

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 388 of 2018

BETWEEN: IBUILD CONSTRUCTION LIMITED (in Liquidation)

PLAINTIFF

AND HARISHWAR CHAND trading as HARRIS SUPERMARKET of Lot 3, Khalsa Road,  
Nasinu.

DEFENDANT

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSELS: Ms. Taukei S - for the Plaintiff  
Mr. Nand S - for the Defendant

Date of Decision: 29<sup>th</sup> December, 2020 @ 9.30am

DECISION

*[Leave pursuant to Sections 531 and 543(1) (a) & (c) of the Companies Act 2015]*

## INTRODUCTION

- [1] Before Court is the Official Receiver's Summons filed on 11<sup>th</sup> September, 2019 seeking for the following Orders-
- (i) That leave be granted to the Official Receiver to proceed with legal proceedings in Civil Action No. HBC 338 of 2018 on behalf of the Plaintiff.
  - (ii) That Leave be granted to appoint Amrit Chand Lawyers to Assist the official receiver to continue legal proceedings in Civil Action no. HBC 338 of 2018 in the name and on behalf of the Plaintiff; and
  - (iii) That costs of this application be costs in the cause.
- [2] The nature of the application is Interlocutory since the substantive Writ of Summons together with a Statement of Claim action is impending for deliberation and determination by this court.
- [3] The Application is made pursuant to *sections 531 and 543 (1) (a) (c) of the Companies Act 2015 and Inherent Jurisdiction of this Honourable Court.*
- [4] The application herein relies on the affidavit in support deposed by the acting Official Receiver coupled with the written submissions furnished to this court.
- [5] The Defendant has opposed the application and filed written submissions in the proceedings.

## OFFICIAL RECEIVER'S CASE

- [6] A Winding Up order was issued against the iBuild Construction Limited on 17<sup>th</sup> April, 2019 and the Official Receiver was appointed the Provisional Liquidator.
- [7] Prior to the Winding Up order being issued by the court, the Company had filed a Writ of Summons and the Statement of Claim on 21<sup>st</sup> November, 2018 against Harishwar Chand trading as Harris Supermarket in Civil Action No. HBC 338 of 2018.
- [8] The Company's claim against the Defendant is for damages collectively in the sum of \$484, 310.64 for loss suffered as a result of breach of contract by the Defendant.
- [9] On 11<sup>th</sup> September, 2019, the Official Receiver filed summons with an affidavit in support for leave to proceed with the legal proceedings together with an order for leave to appoint Amrit Chand Lawyers to assist the Official Receiver to continue the legal proceedings in Civil Action No. HBC 338 of 2018 in the name and on behalf of the Plaintiff.
- [10] The Official Receiver relied on *Sections 531 and 543 (i) (a) and (c) of the Company's Act 2015.*
- [11] In the present case, the Official Receiver in its capacity as the Provisional Liquidator of the Company

has decided to proceed with the Company's claim against the Defendant and the decision to proceed with the claim is premised on the Writ of Summons and the Statement of Claim which discloses that the company had entered into a contract with the Defendant. The Company alleged that the Defendant breached the contract and has accordingly suffered losses as a result of the breach by the Defendant.

- [12] The Official Receiver submitted that the decision to proceed with the companies claim against the Defendant can only take effect once the Official Receiver has complied with the provisions of **Section 531 and 543 (i) (a) and (c) of the Act** which the Official Receiver has made filing the necessary application before court on 11<sup>th</sup> September, 2019.
- [13] The Official Receiver submitted that in the balance of convenience and interest of justice, the company be given the opportunity to prove its case and a proper adjudication made on their cause of action in Civil Action No. HBC 338 of 2018. This would also allow the company, should it be success in its claim, to pay off its Creditors as the ultimate duty of the Official Receiver as Provisional Liquidator of the company.

#### DEFENDANT'S CASE

- [14] The Defendant submitted that there is a preliminary issue in this action which warrants dismissal of the action.
- [15] The company was wound up on 17<sup>th</sup> April, 2019 and therefore any action that has been filed by the Company or pending in court cannot be proceeded or continued with by the Company as the Plaintiff Company had no locus.
- [16] That the companies control in affairs is taken upon from the Defendant and vested in the appointed liquidator.
- [17] That in the present case the Plaintiff has been wound up. Section 531 of the Companies Act is only applicable to actions or proceedings commenced against the company. This section does not provide for actions which have been commenced by the Company.
- [18] Under **Section 543 (i) (a) of the Companies Act**, the Liquidator has power with the sanction to the court bring or defend any actions or other legal proceedings in the name and on behalf of the company.
- [19] Though the liquidator has made an application seeking sanction to the court, however, the orders sought is for continuation of the legal proceedings. The Companies Act is silent on the issue whether the liquidator can seek sanction of the court to continue with the proceedings. However, it does have power to seek leave to bring or defend any action.
- [20] The current proceedings on foot is not an action which the Official Receiver can bring or defend, therefore, it cannot be proceeded with as there is no locus. Hence, it ought to be dismissed and struck out.



