

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Companies Action No. HBE 30 of 2022

IN THE MATTER of the invalidity of their appointment as Receivers & Managers to Island Grace (Fiji) Limited dated 27 May 2022 **VAUGHAN STRAWBRIDGE AND DAVID MCGRATH** ("the First Defendants") against **SATORI HOLDINGS LIMITED** ("the Plaintiff").

AND

IN THE MATTER of an Application by the Plaintiff for an Order to set aside their appointment under Section 445 of the Companies Act 2015

BETWEEN: **SATORI HOLDINGS PTE LIMITED** a foreign company registered in Fiji under the Section 367 of the Companies Act (Cap 247) having its registered office at Level 7 Pacific House, 1 Butt Street, Suva
PLAINTIFF (in Liquidation)

AND: **VAUGHAN STRAWBRIDGE AND DAVID MCGRATH** both of FTI Consulting (Australia) Pty Ltd, level 22 1 Macquarie Place, Sydney NSW 2000, Australia
FIRST DEFENDANT

AND: **ISLAND GRACE (FIJI) LIMITED** a limited liability company having its registered office Unit 016, Retail & Commercial Centre, Port Denarau, Nadi, Fiji
SECOND DEFENDANT

Before: Mr. Justice Deepthi Amaratunga

Counsel:

Applicant (Intended second and third Plaintiffs): Mr. Haniff F
Plaintiff (in liquidation): Mr. Kalim M
First and second Defendants: Ms. R.Lal., M. Raga

Date of Hearing: 20.6.2024

Date of Judgment: 26.7.2024

JUDGMENT

INTRODUCTION

- [1] Plaintiff (in liquidation) in this originating summons sought declaratory orders relating to appointment of receivers to second Defendant and also nullification of some disposition of assets of second Defendant, in terms of Section 445 of Companies Act 2015. First Defendants were the receivers appointed for second Defendant.
- [2] There was a conditional appointment and acknowledgment for the Defendants and an application for strike out of the originating summons was made. This summons for strike out was fixed for hearing along with the originating summons for case management purposes. On the day of the hearing there were two law firms who appeared for the Plaintiff and the resolution of the same through amicable means was not successful though a reasonable time was granted. So a ruling was delivered after a hearing as to which law firm to represent Plaintiff (in liquidation). **At that ruling it was observed that Plaintiff had failed to comply with provisions of High Court Rules 1988(HR)**, hence time granted for fulfilment of those, in order to technical objections stand in the way of the issues in the originating summons.
- [3] Having granted time to fulfill the requirement under HCR, again Plaintiff did not file a statement of the cause of action as required in terms of Order 7 rule 3 of HCR and for this again time granted to Plaintiff to rectify the non-compliance with the said provision, without adopting path of least resistance of strike out of the action for non-compliance on the day of the hearing on 21.4.2023.
- [4] Plaintiff (in liquidation) filed **amended originating summons on 28.4.2023** as there were further, errors that needed rectification prior to hearing. So the action proceeded on amended originating summons and statement of cause of action, which is vital in originating summons to determine the issues.
- [5] **On 18.10.2023 the solicitors for liquidator of the Plaintiff** (in liquidation) filed change of solicitors in this action due to orders made through appointment of liquidator for Plaintiff (in liquidation) on **27.9.2023**. These orders were made in a separate action HBE 43 of 2023 .in terms of **Section 62(11)(b) read with Sections 513(e) and 533 of Companies Act 2015**.
- [6] Section 533 of Companies Act 2015, applies for winding up through appointment of liquidator and Section 513(e) of the Companies Act 2015. It was winding up of a 'foreign company' doing business in Fiji, where

proceeding for winding up had commenced in the country of incorporation.

