FRANK SEBESY SKERLEC

A **v.**

CHARLES DWIGHT TOMPKINS
and Others

[HIGH COURT, 1994 (Fatiaki J), 15 December]

B Civil Jurisdiction

Practice (Civil) - application for security for costs - compromise of actions- High Court Rules 1988 Order 23 rule 1.

On an application to set aside an injunction restraining the transferring, dealing with or disposing of the assets of 2 companies the Court discussed non C disclosure, the setting aside of a compromise, the restraint of a mortgagees' powers of sale, security for costs and the meaning of fraud in company law.

Cases cited:

A.G. v Shiu Prasad Halka (1972) 18 F.L.R. 210
Burland v Earle [1902] A.C. 83
D *Callisher v Bischoffsheim* (1870) 5 L.R.Q.B. 449
Cowell v Taylor (1885) 31 Ch.D. 34
Devy v Peek [1889] 14 A.C. 337
Edwards v Halliwell [1950] 2 All E.R. 1064
Estmanco Ltd v G.L.C. [1982] 1 W.L.R. 2
Fargro Ltd v Godfroy [1986] 1 W.L.R. 1134
E *Foss v Harbottle* (1843) 2 Hare 461
Gilbert v Endean (1878) 9 Ch.D. 259
Green v Rozen [1955] 1 W.L.R. 741
Inglis v Commonwealth Trading Bank of Australia (1972) 126 C.L.R. 161
Maganex Ltd v Akhil Holdings (FCA Reps 76/162)
Newhard Development Ltd v Co-op Commercial Bank Ltd
F [1978] 2 All E.R. 896
Paramount Acceptance Co. Ltd v Sonster [1981] 2 N.Z.L.R. 38
Prudential Assurance v Newman Industries [1982] 1 All E.R. 357
Rhodes v Dawson (1886) 16 Q.B.D 548
Standard Chartered Bank v Walker [1982] 1 W.L.R. 1410
Wade v Simeon (1846) 69 R.R. 523
G *Xenos v Wickham* (1866) 149 R.R. 467

Application to dissolve ex parte injunction

M. Raza for Plaintiffs
Dr. M.S. Sahu Khan with *S. Parshotam* for 1st & 2nd Defendants
R. Smith for 3rd, 4th & 6th Defendants

Fatiaki J:

On the 16th February 1994 this court granted an ex parte application of the Official Receiver for an injunction restraining the defendants from transferring, dealing with or disposing of the assets of 2 named companies and in particular the properties comprised in 6 enumerated title documents. On the 16th of March 1994 the injunction was extended on an inter partes summons "until further order of this Court."

On the 22nd and 27th of April 1994 the defendants filed 2 separate summonses seeking numerous orders including the dissolution of the above injunction.

Before dealing however with the various orders sought by the defendants I must record my gratitude to all counsel concerned for the extremely helpful and well-researched written submissions presented to the Court. This has greatly reduced my task and the length of what would otherwise have been an inordinately lengthy ruling.

In this latter regard the written submissions for the defendants sets out 3 broad categories of applications as follows :

(A) Application to strike out Statement of Claim ;
(B) Application for dissolution of Injunction ;
(C) Application for security for costs.

I propose to deal with (B) first. In this regard learned counsel for the defendants raises 3 main grounds :

(1) material non-disclosures ;
(2) damages an adequate remedy ; and
(3) improper restraint of mortgagees power of sale.

<u>As to (1)</u>, three matters are raised by the defendants as amounting to material non-disclosures. These are, the Terms of Settlement of a prior Civil Action No. 400/90; the unconditional transfer in June 1989 of the shares in Union and Somosomo to the 1st and 2nd defendants and the unconditional prior assignment in April 1989 of the interests in Union to the 1st defendant or his nominee.

Having carefully perused the relevant Statement of Claim placed before the Court at the ex parte stage, I am satisfied that there was a sufficient disclosure of the above matters in paras. 20 and 40. Furthermore the amended Statement of Claim filed together with the inter partes summons for an extension of the injunction and which although served on the defendants did not elicit any response at the time, makes clear reference to "... an agreement (the 1st defendant) entered into with Skerlec on 19th September 1991 in which (the 1st defendant) accepted that he needed to pay Skerlec no less than $593,000 as the balance of the purchase price for the same Union Shares."

