IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0060 OF 2003S
(High Court Labasa Civil Action No: HBC 28 of 1997)

BETWEEN:

ALI'S CIVIL ENGINEERING LIMITED

First Appellant
(Original First Plaintiff)

AND

VALEBASOGA TROPICBOARDS LIMITED

Second Appellant
(Original Second Plaintiff)

AND

FIJI DEVELOPMENT BANK

First Respondent
(Original First Defendant)

AND CHIRK YAM AND ILAITIA BOILA
AND
PRICEWATERHOUSECOOPERS

Second Respondents
(Original Second Defendants)

Coram: Sheppard, JA
Penlington, JA
Scott, JA

Hearing: 14 July 2004

Counsel: Dr. M.S. Sahu Khan and Mr. R.P. Singh for the Appellants
Mr. D.P. Sharma for the First Respondent
Mr. J. Apted for the Second Respondents

Date of Judgment: 15 September 2004

JUDGMENT OF THE COURT

This is an appeal from a ruling of the High Court (Pathik J) in which an application for an interlocutory injunction was refused. The Appellants (the original Plaintiffs) challenged the validity of a debenture given by the second Appellant to the first Respondent (the original first Defendant), the Fiji Development Bank. The basis of the challenge was the alleged failure of the Bank to obtain the consent of the Director of Lands to the transactions pursuant to Section 13 of the Crown (State) Lands Act (Cap. 132). It is common ground that the consent of the Director was not endorsed on the debenture. The consent of the Director was however endorsed on a contemporary transaction namely a mortgage of certain leasehold land upon which are erected buildings in which the second Appellant carried on business. Pursuant to the debenture the Bank purported to appoint Chirk Yam and Ilaitia Boila as receivers and managers to go into possession of the buildings and to take over the business carried on by the second Appellant. It is that conduct which the Appellants say was unlawful. In his submission counsel for the Appellants emphasised that the Bank had not purported to go into possession under the mortgage. It did not claim to be a mortgagee in possession. Rather, it claimed to be entitled to go into possession under the debenture.

There are also cross appeals by the Respondents who had sought to have the Plaintiffs' action against them dismissed on the ground that it was frivolous and vexatious and an abuse of the process of the court. The Respondents also sought to have the proceedings against them stayed on the grounds that the Plaintiffs had failed to provide indemnity or security for their costs. The High Court declined to rule on these applications by the Respondents, instead deferring consideration of them until the trial.

The following is a brief chronology. For convenience we will use the descriptions applied to the parties in the High Court in this judgment.

On 25 April 2002 the Plaintiffs commenced the action by way of Writ issued out of the High Court at Labasa. The writ was endorsed with a general claim seeking nine declarations and damages amounting to F$65,300,000.00. It was followed on 4 June 2002 by a lengthy and somewhat convoluted statement of claim running to 36 pages and 86 paragraphs.

On 10 June 2002 the first and second Plaintiffs filed an amended Notice of Motion seeking:

> "A mandatory interlocutory injunction directing –
>
> a) That the first [Defendant] cease exercising its rights as mortgagee under the Deed of Debenture executed by the second [Plaintiff] and dated 9 August 1993; and
>
> b) That the second [Defendants] cease exercising their rights as receivers and managers under the Deed of Appointment executed by the first [Defendant] as mortgagee under the Deed of Debenture dated 9 August 1993 and accepted by themselves on 1 May 2001; and
>
> c) That the first and second [Defendants] deliver up possession of the second [Plaintiff's] undertaking, property, stock-in-trade and book debts to the second [Plaintiff]; and that
>
> d) The first [Defendant] be restrained from exercising all or any of its rights as mortgagee under the security granted by the first and the second Plaintiffs to it pending the trial of this action ..."

