IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

High Court Civil Action No. 141/2011

BETWEEN : **MEAT CUISINE FIJI LIMITED** (In Receivership) a duly incorporated limited liability company having its registered office in Nadi.

Plaintiff

AND : **CARPENTERS FIJI LIMITED** a duly incorporated limited liability company having its registered office in Suva, trading under the name and style of **MORRIS HEDSTROM**

Defendant

Solicitors : M/S Rams Law for the Plaintiff
M/S Krishna & Company for the Defendant

RULING

INTRODUCTION

1. In the Fiji Sun's issue of **27 March 2013**, an advertisement was published by the Acting Deputy Official Receiver and Provisional Liquidator. By that advertisement, the Deputy Official Receiver was giving Notice of the date, time and venue of a 1st Creditors Meeting for various companies. Amongst the twenty two companies listed, was Meat Cuisine (Fiji) Limited (**"Meat Cuisine"**).
2. Meat Cuisine is the plaintiff in this case. Some eighteen months prior to the above advertisement, on **09 September 2011,** Meat Cuisine had filed a Writ of Summons and Statement of Claim against Carpenters Fiji Limited (**"Carpenters"**). In the intituling page of the originating process, the words *"in Receivership"* appear after and beside Meat Cuisine's name.
3. That Meat Cuisine was already under receivership at the time it filed its writ of summons and statement of claim is not a point of dispute. However, what would emerge after the close of pleadings is that a Mr. Kamal Sen was appointed receiver (or liquidator?) for Meat Cuisine.
4. I say receiver (or liquidator?) because Sen himself, on the one hand, had deposed that he was appointed receiver pursuant to a mortgage-debenture of a creditor and yet, in another affidavit, he deposes that he was appointed

company liquidator at an Extraordinary General Meeting of Meat Cuisine members held in July 2011. It is also not in dispute that Sen also has a Receiving Order against him by the Official Receiver.

5. By summons dated 09 May 2012, Carpenters seeks an Order that Meat Cuisine's writ and claim be struck out and dismissed and that the "liquidator" be ordered to pay a fine of $10.00 per day from 07 September 2011 "in default and failure of the Liquidator to comply with section 300 of the Companies Act". Alternatively, the defendant seeks an Order that the Official Receiver be appointed Receiver of Meat Cuisine.

GROUNDS

6. The application is based on the following grounds:

   (a) that the Official Receiver has never granted consent to the liquidator to institute legal proceedings on behalf of Meat Cuisine/or the liquidator has failed to obtain consent of the Official Receiver to institute legal proceedings on behalf of Meat Cuisine.

   (b) the appointed liquidator of Meat Cuisine is an undischarged, bankrupt and has a Receiving Order issued against him issued on 18 August, 2010.

   (c) in the alternative, that the liquidator has failed to publish his appointment in the Gazette and deliver to the Registrar for registration a Notice of his Appointment in the prescribed form.

7. I reduce Carpenters' solicitors' submissions into three parts:

   (i) first – is the argument that Sen does not qualify to be liquidator/receiver of Meat Cuisine.

   (ii) second – is that Meat Cuisine is already wound up and as such, the consent of the Official Receiver is required before Meat Cuisine can proceed with this action.

   (iii) third – is the submission that, as a creditor of Meat Cuisine, Carpenters is entitled to show cause for the removal of Sen as Liquidator on account of the fact that it is aggrieved by "the decision of Liquidator".

PARTIES' RESPECTIVE POSITIONS

8. The Summons is supported by an affidavit of Ms. Miriama Latianara, a solicitor who was then in the employ of Carpenters' Solicitors, Krishna & Company. She deposes that Sen had a Receiving Order issued against him on 18 August 2010 and is an undischarged bankrupt. The Official Receiver, she

says, is now the consolidated receiver of Sen's estate. He has failed to obtain the consent of the Official Receiver to institute these legal proceedings[1].

