**IN THE HIGH COURT OF FIJI**
**AT LAUTOKA**
**CIVIL JURISDICTION**

**HBC 215 of 2015**

**BETWEEN:** **SAMUEL SEN** of Otahuhu, Auckland, New Zealand and RS Promotions Limited

**PLAINTIFFS**

**A N D:** **GAURANG PATEL** trading as G6 Events of Drasa Avenue, Lautoka

**DEFENDANT**

Appearances: Mr J. Sharma for the Plaintiff
N/A for the Defendant
Date of Formal Proof: 14.11.2019
Date of Ruling: 27.04.2020

# FORMAL PROOF RULING

## INTRODUCTION

1. The statement of defence in this case was struck out by the Learned Master on account of the defendant's failure to comply with an unless order relating to the filing of List of Documents. The case was then allocated to this court for formal proof. The plaintiff, Samuel Sen (**"Sen"**) then attempted to formally prove his case before me on 14 November 2019.

2. Sen is the sole director / shareholder of R. S Promotions Ltd (**"RSPL"**), a limited liability company having its registered office at Otahuhu, Auckland, New Zealand. R.S.P.L is registered in Fiji as well.

3. The relevant New Zealand *Certificate of Incorporation* and *Companies Extract* were tendered and marked **PEX1** and **PEX2** respectively.

4. RSPL is an events company. It operates mostly in promoting (managing the logistics as well as marketing) Bollywood shows in New Zealand and Fiji. In the year 2015, a popular Bollywood music director, composer, actor and artist/singer by the name of Himesh Reshmaiya - was scheduled to perform two shows in Fiji on 28 and 29 May at the National Gymnasium in Suva and at Prince Charles Park in Nadi respectively.

5. Reshmaiya was also contracted for several performances in New Zealand. The New Zealand shows were to follow the Fiji shows.

6. RSPL was the organizer for the New Zealand shows.

**THE AGREEMENT**

7. For the Fiji shows, the defendant, Mr. Gaurang Patel, had expressed an interest to manage and promote these to raise funds for a temple. Patel told Sen at their first meeting in Patel's Office on the fifth floor of Tappoo City Building in Suva that all proceeds from ticket-sales was to go to the temple. Sen agreed.

8. Sen and Patel were not acquainted prior to that first meeting. They linked up through a mutual friend.

9. Sen and Patel were able to reach an agreement in their first meeting. The terms of their agreement were recorded in a written document which he and Patel later executed.

10. Notably, the agreement described the parties as follows:

> *"Samuel Sen of RS Promotions Ltd having its registered office at P.O Box 22792, Otahuhu, Auckland New Zealand" .....**AND** **G6 EVENTS** a company incorporated under the Companies Act having its registered office on Suite 1, level 2, Victoria Parade, HFC Building, Suva....."*

11. I observe that the attestation clause of the Agreement in question has the common seal of G6 Events annexed preceded by the following:

> *THE COMMON SEAL OF G6 EVENTS LIMITED was hereunto fixed in our presence and we certify that we are the proper officers of the said company by whom and whose presence was affixed said seal is to be affixed to documents by the company.*
>
> *Signature*
>
> _____ *Director*
>
> *Common Seal of G6*
>
> _____

**THE BARGAIN**

12. By their agreement, G6 Events had agreed to sell to Patel, and Patel had agreed to buy from G6 Events, the Fiji shows for FJD$132,000.00. Clause 2 of the Agreement sets out the following installment scheme:

| | |
|---|---|
| *$66,000.00* | *To be paid upon signing of the contract* |
| *$59,400.00* | *To be paid 30 days prior to the show* |
| *$6,600.00* | *To be paid 7 days before Artist flies to Fiji* |

13. Sen said that, in addition to paying him the above monies, Patel was expected to handle all the logistics which entails, amongst other things - organising , promoting and all other workings which must be taken care of to host the show in Fiji including paying for all the hotel expenses and venues. The Agreement was tendered and marked **PEX3**.

