

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 186 of 2017

BETWEEN : **SHAREEN LATA HANS** of Lot 17, The Links, Denarau, Nadi,
Businesswoman.

PLAINTIFF/APPLICANT

AND : **MAHENDRA DEO** of Flat No. 4, Lot 22, 66 Paul Sloan Street, Bay
View Heights, Suva, Civil Engineer.

DEFENDANT/RESPONDENT

Civil Action No. HBC 121 of 2018

BETWEEN : **MAHENDRA DEO** of Lot 27 Fairway Palms, Denarau Island, Nadi, Fiji,
and Engineer/Director/Businessman.

PLAINTIFF/RESPONDENT

AND : **SHAREEN LATA HANS aka SHAREEN LATA DEO** of Lot 17, The
Links, Denarau, Nadi, Businesswoman.

DEFENDANT/APPLICANT

WINDING UP NO. 11 OF 2017

IN THE MATTER OF PACIFIC WEST
BUILDERS LIMITED a limited liability
company having its registered office at Lot 9,
Bountiful Subdivision, Namaka Lane, Namaka,
Nadi.

AND

IN THE MATTER OF A WINDING UP
APPLICATION UNDER COMPANIES ACT
2015

AND

SHAREEN LATA DEO aka **SHAREEN**
LATA HANS of Lot 17, The Links, Denarau
Island, Nadi, Fiji Islands, Businesswoman.

RESPONDENT/APPLICANT

Counsel : Applicant Mr Sharma. J
: Respondent Mr Ashnil K. Narayan
Date of Hearing : 22.10.2021
Date of Judgment : 15.11.2021

JUDGMENT

INTRODUCTION

1. This summons was filed on 15.9.2021, (the Summons) by Mrs. Hans (the Applicant), after Justice Stuart in his decision dated 19.8.2021 made an order to wind up Pacific West Builders Limited (the Company) in the consolidated action of HBC11/2017, HBC 186/2017 and HBC121/18. His lordship had allowed the parties to submit submission relating to the appointment of a suitable liquidator¹. His lordship appointed KPMG as the liquidator. KPMG had not consented to be liquidator, in terms of Rule 18 of Companies (Winding Up) Rules 2015. Even after the appointment, KPMG, had refused to act as liquidator. Apart from seeking an appointment of liquidator, the Summons sought to 'declare' that orders of Master 'dissolved and discharged'. The orders made by Master, was appealed to Court of Appeal in Civil Appeal No ABU55 of 2020. There was no need to 'declare' anything by this court, when there is an appeal in Court of Appeal, relating to said orders. All the orders of Master, are under appeal hence a determination of Court of Appeal is awaited. I have taken judicial notice of this appeal being mentioned before a single judge of Court of Appeal before filing of the Summons. So orders of Master should not be dealt by this court, in terms of Order 20 rule 10 of High Court Rules 1988 or inherent power of the court. The orders seeking 'declaration' of Master's orders when there is an appeal and that matter is being dealt by Court of Appeal, is struck off *in limine*. It is axiomatic that appointment of provisional liquidator and orders or directions to provisional liquidator are only till a liquidator takes over. Provisional liquidator can only function till a winding up order is made and liquidator takes over winding up in terms of Section 538(a) of Companies Act 2015. All statutory obligations of Official Receiver must be complied and there is no provision relied on to give further directions for handing over of work, other than statutory obligations.

FACTS

2. This is a consolidated Action where three actions including winding up action were consolidated. Applicant had obtained certain orders initially in HBC 186 of 2017 on an *ex parte* application against Mr Deo (Respondent).