9. Sen confirms that a Receiving Order was issued against him. However, he refutes, and responds to, the allegation that he is an undischarged bankrupt, as follows:

a. That my and my wife's house was mortgaged to Fiji Development Bank. We fell behind in the repayments and the bank sold the property under mortgagee sale at a substantially lower price than the market price. I even had a buyer who was willing to purchase the property and the bank was aware of it but did not sell it to that person.
b. That I was not aware that the bank had sold our house for about two hundred thousand lesser than its market value and the value that I was offered.
c. That the bank did not serve any documents to me. I only came to know about their being a receiving order against me when the present application herein was brought to my knowledge. I did not know that the bank had proceeded to obtain a receiving order against me and my wife on the 18th day of August 2010 and apparently had advertised the same in the Fiji Sun newspaper on the 23rd day of February 2012.
d. I have never been served with any documents by the Official Receiver or the bank and I did not read or even came to know the above mentioned publication in the newspaper.
e. That I am advised by Rangeeta Prasad of the office of the Official Receiver that the Office of Official Receiver has not taken any steps at all in seeking my statement of affairs and has not taken any steps towards arranging any creditors meeting. In fact I have been advised by her that they have not taken any action in the matter at all.
f. That no bankruptcy orders have even been made against me and I am now in the process of taking actions to have the receiving order set aside.
g. That I have caused a letter dated the 13th day of June 2012 to be written by the Plaintiff's solicitors to the Official Receiver in which I have sought the basis for the Official Receiver claiming that I require the Official Receiver's consent to act as a Receiver. Despite the said letter and despite my several telephone calls to the said Rangeeta Prasad of the Official Receiver's office to date it has not responded to the said letter. A copy of the said latter of the 13th day of June 2012 is annexed hereto and marked as "KS1".

13. Although the Official Receiver would become the Receiver of his property, Sen asserts that the Official Receiver has no rights to interfere with his work as

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[1] Ms Latianara deposes as follows:

5. That the Liquidator of the Plaintiff Company is a Mr. Kamal Sen.
6. That I believe and am informed by Rangeeta Prasad from the office of the Official Receiver that Mr. Kamal Sen, the Liquidator of the Plaintiff Company is an undischarged bankrupt and that he had a Receiving Order issued against him on the 18th day of August, 2010.
7. That I believe and am informed by Rangeeta Prasad from the Office of the Official Receiver is now the consolidated receiver of Kamal Sen's estate including all business dealings and as such, Kamal Sen, the liquidator of the Plaintiff Company has failed to obtain the consent of the Official Receiver to institute these legal proceedings.
8. That exhibited hereto and marked "ML1" is a copy of letter dated 30th March, 2012.
9. That I pray for Order-in-Terms of our Summons filed herein.

Receiver of Meat Cuisine, nor does he need the prior consent of the Official Receiver before he can function as such[2].

14. Sen further deposes that he was appointed Receiver pursuant to a registered mortgage-debenture which obliges him to apply any monies he receives in accordance with the relevant provisions of that security instrument[3]. He adds that he has been remunerated for his services as Receiver and that he will account accordingly for this to the Official Receiver[4].

10.I seek that the Defendants application be dismissed with costs.

10. Curiously, Sen also deposes in the affidavit opposing this application now before me that he was appointed Receiver pursuant to a registered mortgage-debenture which obliges him to apply any monies he receives in accordance with the relevant provisions of that security instrument.

7. That I was appointed under as the Receiver of the Plaintiff pursuant clause 21 of the Mortgage Debenture registered at the Companies Office on the 20th day of June 2007. A copy of the mortgage debenture is annexed hereto and marked as "KS2".
8. That I am obliged under the Mortgage Debenture to apply any money I receive in accordance with clause 23 of the Mortgage Debenture.

OBSERVATIONS

11. After close of pleadings, Meat Cuisine filed Summons for Directions on 01 December 2011. Order in Terms would be granted in due course. By Meat Cuisine's Affidavit of Documents sworn by Sen on 13 February 2012, the fact was disclosed that the company had been placed in voluntary liquidation at an Extraordinary General Meeting of its members held on **25 July 2011**. Of course, nearly two months later, on 09 September 2011, Meat Cuisine would file its writ and claim against Carpenters.

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[2] Sen deposes:

5. That as to the allegations contained in paragraph 7 of the Affidavit I say as follows:
   a. That upon the making of the Receiving Order the Official Receiver has become the receiver of my property.
   b. That the Official Receiver has not rights to interfere with the work I carry out. I do not require the Official Receiver's consent to act as a Receiver in the action herein as alleged or otherwise.

[3] Sen deposes:

7. That I was appointed under as the Receiver of the Plaintiff pursuant clause 21 of the Mortgage Debenture registered at the Companies Office on the 20th day of June 2007. A copy of the mortgage debenture is annexed hereto and marked as "KS2".
8. That I am obliged under the Mortgage Debenture to apply any money I receive in accordance with clause 23 of the Mortgage Debenture.

