REX FERA (An Adjudged Bankrupt) **–V- WAYNE FREDERICK MORRIS AND BENJAMIN ST. GILES PRINCE** (Trustees of the Estate of Rex Fera)

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 177 of 2000

Date of Hearing: 12th February 2003
Date of Ruling: 19th February 2003

Mr C. Ashley for Mr. Fera, the Adjudged Bankrupt
Mr J. Sullivan for the Trustees

RULING

Kabui, J. This is an application by Rex Fera, an adjudged bankrupt, for leave to commence proceedings against the Trustees of his Estate on the ground that-

(a) the actions of the Trustees in paying moneys to the creditors of Ta'as Marketing Limited is contrary to the provisions of the Bankruptcy Act (Cap. 14);

(b) the actions of the Trustees in not consulting Rex Fera before paying out moneys to purported creditors contrary to the provisions of the Bankruptcy Act cited above. He also seeks an order that the administration of the Estate be stayed until the Court decides the matters in (a) and (b) above. The third order he seeks is that Sol-Law, as a firm of Solicitors and Barristers be not allowed to act for the Trustees on the basis of conflict of interest. The third request is an order for costs.

The case for Mr Fera the Adjudged Bankrupt

(a) **The Evidence**

Mr. Fera, in his affidavit evidence filed on 31st January 2003, stated that the Trustees were not acting in the best interest of the creditors of his Estate. He cited the petitioning creditor Mobil Oil Australia Ltd., a judgment creditor, as one example. He said that out of $1,698,286.76 derived from his Estate, only $155,682.76 had been paid to Mobil Oil Australia Ltd. The rest of the money, he said, had been distributed amongst other creditors, one of which was Ta'as Marketing Ltd to which he did not owe any money. He relied on the Minutes of the Joint-Committee of Inspection held on 2nd March 2001 in Price Waterhouse/Coopers Office to support his point. The relevant minute pointed out the need to link him to Ta'as Marketing Ltd. in terms of taking stock from Ta'as Marketing Ltd. and not paying for it. He said that in spite of this doubt, the Trustees paid Ta'as Marketing Ltd. the sum of $ 406,120.89. The next creditor he cited was Solbrew, which he said never, obtained any judgment against him and yet the Trustees paid it the sum of $204,638.43. He said the default judgment obtained against Ta'as Marketing Ltd. was irregular in that appearance had in fact been filed within time. The other creditors he cited were Goodman Fielders and Shell Company Ltd., which he said, never took him to Court for any debts. He said, in spite of this fact, the Trustees paid them a total sum of $80,3276.72. He said that out of the money collected so far, $374,824.52 were legal fees, which he said, constituted one third of the total amount collected. He said such sum was unreasonable and excessive. Finally, he said that Mobil Oil Ltd., the Trustees, the Petitioning Creditor of Ta'as Marketing Ltd. and Sol-Rice and the Liquidator of Ta'as Marketing Ltd. were all clients of Sol-Law. He said that he

believed that Sol-Law had also acted for Goodman Fielders and Shell Company Ltd. He said he would not like Sol-Law to act for the Trustees in any proceeding that he may commence against the Trustees because Sol-Law had conflict of interest arising from their previous association with creditors, the liquidator of Ta'as Marketing Ltd. and the Trustees.

(b) **His Counsel's Submissions**

Under an order I made on 14 November 2002, Mr. Fera would have to seek the leave of the Court in order to commence any proceeding against the Trustees. The ground upon which this application is based is section 19(8) of the Bankruptcy Act (Cap.3) "the Act". Subsection 8 of section 19 states-

"...**The debtor shall be examined upon oath and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down either in shorthand or longhand and they or a transcript thereof shall be read over either to or by the debtor and signed by him and may thereafter, save as in this Act provided, be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times upon payment of the prescribed fee...**"

Mr. Fera does not dispute that he had undergone public examination under section 19(8) of the Act. However, the argument advanced by his Counsel was that he had not signed the transcript of his evidence and furthermore, nowhere in his evidence did he say that he owed Ta'as Marketing Ltd. any money. His Counsel argued that this point did show that the Trustees had not followed section 19(8) of the Act. Together with Mr. Fera's affidavit evidence, said his Counsel, Mr. Fera's case for leave to be granted was strong.