- [21] Therefore is no evidence on the issue of balance of convenience and on the issue concerning the interest of justice apart from bare facts that should it be successful in its claim, it will enable them to pay off the Creditors.
- [22] The Official Receiver has failed to seek leave of the court to amend or substitute the Plaintiff by reason of the Plaintiff being wound up and the Official Receiver appointed as the Liquidator.
- [23] The balance of convenience does not favour for the appointment of the receiver to continue this case.

#### THE DETERMINATION

- [24] Following are the two (2) issues to be determined by this Honourable Court-
- (a) Whether leave should be granted to the Official Receiver to proceed with the legal proceedings in Civil Action no. HBC 338 of 2018?; and
- (b) Whether leave should be granted appointing Amrit Chand Lawyers to assist the official receiver in continuing legal proceedings in Civil Action no. HBC 338 of 2018 in the name and on behalf of the Plaintiff?
- [25] *Sections 531 and 543 (i) (a) and (c) of the Companies Act 2015 provides as follows -*
- "531 - when a winding up order has been made or provisional 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 imposed.
- "543 (1) - Subject to this section, the liquidator in a winding up by the court must have power, with the sanction either of the court or of the committee of inspection-
- (a) To bring or defend an action or other legal proceeding in the name of or on behalf of the company;
- (b) To carry on the business of the company, so far as may be necessary for the beneficiary winding up of the company;
- (c) To appoint a barrister an solicitor to assign a liquidator in the performance of his or he duties;
- [26] In the present case the Official Receiver in his capacity as the Provisional Liquidator of the Plaintiff Company has now decided to proceed with the impending Plaintiff Companies claim against the Defendant and also seeks leave and sanction of this Honourable Court to appoint Amrit Chand Lawyers to assist the Official Receiver to continue with the legal proceedings in Civil Action No. 338 of 2018 in terms of *sections 531 and 543 (1) (a) & (c) of the Companies Act 2015.*

- [27] The decision to proceed with the claim against the Defendant is premised on the Writ of Summons coupled with the Statement of Claim filed by Amrit Chand Lawyers on behalf of the Plaintiff Company on 21<sup>st</sup> November, 2018 alleging breach of building contract entered into and suffered losses as a result of the Defendant's breach.
- [28] In order for the Official Receiver to succeed in their decision to proceed with the Plaintiff Companies' Claim against the Defendant in impending Civil Action No. 338 of 2018, the Official Receiver needs to seek leave and sanction of the Court and fully comply with the requirements of the provisions of sections 531 and 543(1) (a) & (a) and (c) of the Companies Act, 2015.
- [29] The Official Receiver has filed in the necessary application on 11<sup>th</sup> September, 2019 in order to fully comply with the Provisions of **sections 531 and 543 (1) (a) & (c) of the Companies Act, 2015**.
- [30] **Section 531 (i) (a) of the Companies Act** the Defence submitted that the liquidator has the power with the sanction of the court to bring or defend any actions or other legal proceedings in the name and on behalf of the company.
- [31] The Defence contention further is that though the liquidator had made an application seeking sanction of the court, however, the order been sought is for continuation of the legal proceedings. He added that the Companies Act is silent on the issue whether the liquidator can seek sanction to the court to continue with the proceedings, however, it does have power to seek leave to bring or defend any action. Therefore the current proceedings is not an action which the Official Receiver can bring or defend, hence it cannot be proceeded with or continued with as there is no locus and the application ought to be dismissed and struck out.
- [32] It is not in dispute that the Plaintiff's Company **iBuild Construction Limited** filed the **Writ of Summons** against the Defendant in the current **Civil Action No. HBC 338 of 2018** on 21<sup>st</sup> November 2018, alleging **Breach of building contract** and **claimed for Compensation and Damages together with Declaratory Orders including other Orders** as enumerated at paragraph 54 (i) - (viii) of the Statement of Claim.
- [33] Further, it is also not disputed that the Plaintiff's company **iBuild Construction Limited** was **Wound up** under the provisions of the **Companies Act 2015** and the **Official Receiver** was appointed as the **Provisional Liquidator** by the Court in terms of **section 537 of the Companies Act 2015**.

Since the Plaintiff's substantive Writ Action No. HBC 338 of 2018 was filed on 21<sup>st</sup> November 2018, prior to the Plaintiff's Company being wound up some five (5) months later on 17<sup>th</sup> April 2019, it is incorrect for the Defendant to submit to the Court that the Plaintiff did not have the locus to do so. The Defendant's submissions tend to mislead this Court and paint a wrong picture altogether.

The Plaintiff's Company at the time of the filing of the substantive Writ Action No. HBC 338 of 2018 on 21<sup>st</sup> November 2018 was not wound up then and therefore the Plaintiff had the locus to commence proceedings against the Defendant.



