

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBC No. 414 of 2019

BETWEEN : **PRADEEP PATEL** aka **PRAKASH PATEL** of BDO, FNPF
Place, Victoria Parade, Suva in Fiji, Chartered Accountant as
Receiver and Manager of **SERENE WATER ESTATE PTE**
LIMITED.

PLAINTIFF

AND : **NAFIZ ALI WAHEDA SHENAZ BEGUM HANIF** aka
WAHEEDA HANIF aka **WAHEEDA BEGUM** and
SAIYADI SAMS all of 34 Belo Street, Samabula, Suva in Fiji.

DEFENDANTS

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. H. Nagin for the Plaintiff
: Mr. F. Haniff for the Defendants

DATE OF HEARING : 23 December 2019

DATE OF RULING : 25 February 2020

RULING

COMPANY LAW: *Receiver - Restraining order – Interference with the functions of a receiver – Appointment of a receiver – Notice of appointment of a receiver – Conflict of interest of a receiver – Action against a receiver – Jurisdiction of Court – Sections 441 & 446 of the Companies Act*

Cases referred to:

1. Newheart Developments Ltd. V Co-op Commercial Bank Ltd. [1978] 2 AER 896
 2. Ilaitia Boila & Chirk Yam, Fiji Development Bank & Merchant Bank of Fiji v Bahadur Ali, Mukthar Ali & Niwazli [2001] 1 FLR 368
 3. Deangrove Pty Ltd v Commonwealth Bank of Australia [2001] FCA 173
 4. Edwards v Singh [1990] 5 NZCLC
 5. Re B. Johnson & Co. (Builders) Ltd [1955] 2 All ER 775 at 783
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1. The plaintiff filed an *ex-parte* summons dated 5 December 2019 seeking an order against the defendants:
 - a. from interfering in any manner whatsoever with the plaintiff's operations and activities as the receiver and manager of Serene Water Estate Limited;
 - b. from obstructing or interfering with the plaintiff's access to the premises, equipment and documents of Serene Water Estate Limited.
2. When the matter came up for hearing, on 23 December 2019, Mr. Haniff moved for an adjournment stating that he had received the plaintiff's affidavit in reply dated 20 December 2019 only at 10 am that morning – on 23 December – and that he was taken by surprise by the numerous new positions and information disclosed in the plaintiff's affidavit in reply and that, therefore, he needed to take instructions on the new material. The hearing was nevertheless taken up. I made a ruling on 24 January 2020 allowing the defendants' counsel time to obtain instructions on the material annexed to the plaintiff's affidavit in reply dated 20 December 2019. The defendants were directed to file a reply to the plaintiff's affidavit dated 20 December 2019 within 7 days of the ruling.
3. When the matter was mentioned on 12 February 2020, Ms. Kant who appeared for the defendants on that day submitted that one of the defendants had spoken to Mr. Nagin and indicated that further time was needed for filing of the

affidavit, and that when the affidavit was sought to be served the previous day (11 February), the plaintiff's solicitors refused to accept the affidavit. Ms. Kant submitted that she did not have any other instructions on the matter. Counsel for the plaintiff, Mr. Nagin, submitted that the time for filing of the affidavit expired 7 days after 24 January 2020, and that though the solicitor for the defendants undertook to file the affidavit on 2 February, she had failed to do so. The defendants tried to serve the affidavit at 5 pm on 11 February when the office of the plaintiff's solicitor was closed. He objected to the acceptance of the affidavit as part of the pleadings and submitted that the defendants were attempting to delay proceedings, and that grave prejudice was being caused to his clients. Ruling on the application dated 4 December 2019 was reserved. In view of the plaintiff's objection on that day, the ruling was also to make reference to whether the contents of the defendants' affidavit filed late on 11 February 2020 would be considered by Court.

4. The defendants were directed to file a further affidavit within 7 days of the ruling dated 24 January 2020. This was after pleadings were closed – and a hearing held – in order to afford the defendants an opportunity due to the submission of their counsel that the plaintiff had averred new matters in his affidavit in reply and annexed documents that had taken the defendants by surprise. The Court's direction was intended to prevent any possible prejudice to the defendants and to Serene, especially as receivership entails serious legal consequences. The defendants, however, did not comply with the Court's order to file the affidavit within 7 days. Nor was an application made to Court to extend the time for filing such an application, as provided for by the rules of court. The delay in filing the affidavit was not explained to Court. The impression that forms is that despite the granting of time by Court on 24 January, the defendants have been casual in their response. That is not acceptable, especially in the context of the urgency of the plaintiff's application. In those circumstances, I will not be considering the contents of the affidavit filed on behalf of the defendants on 11 February 2020. Written submissions were tendered on behalf of the plaintiff. Submissions were not filed on behalf of the defendants.