- [7] Plaintiff (in liquidation) is a ‘foreign company incorporated in New Zealand and carrying business as a branch in Fiji’ as stated in the order made by court on 27.9.2023.
- [8] Plaintiff (in liquidation) pleaded its cause of action in terms of Order 7 rule 3 of High Court Rules 1988. As pleaded in the statement *choes in action* of Plaintiff (in liquidation) is vested with liquidator in terms of Section 541 of Companies Act 2015 and this action is stayed in terms of Section 531 of Companies Act 2015 and it cannot be circumvented by indirect application by an application for joinder of additional parties as Plaintiffs. Latin maxim “*Quando aliquid prohibeture, fieri, prohibeture ex directoet per obliquum*” applies.
- [9] Application for joinder of additional parties to already statutorily stayed and *chose in action* vested with liquidator.
- [10] Ex-solicitor , for Plaintiff(in liquidation) , filed purported summons seeking leave for joinder of Andrew Hugh Griffiths and Blue View LLC be joined as second and third Plaintiffs (intended Plaintiffs) to originating summons and for amend the same , while the action is stayed statutorily.
- [11] Admittedly intended Plaintiffs were not seeking to be joined in terms of Section 180 of Companies Act 2015(see written submissions of intended Plaintiffs). So intended Plaintiffs are seeking to intervene independently of Plaintiff (in liquidation), while the action is stayed.
- [12] I used the word purported as Section 532 of Companies Act 2015 binds all the creditors and contributories of the company in liquidation and the basis of intended parties to be added as stated in paragraph 5 of the affidavit in support of the application for addition of above-mentioned parties as second and third Plaintiffs.
- [13] In terms of Sections 531 read with 542 of the Companies Act 2015, stays this action and all *choes in action* is vested with liquidator appointed, and summons for joinder struck off *in limine*.

Can Intended Plaintiffs file an application to Intervene in statutorily stayed action in terms of Section 531 of Companies Act 2015, Filed by Plaintiff (in liquidation)?

- [14] Purported summons seeking leave for joinder and other reliefs filed on 24.10.2023 is made pursuant to Order,15 Rule 6(2) and Order 29 Rule

(1) and (2) of the High Court Rules 1988. In the submission counsel for intended Plaintiffs also relied on Order 33 rule 3 of HCR which has no application to the application for joinder and or to statutorily stayed action.

[15] Pursuant to the affidavit in support filed on 24.10. 2023, the basis of the application for seeking leave to join as parties were:

(a) That Andrew Hugh Griffiths is a contributory of the Defendant company;

(b) That Blue Views LLC is a creditor of the Defendant company.

[16] Section 542 of Companies Act 2015 states;

“542. Where a Company is being wound up by the Court, the Court may, on the application of the liquidator, by order, direct that all or any part of the Property of whatsoever description belonging to the Company or held by trustees on its behalf must vest in the liquidator by his or her official name, and thereupon the Property to which the order relates must vest accordingly, and the **liquidator may, after giving such indemnity, if any, as the Court may direct, bring or defend, in his or her official name, any action or other legal proceeding** which relates to that Property or which it is necessary to bring or defend for the purpose of **effectually winding up the Company** and recovering its Property.”(emphasis added)

[17] There is no dispute that Plaintiff (in liquidation) was wound up by order of the court on 27.9.2023 as orders were made in pursuant to Sections 513(e), 533 read with Section 62(11) of Companies Act 2015.

“Division 2—Cases in which a Company may **be wound by Court**
Circumstances in which Company may be wound up by the Court

513A Company (which where applicable in this Part includes a Foreign Company) may be wound up by the Court, if—

(a) the Company has, by Special Resolution, resolved that the Company be wound up by the Court;

(b) the Company does not commence its business within a year from its incorporation or suspends its business for a whole year;

- (c) the Company is Insolvent;
- (d) the Court is of opinion that it is just and equitable that the Company should be wound up;
- (e) **in the case of a Foreign Company and Carrying on Business in Fiji, winding up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business.**”(emphasis is mine)

[18] So the winding up of Plaintiff (in liquidation) was made pursuant to winding up proceedings being commenced in respect of country or territory of its incorporation. Accordingly, wound up entity required a liquidator and Section 533 allows a party other than official receiver to be appointed.

