IN THE HIGH COURT OF FIJI AT LAUTOKA
COMPANIES JURISDICTION

Winding Up Action No. HBE 011 of 2011

IN THE MATTER of **KHAN BUSES LIMITED** a limited liability company having its registered office at Navutu Industrial Sub-Division, Queens Highway, Lautoka

AND

IN THE MATTER of the Companies Act (Cap 247).

Appearances: Ms N Khan for the Applicant
Mr. R. Singh for the Company

RULING

BACKGROUND

1. The rather long and convoluted dispute between the parties is reflected in the various judgments and rulings of the High Court, the Fiji Court of Appeal and the Supreme Court. What I provide in this ruling is background only for the purpose of the application now before me, which is an application to stay the Winding Up Order I had made on 29 August 2014.

2. The following rulings and judgments do set out in greater depth the history of the dealings and the issues between the parties.

   (i) **Janardhan v Khan** [2005] FJHC 414; HBC0358J.2004L (& November 2005) – per Coventry J, High Court of Fiji.

   (ii) **Janardhan v Khan** [2008] FJCA 82; ABU0122.2005S (7 November 2008) – Judgment of the Fiji Court of Appeal.

   (iii) **Janardhan v Khan** [2009] FJSC 12; CBV0012.2008 (3 December 2009) – Judgment of the President of the Fiji Supreme Court (per Gates P).

   (iv) **Janardhan v Khan** (not reported in paclii) date of judgment 27 August 2010 – Judgment of the Full Supreme Court.

   (v) **Khan Buses Ltd v Janardhan** [2011] FJHC 295; HBC247.2010L (24 May 2011) – per Inoke J, High Court of Fiji.

   (vi) **Khan Buses Ltd v Janardhan** [2013] FJCA 130; ABU0035.2011 (5 December 2013) – Judgment of the Fiji Court of Appeal.

THE AGREEMENT

3. Janardhan and one Mr. Mohammed Nasir Khan had entered into an agreement for the sale and purchase of some 9 acres of agricultural land that was owned by the former in early 1995. In due course, Mr. Khan would transfer his benefit from that agreement to his company, Khan Buses Limited. The agreed price was $170,000. Janardhan's lease expired later in the year that the parties executed the agreement (i.e. on 31 December 1995). He would have been entitled to a further 20 year extension under ALTA. All that was known to Khan. Settlement date was to be 08 December 1995. However, to date, settlement has not happened. By 2004, Khan/the company had only paid $99,300[1].

JUDICIAL APPROACH

4. The courts have found that Khan/the company had stalled settlement after it learnt that the land in question was to be rezoned from agricultural to commercial. Upon rezoning, the company acquired the industrial lease over the property in question.

5. Janardhan had been oblivious to the rezoning exercise that was going on, let alone, that Khan had designs, and was in fact quietly working, scheming, and planning in the background to acquire an industrial lease over the land immediately after rezoning. The High Court, the Fiji Court of Appeal and the Supreme Court have all formed the view that, because Khan had such designs, he had deliberately stalled settlement in the thinking that once the land was

[1] As per Fiji Court of Appeal ruling in Khan v Janardhan [2008] FJCA 82; ABU0122.2005S (7 November2008).
[14] Despite the terms of Clause 6 set out above requiring settlement in the first instance on 8 December 1995, this in fact did not take place and it seems that Janardhan accepted payments from Khan towards the purchase price on various dates and for various amounts from December 1995 until mid 2004. The initial deposit of $5,000.00 appears to have been paid as required on the execution of the agreement but only a further $5,000.00 paid on the 8 December 1995, the initial date fixed for settlement as per the written terms of the agreement. Nevertheless, uncontested documentary evidence was adduced by the appellants at trial showing some 39 receipted payments towards the purchase price made by Khan in the period 1995 to mid-2004 totaling $94,300.00 and additional to the initial $5,000.00 paid as the deposit. The last documented payment was in the sum of $2,000.00 paid by Khan to Janardhan on 2 July 2004. So by early July 2004 Khan had paid to Janardhan $99,300.00 of the $170,000.00 owing on the sale. This represents approximately 60% of the purchase price. In his judgment the trial judge makes no clear finding as to the correct legal description to be placed on the various instalment payments made by Khan to Janardhan between 1995 and mid 2004. We are of the view that despite the payments being described in documentary exhibits as both 'deposits' and 'part payments of the purchase price' the later description is the proper categorization of the payments.

rezoned, and once he acquired an industrial/commercial lease on the land, his agreement with Janardhan would be frustrated.