**THE ALLEGED BREACH**

14. Neither Patel nor G6 paid the sum $66,000 upon the signing of the contract.

15. In his evidence, Sen referred to this first payment as the *"deposit"*. He said that, in accordance with the common practice in this business, he (Sen) was supposed to have received the deposit first from Patel/G6. Upon receiving

the deposit, he (Sen) would then send to Patel/G6 some audio scripts and posters. These (audio scripts and posters) are then to be used by Sen / G6 for the promotional work for the Fiji shows.

16. There is no evidence that Sen sent Patel/G6 the audio scripts or posters. Notably, Sen said he did send Patel/G6 the posters and audios for the New Zealand shows.

> *And I sent him pictures of the posters. The audios which was audios and videos for the New Zealand show as I needed details for Fiji Show. And he kept on going he will do the deposit. A common practice my Lord in this field is until unless the deposit is done we do not release any script, audios, postage information and we stick with that policy.*

17. Sen said Patel/G6 never paid the deposit. However, he said he went ahead and paid the artist in India. He said he had to do so otherwise, he would not get any scripts.

> *……. But meanwhile my Lord, I have already paid the artist in India otherwise we will get no scripts my Lord. And I kept on emphasizing on him about the deposit.*

18. Sen said that all the while, Patel kept assuring him that he would book the venue and the accommodation – but did not live up to that promise as he kept going in and out of the country.

> *….. Patel said that; "I will arrange the accommodations, the venues". He still agreed to do the show at National Gymnasium and then kept on going that he is out of country. He is here, there. That's why we kept the message via viber. He is in Columbo and it kept on going till April. We had phone conversation as well my Lord. In April I told him I am coming to Fiji my Lord. And I tried arranging a meeting with him at his office in Tappoo City. He kept on going, "See you in Suva at 3.00pm". And when I called him up, went to Suva, he didn't show up. He said he had some commitments my Lord. And then he went to Hong Kong my Lord and this is in April. So just one month before the show he still confirmed that he is going to go with the show. Then I tried to meet him in Fiji again. And then kept on texting him about the money.*

19. Sen said that he kept talking to Patel until about a month before the show when he realized that he would have to do the promotions himself. And a little over two weeks before the show, Patel told Sen to go ahead with the show:

....*That I am flying out of Fiji. He gave me the contacts for people for sponsorship as on the thing. As he said he is out of country. That some conversations we had over the phone and he gave me all the details. Then he said; "Can you send me the total costs". He said; "Because I am busy but I will still go ahead with the show". Then I gave him the total cost as per tax my Lord. While it was happening I thought to help him out. I get all the details. I have got FBC to work and give details, offer and everything. He even asked me for the bank details with the code and stuff which I photo took and sent it. That's on the end of April. Then I sent him the accounts details as well just to be sure. Then he promised that I will get it back on Monday and the show is on May. As you see there is a conversation mentioning Raj bhaiya. That's the person who introduced me. It kept on going. We knew nothing was going to happen because I had to do that 30 days prior to the show payment. That's when started to organize because I had already made the payment. When Monday came nothing happened. And as you can see after that he stopped messaging me. That's when we realized and then we started to promote the show ourselves my Lord because otherwise I could have per contract, it could have be a disaster to myself my Lord and the industry.*

.....

**Q.** *Now witness how many days prior to the first show did you realize that the Defendant was not going to fulfill his!*

**A.** *It was less than a month my Lord. Say about a month that we started having the doubts when he was not responding or answering my phone calls my Lord.*

**Q.** *Witness if you look at your messages. The last message he sent you before the show on 1st of May 2015 and he told you he will get it on Monday. That was the money he was talking about?*

**A.** *Yes my Lord.*

**Q.** *And then nothing from him until the 9th of May it looks like when he says; "Don't worry I will see you on Tuesday"?*

**A.** *Yes my Lord.*

**Q.** *And then on 11th of May 2015 he tells you; "You go ahead with your show. We will let you know once I am sure"?*

**A.** *Yes my Lord.*

**Q.** *There is a date my Lord. It says 11th of May on the messaging. Right witness, let's look at what he is saying from there. Now can you read the conversations from 11th of May? It's not too many so let's just?*