¹ Paragraph 5 of Justice Stuart's decision of 19.8.2021

3. Respondent filed winding up action 11 of 2017 for winding up of the Company. He also filed an action HBC 121/18 for an action based on fraud against Applicant.
4. These three actions were consolidated and Master had dealt the consolidated actions, in a summons filed by Respondent, and made some orders in the consolidated action on 3.7.2020 on following terms

- a. The ex-parte orders made on 31.08.2017 in Civil Action No. 186 of 2017 are set aside forthwith,
- b. The Official Receiver is hereby appointed as provisional liquidator and he or she to take control of the affairs of the company with immediate effect,
- c. The Official Receiver in his or her capacity as the provisional liquidator is to conduct the affairs of the company as he or she is required by law until final determination of all three consolidated matters and specifically;
 - [i] To issue payments to all suppliers and utility service providers as and when necessary.
 - [ii] To prepare, lodge and pay monthly VAT returns and other tax related statutory obligations in consultation with the company's external accountants;
 - [iii] To issue payments for all staff and other employees' salaries and wages as and when necessary including director's fees;
 - [iv] To issue and provide instructions to any commercial bank affiliated with the company;
 - [v] To receive money on behalf of the company; and
 - [vi] To manage the books and accounts of the company.
- d. The Official Receiver to pay Mr. Deo the all payments that were withheld by Ms. Hans from 31.08.2017 till to date if he is entitled to the same in his capacity as director and employee of the company,
- e. Ms. Shareen Lata Deo aka Shareen Lata Hans be restrained from entering the company's principle place of business at Lot 9, Bountiful Subdivision, Namaka Lane, Namaka, Nadi and by herself, her servants, agents or otherwise and howsoever from dealing with, withdrawing, assigning, utilizing, charging and/or encumbering any bank account with any financial institution within Fiji until the final determination of all three consolidated matters,
- f. Ms. Shareen Lata Deo aka Shareen Lata Hans be restrained by herself, her servants, agents or otherwise and howsoever from transferring, assigning, disposing, charging, or encumbering any of the company's assets, or reconstructing, restructuring, amalgamating, transferring, charging or assigning any shares in the company until the final determination of all three consolidated matters,
- g. Ms. Hans should pay damages that might have caused to Mr. Deo by her conducts after obtaining the ex-parte orders, and it should be assessed if not agreed, and
- h. Ms. Hans should pay indemnity cost in all three applications and it should be taxed if not agreed."

5. Master's aforesaid decision was appealed to Court of Appeal and this matter was mentioned before a single judge of Appeal in Court of Appeal in Abu 55 of 2020.
6. While the appeal was pending Applicant also filed a summons before a judge dated 9.12.2020 seeking following orders,
 1. That the Consolidated Files (more particularly **WINDING UP NO. 11 OF 2017**) be transferred to a Judge for Winding up Order to be made as consented to by the RESPONDENT/APPLICANT/DEFENDANT Shareen Lata Deo aka Shareen Lata Hans.
 2. That an order for Winding Up of Company Pacific West Builders Limited be made as per Winding Up Petition NO. 11 OF 2017 in matter IN THE MATTER OF A WINDING UP APPLICATION UNDER COMPANIES ACT 2015 filed by the DEFENDANT/RESPONDENT /APPLICANT, MR.MAHENDRA DEO and as consented by the Respondent/Applicant SHAREEN LATA DEO aka SHAREEN LATA HANS of Lot 17, The Links, Denarau Island, Nadi, Fiji Islands, Businesswoman in Masters Court on the 26th of November 2020.
 3. The Winding up order be made as pleaded by the DEFENDANT/RESPONDENT/APPLICANT, MR. MAHENDRA DEO or **alternately**.
 4. That the parties divide the assets amongst themselves with mediation with the Liquidators under court supervision.
 5. That the Official Receiver appoint a Chartered Accounting Firm who are registered with the Ministry of Justice to be appointed as Liquidators pursuant to the Companies Act 2015.
 6. Official Receiver to provide full financial report, inventories and other requirement to fulfil audit and liquidation requirements of the appointed Liquidator.
 7. **That the Orders b, c (i) to (vi), d, e, f of the Master delivered on the 3rd of July and filed on the 8th of July relating to interlocutory application for appointment of Provisional Liquidator be declared as dissolved since orders on the substantive application is being made.**
 8. That the Respondent/Applicant/Defendant show cause why Civil Action No. HBC 121 of 2018 should not be struck out for want of Prosecution on the grounds that:

