RE NAINASO I RA HOLDINGS LTD (HBF0005 of 2012L)

HIGH COURT — COMPANIES JURISDICTION

TUILEVUKA M

27 November 2012, 13 February 2013

Corporations — winding up — practice and procedure — locus standi — winding up order made in respect of company on basis of failure of substratum — petitioner for winding up order not incorporated at time of application for winding up order — petitioner not contributor, shareholder or creditor of company — petitioner competitor of company — whether Court has jurisdiction to set aside winding up order under O 19 r 9 — whether appropriate to set aside winding up order — company applies to set aside winding up order — High Court Rules O 19 r 9 — Companies Act ss 220(c), 252 — Companies (Winding Up) Rules r 203; — High Court Rules O 1 r8, O 19, r 9

The respondent company was established by certain members of the mataqali Nainaso as the corporate vehicle for a tourism investment project. A rival faction of the mataqali Nainaso established the petitioner company as a competitor of the respondent.

The petitioner purported to apply to the High Court of Fiji to wind up the respondent on the basis that its substratum had failed and that it had not commenced business a year after incorporation. The winding up application was filed one month before the petitioner was incorporated and the petitioner was not a contributor, shareholder or creditor of the respondent. The application for the winding up order was served at the respondent's registered address, but the respondent did not receive the application because it had relocated its corporate offices following severe flooding. The winding up order was made in the absence of any representation by the respondent.

The respondent applied to set aside the winding up order pursuant to O 19 r 9[@fffd]of the[@fffd]*High Court Rules 1988*. It was accepted that the respondent had no standing to apply for a stay of the winding up order under the *Companies Act 1983* or the *Companies (Winding Up) Rules[@fffd](Cap 247*).

Held –

(1) A company subject to a winding up order may apply to set aside that order under O 19 r 9[@fffd]of the[@fffd]*High Court Rules 1988* if it can establish that neither the *Companies Act* nor the *Winding Up Rules* make provision for the issues relevant to set aside the application.

(2) The winding up order should be set aside under O 19 r 9 of the *High Court Rules 1988* because of the serious issues regarding the petitioner's *locus standi*, capacity to present the petition, *bona fides* in presenting the petition and the possible vexatious conduct of the members of the mataqali Nainaso behind the petitioner which may amount to an abuse of process.

Winding up order set aside.

Case referred to

Aleems Investments Ltd v Khan Buses Ltd [2011] FJCA 4; *BW Holdings Ltd v Sinclair Knight Merz Fiji Ltd* [2008] FJCA; *Covec (Fiji) Ltd v Singh* [2008] FJCA 81; *Fiji Sugar Corporation Ltd v Ismail* [1988] FJCA 1; [1988] 34 FLR 75; *Re German Date Coffee Co* (1882) 20 ChD 169; *Re Red Rock Gold Mining Co Ltd* (1889) 61 LT 785; *Wearsmart Textiles Ltd v General Machinery Hire Ltd* [1998] FJCA 26, cited.

Charles Cadiz Waterworks Co v Barnett (1874) LR 19 Eq 182; *Pembinaan Lian Keong Sdn Bhd v Yip* [2005] Part 2 Case 4 [HCM]; *Re Amalgamated Syndicate* [1897] 2 Ch 600; *Re Baku Consolidated Oilfields LTD* [1944] 1 All ER 24; *Re*

Eastern Telegraph Co Ltd [1947] 2 All ER 104; *Re Kitson & Co Ltd* [1946] 1 All ER 435; *TCI Hotels (Lanka) Ltd v Marina Overseas Corporation*, considered.

Charles Forte Investments Ltd v Amanda [1963] 2 All ER 940, explained.

Dallas Fort Worth International Airport v Co 261 SW 3d 378, applied.

Samuel K. Ram for the Petitioners.

Rayawa for the Respondent Company.

Tuilevuka M.

INTRODUCTION

[1] Whether or not the High Court Rules 1988 are applicable in winding up proceedings is the question that arises in this case? Can a winding up order granted pursuant to s 220(c) of the Companies Act (Cap 247), in the absence of the company, be set aside under **Order 19 r 9 of the High Court Rules 1988** if the company is able to show:

- (i) merit in its argument that it should be allowed to continue to operate.
- (ii) some serious doubt as to the capacity and locus of the petitioner in these proceedings.