The case for the Trustees

Mr. Morris, the accountant and one of the Trustees gave a detailed explanation in response to each paragraph of the matters raised by Mr. Fera in his affidavit. In response to paragraph 2, he said the total receipts from the Estate as on 31st January 2003 stood at $1,948,286.64. Out of that, $1;871,435.21 had been disbursed as payments. These payments were-

Trustees fees and recoverable---------	$421,776.02;
Legal fees and recoverable----------	$270,795.92;
Refund legal fees Mobil Oil------- ----	$ 41,517.08;
Bank fees----------	$ 13,134.00;
Insurance---------- ----------	$ 7,436.20;
Advertising----------	$ 9,298.80;
Refund contribution from Creditors---	$250,000.00;
Marine fees----------	$ 100.00;
Land rent----------	$ 9,191.80;
Dividends paid----------	$848,185.39.

In response to paragraph 3, he said the admission of proof of debt in respect of Ta'as Marketing Ltd. was based upon through examination of all documentary evidence available together with a detailed consideration of Mr. Fera's evidence obtained at the public examination in the High Court. He said the "missing link" that Mr. Fera referred to in his affidavit was thereby resolved. He said it was clear from the report produced by Sol-Law dated 21st June 2001 for the attention of the Trustees that Ta'as Marketing though appearing to operate as a retail business was also doing so as a wholesaler. He said Mr. Fera had taken goods from Ta'as Marketing Ltd. for which he had not paid in his practice of trading "as Ta'as Marketing" being the retail business. In response to paragraph 4, he said that the

proof of debt had been discussed and approved by the committee of inspection before admission by the Trustees and later paid to Ta'as Marketing Ltd. In response to paragraph 5, he said that the professional fees were reasonable and not excessive in view of the complexity of the Estate and the cost of defending challenges to the bankruptcy mounted by Mr. Fera and his relatives. He said the committee of inspection had also approved the fees. In response to paragraph 6, he said that Solbrew's debt was based upon a default judgment, which had not been set aside by anyone. In response to paragraph 7, he said that it was not a requirement that all creditors must obtain judgment before there could be proof of debts for all debts whether present, in the future or contingent were provable debts. In the case of Goodman Fielders, he said the Trustees had to adjust the proof of debt because of previous preferential payments, which came to $60,000.00. Likewise, he said that in the case of Shell Company Ltd., the proof of debt had to be reduced to $400,525.26 and as a matter of fact the Trustees had obtained a default judgment against it for $2,049,913.66. In response to paragraph 8, he said that the Trustees had paid all the creditors pari passu in accordance with the admitted debts. In response to paragraph 9, he said that Sol-Law had acted for the parties with their consent in view of common interest and the acceptance of the belief that Sol-Law were the most able Solicitors to handle this complicated bankruptcy exercise.

The Court's determination in this case

Whilst Mr. Fera's Counsel argued that the Trustees had not complied with section 19(8) of the Act, there was no evidence to sustain that argument. Nowhere in Mr. Fera's affidavit filed on 31st January 2003 did he say that he had not signed the transcript of his evidence he gave at the public examination nor did he produce that contested transcript. He merely referred to the relevant paragraph of the Minutes of the joint committee of inspection which took place on 2nd March 2001 that emphasized the doubt over Mr. Fera's link with Ta'as Marketing Ltd. in terms of taking goods there from and not paying for them. As explained by Mr. Morris in his affidavit, that doubt had been resolved resulting in the Trustees paying the liquidator of Ta'as Marketing Ltd. $406,120.89. He said that the doubt had been resolved before 2nd March 2001, the date of the Minutes referred to above. The position was clearly explained at pages 4 and 5 of the letter written by Mr. Sullivan dated 21st June 2001, addressed to Messrs Morris and Prince. I think the Trustees were entitled to reach that conclusion on the evidence before them. Whilst it is not doubted that Ta'as Marketing Ltd. was a separate legal entity, its majority shareholder was doing business with it also as an individual trader using its name in his retail business. That is, Ta'as Marketing Ltd. and Mr. Fera were two separate legal entities doing business with each other at arms length. Mr. Fera might not have realized this difference believing that since he was the majority owner, what he was doing was simply being an agency salesman of Ta'as Marketing Ltd. His own evidence given at the public examination stage points to a wholesaler/retailer relationship than anything else. So, if the retailer does not pay for his goods taken on credit from the wholesaler, the wholesaler clearly has the right to claim payment from the retailer. This was the situation found in this case and the Trustees had acted appropriately to clear Mr. Fera's debt. Apart from this complaint, Mr. Fera also seemed to believe that the Trustees should have only cleared the debt owing to Mobil Oil Ltd. being the judgment creditor and should not have bothered about the debts of other creditors because the other creditors had not proved their debts against him in Court. This belief, I must say, is a misunderstanding of the bankruptcy practice. Only one final judgment creditor is enough to set off the bankruptcy process in train for the benefit of all other creditors. However, all other creditors must prove their debts of whatever nature to the Trustees. The Trustees can then either admit the debts or reject them in whole or in part. The power to investigate the debts to establish proof thereof or otherwise is quite extensive and can be intrusive if necessary. Debt priorities are set out in section 39 of the Act. Debts that are not priorities under the Act are to be paid pari passu. That is, all debts that are not priorities under the Act are to be paid out on equal basis so long as there is enough money to enable the Trustees to do that for the benefit of the creditors. This is exactly what the Trustees have so far done in this case. There is no legal basis for the Trustees to use all the moneys derived from the Estate to pay off Mr. Fera's debt owed to Mobil Oil Ltd. and not the other creditors who had proven their debts and admitted by the Trustees. In fact, this point had already been explained by Mr. Sullivan

