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

WINDING UP ACTION NO. 032 OF 2009 & 002 OF 2010

BETWEEN : **VODAFONE FIJI LIMITED & CHANDRA LOK**

Petitioner

AND : **BA PROVINCIAL HOLDING COMPANY LTD** a limited liability company having its registered office at Rogorogo – i Vuda House, Tavewa Aveue, Lautoka

Respondent

Appearances : Mr. Victor Sharma for the Applicant
Mr. K. Vuataki for the Company

R U L I N G

(Oral Ruling pronounced in Court on 15 February 2013).

INTRODUCTION

[1]. This Court made a winding Up Order against Ba Provincial Holdings Company Limited (**"BPHCL"**) on 12 August 2011. A week later, on 19 August 2011, I granted another Order temporarily staying the above. This second temporary stay Order was made pursuant to section 252 of the Companies Act (Cap 247) on the application of Island Electric Wholesales Limited who was one of BPHCL's many creditors. At the outset, it was clear that BPHCL was adamant to recover from that state of insolvency and to get back to normalcy. Hence, the temporary stay Order was extended from time to time between 19 August 2011 to 15 March 2013 to review the company's solvency status. What is before me now is an application to permanently stay the winding up order. The application is made, also, under section 252 of the Companies Act.

SECTION 252

[2]. Section 252 states as follows:

Power to stay winding-up

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**.

(2) On any application under this section, the **court may, before making an order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application**.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar for registration.

[3]. It is clear from the wording of section 252 that the only persons who have standing to apply for stay under section 252 are: the liquidator, or the official receiver, or any creditor, or any contributory. It is noteworthy that the company which is the subject of the winding up Order does not have *locus standii* under section 252. This is so based on the underlying need to protect the interests of the general body of creditors as a whole. Pennycuick V.C. explains this as follows in **Practice Note (Winding Up Order: Rescission)(No. 2) [1971] 1 W.L.R. 757**:

> 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.** (my emphasis)

ONUS

[4]. Section 252 clearly puts the onus on the applicant to prove to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed. As I discuss below, mainly (although there are other factors relevant also as per Master Lee QC's approach below), this means placing material that would sway the court into believing – either that the company is solvent or - is likely to return to solvency.

FACTORS TO CONSIDER

[5]. As to what factors the court should consider, Megarry J in his **Practice Note (Winding Up Order: Rescission)(No. 2) [1971] 1 W.L.R. 4** sets out the following which – in my view – is/are just as relevant in the balancing process under **section 252**:

> 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.
>
> Cases in which the making of the order has not been opposed owing to some matter such as an error or misunderstanding in instructing counsel may, if the application is made promptly, still be dealt with on a statement by counsel of the circumstances; but apart from such cases, the court will normally require any application to be supported by affidavit.

In making this statement, I am speaking after consultation with the other judges of the Companies Court.

[6]. In **In the matter of Yelin Group Pty Ltd - Li v Jin [2012] NSWSC 74**, the Supreme Court of New South Wales had to consider an application made under section 482 (1) and (1A) of the *Corporations Act 2001* (Cth)[1]. The court[2] followed the approach of Master Lee QC in **Re Warbler (1982) 6 ACLR 526**.

[7]. That approach considers relevant the following: firstly, the interests and attitude of the liquidator, the creditors and contributories; secondly, the solvency and financial position of the company; and thirdly, questions of commercial morality or public interest. Master Lee QC lists the following in particular:

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 WLR 355; at p358-p359** per Megarry J. See also s243 of the Act.
2. There must be service of a notice of the application for a stay on all creditors and contributories, and proof of this: **Re South Barrule Slate Quarry Co (1869) 8 Eq 688; Re Bank of Queensland Ltd [1870] 2 QSCR 113**.
3. The nature and extent of the creditors must be shown, and whether or not all debts have been or will be discharged: **Krextile Holdings Pty Ltd v Widdows (supra)**; **Re Data Homes Pty Ltd (supra), Law of Company Liquidation (supra) at p395.**
4. The attitude of creditors, contributories and the liquidator is a relevant consideration: s243 (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) NZLR 120; Re Mascot Home Furnishers Pty Ltd (1970) VR 593; at p598**.
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 be given: **Re Telescriptor Syndicate Ltd** (supra).