- a. Defendant/Respondent/Applicant has not taken any steps to move this matter to trial for 18 months and more.
 - b. It is an abuse of the process of the court;
 - c. Delay is inordinate and inexcusable
 - d. The Applicant herein is prejudiced by delays in prosecution of this action for resolution of matters in a timely manner.
 - e. It is in breach of the Applicant's constitutional and human rights to a fair trial and/or quick resolution within a reasonable time.
9. Any such or further Order that the court may deem just and expedient in the Circumstances of the matter.
 10. Costs of this Application on a Solicitor Client Indemnity basis.”(emphasis added)
7. This summons along with another summons filed by official receiver was dealt by Justice Stuart. Official receiver's summons was struck off.
 8. Justice Stuart granted winding up of the Company, and also appointed KPMG as liquidator. Order of his lordship, was handed down on 19.8.2021. Orders made by Justice Stuart were not appealed.
 9. Both parties accept the order for winding up of the Company, but as the court appointed liquidator had not consented to winding up and refused to act as liquidator.
 10. Applicant filed the Summons seeking *inter alia* for removal of KPMG and suggested one prospective liquidator. Respondent does not object to removal of court appointed liquidator, but object to single nominee of Applicant as the liquidator.
 11. Summons filed on 15.9. 2021, Ms. Hans was seeking the following Orders:
 1. “That Orders granted by this Court via Ruling delivered on 19 August 2021 and sealed on 27 August 2021 whereby the Court ordered as follows:

THAT KPMG is appointed as liquidators of Pacific West Builders Limited

Be **varied** and the following Orders be made:
 2. THAT KPMG is discharged as liquidator of Pacific West Builders Limited.
 3. THAT *PFK Chartered Accountants & Business Advisors* or such other Liquidator (who is registered with the Ministry of Justice) as approved by the Court is appointed as Liquidator of Pacific West Builders Limited.

4. THAT Official Receiver to provide full Financial Report, Inventories and other requirement to fulfil audit and liquidation requirements of the appointed Liquidator.
5. **THAT the Orders b, c (i) to (vi) , d, e ,f of the Master delivered on the 3rd of July, 2020 and Sealed on the 8th of July, 2020 relating to interlocutory application for appointment of Provisional Liquidator be declared as Dissolved and Discharged since Orders on the substantive Winding Up Application has been made.**
6. Any such or further Orders that the court may deem just and expedient in the Circumstances of the matter.
7. Costs of this application.”(emphasis is mine)

ANALYSIS

12. As there was no appeal against Justice Stuart’s order for winding up, both parties accept the Order of the court that the Company must be wound up.
13. Justice Stuart made following orders relating to summons of Applicant dated 9.12.2020 and application by official receiver of 28.1.2021 which was rejected by the judge. Following are the orders,
 - i) “That the application by Ms. Hans to strike out HBC 121/18 is dismissed;
 - ii) **That Pacific West Builders Limited is to be wound up.**
 - iii) **That KPMG is appointed as liquidator of Pacific West Builders Limited.**
 - iv) The application filed on 28 January, 2021 by the Official Receiver is dismissed.
 - v) That Costs are reserved until the determination of the matter
 - vi) That the remaining matters are adjourned to 30 September, 2021 for Mention at 10.30am.”(emphasis is mine)
14. Justice Stuart , did not deal with order 5 of summons dated which sought that Master’s orders ‘ **b, c (i) to (vi) , d, e ,f** , be ‘declared ‘ dissolved.
15. Again in the Summons before me, Applicant is seeking **Orders b, c (i) to (vi) , d, e ,f** of Master that were subjected to an Appeal in Court of Appeal in ABU 55 of 2020, be declared ‘dissolved’.

