

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Winding Up Action No. HBF 001 of 2009

Re : **PLESSVILLE AUTOMOTIVE GROUP PTY LIMITED**

Before : Master Anare Tuilevuka

Counsel : Mr.Shalen Krishna for the Petitioner
 Mr.Chen Bun Young for the Company

Date of Hearing: 23rd September 2009

Date of Ruling: 04th November 2009

J U D G M E N T

Introduction

- [1] On the 06th of January 2009, Chemplex Automotive Group Pty Limited (“**Chemplex**”) filed a Petition to wind-up Plesseville Limited (“**Plesseville**”) on the ground that Plesseville is insolvent and unable to pay its debts (*see paragraph 7 of the Petition*). The total debt of \$132,083.51 is verified by an *Affidavit Verifying Petition* filed on the 7th day of January 2009.

- [2] Paragraph 5 of the Petition asserts that Plesseville's debt is owed to Chemplex in respect of goods sold and delivered by Chemplex at the request of Plesseville.
- [3] On 4th April 2006, Chemplex served on Plesseville a Notice under section 221 of the Companies Act 1983 for payment of the total debt due and owing together with solicitor's costs in the sum of \$500-00.
- [4] Chemplex in due course, presented in Court a Winding Up when Plesseville did not oblige to the section 221 Notice. That Petition was duly served on Plesseville and was later advertised in the Fiji Times on Tuesday 18th August 2009 and in the Fiji Government Gazette on Friday 21st August 2009.
- [5] Following the advertisement, *Mahajibhai & Company Limited* filed a *Notice of Intention to Appear and Support the Petition*. It claimed the Company owes it a sum of \$13,798-91 as of 09th April 2009. However, at the hearing of the Petition, Mahajibhai did not appear in Court.
- [6] On first call of the Petition on the 9th day of February 2009, Plesseville appeared by counsel and opposed the Petition. And on the 4th day of March 2009, Plesseville filed the Affidavit of Anne Hazelman disputing the debt alleged.
- [7] Chemplex filed its *Memorandum of Due Compliance* on 31st March 2006 and the Affidavit of Stephen Grubb in response to Hazelman's Affidavit on 3rd April 2009.

Hazelman's Affidavit

- [8] Hazelman is the current Manager of Plesseville. She is the widow of the late Allan Watters who died on 10th August 2008. Watters was a director of

Plesseville. The other director is Stephen (not “Steven”) Fields of Sydney Australia.

- [9] Annexed and marked **AH1** to Hazelman’s Affidavit is the authority of Steven (not “Steven”) Fields as director of Plesseville to Hazelman to sign the Affidavit opposing the Winding Up proceedings.
- [10] Hazelman received two e-mails (**AH2 & AH3**) from Chemplex on 10th September 2008 and 17th September 2008 respectively. Both e-mails were sent by Grubb as director of Chemplex advising Hazelman of “monies owing by means of **loans or expenses incurred by others to be reimbursed by Allan Watters/Plesseville/Outer Reef**” (my emphasis) as follows:

<i>Marisa Micelotta</i>	<i>Aud \$50,000 Loan plus interest @ 12% p/a</i>
<i>Judith O’Leary</i>	<i>Aud \$30,000 “ “ “ “ “ “</i>
<i>Stephen Grubb</i>	<i>Aud \$25,000 “ “ “ “ “ “</i>
<i>“ “ “</i>	<i>FJ \$ 350 Sky Pacific</i>
<i>“ “ “</i>	<i>FJ \$ 2,000 Air Fare and Accom. Sarah Miller/Training</i>
<i>“ “ “</i>	<i>FJ \$ 500 Police/LTA/Customs/FIRCA</i>
<i>Chemplex</i>	<i>FJ \$ 1,000 Administration/FIRCA VAT etc</i>
<i>“ “ “</i>	<i>FJ \$ 3,500 Phone/Diesel fuel</i>
<i>“ “ “</i>	<i>FJ \$ 1,500 3 toilets/seats/cisterns and 2 basins</i>
<i>Tony Koen</i>	<i>FJ \$ 1,000 Staff Uniforms.</i>

- [11] Hazelman also attaches an email (**AH4**) she sent to Judith O’Leary on 29th October 2008. In that e-mail, Hazelman asks the following:

*“Can you please tell me who you gave the \$30,000 to as **I see absolutely no record of your name on any paperwork left by Allan**”(my emphasis)*

- [12] On 18th November 2008, Hazelman received a letter (**AH5**) from Tony Koen of Subsur Place Fiji. That letter says inter-alia as follows:

*“I gave **a personal loan to Allan** of \$1000 which I was told was to pay for uniforms” (my emphasis)*

- [13] Hazelman deposes that she did make contact with Koen about the letter who merely told her to forget about that letter as the sum mentioned was in fact given to Stephen Grubbs.
- [14] Hazelman deposes that on the same day, Plesseville was served the Winding Up petition. Plesseville then, through its solicitors, wrote to Chemplex Solicitors and denied owing the amount.
- [15] Hazelman insists in paragraph 15 of her Affidavit that Plesseville is solvent and in a position to pay its creditors as and when payment is due. She also says that Plesseville has net assets worth \$600,000.

The Affidavit of Stephen Grubb

- [16] Grubb is the Managing Director of Chempex. He points out that “Steven” (not “Stephen”) Fields is a director of Plesseville as shown by his search records of the Company. He is aware that Hazelman is now running Plesseville. He adds though that Hazelman is also running her own business in Mandara Spa.
- [17] Grubb concedes that he sent the e-mail **AH2** and **AH3** to Hazelman. The loan, he says, was given to Plesseville.
- [18] Grubb swears in his Affidavit that Mariisa did tell him that Anne is aware of Marissa’s conversation with Watters in September 2007 so Anne is aware of Marissa’s loan to Allan.
- [19] Grubb also swears that he was told by Judith O’Leary that Anne is aware of e-mails and monies given to Watters by O’Leary.

- [20] Grubb says the \$1,000 that Koen gave was given to Watters as Watters and not he was a director of Plesseville. The loan was given for payment of Plesseville staff uniform. He annexes a letter by Tony Koen (**SG2**) which states inter alia as follows:

“The loan of \$1000 was made to Mr.Allan Watters for the outer Reef”

“When I spoke to Ms Hazelman I was very embarrassed to be hassling her about a loan which I made to her deceased husband. The loan in question was made to Mr Watters but it was done through Mr.Stephen Grubb who is a personal friend and better known to me than Mr.Watters”

- [21] Grubb annexes to his Affidavit the following *Commercial Loan Contract* (**SG3**) which he says, clearly shows Plesseville is indebted to Chemplex.

Commercial Loan Contract

Between:

*Chemlex Auto Group Fiji P/L
P.O Box 4359
LAUTOKA*

And:

*Plesseville Ltd
P.O Box 10429
NADI AIRPORT*

On this day 31/03/07 in Lautoka, Fiji Islands.

It was decided that the loans as listed below be an investment into the building and construction business of Plesseville.

The loans are at a “no fixed” term.

Interest commences at date of receipt of monies as listed at 12% p/a.

Interest payable on return of capital in full.

<i>15/09/06</i>	<i>\$3000.00</i>
<i>18/09/06</i>	<i>\$22500.00</i>
<i>14/12/06</i>	<i>\$25000.00</i>
<i>28/02/07</i>	<i>\$5000.00</i>
<i>02/03/07</i>	<i>\$6300.00</i>
<i>16/03/07</i>	<i>\$1350.00</i>

Sgd and stamped (S.Grubb, Director, Chemplex Auto Grp Fj. P/L

(A Watters, Director, Plesseville Limited).

- [22] He then refers to **SG4** of his Affidavit which is a Bank Statement of Chemplex's ANZ.
- [23] Grubb highlights a record of transaction which evidences a receipt of \$31,9000 from Marissa Micelotta and transfer of the same via Cheque No. 0327 and \$6,600 via Cheque 0334 to Plesseville.
- [24] In paragraph 14 of his Affidavit, Grubb deposes to certian monies advanced by Chemplex to Plesseville.
- [25] Interestingly, annexed and marked **SG5** to Grubb's Affidavit is a copy of an e-mail by Steve Fields (a Director of Plesseville) to Marissa, Judy & Brian. Grubb reasons in paragraph 15 of his Affidavit that **SG5** shows that Fields acknowledges "*not in exact words but monies given to Plesseville*". The following extracts from that rather long e-mail are noteworthy:

*"At no stage would she (i.e. Anne) **let Stephen run anything in the Business.....**"*

*"So that leaves us with only one option which is to back Anne 100% otherwise we loose our **investment**" (my emphasis)*