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[1] Section 482 provides that:

(1) At any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order.

(1A) An application may be made by:

(a) in any case – the liquidator, or a creditor or contributory, of the company; or
(b) in the case of a company registered under the *Life Insurance Act 1995* - APRA; or
(c) in the case of a company subject to a deed of company arrangement – the administrator of the deed.

[2] The court said as follows in paragraph 8:

8 As to the matters to be taken into consideration on an application under s 482, a succession of cases have adopted (with some refinement) the list set out in the judgment of Master Lee QC in ***Re Warbler Pty Ltd*** **(1982) 6 ACLR 526** (***Anderson v Palmer*** **[2002] NSWSC 192**, per Barrett J, as his Honour then was, at [5]; ***Modena Imports Pty Ltd (In Liq), In the Matter Of; Leveraged Capital Pty Ltd (Admin App) (In Liq) v Modena Imports Pty Ltd (In Liq)*** **[2010] NSWSC 739, per Palmer J at [13];** ***In the Matter of SNL Group Pty Ltd (In Liq); Su v SNL Group Pty Ltd (In Liq)*** **[2010] NSWSC 797**, per Bergin CJ in Eq at [22]; ***Stolar Joinery (Aust) Pty Ltd v Charterarm Investments Pty Ltd (in liq)*** **[2011] VSC 577**, per Ferguson J at [17]; to name but a few). The list is a guideline (not a set of rigid principles) as made clear by Santow J (as his Honour then was) in ***Dubolo Pty Ltd (t/as Fender Signs) v Codrington Investment Corporation Pty Ltd*** **(1998) 26 ACSR 723 at 724**.

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).

COMMENTS

[8] It is hard to find a reason not to adopt Master Lee QC's approach here. So, applying that approach, I state for the record that I did direct the applicant here to serve a copy of its application on all creditors. That was duly complied with as evident from the numerous affidavits of service that have, since, been filed. Having said that, the granting of stay is also a matter of court-discretion in Fiji. The due judicious exercise of that discretion rests on the kind of factors that are taken into account in the balancing process. I am convinced that Master Lee's list (see above) is relevant in Fiji. This, I now turn to consider next.

Nature and Extent of the Creditors. Whether or Not All Debts Have been or Will be Discharged?

[9]. As stated, this case was reviewed from time to time between 19 August 2011 and 15 March 2013. On each review, I was looking out for evidence of any improvement in the company's solvency status that might justify a permanent stay of the winding up Order. I saw no such sign initially. What I saw instead was BPHCL's determination to return to solvency and settle its debts as well as the creditors continuing support for the company's bid for more time. Evidence placed before me on each occasion showed that BPHCL was paying off its creditors little by little from review to review[3].

[10]. It was asserted from time to time that the total value of the company's assets has always been greater than the total value of its liabilities. Those early assertions were not properly verified. But even if they were, the company was still insolvent. The only way out was through a bailout from a commercial bank. Eventually, this happened in November 2012 when ANZ Bank approved a loan to refinance the company's debts[4] (after the company had been turned down initially by BSP Colonial bank). From material in affidavits filed, it appears that ANZ took into account the following in approving the refinance-loan[5]:-

[3] Hence, the total value of its debts was reducing from call-over date to call-over date – although – it remained at an exorbitant level.

[4] ANZ – in fact - had taken a keen interest in the Court proceedings. Its Lautoka Manager, Mr. Nathan Wilson, did attend two or three court sessions, and in one of these, was helpful in clarifying ANZ's position at a time when ANZ was still considering BPHCL's loan application.

[5] ANZ approved (in November 2012) a new loan of $1,050 million which was given on the condition that the following payments will be made directly by ANZ via bank cheque to the various creditors concerned. That proposal was duly accepted on acceptance of ANZ's variation letter. That variation was duly accepted by BPHCL.

(i) cash flows forecasts from BPHCL's Accountants (namely *aliz pacific*).
(ii) an updated valuation of BPHCL's assets.
(iii) a special independent audit by ANZ's auditors namely Ernst & Young, Melbourne (from October to November 2012).

[11]. Following that breakthrough in ANZ refinance - various affidavits[6] were filed in February and March 2013 confirming payments and exhibiting discharges from the creditors concerned. These latest affidavits also re-assert the position in earlier affidavits filed in 2011 and 2012 that the company's assets are far greater in worth then its liabilities.