[2] The company in question is Nainaso *i* Ra Holdings Ltd (**'N*i*RHL'**). It was set up to be the vehicle of some tourism investment project of the members of the mataqali Nainaso. The petitioner is Mataqali Nainaso Holdings Ltd (**'MNHL'**). MNHL was incorporated by a rival faction of the mataqali Nainaso to take over N*i*RHL amidst allegations that the latter was not truly representative of the interests of the mataqali. The petition in fact alleges that N*i*RHL's substratum has failed and that it has not commenced business more than a year after incorporation.

[3] An Order to wind up N*i*RHL was granted when the company failed to appear in Court to oppose the petition. The Order was made upon evidence of service and that the petition had been duly advertised and gazetted. Shortly after the Order was granted, N*i*RHL filed an application under s 252 of the Companies Act (Cap 247) and under various Orders of the High Court Rules 1988 to either stay the winding up order or set it aside. The affidavit in support of the application states inter alia that N*i*RHL had been unaware of the proceedings for some time as the petition was posted onto it's registered post in Nadi. That service-by-post would have happened during or shortly after the floods that hit Fiji in early 2012. At that time, N*i*RHL, whose premises was amongst the many businesses that were affected by the floods, had relocated office to Suva. The company was not checking its post box in Nadi regularly. They did finally check the post in due course only to find the petition as well as a copy of the sealed Winding Up Order in the box.

[4] I have no reason to doubt that explanation. But the legal issue is, given that a company (such as N*i*RHL) does not have locus to apply under s 252 of the Companies Act to stay the winding up order[1], can the company apply anyway under the High Court Rules to set aside the winding up order upon grounds being shown?

1. [1] Section 252 says as follows:
Power to stay winding-up
252.-(1) The court may, at any time after an order for winding-up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the

[5] It is important to highlight that, in one of the many affidavits filed for and on behalf of N*i*RHL, it was uncovered that, at the time of its petition, MNHL was not even yet incorporated. The company was formally incorporated a month after it presented its petition. There is also no material before me to suggest that MNHL is either a contributory, a shareholder and/or a creditor of N*i*RHL.

[6] The policy reason why a wound-up company does not have locus to apply under s 252 to stay the winding up order against it is stated by Pennycuick V.C. in his **Practice Note (Winding Up Order: Rescission) (No 2) [1971] 1 WLR 757.**

> After discussion with other judges of the Companies Court, I have the following further statement to make with regard to applications to ***discharge*** winding up orders: see **Practice Note (Winding up Order: Rescission) [1971] 1 WLR 4.** Applications to rescind winding up orders will henceforward only be entertained if made (a) by a creditor, or (b) by a contributory, or (c) by the company jointly with a creditor or with a contributory. In the case of an unsuccessful application the costs of the petitioning creditor and of the supporting creditors will normally be ordered to be paid by the creditor or the contributory making or joining in the application. ***The reason for this direction is that if the costs of an unsuccessful application are made payable by the company, they fall unfairly on the general body of creditors.*** (my emphasis)

[7] Mr Rayawa accepts the above. He argues however that no such issue of locus would arise if N*i*RHL were to apply to set aside the winding up order pursuant to the High Court Rules and on the inherent jurisdiction of this court. He argues that the winding up order in this case is akin to a default judgement as it was made in his client's absence in breach of the principles of natural justice and considering the lack of proper notice to his client in the circumstances of this case.

[8] In response to my query for support to that submission, Mr Rayawa draws attention to **Order 1 r 8** of the **High Court Rules 1988** and **Rule 203** of the Companies (Winding Up) Rules (Cap 247). Order 1 r 8 (see below) narrowly limits the application of the High Court Rules.

> **Order 1 r 8** of the High Court Rules 1988 provides that:
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> Where, for the time being, by or under any law in force in Fiji, specific provision is made for regulating the practice and procedure in, or in relation to, any particular form of proceedings in the High Court, these Rules shall not apply thereto except in so far as any such provision applies, incorporates, or imports the application of these Rules, whether by express reference thereto or by reference to the rules of the Court of, or the practice or procedure in, the High Court.

[9] However, **Rule 203** (see below) stipulates that the High Court Rules will apply in winding up proceedings if a situation arises for which neither the Companies Act nor the Companies (Winding Up) Rules make provision.

> In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other

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satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

(2) On any application under this section, the court may, before making an order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar for registration.

provision is made by the Act or these Rules, the practice, procedure and regulations in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court.

