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1. **PACIFIC TIMBER DEVELOPMENT LTD**
2. **NORTHAM INTERNATIONAL INVESTMENTS LTD**
3. **AXIOM INVESTMENTS LTD**

v

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1. **N.Z. FOREST PRODUCTS LIMITED**
2. **NZFP RESOURCES FINANCE LIMITED**
3. **ELFIC LIMITED**

[HIGH COURT, 1994 (Fatiaki J), 19 October]

Civil Jurisdiction

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Practice (Civil)-injunctive relief-fortification of undertaking as to damages-debenture charge creating equitable interest-whether payment into Court appropriate.

Following the grant of an injunction restraining the defendants from exercising rights conferred under a charge defendants sought orders fortifying the usual
D undertaking as to damages and further security for the sum secured. The High Court reviewed the applicable law before refusing both applications.

Cases cited:

Allen v Jambo Holdings [1980] 1 W.L.R. 1252
E *Baxter v Claydon* (1952) W.N. 376
Blundell & Anor v Associated Securities Ltd (1971) 19 F.L.R. 17
British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] 1 QB 137
Cunningham v National Australia Bank (1987) 77 A.L.R. 632
Glandore Pty Ltd v Elders Finance and Investment Co. Ltd (1948) 4 F.L.R. 130
F *Grant v N.Z.M.C. Ltd* [1989] 1 N.Z.L.R.8
Harvey v McWatters (1948) 49 N.S.W.S.R. 173
Inglis and Anor v. Commonwealth Trading Bank of Australia (1972) 126 C.L.R. 161
Manganex Ltd and Robert Southwell v Akhil Holdings Ltd. (Civil App. No. 13/76)
G *Murphy v. Zamonex* (1993) 31 N.S.W.L.R. 439)
Pearson and Sons Ltd v Dublin Corporation [1907] A.C. 351
Rawcliffe v Customs Credit and Others No. 7
Rawson v Samuel (1841) 54 R.R. 259
Town and Country v Planning Partnership Pacific (1988) 20 F.C.R. 540

P. Larkin with *I. Fa* for the Plaintiffs
B.N. Sweetman with *Ms. D. White* for the Defendants

Fatiaki J:

On the 9th of December 1993 this Court granted on the ex parte application of the plaintiffs, an interim injunction restraining the defendants from appointing a receiver or exercising any rights or remedies under a charge executed on the 2nd of December 1992 between the second plaintiff company and the defendants and effectively secured over the land and business assets of the 1st plaintiff company in Fiji.

At the outset it should be recorded that the injunction order sealed by the plaintiffs carelessly omitted any reference to the usual undertaking in damages which was required and recorded in the Court's handwritten minutes. This is conceded however by counsel for the plaintiffs and is undoubtedly a universal requirement with few exceptions of which the present is not an instance.

On the 11th of January 1994 the plaintiffs issued an inter partes motion for a continuation of the interim injunction until further order and/or upon final determination of the plaintiff's claim. By a consent order dated the 14th of January 1994 the injunction was continued indefinitely with liberty reserved to the defendants to apply for any of the following orders :

> "(a) For security for costs ;
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> (b) That the plaintiffs usual undertaking as to damages be fortified;
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> (c) That the sum said by the defendants to be secured by the charge be paid into Court (or alternatively that the plaintiffs provide evidence of the plaintiffs ability to maintain the assets the subject of the charge and provide personal undertaking of the principals of the plaintiffs that the assets will not be eroded in value pending the trial) ; and
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> (d) That the injunction be dissolved if the plaintiffs or their principals fail to comply with any order made pursuant to any such application or breach of any undertaking given, or if the plaintiffs ability to maintain the assets diminishes."

On the 6th of May 1994 the defendants in pursuance of the above reservations filed a bare summons seeking in terms the orders enumerated in (b), (c) and (d) above. The summons was subsequently supported by 5 affidavits as follows :

(1) Affidavit of Paul Goodsall filed 13.5.94;

(2) 1st Affidavit of Deborah White filed 17.5.94;
(3) 1st Affidavit of Anil Rana filed 25.5.94;
A (4) 2nd Affidavit of Anil rana filed 21.9.94;
(5) 2nd Affidavit of Deborah White filed 26.9.94.