[4] Sen deposes:

9. That I have been remunerated for my services as a Receiver and I will disclose the same to the Official Receiver.

12. At paragraphs 1 and 2 of his affidavit, Sen deposes that he was appointed Liquidator at that EGM. He deposes that under section 298 of the Companies Act, he has power to bring any action or other legal proceedings in the name of Meat Cuisine without the sanction of the Court[5].

13. If Sen was indeed appointed by the members pursuant to their *25 July 2011 EGM resolution* to voluntarily wind up the company, his general duty would primarily be to take control of *all* company assets and sell them to try and repay all (unsecured) creditors. He must be impartial and be seen to act independently and in that regard, is accountable equally to the company and to all creditors. However, the job of a receiver appointed pursuant to a registered mortgage-debenture is to take control of, and sell only, those company assets charged under the security instrument to secure the money owed under a loan. He would primarily be accountable then to the security-holder (see **Boila v Ali** [2001] FJHC 244; HBC183.2001 (2 November 2001) [6].

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[5] Sen deposes:

1. That the Plaintiff Company was placed in voluntary Liquidation at the Extraordinary General Meeting of its members held on or about the 25th day of July 2011 when it was resolved that the Company be wound up voluntarily and that I be appointed as the Liquidator of the Plaintiff Company.
2. That under section 298 of the Companies Act I am empowered and have a duty to bring or defend any action or other legal proceedings in the name of the Company on behalf of the Company without the sanction of the Honourable Court.

[6] The receiver's job as the court in **Boila** said:

> Receiver and manager for debenture-holder
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> In the context of this case, let me now look at the meaning and the distinction between the phrase 'manager of a company' and 'receiver and manager for debenture-holder'. This is how Jenkins L.J. stated this aspect in **Re B. Johnson** (supra at 790) and this is quite appropriate to the facts and circumstances of this case:
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> > "the phrase "manager of the company", prima facie, according to the ordinary meaning of the words, connotes a person holding, whether de jure or de facto, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit; whereas a receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture-holders. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. The whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers".
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> His Lordship goes on to say in regard to duty owed by receiver and manager to the Company:
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> > "In determining whether a receiver and manager for the debenture-holders of a company has broken any duty owed by him to the company, regard must be had to the fact that he is a receiver and manager - i.e., a receiver, with ancillary powers of management - for the debenture-holders, and not simply a person appointed to manage the company's affairs for the benefit of the company.
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> Further, on duties of a receiver and manager, and this is pertinent to this case, His Lordship states:
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> > "The duties of a receiver and manager for debenture-holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture-holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture-holders, the terms might be regarded as disadvantageous.
> >
> > In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture-holders' security to be preserved and realised."

14. Both counsel and their clients use the word "receiver" and "liquidator" interchangeably in their submissions. This only adds to the confusion created by Sen.

15. Indeed, there is a potential conflict if the one person appointed receiver under a security instrument were to also be appointed liquidator by the members of the company in a voluntary winding up. To say the least, a liquidator who is also receiver, may lack impartiality (or at least be seen to lack impartiality) as he will tend to favour the debenture holder in adjudicating proofs of debt.

16. It is the members whose interests are mostly at risk. Perhaps, because they have appointed Sen knowing (assuming) full well that he is also a receiver for the security holder, then I need say no more with regards to their position.

17. But what is to happen to the interest of the body of unsecured creditors. As far as one can gather from the advertisement mentioned above in paragraph 1, the Official Receiver is currently a "provisional liquidator"[7].

ANALAYSIS

Does Sen Qualify To Be Receiver /Liquidator of Meat Cuisine

18. Section 347 of the Companies Act (Cap 247) makes it a criminal offence for an undischarged bankrupt to act as receiver or manager of the property of a company on behalf of debenture holders[8].