5. In order to deal with the plaintiff's application, I will reproduce portions of my ruling of 24 January 2020, by which I granted time to the defendants to file a further affidavit.

6. The affidavit in support dated 14 December 2019 of the summons dated 5 December 2019, given by the plaintiff, averred, *inter alia*, that Serene Water Estate Pte. Limited (Serene) maintained an account with BRED Bank (Fiji) Limited (BRED); that on 17 September 2019, BRED issued a demand notice to Serene and the Defendants and another guarantor, Ginza Holdings Pte. Limited; that as the demand notice was not complied with he was appointed as the receiver and manager of Serene pursuant to deed of appointment dated 5 November 2019, and that the notice of such appointment was served on the company; that the company was initially permitted to continue trading in order to assess the situation generally; that no payment was made to BRED in terms of the sale and purchase agreement dated 30 October 2019; that the defendants did not allow him access to the premises of Serene after 26 November 2019, and had through its lawyers sent him letters questioning the validity of his appointment and also alleged a conflict of interest in him holding such position; that he was denied access to the financial records of Serene and prevented from properly exercising his powers as receiver and manager in terms of Section 446 of the Companies Act and that this would cause irreparable damage to BRED as well as to him as the receiver and manager of Serene.

7. The first named defendant, Mr. Nafiz Ali, replying by affidavit filed on 18 December 2019, denied that the defendants were served a demand notice, and that as the loan was recalled, the defendants were unaware of whether they were in default; that the defendants were unaware of how the plaintiff was appointed as the receiver; that by closing the company's bank account the receiver had made it impossible for the company to trade, and that BDO, of which the plaintiff is a partner, stood in a position of conflict, being the auditor of New World Pte. Ltd, to whom the receiver wanted supplies to be made despite New World Pte. Ltd. owing substantial sums to Serene. The defendants admitted denying access to the plaintiff, and maintained that they had not been informed of the receiver's appointment.

8. The affidavit in reply dated 20 December 2019, given on behalf of the plaintiff, stated, *inter alia*, that the plaintiff's agents advised Mr. Nafiz Ali of his appointment on 6 November 2019; that Serene was served with several default notices, and that all monies owed by Serene were repayable on demand; that the company was insolvent and unable to pay its debts, and that winding up action HBE No.43 of 2019 was heard on 2 December 2019, and has been fixed for judgment; that the power to appoint the receiver was clearly stipulated in the debenture and mortgage documents, and that the receivership appointment was not disputed until letter dated 26 November 2019 was sent on behalf of Mr. Nafiz Ali; that Mr. Nafiz Ali was advised to provide a statement of affairs as required by Section 450 of the Companies Act and the form 82 in the Companies Regulations 2015; that BDO did not act as accountants of New World Pte. Ltd, but acted as its independent auditors in accordance with the Companies Act 2015; that the plaintiff was not disqualified from acting as receiver and manager of Serene by virtue of Section 441 of the Companies Act 2015; that the plaintiff was told on a number of occasions by Mr. Nafiz Ali that access to the company would be denied; and, that the Court had jurisdiction as all parties to the proceedings are from Suva. In the affidavit in reply, the plaintiff outlined the various measures he took as the receiver and in operating the business until he could properly assess the company, and countered the claims of the defendants in the affidavit filed on behalf of Mr. Nafiz Ali.
9. It was the affidavit in reply dated 20 December 2019, given on behalf of the plaintiff, which Mr. Hanif insisted upon responding to, at the hearing on 23 December 2019, and sought further time to do so. As adverted to above, the affidavit of Nafiz Ali filed on behalf of the defendants on 11 February 2020 will not be considered for the purpose of this ruling.
10. The notice of appointment of the receiver appears to have been communicated to Serene Waters Estate Pte. Limited by letter dated 6 November 2019, and on the face of it, this letter seems to have been acknowledged on behalf of the defendants. For this reason, it would be onerous for the defendants to maintain that they had no notice of the appointment of the receiver and manager, a position taken up as one of the main planks of opposition of the defendants. Moreover, it seems improbable that the plaintiff would attempt to take over and

manage Serene's property without giving notice of appointment to the defendants. That assertion of the defendants defies ordinary logic, and cannot be accepted.