The contents of these affidavits are conveniently summarised in the skeleton argument of defence counsel as demonstrating the plaintiffs impecuniosity as evidenced by its failure to meet creditor's demands ; by the existence of a petition to wind up the 1st plaintiff company ; in eviction proceedings being
B undertaken by a landlord of the 1st plaintiff company ; by the refusal of the 2nd plaintiff company to release the names of its directors and shareholders and by the 1st plaintiff company's extreme reluctance to permit an inspection of its timber mill and facilities at Deuba by an authorised representative of the defendants. Defence counsel also criticised the nebulous nature of the plaintiffs
C undertaking and the almost complete absence of any information as to the financial standing of the 2nd plaintiff company which is the named chargor under the defendant's charge.

Counsel was especially critical of the figures in the affidavit of Stephen Turner and his reference to the existence of undisclosed intercompany guarantees describing it as a "meaningless statement" and the figures as : "No use speaking
D about $50 million when you can't find $1.5 million to pay into Court." There is in defence counsel's submission some real fear that the plaintiffs undertakings may prove illusory or worthless.

The Plaintiffs in opposing the application have in turn lodged 4 affidavits :

E (1) 1st affidavit of Greig Hill filed 21.9.94;
(2) 1st affidavit of Isireli Fa filed 23.9.94;
(3) 2nd affidavit of Greig Hill filed 26.9.94; and
(4) 2nd affidavit of Isireli Fa filed 26.9.94.

The contents of the plaintiffs affidavits may be summarised as an attempt to explain the nature and status of various creditors and their claims against the
F 1st plaintiff company and to reassert the solvency of the 1st plaintiff company as exemplified by an unaudited proforma Balance Sheet of the 1st plaintiff company.

I note however that there is a profound silence in the plaintiffs answering affidavits as to the financial position of the 2nd plaintiff company the actual
G chargor and it is upon this factor which defence counsel lays greatest stress. So much then for the affidavits in the case. I turn next to deal with the particular orders sought by the defendants.

Firstly, the question of fortification of the plaintiffs undertaking as to damages. In this regard I am more than satisfied that the Court has power at any time during the subsistence of an injunction to order that the party for whose benefit

the injunction was granted be required to fortify an undertaking given as to damages by the provision of some form of additional security.

Furthermore the nature and form of such security is a matter in the discretion of the Court to determine having regard to all the circumstances of the case including, whether or not the party giving the undertaking is resident within or outside the Court's jurisdiction ; the nature value and location of any assets within the jurisdiction; the nature of any claims put forward by the parties in the substantive action; the financial ability of the injunctor (for want of a better term) to meet an award for damages should an order be made in that regard and the overall justice of the case.

In this instance Mr. Sweetman suggested that fortification could take the form of a cash deposit such as in Baxter v. Claydon (1952) W.N. 376 or a personal covenant of the directors of the plaintiff companies such as was affirmed by the Fiji Court of Appeal in Manganex Ltd. and Robert Southwell v. Akhil Holdings Ltd. Civil Appeal No. 13/76 or a bankers guarantee.

Counsel for the plaintiffs in opposing this ground of the defendants application argued that this was not an appropriate case to order fortification in as much as two of the 3 plaintiff companies giving the undertaking are local companies registered in Fiji with substantial assets in Fiji, but even if the Court should find that the plaintiff companies were impecunious that alone would be an insufficient ground for ordering fortification (See : Allen v. Jambo Holdings [1980] 1 W.L.R. 1252 and Rawcliffe v. Customs Credit and Others No.7 in the defendant's list of authorities). Secondly, the trial dates for the hearing of the substantive claims has been fixed and an order for fortification at this stage of the proceedings would have the unwarranted consequence of pre-determining the defendant's entitlement under its charge which is the very matter at issue in these proceedings.

Having carefully considered the various competing factors I am firmly of the view that this is not an appropriate case for the exercise of the Court's discretion to require the plaintiffs to fortify its undertaking as to damages.

