

IN THE HIGH COURT OF FIJI
AT SUVA

Companies (Winding Up)
No. HBE 39 of 2015

IN THE MATTER of RITUNA FISHERIES
LIMITED

A N D

IN THE MATTER of THE COMPANIES
ACT (CAP 247)

BEFORE : Acting Master : Vishwa Datt Sharma

COUNSEL : Mr. Shelvin Singh : for the Petitioner,
Mr. Mukesh Nand : for the Respondent,

Date of Hearing : 10th September, 2015

Date of Judgment : 23rd September, 2015

JUDGMENT

INTRODUCTION

1. The Petitioner, **Happies (Fiji) Company Limited** instituted this winding up proceedings against the debtor company **Rituna Fisheries Limited** formerly known as **Corriente Limited** seeking the following orders inter alia;
 - i. *That the company may be wound up by the court under the provisions of the Companies Act,*
 - ii. *That the cost of the Petitioner be taxed and paid out of the assets of the Company,*
 - iii. *That the Official Receiver attached to the court be constituted Provisional Liquidator of the affairs of the Company,*

- iv. *That such other order may be made in the premises as shall be just.*
2. The application is made pursuant to the *Companies Act 1983*.
 3. Reference is also made to *s. 2(1) and (4) of the interpretation Act Cap 247, Rev. 1985*, as well as *Legal Notice No. 89 of 1983* respectively.
 4. The Winding up Petition was served on the Respondent Company who neither opposed the Petition nor filed any affidavit in opposition.

BACKGROUND FACTS OF THE CASE

5. The winding up petition herein is filed on the basis that the debtor company is truly and justly indebted to the Petitioner in the sum of \$95, 734.10 (owing as at 01st July, 2015) being the amount due and owing for goods sold and delivered.
6. The Debtor Company has defaulted or neglected to pay its debt pursuant to *section 220(e)* of the Companies Act.
7. Further, the Company is unable to pay its debt pursuant to *section 221 (c)* of the Act.
8. These proceeding are based on debt owed for goods sold and delivered to the Debtor Company.
9. On 03rd July, 2015, the Petitioner issued a Demand Notice ('s.221 notice') to the Company pursuant to section 221 of the Companies Act ('the Act') for the payment of the debt.
10. The s.221 notice was served on the Company at its registered office situated at GH Whiteside & Co., 211 Ratu Sukuna Road, Suva.

11. Despite service of the s. 221 notice, the Company made no payments.
12. On 30th July,, 2015, the Winding-up Petition ('the Petition') was presented to Court.
13. The Winding-up Petition was appointed to be heard before the Master of the High Court on 10th September, 2015 at 9:00 am, for the Petitioner or his Barrister and Solicitor to appear for the purpose of rule 28 of the Companies (Winding Up) Rules, 1983.
14. The affidavit of Shelvin Singh Verifying Petition was sworn on 31st July, 2015 and filed into court.
15. On Tuesday, 05th August, 2015, Affidavit of Service by Romil Prakash was filed verifying service of the Winding-up Petition.
16. The Petition was duly advertised in the 'Fiji Sun 'of 15th August, 2015, and in "The Republic of the Fiji Islands Government Gazette" (No. 60, Vol. 16) on 21st August, 2015 respectively.
17. On 09th September, 2015, the Petitioner's Memorandum of Due Compliance (MODC) was filed pursuant to rule 28 of the Companies (Winding Up) Rules of the High Court Practice Direction No. 2 of 1986.

THE LAW

18. *Section 220* of the *Companies Act* [Cap 247] ("the Act") states that a company may be wound up if it is unable to pay its debt.
19. The Definition of inability to pay the debt has been defined under *section 221* of the *Companies Act*, where it states that;

"A company shall be deemed to be unable to pay its debts-

- (a) *if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter; neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*
- (b) *if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or*
- (c) *if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company”.*

20. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd* the onus is on the Petitioner to establish that the Company is unable to pay its debt. Justice Pathik stated:

This Petition is brought on the ground that the Company 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.