Onus

- [26] A debt alleged in a Petition is *prima-facie* proved when the Affidavit Verifying the Petition is filed. It is then open to a Company (e.g. Plesseville) to refute the debt alleged. And if Plesseville disputes the debt, it must do so on substantial grounds as opposed to a mere frivolous assertion (see **Offshore Oil NL and Investment Corporation of Fiji Limited; Civil Appeal No: 29/84**; cf. **Avery v. Worldwide Testing Services Pty Ltd. (1990) 2 ACSR 844, at 841**). On the other hand, the Court will usually penalise in costs a creditor who uses winding up proceedings in an attempt to enforce a debt where the creditor knows or suspects that the debt is disputed and which has not been pursued through normal litigation channels (see **Re Lympne Investments [1972] 2 All ER 385**)

[27] Once the Court finds that Plesseville does have substantial grounds for disputing the debt (rather than putting forward a mere frivolous assertion) the onus then shifts back to Chempex to prove its debt.

[28] In **In Re Tweeds Garages Limited [1962] I Ch 402** at 408, dispute must be as to the existence and not necessarily the quantum of debt.

Issues

[29] The issues in this case are as follows: -

- (i) does Hazelman's Affidavit contain substantial grounds for disputing the debt or are her denials a mere frivolous assertion?
- (ii) if so, does Grubb's Affidavit contain as much evidence as necessary to prove its debt?

Does Plesseville have substantial grounds for disputing the debt or is its dispute a mere frivolous assertion?

[30] Hazelman says that she is not aware of the debt(s) alleged. She has been candid though in her affidavit about every e-mail she has received from Grubb on 10th and 17th September 2008 and which was copied apparently to Steve. Hazelman has also stated repeatedly that she has seen no record of the debts alleged on any paperwork left by Allan. Notably, she does not attach to (or explain in) her Affidavit what "*paperwork left by Allan*" she has perused. Nonetheless, it appears Hazelman did request details of the alleged debts from Marris Micelotta, Judith O'Leary and Koen but these were not provided.

[31] Hazelman is adamant though¹ that Plesseville is solvent and has net assets in Fiji worth approximately \$600,000 and is in a position to pay its creditors as and when due. Mr. Krishna submitted that, unless

¹ at paragraph 15 of her Affidavit.

Plesseville offers to deposit monies owed into court or into their lawyers' trust account, the court should not believe that statement.

- [32] It would appear then that Plesseville's principal ground for disputing the debt is that there is no record of it/them in *Plesseville's books*.
- [33] Hazelman does not make known to us what book(s) she is referring to.
- [34] But is the onus on Plesseville to disprove the debt(s) by producing it's books? It might be argued that Hazelman's failure to *show* the books should entitle this court firstly to assume things against Plesseville² and secondly, to conclude that Plesseville's dispute of the debt is but a mere frivolous assertion with no evidence to back it.
- [35] In my view, in the circumstances of this case³, the entirety of the Petitioner's evidence should be put to the test first before one considers whether Plesseville's dispute of the debt is a mere frivolous assertion.
- [36] While Chemplex's ANZ Bank Statement (**SG4**) appears to confirm that the sum of \$31,900 did indeed originate from Marissa and was immediately transferred to Plesseville, one would be forgiven for thinking that the said payment was in fact an investment by Marissa when considered against the tone of the e-mail of Steven Fields (see paragraph 25 above),.
- [37] The bottomline is, the documentation in Grubb's Affidavit raise more legal questions than they solve so much so that I am not prepared to dismiss Hazelman's dispute of the debt as a mere frivolous assertion. Otherwise, I would have to put myself in a position where I have to

² e.g. that the books do in fact record the debt OR that Plesseville does not keep proper books at all etc.

³ The petition alleges that the sum of \$132,083.51 is owed in respect of goods sold and delivered whereas the evidence differs not only on the amount but also on how it was (allegedly) owed. Also, there are issues as to whether the debt (if proved) was owed to Chemplex or whether it is owed to individuals (Marissa, O'Leary, Koen and Grubb). This, apart from the issue of whether the monies paid (if paid) were in fact for investment purposes or as a loan. The Commercial Loan Agreement annexed as **SG3** to Grubb's Affidavit raises more issues than it solves (see further discussion below). Also, the allegation that there is no record of documentation. Again, some of the evidence (e.g Koen's letter) seem to suggest that the monies were given to Watters personally.

presume and assume a lot of things which frankly, I am not prepared to do.

Did the sum of \$132,083.51 ever pass from Chemplex to Plesseville?

[38] Again, this raises a basic evidentiary issue. Has Chemplex proven its debt?