The second limb of the defendants application is for an order for the payment in of the amount secured by the defendants charge. This is principally based on the general rule enunciated in Inglis and Anor. v. Commonwealth Trading Bank of Australia (1972) 126 C.L.R. 161 where it was :

> "Held : As a general rule an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage and, in particular, a power of sale unless the amount of the mortgage debt, if this is not in dispute, is paid or unless, if the amount is disputed, the amount claimed by the mortgagee is paid into Court ; and this rule will not be departed from merely because the mortgagor claims to be

> entitled to set off the amount of damages claimed against the mortgagee."

A This rule has been applied, discussed and refined in numerous decisions of the Australian Courts thereafter as was helpfully pointed out by both counsel before me. In particular I detect a growing tendency to relax the stringency of its application in cases where the enforceability of the security or the validity of the exercise of the mortgagee's powers are directly challenged by the mortgagor.

B Mr. Sweetman basing himself on the plaintiffs Statement of Claim asserts that there is no direct attack on the security document, the charge, in this case, rather the plaintiffs claim to be entitled to an equitable set-off. The difference is further reflected in the nature of the relief claimed by the plaintiffs which is not a declaration that the charge is null and void but that they are entitled to an equitable set-off.

C In the circumstances defence counsel relying on such authorities as Harvey v. McWatters (1948) 49 N.S.W.S.R. 173 and Glandore Pty Ltd. v. Elders Finance and Investment Co. Ltd. (1948) 4 F.L.R. 130 and Blundell & Anor v. Associated Securities Ltd. (1971) 19 F.L.R. 17, urges the Court to to which list might be added consider "moulding" an order "so as to require payment in of so much D only as will suffice to give adequate protection to the mortgagee" per Sugarman J. in Harvey v. McWatters (ibid) and counsel suggests the payment in of the interest accrued to date.

Learned counsel for the plaintiffs in opposing this second order lays stress on the close even direct relationship between the plaintiffs claim and the creation E of the defendants charge. In this counsel relied on such authorities as Rawson v. Samuel (1841) 54 R.R. 259 ; Cunningham v. National Australia Bank (1987) 77 A.L.R. 632 and British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd. [1980] 1 Q.B. 137 where the particular expressions used are : "... whether the nexus between the claim and cross claim was such that the cross-claim could be said to impeach the title of the plaintiff" (per F Jenkinson J. at p.637) and "... the important qualification is that the equity must impeach the title to the legal demand, or in other words go to the very foundation of the landlords claim." (per Forbes J. at p.152).

To this list may be added the observation of Somers J. in Grant v. N.Z.M.C. Ltd. [1989] 1 N.Z.L.R.8 when he said at pp.12, 13 in delivering the judgment of the Court of Appeal :

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> "The principle is we think, clear. The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependant : judgment on one cannot fairly be given without regard to the other; the

> defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract."

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(See also : The judgment of Giles J. in Murphy v. Zamonex (1993) 31 N.S.W.L.R. 439).

It is convenient at this stage to deal with the nature of the plaintiffs claim in the present case as disclosed in its amended Statement of Claim. Briefly the plaintiffs claim that contracts entered by them for the purchase of a sawmill and for which a charge was given by the plaintiffs to the defendants to secure the purchase price were induced by a false misrepresentation as to the production capabilities of the mill upon a small outlay by the plaintiffs, made recklessly by representatives of the defendants and without regard to the truth or accuracy of the representation. In as much the plaintiffs claim includes an allegation of fraud and deceit. Since the purchase was finalised the plaintiffs have paid $2 million to the defendants and there remains an outstanding balance of $1.5 million which is secured by the charge in question. The plaintiffs claim to have suffered substantial damages for the losses sustained by it in reliance on the defendants misrepresentations as to the nature and costs of the remedial works required by the mill.

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The defendants for their part deny making any such misrepresentations and/or the falsity of the same. In particular, learned defence counsel also drew the Court's attention to the terms of Clause 7.35 an exclusion clause in the Charge under which the chargors duties and obligations are described as being : "... absolute and unconditional and shall not be subject to reduction, termination or other impairment by set-off ..." and in which the Chargor agreed that its obligation to make any payments under the charge would not be "... released, relieved or discharged ... for any reason whatsover including ... misrepresentation, negligence, gross negligence, wilful misconduct ... under or in connection with this agreement ...", and counsel submits that the plaintiffs thereby contractually excluded expressly any right of equitable set-off.