**A.** *"Just landed in New Zealand. So what's the update".*

**Q.** *Who said that?*

**A.** *That's me my Lord.*

**Q.** *And his response?*

**A.** *"You go ahead with your show, will let you know once I am sure". Then I replied; "You could have said the same thing 2 months ago before signing the contract. Basically till now you are still not sure". That was my words my Lord. Then he goes; "Because you have launch it under RS and you have also registered in Fiji which I was not aware of. Don't worry I will let you know" my Lord. Then I texted him on the next page my Lord; "I waited for nearly 2 months what do you*

*expect me to do. Keep on waiting until and then you text me saying you are not sure. You deposit the money into my account and I will change it to G6 Events same time. Okay do let me know I will be waiting and about registering the company etc yes I did because without the legal procedures you can't do anything and I had no choice and I do my business legally"my Lord. And on 30th May this was!*

**Q.** *So that message was the last message before the show? And the first show was what date witness?*

**A.** *29th May.*

**Q.** *So 11th May is when he tells you he is not going to do it. That's about 2 weeks before the show. A little over two weeks before the show?*

**A.** *Yes my Lord.*

20. The viber-conversation between Sen and Patel on 03 May 2015 after the shows went as follows:

**A.** *Yes my Lord. This was when I was flying out of the country my Lord. I texted him; "Jai Shree Krishna. Which is like respect saying hello. Hope you are well. Both Fiji show is done and it was a great success even though a lot of running around and stuffing around but the show did go on. Anyway let's move forward email or text me your legal teams details as my legal team will contact them. The sooner the better. Thanking you". My Lord his response was; "What do you mean by legal team, if you do wrong things, I will be very bad to you, so don't play dirty games with me. I'm young but not fool. Because of Ashish (Ashish is a businessman here in Lautoka. He is a friend of mine as well and as a relation to Mr Gaurang Patel). I did not take any action. But I knew you will do this" my Lord. "You do what you have to do and I'll do what I have to do. Legal team is the person who looks after your legal side when things go wrong and that's your choice my friend for not doing anything. Maybe you should discuss with your legal team first before saying something". That was my text my Lord. He responded; "Some people did told to stop the show because I had legal contract, I did not listen to them. Seems like they were right and I was wrong. Don't have a safe trip to New Zealand" my Lord. My response was; "And dirty games you should know about that as I don't play dirty. You also don't know me but I don't do bad things and play dirty. Yeah and people also told me you were, are fraud and I didn't listen to them but I told you that people say".*

21. The Viber messages were tendered and marked **PEX4.**

## G-6 NOT INCORPORATED UNDER THE COMPANIES ACT (CAP 247)

22. As I note above in paragraphs 10 and 11, the agreement in this case was between *Samuel Sen of RS Promotions Ltd* on the one hand and *G6 Events*.

23. G6 Events is described in the title to the Agreement as *"a company incorporated under the Companies Act having its registered office on Suite 1, level 2, Victoria Parade, HFC Building, Suva....."*. A stamp purporting to be the common seal of G6 Events is affixed in the attestation clause and signed off by Patel in his purported capacity as "director" of G6.

24. It is clear to me that the agreement in question was subscribed by the name of G6 Events rather than the name of Patel.

25. As it turns out, at the time the above agreement was executed, G6 Events was not incorporated under the Companies Act. I do not know whether it has since been incorporated.

**ISSUES**

26. Sen is suing Patel for breach of contract which he entered into with G6. The agreement is obviously unenforceable against G6 Events which is non-existent entity. Is the agreement enforceable against Patel personally, in any event?

**ANALYSIS**

27. Only a binding agreement is enforceable. To be binding, the agreement must embody all the essential requirements of a valid agreement, that is, there must be an offer, an acceptance, consideration, and an intention to create legal relations.