6. Coventry J summarises the position thus in the ruling cited in paragraph 2(i) above:

> There is no doubt from the outset Nasir Khan was seeking somewhere to park his buses and trucks. Janardhan's land was agricultural or agricultural/residential B. As a businessman he knew he would need rezoning to industrial usage for his purposes. This was not apparent as a requirement to Janardhan. In fact I find specifically that Janardhan did not know at the time of signing the agreement or postponement of settlement that Nasir Khan was seeking rezoning or indeed needed rezoning for the purposes he had in mind.
>
> If settlement had taken place but rezoning had not been permitted then Nasir Khan would have been left with a piece of land which was zoned agricultural/residential B. This was not what he required at all. He wanted the land for parking his buses and trucks. It therefore was to his advantage to postpone settlement until he knew whether or not rezoning would be permitted. If it was not permitted then he could then seek to extricate himself from the contract.
>
> It is also pertinent to note that Nasir Khan had bought a piece of adjoining land and was looking to rezone that as well.
>
> Mr. Khan had a further interest in delaying settlement in that he wanted to negotiate the leasehold value and other potential outgoings on the rezoned land to as low a figure as possible. This took several months and in fact in this regard, including through the intervention and attendance of the Minister, he was successful. Thus by 1999 he had rezoning, he had negotiated down the values for and outgoings on the land and was seeking and had every prospect of getting a ninety-nine year industrial lease. He was on the land with electricity and water connected and was using it for what he wanted yet had only paid approximately half of the purchase price.
>
> In 2000 in Fiji there were violent political actions of a far-reaching nature. Mr. Khan himself unprompted in evidence stated there had been concerns that if a new regime was established in the country then much land might revert to native land. It was clear that he had been concerned that had he been the owner of the land then he might have lost it on very disadvantageous terms. This then was another reason why Nasir Khan wished to put off settlement.
>
> It is supportive of these conclusions that Nasir Khan on the transfer documents and on the application to the Fiji Sugar Corporation for transfer of their licence described himself as a cane farmer and that he would be farming cane on the land. This was simply not true. It was a statement made for the purposes of the sale and transfer of the land. It might be this is a common fiction in land dealing, however, it does illustrate the fact that Nasir Khan was willing to state an untruth on official document for the purposes of progressing his interest in this land.
>
> The Janardhans were repeatedly told that as soon as his loan came through Mr. Khan would complete settlement. He called evidence to show that at various stages loans had been available to him. He blamed Janardhan for wanting to continue cane farming as to why these loans were not taken up and eventually lapsed by running out of time. I do

not accept this explanation. First, the contract itself has no clause stating that settlement is dependant upon the provision of a loan by Mr. Khan. Second, on the occasions that, even on his own evidence, loans were available Mr. Khan made no attempt whatsoever to settle the transfer. I do not believe that a businessman in these circumstances when asked by the Janardhans if he could harvest yet another cane crop would yet again put off settlement. The plain fact is that postponement of settlement suited Nasir Khan.

There is the stark question that had the Janardhans not, through their new solicitors, rescinded the contract when would settlement have taken place?

A further question that must be posed is this. Had the rezoning not been approved what would Mr. Khan have done? The simple fact in law was that he was bound to purchase the land for the sum of $170,000.00. The possibilities of rezoning, of obtaining of a 99 year lease, of an advantageous valuation and setting of outgoings on the land were simply of no relevance to the agreement between Janardhan and Khan.