16. The Summons sought to vary orders made by a Judge as regards to naming the liquidator after further submission of material on the appointment of liquidator.
17. In my mind neither can I vary the order of a judge nor can I 'declare' about Master's orders which was appealed to Court of Appeal.
18. The order 1 of the Summons, seeks to vary the orders made by the judge. This can only be done in limited circumstances in terms of Order 20 rule 10 of High Court Rules 1988. The summons filed by the Applicant does not state specific provision but was made pursuant to 'High Court Rules 1988, Companies Act 2015 and inherent jurisdiction'.
19. In the written submissions Applicant had relied on Section 540 of Companies Act 2015. This is not a variation of order under judgment, but a separate application for removal of a liquidator appointed by court. So I consider the Summons in terms of provisions contained in Companies Act 2015 for removal and appointment of a liquidator with *mutatis mutandis*.
20. This was done as there was no prejudice to either party from regularizing the irregular application considering the prejudice to parties who had expended money and time for the removal of KPMG due to stalemate.
21. In my mind an application in terms of Section 540 should be by way of originating summons, but I do not consider the irregularity had prejudiced any party to this action, as Respondent does not object to removal of KPMG and had not raised the said technical objection.
22. Respondent does not oppose an appointment of another liquidator in place of KPMG as it had refused to act. It had not consented to be appointed as required in Rule 18 of Companies Winding up Rules 2015. So the removal of KPMG is a must in order to execute the orders of this court.
23. Applicant in written submissions relied on Section 540 of Companies Act 2015 for the removal of orders sought regarding appointment of liquidator and it reads,

“540.—(1)A liquidator **appointed by the Court** may resign or, **on cause shown, be removed by the Court.**

(2)Where a person other than the Official Receiver is appointed liquidator or interim liquidator, the person must receive such salary or remuneration by way of percentage or otherwise as—

(a) is agreed between the liquidator and the committee of inspection;

(b) if there is no committee of inspection or the liquidator and the committee of inspection fail to agree, by a resolution of the majority of creditors;

(c) or otherwise as the Court directs.

(3) A vacancy in the office of a liquidator appointed by the Court must be filled by the Court.

(4) If more than one liquidator is appointed by the Court, the Court must declare whether any act, by this Act required or authorised to be done by the liquidator, is to be done by all or any one or more of the persons appointed.

(5) Subject to section 490, the acts of a liquidator must be valid, notwithstanding any defect that may afterwards be discovered in, his or her appointment or qualification.”(emphasis added)

24. So it is mandatory for court appointed liquidator be removed by the court, even with consent of the parties, unless the liquidator resigns.
25. At the hearing as well as in written submissions Respondent consented to removal of KPMG.(see paragraph 1.4 of submissions).
26. Even though there was no objection to removal of liquidator appointed by the judge, Respondent relied on Section 492 of Companies Act 2015 for removal of KPMG. It reads,
“Power of Court to appoint and remove liquidator in winding up
492.(1) If, from any cause whatever, there is no liquidator acting, the Court may appoint a liquidator.
(2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.”
27. The salient feature of removal of liquidator in Section 492 and also 540 of Companies Act, 2015 is that there should be ‘cause shown’ for the removal of liquidator. Though Applicant and Respondent relied on different sections in the Companies Act 2015, the requirements for such removal is the same.
28. There is sufficient cause to remove KPMG as there was no ‘written consent’ filed by Applicant or Respondent (who was the original petitioner of winding up) in terms of Rule

18 of Companies (Winding Up) Rules 2015 from KPMG, and the refusal of it to take the responsibilities of liquidator, which is voluntary.