21. As stated in *section 221 of the Act*, a company is deemed to be *insolvent* (unable to pay its debt) if it fails to pay its debt within 3 weeks of the creditor issuing a statutory demand. Justice Pathik went on to state (in *Arjun* [supra])

No question of statutory demand arose in GLOBE (supra) but the Companies Act Cap. 247 have provided for certain situations where deemed inability to pay debts arises. Even if the company can show that it is able to pay its debts, it will do no good whatsoever. If the situation exists, it is deemed unable to pay its debts whether or not that is in fact correct.

It was so held in CORNHILL INSURANCE PLC v IMPROVEMENT SERVICES LTD and OTHERS (1986 1 WLR p.114) as follows:-

"Held, 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."

ANALYSIS and DETERMINATION

22. In this case, the Counsel representing the Debtor Company has readily admitted the debt and submitted to the Court that the Respondent Company is in a position to pay off the debt to the Petitioner, if granted time.
23. Accordingly, he sought for further time to settle the debt with the Petitioner.
24. No evidence by the Respondent Company was produced to this Court to show and establish that the Respondent Company is in a position to pay the debt, if given time.
25. The Court during the conduct of the hearing of this case, whilst the Counsel representing the Respondent Company made oral submission to the Court, asked Counsel, by when can the Respondent Company settle or fully pay the debt owed to the Petitioner, if granted time?

The answer given was-

'Seek time till the 17th September, 2015 if the Company is able to get the money or has the money will pay.'

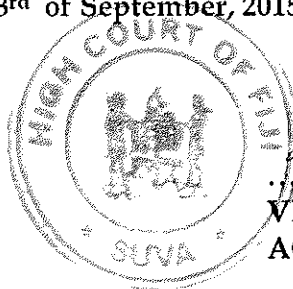
26. If the Counsel representing or the Respondent was serious and genuine about settling this debt, then no doubt the Respondent Company would have liaised with the Petitioner and made arrangements to settle the debt. Reference is made to the Petition at paragraph 8 which reads as follows-
- "Your petitioner has made numerous applications to the Company for payment of its debt, but the Company has completely failed or neglected to pay the balance now owing or to make any reasonable offers to your Petitioner to secure or compound the same."*
27. The Petitioner's Counsel vigorously objected to any time be given to the Debtor Company to settle the debt in question and asked Court to grant the relief sought by the Petitioner.
28. A demand notice was initially served onto the Respondent Company on 03rd July, 2015. The law required the Company to pay the sum so due and the Company had 3 weeks time to pay the debt after service of the statutory demand. The Company neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the Petitioning Creditor.

CONCLUSION

29. The Counsel representing the Respondent Company, Rituna Fisheries Limited formerly known as Corriente Limited has admitted the debt owed by the Respondent Company to the Petitioner.

30. It is insufficient for the Company to assert that the debt will be paid, if granted time.
31. There is no evidence before this court that the Company is solvent or that it is able to pay its debt.
32. The Petitioner has proved to the satisfaction of this court that the Company is unable to pay its debt after the service of the statutory demand in terms of the law.
33. In my conclusion, I make following orders that;
- i. The winding up petition dated 30th of July 2015 filed by the Petitioner is hereby granted.
 - ii. That the Official Receiver be constituted as the Provisional Liquidator of the Company in terms of the procedures provided for within the Companies law.
 - iii. The Petitioning Creditor is awarded a sum of \$500 costs of this proceedings assessed summarily,

Dated at Suva this 23rd of September, 2015.



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VISHWA DATT SHARMA
ACTING MASTER HIGH COURT, SUVA

cc: *Mr. Shelvin Singh of Shelvin Singh Lawyers, Suva.*
Mr. Mukesh Nand of Nands Law, Suva.