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[7] That said that, let me just say here as a point of interest for practitioners that in Hong Kong, in the case of **In Re Orient Power Holdings Limited**, Madam Justice Kwan was faced squarely with a similar issue.
In that case, the Official Receiver had sought directions from the court concerning the appointment as joint and several liquidator of a certain Mr. Sutton. Sutton's appointment was made at a creditors meeting. The same Mr. Sutton had acted as receiver pursuant to a debenture for the insolvent company concerned, which, by the time of his appointment as joint and several liquidator, was already being wound up. The creditors' meeting favoured Sutton because, in the course of his duties as receiver, Sutton had thoroughly investigated the company's business affairs, and, accordingly, had considerable first-hand knowledge. His in-depth knowledge would be useful and handy in the liquidation of the company.
The Official Receiver was concerned about a potential conflict between a receiver and a liquidator and particularly in light of the fact that the contributories had no input in Sutton's appointment as joint and several liquidator.
Before Kwan J, it was argued that if Sutton was involved also in the liquidation, the process would be completed quickly, efficiently and cost-effectively because of his in depth knowledge of the company's affairs, operations and dealings with customers, suppliers and other third parties.
Kwan J accepted that argument, but she had to balance that with the real potential conflict of interest involved. In her balancing exercise, she considered:
(i) the tremendous benefit to the creditors, both secured and unsecured who were all in favour of Sutton's appointment and who would pay for Sutton's fees (because the company had little assets left)
(ii) the time and costs it would save to let Sutton continue. To appoint another would cost a lot in time and money in bringing them up to the in-depth knowledge that Sutton already had about the company.
(iii) the potential conflict was manageable because certain of Sutton's powers as liquidator could be checked by the other two co-liquidators.
(iv)

[8] Section 347 provides:
347.-(1) If any person, being an undischarged bankrupt, acts as receiver or manager of the property of a company on behalf of debenture holders, he shall, subject to subsection (2), be liable to imprisonment for a term not exceeding 2 years or a fine not exceeding $1,000, or to both.
(2) Subsection (1) shall not apply to a receiver or manager where-
(a) the appointment under which he acts and the bankruptcy were both before the appointed day; or
(b) he acts under an appointment made by order of the court.

19. The fact of the Receiving Order[9] is conclusive evidence that Sen had committed an act of bankruptcy[10] in terms of section 3 of the Bankruptcy Act (Cap 48). But is Sen an undischarged bankrupt?

20. Section 20(1) of the Bankruptcy Act sets out those situations/circumstances when a debtor may be adjudged bankrupt.

> *Adjudication of bankruptcy where composition not accepted or approved*
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> **20.**-(1) Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors, and shall vest in a trustee.
>
> (2) Notice of every order adjudging a debtor bankrupt, stating the name, address and description of the bankrupt, and the date of the adjudication, shall be *gazetted* and advertised in a local paper in the prescribed manner, and the date of the order shall, for the purposes of this Act, be the date of the adjudication.

21. In the scheme of things, those situations/circumstances must arise after a receiving order is made. In other words, an adjudication of bankruptcy, if the court were to be minded to make one, will come after the receiving order is made.

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[9] Section 5 of the Bankruptcy Act provides:

5. Subject to the conditions hereinafter specified if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.

[10] Section 3 of the Bankruptcy Act provides:

3.-(1) A debtor commits an act of bankruptcy in each of the following cases:-

(a) if in Fiji or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;

(b) if in Fiji or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof;

(c) if in Fiji or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt;

(d) if with intent to defeat or delay his creditors he does any of the following things, namely, departs out of Fiji, or being out of Fiji remains out of Fiji, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house, or removes his property or any part thereof beyond the jurisdiction of the court;

(e) if execution against him has been levied by seizure of his goods in any civil proceedings in any court, and the goods have been either sold or held by the sheriff for twenty-one days:
Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled or abandoned, shall not be taken into account in calculating such period of twenty-one days;

(f) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;

(g) if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in Fiji, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not within seven days after service of the notice, in case the service is effected in Fiji, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained:
For the purposes of this paragraph and section 4, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order;

(h) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

(2) In this Act the expression "a debtor", unless the context otherwise implies, includes any person, whether domiciled in Fiji or not, who, at the time when any act of bankruptcy was done or suffered by him-

(a) was personally present in Fiji; or

(b) ordinarily resided or had a place of residence in Fiji; or

(c) was carrying on business in Fiji, personally, or by means of an agent or manager; or

(d) was a member of a firm or partnership which carried on business in Fiji,

22. Although a receiving order is made after an act of bankruptcy has been committed, the receiving order *per se* is not an adjudication of bankruptcy. Rather, it is in essence, a court order to constitute the Official Receiver as receiver of the properties of the debtor (as per section 9)[11]. The essence of an order of adjudication of bankruptcy by the court is to vest the properties of the debtor in a trustee so they can be divided among the creditors.