[10] Applying r 203, the questions I ask are:

• (i) what issues have arisen in this case?

y (ii) whether the Companies Act and/or the Companies (Winding Up) Rules do make provisions for these issues?

• (iii) if not, whether there is any reason why the rules and practice of the High Court should not then be applied to resolve these issues?

ISSUES

[11] The following passage from *Dallas Fort Worth International Airport v Cox,* 261 SW 3d 378 (Court of Appeals of Texas at Dallas, 2008) is appropriate to foreshadow the main issues in this case before me:

> A plaintiff has standing when he is personally aggrieved, regardless of whether he acts with legal authority; a party has capacity when it has legal authority to act, regardless of whether it has a justifiable interest in the controversy.

[12] There are two principal issues. First, because MNHL was not incorporated when it presented its petition – whether MNHL had legal capacity to even institute these proceedings? If not, then was the winding up order granted on the petition therefore irregular? If so, can the Order be set aside under the High Court Rules? Second, its lack of incorporation at petition time aside, whether or not the company, as a legal entity separate from its members (it was incorporated a month after petition), is at all truly aggrieved by N*i*RHL's (alleged) failure to commence business and failure of substratum?

[13] Flowing from that, did MNHL even have locus or standing to present the petition in the first place? If not, was the petition therefore an abuse of process considering that MNHL is neither a contributory nor a member nor a creditor of N*i*RHL?

[14] I ask all the above questions in the context of the following:

• (i) there is no allegation that *Ni*RHL is insolvent.

• (ii) MNHL was incorporated to take over and assume the very substratum of N*i*RL (i.e., to, somehow, acquire the same native lease that is already issued to N*i*RHL and to build and operate on it the hotel). Essentially then, the purpose of MNHL coming into existence is to take over from N*i*RHL as the vehicle for the mataqali project.

• (iii) the petition therefore would appear to be rather self serving for MNHL.

• (iv) the mataqali members are evenly divided on whether or not N*i*RHL is truly representative of mataqali interests.

• (v) whether the issues are resolvable by other means.

DISCUSSION

[15] In Fiji, a company which is defunct in the sense that it has not carried on business for a year may either be struck off the register of companies by the Registrar of Companies or it may, by petition, be wound up by the Court. The Registrar's powers are set out in s 340 of the Companies Act[2]. The Court's power

2. [2] Registrar may strike defunct company off register:

340.-(1) *Where the registrar has reasonable cause to believe* that a company is not carrying on business or in operation, he may send to the company, by post, a letter inquiring whether the company is carrying on business or in operation.

is set out under s 220(c) of the same Act[3]. Clearly, one is a matter of administrative discretion whilst the other, a case of judicial discretion. The factors that the Registrar must consider under s 340 will obviously be quite different from the concerns that would drive a petitioner under s 220(c).

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(2) If the registrar does not, within 30 days of sending the letter, receive any answer thereto, he shall, within 14 days after the expiration of the said period of 30 days, send to the company, by registered post, a letter referring to the first letter, and stating that no answer thereto has been received, and that, if an answer is not received to the second letter within 30 days from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.

(3) If the registrar, either receives an answer to the effect that the company is not carrying on business or in operation, or does not, within 30 days after sending the second letter, receive any answer, he may publish in the Gazette, and send to the company, by post, a notice that, at the expiration of 3 months from the date of the notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved:

Provided that the registrar shall not be required to send the letters referred to in subsections (1) and (2) in any case where the company itself or any director or secretary of the company has requested him to strike the company off the register or has notified him that the company is not carrying on business.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe, either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of 6 consecutive months, the registrar shall publish in the Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (3).

(5) At the expiration of the time mentioned in the notice, the registrar may, unless cause to the contrary is previously shown by the company, or the liquidator, as the case may be, strike the name of the company off the register, and shall publish notice thereof in the Gazette and, on the publication in the Gazette of this notice, the company shall be dissolved:

Provided that-

(i) the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and

(ii) nothing in this subsection shall affect the power of the court to wind up a company the name of which has been struck off the register.