In my judgment Nasir Khan knew that had Janardhan realised rezoning was taking place and the effect on the value of the land of that rezoning then Khan would have moved quickly to settlement. It was the fact that he correctly assessed that Janardhan did not know about the rezoning and therefore could not know about its consequential increase in value of the land that he could postpone settlement with comfort for so long.

UPHOLDING THE AGREEMENT

7. The Fiji Court of Appeal has upheld the agreement and held the company accountable to Janardhan for the balance of purchase price in the sum of $70,700-00 (seventy thousand and seven hundred dollars) plus compound interest at the rate of 10% per annum. At paragraph [38], the Fiji Court of Appeal (**Janardhan v Khan** [2008] FJCA 82; ABU0122.2005S (7 November 2008) – Judgment of the Fiji Court of Appeal) would rule as follows:

> [38] Finally, given the unmeritorious conduct of Khan as found by the trial judge, and given that Khan delayed settlement for a period of nine years from September 1995 until September 2004 we feel it only fair and just to Janardhan in all the circumstances of the case that we order the appellants to pay to Janardhan compound interest at the rate of 10% per annum on the unpaid balance of the purchase price (the sum of $70,700.00) from 8 December 1995 (the date originally fixed for settlement) until the date of final settlement. We order that such a sum is to be paid by Khan to Janardhan at the time of settlement. Such an order also reflects the application to the facts of this case of the rule in ***Birch v Joy*** ((1852) 3 HLC 565 at 590-591) that, absent express agreement to the contrary, a purchaser who obtains possession of the subject-matter of the contract before the payment of the purchase price must pay interest on the purchase money from the date when he gets possession until the date of payment (see also ***International Railway Co v Niagra Parks Commission*** [1941] 2 All E R 456). We are told that Khan took possession of part of the land around 1997.

8. It is noteworthy that the Honourable Chief Justice, sitting as a single judge of the Supreme Court, in January 2009, stayed the judgment of the Fiji Court of Appeal until the determination of a Petition for Special Leave that was filed by the company. Gates P however did not stay that part of the FCA's judgment regarding compound interest.

FULL COURT OF SUPREME COURT DISMISSES PETITION FOR SPECIAL LEAVE

9. In the event, the full Supreme Court was to dismiss the petition for special leave. The Court then ordered as follows:

> The result therefore is that compound interest ran from 08 December 1995 continuously throughout and does not stop until the Contract is actually settled, which seems to be, for all practical purposes, the actual date the Respondents actually pay the Petitioner.

10. At the time the Supreme Court made the above ruling, the company had already become the registered lessee of a new industrial lease over the same land (it, becoming so on 04 May 2009). The Supreme Court was well cognizant of the fact as obvious in the following observation:

> Since the issue of those proceedings, the new lease was executed, stamped and registered all done on the same day 4 May 2009.

PARTIES ATTEMPT TO SETTLE

11. Following the Supreme Court decision, Janardhan's solicitors contacted Khan Buses' solicitors for settlement of the sale and purchase agreement. Janardhan's solicitors calculated the amount due at $290,275-00. Khan Buses' solicitors had a different argument.

STATUTORY DEMAND & WINDING-UP PROCEEDINGS

12. Meanwhile, on 10 December 2010, Janardhan sent a statutory demand notice pursuant to section 221 of the Companies Act (Cap 247). The company then applied to the High Court for an injunction to restrain the defendant from presenting, advertising, publishing a winding up petition and also sought a declaration that the alleged debt as per the demand notice is not payable by

Khan Buses Ltd. On 24 May 2011, Inoke J dissolved the ex-parte injunction he had granted earlier and observed as follows:

> **CONSIDERATION OF THE ARGUMENT**
>
> [10] In my opinion, the argument totally ignores the reality of the situation. Khan Buses sought specific performance of the agreement for Janardhan to sell the land in question to it. The Court of Appeal granted what it wanted. Khan Buses, by some "dubious means" got itself registered as the lessee of the very same land. It got exactly what it wanted. I do not think that Khan Buses can avoid paying for what it wanted and the Court of Appeal granted on **7 November 2008.**
> [11] The only matter that can be disputed is the amount which is to be paid under the agreement. I therefore think there is no proper basis for stopping Janardhan from proceeding with winding up proceedings in which proceedings the question of quantum can be determined.
> [12] I therefore dissolve the interim injunction granted on 31 December 2010.
> [13] Janardhan has filed an application to strike out the Khan Buses originating summons and I will set that down for hearing.