28. At face value, the agreement in question appears to satisfy all the basic requirements.

29. The only niggling question is whether the consideration in this case had moved from Patel or whether it had moved from G6 Events. Did consideration in this case move from Patel or did it move from G6 Events? Is Patel a stranger to the agreement and could not be sued personally on it?

30. Mr. Sharma submits that Sen is able to sue Patel personally, notwithstanding that the agreement in question was with G6 Events. He argues that even if G6 Events was not in existence at the time of the agreement, it was Patel who signed it and dealt with Sen. Patel is therefore liable under the contract.

31. Of course, a duly incorporated company, being an artificial legal person, and having no physical existence, will enter into, and commit itself to, a contract through human agency namely, the director(s). Generally, the director(s) cannot be held personally liable for a breach of contract by the company, if the director(s) had acted in good faith and within the scope of their authority. This is because the company has a separate legal personality.

32. Does the same apply to a person who signs a contract for and on behalf of a company which is yet to be incorporated?

33. The starting point is the case of **Kelner v. Baxter** (1866) L.R. 2 C.P. 174. This case established that if a person **(A)** contracted on behalf of a non-existent company, **(A)** would be liable under the contract[i].

34. Lord Denning MR summarized **Kelner** (supra) in **Phonogram Ltd v Lane** [1982] 1 QB 938, [1982] QB 938 as follows:

> *I am afraid that before 1972 the common law had adopted some fine distinctions. As I understand* ***Kelner v. Baxter*** *.....it decided that, if a person contracted on behalf of a company which was nonexistent, he himself would be liable on the contract. Just as, if a man signs a contract for and on behalf 'of his horses,' he is personally liable.*

35. In **Black v Smallwood** [1966] HCA 2; (1966) 117 CLR 52 (25 February 1966), the Australian High Court (as per Barwick C.J., Kitto, Taylor & Owen JJ) opined that the common law never intended **Kelner** to be an absolute rule.

> *4.* ***Kelner v. Baxter*** *(1866) LR 2 CP 174 was cited as an authority for the proposition that there is a rule of law to the effect that where a person contracts on*

*behalf of a non-existent principal he is himself liable on the contract. But we find it impossible to extract any such proposition from the decision.*

36. The Australian High Court in **Smallwood** (supra) interpreted **Kelner** as advocating the following analytical structure[ii]:

(i) look at the written instrument.

(ii) can it be imputed from the written instrument that the defendant intended that he is to be bound personally or is it clear that the parties intended for there to be a binding contract?

OR

(iii) is there anything in the written instrument inconsistent with the conclusion that the defendants should be bound personally?

37. In **Summergreene v. Parker** [1950] HCA 13; (1950) 80 CLR 304, Fullargar J took the approach that where **A** signs a contract for a non-existent principal, and the circumstances are that **B** (the other party to the contract) was of the view that a binding contract had been made, there should be a strong presumption that **A** had intended himself to be bound personally.

*"I do not myself think that **Kelner v. Baxter** (1866) LR 2 CP 174 or any of the cases cited affords any assistance in the present case. Where A, purporting to act as agent for a non-existent principal, purports to make a binding contract with B, and the circumstances are such that B would suppose that a binding contract had been made, there must be a strong presumption that A has meant to bind himself personally.*

38. The above presumption is rebuttable, but only in exceptional circumstances, if consideration has flown from **B** in reliance on the existence of a binding contract.

*Where, as in **Kelner v. Baxter** (1866) LR 2 CP 174 , the consideration on B's part has been fully executed in reliance on the existence of a contract binding on somebody, the presumption could, I should imagine, only be rebutted in very exceptional circumstances.*

39. At the end of the day, the fundamental question in every case is what the parties intended or must be fairly understood to have intended. This is ultimately a question of construction of their written agreement, or determining the effect of their oral expressions:

> *But the fundamental question in every case must be what the parties intended or must be fairly understood to have intended. If they have expressed themselves in writing, the writing must be construed by the court. If they have expressed themselves orally, the effect of what they have said is a question of fact - a question for the jury, if there is a jury" (1950) 80 CLR, at pp 323, 324 . (at p56)*