29. Any defect in the appointment, such as lack of consent, prior to appointment, may not be material if KPMG, consented, in terms of Section 540(5) of Companies Act 2015, but this has no application as court appointed liquidator did not wish to act as liquidator.
30. Applicant states that Section 540(5) of Companies Act 2015 cannot be applied to defects in the appointment of liquidator when such defects were 'already known'. (see paragraph 3.3 of written submissions). This is not correct position of law.
31. Section 540(5) of Companies Act 2015, gives legality to actions of liquidator irrespective of any irregularity in the appointment that was discovered after appointment. So that means appointment was valid irrespective of deficiency which was discovered subsequent to appointment.
32. It is clear indication that any defects in appointment or even qualification is to be disregarded and only exception to this is Section 490 of Companies Act 2015 , which is not material here.
33. Even after appointment of KPMG as liquidator, neither party sought removal of KPMG as liquidator till KPMG refused to act as liquidator.
34. Applicant states that defect of appointment of KPMG without their consent was a defect already known. This may be so, but when his lordship appointed KPMG the absence of obtaining consent, was discovered subsequent to the winding up order and also appointment happened on 19.8.2021 and covered in terms of Section 540(5) of Companies Act 2015.
35. So, in spite of KPMG, not consenting to become a liquidator prior to appointment, the appointment is valid. If KPMG consented it could have acted upon.
36. The phrase 'may afterwards be discovered' cannot be given a strained or twisted meaning as suggested by Applicant, and I reject that.
37. Section 542 (2) of Companies 2015, Act allows a court to remove a liquidator for 'a sufficient cause'. Accordingly, what is sufficient cause is the issue to the court and in this instance, the refusal of KPMG is sufficient cause as Court had already ordered winding up and this decision was not appealed and a stalemate had arisen in winding up.
38. I prefer to rely on both, section 542 of Companies Act 2015 and also Section 540 of Companies Act 2015, for removal and also appointment as there is no conflict of the provisions contained in both sections regarding removal of a liquidator appointed by court.

39. They are complimentary to each other and removal and appointment of liquidator should be done simultaneously, considering that already official receiver had also made a summons which was stuck off.
40. It seemed that removal and appointment of a new liquidator must be simultaneous in terms of Section 542 of Companies Act 2015. It also gives discretion to court to appoint a suitable liquidator.
41. Section 540(3) of Companies Act 2015, states that court must appoint a liquidator when there is a vacancy, which can be due to reasons other than removal, such as legal impediments to act as liquidator, or death of liquidator when natural person was appointed, resignation etc. So Section 540(3) of Companies Act 2015, makes it mandatory for the court to appoint a liquidator when there is a 'vacancy' in the office of a liquidator appointed by court.
42. In strict sense this provision of law can be applied when there is already a vacancy of a liquidator, whereas Section 542 is for removal and appointment of a liquidator by court. But in my mind this distinction is not material for this application as both parties in written submission seeking 'removal' of KPMG as opposed to 'vary' orders of the judge sought in the Summons.
43. KPMG is removed from being a liquidator of the Company and for avoidance of doubt its released from all obligations as liquidator, under Companies Act 2015.
44. Next issue is how to exercise discretion to select a liquidator.

Appointment of Liquidator

45. Applicant in the written submission relied on Section 410 of Companies Act 2015. At the hearing counsel relied on Section 415 of Companies Act 2015. These are provisions that applies to Ministry of Justice when they select liquidators for Registration and has no application to court, in the appointment or selection of liquidator.
46. In the affidavit in response of Respondent filed on 12.10.2021 there is a list of Registered (Accredited) Liquidators annexed as MD 1. Applicant, though denied contents of the relevant paragraph (para 4) had not denied the registered liquidator list, and had avoided commenting on this list.
47. Section 415 of Companies Act 2015 required a register to be maintained with specific details stated in Section 415(1) (a) from (i) to (v) of the said Act, and this includes particulars as to

any suspension of registration. So absence of such information from either party to this action to be presumed that names contained in MD1 are prospective liquidators as at 23.9.2021 none of them were suspended by that date.