to Mr. Mamatekwa at a Meeting on 19th April 2001. (See page 4 of the Report by the Trustees). Any idea in the mind of Mr. Fera that all the moneys derived from his Estate were enough to clear off his debt with Mobil Oil Ltd. and thereupon he should be free from that debt and all his other debts is wrong. The fact is that there are other creditors wanting to be paid out of the same Estate. The Trustees cannot forget them in their administration of the Estate for payment of all proven debts is the prime purpose of their appointment as trustees of the Estate. It is in this context that the Trustees had decided to pay off the debts owing to Goodman Fielders and Shell Company Ltd. as creditors. Whilst it is true that these two creditors did not produce any creditor judgments to prove Mr. Fera's liability to them, that requirement was not necessary. The admission of their proofs of debts by the Trustees was enough to enable payment to be made to them by the Trustees. The same is true in the case of Solomon Breweries Ltd. as a creditor. Although Mr. Fera questioned the default judgment dated 17th July 2000 against the Estate as being irregular, he has not set it aside to date. It is therefore a binding judgment. The Trustees were correct in admitting it as proof of debt by Solomon Breweries Ltd. The last complaint by Mr. Fera has two parts. The first part was about the professional fees paid to the Trustees and Sol-Law as Solicitors for the Trustees. He cited the sums of $374,824.52 for the Trustees and $266,824.52 for Sol-Law respectively as being unreasonable and excessive. All I can say on this is that the committee of inspection had sanctioned these amounts as being reasonable. As to the level of the professional fees, Mr. Fera has said nothing as to why he believes the Trustees and Sol-Law should not have been paid the fees they had been paid. He has not produced any evidence to substantiate his complaint. As said by Mr. Morris in his affidavit cited above, the Estate is complex. The Estate is indeed complex. The reading of my judgment delivered on 23rd May 2001 in **Wayne Frederick Morris and Benjamin of Giles Price (as Special Managers of Rex Fera, Receivers and Special Managers Appointed v. Clement Tori, Jack Wale, Bradley Boeni Ferris Foli, Edna Geoffrey and Others**, Civil Case No. 037 of 2001 will show that the Estate is rather complex to say the least. A lot of work would have been done to sort out what was what and so on, which in turn, was time consuming. Remuneration was of course would have to be commensurate with work and time. As I have said, Mr. Fera has not provided the evidence to persuade me to agree with him on this issue. The second part of his complaint is that Sol-Law Solicitors had a conflict of interest all along in this bankruptcy proceeding. The explanation of course by Mr. Morris in his affidavit cited above was that all the parties had agreed to Sol-Law acting for them because they had a common interest in view of the complexity of the Estate. In terms of rule 11 of the Legal Practitioners (Professional Conduct) Rules 1995, (L.N. No. 98 of 1995) conflict of interest could be compromised where the parties have consented or where the client has not placed instructions with another firm if there are more than one firm in town. The common interest here is the Estate of Mr. Fera against which claims by all creditors were being placed in the hope that they are paid out of the Estate by the Trustees. Although there are more than one firm of Solicitors and Barristers in Honiara, the parties had not placed instructions with the other firms. I do not therefore think Mr. Fera has been able to make out good case on this issue.

Does Mr. Fera have any right at all to question the administration of his Estate by the Trustees?

