IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Winding Up Case No. HBE 28 of 2015

IN THE MATTER of POWER PLANTS & EQUIPMENT LIMITED

AND

IN THE MATTER of THE COMPANIES ACT (CAP 247)

Appearances:	Ms. Kunatuba, U. for the Petitioner Ms. Narayan, S. for the Company
Before:	Acting Master S. F. Bull
Hearing:	17 May 2016
Judgment:	31 August 2016

JUDGMENT

Introduction

1. On 30 June 2015, Sun Insurance Company Limited (the Petitioner), presented a petition for the winding up of Power Plants & Equipment Limited (the Respondent).

2. The Petition is founded on the failure of the Respondent to comply with a demand notice served on it by the Petitioner pursuant to section 221 of the Companies Act, requiring the Company to pay an alleged debt of $7,172.29 for unpaid insurance premiums.

The petition

3. The Petitioner claims that the Company is "truly and justly indebted" to it in the principal sum of $7,172.29, comprised of outstanding premiums under Public Liability Policy No. 100241400PLP000803; Workers Compensation Policy No. 10024140WCP000982, and Motor

Vehicle Commercial Policy No. 10024130MVCP002735, the particulars of which it says, are known to the Company.

4. A demand notice under section 221 of the Companies Act was sent to the Company on 23 September 2014 but the debt remains unpaid.

5. The Petitioner says the Respondent is insolvent and unable to pay its debts and therefore prays:

   (i) that it be wound up;
   (ii) that the Official Receiver be constituted Provisional Liquidator for the affairs of the Company;
   (iii) for indemnity costs to be paid out of the assets of the Company, and;
   (iv) for any other orders the Court deems fit.

The law

6. Section 220 of the Companies Act provides the circumstances in which a company may be wound up by the court. One of these is where:

   (e) the company is unable to pay its debts;

7. The phrase "unable to pay its debts" is defined in section 221 of the Act. The Petitioner relies on paragraph (a) which provides that a company is deemed 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...

8. Upon hearing the petition, the Court may dismiss it, adjourn the hearing with or without condition, make any interim order or any other order it deems fit. (Section 223)

9. There can be no doubt that the Court has jurisdiction to hear a winding-up petition. Section 219 of the Act gives the High Court jurisdiction to wind up any company registered in Fiji. Under Order 59 rule 2 (g), the Master has jurisdiction to deal with applications for the winding up of companies, which this is.

Disputed debt

10. In this case, the Respondent disputes the alleged debt. *Halsbury's Law 4th Edition, 1986 Reissue, Volume 7(2) Companies* at paragraph 1451 (page 1101) states:

> A winding-up order will not be made on a debt which is disputed in good faith by the company[1]; the court must see that the dispute is based on a substantial ground[2]...

11. A finding that there is a genuine dispute to the debt may result in a dismissal or stay of the petition. (*Re Gold Hill Mines* (1883) 23 ChD 210, CA; *Re Compagnie Generale des Asphaltes de Paris, ex p Neuchatel Asphalte Co* [1883] WN 17; *Re Rhodesian Properties Ltd* (1901) 45 Sol Jo 580)

12. In *New Travellers' Chambers Ltd. v. Cheese and Green* 70 L.T. 271, 272, Kekewich J stated:

> Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt – if the question is not a mere question of quantum, but whether there is in fact a debt or not – a petition ought

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1 *Re Gold Hill Mines* (1883) 23 ChD 210, CA; *Re Brighton Club and Norfolk Hotel Co Ltd* (1865) 35 Beav 204; *Re London Wharfing and Warehousing Co Ltd* (1865) 35 Beav 37; *Re Lympne Investments Ltd* [1972] 2 All ER 385, [1972] I WLR 523; *Re a Company (No 003729 of 1982)*[1984] 3 All ER 78, [1984] I WLR 1090; *Re a Company* [1985] BCLC 37; cf*Re Russian and English Bank* [1932] I Ch 663.

2 *Re King's Cross Industrial Dwellings Co* (1870) LR II Eq 149; *Re Imperial Hydropathic Hotel Co, Blackpool Ltd* (1882) 49 LT 147, CA; *Re Great Britain Mutual Life Assurance Society* (1880) 16ChD 246, CA.

> not to be presented, and therefore the court ought to restrain the presentation of the petition.