48. Section 415(1) (iv) of Companies Act 2015, also required that such register should also contain the 'name and address of that firm, Company or other name under which he or she so practices'.
49. Counsel for Applicant in his submission relied on annexed MD 1 for their objections to the nominees of Respondent, and this is acceptance of MD 1.
50. Hence this is a list of Registered Liquidators by Ministry of Justice in terms of Section 410 and 415 of Companies Act 2015 as at 23.9.2021.
51. Companies (Winding up) Rules 2015, Rule 32 (2) requires that judicial notice can be taken as regards to the registered liquidators. Since all three nominees have consented to become prospective liquidator of the Company, judicial notice is taken as to registered status of all the three candidates to act as liquidator of the Company.
52. Applicant rely on Section 410 (1) of Companies Act 2015 to argue that only natural person be appointed as liquidator, by court. This is not correct. As I said previously, only natural person can be registered by the Ministry of Justice in terms of the said provision of law as a liquidator. This is the position in any professional accreditation process of an individual, but cannot be used to argue a professional body cannot be appointed for a specific task, by the court.
53. Section 410(1) of Companies Act 2015, applies to both, Liquidators and Auditors. It does not preclude either courts or any other person from appointing a firm for auditing or liquidation, depending on circumstances.
54. If Applicant's argument is taken appointment of auditors by the name of international firms (eg. KPMG, EY, PWC, etc) are not allowed under Companies Act 2015. This was never the intention and purpose of Section 415 of Companies Act 2015.
55. In my mind there needs no further elaboration on objection to as naming a firm as liquidators, so I reject the argument that only natural person can be appointed as liquidator of the Company.
56. If so why did not Applicant objected to appointment of KPMG as liquidator as soon as appointment? This objection of Applicant is an afterthought.

Factors to be considered in the appointment.

57. Justice Hansen, in *Jacobsen Creative Surfaces Ltd v Smiths City Ltd* [1994] 1 NZLR 128 (which was followed in *Fisher International Trustees Ltd v Waterloo Buildings Ltd* [2009] Civil 2009-404- 006640), listed the following factors as relevant to the exercise of discretion:

- "1. **Independence.** There must be on the part of the liquidator the ability to make informed and unbiased decisions in the interest of all groups;
2. The **resources of the liquidator**;
3. The wishes of the creditors and contributories. This may include the indications given at the hearing where there has been a change in heart since the creditors' meeting. It is not a matter that of necessity requires adherence to the strict arithmetic calculation.
4. The **competence and experience of the liquidator.** This will be his ability to carry out the task required in an efficient manner, and in complex cases will include consideration of his commercial experience.
5. The **speed with which the liquidator can be carried out.**
6. On occasions, the liquidator's familiarity with the company will be of relevance."(emphasis is mine)

58. The above factors are not comprehensive but depending on the type of company and other circumstances, the weight given for each factor may vary and additional factors such as difficulties faced by liquidator appointed by court, reason for resignation, the reason for removal of liquidator, may be relevant in appointment of liquidator.

59. All the liquidators appointed by the court are 'officers of the court' in terms of Rule 32 of Companies (Winding Up) Rules 2015. So their primary obligation in the liquidation process is towards the court.

60. They are all subjected to the statutory obligations under Companies Act 2015 and Companies (Winding Up) Rules 2015.

61. Section 433 of Companies Act 2015 states persons who are disqualified to act as liquidators. It reads;

"Disqualification of liquidator

433.—(1) Subject to this section, a person must not, **except with the leave of the Court**, be appointed, or act, as liquidator of a Company or a specified Company or Managed Investment Scheme—

(a) if the person is not a registered as a liquidator or a liquidator of a specified Company under this Act;

(b) if the person is, otherwise than in his or her capacity as liquidator, a creditor of the Company or a Related Body Corporate in an amount exceeding \$5,000;

(c) if—

(i) the person is an Officer or employee of the Company (otherwise than by reason of being a liquidator of the Company or of a Related Body Corporate);

(ii) the person is an Officer or employee of any Company that is a mortgagee of Property of the Company;

(iii) the person is an Auditor of the Company;

(iv) the person is a partner or employee of an Auditor of the Company; or

(v) the person is a partner, employer or employee of an Officer of the Company;

(d) if the person is bankrupt or Insolvent; or

(e) if the person has not, before his or her appointment, consented in writing to act as liquidator of the Company or a specified Company or Managed Investment Scheme.”(emphasis added)

62. The above disqualifications state as to what type of connections are to be avoided. But these are not absolute disqualifications that bar a liquidator from being appointed by the court.

63. The disqualifications are absolute if there is no court order, but court can allow even such a person but this will be rare, but not impossible depending on circumstances. There should be good reasons to deviate through a court order.