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In similar vein paras. 89 and 90 and 96(4) of the amended Statement of Claim make reference to the circumstances under which the transfer of shares and the assignment came to be executed.

These non-disclosures are said to be material to the true state of affairs and would have driven the Court to find that the only claim available to the plaintiff would be to challenge the Terms of Settlement agreed in Civil Action No. 400/90 and not the commencement of fresh proceedings seeking "... to have all their grievances tried in Court all over again when in fact there has been a compromise on this."

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At the outset I observe that there has never been a trial on the merits of the plaintiffs claim in any court but in any event the Court retains a discretion even where there has been a material non-disclosure in an ex parte application, whether to set aside or continue the relief granted ex parte or to grant fresh relief as justice requires in the circumstances when the matter is being considered.

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In the second place I note that the parties in Civil Action No. 400/90 are fewer and different from those in the present action and the Terms of Settlement did not include the third defendants who are named as the seventh defendants in the present action. Furthermore as indicated by counsel for the plaintiffs the Terms of Settlement has not been made the subject of a court order nor does it in terms provide for the future disposal of the action such as by its dismissal, discontinuance, or by the entry of a consent judgment, a stay of proceedings or withdrawal of the record.

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I shall be dealing more fully with the Terms of Settlement at a later stage in this ruling but for present purposes suffice it to say that I am satisfied that there has been a sufficient disclosure of it in the plaintiff's pleadings and affidavits filed in support of the injunction.

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As to (2) defence counsels submission is that the plaintiffs have not established that they would suffer any damage to any proprietary right and even if they did damages would be an adequate remedy. I cannot agree.

This is a case where the legal status of a bankrupt's assets is yet to be determined and it is critical in my view that whatever remaining assets there may be ought to be protected until such time as the action has been disposed of by a trial on the merits.

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Furthermore having regard to the nature of the assets concerned and the possible further complications that may arise from their transfer to third parties I am firmly of the view that the assets should be maintained in their present form until their ownership has been properly determined and settled.

Needless to say this is not just a simple straightforward case of a transfer of readily available shares or assets as might be expected in more developed countries with large Stock Exchange listings and where freehold land is readily available.

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As to (3) the defendants rely on the well-known rule enunciated by Walsh J. in Inglis v. Commonwealth Trading Bank of Australia (1972) 126 C.L.R. 161. The general rule however is not an inflexible one and has been relaxed where the creation, enforceability or validity of the exercise of the mortgagee's powers are directly challenged by the mortgagor.

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Furthermore in Maganex Ltd. v. Akhil Holdings Civil Appeal No. 13 of 1976 (FCA Reps 76/162) the Fiji Court of Appeal doubted the applicability of the general rule to equitable mortgages or interests. In this latter regard it is common ground that the 4th defendant Westpac holds an equitable mortgage over the assets of Union.

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The plaintiffs for their part whilst not necessarily challenging the security documents have sought to raise doubts as to the genuiness of their creation, the method and manner in which the loan funds raised thereby were applied or utilised, and the role and actions of the receivers after their appointments. There is a further, as yet, unpleaded submission which raises the legality of the defendant's mortgages insofar as they purport to charge several protected crown leases without the prior written consent of the Director of Lands (See : Section 13 of the Crown Lands Act Cap. 132). This submission although clearly set out in the plaintiffs written submissions has been either over-looked or ignored by the defendants.

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Be that as it may having regard to the rather unusual circumstances of the case and mindful that it is no part of the court's function at this stage to seek to determine complicated legal or factual issues I hold that there is nothing improper in the court's exercise of its discretion restraining the exercise by the defendants or their agents of their powers under the securities.

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I turn next to deal with (C) i.e. the application for security for costs. It is common ground in this action that Skerlec is an undischarged bankrupt and the plaintiff company's Union and Somosomo are both under receivership. Further the written sanction of the Official Receiver, dated 1st November 1993, clearly states inter alia :

> "(a) That all legal costs will be on your account and not the Receiver ; and
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> (b) All risks from litigation will not be for the Receiver."

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In the circumstances it is not surprising that the defendants, who maintain they have incurred considerable expenses in this and in two prior related actions,

seek some form of security for the costs that they are likely to incur.