I think Mr. Fera does. Section 83 of the Act does give that right to apply to the Court for orders and the Court may act appropriately. The equivalent of this section in the Bankruptcy Act 1914 of the United Kingdom had been considered in **Re a Debtor** (No. 44 of 1940) [1949] Ch. 236. In that case, the bankrupt applied on the ground that the trustee had wasted the asset through negligence and delay but the Court said he was not entitled to relief on that ground unless he could show that a surplus did exist or the possibility of it was present but for the trustee's conduct. I could sense a fear in the mind of Mr. Fera that the moneys from his Estate were being diverted to other creditors so that the possibility of there being a surplus for him could never be reached. This I think was the basis of his application. Whilst this is his fear, there is no evidence to sustain it. As said by Mr. Sullivan in his submissions, the total debt against the Estate was in the sum of $8million but he said it could go up to $10 million. So the existence of any surplus or its possibility cannot yet be assessed with any degree of certainty. Certainly, paying creditors upon proof of debts cannot be said to be wasting the Estate nor

can the payment of legitimate professional fees of the Trustees and the Solicitors be regarded as such. There may well be no surplus. The true position really depends upon the number of proofs of debts recorded and the sufficiency of the Estate to accommodate the payment of such debts. Mr. Fera has failed to make out a good case for the orders he sought in his Summons. This Summons is dismissed with cost. Mr. Fera must realize that each time he takes the Trustees to Court and loses his case against them, he faces the real possibility of paying costs, which may be taken, out of his Estate. The more he goes to Court and loses his actions, the more costs he would have to pay out of is Estate through the Trustees. These costs can eat up a substantial part of his Estate. Mr. Morris did point out this danger in his affidavit cited above as already being the case resulting from previous actions by Mr. Fera and his relatives against the Trustees, which they had lost in the Court. Mr. Fera has to be careful about this the next time. The order I made on 4th November 2002 requiring Mr. Fera to seek leave of the Court before commencing any further proceedings against the Trustees was an attempt to control or minimize costs against the Estate that may arise from ill-conceived actions by Mr. Fera against the Trustees. I do understand the feeling of Mr. Fera that his Estate has been placed in the hands of non-Solomon Islanders whom he perceived as benefiting handsomely from his Estate in terms of receipt of professional fees. The fact is that the creditors had not instructed the other Solicitors and Accounting Firms in Honiara who Mr. Fera might personally have chosen. The choice of Solicitors and Accountants by the creditors is not a matter for Mr. Fera. Mr. Fera had had the chance to instruct any Solicitor of his choice to defend his Estate in the first place. It is not right for him to bemoan the choice of Solicitors by the creditors and the Trustees likewise. His duty now is to co-operate with the Trustees in the smooth administration of his Estate. It is obviously a bitter experience for him but he is not alone. Thousands are like him the world over. I do not blame Mr. Fera for one moment if has misunderstood some of the legal niceties at play in a typical bankruptcy proceeding such as this. That is why a good choice of a reasonably good Solicitor is vital in the first place. I recall I said a lot about this point in respect of Mr. Fera in my judgment delivered on 13th June 2001 in **Mobil Oil Australia Limited v. Rex Fera (Trading under the firm name or style of Ta'as Marketing Limited**, Civil Case No. 177 of 2000. That is, Mr. Fera has only himself to blame for what has happened to his Estate. Both Counsel agreed that I vary paragraph 2 of my order dated 4th November 2002 to cater for the departure of Mr. Ashley from Honiara so that whoever is his representative in Honiara during his absence will continue to attend meetings of the committee of inspection if and when Mr. Mamatekwa is not able to attend those meetings. Mr. Ashley of A & A Legal Services in a letter to the Registrar dated 13th February 2003 said that Messrs Solosaia and Upwe would be the ones looking after his practice during his absence from Honiara. However, only Mr. Upwe has renewed his practicing certificate for 2003. Mr. Solosaia, on the other hand, has not. I do not know the terms of the arrangement but I suppose I would replace Mr. Ashley with Mr. Upwe and hope he carries out his duty on the committee of inspection. Mr. Fera should also ensure that Mr. Upwe is aware of his responsibility in this regard lest he had not been instructed by Mr. Ashley before his departure. If there is a problem, Mr. Fera should instruct another Solicitor to protect his interest. I would simply amend paragraph 2 of my order by deleting the words "Mr. Charles K. Ashley" and replacing them with the words" Barnabas Upwe." The orders of this Court are-

1. **This application is dismissed with costs;**

2. **Paragraph 2 of my order made on 4th November 2002 be amended in the second line thereof by deleting the words, "Charles K. Ashley" and replacing them with the words, "Barnabas Upwe." I order accordingly.**

F.O. Kabui
Judge