64. In my mind this ‘leave of the court’ should be exercised cautiously, in exceptional circumstances and disqualification are types of conflicts that should be avoided as much as possible, unless there are very good reason to deviate from the norm.

65. Examination of disqualifications, shows that objections taken by Respondent to the nominee of Applicant are not disqualifications found in Companies Act 2015. These disqualifications are minimum requirements, unless there are good reasons to deviate from minimum requirements. By the same token, these are neither exclusive nor comprehensive list, for the court when it exercises the discretion. The court may raise the bar of disqualifications depending on circumstances.

66. Court may raise the bar, or lower, depending on the circumstances of the case. In my mind the disqualifications stated in the Section 433 of Companies Act 2015 is a guide line to follow in the exercise of discretion.
67. While each professional entity may have its own ethical, and financial policies, and their own, conditions the statutory provisions contained in Companies Act 2015 and Companies (winding up) Rules 2015 are mandatory requirements and once consented and appointed cannot override such requirements. Liquidators are officers of the court and needs to function accordingly.
68. In my mind the factors that are relevant to the appointment of liquidator in this case are as follows
 - a. Independence
 - b. Competence and resources.
 - c. Past track record.
69. Independence is the paramount factor considering objections raised by Applicant and also Respondent regarding each other's nominees. While considering that all professional bodies must act independently, it is equally important to understand local situation.
70. A close networking and connections with professionals and conflicts or perceived conflicts, due to the professional status of Applicant and also Respondent, can be seen from allegations by each party.
71. I have no doubt, that all the names /bodies presented by both parties are independent and professional in their conduct. Prima facie this is the requirement for registration and also removal from registration due to misconduct.
72. I have no evidence of any misconduct being reported against any of the three nominees hence presume they are all independent and professional.
73. It is not needed in this judgment for me to consider each and every allegation contained in the affidavits against Applicant's nominee in summary manner or to assume that allegations will be proved. This is not a case where removal of a liquidator on allegations of conflict and or bias conduct.
74. Court needs to appoint a liquidator that will have least conflict from the prospective three liquidators.
75. It is not only the belief, or ideals that matter. The court needs to select one liquidator from the three candidates that had consented to act as liquidators.

76. Both Applicant and Respondent are having connections with business and professional community in the community hence it is difficult to alleviate all remote connections with the parties due to their past and present status in the community. What had happened in the past cannot be changed, but it is safe to avoid all possible conflicts, even it cost more. At the end parties will benefit such an appointment.
77. This is the most critical aspect of this winding up considering the nature of case and also nature of allegations levelled against professionals. Due to their professional standing as well as businesses both parties had contacts with people in the community, especially professionals.
78. Some of the allegations against Applicant's nominee are personal relationships and that Respondent had some arguments and relationship ended after that. As I said earlier these cannot be tested through affidavits and it is futile to do so as court can appoint the most suitable liquidator from the three nominees.
79. Respondent had nominated two firms and they are
- a. EY
 - b. HLB Mann Jud
80. The objections of Applicant to EY are
- a. They are firms and cannot be appointed as liquidator unless personal consent or registered liquidator is given.
 - b. Expiration of registration by individuals who had submitted expression of interest.
 - c. Price.
 - d. Conditions imposed.
81. Applicant's lawyers had written to reputed firms such as KPMG, EY, PWC etc. and there was no objection by any party when KPMG was appointed by decision of the court on 19.8.2021 even without their consent. The removal of KPMG as liquidator of the Company was sought as they refused to act. None of the parties to this action objected to naming of KPMG by court, till they refused to act for lack of consent to act. So this objection of Applicant that firms cannot be appointed is an afterthought and without merit.
82. The registration is an issue that Ministry of Justice and court is required to take judicial notice of that.