According to paragraph 7 (d) of the Statement of Claim the securities referred to in paragraph (d) above which were granted by the first and second Plaintiffs comprised:

i) A mortgage over the second Plaintiff's leasehold property comprised in Crown lease LD 4/9/3747 over Lot 2 on Plan DO 702 Nayaca subdivision;

ii) A second mortgage over the first Plaintiff's leasehold property comprised in registered Crown lease No. 2994;

iii) A debenture over the second Plaintiff's assets and undertakings;

iv) A bill of sale over existing plant, machinery, logging equipment and vehicles and plant machinery and logging machinery to be purchased;

v) Guarantees by the second Plaintiff's directors; and

vi) A guarantee by the first Plaintiff.

On 25 June 2002 the second Defendant filed a cross application. The first Defendant had filed its own cross application on 13 May 2002. These cross applications gave rise to the cross appeals.

On 10 July 2002 the three applications came on for hearing before Pathik J. As will be seen from the transcript the Plaintiffs application proceeded on the basis that it was, as stated on its face, merely an application for interlocutory relief. Such applications are brought pursuant to RHC O 29. It is important to note that there was no application before Pathik J (nor before us) to treat the application as if it was an application for the trial of a preliminary issue of law under the provisions of RHC O 33 rule 3. In these circumstances and notwithstanding the extensive legal submissions by counsel and Pathik J's careful analysis of the arguments advanced we cannot treat the Ruling as final on the Section 13 question nor treat the appeal as an appeal against a final judgment on that issue.

The sequence was as follows: Pathik J refused, in the exercise of his discretion, to grant the interim injunctive relief which the Plaintiffs had sought. They appealed. Their appeal must mean that they are challenging the exercise of the judges discretion. They are saying that he wrongly exercised that discretion.

Applying the well known principles explained in American Cynamid v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504 we ask ourselves:

i) Whether the judge was wrong in finding, in effect, that there was no serious issue to be tried on the Section 13 point;

ii) Whether he erred in his assessment of where the balance of convenience lay; and

iii) Whether, in any event, overall justice required that interlocutory injunctive relief be granted (see Klissers Farmhouse Bakeries v Harvest Bakeries Ltd [1985] 2 NZLR 129 CA 142).

The applicability or otherwise of Section 13 to the debenture was described by the judge as lying at the heart of the Plaintiff's application. Section 13 of the Crown Lands Act reads as follows:

"Protected Leases

13-(1) Whenever in any lease under this Act there has been inserted the following clause:-

"this lease is a protected lease under the provisions of the Crown Lands Act." (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sublease, or in any other

> manner whatsoever, nor to mortgage, charge or pledge the same without the written consent of the Director of Lands first had and obtained nor, except at the suit or with the written consent of the Director of Lands shall any lease be dealt with by any Court of law or under the process of any Court of law nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.
>
> Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."

In this case, the lease states:

> "It is expressly declared that this lease is a Protected Lease under the provisions of the Crown Lands Act."

Paragraph 2 of the lease states:

> "the lessee [the second Plaintiff] shall not transfer, sublet, mortgage, assign or part with the possession of the demised land or any part thereof without the written consent of the lessor [the first Defendant] first had and obtained."

The Property Law Act (Cap 130) is intituled:-

> "An Act to consolidate and amend the law relating to property and for incidental and other purposes."

Part VIII of the Property Law Act deals with mortgages. "Mortgages" are defined in Section 2 of the Act to include:

> "A mortgage registered or capable of being registered under the provisions of the Land Transfer Act (Cap 131) *and also includes a charge on any property* for securing money or money's worth or the performance [of] any obligations;" (emphasis added)

Paragraph 3 of the debenture (in which the second Plaintiff is described as "the Company" and the first Defendant is described as "the mortgagee") reads as follows:

> "the Company hereby charges with such payment all its undertakings and all its property, stock-in-trade, book and other debts whatsoever and wheresoever present and future including its uncalled capital with the benefit of the security for the same."