13. The position in Fiji was stated by the Court of Appeal (per Barker JA) in *Offshore Oil N.L v Investment Corporation of Fiji Limited* Civil Appeal No. 29 of 1984, as follows:

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

14. The rationale seems to be that where a debt is disputed on substantial grounds, the petitioner cannot be a "creditor" in terms of section 221 of the Act, and cannot therefore be said to have standing to present a winding up petition against the Respondent. Further, a debt which is disputed in good faith, and on substantial grounds cannot possibly lead to a conclusion that the Respondent has "neglected to pay." (Section 221 Companies Act; see also *Re Lympne Investments Ltd* [1972] 2 All ER 389; *Mann v Goldstein*[1968] 2 All ER 769, [1968] I WLR 1091; *Re London & Paris Banking Corporation* (1875) LR 19 Eq 444)

15. In *Mann* (supra), Ungoed-Thomas J said at 1096:

> When the debt is disputed by the company on some substantial ground (not just on some ground which is frivolous or without substance and which the court should, therefore, ignore) and the company is solvent, the court will restrain the prosecution of a petition to wind up the company. As Malins V.C. said in *Cadiz Waterworks Co. v. Barnett* (1874) L.R. 19 Eq 182, 196, of a winding-up application:
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> > It is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist – solvency and disputed debt.

16. On the other hand, a winding up order will be made where the debt is established. *Mann* (supra)

Preliminary objection

17. The Respondent questions whether the Petitioner has complied with the requirements of the Companies (Winding-up) Rules, specifically, rules 24 (2), 28 and 30, submitting that non-compliance means that the Petitioner is not entitled to the winding up orders it seeks.

18. Rule 24 provides for service of the petition. Rule 28 requires attendance before the registrar to show compliance with the Rules. Rule 30 requires a petitioner to prepare and file a list of:

    (i) the names and addresses of persons who have given notice of their intention to appear at the hearing of the petition, and;
    (ii) the names and addresses of their respective barrister and solicitor.

19. I have considered the objection on the grounds of non-compliance with the Rules. The Petition has been served. An undisputed affidavit of service is on file, as is a memorandum of due compliance. However, the Petitioner has not filed a list of persons intending to appear at the hearing of the petition. Rule 30 requires that such a list be filed.

20. In *Aleems Investments Ltd v Khan Buses Ltd* ABU0036.2009 (24 January 2011), Marshall JA with whom Calanchini and Wati JJA concurred, stated:

> Once the advertisement has been placed, Rule 30 requires the serving of a list by the Petitioner on the court of those intending to appear. If there are none then a written statement must be served that the list is negative.

21. In this case, the Petitioner has neither filed a list of persons who had shown an intention of appearing at the hearing, nor a statement that the list is negative. Notwithstanding the absence of a list, I do not consider that any prejudice to the Respondent has resulted from this failure on the part of the Petitioner and the objections are accordingly dismissed.

The issue for determination

22. The Company disputes the debt. The issue thereforefor the Court's determination is whether the dispute is made in good faith, and based on substantial grounds. The onus of proof is on the Company. (*In the Matter of ICT International Cotton and Textile Trading Company Ltd and In the matter of the Companies Acts 1963 to 2004* [2004] IEHC 55); In Fiji, see *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd* [1994] FijiLawRp 24; [1994] 40 FLR 263 (11 November 1994) per Pathik J; and *In the Matter of Latu Engineering Works Ltd* Civil Action No. HBE 03 of 2013 at [50] per Corea J)

Onus of proof

23. *Palmer's Company Law* Vol. 3, 15.214 (cited by Pathik Jin *In re Pacific Timber Development Ltd* Winding Up Cause No. 84 of 1998), states:

> ... The onus is on the company "to 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." (*Re Great Britain Mutual Life Assurance Society*1880) 16 Ch.D. 246, 253, per Jessel M.R.)

24. What is not disputed is that the alleged debt arises out of contracts between the Petitioner and the Respondent, for three separate insurance policies, namely: Public Liability Policy No. 100241400PLP000803 (PLP); Workers Compensation Policy No. 10024140WCP000982 (WCP), and Motor Vehicle Commercial Policy No. 10024130MVCP002735 (MVCP). The parties also agree that the policies were for one year each. The PLP was to be from 07 February 2014 to 07 February 2015; WCP from 12 February to 12 February 2014, and MVCP from 21 November 2013 to 21 November 2014.

25. Also in agreement is that the Company had made only one payment for each policy.

26. The dispute begins with what happened after issuance of the policies and payment of the first instalments.

The Respondent's evidence

27. The Respondent says that the Petitioner had provided it with quotations indicating that the value to be covered for WCP was to be $143,847.60 and $1,000,000.00 for PLP. The Company entered into arrangement contracts with the Petitioner based on the said quotations, with all three policies taking effect from February 2014. The Petitioner furnished it with policy certificates for PLP and WCP but not that for MVCP. Upon realising that the PLP cover was not $1,000,000.00 as quoted, but for $100,000.00 only, the Company requested the Petitioner to have the amount rectified. This was not done.

