor proceeded with his petition, and a winding-up order was made upon that petition and another petition:-*
>
> *Held, that the creditor must pay back the money paid to him.*

There the question posed was as below at 512:

> *But here the question is, whether the very creditor who has prosecuted the petition should be allowed to retain money which he has obtained by means of the petition, when the result of the petition is that the assets of the company are to be divided equally amongst its creditors.*

In the outcome for these reasons it is ordered:

(1) That the Defendant its servants and agents be restrained from proceeding with the winding-up petition against Vivrass Development Ltd (the 1st Plaintiff) as it has ample powers to proceed to exercise its power of sale under the security document it holds.
(2) Further, the petitions to wind up against 3rd, 4th, 5th and 6th Plaintiffs may be proceeded with.
(3) Liberty is granted to parties to apply generally.
(4) Each party to bear its own costs.

Injunction dismissed against P1 but allowed on P3–P6.