13. Khan Buses Limited appealed InokeJ's decision to the Fiji Court of Appeal. It its judgment handed down on 05 December 2013, the Fiji Court of Appeal dismissed the appeal and observed as follows at paragraphs [15] and [27]:

> [15] The plaintiff never raised an argument that the debt was wiped off with the issuance of the new lease. The debt was confirmed by the Court of Appeal as well as the Supreme Court. The entire proceedings revolved around the debt not having been settled by the plaintiff since 1995. All these orders now confirmed the plaintiff's obligation to settle the balance payment together with interest at 10% from 8 December 1995 until payment in full. The plaintiff by filing this present action is seeking to litigate again on the same issue that both parties have been litigating from 2004. This litigation ended with the Supreme Court judgment pronounced on 27 August 2010. The plaintiff is seeking a declaration from the High court that the debt is not payable or in the alternative that the debt is disputed when the debt had been confirmed and all disputes with regard to the debt has been resolved.
>
> .....
> .....
>
> [27] The courts have finally resolved the dispute between the plaintiff and the defendant which has been spanning for more than fifteen years (from 1995). The whole dispute relates to a debt. This has now been resolved. There cannot be any more disputes over this debt now. The plaintiff by filing this action is seeking court to inquire in to this debt over and over again.

14. Meanwhile, shortly after Inoke J dissolved the interim injunction on 24 May 2011, Janardhan presented a petition on 31 May 2011 to wind up the company. The petition claims that the company is indebted to Janardhan in

the sum of $294,369-37 plus further interest at the rate of 10% compound interest from 26 November 2010 to the date of final settlement together with costs. An affidavit verifying petition was filed on 02 June 2011 and a Memorandum of Due Compliance filed on 20 July 2011. The hearing of the petition happened on 01 September 2011 however I had withheld a ruling to await the decision of the Fiji Court of Appeal. In fact, the pending decision of the Fiji Court of Appeal was the company's main ground for resisting the winding up petition.

15. However, following the Fiji Court of Appeal's ruling of 05 December 2013, I did, on 29 August 2014, I grant Order in Terms of the petition to wind up the respondent company.

16. The Order was sealed on 01 September 2014.

17. Then on 03 September 2014, the respondent company filed an *ex-parte* summons through its lawyers, Natasha Khan & Associates seeking to stay the execution of the 29 August Order. The application was made pursuant to Order 45 Rule 10 of the High Court Rules 1988 and to section 252 of the Companies Act (Cap 247) and under the inherent jurisdiction of this Court.

INTERIM STAY

18. I did grant interim stay on 03 September 2014 after hearing Ms Khan's *ex-parte* application. I then adjourned the case to 05 September and directed that the Official Receiver and the petitioner be served.

19. On 05 September 2014, I dealt with the matter *inter-partes*. Mr. Roopesh Singh appeared for the petitioning creditor and Ms Khan for the applicant.

20. After hearing both counsel, I ordered that the interim orders granted earlier were to continue until further orders on the condition, as requested by counsel for the petitioning creditor, that the directors of the company hand up a personal undertaking that the assets of the company are not to be dissipated for the duration of the stay. The directors did comply with that condition.

21. In hindsight, that condition is superfluous, considering that section 225[2] forbids the disposition of property of a company once a winding up has commenced and section 227(2)[3] deems winding up to have commenced at the time of presentation of the petition[4].

THE HEARING

22. One of the issues that emerged at the *inter-partes* hearing was whether or not there was a debt. The other point that Ms. Khan argued before me to support a stay was that the agreement between Janardhan and the company was frustrated because Janardhan could not deliver title. However, the courts in the above rulings and judgments have made pronouncements on these issues and if I were to consider them at all, I would be encouraging Ms Khan to re-litigate them.

