

IN THE HIGH COURT OF FIJI
AT SUVA

Companies (Winding Up)
Action No. HBE 56 of 2015
HBE 19 of 2015

IN THE MATTER of BLIGH WATER SHIPPING
LIMITED

A N D

IN THE MATTER of THE COMPANIES ACT (Cap 247)

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Ms. Lo : for the Petitioner
: Ms. Vasiti : for the Respondent

Date of Judgment: 30th July, 2018 @ 9am

RULING

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

INTRODUCTION

1. On 04th September, 2015, **PACIFIC ENERGY (SOUTH WEST PACIFIC) LIMITED** formerly called BP (South West Pacific) Limited filed a petition to wind up **BLIGH WATER SHIPPING LIMITED** on the basis that it is unable to pay its debt amounting to **\$270,530-62**.
2. The Respondent Company admits the Debt claimed by the Petitioner but needs sometime to pay off the Debt.
3. The Counsel representing the Company informed court that the Company entered into a Deed of Settlement with the Petitioner dated 16th October, 2015. The Respondent agreed to pay \$2,500 per week beginning on 16th October, 2015. Also it was agreed in the Deed that the Respondent's debt would be paid off by 30th November, 2015. The Respondent intended to do so. Unfortunately, the Respondent's ability to refinance and pay off its debts is limited by its still yet precarious financial status. Lastly, the Respondent's financier is ready to finance the Respondent subject to a period of financial stability.
4. The Respondent apprised court that a Winding up Petition against the Company was previously filed by Messrs Jamnadas & Associates on 13th May 2015 and the same was then ongoing in court for determination. The respective file referenced **HBE 19 of 2015** has been perused by me and I confirm that the matter was settled, withdrawn and accordingly struck out on 11th February, 2016.
5. The Petitioner and the Respondent Company furnished court with written submissions in support of their respective cases.

BACKGROUND

6. The **Petitioner's contention** is that the Company **BLIGH WATER SHIPPING LIMITED** is indebted to the Petitioner in the total sum of **\$270,530-62**.
7. The Company is unable to pay its debt to the Petitioner and the Petitioner is now seeking an order to Wind up the Company.
8. The **Company's contention** is that it is trying to pay the debt under the Deed arrangement and that an opportunity be granted to settle the debt rather than proceed with the Winding Up.
9. Eventually, it became apparent that the debt could not be settled as per the Deed arrangement and therefore the matter proceeded to hearing.

THE LAW

10. **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**.

11. 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)

12. 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.¹ 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

13. 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). **PACIFIC ENERGY (SOUTH WEST PACIFIC) LIMITED** commenced proceedings by a winding up petition to wind up **BLIGH WATER SHIPPING LIMITED** on the basis that it is **unable to pay its debt** of \$270,530-62 being the monies due and owing by the Company for the sale and supply of Petroleum Products by the Petitioner whereof are known to the Company.
14. On 30th April, 2015, the Petitioner served a Demand Notice to the Company pursuant to *section 221* of the Companies Act for the payment of the debt.
15. The *Section 221* notice was served on the Company at its registered office situated at 1-2 Matua Street, Walu Bay, Suva.

16. Despite service of the **Section 221 notice**, the Company failed to and made no payments hereafter towards the debt.
17. On 04th December, 2015, the Winding-up Petition was presented and filed to the High Court.
18. The Winding-up Petition was listed to be heard before the Master of the High Court on 31st August, 2016, 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.
19. The Affidavit of Lusiana Tokalau Verifying Petition was sworn on 08th December, 2015 and filed on 08th December, 2015.
20. On 15th December, 2015, Affidavit of Service by Anirudh Kumar 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.
21. The Petition was duly advertised in the *Fiji Times* newspaper on Friday 27th May, 2016, and in the Republic of the Fiji Islands Government Gazette (No. 40, Volume 17) on 27th May, 2016.
22. On 22nd June, 2016, 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.
23. The **Respondent Company had no time disputed** the debt as claimed; rather either informed court that he was endeavouring to settle the debt and had entered into a Deed. The Respondent Company had several opportunities to fully settle the Debt as per the Deed arrangement as sought for but eventually upon non-payment, the Petition proceeded with the Winding up Petition. The Respondent Company had admitted that he owed the Debt.
24. Where the **debt is disputed** (In the current case the Company admitted the debt but said he was endeavouring to settle under the Deed arrangement), 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)

25. 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)

26. References are also made to the Statutory Demand Notice and the Petition filed herein that consistently indicate that a debt of \$270,530-62 is owed by the Respondent 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.
27. 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.
28. 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. There is none, since the Respondent Company has never denied the Debt but confirmed in its Answering Affidavit owing the Debt and that the Company solvent and trying its best to settle the Debt it inherited.

IN CONCLUSION

29. There is clear evidence on the admission of the Respondent Company that the debt of \$270,530-62 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. Further, the Respondent Company also did not abide by the Deed arrangement to pay off the Debt.
30. The Petitioner has complied with the requirements of the Act and the Rules and now seeking an order for Winding up of BLIGH WATER SHIPPING LIMITED.
31. The Respondent Company has admitted the Debt but 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 admitted but seek time to pay the Debt as per the Deed arrangement. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts. The Respondent Company has simply not adhered to the Deed arrangement and this court is unable to give any more time to the Respondent Company.


32. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, **BLIGH WATER SHIPPING LIMITED** is hereby acceded to and accordingly, I now proceed to Wind up the Respondent Company, **BLIGH WATER SHIPPING LIMITED** and make the following final orders.

FINAL ORDERS

- a. That **BLIGH WATER SHIPPING LIMITED** is hereby wound up 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 \$500.00 and ordered to be paid out of the assets of the Company.

DATED AT SUVA THIS 30th DAY OF July, 2018




Master
VISHWA DATT SHARMA

cc. *Howards Lawyers, Suva*
Lajendra Law, Suva