23. Section 28 of the Act provides for when a bankrupt may be discharged by an Order of the Court. In this regard, this section tells us who is an undischarged bankrupt[12]. Clearly, under section 28 (see footnotes), an undischarged bankrupt is one who has been adjudged a bankrupt and who has not received an order of discharge from the court under section 28.

24. Since Sen has not been adjudged a bankrupt, notwithstanding the receiving order against him, a *fortiori* that he cannot be an undischarged bankrupt. In that regard, one can safely say that he has not offended section 347 of the Companies Act.

25. Should Sen still be disqualified from acting as receiver/manager under any other branch of the law? It is hard for me to think of any reason why he should be in the particular circumstances of this case. I say that considering that both the members of the company and also a particular secured creditor are clearly in favour of his functioning as a receiver/liquidator at the same time. If anything, it is the interest of the body of unsecured creditors which may yet be left exposed.

Consent Of The Official Receiver Not Obtained. Can Meat Cuisine Yet Proceed With This Action?

[11] Section 9 of the Bankruptcy Act provides:

Effect of receiving order

9.-(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.

(2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

[12] Section 28 provides:

Discharge of bankrupt

28.-(1) A bankrupt may, at any time after being adjudged bankrupt, apply to the court for an order of discharge, and the court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall, except when the court in accordance with rules under this Act otherwise directs, be heard in open court.

26. The consent of the Official Receiver, as liquidator, is required before any action or proceeding can brought by, or against, any company that has been wound up by the court[13].

27. Section 229 prohibits a wound-up company and/or a company for which an interim liquidator has been appointed from *"proceeding with"* an *"action or proceeding"*.

28. The section also prohibits a defendant from *"commencing against"* such a company any *"action or proceeding"*.

> 229. When a winding-up order has been made or an interim liquidator has been appointed under section **236,** no action or proceeding shall be proceeded with or commenced against the company, except by leave of the court and subject to such terms as the court may impose.

29. In **Khan v Official Receiver** [1999] FJHC 109; [1999] 45 FLR 220 (17 September 1999), Mr. Justice Pathik said there are two factors to be taken into consideration[14]:

(i) the nature of the plaintiff's claim
(ii) the balance of convenience and the demands of justice

30. Pathik J also observed[15] that the Court will not usually interfere with a liquidator's exercise of power unless he or she is doing something that is utterly unreasonable and absurd that no reasonable man would so act[16]. He then adopts Dunn J's sentiments in **Burnells Pty Ltd (In Liquidation) v Walsh re Burnells Pry Ltd** (Supreme Court, Brisbane 1979 Qd.R 440 at

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[13] (see Victory Tours Ltd v Merchant Finance Investment Company Ltd [2016] FJHC 63; HBC204.2012 (8 February 2016); Extreme Business Solutions (Fiji) Ltd v Formscaff (Fiji) Ltd [2016] FJHC 159; HBE30.2013 (9 March 2016); Unisan Co Ltd, In re [2015] FJHC 393; HBE27.2014 (19 May 2015); Khan v Official Receiver [1999] FJHC 109; [1999] 45 FLR 220 (17 September 1999).

[14] Pathik J said:

> Where leave is sought to commence or continue proceedings by a company in liquidation as in this case there are two determining factors; one is the nature of the plaintiff's claim and the other is the balance of convenience and the demands of justice.
> The O.R. (the liquidator) in the case before me considered the issue before him and decided to refuse consent to proceed with the action for the reasons he had given based on the advice he received. I find that he has exercised his powers properly and in accordance with the law and in accordance with the following statement from *Lindley on Companies* (6th Ed. Vol. 2 p.908) in determining whether he should proceed:
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> > *"The only material question to be considered is whether there are any circumstances which render it necessary that the action should be continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding up as in any other way."*

[15] citing Sir George Jessel in re Peters, ex parte Lloyd (1882) 47 L.T. 64

[16] Pathik J said:

> When the liquidator exercises his powers under the relevant provisions of the Act "... the Court will not interfere unless the trustee is doing that which is so utterly unreasonable and absurd that no reasonable man would so act" (Sir George Jessel in re Peters, ex parte Lloyd (1882) 47 L.T. 64). Sir George went on to say speaking of the trustee in bankruptcy: 'He is certainly not doing anything of the kind in the present case and, in my opinion, the appeal ought to fail'
> I adopt the same statements in this case.

442) that a liquidator who exercises his power in good faith having taken proper advice is not answerable to a creditor or contributory[17].

Why Leave of Court Required Under Section 229?