[19] Section 533 of Companies Act 2015 states,

“Division 6—Official Receiver in Winding Up

Appointment of Official Receiver by Court in certain cases

533.If, in the case of the winding up of any Company by the Court, it appears to the Court desirable, with a view to securing the more **convenient and economical conduct of the winding up, that some officer other than the Official Receiver should be the Official Receiver for purposes of that winding up**, the Court may appoint that other officer to act as Official Receiver in that winding up, and the person so appointed must be deemed to be the Official Receiver in that winding up for all the purposes of this Act.

[20] So the appointment of liquidators for Plaintiff (in liquidation) made as it was a foreign company doing business in Fiji and winding up of the foreign company in the place of incorporation had commenced on the basis Section 533 of Companies Act 2015 read with Section 513 (e) of the same Act. These orders were required to safeguard interest of parties who were unaware of the status of winding up in foreign country.

[21] Plaintiff (in liquidation) had pleaded its cause of action in the statement filed on 28.4.2023 and this is vested with the liquidator in terms of Section 541 of Companies Act 2015.

“Custody of Company's Property;

541. Where a winding up order has been made or where an interim liquidator has been appointed, **the liquidator** or the interim liquidator, as the case may be, **must take into that person's custody or under his or her control all the Property and things in action** to which the Company is or appears to be entitled.”

[22] So the *choses in action* as pleaded in amended originating summons vested with the liquidator. Section 542 and 543 of Companies Act 2015 applies, hence there is no room for party other than the liquidator to proceed with this action and or seek leave of the court to proceed in terms of Section 531 of Companies Act 2015. A third party such as intended Plaintiffs do not have *locus* to file this application as condition precedent, had not fulfilled and the action remained stayed by operation of law in terms of Section 531 of Companies Act 2015.

[23] So this action statutorily stayed due to orders made by the court *inter alia* for appointment of liquidator for winding up in HBE 43 of 2023 in terms of Section 513(e) of Companies Act 2015.

[24] Section 542 of Companies Act 2015 deals with the vested property and the power of the liquidator to make an application to court ‘after giving such indemnity, if any’ to be a party to legal proceedings ‘for the purpose of effectually winding up the Company and recovering its Property’. It reads,

Vesting of Property of Company in liquidator

542. Where a Company is being wound up by the Court, the Court may, on the application of the liquidator, by order, direct that all or any part of the Property of whatsoever description belonging to the Company or held by trustees on its behalf must vest in the liquidator by his or her official name, and thereupon the Property to which the order relates must vest accordingly, and the **liquidator may, after giving such indemnity, if any, as the Court may direct, bring or defend, in his or her official name, any action or other legal proceeding which relates to that Property or which it is necessary to bring or defend for the purpose of effectually**

winding up the Company and recovering its Property.”(emphasis added)

[25] The powers of the liquidator are clearly defined in Section 543 of Companies Act 2015.

“Powers of liquidator

543.—(1) Subject to this section, the liquidator in a winding up by the Court must have power, with the sanction either of the Court or of the committee of inspection—

- (a) to bring or defend any action or other legal proceeding in the name and on behalf of the Company;
- (b) to carry on the business of the Company, so far as may be necessary for the beneficial winding up of the Company;
- (c) to appoint a barrister and solicitor to assist the liquidator in the performance of his or her duties;
- (d) to pay any class of creditors in full;
- (e) to make any compromise, or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the Company, or whereby the Company may be rendered liable;
- (f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the Company and contributory or alleged contributory or other debtor or person apprehending liability to the Company, and all questions in any way relating to or affecting the assets or the winding up of the Company, on such terms as may be agreed, and take any security for

the discharge of any such call, debt, liability or claim and give a complete discharge.