40. Notably, in **Smallwood** (supra), Barwick C.J., Kitto, Taylor & Owen JJ did cite and agree with Fullagar J's above analysis in **Summergreene**:

> *We should add that we fully agree with the observations of Fullagar J. in **Summergreene v. Parker** [1950] HCA 13; (1950) 80 CLR 304 concerning the basis of the decision in **Kelner v. Baxter** (1866) LR 2 CP 174 .*

41. After reviewing more cases, Barwick C.J., Kitto, Taylor & Owen JJ concluded by agreeing with the approach in the English case of **Newborne v. Sensolid (Great Britain) Ltd**. [1954] 1 Q.B. 45[iii].

42. In **Newborne**, a written contract was entered into by Leopold Newborne (London) Ltd (**"LNLL"**). It was a contract of sale (by LNLL) of goods to Sensolid. The contract was subscribed by the name of LNLL. At the time of contract, LNLL was in the process of formation but not yet incorporated.

43. Apparently, Mr. Newborne, the man behind LNLL, took steps to substitute his name for LNLL as plaintiff as he (Newborne) tried to enforce the contract personally rather than in the name of LNLL.

44. It was held that the contract purported to be a contract by LNLL. However, as LNLL was not in existence when the contract was signed, there never was a contract. Newborne's name therefore could not be substituted in the place of LNLL's name. The contract was therefore a nullity.

45. Lord Goddard CJ said:

*'In my opinion, unfortunate though it may be, as the company was not in existence when the contract was signed there never was a contract, and Mr Newborne cannot come forward and say: 'Well, it was my contract.' The fact is, he made a contract for a company which did not exist.' The contract purported to be a contract with the company and it was not relevant that, as was the case, it was a matter of indifference to the purchasers whether they contracted with the company, or with Mr Newborne personally.*

46. In Fiji, the Court of Appeal in **Prasad v Sunrise Corporation Ltd** [2005] FJCA 23; ABU0065.2004S (15 July 2005) applied **Newborne** and **Black v Smallwood** as follows:

> *[7] It is the other matter relied on by the first appellant that calls for closer consideration. It is that, at the time the agreement for sale and purchase was made on 29 March 2004, the respondent had not been incorporated. Indeed, so far as the material goes, there is nothing to suggest that the respondent has even now been registered and incorporated as a legal entity. From this it is evident that as a matter of law the respondent had no existence and so on 29 March 2004 was incapable of being a party to the contract that is claimed to constitute the ground for lodging and maintaining the disputed caveat.*
>
> *[8] There are two decisions of authority to that effect. The first is that of the English Court of Appeal in **Newborne v . Sensolid (Great Britain) Ltd** [1954] 1 QB 45. It was a case of a written offer to sell the defendant 200 cases of cooked meat on terms set out in a document which was subscribed "Leopold Newborne (London) Ld." followed by the signature of Leopold Newborne. His name appeared elsewhere on the document as one of the directors. It later turned out that at the time the agreement was made by completion by the defendant of the acceptance slip attached to the letter, Leopold Newborne (London) Ld. had not been incorporated by registration as a limited liability company. An attempt was then made to substitute Leopold Newborne in place of Leopold Newborne (London) Ld as the plaintiff in proceedings to recover damages for non-acceptance of the goods.*
>
> *[9] In affirming the decision of Parker J. dismissing this claim, Lord Goddard CJ in the Court of Appeal said ([1954] 1 QB 45, 51):*
>
> > *"The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature*

*of one of its directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr Newborne."*

*The result, his Lordship said, was that because the company did not exist, there never was a contract, and Mr Newborne could not come forward and say there was a contract with him. With this Morris and Romer LJJ agreed, the former saying that both the signature on the document, and the document itself, were a complete nullity.*