(6) *If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court, on an application made by the company or member or creditor before the expiration of 10 years from the publication in the Gazette of the notice aforesaid, may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register and, upon a certified copy of the order being delivered to the registrar, for registration, the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may, by the order, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.*

(7) A notice to be sent under this section to a liquidator may be addressed to the liquidator at his last known place of business, and a letter or notice to be sent under this section to a company may be addressed to the company at its registered postal address or, if no postal address has been registered, to the care of some officer of the company, or, if there is no officer of the company whose name and address are, known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

3. [3] 220. A company may be wound up by the court, if-

(a) …….

(b) …….

(c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

[16] In the few cases I have stumbled upon, the petitioner who alleges that a company is defunct and whose substratum has failed – and who seeks a winding up order on that basis is usually a shareholder who is motivated by a desire to recover his or her share of the company's assets. A creditor who fears that the inactive company may quietly dissipate its assets and avoid paying its debt may also petition under s 220(c) (though usually, they apply under s 220(a) following a demand notice).

[17] The High Court of Malaysia in *Pembinaan Lian Keong Sdn Bhd v Yip* [2005] Part 2 Case 4 [HCM][4] (as per **Vincent KK NG J**) observed as follows:

> All petitions for winding-up of companies under the Act could broadly be divided into only two categories, namely: petitions instituted by shareholders of a company, or petitions by creditors of the company.

[18] The same observations may be made for petitions under Fiji's Companies Act (Cap 247). In **Re Amalgamated Syndicate [1897] 2 Ch 600** Vaughan Williams, J. said:

> I do not think the court could, or would if it could, make a winding –up order merely because there was nothing left to be done besides dividing the surplus assets and adjusting the rights of the shareholders. But it is said that 'just and equitable' that the court should in this particular case take upon itself to wind-up the company, because the principal business which the company was formed to carry on has come to an end, and the directors, instead of setting about to divide the assets, are contemplating entering on fresh business.

[19] In **Re Baku Consolidated Oilfields Ltd [1944] 1 All ER 24**, Bennet J said as follows at 25:

> In my judgment it is clear on the facts that the purpose for which this company was originally formed has gone. It can never carry on the business it was formed to carry on. That seems to me to be clear. It also seems to me to be clear that majority of shareholders have no right to compel a minority to embark upon any other undertaking.
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> and at page 26:
>
> In my judgement, **the creditors and shareholders** of this company who now want to have their share of the company's assets paid over to them have reached the time, the company being no longer able to carry on, when they are entitled to ask the court to make an order for the winding up of the company. For these reasons, I think the usual compulsory order must be made.

[20] In **ReEastern Telegraph Co Ltd [1947] 2 ALL ER 104 at 109**, Jenkins J clarifies the position thus:

> The second ground is that it is just and equitable that the company should be wound-up because its substratum has gone. On this branch of the case I was referred to a number of authorities. I do not think that I need refer to them in any detail. The first was the well-known case of In r**e Haven Gold Mining Co (1882) 20 Ch D 151.** The principle laid down in that case is, I think, sufficiently stated in the first paragraph of the headnote:
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> *Where the court is satisfied that the subject-matter of the business for which a company was formed has substantially ceased to exist, it will make an order for winding up the company, although the large majority of the shareholders desire to continue to carry on the company.*
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> That, I take it, means that, *if a shareholder has invested his money in the shares of the company on the footing that it is going to carry out some particular object, he*

4. [4] [4] (see http://www.ipsofactoj.com/highcourt/2005/Part2/hct2005(2)-004.htm).

cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation. It is a matter on which the individual consent of every person who will be effected by the change of plan ought to be obtained.

[21] In Re Red Rock Gold Mining Co Ltd, (1889) 61 LT 785, the company in question had been formed in particular to purchase and work the Red Rock Mine. The company's memorandum of association however also mentioned further general objects namely:

> To purchase and otherwise acquire mines and other properties in the colony of New South Wales and elsewhere, and generally to carry on the business of milling and mining in all its branches.

[22] In the year after its formation, the directors reported that the Red Rock Mine was no longer viable. They then suggested that the company either go into liquidation or employ the capital in other ways. At a shareholders meeting, the majority, by resolution, requested the directors to find some suitable mode of investing the money. On a minority member's petition, Kay J held at page 787 that the main object for which the company was formed had failed. Although there were large subsidiary powers in the memorandum of association, these were disregarded and a winding—up order was granted.

