

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
: Ms. T. Haniff for the Respondent

DATE OF HEARING : 23 December 2019

DATE OF RULING : 24 January 2020

RULING

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. This was supported by the affidavit dated 3 December 2019 of the Plaintiff, Mr. Pradeep Patel aka Prakash Patel. Submissions were made in support on 11 December 2019. On that day timelines were given for the parties to file their affidavits and submissions. The hearing was fixed for 23 December 2019.
3. When the matter came up for hearing, Mr. Hanif moved for an adjournment stating that he had received the Plaintiff's affidavit in reply only at 10 am that morning, as it had been served on his client late afternoon the previous day, that he has been 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 – as Mr. Nagin submitted that the matter necessitated urgency – and both counsel made submissions. Prior to the hearing, on 18 December 2019, the Plaintiff filed a statement of claim. The reliefs prayed for in the statement of claim were the same as those in the summons dated 5 December 2019.
4. The affidavit in support of the summons 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 against Serene and the Defendants and another guarantor, Ginza Holdings Pte. Limited; that the demand notice was not complied with; that he was appointed as the Receiver and Manager of Serene pursuant to deed of appointment dated 5 November 2019; that the notice of his 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; that the Defendants had through its lawyers sent him letters questioning the validity of his appointment and had 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.

5. 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, to whom the Receiver wanted supplies to be made despite New World 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.
6. 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; 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; 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 independent auditors for New World Pte. Limited 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.

7. It would appear that the notice of appointment of the Receiver was communicated to Serene Waters Estate Pte. Limited by letter dated 6 November 2019, which, on the face of it, seems to have been acknowledged on behalf of the Defendants. But, this document, as in the case of the debenture and mortgage instruments, has been disclosed by the Plaintiff's affidavit in reply dated 20 December 2019, which Mr. Hanif states did not reach him until the morning of the day of hearing – on 23 December 2019 – due to what he called the Plaintiff's late filing. He submitted that the affidavit in reply and annexed documents reached the Defendants' agents at 4.15 pm on Friday, 20 December 2019, and that the annexed documents should have been submitted with the Plaintiff's affidavit in support.
8. Once appointed, a Receiver or Manager has wide power to do all things necessary for the attainment of the objectives for which the Receiver or Manager was appointed. The powers of the Receiver and Manager in this case will flow from the instrument by which such Receiver or Manager was appointed. The appointment was made on 5 November 2019, and the notice of appointment, dated 6 November 2019, states that the appointment was under powers contained in an instrument dated 10 July 2015. On behalf of the Plaintiff it was submitted that the power to appoint the Receiver was clearly stipulated in the Debenture and Mortgage documents. These instruments and the notice of appointment, however, were annexed to the Plaintiff's affidavit in reply dated 20 December 2019, but were not furnished with the affidavit in support of the summons.

9. There is no doubt that when a company is in receivership, the powers of the board are vested in the Receiver. Receivership entails serious legal consequences, and, 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. Hence, the Court needs to carefully consider the validity of the appointment, and the powers and duties of the Receiver, in terms of the disclosed instruments, prior to the making of an order. In these circumstances, I am of the view that it would be fair to allow the Defendants' counsel time to obtain instructions on the material annexed to the Plaintiff's affidavit in reply dated 20 December 2019.
10. When the matter was heard on 23 December 2019, during the legal vacation, ruling was reserved by Court. Parties were then noticed to appear in Court on 27 December 2019, to take notice of the ruling. However, lawyers for the parties did not make an appearance, presumably due to the warning of an impending cyclone in Fiji, and, therefore, no order was made on that day.

Orders

- A. The Defendants are directed to file a reply, within 7 days of this ruling, to the Plaintiff's affidavit dated 20 December 2019.
- B. The parties will bear their own costs.

Delivered at Suva this 24th day of **January, 2020**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

Justice M. Javed Mansoor
Judge of the High Court