The Plaintiffs' argument was simple: there is nothing to suggest that the consent of the Director of Lands was sought before the debenture was executed and indeed a letter from the Department of Lands and Survey dated 24 April 2002 suggests that it was not. In these circumstances the debenture, containing as it did a charge over the Plaintiffs land was, pursuant to Section 13, null and void and accordingly the appointment of the second Defendants as receivers was also invalid. Therefore the purported appointment should be immediately be revoked.

Pathik J rejected this argument. In our opinion he was right to do so. He pointed out that the Director of Lands had consented to the mortgage and held that he was aware of the debenture. The debenture is dated 9 August 1993. The mortgage is dated 31 August 1993. The consent of the Director of Lands dated 31 August 1993 is endorsed upon the mortgage which was registered on 3 September 1993. Paragraph 26 of the mortgage reads as follows:

> "This mortgage is hereby expressed to be collateral to a debenture dated 9 August 1993 given by the said mortgagor to the said mortgagee."

On 1 November 1994 the Director's consent to the up stamping of the mortgage was obtained and endorsed upon it. On 15 December 1995 the Director again endorsed his consent to a further up stamping.

Where two contractual documents are collateral to each other then neither of the documents contains the whole of the contract between the parties. The terms of the whole contract entered into are contained in both documents which must be taken together (see e.g. De Lassalle v Guildford [1901] 2 KB 215 and Jacobs v Patavia and General Plantations Trust Ltd [1924] 1 Ch. 287).

In our judgment the Director of Lands, in granting his consent to the mortgage which was clearly expressed to be collateral to the debenture, must be taken not only to have been aware of the debenture but also to have consented to it.

Pathik J also concluded that in any event the granting of the debenture was not a dealing in the land.

In Maharaj v. Chand [1986] 1 AC 898; (1986) 32 FLR 120 the Privy Council explained the purpose of Section 12 of the Native Land Trust Act (Cap 134) - a section having the same purpose as Section 13 in relation to Native Land - to be:

> "... directed against alienating or dealing with *the land* without the consent of the [Native Land Trust Board]. Manifestly the section is intended to ensure that the power of control and the beneficial interest of the Fijian owners are not to be prejudiced by unauthorised transactions. Neither the terms nor the

> spirit of this section are violated by an estoppel or equity operating solely inter partes. (emphasis added)

A dealing with *the land* would occur, for example, where:

> "... the Board would find the Respondent completely dispossessed and the Appellant in full possession and control of the land without having an opportunity of considering whether he was a desirable tenant in the exercise of its statutory duty to administer for the benefit of Fijian owners..." (see Phalad v Sukh Raj (1978) 22 FLR 170 and Chalmers v Pardoe [1963] 3 All ER 552).

On the other hand, an agreement of a purely contractual and personal character, even one permitting another to enter onto the land and there carry out operations on behalf of the owner, may not amount to a dealing in the land (Kulamma v Manadan [1968] AC 1062; [1968] 2 WLR 1074). Furthermore, an agreement to deal with the land, held incohate and inoperative while the consent of the Director is being applied for is not rendered illegal and void by the section (see Chandra Kant Pala v. ANZ Savings Bank Ltd FCA Civ. App. 50/1991; FCA BV 93/555 and Butts v. O'Dwyer (1952) 87 CLR 267).

In the most recent consideration of sections 12 and 13 the Supreme Court of Fiji in Guiseppe Reggiero v Nabuyoshi Kashiwa (CBV 005/97S) said:

> "We think that [the] authorities show that the relevant section is infringed if without the prior consent of the Director of Lands or the [Native Land Trust] Board, as the case may be, action contrary to the policy is taken in performance of the agreement. *Such contrary action* coupled with the agreement itself constitutes a prohibited "dealing". (emphasis added)

and:

> "the policy of the Act is to be borne in mind in determining whether what has occurred in any given case amounts to a prohibited dealing."

Under paragraph 15 of the debenture:

> "...every... receiver shall be the agent of the company and the company alone shall be responsible for his acts and defaults and such receivers so appointed shall, without consent on the part of the company have power:
>
> (a) to take possession ... of the mortgage premises
> (b) to lease ... the mortgage premises
> (e) to sell or concur in selling ... the mortgaged premises ...