> The principle of this court is, that where an association is formed for a particular purpose, it does not matter that it has large powers in addition to that particular purpose; if that particular purpose fails, any shareholder has a right to say 'Put an end to it, pay me my money'.
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> (see also Re German Date Coffee Co **(1882) 20 ChD 169).**

[23] In contrast, in Re **Kitson & Co Ltd [1946] 1 All ER 435**, Lord Greene, MR, said at 438:

> It must be remembered in these substratum cases that there is every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject-matter and a company which is formed with wider and more comprehensive objects.

[24] In *T.C.I. Hotels (Lanka) Ltd v Marina Overseas Corporation* (http://www.lawnet.lk/docs/case_law/slr/HTML/2000LR2V367.htm), Jayasinghe J of the Sri Lankan Court of Appeal, in revision from an Order of the District Court of Colombo, said:

> … the mere fact that business had not commenced within a year by itself is not ground for a Court to order winding up and the Court must ascertain whether there was some good reason for the failure. That another consideration in the matter of an order for winding up are the wishes of the majority of shareholders. In **Metropolitan Railway Warehousing Co** it was held that the jurisdiction given to Court by s 222(c) of the Companies Act of 1948 vests a discretionary jurisdiction in Court as to whether a winding up order should be issued. It was held that the circumstance that a business has not been commenced within a year does not give a member an absolute right to a winding up order. Hence where the delay is sufficiently accounted for and there appears to be a reasonable prospect that the company if allowed to go on may succeed or if the great majority of members desire to go on an order may be refused. In **Langham Skating Rink Co** at 685 it was held that a shareholder presenting a petition is largely at the mercy of the majority and that it is a settled principle that as between share holders the wishes of the majority shall prevail. It was held that it is very important that the Court should not unless a very strong case is made take upon itself to interfere with the domestic forum which has been established for the management of the affairs of the

company. To justify interference there must be something unreasonable something like tyranny something amounting to an injury, of which the minority have a right to complain.

[25] In **Re Eastern Telegraph Co. Ltd** (supra), Jenkins J summarised the case law thus at 111:

> The cases to which I have been referred to do nothing more than enunciate the well-settled principles that it is in general just and equitable that a company should be wound-up when its *substratum* is shown to have gone, and that the question whether the *substratum* of a company has gone or not is one which depends, or may depend, on the construction of the memorandum of association. I should add that I do not think that any of the principles of construction which these cases enunciate displaces the conclusion at which I have arrived as regards the construction of the memorandum of association in this case in relation to the petitioner's first ground for claiming a winding-up order.

OBSERVATIONS

[26] When held up to light, MNHCL's petition appears to have been spurred on by a desire to derail N*i*RHL. That, coupled with MNHCL's lack of incorporation at petition, gives a strong first impression that MNHCL's petition is vexatious and an abuse of process. In *Charles Forte Investments Ltd v Amanda* [1963] 2 All ER 940 at 944-945, Willmer and Danckwerts LLJ clarified that when the courts do grant an injunction to stay winding up proceedings which **are vexatious or an abuse of process – they are in fact invoking an inherent jurisdiction.**

> As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the learned judge's caution, which he quoted from the Annual Practice **(Annual Practice, 1963 Edn, p 577, note 'Inherent Jurisdiction' to RSC, O 25 r 4.)** that this is a jurisdiction to be exercised with great circumspection…….We were…referred to several cases where the jurisdiction has been invoked in order to restrain the presentation or prosecution of a winding up petition. One case very much in point was In r**e a Company [1894] 2 Ch 349** At 351, in which the petition had actually been presented, but an injunction was sought and obtained to restrain the advertisement of it. It was found in that case that the petition had been presented for the purpose of putting pressure on the company, and it was held that that was sufficient to justify an injunction restraining its advertisement. Vaughn Williams, J. Said:
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> In my judgement, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding-up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company.
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> I accept of course as has been pointed out that these cases, being cases of creditors' petitions, are not the same as the present case; but those words of Malins, V.C. as it seems to me, are words of general application and seem to me to be apt to the present case.

[27] In Fiji, the Courts have invoked/acknowledged the same inherent jurisdiction (see for example Fiji Court of Appeal in *Aleems Investments Ltd v Khan Buses Ltd* [2011] FJCA 4; ABU0036.2009 (24 January 2011) and in *BW Holdings Ltd v Sinclair Knight Merz Fiji Ltd* [2008] FJCA). Malins VC in *Charles Cadiz Waterworks Co v Barnett* (1874) LR19Eq 182 at 196 had granted an injunction to restrain winding up proceedings:

…on the ground that it is the object of the court to restrain the assertion of doubtful rights in a manner productive of irreparable damage[5].

