

Re VANUALEVU HARDWARE FIJI LTD AND THE COMPANIES ACT

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

18 July 2002

[2002] FJHC 85

10 **Receivers — remuneration — motion to set aside fees — winding up — stay of winding-up order — whether official receiver is entitled to fees — Companies Act (Cap 247) s 252.**

15 Vanualevu Hardware Fiji Limited (Company) sought an order by motion that the Official Receiver (OR) was not entitled to the fees as agreed by the OR and the counsel for the Company. The OR gave the Company its bill for fees. The Company disagreed with this bill as it is unconscionable and unrelated to the fees prescribed in the schedule. The OR said that the sum truly represents the amount owing to her as fees as prescribed under the schedule.

20 **Held** — (1) The fees on the basis of the schedule is applicable in this case because the OR was provisional liquidator and there was a stay of further proceedings before the summoning of the statutory meeting of creditors.

(2) Where the Official Receiver acts as provisional liquidator or liquidator, he is paid the prescribed fees, which are taken in money. Some of these fees are for realising the assets and others in respect of remuneration. The amount prescribed is reasonable by the court if it is ascertained solely by reference to the services performed.

25 Motion denied.

Cases referred to

Re Joseph Phillips Ltd [1964] 1 All ER 441, applied.

30 *Re Oriental Bank Corporation* (1884) 10 VLR (E) 154; *Re Western of Canada Oil, Lands & Works Co* [1874] WN 148, cited.

Krextile Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Limited [1974] VR 689, considered.

35 *E. Vula* for the Official Receiver

R. P. Singh for the Company

Decision

40 **Pathik J.** By motion dated 19 March 2002 Vanualevu Hardware Fiji Limited (hereafter referred to as the Company) is seeking an order that the Official Receiver (the OR) is not entitled to the sum of \$14,215.32 as fees and that the fees be assessed upon the grounds appearing in the affidavit of Bashir Khan sworn 19 March 2002 and filed herein.

45 The background to the case is that a winding-up order was made against the Company on 24 January 2000 on the petition of Mobil Oil Fiji Limited (the Petitioner) on account of a debt of \$22,430. According to Mr Singh it was agreed between the Official Receiver and himself (counsel for the Company) that he will collect this sum and send to OR which he did. The total sum sent was \$22,980 which included \$550 costs.

50 Subsequently on 14 December 2001 a stay of the winding-up order was made by the court.

The OR gave the Company its bill for fees in the sum of \$14,215.32. The Company disagrees with this bill. It states that under r 2 in the Schedule to the Companies (Winding-Up Fees) Rules, the Official Receiver is entitled to fees as prescribed in the said schedule in item 5. Mr Singh says that this bill is an
5 “imposition” and “*exorbitant as it is unconscionable and unrelated to the fees prescribed in the said Schedule*”.

The OR in her affidavit says that there is nothing in her file in the matter to show that there was a meeting at which it was agreed that Mr Singh collect the rent monies and send to the Official Receiver. She says that the “*said sum of*
10 *\$14,215.32 truly represents the total sum owing to the Official Receiver as fees as prescribed under items 7(b) & (c), 8, 12(a) & (b) of the said Schedule*”.

The OR says that the delay in payment out to the petitioner is caused by the Company’s unwillingness to pay the OR’s fees.

15 The issue for the court’s determination is as to under which item in the said schedule the Official Receiver is entitled to her fees in this case.

The application for a stay of the winding-up order was made under s 252 of the Companies Act (Cap 247) which (inter alia) provides:

20 *252(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.*

25 The order for stay made on 14 December 2001 was as follows:

It is this day ordered by consent that the proceedings be permanently stayed on the condition that the Petitioning Creditor is paid the amount of the debt by the Official Receiver. Costs of the parties to those entitled be paid on the appropriate scale.

30 Before I deal with the fees aspect it is important to bear in mind the effect of an order for stay as far as a company is concerned and consequently the bearing it has on the OR’s fees.

Once a company goes into liquidation there is a change in its status with certain legal consequences. But its corporate status and powers are not so much affected except that it exists thereafter only for the purposes of being wound up,
35 the directors’ powers pass to the liquidator and apart from that there are restrictions on the alienation of its property and on the right to take proceedings and levy execution against it. These changes are as a result of statutory enactment, hence they cannot be displaced by any act whereby the company of its own motion reverts to its former state. This can only be achieved by obtaining
40 an order of the court staying proceedings in the winding up. The effect of such an order is that the winding-up process comes to an end, and the company can thereupon resume the conduct of its business and affairs as if no winding up existed (Gillard J in *Krextil Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Limited* [1974] VR 689.

45 The said order under s 252(1) meant that there was a virtual end to the winding-up process and the order for winding up becomes quite inoperative (see, per Moleworth J in *Re Oriental Bank Corporation* (1884) 10 VLR (E) 154 at 185; *Re Western of Canada Oil Lands & Works Co* [1874] WN 148). In other words by the said order under s 252(1) the court, as Gillard J said in *Krextil* (above),
50 “renders its own order a dead letter”.

With the above background to the case I have considered the issue before me.

I hold that fees on the basis of item 5 of the said schedule is applicable in this case because the OR was provisional liquidator and there was stay of further proceedings “before the summoning of the statutory meeting of creditors”. The said item 5 provides as follows:

- 5 5. *Where the official receiver acts as provisional or interim liquidator only*
 (a) where no winding-up order is made upon the petition, or where a winding-up order is rescinded, or all further proceedings are stayed before the summoning of the statutory meetings of creditors and contributories: such amount as the court may consider reasonable to be paid by the petitioner, or by the company as court may direct, in respect of the services of the official receiver as provisional or interim liquidator. [Emphasis mine.]

Also as stated in Halsbury, 4th ed, vol 7, para 1092:

- 15 *Where the official receiver acts as provisional liquidator or liquidator, he is paid the prescribed fees, which are taken in money. Some of these fees are in respect of realising the assets, and others in respect of remuneration. Where the amount prescribed is “that which the court may consider reasonable, the amount must be ascertained solely by reference to the services performed”.*

20 On the aspect of what “the court may consider reasonable”, I adopt the following passage from the judgment of Buckley J in *Re Joseph Phillips Ltd* [1964] 1 All ER 441 at 447:

- 25 *The amount of remuneration that is reasonable must be ascertained in relation to the services which the Official Receiver performed, and is not to be ascertained in relation to either the means of the party out of whose pocket the remuneration would fall to be paid nor the fortunes of war in the litigation which gives rise to the necessity to pay the Official Receiver the remuneration. If the court were to embark on the hazardous task of considering in every case how far the wind should be tempered for the benefit of those who are exposed to its unkindly blasts, the court would be left in a state of complete uncertainty as to what ought to be regarded as reasonable in any particular case. In any event that is not, in my judgment, the approach which should be made to the problem. **The approach must be to ascertain what work the Official Receiver has done and then to ascertain what remuneration is reasonable for that work.** [Emphasis mine.]*

35 To arrive at a “reasonable” fee I consider that the fees payable are to be taxed as there has been payment out of certain sums of money over a period of 1 year. It is therefore ordered that the fees payable be taxed by the Acting Deputy Registrar (Legal) of the High Court unless agreed.

Motion denied.

40

45

50