31. When a company is being wound up, debtors are ordinarily required to prove their debts before the Official Receiver. Section 229 ensures that such a company is not subject to a multiplicity of proceedings and contemplates that a claimant will ordinarily be required to lodge a proof of debt in the winding up rather than bringing proceedings against the company.

32. The idea is that a multiplicity of proceedings is expensive, time-consuming and may divert available funds away from the orderly winding up of the company.

33. I find the New South Wales Supreme Court decision in **In the matter of Ozrac Engineering New South Wales Pty Limited (in liquidation)** [2013] NSWSC 740[18] useful as a guide on the exercise of judicial discretion under section 229.

34. In order to obtain leave under section 229, an applicant must establish that:

    (i) it has a *prima facie* case in the sense that there is a real dispute about the parties and

    (ii) that there is good reason why it should be permitted to commence proceedings parallel to rather than instead of the proof of debt process.

35. On the first point (i) above, the commentary in *Austin and Black's Annotations to the Corporations Act* (para 5.471B) is most helpful:

> "The relevant factors to be taken into consideration include the amount and seriousness of the claims; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings, if commenced, have progressed; the risk that the same issues would be relitigated if the claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; whether the proceedings will result in prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants;

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[17] Pathik J said:
In this regard Dunn J in Burnells Pty Ltd (In Liquidation) v Walsh re Burnells Pry Ltd (Supreme Court, Brisbane 1979 Qd.R 440 at 442) has summed up the position very well, which I adopt, in the following words, after referring to the above passage in Burnells (at p.442):
"Similarly, in my opinion, a trustee or liquidator who exercises his powers in good faith, having taken proper advice, is not answerable to a creditor or a contributory even if the creditor or contributory is disposed to challenge the judgment of the liquidator, ..."

[18] The court was considering an urgent application under section 417B of the Corporations Act which provides that a person cannot begin or proceed with Court proceedings against a company that is being wound up by the Court, without leave of the Court.

whether the grant of leave will unleash an avalanche of litigation; whether the cost of the hearing will be disproportionate to the company's resources; delay and whether pre-trial procedures such as discovery and interrogatories are likely to be required or beneficial."

36. On the second point (ii) above, generally, where a claim could not be proved in the *proof of debt process*, the court should grant leave.

37. **Ozrac Engineering** also considered it to be "good reason" to preserve the limitation period. In this regard, the Court must consider the following –

(i) assuming it were to refuse leave now, and
(ii) the applicant was to then pursue his claim through the *proof of debt process*, and
(iii) if it were to transpire later that the Official Receiver or the liquidator were to require the applicant to first establish his claim through a court process,
(iv) is there a risk that the applicant would then be in danger of being barred by the expiry of the limitation period?

If so, then leave should ordinarily be granted. Also, leave should be more readily granted if the company is insured against the liability which the applicant seeks because there is no prejudice as such against the creditors' interests (see **Re Coastal Constructions Pty Ltd** (in liq) (1994) 13 ACSR 329 at 32.

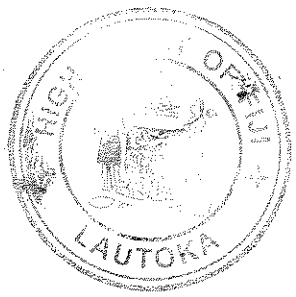
As A Creditor Of Meat Cuisine, Carpenters Is Entitled To Show Cause For The Removal Of Sen As Liquidator On Account Of Fact That It Is Aggrieved By "The Decision Of Liquidator

38. Carpenters alleges that it is a "creditor" on the basis of the counter-claim in this case which is yet to be adjudicated upon and which, in any event, has been filed in contravention of section 229 of the Companies Act (see above). Taking both these factors into consideration, I am not inclined to entertain its application in this regard. In any event, it is not clear to me what "decision" of Sen as Liquidator Carpenters is aggrieved by.

ORDERS

39. After taking all the above into account, I think the most appropriate Order to make is for the Official Receiver to be joined as a party in the interests of the body of unsecured creditors. Case adjourned to 17 August 2016 at 10.30 a.m. Parties to bear their own costs. The plaintiff is to seal the orders and serve a

copy on the Official Receiver fourteen days before 17 August 2016. Once the Official Receiver is in Court, I will then consider whether or not to grant leave to both plaintiff and the defendant under section 347.



Anare Tuilevuka
JUDGE
20 July 2016