While at first sight these powers might be thought to amount to the power to deal with the land it must be remembered first, that the powers are not, by virtue of paragraph 2 of the lease actually exercisable without the further consent of the Director of Lands. Secondly, the receivers, qua agents of the company, merely have the right to exercise those powers which the company itself possessed prior to the receiver being appointed. It hardly needs to be stated that an agent cannot possess powers greater than those of his principal.

It could not, in our view, be argued that a hypothetical debenture which gave the receiver no powers touching the protected land required the consent of the Director of Lands. A debenture which touches the land but which merely amounts to an agency agreement does not in our view require consent either.

Although we have held that in the circumstances of this case the Director of Lands must be taken to have consented to the debenture we are satisfied that in fact the granting of the

debenture did not amount to a dealing in the land within the meaning of Section 13 of the Act and that therefore the consent of the Director to the transaction was not actually required.

Although in ruling against the Plaintiffs on the Section 13 issue the judge found that the Plaintiffs had not succeeded on the "threshold question" (see Klissers Farmhouse Bakeries – supra p 133) he also went on to consider where the balance of convenience lay. He concluded that it lay in favour of refusing the injunction sought. We agree.

The first generally accepted consideration in evaluating the balance of convenience is whether damages would be a sufficient remedy. Dr. Sahu Khan did not address us on that matter and we are not persuaded by paragraph 42 of the Plaintiffs submissions in the High Court.

No attempt was made by the Plaintiffs to suggest that the circumstances were of such an exceptional nature as to justify the granting of an interlocutory mandatory injunction (see Canadian Pacific Railway v. Gaud [1949] 2 KB 239; Morris v. Redland Bricks Ltd. [1970] AC 652).

Although the Plaintiffs were seeking to restrain the Defendants from exercising powers granted under the debenture no payment in of the amount due under the mortgage or of any amount had been made (see Inglis v. Commonwealth Trading Bank of Australia (1971) 126 CLR 161).

In view of the apparent extent of the second Plaintiff's indebtedness the undertaking as to damages offered by the first Plaintiff appears to be worth very little.

In our view the Appellants have not shown that the judge erred in the exercise of his discretion either in regard to the threshold question or in relation to the balance of

convenience. Taking all these circumstances together we are satisfied that overall justice required that interlocutory relief be refused. Accordingly the appeal on the Section 13 issue must be dismissed.

A second ground of appeal was also filed by the Plaintiffs. It may be taken briefly. The Plaintiffs sought to set aside the order of the High Court dismissing the third named second Defendant from the suit. As will be seen from the Statement of Claim no mention is made of PriceWaterhouseCoopers apart from describing them as a party. Pathik J examined the evidence placed before him and found as a fact that PriceWaterhouseCoopers was "not involved in the actions of the Bank and the receivers" in the action. Nothing was placed before us to suggest that this finding was reached in error; in fact this ground of appeal was not addressed at all. We see no merit in it. The second ground of appeal is dismissed.

As already noted, the cross appeals by the Defendants arise from their cross applications.

The second Defendant's cross application sought security for its costs. The first Defendant's cross application sought payment into Court of the amount due under the mortgage. Both Defendants also sought to have the Plaintiffs' claims struck out as an abuse of the process of the court.

The second Plaintiff is a subsidiary of the first Plaintiff. The second Plaintiff is substantially indebted to the first Defendant. On 7 March 2001 the first Defendant demanded repayment of $9,703,904.91. The demand was not met and therefore the receivers were appointed.

The Second Defendants relied on the rule that where a receiver has been appointed the directors of the company may only bring proceedings in the name of the company if the receiver is indemnified by the directors against any liability of costs (see Newhart Developments Limited v. Co-operative Commercial Bank [1978] 1 QB 184 and Paramount

Acceptance Co. Ltd v. Sauster [1981] 2 NZLR 38). This rule clearly applies to the facts of the present case.