11. That the plaintiff had a conflict of interest and was in collusion with New World Pte. Ltd. was the other major contention of the defendants. This was allegedly on the basis that the plaintiff is a partner of the firm BDO, and that BDO allegedly provided accounting services to New World Pte. Ltd. with whom the plaintiff was overseeing a transaction related to Serene. The plaintiff, though admitting to be a partner of BDO and that the firm acted as an independent external auditor, denied being in a position of conflict. In my view there must be some evidence pointing to a financial interest or personal interest or a situation leading to competing loyalties. Apart from the general assertion of the plaintiff's conflict of interest based on the provision of accounting services by BDO to New World Pte. Limited, there is no tangible evidence before Court of such a conflict arising.
12. The plaintiff, a registered liquidator, was appointed as receiver and manager on 5 November 2019. The notice of appointment, dated 6 November 2019, states that the appointment was under powers contained in an instrument dated 10 July 2015, particulars of which were registered with the Companies Registrar on 29 and 30 July 2015.
13. The instrument dated 10 July 2015, titled Debenture of Serene Water Estate Limited provides for financial facilities to be granted by BRED (the mortgagee) and for all sums owing by SERENE to be paid on demand by the mortgagee. In consideration of such facilities SERENE charged all its undertaking, property and assets both present and future. The charges created were fixed as well as floating. Clause 39 of the instrument provides that at any time after the principal moneys secured by the debenture become payable whether by demand or otherwise the mortgagee may appoint in writing any person (whether an officer of the mortgagee or not) to be receiver or receivers of all or any part of the mortgaged premises and may from time to time and at any time in like manner remove any receiver so appointed and every receiver so appointed shall be the agent of the company and the company alone shall be responsible for his acts and defaults. I am in agreement, therefore, with the submission of the plaintiff's counsel that the

power to appoint the receiver is clearly stipulated in the debenture instrument. Moreover, section 441¹ sets out the persons who are not qualified to be appointed as a receiver or manager of property of a company. Subject to this restriction, a debenture holder could appoint any person as a receiver or manager of property of a company. In terms of the debenture instrument, therefore, the debenture holders in this action are entitled to appoint any person, including an officer of the bank as the receiver.

14. The instrument grants a range of powers to the receiver. The first such is to take immediate possession of all or any part of the mortgaged premises and to exercise and enforce all or any of the powers, rights, remedies and authorities of the mortgagee. The powers granted to the receiver by this instrument are wide ranging, which is to be expected in order to safeguard and enforce the interests of the mortgagee. They include the power to manage the property. The instrument sets out the manner of applying the moneys received by the receiver, with the residue of such monies to be paid to the company.
15. Therefore, the main objections raised by the defendants i.e: that they received no notice of appointment of the receiver and that there is a conflict of appointment are without merit. Although I need go no further, for clarity, I must state that even a finding of a conflict of interest on the part of the receiver may not have helped the defendants' cause in the circumstances of this case.
16. Once a company is in receivership, the powers of the board are vested in the receiver. In the ordinary course, and subject to the terms of the security instrument, the law would not permit interference by another person with the functions of a receiver. The general principle that can be derived from the authorities is that the directors could sue in appropriate circumstances in the name of the company, after obtaining the consent of the receiver; such consent, though, could be dispensed by court in appropriate situations. Such circumstances where the courts have held that directors may exercise their residual powers and sue the receiver in instances where fraud by the receiver is

¹ Companies Act 2015

alleged² are exceptional and not to be taken as a right to interfere with the work of the receiver.

17. In Ilaitia Boila & Chirk Yam, Fiji Development Bank & Merchant Bank of Fiji v Bahadur Ali, Mukthar Ali & Niwazli³, the High Court held that a receiver could be removed for fraud or mala fides or when he does something he is not empowered to do and omits something he is enjoined to do in terms of his appointment, and that the proper course would be for the directors to initiate proceedings for misconduct in the name of the company under their residual powers. In that case, Pathik, J referred to two other decisions: in Deangrove Pty Ltd v Commonwealth Bank of Australia⁴, Sackville, J in the Federal Court of Australia stated, *“In my view, the authorities clearly support the proposition that, where a company in receivership has a claim against the debenture holder and the receiver declines to pursue the claim, the directors are entitled to initiate and maintain proceedings in the name of the company, provided the directors offer the company a satisfactory indemnity against costs. The latter requirement is designed to ensure that the interests of the debenture holder, qua debenture holder, are not prejudiced”*; in Edwards v Singh⁵, the High Court of New Zealand held that a shareholder could not bring an action against the debenture holder or the receiver for misconduct, but that such an action had to be brought by the directors in the name of the company under their residual powers.