*[10] The decision in* ***Newborne v . Sensolid*** *was followed by the High Court of Australia in* ***Black v. Smallwood*** *[1966] HCA 2; (1966) 117 CLR 52. The facts were similar to those of the present case in that the two plaintiffs sought specific performance of a contract to sell made under the name Western Suburbs Holdings Pty Limited. The contract was signed under that name by both plaintiffs described as "directors", although the company had at that time not been incorporated. The action by the two individual signatories failed because they were not parties to the contract, which professed to be made on behalf of a company that did not then exist.*

*[11] When one turns to the correspondence in the present case, it is clear that the principle of those two decisions must govern this. The letter of offer dated 29 March 2004 is on letterhead showing the offeror to be "Sunrise Corporation Limited", of P O Box 1921, Nadi, Fiji. It is subscribed "Yours faithfully, Sunrise Corporation Ltd.", and signed "P Singh Executive Consultant, Head Office, Queen Street, Nadi." The offer is made by a non-existent corporation and purports to be authenticated by the signature of someone acting as executive consultant to that non-existent corporation.*

*[12] The real estate agent Prime Properties in its letter dated 29 March 2004, communicating the offer to the appellant Rajesh Prasad simply adopted the form in which the written offer itself was cast. As well as enclosing a copy of the offer, it described the buyer's name as "Sunrise Corporation Limited" and its "executive director" as Mr Ramend Charan. The "company", it said, was willing to buy the property for $670,000.00.*

*[13] The problem of exactly who the appellant was dealing with became even more acute for the respondent's solicitors in drawing up the caveat dated 23 April 2004. In the end, it was expressed as follows:*

> *"I Ramend Prasad Charan.....of Nadi, Businessman as Managing Director and agent of Sunrise Corporation Limited claiming an estate or interest as purchaser by virtue of agreement dated 19 March and 29 March....."*

*[14] The signature of R P Charan is then declared to have been made in the presence and to be that of Suresh Chandra "as Managing Director and agent for Sunrise Corporation Limited a limited liability company having its registered office at Nadi, the Caveator...."*

*[15] It is, of course, impossible to reconcile these conflicting statements or contentions, for that is what they really are. To sustain the caveat, there must be a contract for sale and purchase. There can be no contract with Sunrise Corporation Limited, because it did not exist at any relevant time. There can be no contract with either P Singh, calling himself Executive Consultant, or with R P Charan as Managing Director, because neither of them professed to buy and because a person cannot be a consultant to or director of a non-existent corporation. As individuals neither of them can claim an interest in the land by virtue of any contract with Mr Rajesh Prasad as the owner of the land.*

*[16] It was nevertheless submitted by Dr. Sahu Khan that the description Sunrise Corporation Ltd. was simply the name under which Ramend Prasad Charan and Praveen Singh carried on an enterprise or partnership business. There is an affidavit from Mr Charan which disposes (para.5) that the respondent plaintiff "has never claimed that it was incorporated as a company or registered as such...." That is, inconsistent with the jurat completed by Suresh Chandra, solicitor, in deposing to the signature on the caveat of R P Charan as being that of the Managing Director of Sunrise Corporation Limited "a limited liability company – having its registered office at Nadi...." It is also inconsistent with the description throughout the material of the respondent as a "Corporation." No one suggests that it is possible in Fiji to attain corporate status or limited liability except under and by virtue of statutory authority. No such authority is identified or relied on here.*

*[17] The same paragraph (para.5) of Mr Charan's affidavit goes on to say that the respondent is a "business entity" and enterprise, of which he and Praveen Singh are the partners "and an application has been made for registration of the business as a limited liability company." This is reminiscent of a passage in the separate reasons for judgment of Windeyer J. in Black v. Smallwood [1966] HCA 2; (1966) 117 CLR 52, at 64, where his Honour said:*

> *"Questions such as are now before us have frequently arisen in America. The answer has in some jurisdictions been supplied by legislation; in others by the adoption of a rule that "organizers of corporation who transact business in the corporate name before its organization has been*

*completed will be deemed partners operating under the corporate name as a trade name....."*

*This is essentially what Dr. Sahu Khan is contending for in the present case. However, Sir Victor Windeyer went on to add in that case, "But we have no such rule."*