It is markworthy that Section 402 of the Companies Act (Cap. 247) provides that:

> "Where a limited company is plaintiff in any suit or other legal proceedings any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

In Northampton Coal, Iron and Wagon Co. v. Midland Wagon Co. (1878) 7 Ch. D. 500 it was held that the fact that a company is in liquidation is prima facie evidence that it would be unable to pay the Defendants costs. We are of the opinion that the failure to satisfy a demand that money secured by a debenture be repaid gives rise to a similar inference.

Since the purpose of requiring security is to prevent irrecoverable costs being incurred the question of whether security should be provided should preferably be considered and decided at an early stage in the litigation. In our opinion the High Court erred in not hearing the applications for security placed before it.

The first Defendant in seeking payment in of the amount due under the mortgage relied on Inglis (supra) for the proposition that injunctive relief will not be granted to a mortgagor to restrain the mortgagee from exercising its powers unless the amount claimed by the mortgagee is first paid into court. No payment in has been made by the Plaintiffs.

Dr. Sahu Khan referred us to Harvey v. McWatters (1948) SRNSW 173 and suggested that since the validity of the debenture was itself in question the rule in Inglis did not apply.

While we accept that the rule in Inglis is modified where the validity of the security is in question we do not agree that Harvey v. McWatters is authority for the proposition that in those circumstances no amount is to be paid in by the mortgagor at all. It is clear from the judgment the sum required to be paid in is the value of the security itself. In our view the High Court erred in not ordering the payment in of this amount. We would however observe that the grounds for departure from the general rule in Inglis may not in fact here be available since, in dismissing the appeal we have already rejected the Plaintiffs reasons for disputing the validity of the debenture.

The remaining application by the Defendants was for the action against them to be struck out as an abuse of the process of the court. As will be seen from the Statement of Claim the allegations by the Plaintiffs against the Defendants are extremely wide ranging. The affidavits disclose numerous issues both of facts and of law. The financial claim is very substantial indeed. On the other hand, it is said that this action is the ninth to be taken by the Plaintiffs or their close associates. It was suggested that the Plaintiffs' conduct was vexatious and oppressive. In particular, by failing to raise the Section 13 argument in an earlier action (HBC 183/2001 and Court of Appeal ABU 30/02) the Defendants say that the Plaintiffs have clearly abused the process of the Court (see Yat Tung Investment Co. Ltd v. Dow Hang Co. Bank Ltd [1975] AC 581).

While there is force in these submissions we are mindful that it is only in plain and obvious cases that an action should be struck out (Hubbock v. Wilkinson [1899] 1 QB 86). We agree with the High Court that this was not such a case.

Towards the end of the decision on appeal the High Court noted:

> "There are a multiplicity of actions. All of them are still pending two years after the receivers were appointed. No finality has been reached in any of them. [The Plaintiffs] legal advisors should set a goal and frame legal actions

accordingly so that the issues between the parties are decided once and for all."

We are in entire agreement.

4. RESULT

The appeal is dismissed. We affirm the order of Pathik J dismissing PriceWaterhouseCoopers from the suit.

The cross appeals are partly allowed. The action is remitted to the High Court with the direction that the Chief Registrar place the matter back before Pathik J for mention within 28 days of the delivery of this Judgment. The second Plaintiff is to provide such security for costs as shall be determined by the High Court to be sufficient to indemnify the first and second Defendants. The second Plaintiff is to pay into Court such sum as the High Court shall determine to amount to the value of the security held.

The first and second Defendants are entitled to their costs which we fix at $2,000 each.

Sheppard, JA

Penlington, JA

Scott, JA

Solicitors

Messrs. Sahu Khan & Sahu Khan for the Appellants
Messrs. R. Patel & Co. for the First Respondent
Messrs. Munro Leys for the Second Respondent