[39] Again, Chemplex alleges at paragraph 5 of its Petition that Chemplex is owed the sum of \$132,083.51 by Plesseville in respect of goods sold and delivered by Chemplex at Plesseville's request. Grubb's Affidavit sets out the evidence upon which Chemplex relies:

- (i) Commercial Loan Agreement
- (ii) Bank Statement
- (iii) Marissa
- (iv) Judith O'Leary
- (v) Tony Koen
- (vi) Chemplex

[40] Notably, Grubb's Affidavit makes no mention of any goods sold and delivered by Chemplex to Plesseville.

The Commercial Loan Agreement

[41] Mr. Krishna submits that as Plesseville has not filed any affidavit in response to Grubb's Affidavit, the above is not disputed and must therefore be accepted. Mr. Young on the other hand highlights the following words in the so-called Agreement i.e. that "*the alleged loan is to be investment in the building and construction business of Plesseville*". He submits that the money was in fact an investment and not a loan as otherwise, it would have a clause to suggest when the debt was to become due and payable.

[42] Mr. Young questions the nature of the document. Is it a loan? How can it be so when it has no fixed term? If it is an investment, are they

asking for a return of capital in full? He submits that if **SG3** is the basis of the petition, then the petition has many problems. In an investment, he says, the investor does not get his or her investment back willy nilly. What he or she gets are the returns on the investment. If this is a loan, the problem is that the document does not say when it is repayable. Mr. Young cites **Cryne -v- Barclays [1987] BCLC** as authority for the proposition that unless a loan specifically says otherwise, a loan is not payable on demand.

Bank Statement

[43] Mr. Krishna again submits that as Plesseville has not filed an Affidavit in Reply to Grubbs' Affidavit, the Bank Statement annexed thereto must therefore be taken as being accepted by Plesseville.

[44] He highlights the last entry of the Bank Statement (**SG4**) which he says clearly shows \$31,900 was transferred to Plesseville Ltd showing the following:

“TRF to Plesseville Ltd \$31,900.00”

[45] Mr. Young acknowledges that the Statement shows that on 5th June 2007 and 9th July 2007 respectively, the sum of \$31,900.00 and \$6,000.00 respectively was transferred to Plesseville. He points out though that the statement shows that on 5 June 2007 a sum of \$31,907.11 was transferred into the Petitioner's account by Marissa Micelotta.

[46] It is not clear whether this sum is accounted for in the \$50,000 loan plus interest at 12% by Marissa as referred to in **AH2**. In any event, there is still the issue of whether the \$31,900 was investment or a loan (see paragraph 36 above) and either way, how is it relevant to Chemplex's Petition.

Marissa, Judith O'Leary & Tony Koen

[47] Grubb's email to Hazeman (**AH2** – see paragraph 10 above) again raises more issues. How are those monies allegedly given by *others* relevant to Chemplex's Petition and were they given to Watters personally or to Plesseville? Was any loan agreement drawn up in respect of these? Is **SG3** relevant to these? If so, how?

[48] Grubb also acknowledges the e-mail annexed **AH3** to Hazelman's Affidavit which he he sent on 17th September 2007. The main subject matter of that e-mail appears to be well summarised in the following extract:-

"I would like to sit with you ASAP, particularly on Marissa's loan as Allan promised it back by end March this year and then when she was over here at Easter, she ok'd till Oct 08 but no longer as she had to return the money to her father as he needed it to settle on some land. Now, he to Marissa thru me has lent it in good faith when Allan needed the money to open O/R, we must get her money back as to rescind the contract of purchase will involve huge costs, lawyers, courts let alone personal letdowns etc"

[49] Even Tony Koen's' alleged loan (see **AH5**) raises an issue as to whether that loan, if indeed it was made, was a personal loan to Watters or a loan to Plesseville (see paragraphs 12 and 20 above).

Discussion of the Issues

[50] A company may be wound-up if it is unable to pay its debt (*S. 220 (e)*) of the *Companies Act 1983* and if the circumstances are such that it is just and equitable to wind-up the company. A company is unable to pay its debt if :-

- (a) it is indebted for a sum in excess of \$100.00.

- (b) s. 221 notice was duly served to the Company.
- (c) within three weeks of the service of the said demand notice the company **neglected** to pay the debt.

[51] Mr.Krishna submits that a section 221 Demand Notice was duly served on Plesseville. And because Plesseville has not paid the debt within 21 days, the section 221 Notice is sufficient enough to calling in a debt.

[52] That statement however must be qualified by the authority of **Re Lympne Investments [1982] 2 All ER 385**) that a refusal on legitimate grounds to pay a disputed debt is not “***neglect***” within the meaning of section 221.

