

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 600 of 2005

BETWEEN : FIJI DAILY POST COMPANY LIMITED (In liquidation)

PLAINTIFF

AND : WESTPAC BANKING CORPORATION

First Defendant

AND : ASSOCIATED MEDIA LIMITED

Second Defendant

AND : YASHWANT GOUNDAR

Third Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. K. Singh for the Appellant
Mr C. B Young for the First Defendant
Ms S Taukei for the Official Receiver

Date of Hearing : 13 March 2018

Date of Judgment : 28 March 2018

JUDGMENT

1. This is the Summons for Directions of the Plaintiff for leave to prosecute their Appeal under s.531 of the Companies Act 2015 (Act). It is supported by the affidavit of Alan Hickling (Hickling) who deposed on 11 December 2017:
 - (i) That he is a director of the Plaintiff and that the Plaintiff was wound by the High Court on 22 February 2011 (sic).
 - (ii) That neither the Plaintiff nor its directors had knowledge of the winding proceeding or the order made by the High Court.
 - (iii) The Provisional Liquidator of the Appellant had by her first letter dated 24 November 2016 informed the solicitors of the Appellant that“. As Provisional Liquidator of the Company, (Plaintiff) I hereby grant consent to take legal proceeding.....”.
 - (iv) The Provisional Liquidator by her second letter dated 8 December 2016 (the second page is missing) stated, inter-alia that “In our capacity as the Provisional Liquidator we request for the sanction of the Court to continue with the proceedings against” the Defendants.
 - (v) The Provisional Liquidator by her third letter dated 8 December 2017 stated “the Official Receiver hereby grant consent to proceed with the legal proceedings since you have accepted the conditions.....”
2. Counsel for the First Defendant (Defendant) had earlier informed the Court that it did not want to file an affidavit.
3. The hearing commenced with the Counsel for the Plaintiff making his submission. He said it was their application for leave to continue the appeal. The Plaintiff was wound up on 25 August 2010. Under s.531 of the Act the Court’s leave was required and the Plaintiff made such an application to the

Master. The Master dismissed the application for leave and also the Plaintiff's claim.

4. The Defendant's Counsel in his submission said his objection was based on a fundamental ground. This was that the order was an interlocutory judgment and therefore the leave of the Judge was required first of all. The Act has no provision for a company to continue with proceedings against the Defendant. Neither s.531 nor s.543(1) of the Act helps the Plaintiff.
5. Counsel for the Official Receiver (O.R) then submitted. She said the winding up order was made on 25 August 2010. The instant action by the Plaintiff only came to the knowledge of the O.R. in 2016. On 16 November 2016, Counsel for the Plaintiff contacted the O.R to continue with the action against the Defendant and consent was granted on 24 November 2016. On 11 September 2017, the Plaintiff wrote to the O.R attaching the Ruling of the Master. On 18 September 2017, the Plaintiff filed its notice of appeal in the High Court. No consent was given by the O.R in relation to the appeal. The O.R says the Plaintiff can continue with this action against the Defendant to collect debts which can be used to pay the creditors of the Plaintiff.
6. Counsel for the Plaintiff in his reply said s.543 of the Act means the O.R. is bringing the action, when the company is wound up, to collect debts from its debtors. The Master's Ruling is final as the Statement of Claim was struck out.
7. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I shall now deliver my decision. To my mind there is only one pivotal issue here which when resolved would conclude all other issues and it is

this. Can the directors of the Plaintiff or the Plaintiff proceed or continue with the instant action. So I shall turn to the Act, the relevant provisions of which – all Counsel agree – are in pari materia with the analogous provisions of the previous Companies Act.

8. I shall start with s.531 of the Act, which reads “When a winding up order has been made or an interim liquidator has been appointed under section 537, no action or proceeding must be proceeded with or commenced against the Company, except by leave of the Court and subject to such terms as the Court may impose”.
9. I shall take it as Parliament’s intention that it is obligatory to obtain the permission, consent or authority of the Court:
 - (a) To go on or to continue with legal action by the Company.
 - (b) Or to start legal action against the Company.(See the Oxford Advanced Dictionary of Current English).
10. I note in the third letter of the O.R. that the O.R. also stated that the O.R had been appointed the Provisional Liquidator of the Company by the Order made on 22 February 2010 (sic). From that date “the Company was not empowered to continue with the proceedings”. “In our capacity as the Provisional Liquidator we request for the sanction of the Court to continue with the proceedings against” the Defendants.
11. I have perused the sealed copy of the order that the High Court made on 25 August 2010 (that date). It orders the company (Plaintiff) be wound up by the Court and the O.R. be constituted Provisional Liquidator of the Company.

12. I do not need to travel any more to reach my decision. In my view it is crystal clear that on that date all proceedings by or against the Plaintiff would have come to an immediate halt. And in that state of legal paralysis the Plaintiff has remained to this very day. I do not think that the Provisional Liquidator's request for the Court's sanction contained in their letter to the Plaintiff's solicitors can by any stretch of the imagination be considered as tantamount to an actual request to the Court for its leave. Indeed the Court file does not show any such request.
13. The winding up order has the effect of dismissing the company's directors and putting an end to their powers of management (see para 1044, Halsbury's Laws of England, Fourth Edition Vol.7). It is the Provisional Liquidator who has to make the application to the Court for leave to continue with the instant action. This she has not done.
14. In the result, I find and I so hold that the proceedings (the Plaintiff's Summons to continue proceedings) before the Master were a nullity, as the Plaintiff did not have the prior leave of the Court, and were therefore correctly dismissed by the Master.
15. For the same reason and also because it is not the Provisional Liquidator who is making this Application to the Court, leave to prosecute the Appeal must necessarily be declined by the Court.

16. The Plaintiff's application for leave to be granted to prosecute the Appeal is dismissed and the Plaintiff is ordered to pay the First Defendant only costs summarily assessed at \$1,000.

Delivered at Suva this 28th day of March 2018.



David Alfred

Judge

High Court of Fiji