28. Thereafter, it ceased all payments and verbally advised the Petitioner of its intention to cancel all its existing policies. Despite this, the Petitioner issued notices for overdue premiums.

29. The debt is also disputed on the following grounds:

(i) that the Petitioner failed to provide the Respondent with a full Motor Vehicle Policy since the inception of the said policy;

(ii) the failure of the Petitioner to provide the Respondent with the terms and conditions of the policies, with the result that the Respondent was unaware of the terms governing the policies, including the means and methods of calculating the same;

(iii) that the Petitioner failed to provide the correct policy for Public Liability, by issuing an insurance cover for public liability in the sum of $100,000.00 and not $1,000,000.00 which was the amount quoted to it by the Petitioner's agent;

(iv) that the failure of the Respondent to pay premium instalments meant an automatic cancellation of the policy;

(v) that the Petitioner failed to provide it with a policy certificate in respect of the Motor Vehicle Policy such that the terms of payment and the consequences of non-payment are not known in respect of that policy;

(vi) that the Respondent's vehicle registration number HH381 has since been involved in an accident but the Petitioner has denied the claim saying that the premiums had not been paid in full.

(vii) The Respondent is entitled to a refund of $1,700.65 for the Public Liability Policy and Workmen's Compensation since the policies had lapsed after payment of the first instalment. (Address and determine this contention from the contract. i.e., does the contract state this?)

(viii) The Respondent does not owe any money to the Petitioner; rather, it is the Petitioner that owes money to the Company.

30. In reply, the Petitioner says:

(i) The MVCP was for the period from 21/11/13 to 21/11/14;

(ii) Premium payments and policies are based on their respective proposals, not on quotations;

(iii) There is no need to reissue a Policy Certificate for vehicle registration number HH 381 since one had already been issued when the policy took effect on 21 November 2013. On 22 November 2013, the Company made a part payment of the premium, in the sum of $4525.65. The Company would not have so readily made this part payment had it not had a copy of the policy certificate. A copy of the receipt issued by the Petitioner for this payment by the Respondent is annexed.

(iv) The sum of $100,000 for the PLP was accepted by the Respondent. The credit arrangement signed by the Company bore its common seal. Monthly instalment payments in the credit arrangement and in the PLP are exactly the same and show that the Company had known it had entered into a PLP cover for $100,000 and not $1,000,000.

(v) The Petitioner denies that the Company had made numerous requests to rectify the PLP and says that the Company has failed to provide proof of any such requests.

(vi) The Respondent did not withdraw any of the policies or advised the Petitioner that it had withdrawn or cancelled the same. It is a condition of each policy that any cancellation be made in writing. Reference is made to annexures SG 5 and SG 6 of the Petitioner's affidavit in reply, which is a requirement in each of the policies that any cancellation be in writing.

(vii) When the Respondent defaulted in payment of its premiums for all 3 policies, the Petitioner then issued it with three cancellation notices on 24 July 2014. The said notices gave the Company 30 days within which to pay, and stated that a default in payment would result in the cancellation of policies without further notice. The Company was also informed that cancellation in this way would result in the charging of a "time on risk" premium. Copies of the cancellation notices are annexed to the reply affidavit. The deponent says the notices were sent to the Company owing to the default in its payments and not as a result of any cancellation by the Company of its policies, since that was never done.

(viii) Each of the three policies was different in nature and it is the Petitioner's policy that the terms and conditions of each policy are supplied together with a copy of the Policy when the said policy becomes effective. This procedure was followed in respect of the Company's policies.

(ix) The Petitioner's claim is based on the "time on risk" as informed to the Company in the cancellation notices sent to it. Default in payment of premiums will lead to cancellation of policy, however, upon cancellation owing to non-payment of premiums, the insurer charges for protection provided to the policy holder whilst the policy was in force. i.e., from the date of inception to the date of cancellation. It is this premium that is claimed against the Company.

(x) The Petitioner denies any alterations were made to the credit arrangements without the Company's knowledge after these were signed, and without the Respondent's knowledge. The only alterations were in respect to the dates of the instalment payments. The Company's common seal and signature of the Respondent appear next to these alterations.

(xi) A search conducted of the Petitioner's systems has failed to show that the Respondent had filed a claim in respect of an accident to the vehicle whilst the policies were in existence, and in any event, the Respondent has not annexed any evidence in its affidavit to support its allegation that it had filed such a claim.

Analysis

31. I have considered the objections and disputes raised by the Respondent, the affidavit material before the Court, and counsel's submissions. I bear in mind that the burden of proving good faith and substance in the dispute, rests with the Respondent.