A Order 23 r.1 of the High Court Rules 1988 sets out 4 situations in which the Court is given a discretion to order the plaintiff to give security for the defendants's costs. These are :

(a) where the plaintiff is ordinarily resident out of the jurisdiction ;

B (b) where the plaintiff is a nominal plaintiff suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so ;

(c) where the plaintiff's address is not stated in the writ or is incorrectly stated; and

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(d) where the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation ; "

In this case the defendants rely particularly on ground (b) and the exercise of

D the court's general jurisdiction where special circumstances are found to exist.

In Rhodes v. Dawson (1886) 16 Q.B.D. the Court of Appeal (U.K.) in setting aside an order for security for costs against an insolvent plaintiff in that case reaffirmed the general rule that the poverty and possible or

E probable bankruptcy of a plaintiff is not a ground for requiring him to give security for costs.

Furthermore it was firmly established as long ago as 1885 in Cowell v. Taylor (1885) 31 Ch.D. 34 that the Court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where

F he is in insolvent circumstances. In particular Bowen L.J. said at p.39:

"It cannot be said that a trustee in bankruptcy is a mere nominal plaintiff, he is the person whose statutory right and duty it is to get in the assets ... He is not a mere shadow, he

G is a person with a duty to perform, that of getting in the estate. It is not necessarily his duty to carry on litigation, but it is his duty to do so where litigation is requisite. I think, then that there is good sense in not requiring him to give security."

In the circumstances and mindful that both the plaintiff in this action is the Official Receiver and Union and Somosomo are companies registered in Fiji

and have substantial real estate holdings within the court's jurisdiction, I would exercise my discretion by refusing the defendant's application for security for costs.

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The final application by the defendants namely (A), is one to strike out the plaintiffs amended Statement of Claim under Order 18 r.18 of the High Court Rules 1988.

Under this head the defendants have raised the following 5 issues for determination :

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"(i) The Tompkins/Barclay abuse on the basis of earlier compromise issue;

(ii) The Foss v. Harbottle argument ;

(iii) No cause in the first plaintiff against either Westpac or Nalin ;

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(iv) Particular attack on paragraph 85 of the Statement of Claim ;

(v) The "prolixity and embarrassment attack on the Statement of Claim and the disposal of the application by the Plaintiffs to strike out the pro forma defences of third, fourth and sixth defendants ..."

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For convenience I propose to deal with these various issues as follows : (i) and (ii) separately, and (iii) to (v) together.

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Firstly, the question of the compromise. In this regard the short submission of counsel for the defendants is that in an earlier action against the 1st and 2nd defendants (i.e. C.A. 400/92) the proceeding was settled or compromised by the parties and in so far as the present proceedings comprise a re-issuing of the previous proceedings it is manifestly groundless and cannot possibly succeed and should be dismissed as an abuse of process.

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Learned counsel for the plaintiffs on the other hand points to the vagueness and uncertainty of the Terms of Settlement and the fact that it has never been made the subject of a court order nor has it been performed by either party in any way, shape or form. Reference was also made to the motive of the plaintiff in executing the Terms of Settlement i.e. to obtain some form of tactical admission from the defendants and the defendant's artful of avoidance of the Terms of Settlement by the appointment of a receiver after its execution.

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Halsburys Laws of England (4 edn) Vol. 37 clearly sets out the law in relation to the nature and effect of a 'settlement or comprise' in para.391 which reads:

"Where the parties settle or compromise pending proceedings,

> whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted ; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms and (3) to supersede the original cause of action altogether."

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and later in the same paragraph may be found the following :

> "An agreement for a compromise may be enforced or set aside on the same grounds and in the same way as any other contract and in certain cases also by the summary intervention of the court."

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More particularly, Slade J. in Green v. Rozen [1955] 1 W.L.R. 741 in dealing with a compromise which had not been made the subject matter of a court order as in the present case, said at p.746:

> "The Court has made no order of any kind whatever, and having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the Court has no further jurisdiction in respect of the original cause of action, because it has been superceded by the new agreement between the parties to the action, and if the terms of the new agreement are not complied with the injured party must seek his remedy upon the new agreement."

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In that case however the learned judge was not dealing with an action which in part sought to impeach the compromise but rather with one seeking the Court's intervention to enforce it and which the Court declined to do in the circumstances.