83. There are advantages in appointing a firm than an individual as they are equipped to even create 'Chinese wall' (see Prince Jefri Bolkiah v KPMG [1999] 2AC 222 at 239) in case of any conflicting situation that may arise.
84. This is a factor that stand out in this case considering the affidavits submitted before me and also submissions alleging biases and conflicts against prospective nominees of liquidators.
85. At the same time skills of such a firm are diverse and more suitable considering circumstances of the matter.
86. I have earlier dealt this issue in this judgment and do not wish to repeat the same, and suffice to state that any registered liquidator in such a firm may take over the liquidation and I reject the objection of Applicant that a firm or professional body cannot be appointed.
87. Though professional remuneration is a factor to be considered, this is not determinative in this action. If the best liquidator is rejected due to higher cost that may end up in more costs to the party by allegations of bias later. This will add up to cost and time of parties.
88. As a firm will have expertise in diverse fields without outsourcing them, hence reducing time taken and also cost will reduce in such an instance.
89. Applicant had not trusted official receiver. In the same way Respondent is alleging some bias by the prospective liquidator of Applicant's choice. So it is paramount that a liquidator who is trusted and free from bias be appointed.
90. By default it is the Official Receiver which includes deputy that is appointed. For obvious reasons in this case official receiver was not appointed and both parties agree that official receiver should not be appointed.
91. At the outset the objections raised by Respondent regarding Applicant's nominee as to conflict and or biases are without merit. I need not go in to each and every allegation for obvious reasons.
92. Applicant's objections regarding conflict to HBL Mann Jude is also without merit.
93. Section 527(2) of Companies Act 2015, stated that the winding up is **deemed** to commence at the time the court order was made and in this instance 19.8.2021. This is a legal fiction as to the commencement of winding up
94. Irrespective of consent of the two parties, there is no need to make additional orders to official receiver as the position of official receiver as provisional liquidator is statutorily dealt in

Companies Act 2015 and Companies (Winding up) rules 2015. Section 538 of Companies Act 2015 states.

“**538.** The following provisions with respect to liquidators must have effect on a winding up order being made—

(a) the Official Receiver must, by virtue of his or her office, become the provisional liquidator and must continue to act as such, until he or she, or another person becomes liquidator and is capable of acting as such;

(b) the Official Receiver must summon separate meetings of the creditors and contributories of the Company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the Official Receiver, provided that, where the Court has dispensed with the settlement of a list of contributories, it must not be necessary for the Official Receiver to summon a meeting of contributories;

(c) the Court may make any appointment and order required to give effect to any such determination and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matter aforesaid, the Court must decide the difference and make such order thereon as the Court may think fit;

(d) in a case where a liquidator is not appointed by the Court, the Official Receiver must be the liquidator of the Company;

(e) the Official Receiver must, by virtue of his or her office, be the liquidator during any vacancy;

(f) a liquidator must be described, where a person other than the Official Receiver is liquidator, as "the liquidator", and, where the Official Receiver is liquidator, by the style of "the Official Receiver and liquidator", of the particular Company in respect of which he or she is appointed and not by his or her individual name.”(emphasis added)

95. From the above provision it is clear that obligations of official receiver is statutorily determined and this along with Master’s decision which was appealed to Court of Appeal, needs to be complied and official receiver should not be burdened more than what is required under law.
96. There is no need for me to make additional orders or vary the orders judge or Master subject to what was stated in this decision and I refuse to deal with Master’s decision as it is appealed to Court of Appeal in Abu 55 of 2020 and it was already mentioned in Court of Appeal by a single judge.

CONCLUSION

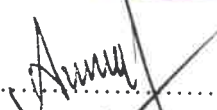
97. KPMG is immediately removed as liquidator as sufficient cause was shown for such removal. EY is appointed as liquidator of the Company. Applicant's request to make declarations regarding orders of Master is denied as all the orders were appealed to Court of Appeal. No cost granted considering circumstances of the case.

FINAL ORDERS

- a. KPMG is removed as liquidator, Deputy Registrar is directed to inform this to KPMG forthwith.
- b. EY is appointed as the liquidator of Pacific West Builders Limited (in liquidation).
- c. No order as to costs.

Dated at Suva this 15th day of November, 2021.




.....
Justice **Deepthi Amaratunga**
High Court, Suva