

**IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION**

WINDING UP ACTION NO.: HBE 22 of 2019

**IN THE MATTER OF BALTHAN  
(WESTERN) LIMITED** having its regarded  
office at Balthan International (Fiji) Ltd, Suite  
A1 & A2, Raiwaqa Shopping Complex,  
Grantham Road, Raiwaqa.

**AND**

**IN THE MATTER of THE COMPANIES  
ACT 2015**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF** : Ms N Choo [R. Patel Lawyers]  
**DEFENDANT** : Mr G O'Driscoll [O'Driscoll & Co]  
**JUDGMENT OF** : Acting Master Ms Vandhana Lal  
**DELIVERED ON** : 03 October 2019

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**JUDGMENT**

[Winding Up by a Creditor of a Company]

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1. This is an application by Narseys Plastic Industries Limited [the Applicant] pursuant to Section 513(c) of the Companies Act 2015 to wind up Balthan (Western) Limited [the company] on the basis of insolvency. The presumption of insolvency arises from the Company's failure to comply with a statutory demand dated 20 August 2018.
2. The quantum of debt claimed to be owed is \$30,819.01 being balance amount due and owing comprising of principal and interest for the purchase of plastic bags and packaging between July 2012 and August 2013.

3. The winding up application was initiated on 21 March 2019.

On 02 May 2019 the company was granted leave to file and serve its opposition.

The company's ground of opposition can be summarised as follows:

- i. On August 2018 the Applicant served on the company a statement which showed a sum of \$14,379.31 as outstanding whereas the statutory demand so served is for a sum of \$30,819.01.*
  - ii. The first six items on the statement was statute barred when the demand was issued as it is over 6 years when the invoice was issued.*
  - iii. At the time of filing the application further items on the statement was also time barred.*
  - iv. Only two invoices remain outstanding totalling a sum of \$2,457.38.*
4. In reply, the applicant on 30 May 2019 filed an Affidavit of one Umang Patel a Financial Controller with the Applicant.
  5. As mentioned earlier the Affidavit in Support outlines that the sum of \$30,819.01 is the balance amount due and owing for sale of plastic bags and packaging between July 2012 and August 2013.

On 20 August 2018 the Applicant served the company a demand for said sum.

Despite service the company failed to secure the debt. According to the Applicant, the company is unable to pay its debts.

6. In reply to the opposition the Applicant states as follows:

- i. *The debt owed relates to an overdue account number 0044 and account under which the company continued to make purchase till 05 August 2013;*
- ii. *The debt of \$30,819.01 includes interest rate at 1.5% on unpaid invoices from July 2012;*
- iii. *The said debt accumulated from July 2012 with payment made latest on 22 June 2016;*
- iv. *The statement referred by the company shows the principal debt minus the interest rate.*
- v. *Invoices outstanding reflects the 1.5% interest incurring on unpaid invoices on a monthly basis. The company is said to be privy to the documents and aware of the interest;*
- vi. *The company via an email dated 19 April 2016 gave an undertaking to settle the debt. A sum of \$1,000 was paid for the old debt whereas the company was allowed to make further purchase.*

In their Affidavit in Reply annexure UP 1 are the invoices, an account of which is the last item in the annexure.

The invoices are from 04 July 2012 till 05 August 2013.