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Plaintiffs counsel in a short response referred to the decision of the House of Lords in Pearson and Sons Ltd. v. Dublin Corporation [1907] A.C. 351 in which their lordships declined to uphold an exclusion clause where there had been allegations of fraud. Reference need only be made to the judgments of Lord Loreburn L.C. where he said at p.353 in referring to the exclusion clause:

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> "Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them."

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and the Earl of Halsbury who said at p.356 :

> "The action is based on the allegation of fraud, and no subtility

> of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to the jury."

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I am satisfied at this interlocutory stage that the plaintiffs claim raises serious questions including allegations of fraud on the part of the defendants representatives which are incapable of being resolved or determined without a trial.

B To return then to the second order sought by the defendants i.e. of payment in. This application in my opinion is concluded by the judgment of the Fiji Court of Appeal in the Manganex case (op. cit) in which the Court rejected a similar submission of Mr. Handley Q.C. that in restraining the debenture holder and its appointed receiver from exercising its powers under the debenture the Court ought to have imposed a condition that the injunctor C bring into Court either the whole or a substantial part of the sum claimed by the debenture holder.

O'Regan J.A. in discussing the nature of the security in the case i.e. a company debenture, said in words that are directly applicable to the present security, at pp.10, 11:

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> "The first appellant's security does not vest in it the legal estate in any of the respondent's realty or ownership of its personalty. It charges ... all its undertaking and all its property whatsoever and wheresoever both present and future including its uncalled capital and then goes on to provide :
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> > 'The charge hereby created shall operate as a fixed charge as regards all freehold and leasehold property ... building structures, erections improvements uncalled capital, engines, machines, machinery plant and vehicles of the company ...'
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> Whether fixed or floating it is nonetheless a charge and clearly does not pass the legal estate or property in the assets of the company. In that circumstance, having regard to the historical base and the genesis of the rule as enunciated by Fox J. (with whom we respectfully agree) in Blundell's case we are of G opinion that neither the general rule (as set out in the Inglis case) nor the special or subsiduary rule expounded by Sugarman J. in McWatters case apply to debenture charges creating as they do merely equitable interests."

Furthermore in Town and Country v. Planning Partnership Pacific (1988) 20 F.C.R. 540 the full Court of South Australia in refusing leave to appeal against

the discharge of an injunction restraining the appointment of a receiver under a mortgage recognised albeit tentatively a somewhat similar distinction in commenting on the general rule enunciated in the Inglis case when it said at p.544 :

> "The rationale for the rule may thus be thought to have less relevance to a mortgage of land which is included in a Torrens system of title registration where the mortgage operates as a mere charge on the land and not as a conveyance to the mortgagee of the mortgagor's legal interest in the property."

In the present case the defendants interest or claim under its charge may be described as being that of an assignee of a mortgage which is secured over real property, a sawmill, and a timber milling business beneficially owned and operated by the plaintiffs in Fiji. Such a security could only give rise in my opinion to what the Fiji Court of Appeal describes as "merely equitable interests".

O'Regan J.A. recognised however the possibility that there may be some dimunition in the value of the security by virtue of a lack of proper maintenance or mismanagement and in order to meet such an eventuality the Court could not in pursuance of any rule of law - but in the Court's discretion, impose conditions which would avoid hardship and consequential injustice and not render the interlocutory relief nugatory.

I turn then to consider whether or not there is any evidence of a possibility of dimunition in the value of the defendants security or from which the Court might infer lack of proper maintenance or mismanagement on the part of the plaintiffs.

In this regard I confess that having carefully considered the affidavits filed on behalf of the defendants I am unable to find any such evidence nor am I constrained to draw such adverse inferences against the plaintiff companies with whom the defendants chose to deal with at the outset in establishing its charge.

Finally, although no issue was raised with regard to the balance of convenience in the case I am firmly of view that this factor strongly favours the plaintiffs and the maintenance of the existing status quo.

The defendants application is accordingly dismissed with costs to be taxed if not agreed.

(Application dismissed.)