23. In my ruling on 29 August 2014, I did reproduce in full the Fiji Court of Appeal ruling in **Khan Buses Ltd v Janardhan** [2013] FJCA 130; ABU0035.2011 (5 December 2013). That ruling, in my view, confirmed yet again that the company does owe a debt to the petitioner. I say *"yet again"* because the fact of the company's indebtedness to the applicant had long been settled at the Supreme Court – in my view, as the Fiji Court of Appeal had observed in its ruling I cite the following from the Fiji Court of Appeal ruling:

> **The Judgment**
>
> [16] The learned Judge stated that (quoting from his interlocutory order dated 24 May 2011 which dissolved the interim injunction issued in favour of Khan Busses) the originating summons rested on one main point. "Its counsel argued that because Janardhan could not deliver title, because it is now held by her client, Janardhan was not in a position to settle, therefore he could not specifically perform the sale and purchase agreement. Because Janardhan could not perform the agreement, he was therefore not

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[2] **Section 225** states:
225. In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up , shall, unless the court otherwise orders, be void.

[3] **Section 227(2)** states:
Section 227(2)...the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

[4] **Grower's Principles of Modern Company Law**, 4th ed. 1979 states that:
Winding up is deemed to commence not when the order is made, but when the petition is presented.....

entitled to any payment and it followed that no debt was owed by Khan Buses (plaintiff) to ground the statutory demand against the company".
[17] The learned Judge stated that "the argument totally ignores the reality of the situation. Khan Buses sought specific performance of the agreement for Janardhan to sell the land in question to it. The Court of Appeal granted what it wanted. Khan Buses, by some "dubious means" got itself registered as the lessee of the very same land. It got exactly what it wanted. I do not think that Khan busses can avoid paying for what it wanted and the Court of Appeal granted on 7 November 2008".
[18] ....
[19] ....
[20] Considering the question whether the debt had been genuinely disputed the learned Judge again quoted from his judgment dated 24 May 2011 that "*the Court of Appeal on 7 November 2008 ordered Janardhan "to take all necessary steps required of him to bring about a settlement of the sale and purchase agreement of 11 September 1995, such settlement to take place within 90 days of the date of the handing down of this judgment*". The Court of Appeal also ordered Khan Buses to pay Janardhan "*compound interest at the rate of 10% per annum on the sum of $70,700 from 8 December 1995 until the date of settlement of the sale and purchase agreement dated 11 September 1995*". *That judgment was not disturbed on appeal to the Supreme Court. Whilst these court proceedings were on foot, Khan Buses made it impossible for Janardhan to perform the agreement by having itself registered as the registered proprietor...*".

[21] The learned Judge referred to these proceedings as nothing more than an attempt to drag the matter through the courts again to delay and avoid payment of the purchase price. This litigation must come to an end (Reserve Bank of Fiji v Gallagher [2006] FJCA 37 where Lord Bingham was quoted in Johnson v Gore Woods & Co [2000] UKHL 65; (2001) 1 All ER 481 at 498-9).

[22] ....

[23] ....
[24] The whole of the submission of the learned counsel appears to rest on the issuance of a lease by the Director of Lands to the plaintiff. The learned counsel submitted that this frustrated the performance of the Court of Appeal Judgment. The defendant was not able to perform the sale at the time the notice of winding up was issued, namely, on 10 December 2010. The plaintiff became the owner of this land by virtue of the new lease issued on 4 May 2009. Therefore the learned counsel submitted that the filing of the winding up application was an abuse of the process of court. The learned counsel further submitted that the only way the plaintiff could obtain an injunction to prevent the publication of the winding up petition was by filing an originating summons.
....
[25] The learned counsel for the defendant submitted that the plaintiff has not pleaded a cause of action at all and has abused the process of court by filing a frivolous, vexatious and scandalous action.
[26] From the time of signing the contract the plaintiff had made 39 payments, the last payment being on 2 July 2004 totaling $94,300. In all, the plaintiff had paid $99,300 ($5000 paid as deposit). When the defendant was about to file action in 2004, the