In my view the case of Callisher v. Bischoffsheim (1870) 5 L.R.Q.B. 449 is more closely related to the present and in which it was held :

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> "The compromise of a disputed claim made bona fide is a good consideration for a promise even although it ultimately appears that the claim was wholly unfounded."

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More relevant however, for present purposes, is the observation of Cockburn C.J. at p.452 where he said :

> "It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it : in that case his conduct would be fraudulent."

Furthermore in Wade v. Simeon (1846) 69 R.R. 523 in rejecting the plaintiff's claim on a compromise of a monetary claim for which he (the plaintiff) knew he had no cause of action and in discussing the question of valuable consideration as it applies in a compromise, Tindal C.J. said at p.527 : A

> "It is almost contra bonos mores, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action ; and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain." B C

I am mindful that in the above passages the learned Chief Justices were referring to the plaintiff but that does not mean in my view, that the same cannot apply equally to a defendant who enters into a compromise knowing full well that he has no defence to the claim being put forward by the plaintiff. D

Now it seems to me that that is very similar to what the plaintiffs are saying in this case i.e. that there was a want of good faith on the part of the defendants in the maintenance of their denial of liability in Civil Action No. 400/92 or in their positive assertion of having paid the full purchase price for the plaintiff's shares in Union, and, this absence of good faith or honest belief in their defence in Civil Action No. 400/92, is conclusively demonstrated, the plaintiff claims, by the defendants execution of the Terms of Settlement in which they acknowledge that more than $½ million of the purchase price was still outstanding. E F

I am of course mindful of the form in which this question has been raised in the present proceedings in the context of an interlocutory application, and that such a procedure was deprecated by the Court of Appeal in Gilbert v. Endean (1878) 9 Ch.D. 259 in which it was held:

> "That the question whether the compromise was invalid ought to have been made the subject of a new action and ought not to have been tried on a motion of this nature (i.e. to enforce an earlier consent decree which had subsequently been compromised)." G

In the circumstances it would be inappropriate for me to determine the matter

solely on the basis of the plaintiffs affidavits and the pleadings.

A I turn next to the Foss v. Harbottle argument which is a reference to a famous rule that : "a company must sue and be sued in its own name." The classic definition of the rule was enunciated in the judgment of Jenkins L.J. in Edwards v. Halliwell [1950] 2 All E.R. 1064 at pp.1066-1069 and which the Court of Appeal later summarised in Prudential Assurance v. Newman Industries [1982] 1 All E.R. 354 at 357, 358 into the following relevant propositions (for present purposes):

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> "(1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is prima facie the corporation ;
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> (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of the matter because, if the majority confirms the transaction, cadit quaestio ; or, if the majority challenges the transaction, there is no valid reason why the company should not sue ;
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> (3) There is no room for the operation of the rule of the alleged wrong is ultra vires the corporation because the majority of members cannot confirm the transaction;
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> (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance would never reach the court because the wrong-doers themselves, being in control, would not allow the company to sue."

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Furthermore in Burland v. Earle [1902] A.C. 83 Lord Davey in discussing what he meant by fraud in that case said at p.93 :

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> "... acts of fraudulent character, familiar examples are when the majority are endeavouring directly or directly to appropriate to themselves money, property or advantage which belong to the company or in which the other shareholders are entitled to participate."

In this case the plaintiffs allege fraud in several respects - against Skerlec, in the purported illegal and fraudulent transfer of his shares in Union to the defendants and, against Union, in the loss and misappropriation of its property and assets (including Skerlec's shares) by the defendants and their agents.

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In particular, it is claimed that the signed transfer of shares and the share certificates were deposited in escrow with the 7th defendants who unlawfully and improperly released the same to the 1st and 2nd defendants. Further that the 5th and 6th defendants as duly appointed receivers of Union had acted negligently in the discharge of their respective duties in relation to the business assets of the company.

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In Xenos v. Wickham (1866) 149 R. 467 Lord Cranworth discussed the nature and effect of an escrow when he said at p.487 :

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> "The maker (of a deed) may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the matter of the deceased is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed, it is a mere escrow."

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In this instance Skerlec maintains not only that he has not been paid the full purchase price for his shares in Union but also, Reserve Bank of Fiji approval had not been given for the transfer of the shares to the 1st defendant, a foreign resident, and as such at least two vital conditions had not been performed by the defendants and therefore the shares legally remained Skerlec's. This is clearly a question of fact that needs to be determined on oral evidence as with the various allegations of 'fraud' regarding the same.

