

THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 600 of 2005

BETWEEN : FIJI DAILY POST COMPANY LIMITED (in liquidation)  
  
PROPOSED APPELLANT/ORIGINAL  
PLAINTIFF

AND : WESTPAC BANKING CORPORATION  
  
1<sup>ST</sup> RESPONDENT/ (ORIGINAL 1<sup>ST</sup> DEFENDANT

AND : ASSOCIATED MEDIA LIMITED  
  
2<sup>ND</sup> RESPONDENT/ORIGINAL 2<sup>ND</sup> DEFENDANT

AND : YASHWANT GOUNDAR  
  
3<sup>RD</sup> RESPONDENT (ORIGINAL 3<sup>RD</sup> DEFENDANT)

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. K. Singh for the Proposed Appellant/Plaintiff  
Ms P. Law for the First Respondent/First Defendant.

Date of Hearing : 6 July 2018  
Date of Decision : 13 July 2018

## DECISION

1. This is the application (Summons) of the Proposed Appellant/Plaintiff seeking the following orders:
  - (1) That the Appellant/Applicant be granted an enlargement of time to file a Notice and Grounds of Appeal, against the Decision of this Court delivered on 28 March 2018, to the Court of Appeal.
  - (2) The Applicant be granted leave under section 531 of the Companies Act (Act) to proceed with those proceedings by way of an appeal to the Court of Appeal.
  - (3) For a stay of the Master's Orders delivered on 4 September 2017, pending the hearing and determination of the appeal therefrom.
  
2. The application is supported by the affidavit of Alan Hickling (Hickling). In his affidavit, Hickling says he is a director of the Plaintiff Company and deposes as follows:
  - (1) On 22 February 2011 a winding up order was made by the High Court against the Company and the Official Receiver was appointed the Provisional Liquidator. The Company and its directors were not aware of this until their present solicitors were informed by the solicitors for the First Defendant.
  - (2) The Provisional Liquidator by letter dated 24 November 2016 consented to the appeal, against the Master's orders to the High Court. Subsequently the Liquidator wrote 4 further letters.
  - (3) There are arguable grounds to appeal the Master's Decision.

- (4) The Judge dismissed the Plaintiff's application for leave under s.531 of the Act holding that only the liquidator has the locus to apply for such leave.
  - (5) The Judge did not consider and adopt the decision of another High Court Judge, Mutunayagam J who approved a two-tier process viz first the consent of the liquidator and second the leave of the court.
3. The hearing commenced with Mr Singh submitting. He said the Master refused the application for leave as it did not comply with s.531. The Plaintiff had followed the procedure adopted by Mutunayagam J. He said there are 2 conflicting decisions. He is applying for leave to appeal to the Court of Appeal. If unsuccessful the other applications become redundant, except he would want the Court to grant stay of the Master's Order. If successful he would ask for the security for costs (payable by the Plaintiff) to be paid into his trust account or into the Court, and to be \$3,500 to \$5,000.
  4. Ms Low then submitted. She said the Official Receiver should be making the petition and not the company and therefore leave should not be granted and the applications fail.
  5. Mr Singh in his reply referred to s.543 of the Act and said Mutunayagam J stated only the consent of the liquidator was required.
  6. At the conclusion of the arguments I said I would take time for consideration. Having done so, I now deliver my decision.
  7. In my opinion the pivotal issue is this. Whether this application should have been brought by the Official Receiver as Provisional Liquidator? I have been referred by Mr Singh to the decision of my brother, Mutunayagam J in the case of : ALSPEC Holdings Limited vs Ministry of Works, Transport and Public Utilities and the Attorney General

of Fiji : Civil Action No. HBC 341 of 2011 : 3 March 2017. The learned Judge laid down a two tier process viz first the consent of the liquidator and second the leave of the Court.

8. With the greatest respect I am unable to accept the first tier as stated by his Lordship. To my mind s.543 (1) of the Act lays down that it is the liquidator, who has the power under "(a) to bring or defend any action or other legal proceeding in the name and on behalf of the Company". So it is crystal clear that Parliament intends the liquidator himself/herself to bring the legal proceedings and not merely stand on the side after giving his/her consent.
9. The words of (a) are in pari materia with the words in s.167(1)(a) of the English Insolvency Act 1986 except the word "claim" there is the word "action" here. Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 7(3) in the footnote to para 578 states this provision enables the liquidator to sue in the name of a dissolved company which is being wound up..
10. In the result the Plaintiff cannot proceed any further with any appeal nor apply for a stay of the Master's Orders as neither were brought by the Provisional Liquidator. The Summons filed on 4 May 2018 is hereby dismissed, the orders applied for therein including for a stay of the Master's Orders are not granted.
11. I shall now turn to the question of costs. In the normal course, costs follows the event. Here the Plaintiff's Counsel had referred to the decision in the ALSPEC case which I declined to follow as it is a decision of a court of co-ordinate jurisdiction which was therefore not binding on me and with which I had to differ. I trust my decision here will clarify the situation. I shall in the particular circumstances of this matter order each party to bear their own costs of the Summons.

Delivered at Suva this 13<sup>th</sup> day of July 2018.



David Alfred

JUDGE

High Court of Fiji