- (2) Subject to this section, the liquidator in a winding up by the Court must have power—
- (a) to sell the real and personal Property and things in action of the Company by public auction or private contract, with power to transfer the whole Property to any person or Company or to sell the same in parcels;
 - (b) to do all acts and to execute, in the name and on behalf of the Company, all deeds, receipts and other documents;
 - (c) to prove, rank and claim in the bankruptcy, Insolvency or sequestration of any contributory for any balance against his or her estate, and to receive dividends in the bankruptcy, Insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or Insolvent, and rateably with the other separate creditors;
 - (d) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company, with the same effect with respect to the liability of the Company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the Company in the course of its business;
 - (e) to raise, on the security of the assets of the Company, any money requisite;
 - (f) to take out, in his or her official name, letters of administration for any deceased contributory, and to do, in his or her official name, any other act necessary for obtaining payment of any money due from a contributory or his or her estate which cannot be conveniently done in the name of the Company and,

in all such cases, the money due must, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator, provided that nothing in this paragraph must be deemed to affect the rights, duties and privileges of the Public Trustee;

- (g) to appoint an agent to do any business which the liquidator is unable to do;
 - (h) to do all such other things as may be necessary for winding up the Affairs of the Company and distributing its assets.
- (3) The exercise by a liquidator in a winding up by the Court of the powers conferred by this section must be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.
- (4) Except with the approval of the Court, the committee of inspection or a resolution of the majority of creditors, a liquidator must not enter into an agreement on the Company's behalf (for example, but without limitation, a lease or a Charge) if—
- (a) without limiting paragraph (b), the term of the agreement may end; or
 - (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;
 - (c) more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months

[26] As pleaded in the statement and amended originating summons, the *chose in action* is vested with the liquidator without any reservation of residual right for third party including intended Plaintiffs. The proceeding of such 'things in action' can only proceed in terms of Companies Act 2015 and special provision for seeking leave to proceed such action is condition precedent and this is vested with the liquidator. This cannot be

circumvented by purported application through joinder of additional parties as Plaintiffs.

[27] So the intervention of intended Plaintiffs cannot be made in terms of Section 445 of Companies Act 2015. It is clear that legislation had vested chose in action to liquidator without reservation. So that cannot be circumvented by the proposed parties in this action.

[28] Plaintiff is seeking directions from the court in terms of Order 33 rule 3 of HCR in the submissions. This is misconceived as the party should seek appropriate remedy and it is not the courts duty to give directions to counsel. Order 33 rule 3 of HCR applies when there are determinations of fact and law. The Court may order any question or issue arising in a cause or matter, '*whether of fact or law or partly of fact and party of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions*' for that. Utility of Order 33 rule 3 of HCR is virtually nonexistent for originating summons, as disputed facts are not determined in such action. So the direction required in Order 33 rule 3 of HCR is when question of law is determined in 'split trial' situation, with is limited direction.

[29] So Order 33 rule 3 of HCR cannot be applied to this action which is stayed due to statutory provision and it can only proceed in terms of Companies Act 2015 in terms of provisions of the said Act by liquidator appointed for the Plaintiff (in liquidation).

[30] If intended Plaintiffs are having a cause of action independent of Plaintiff (in liquidation), as stated in their submissions, that is not a reason to deviate from clear statutory provision of stay of this action in terms of provisions discussed previously under Companies Act 2015.

CONCLUSION

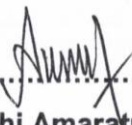
[31] This action is statutorily stayed upon orders made in HBE 43 of 2023 in terms of Section 531 of Companies Act 2015 read with Sections 62(11)(b), 513, and 533(e) of Companies Act 2015. The liquidator appointed for Plaintiff (in liquidation) seized or vested with the *chose in action* relating to amended originating summons and statement filed on 28.4.2023 in terms of Section 542 of Companies Act 2015. Intended Plaintiffs cannot file an application to seek joinder of them as action is statutorily stayed and Plaintiff's chose in action vested with liquidator. The statutorily stayed position cannot be circumvented by indirect method by third parties. Cost of this application assessed summarily at \$2,000 to be paid by intended Plaintiffs to first and second Defendants assessed

summarily. No costs awarded to Plaintiff (in liquidation) considering circumstances.

FINAL ORDER:

- a. Application for intervention on this action is struck off.
- b. Applicants are ordered to pay a cost of \$2,000 as cost of this application assessed summary. The cost to be paid within 21 days.




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Deepthi Amaratunga
Judge

At Suva this 26th July, 2024.

Solicitors

Haniff Tuitoga
Patel Sharma Lawyers
Lal Patel Bale Lawyers