CONCLUDING REMARKS

[28] N*i*RHL does not have locus to apply to stay the winding up order under s 252 of the Companies Act. But N*i*RHL may still apply under the appropriate Rules of the High Court if it can show that neither the Companies Act nor the Winding Up Rules do make provision for the issues that arise in this case (see r 203 of the Companies (Winding Up) Rules (supra)). In this case, there are no allegations of insolvency whatsoever against N*i*RHL in the petition or in any of the affidavits filed. Instead, the facts which are now before me bespeak of strife between rivalling members of the mataqali as to which of the two companies should be the vehicle for their tourism project. If the principles underlying the Companies Act and the Companies (Winding Up) Rules were to be applied strictly in this case, this court would necessarily have to embark on a red-herring inquiry on the solvency of N*i*RHL[6]. Authorities are abound that a court will not terminate or stay a winding up order a s 252 unless it is satisfied as to the company's solvency. In light of these issues, I am drawn more and more to the view that the winding up order granted in N*i*RHL's absence must be treated as akin to a default judgement entered regularly which may be set aside under the High Court Rules upon N*i*RHL showing an affidavit of merits which establishes a prima facie defence showing an arguable case (see Fiji court of Appeal cases of *Fiji Sugar Corporation Ltd v Ismail* [1988] FJCA 1; [1988] 34 FLR 75 (8 July 1988) and *Wearsmart[@fffd] Textiles Ltd v General Machinery Hire Ltd* [1998] FJCA 26; Abu0030u.97s (29 May 1998)) and *Covec (Fiji) Ltd v Singh* [2008] FJCA 81; ABU0083.2007S (7 November 2008)).

ORDERS

(1) After considering the following:

- (i) that the petitioner was not incorporated at the time of petition.

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5. [5] As paraphrased by Sir George Jessel M.R. in *Niger Merchants Co v Capper* (1877) 18 Ch D 557 n.
6. [6] Megarry J in his ***Practice Note (Winding Up Order: Rescission)(No 2)*** **[1971] 1 WLR 4** sets out the following which – in my view – is/are just as relevant in the balancing process under **s 52:**

   In recent years, applications to rescind a winding up order before it has been drawn up have become increasingly common. Owing to the great increase in the number of such orders it often happens that some time elapses before the order can be drawn up. The making of the order, however, affects all creditors of the company, and gives the Official Receiver authority to act forthwith; and in the circumstances the inherent power of the court to revoke or vary an order at any time before it is perfected is one that ought to be exercised with great caution. Accordingly, although the matter is one for the discretion of the court in each case, application to rescind a winding up order will not normally be entertained by the court unless it is made within three or four days of the order, and is supported by an affidavit of assets and liabilities. If an application is made later than this, the affidavit should also establish the exceptional circumstances relied upon as justifying the application.

   Cases in which the making of the order has not been opposed owing to some matter such as an error or misunderstanding in instructing counsel may, if the application is made promptly, still be dealt with on a statement by counsel of the circumstances; but apart from such cases, the court will normally require any application to be supported by affidavit.

   In making this statement, I am speaking after consultation with the other judges of the Companies Court.

• (ii) that, although MNHL has since been formally incorporated, as a legal entity separate from its members, it is neither a contributory nor a shareholder nor a creditor of N*i*RHL.

• (iii) that (i) and (ii) above do raise serious issues about MNHL's locus and capacity to petition this court.

• (iv) that MNHL was later incorporated to 'take over' N*i*RHL. As such, along with (i), (ii) and (iii) above, this raises a serious issue as to MNHCL's *bona fides* in presenting the petition. In addition, the petition appears to be vexatious and an abuse of process by the members of the mataqali who are behind MNHCL.

• (v) that a strict compliance with the principles of staying or rescinding a winding up order in this case would necessitate a red-herring inquiry into the solvency of MNHL.

(2) I am of the view that the winding up order granted in this case should be set aside under Order 19 r 9 of the High Court Rules 1988.

(3) Twenty one days to N*i*RHL to file and serve an affidavit opposing the winding up petition. Twenty one days thereafter to MNHL to Reply.

Winding up order set aside.

Will Bateman
Solicitor