Attitude of Creditors

[12]. The attitude of the creditors has been supportive. I need say no more on this.

Current Trading Position & General Solvency of BPHCL

[13]. Mr. Pauliasi Naivalu, Acting Manager Corporate Services for BPHCL deposes in his affidavit sworn on 01 March 2013 that the company is in the business of building buildings and renting these out. Some documentation purporting to be an audit report by *aliz pacific* as at 31 December, 2011 is attached to Naivalu's affidavit. This document values BPHCL's assets at $16,490,297 (sixteen million, four hundred and ninety dollars, two hundred and ninety seven dollars) against BPHCL's total liabilities which is assessed at $13,547,434 (thirteen million, five hundred and fourty seven, four hundred and thirty four dollars). Hence – BPHCL's net assets is assessed at $2,942,864.00 (two million, nine hundred and fourty two thousand, eight hundred and sixty four dollars)[7]. These assets are buildings and BPHCL's main income is $248,518.39 per month in the form of rentals from the Fiji Government. After payment of loan to ANZ Bank, BPHCL would still have a cash flow of $100,519.00 per month from rentals received.

[14]. Naivalu highlights an additional cash inflow of rentals from non Government entities. This is assessed at up to $300,402.00 per month as at March, 2013 and cash outflows as is budgeted in the approved budget of the company[8]. The company also has access to an overdraft facility of $100,000.

[15]. The solvency status of a company is usually the most significant factor relevant in considering whether or not to terminate its winding up. In **Re SNL Group Pty Ltd** , Bergin CJ in Eq stressed that:

[6] sworn by one Peni Sokia, BPHCL's Manager Finance (on 06 December 2012, 31 January 2013, and 05 February 2013).
[7] Annexed to the Affidavit of Pauliasi Naivalu and marked "**PS14**" is a true copy of page 10 of such audit report.
[8] attached marked "**PS15**" on Naivalu's affidavit.

> …other considerations, such as the extent of the creditors, the status of the debts and the nature of the company's business will be taken into account in determining whether the company has returned to, or will be returned to solvency.

[16]. In **Anderson v Palmer** , Barrett J stressed that the enquiry as to solvency and financial stability should focus on three broad issues:

> "first, the capacity of cash resources (including resources immediately convertible into cash) to meet debts due or likely to become due in the short term; second, any capacity there may be to raise money quickly by resort to assets not immediately convertible into cash; and, third, an assessment that there exists a sufficient financial capacity to create confidence that there will be no relapse into insolvency" (at [7]).

[17]. In Australia, a cash flow test is preferred to assess solvency. However, the extent of the company's assets are still relevant[9]. The same is true in England (see Megarry J's **Practice Note (Winding Up Order: Rescission) (No.2) [1971] 1 W.L.R. 4** at paragraph [5] above).

Evidence Required to Establish Solvency

[18]. As to what evidence is required to establish solvency, **"unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative of solvency"**[10]. What is required is the **"fullest and best"** evidence of the financial position of the company[11] and **"proper verification of assets and liabilities"**[12]. Unsubstantiated assertions by a company's controller as to its solvency and the state of its assets and liabilities are of no real value[13]. And courts generally would not act on such evidence[14]. In **Deputy Commissioner of Taxation v Lencal Excavations Pty Ltd [2004] NSWSC 783**, White J discussed two ideal approaches. First - the liquidator must verify the financial facts in such manner to enable the Court to express an opinion that the company is solvent". Alternatively, an external accountant could present a critical assessment of information to assist the court.

[19]. At the end of the day – whatever opinion as to the company's solvency is put before the court must be based on proper investigation and verification beyond the mere say-so of

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[9] see discussion of relevant case law in **In the matter of Yelin Group Pty Ltd - Li v Jin (supra). Brolrik v Sambah [2001] NSWSC 1171; ACE Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd [1999] FCA 728; Rees v Bank of New South Wales (1964) 111 CLR 210**; **Re Tweeds Garages Ltd [1962] Ch 406 at 410** per Plowman J; **Simionato Holdings Pty Ltd (supra)**; **Melbase Corp Pty Ltd v Segenhoe Ltd (1995) 13 ACLC 823 at 832** per Lindgren J; **Leslie v Howship Holdings Pty Ltd (1997) 15 ACLC 459 at 465-466**; **Sandell v Porter (1966) 115 CLR 666 at 671** per Barwick CJ (with whom McTiernan and Windeyer JJ agreed);

[10] see **Yelin** case supra footnote 8. See also **TQM Design and Construct Pty Ltd v Golden Plantation Pty Ltd [2011] NSWSC 500** as per Barrett J at [18].