18. On the question of whether the receiver owed a duty to the company, it was held by the Court of Appeal of England in Re B. Johnson & Co. (Builders) Ltd⁶ that *“In other words, the substance, the gist, of the charge (expanded in the points of claim, which I will mention in a moment) is that the receiver had a duty to the company and its contributories to preserve the goodwill and business of the company. In my judgment, that allegation rests on a fundamental misapprehension. There was not in this case, and there is not in similar cases, any such duty on a mortgagee or a receiver appointed by a mortgagee for the purpose of realising the mortgagee’s security. I have no doubt that the plaintiff in this case is greatly disappointed. He had said that the transactions that the*

² Newheart Developments Ltd. V Co-op Commercial Bank Ltd. [1978] 2 AER 896

³ [2001] 1 FLR 368

⁴ [2001] FCA 173

⁵ [1990] 5 NZCLC

⁶ [1955] 2 All ER 775 at 783

company entered into were of the happy sort that you cannot lose on them; but, unfortunately, the plaintiff and the company depended on the good will of Barclays Bank, which provided the whole of the money for the company's speculations. The bank (says the plaintiff) became altogether unduly alarmed at the effect of the Town and Country Planning Act, 1947. Whether they did or whether they did not, it is not necessary for me to determine; but the moral (as it seems to me) of the matter is this, that if you do depend, and depend exclusively, on borrowed money for the business you propose to carry on, you must at all costs retain the confidence of your lender. In this case, further, in so far as the charges against the receiver involve the proposition that the receiver did not get the best price he could have got and should have got, equally those charges, in my judgment, rest on a misapprehension of the elementary principle that a mortgagee, or a receiver exercising the mortgagee's powers of sale, is under no such duty to the mortgagor to obtain the best possible price for the property charged". The principles discussed in these authorities were not referred to the Court. But they emphasise that the authority of a receiver is not to be lightly challenged, and when there is sufficient ground to do so, it must be in the name of the company.

19. This action was instituted by the plaintiff – the receiver in this case – against the defendants, in their personal names. In the context of the facts of this case, the defendants, solely as directors, cannot personally challenge and object to the receivership on the basis of an alleged conflict of interest. The choice of appointment of the receiver is a matter for the debenture holder, to be exercised at its discretion. If the defendants had a complaint against the receiver, it should have been made in the name of the company.
20. There was one other matter raised by the defendants. That of jurisdiction. It was averred on their behalf, though not with great conviction, that both defendants reside outside the jurisdiction of this Court, in Nadi, and that the company, SERENE, also has its office in Nadi. This does not appear to be factually correct. The guarantee dated 10 July 2015 given by one of the defendants, Nafiz Ali, states his address as 34, Belo Street, Samabula, Suva. The annual return form of SERENE filed up to 11 April 2014 gives the registered office of the company as 34, Belo Street, Samabula. The same form states that the usual postal address of the directors, Waheeda Begum and Nafiz Ali are 34, Belo Street, Samabula. These are the captioned addresses of the defendants. In the absence of material to

countervail the evidence of the defendants' addresses from the documents tendered by the plaintiff, the question of jurisdiction needs no further inquiry.

21. In these circumstances, the plaintiff is entitled to the reliefs sought by the summons dated 5 December 2019, and to costs.

ORDERS

- A. The defendants are restrained from interfering with the plaintiff in functioning as the receiver and manager of Serene Water Estate Limited until the determination of this action;
- B. The defendants are restrained from obstructing or interfering with the plaintiff's access to the premises, equipment and documents of Serene Water Estate Limited until the determination of this action.
- C. The defendants are ordered to pay the plaintiff a sum of \$2,000.00 as costs summarily assessed within two weeks of this ruling.

Delivered at Suva this 25th day of February, 2020



Justice M. Javed Mansoor
Judge of the High Court