*[18] Sir Victor Windeyer was there speaking of Anglo-Australian law; but there is no reason to suppose that the law of Fiji is in this respect any different. Plainly that is so if the matter is considered, as it must be, according to the ordinary rules of offer and acceptance. The meaning and effect of the offer must be determined objectively from the words used in making it. The respondent's offer purported to emanate from an entity calling itself Sunrise Corporation Limited. It did not affect to come from a partnership or firm comprising one or both of two individuals, Singh and Charan, whose signature or signatures on that or any other document served the purpose only of authenticating what purported to be a subscription of the offer of 29 March 2004 in the name of the corporation itself. Since the corporation did not exist at that date, the supposed offer was a nullity and incapable of acceptance to produce a valid contract for purchase of the land sufficient to support a caveat by either or those individuals.*

*[19] Counsel for the respondent also contended that the personality of the purchaser was something that would or could be resolved at settlement or completion when the identity of the transferee would be determined by the parties or their solicitors. Adopting that approach would involve making a new contract, being either one with a corporation that did not exist when the supposed contract was made on 29 March 2004, or with some other person or entity. That would not be the contract which the caveat was lodged to protect or is capable of protecting.*

*[20] As a final submission, counsel for the respondent pointed out that the Companies Act (Cap. 247) does for certain purposes recognize and in s. 358 defines the concept of an "unregistered company." Section 358 says that it includes any partnership, association or company, with certain exceptions. The specified exceptions include:*

> *"(b) a partnership, association or company which consists of fewer than 8 members and is not a partnership, association or company formed outside Fiji."*

*[21] It follows that the partnership, if any, alleged to subsist between Singh and Charan is not an "unregistered company" within the meaning of this*

*provision. Those two are, if anything, a partnership, association, or company formed, not outside but within Fiji. In any event Part IX, of which s.358 forms a principal provision, is directed to "Winding up of Unregistered Companies." Winding up the business enterprise of Messrs. Singh and Charan is not something that any one is seeking to achieve here.*

*[25] The result is in our view that there was and is no valid contract or other ground on which the caveat could have been lodged or can be maintained in this case.*

47. I am bound by the Fiji Court of Appeal's lead in **Prasad v Sunrise Corporation Ltd** (supra) in its application of **Newborne** and **Black v Smallwood**. Accordingly, I hold that there was no valid agreement in this case.

## CONCLUSION

48. Sen cannot sue Patel personally on a contract which is not valid. The plaintiff's case is dismissed accordingly.


.....

Anare Tuilevuka

**JUDGE**

Lautoka

27 April 2020

[i] Lord Denning MR summarized **Kelner** (supra) in **Phonogram Ltd v Lane** [1982] 1 QB 938, [1982] QB 938 as follows:

> *I am afraid that before 1972 the common law had adopted some fine distinctions. As I understand* ***Kelner v. Baxter*** *.....it decided that, if a person contracted on behalf of a company which was nonexistent, he himself would be liable on the contract. Just as, if a man signs a contract for and on behalf 'of his horses,' he is personally liable.*

[ii] The Court said as follows:

> *In* [**Kelner**] *it appeared from the contract itself that the defendants had no principal; they had purported to enter into a contract on behalf of the "proposed Gravesend Royal Alexandra Hotel Company", and the fact that they had no principal was obvious to both parties. But it was not by reason of this fact alone that the defendants were held to be liable; the Court proceeded to examine the written instrument in order to see if, in these circumstances, an intention should be imputed to the defendants to bind themselves personally, or, perhaps, to put it in another way, whether, the intention being sufficiently clear that a binding contract was intended, there was anything in the writing inconsistent with the conclusion that the defendants should be bound personally.*

[iii] They said:

> *8. These reasons lead us to the respectful conclusion, not only that we should follow the decision in* ***Newborne v. Sensolid (Great Britain) Ltd.*** *(1), but also that the decision in that case was correct. We would dismiss the appeal. (at p61)*