[11] see **Metledge v Bambakit Pty Ltd; Manuel Koutsourais, Applicant [2005] NSWSC 160; Commonwealth Bank of Australia v Begonia (1993) 11 ACLC 477**.

[12] see in **Expile Pty Ltd v Jabb's Excavations Pty Ltd (2003) 45 ACSR 711** by Santow JA (with whom Meagher and Handley JJA agreed).

[13] see **Expile Pty Ltd v Jabb's Excavations Pty Ltd** (supra).

[14] see **Deputy Commissioner of Taxation v Sydney Concrete Steel Fixing Pty Ltd (1999) 17 ACLC 972** per Austin J.

the company's controller (see Barrett J again in **TQM Design and Construct** (see footnotes).

[20]. In this case before me, the creditors had – at no time – sought the appointment of a liquidator. If one had been appointed –her opinion would have been invaluable. Nor did any of the creditors ever question the level of criticalness of *aliz pacific's* investigation and verification leading to its report. At the end of the day, from where I sit, Mr. Naivalu's assertions and *aliz pacific's* report appear to tally with the attitude of ANZ to refinance - and consolidate - all BPHCL's debts (presumably -with a lower monthly repayment over a longer term to improve the company's liquidity) - while still allowing an overdraft facility to the company. I am prepared to accept all this favorably as evidence of a breakthrough in BPHCL's solvency and liquidity status. The commercial reality here is that BPHCL now has available to it resources (from the ANZ loan and overdraft facility) from which it has settled its debts. I think the following words of Ward J in **Yelin** (supra) would be apt:

> I note that in **Lewis v Doran (2004) 208 ALR 385; (2004) 184 FLR 454; (2004) 50 ACSR 175; (2004) 22 ACLC 1009; [2004] NSWSC 608, at [112]-[116]**, Palmer J held that a company could be considered to be solvent on the basis that it had available to it, as a resource from which debts could be paid, ongoing support from related entities or the directors and which had historically resulted in those creditors actually being paid.
> The court must look to the "commercial reality" of the position in assessing solvency (**Lewis v Doran** , at [106]-[112] and [119]). In **Brooks v Heritage Hotel Adelaide Pty Ltd (1996) 20 ACSR** 61 it was said that the issue of insolvency is a question of fact to be decided as a matter of commercial reality in the light of all the circumstances. In **New World Alliance Pty Limited, Sycotex Pty Limited v Baseler (No 2) (1994) 51 FCR 425**, Gummow J, then in the Federal Court of Australia, considered that the situation must be viewed as it would be by someone operating in a 'practical business environment'. (So, for example, in **Lam Soon Australia Pty Ltd v Molit (No 55) (1996) 70 FCR 34** where there was "financial support" from the parent company, this was sufficient to warrant a finding of solvency.)

Directors' Compliance With Statutory Duties

[21]. According to Pauliasi Naivalu, the Directors of the company have given all details of accounts to BPHCL's auditors, Aliz Pacific for 2011 financial year and that the company's accounts section will also prepare the 2012 accounts. I have no reason to doubt this.

General Background & Circumstances Which Led To Winding Up Order

[22]. Some background might be gleaned from Madam Justice Phillips Rulings and judgments in **BA Provincial Holding Company Ltd v BA Provincial Council [2006] FJHC 58; HBC225.2006 (2 August 2006)** and **BA Provincial Holdings Company Ltd v BA Provincial Council [2006] FJHC 71; HBC237.2006 (8 September 2006).** Mr. Pauliasi Naivalu explains in his affidavit that the financial woes of the company began

on 31 July, 2006 when the shareholders dismissed the then board of directors and set up an interim board. The mandate given to the interim board was to review the company and report its findings to the shareholders within three months. However – as it turned out – the interim board did not fulfill this and yet remained in position from 31 July 2006 to 2008 without ever reviewing the company – let alone making a report of any finding to the shareholders. What the interim board did at this time was to run up the company's debts. It was those very debts which led to the presentation of numerous petitions to this Court to wind up the company. Apart from running up the company's debts, the interim Board also took various actions – seemingly - to dismantle the structure that the old management had built over the years. For example, after being set up, the interim Board immediately set out to dismiss the entire (old) management of the company as well as every single employee hired by it (old management) even right down to the level of the security guards and cleaners. The interim board also took steps to disassociate the company from certain business projects/ventures that the old management had set up (or was setting up)[15].