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As to the allegation of fraud against Union through the actions of its receivers appointed by the defendants, it was held in Standard Chartered Bank v. Walker [1982] 1 W.L.R. 1410 :

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> "... that a receiver realising assets under a debenture owed a duty both to the borrower and to the guarantor of the debt to take reasonable care to obtain the best price that the circumstances permitted, and he also had a duty to exercise reasonable care in choosing the time for the sale ; that despite the receiver being deemed the company's agent, the bank as debenture holder might be attached with responsibilities for the receivers actions if it were shown that it interferred with his conduct of the receivership."

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A Again this is a question that can only be determined after a trial but for present purposes if the plaintiff should be able to establish his allegations against the defendants then there is little doubt in my mind that that would amount to fraudulent conduct within a recognised exception to the rule in Foss v. Harbottle, as discussed by Sir Robert Megarry V.C. in Estmanco Ltd. v. G.L.C. [1982] 1 W.L.R. 2 when he said at p.12 :

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> "It does not seem to have yet become very clear exactly what the word 'fraud' means in this context ; but I think it is plainly wider than fraud at common law, in the sense of Devy v. Peek (1889) 14 A.C. 317 ... Apart from the benefit to themselves at the company's expense, the essence of the matter seems to be an abuse or misuse of power. 'Fraud' in the phrase 'fraud on a minority' seems to be being used as comprising not only fraud at common law but also fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power."

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Finally, as to the particular form of the present proceedings I derive some support from the case of Fargro Ltd. v. Godfroy (1986) 1 W.L.R. 1134 where a minority shareholder sought to bring a derivative action alleging fraud on the part of other directors in diverting company assets to their own use and where the company went into liquidation after the issuance of the writ.

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Walton J. in allowing the reconstruction of the action in the liquidators name :

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> "Held : ... that had the company not been in liquidation a minority shareholders action would have been appropriate as the only possible method of proceedings; but that once the company was in liquidation the proper plaintiff was the liquidator, who should if willing sue in the name of the company ... or, if unwilling, the aggrieved shareholder should sue in the name of the company subject to the approval of the Court and satisfactory indemnity for costs ; ..."

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I am of course mindful of the existence of the receivers of the company but the appointment of a receiver does not inevitably preclude an action being taken on behalf of the company. More so where part of the complaint is that the receivers themselves have been negligent or fraudulent in their conduct of the receivership (See : Newhart Development Ltd. v. Co-op Commercial Bank Ltd. [1978] 2 All E.R. 896 and Paramount Acceptance Co. Ltd. v. Sonster [1981] 2 N.Z.L.R. 38 at 42, 43.)

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Finally I turn to the remaining grounds urged by the defendants in seeking the dismissal of the plaintiffs Statement of Claim, namely, no cause of action and prolixity and embarrassment of the pleadings.

The principles applicable in the exercise of the courts discretion in this particular instance are comprehensively covered in the written submissions of learned counsel for the plaintiffs at pp.21 to 27 and pp.72 and 73 and also in the defendants written submissions, and need not be repeated.

Reference need only be made to the judgment of the Fiji Court of Appeal in A.G. v. Shiu Prasad Halka (1972) 18 F.L.R. 210 in which it was held :

> "(2) The power to strike out a Statement of Claim given by Order 18 r.19 is one which is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law."

In this latter regard having carefully perused the plaintiffs amended Statement of Claim and the voluminous affidavits provided by the parties in support of/ or opposing the applications and the comprehensive submissions of learned counsels, I confess that the legal and factual issues raised in this case are not only wide-ranging but also difficult and complicated.

In all the circumstances I am satisfied that this is not an appropriate case for the court to exercise its pre-emptive powers, rather in this case, I am firmly of the view that the plaintiff should be ordered to amend it's amended Statement of Claim in so far as its claims against the 4th to 7th defendants are concerned and so as to comply with the terms of Order 18 of the High Court Rules and I so order accordingly that the plaintiff do have leave to file and serve a further amended Statement of Claim within 14 days of the date hereof.

Subject to the above the defendants' applications are dismissed with costs in the cause.

(Application dismissed.)

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