plaintiff had offered to pay the total balance on 12 October 2004 which the defendant had refused to accept. Thereafter the plaintiff had filed a counterclaim and moved for specific performance. The Court of Appeal on 7 November 2008 ordered the plaintiff to pay the balance together with interest at 10% up to the final payment. The Supreme Court on 27 August 2010 confirmed the Court of Appeal Judgment. The Supreme Court had observed the new lease issued to the plaintiff in the judgment. However the Supreme Court reiterated the obligation of the plaintiff to make the balance payment together with interest ordered by the Court of Appeal. (my emphasis)

[27] The courts have finally resolved the dispute between the plaintiff and the defendant which has been spanning for more than fifteen years (from 1995). The whole dispute relates to a debt. This has now been resolved. There cannot be any more disputes over this debt now. The plaintiff by filing this action is seeking court to inquire in to this debt over and over again.

[28] I am of the view that the learned Judge was correct in holding that the originating summons does not disclose a cause of action and striking the same and dismissing it. Hence I find no merit in this appeal and is dismissed with costs fixed at $5000.

THE LAW

24. Section 252 of the Companies Act states as follows:

> Power to stay winding-up
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> 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.

25. 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. 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 (as per Pennycuick V.C. in **Practice Note (Winding Up Order: Rescission)(No. 2) [1971] 1 W.L.R. 757**).

26. The onus clearly is on the applicant to prove to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed. This

means placing material that would sway the court into believing – either that the company is solvent or - is likely to return to solvency.

27. As to what factors to be considered, I reproduce below in full my observations in **Vodafone Fiji Ltd v Ba Provincial Company Holding Ltd** [2013] FJHC 148; Winding Up Action 032.2009 (28 March 2013):

> 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).
- 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. .... 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.

28. I maintain the same position in the above-cited paragraph [8].

ANALYSIS

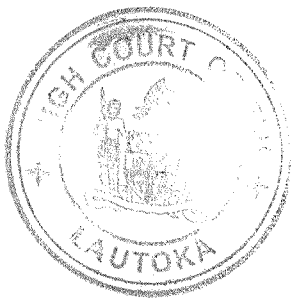
29. In this case before me, the superior courts have put to rest that the company is indeed indebted to the petitioning creditor and that the company must pay Janardhan the balance of the purchase price and compound interest fixed at 10% per annum.

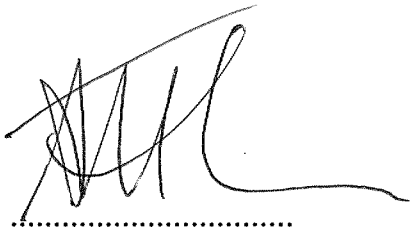
30. The parties have not been able to settle on a figure. Meanwhile, compound interest will continue to mount on the balance of the purchase price. The company has shown no sign before this court of a willingness to settle the amount.

31. From where I sit, it would appear that the company is commercially insolvent. A commercially insolvent company (i.e. one whose balance sheets show a large surplus of assets over its liabilities, but is unable to settle certain debts as they fall due) may still be wound up. **Slade J** in **Re Capital Annuities Ltd [1978] 3 All ER 704, 718** cited the following passage from **Buckley's Companies Act 13th Edn (1957), p. 460**:

> .....A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up."
> (my emphasis)

32. In this case, because of the mounting compound interest on the debt, the delay in settling will only set the company further and further into debt. In the circumstances, I am of the view that public interest demands that I refuse the Orders sought by Mr. Khan as contributor and shareholder of the company. This must mean that Janardhan is at liberty to pursue the Winding Up of the Company with the Official Receiver. The parties of course, are still at liberty to settle the debt before the Official Receiver and in the event that they do there will undoubtedly be a further and better application to this Court for a permanent stay order.





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Anare Tuilevuka
JUDGE
09 January 2014.