[23]. Suffice it to say that – after two years – the Ba Provincial Office finally woke up to the reality (after letters were received from a number of companies, the Lands Department, and even the Banks pointing out and sounding a warning) that the company was treading on thin ice so to speak because of lack of probity in the interim Board's management. It was then that the Provincial Council[16] orchestrated the calling of an emergency meeting of shareholders on 11 December, 2008 which eventually reinstated the old (current) management.

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[15] Mr. Naivalu explains in his affidavit: The interim Board was comprised of a member of the NLTB (now iTLTB), the Secretary of Vanua Development Corporation (VDC) and an employee of Pacific Connex (PCX). Mr. Naivalu explains the dynamics involved in his affidavit by setting out that the iTLTB had formed VDC which held majority shares in PCX. PCX was applying for a cellular mobile phone license from Government. The company was assisting Digicel Fiji Ltd to get established in Fiji and obtain a cellular mobile phone license from Government. On 26 February 2007 - the interim Board gave instruction to their Solicitors "to dissolve and disassociate" the company from Digicel (a copy of this is exhibited in the affidavit of Pauliasi Naivalu). Such dissolution and disassociation was carried out and the company lost Digicel. The interim Board continued to manage the company from 31 July, 2006 to 2008. The Provincial Office then found that two years had passed without the interim Board making its report, their term had passed and they should be terminated. There are many letters received from a number of companies, Lands Department and the Bank pointing out the difficult situation the company was in and this should not be continued into 2009.This difficulty has been occasioned during our time of leadership and I believe we are one in the thought that is better that the Provincial Company be taken back to its original position". Attached to the affidavit of Naivalu and marked "**PS 17"** is a true copy of page 4 of the Ba Provincial Council Minute Sheet showing such findings. A Shareholders meeting of 11th December, 2008 was then proposed and the old management were reinstated. By the time the new management took control of the company again the winding up cause in 32 of 2009 was lodged. The new Management found it difficult to trade as the interim Board after getting rid of Digicel had also not paid Fiji Revenue Customs Authority which took out a garnishee on Government rentals making it difficult to have surplus funds to pay Creditors it had accumulated as well as pay Auditors. This garnishee has been withdrawn after all tax arrears of the company was paid off in December, 2012. The new Management had paid for audit up till December 2011, paid off all outstanding statutory levies. The new Management of the company are committed to paying off all trading debts of the company incurred by the interim Board of 2006 to 2008. The event that led to inability to pay debts in 2006 to 2008 is unlikely to recur as the components that led to such event being the existence of company shares in Digicel with VDC opposition is no longer there. VDC has been wound up.

[16] This is all recorded in an extract of the Minutes of the Ba Provincial Council exhibited in the 4th Supplementary affidavit of Naivalu sworn on 01 March 2013.

[24]. As to be expected, the current management did resume management at a time when creditors were queuing up at the High Court Registry here in Lautoka to petition this court to wind up the company. Needless to say, the new management has only inherited a huge mess left by the interim Board. That mess included a mammoth debt to the tune of over $1.5 million to the Fiji Islands Revenue & Customs Authority and to the Fiji National Provident Fund. At the time the old Board resumed management, FIRCA had already taken out a garnishee on the company's income from Government rentals. This would put considerable strain on BPHCL's cash flow, solvency and liquidity status. Quite simply, it meant that the new management had little liquid cash to pay creditors because its main income was under garnishee to FIRCA. Eventually, this all led to the granting of the Winding Up Order against the company on 12 August 2011.

[25]. However (as discussed) – through ANZ's bailout in November/December 2012 (see above) –BPHCL has managed to settle all tax arrears to FIRCA in December, 2012. This led to FIRCA withdrawing the garnishee. The bailout has also led to creditors being paid and their acknowledgement of the same by signing a discharge.

