

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Winding Up Action No. HBE 54 of 2014

IN THE MATTER of QUEST INVESTMENTS  
LIMITED

AND

IN THE MATTER of the COMPANIES ACT (Cap 247)

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Goundar with Mr. Prakash for the Petitioner  
Mr. Shelvin Singh for the Respondent

Date of Ruling : 24<sup>th</sup> July, 2018 @ 9am

**RULING**

*[Winding up Petition filed by the Petitioner filed pursuant to Companies Act, Cap 247]*

### INTRODUCTION

1. On 24<sup>th</sup> September, 2014, **METROMIX CONCRETE (FIJI)** filed a petition to wind up **QUEST INVESTMENTS LIMITED** on the basis that it is unable to pay its debt amounting to \$94,343.01.
2. The Counsel representing the Company informed court that the Company is trying to settle this matter and will not file any Affidavit in opposition.
3. Following are the affidavit evidence filed in these proceedings. These are:
  - (a) The original Affidavit of Faiz Hussein Verifying the Petition filed on 10<sup>st</sup> October, 2014; and
  - (b) The Affidavit of Service 22<sup>nd</sup> October, 2014; and
4. The Petitioner furnished court with written submissions in support of his respective case only

### BACKGROUND

5. The **Petitioner's contention** is that the Company Quest Investment Limited is indebted to the Petitioner in the total sum of \$94,343.01. The Company is unable to pay its debt to the Petitioner and the Petitioner is now seeking an order to Wind up the Company.  
The **Company's contention** is that it is trying to pay the debt owed and that an opportunity be granted to settle the debt.
6. It would be noted from the court records that whenever the case was listed before court, the Counsel representing the Company would state that he is trying to settle the debt and sought for adjournment. Eventually, it became apparent that the debt could not be settled and the matter was then heard.

### THE LAW

7. **Section 220 (e)** of the Companies Act [Cap 247] states that a company may be wound up if it is **unable to pay its debt**.
8. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd [1994] FJHC 219; [1994] 40 FLR 260 (11 November 1994)* 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.

(Emphasis Added)

9. As stated in **section 221 (a)** 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.<sup>1</sup> Justice Pathik went on to state (in *Arjun [supra]*)

No question of statutory demand arose in *GLOBE* (supra) but the Companies Act Cap. 247 has 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."

(Emphasis added)

### ANALYSIS and DETERMINATION

10. It is a **general principle** that a Petition for Winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs (Palmer's Company Law Vol.3. **Metromix Concrete (Fiji)** commenced proceedings by a winding up petition to wind up **Quest Investment Limited** on the basis that it is **unable to pay its debt of \$94,343.01** being the monies due and owing by the Company for services provided to the Company and full particulars are of which are well known to the Company.
11. On 20<sup>th</sup> May 2014, the Petitioner issued a Demand Notice to the Company pursuant to **section 221** of the Companies Act for the payment of the debt.
12. The **Section 221** notice was served on the Company at its registered office situated at Lot 10 Varre East Road, Vatuwaqa.
13. Despite service of the **Section 221 notice**, the Company failed to and made no payments towards the debt.
14. On 25<sup>th</sup> September, 2014, the Winding-up Petition was presented and filed to the High Court.
15. The Winding-up Petition was listed to be heard before the Master of the High Court on Friday 11<sup>th</sup> December, 2014, at 9:00 am, for the Petitioner or his barrister and solicitor to appear for the purposes of rule 28 of the Companies (Winding Up) Rules, 1983.
16. The Affidavit of Faiz Hussein Verifying Petition was sworn on 01<sup>st</sup> October, 2014 and filed on 01<sup>st</sup> October, 2014.
17. On 22<sup>nd</sup> October, 2014, Affidavit of Service by Satya Chandra was filed verifying service of the Winding-up Petition and Affidavit Annexing Affidavit Verifying Petition at the Company's registered office and principal place of business.
18. The Petition was duly advertised in the *Fiji Times* newspaper on Wednesday 12<sup>th</sup> November, 2014, and in the Republic of the Fiji Islands *Government Gazette* (No. 118, Volume 15) on 14<sup>th</sup> November, 2014.



19. On 04<sup>th</sup> December, 2014, the Petitioner's Memorandum of Due Compliance was filed pursuant to rule 28 of the Companies (Winding Up) Rules and the High Court Practice Direction No. 2 of 1986.
20. The **Company had no time disputed** the debt; rather either informed court that he was endeavouring to settle the matter and or the Debtor is still overseas and sought for adjournment time and again. Several opportunities were granted to the Company to settle as sought for but eventually the Petition was heard. He did admit that he did not file any affidavit in opposition.
21. Where the **debt is disputed** (In the current case the Company never admitted or denied the debt but said he was endeavouring to settle), the Company must prove that the dispute is on substantial grounds. Justice Pathik in *Arjun & Sons* [supra] stated:

The Company says that the debt alleged is disputed. **To be able to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds'** *Re Lympne Investments Ltd* [1972] 2 All ER 385).  
(Emphasis added)

22. Justice Pathik had a similar view in *Vivross Development Ltd v Australia and New Zealand Banking Group Ltd* [2002] FJHC 245; HBC0290d. 2001s (15 February, 2002), Justice Pathik stated:

**The question therefore is whether the debt is disputed on substantial** 15.214 and cases cited therein). In Palmer (ibid), on the principals involved it is further stated:

To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. **Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds.** Substantial means having substance and not frivolous, which disputes the court should ignore. **There must be so much doubt and question about the 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 other proceedings.

(Emphasis Added)

23. References are also made to the Statutory Demand Notice and the Petition filed herein that consistently indicate that a debt of **\$94,343.01** is owed by the Company. The Company failed to take any pro-active steps to deal with the demand notice in terms of the debt sought by the Petitioner.
24. Further, the Company's indication to court that the Company was endeavouring to settle the debt and/or current is in itself clear and sufficient evidence of admission of the debt as claimed by the Petitioner herein.
25. I find that the Company has failed to adduce sufficient evidence to establish a *prima facie* case which satisfies this Court that *there is something which ought to be tried either before the court itself or in an action, or by some other proceedings*, let alone any evidence to establish its solvency.

**IN CONCLUSION**

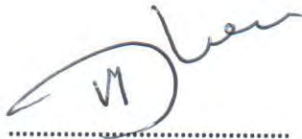
26. There is clear evidence which indicates that a debt of **\$94,343.01** is owed by the Company to the Petitioner. The Petitioner issued a statutory demand for this debt sum which the Company failed to satisfy within 3 weeks of its issue.
27. The Petitioner has complied with the requirements of the Act and the Rules and now seeking an order for Winding up of Quest Investment Limited.
28. The Company has failed to provide any evidence to establish a dispute on substantial grounds as required in terms of the Companies Law. It is insufficient for the Company to simply assert that the debt is disputed. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts.
29. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, Quest Investments Limited is hereby acceded to and I now proceed to make the following orders.

**FINAL ORDERS**

- a. That **QUEST INVESTMENTS LIMITED** is hereby wound up under the under the provisions of the Companies Act.
- b. That the Official Receiver is appointed Provisional Liquidator of the Company.
- c. That the Petitioner's costs is summarily assessed at \$750.00 and ordered to be paid out of the assets of the Company.

DATED AT SUVA THIS 24<sup>th</sup> DAY OF July, 2018



  
.....  
Master  
VISHWA DATT SHARMA

cc: *Lateef & Lateef, Suva*  
*Parshotam & Co, Suva*  
*Messrs O'Driscoll & Co, Suva*