- [34] In the current case, the Winding up order was granted against the Plaintiff Company in terms of section 531 of the Companies Act, 2015 and the Official Receiver was appointed as the Provisional Liquidator of the Plaintiff's Company on 17<sup>th</sup> April, 2019 in terms of section 537 of the same Act.

What this meant was that the grant of Winding up order had the effect of dismissing the Plaintiff Company's Directors and putting an end to their powers of management (*refer to para 1044, Halsbury's Laws of England, Fourth Edition Vol. 7*). However, the Official Receiver then stood in the shoes of the Plaintiff Company to the current to carry out its affairs in terms of the Companies Law since 17<sup>th</sup> April, 2019.

Further, effect of this Court order was that the impending Writ Action No. HBC 338 of 2018 before this Court could not be proceeded with any further until such time the Provisional Liquidator (in this case the Official Receiver) has filed an application seeking for leave to do so; which it has done at the present time for Court's determination now.

- [35] The Defendant's agrees with the provisions of section 543 (1) (a) of the Companies Act that the Liquidator has the power with sanction of the Court to bring or defend any actions or other legal proceedings in the name and on behalf of the Company.

- [36] However, the Defence contention is that the order sought by the liquidator in his application made before this Court seeks for the continuation of the legal proceedings. He added that the Act is silent on this issue whether the Liquidator can seek the sanction of the Court to continue with the legal proceedings? Therefore, the current proceeding is not an action which the Official Receiver can bring or Defend. Hence, it cannot be proceeded with or continued with as there is no locus and the application ought to be dismissed and struck out.

- [37] Bearing in mind the Defendant's contention hereinabove, I will reiterate the usage of the words within the provisions of section 543 (1) (a),: To bring or defend an action or other legal proceeding in the name of or on behalf of the company.

The words in the second limb of this provision is important - "*other legal proceedings in the name of or on behalf of the Company*" - This refers to the impending Substantive *Civil Action No. HBC 338 of 2018 in the name and behalf of the Plaintiff Company iBUILD Construction Limited. For the purposes of the current application, the substantive Civil Action No. HBC 338 of 2018 was filed prior to the winding up and continued to remain in the system and the case management impending its determination. Hence HBC 338 of 2018 is a continuing case in Court.*

Further, section 543 deals with the "Powers of Liquidator". The purpose of section 543 is to empower the Liquidator to recover any debts owed belonging to the Plaintiff Company which will assist him to pay its Creditors.

Hence, the argument of the Defendant does not have any merit in it and therefore fails accordingly.

- [38] The current application seeking for grant of leave to the Official Receiver to proceed with legal proceedings in Civil Action No. HBC 338 of 2018 on behalf of the Plaintiff and leave to be granted to appoint Amrit Chand Lawyers to assist the Official Receiver to continue the impending legal proceedings in Civil Action No. HBC 338 of 2018 in the name and on behalf of the Plaintiff is correctly made by the Official Receiver in his capacity as the Provisional Liquidator in terms of **sections 531 and 543 (1) (a) & (c) of Companies Act 2015** accordingly.
- [39] It is noted that the purpose of the current application by the Official Receiver is made for a good cause and if it is granted, in all fairness, since the Plaintiff's company will be given the opportunity to prove its case and upon a proper adjudication to be made in the impending Civil Action No. HBC 338 of 2018. Should the Plaintiff be successful in its claim only then it may be able to pay off its Creditors as it is an ultimate requirement and duty of the Official Receiver appointed in his capacity as the Provisional Liquidator of the Plaintiff's company accordingly.

#### IN CONCLUSION

- [40] For the aforesaid rationale, I grant the following orders sought by the Official Receiver in his application filed on 11<sup>th</sup> September 2019 as enumerated at paragraph 1 (i)- (iii) of my Decision hereinabove accordingly.
- [41] Since the matter proceeded to the hearing and the provisions of the Law in terms of sections 531 and 543 (1) (a) and (c) were quite clear, therefore the Applicant Official Receiver is entitled to costs which is summarily assessed at \$500 and to be paid before the next returnable mention date.

#### ORDERS

- (i) That leave is granted to the Official Receiver to proceed with the legal proceedings in Civil Action No. HBC 338 of 2018 on behalf of the Plaintiff.
- (ii) That Leave is granted and Amrit Chand Lawyers is appointed herein to Assist the Official Receiver to continue legal proceedings in Civil Action no. HBC 338 of 2018 in the name and on behalf of the Plaintiff.
- (iii) Costs against the Defendant is summarily assessed at \$500 and to be paid before the next returnable date.
- (iv) Substantive Action is now returnable for mention on 20<sup>th</sup> January 2021 @ 9.30 am.

Dated at Suva this 29<sup>th</sup> day of December, 2020.



VISHWA DATT SHARMA  
JUDGE

Cc: Attorney General's Chambers, Suva.  
Nands Law, Suva.