Commercial Morality and/or Public Interest

[26]. In Australia, it is well recognized that there is a public policy against returning an insolvent company to the commercial world. As Street J said in **Re Data Homes Pty Ltd [1971] 1 NSWLR 338** – the court will not exercise its discretion in a way which:

> [has] "the consequence of permitting an insolvent company to go forth again into the community".

[27]. In **Brolrik v Sambah [2001] NSWSC 1171** , the Court said:

> Finally, the court must consider the public interest. The main component of that interest in cases such as the present is that companies not shown to be solvent and financially stable should be left in liquidation so as to avoid risk and prejudice to those with whom they in future do business: **Re Mascot Home Furnishers Pty Ltd [1970] VR 93**; **Re Data Homes Pty Ltd [1971] 1 NSWLR 338**. There are also components which concern themselves with the possibility of breach of the law having been committed which a liquidator, as an officer of the court, would be bound to investigate (**Re Allebart Pty Ltd [1971] 1 NSWLR 24**), but there is no suggestion of any such factor here.

[28]. Sometimes, non-compliance with the requirements of the relevant tax or company law statutes is relevant in assessing the company's commercial morality (e.g. filing of Annual Returns and Tax Returns). I note in this regard that the company has settled all debts owing to FNPF and has committed to settling with the Fund an additional surcharge of

$12,000 for late settlement of debt[17]. I also accept that the company has settled its tax arrears with FIRCA which is explained as follows in the 3rd Supplementary Affidavit of Peni Sokia.

1. **THAT** I crave leave to refer to Annexure RD3 of the affidavit of Ravulolo Draunibaka filed on 9th August, 2011 of an unverified list of creditors and paragraph 5(1) of the Affidavit of Pauliasi Naivalu filed that Fiji Revenue Customs Authority ("FRCA") had been paid $130,692.77. I provide the following explanations as to how the figure of $1,059,032.43 set out in that list was reduced;
   i. That FRCA by letter dated 15th March, 2012 that it had waived $309,328.76 as penalties and that $212,692.73 was owed with penalties of $322,009.68 totalling $534,701.81. Annexed marked **"PS 4"** is a true copy of the said letter.
   ii. There were discrepancies between figures of amount owed by the company to FRCA and on which the company and FRCA met on the 23rd March, 2012 and it was agreed that out of $1,479,775.83 owed the company had paid $1,5555,421.59 leaving a balance of $377,354.03 which it proposed to pay at $12,000.00 a month and to leave balance arrears as at $104,692.73 at December, 2012. Annexed marked **"PS 5"** is a true copy of letter from the company;
   iii. That by letter dated 3rd April, 2012 FRCA agreed to accept payment of $40,000.00 per month of which $12,000.00 would go to pay off arrears. Annexed marked **"PS 6"** is a true copy of said letter.
   iv. The balance of $104,692.73 with accrued penalties came up to $130,692.77 as at December, 2012 and this was paid as evidenced by annexure "PN6" in Pauliasi Naivalu's affidavit referred to.
   v. The company therefore owes no tax in arrears as at February, 2013.
2. **THAT** I crave leave to refer to paragraph 8 of Pauliasi Naivalu's affidavit filed the 30th January, 2013 and annex marked **"PS 7"** is a true copy of letter from ANZ Bank that monthly rental credited into ANZ account per month from February, 2013 would be $248,518.39 if FRCA revoked its garnishee and attached marked **"PS 8"** is copy of revocation of garnishee by FRCA.

CONCLUSION

[29]. The creditors' *post-Winding-Up-Order* attitude of optimism has been borne out. After having being given time, BPHCL has been able to settle its every debt. From where I sit, the company's current trading position and general solvency status looks promising under the current management. Accordingly, I grant permanent stay of the Winding Up Order of 12 August 2011.

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Master Tuilevuka

At Lautoka

28 March 2013.

[17] As per paragraph 6 of the 4th Supplementary Affidavit of Naivalu filed in March 2013.

"Fiji National Provident Fund has been paid the amount found by our Auditors Aliz Pacific and ANZ Bank auditors Ernst Young to be due and we have just received from them a letter of surcharges of $12,000.00 to be paid for the late payments. This will be paid"