[53] I pause here to observe that a winding up order does not affect the legal rights of the creditors or the company. Rather, it only puts into effect a process of collective execution against the assets of the company for the benefit of **all creditors**. In the course of that process, the rights of creditors may have to be determined.

[54] Again, I say that the documentation in Grubb’s Affidavit raise issues. Included amongst those is the issue of whether all the persons involved (i.e. Marissa, O’Leary, Koen & Grubb) are indeed Plesseville’s “***creditors***” and whether the monies involved (if in case this is to be proved later) ought to be classified as “***debts***” within the meaning of section 220 and 221.

[55] Authorities are abound that, as a matter of practice, the appropriate avenue to prove a debt that is disputed is through a Writ action rather than through the Winding Up proceedings. Mr.Young urges this court to adopt the same and refers me to several authorities on the point⁴.

⁴ Buckley L.J in ***Stonegate Securities v Gregory (1980) 1 ChD (CA) 576 at page 579***:

- [56] Recently, in **Parmalat Capital Finance Ltd v (1) Food Holdings Ltd (in liquidation) and (2) Dairy Holdings Ltd (in liquidation) [2008] UKPC 23 9th April 2008**⁵, the Privy Council resonated that, whilst it was normal practice for the Court to dismiss a winding up petition based on a disputed debt and require the creditor to first establish his claim, this was merely a rule of practice and not of law and the Court ultimately still has a discretion to make a Winding up Order regardless of whether the debt was disputed or not.
- [57] Obviously, as with all judicial discretions, the exercise of that discretion must be done within the confines of some limits.

“If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed....That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed”

In ***Estate Management Services Limited*** - Suva High Court Winding Up Action No. 40 of 2002 (unreported) Pathik J cited with approval part of a judgement by Walker J in *In re Amadeus Trading Ltd* TLR 1 April 1997 where His Lordship said:

“whether there was a complex rift of disputed facts and allegations on both sides which cried out for cross-examination, it was inappropriate for a claimant to resort to a petition to wind up a company which was his adversary”

Turner LJ in ***In re Catholic Publishing and Book Selling Co*** 139 RR 54 at p. 57

“I think that applications of this kind by creditors whose debts are bonafide disputed are not to be encouraged. I do not say that the legislature has not given the Court power to decide upon a winding up petition the question whether a debt which the Company disputes is owing or not, but I think that such an application is a most inconvenient mode of trying that question and where there is a bona fide dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, I think the Court would do well to adjourn the petition until the existence of the debt is established”.

⁵ **Privy Council, Lord Hoffman, Lord Hope, Lord Walker, Baroness Hale, Lord Mance.**

- [58] The authorities, in my view, all seem to suggest that the balancing exercise must account for, on the one hand, the need to see that the winding up procedure is not being abused in using the threat of a winding up as a means of forcing a company to pay a bona fide disputed debt and on the other, the need to assess whether there is a substantial ground (as opposed to a mere frivolous assertion) for disputing the debt.
- [59] Mr. Young submits and I agree with him that the balancing exercise must entail some examination of the nature and extent of the dispute and the evidence that might be required to be adduced in the matter.
- [60] And so, in that light, I reiterate here paragraph 37 above, that while the material in Haxzelman's affidavit may seem rather flimsy on the one hand, I am not prepared to dismiss it as a mere frivolous assertion because the documentation in Grubb's Affidavit do nothing towards resolving the issues raised by Mr. Young. There is a bona fide dispute of the debt and in my view, the issues inherent in the documentation in Grubb's Affidavit will have to entail a Writ trial proper on, *inter alia* the interpretation of a document on some aspects of the alleged debt and the lack of documentation on its other aspects.
- [61] Mr. Krishna submits that Plesseville has not filed an Affidavit in reply for the Court to be able to draw the inference(s) that Mr. Young is asking the Court to draw.
- [62] To reiterate, paragraph 37 above, the documentation that Mr. Krishna relies on (for certain portions of the debt alleged) merely highlight the inherent issues that so riddles this case (not to mention the lack of proper documentation to be considered for other aspects of the case).

Conclusion

[63] For the foregoing reasons, on the material before me, I find that there is a bona fide dispute of the debt. The appropriate avenue for Chemplex to prove its debt is through a Writ action. Accordingly, I exercise my discretion and dismiss this Winding Up Petition.

[64] I also order costs which I summarily assess at \$250-00 against the Petitioner.

A. Tuilevuka

Master

04th November 2009.