32. I find the Respondent's objection on the basis of the difference between the quotation and the insured amount of $100,000.00 for the PLP to be without basis. The Respondent had not only signed, but also affixed its common seal to the credit arrangement agreements for both the PLP but also the WCP. The PLP (Annexure E of the Respondent's affidavit) is clear that the sum insured was for $100,000.00. The Credit Arrangement Agreement is binding contract between the parties, the terms of which form the basis of the alleged debt. Whilst the Respondent says it had requested the Petitioner to rectify the sum it was insured for under the PLP, it has failed to furnish evidence of any such requests.

33. In respect of the MVCP, the Respondent disputes the debt on the basis that it was not furnished with a copy of the policy certificate. I do not consider the dispute on this point to be made in good faith,

substantial, or reasonable. *A fortiori* where it paid an instalment of $4525.65 on 22 November 2013 (Annexure 1 of the Petitioner's reply affidavit) in acknowledgement not only of the existence of the said policy, but also the instalment amounts, and when these fell due.

34. I accept the evidence of the Petitioner that its practice was to provide the insured with the policy, and terms and conditions of the same at the time of inception. It has exhibited copies of the said policies in its affidavit.

35. On the other hand, the Respondent's allegation that its claim under the MVCP had been refused by the Petitioner on the ground of non-payment of premium is not supported by any evidence whatsoever.

36. As to the dispute by reason of the Petitioner unilaterally amending the credit arrangement agreements, I do not consider there to be any merit to this ground. The Company's seal is affixed next to the amendments, showing knowledge and endorsement of the alterations made. In any event, the amendments are only in respect of the due dates for the instalments, which, as is clear from the agreements, commence from the effective date of the policies.

37. The Respondent also disputes the debt on the basis that it had verbally advised the Petitioner of the cancellation of all the three policies. However, it has not adduced any proof of this claim. Secondly, each of the three policies requires that any cancellation be in writing. (See Annexure SG 5, Terms and Conditions of the MVCP, clause 2; Annexure SG 6, Terms and Conditions of the WCP, clause 13, and; Annexure SG 7, PLP clause 10.1)

38. On the other hand however, I feel that there is some merit to the Company's contention that non-payment of premium results in the automatic cancellation of the policy. The Credit Arrangement Agreements for the WCP and PLP state that "non-payment or delay in payment of instalment premium" as set out in the arrangement plan

"will lead to the automatic cancellation of policy" and that "A reminder notice will not be issued." (See Annexures C and D of the Respondent's affidavit)

39. The Petitioner agrees that the credit arrangement agreement is a binding contract. Its affidavit in reply (paragraph 16), avers that "what is binding between the parties is the actual proposal and the credit arrangement agreement when signed by the parties."

40. The clear stipulation in the credit arrangement agreement as to the automatic cancellation of the policy upon non-payment or delay in payment of premium instalment seems to me to point to the existence of some genuine substance to the Company's dispute to the debt, and to there being a reasonable explanation for the non-payment of the debt.

41. The basis of the alleged debt is the cancellation of policies and arrears arising out of this. The Petitioner relies on the requirement in the terms and conditions of the policies to say that cancellation must be in writing.The Respondent relies on the credit arrangement agreement to say that non-payment of instalments results in automatic cancellation.

42. The contradiction between the terms and conditions of the policies and the credit arrangement agreement as to cancellation has not been addressed by the Petitioner.

43. In *Vivras Development Ltd & Others v The ANZ Banking Group Ltd*. Civil Action No. HBC0290 of 2001, Pathik J referred to *Palmers Company Law* Vol 3 15.214 which states:

> "Substantial" means having substance and not frivolous, which disputes the courts should ignore. There must be so much doubt and question about liability to pay the debt that the court sees that there is a question to be decided. The onus is on the

company to "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 proceedings.

44. At this stage, and on the papers before me, I feel that there is a doubt in the debt alleged by the Petitioner, and I am of the view that there is a serious question to be tried. I do not consider the dispute on this ground to be frivolous such that I should ignore it. The Company bears the onus of showing a prima facie case and I think it has done that on this one ground, despite the other grounds not having been made out.

45. Indeed, I am satisfied that the dispute is such that it cannot be said that the Respondent has "neglected to pay" in the context of section 221 of the Companies Act.I do not consider a winding up order appropriate in the circumstances.

Conclusion

46. Section 223 of the Companies Act sets out the orders that the Court may, in the exercise of its discretion, make upon hearing a winding up petition. Having found there to be a genuine dispute to the alleged debt, I dismiss the petition.

Orders:

47. The petition is dismissed, with costs summarily assessed in the sum of $800 to the Respondent.

HIGH COURT OF FIJI
SUVA

S.F. Bull
Acting Master