7. Section (4) (2) of the Limitation Act reads:

*"An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action".*

8. Section 12 (3) of the Limitation Act reads:  
*"where any right of action has accrued to recover any debt or other liquidated pecuniary claim or .....and the person is liable or accountable thereof acknowledges the claim or makes any payment in respect; the right shall be deemed to have accrued on and not before the date of the account or the last payment....."*
9. Section 13 required such acknowledgment to be in writing and signed by the person making the acknowledgment.
10. In Annexure UP2 of the Affidavit in Reply is annexed an email from Graeme who on the second paragraph acknowledges debt with the Applicant and mentions the payment has been increased from \$600 per payment to \$1,000 since 2015. The said email is of 19 April 2016.
11. There is sufficient evidence to suggest the debt as claimed by the Applicant was acknowledged by the company as late as July 2016. Hence the right to claim for said invoices is deemed to have accrued from 20 July 2016.
12. I find that the claim for the monies outstanding as per the statutory demand not to be statute barred.
13. For this reason the issue of limitation period raised by the company's counsel is dismissed.
14. Any other dispute concerning the debt raised by the company in its Affidavit in Opposition cannot be entertained for following reasons:
  - *The company did not take the steps of applying to set aside the statutory demand;*
  - *The company did not seek leave pursuant to section 529 of the Companies Act to oppose the winding up on a ground it may have*



*relied upon in an application to set aside the statutory demand, such as a genuine dispute or an offsetting claim.*

15. The test for solvency is found in section 514 (1) of the Companies Act which reads"  
*"A company or foreign company is solvent if, and only if, it is able to pay all the debts, as and when they become due and payable".*

Sub section 2 in turn states that;

*"A company or foreign company which is not solvent is Insolvent".*

16. A company is said 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 \$10,000 or such other Prescribed Amount then due, has served on the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due ("Statutory Demand") and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or*
- (b) *if during or after a period of 3 months ending on the day on which the winding up application is made—*
- (i) *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;*
- (ii) *a Receiver or Manager has been appointed, of Property of the Company was appointed under a power contained in an instrument relating to a Floating Charge on such Property; or*
- (iii) *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 must take into account the contingent and prospective liabilities of the Company.*

17. There is a presumption of insolvency by reason of the company's failure to comply with the statutory demand. Hence the onus is on the company to prove that the company is solvent.
18. Hayne J. in **Commonwealth Bank of Australia v. Begonia Pty Limited** [1993] 11 ACLC 1075 at 1081 stated that to discharge the onus the Court should ordinarily be presented with "the fullest and best" evidence of its [company's] financial position.
19. Weinberg J. in **Ace Contactors & Staff Pty Limited v. Westgarth Developments Pty Limited** [1999] FCA 728 (1 June 1999) laid out the relevant legal principle which it thought it was established by authorities governing operation of Section 459 of the Australia Corporations Law:
  - i. *The Respondent is presumed to be insolvent and as such bears the onus of proving its solvency; Elite Motor Campers Australia v. Leisureport PT4 Limited (1996) 22 ACSR per Spender J; .....*
  - ii. *In order to discharge that onus the court should ordinarily be presented with the "fullest and best" evidence of the financial position of the respondent; Begonia [Supra].*
  - iii. *Unaudited accounts and unverified claims of ownership or valuation were not ordinarily probate of solvency. Nor are bad assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared; Commissioners Simionato Holdings Pty Ltd [1997] FCA 125 .....*

- iv. *There is a distinction between solvency and is a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due must be considered in determining solvency: Rees v. Bank of New South Wales [1964] HCA 47; [1964] III CLR 210.....;*
- v. *The adoption of a cash how test for solvency does not mean that the extent of the company's assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account: Sandwell v. Porter [1966] HCA 28; [1966] 115 CLR 666 at 671 per Barwick C.J. ....;*
- vi. *The question of solvency must be assessed at the date of the hearing. However this does not mean that future events are to be ignored: Leslie v. Howship Holidays Pty Limited [1997] 15 ACLL 459.;*
- vii. *It is not abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, or because there may be an alternate means available to the applicant to vindicate its rights: Elite Motor Campers Australia v. Leisureport Pty Limited [Supra].*

20. There is no evidence before this court to say the company is solvent and displace the statutory presumption of insolvency.

21. For these reasons, I make orders for the winding up of Balthan (Western) Limited.

The said company is wound up with the official Receiver being appointed as a provisional liquidator of the company.

The company shall pay the applicant cost summarily assessed at \$1,000.00.



  
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**Vandhana Lal [Ms]**  
Acting Master  
At Suva.