IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO. 32 OF 1991
(Civil Action No. 34 of 1991)

BETWEEN:

R.V. PATEL AND COMPANY (MERCHANTS) LTD
SUNRISE PACKAGING LTD
PRODOPACT LTD
DAWN MILLING COMPANY LTD
VINOD KUMAR RAMANLAL PATEL — APPELLANTS

-and-

BANK OF NEW ZEALAND
BRUCE LAURENCE AVENT
SAMUEL DUGALD HENDERSON
DHIRAJLAL HEMRAJ
DIRECTOR OF LANDS
ATTORNEY-GENERAL OF FIJI — RESPONDENTS

Dr. Sahu Khan for the Appellants
Mr. B. C. Patel for the Respondents

Date of Hearing : 10th November, 1992
Date of Delivery of Judgment : 15th January, 1993

JUDGMENT OF THE COURT

For reasons that we hope will become clear, the Court has treated the hearing of this matter as an appeal from an interlocutory Judgment and order. However, as it turns out, it is possible that the whole matter can be disposed of on a very simple basis, which we shall also endeavour to explain.

The first plaintiff was, at all material times a company carrying on business in Fiji. The second, third and fourth plaintiff were subsidiaries of the first plaintiff, and the fifth plaintiff was one of its directors. It is sufficient for the purposes of this appeal if they are collectively referred to as the appellant.

The first defendant was at one time, the banker of the appellant; it can be conveniently referred to as the respondent bank or "BNZ". The second defendant appears to have been given a power of attorney by BNZ and as such to have appointed receivers and managers of the plaintiff companies for BNZ; he does not appear to have been a necessary party and has taken no part in the proceedings. The third and fourth defendants are accountants whom BNZ, by its said attorney, purported to appoint as receivers and managers of the assets, property and enterprise of the plaintiff companies. The remaining two defendants were nominal only, and took no real part in the proceedings. Where convenient, the defendants are collectively referred to as the respondent.

BNZ made the appointment of receivers on 18th January 1991. On 30th January 1991 the receivers obtained an ex parte injunction in effect to restrain the disposal of assets of the appellant which they alleged was occurring (proceedings No. 21/91) Just how much further those proceedings went does not appear to matter. On 19th February 1991 the appellant commenced

an action in the High Court seeking certain declarations, injunctions and other orders against the respondent (proceedings No. 34/91). It claimed that BNZ had no right to appoint the receivers. On the same day it filed a summons for an interim injunction to bring to halt, pending the hearing of the action, anything that the respondent was doing or might try to do as a result of the appointment of receivers. This is the interlocutory matter to which we referred at the commencement of these reasons of judgment.

Both matters, or all matters, were heard together on affidavit evidence in April 1991, and the trial Judge gave judgment and made certain orders on 23rd April. Some of the orders were later set aside by consent, and leave given to the respondent to file a counter-claim. The only orders that now remain are those that dismissed the appellant's claim and that ordered the 5th plaintiff to pay the respondent's costs.

The appellant lodged an appeal on 22nd May 1991. There are various grounds of appeal which may have to be decided in due course. But because it seemed to us to be most desirable for the parties to know whether the receivers had been validly appointed or not and, if they had been, for them to get about their business, we decided to hear the matter on the appeal from the interlocutory application of the appellant to restrain the receivers from acting as such, which required a decision as to whether they had been validly appointed or not. Pending a

decision on this aspect, we stood the balance of the appeal over, so that the parties could consider what course was the appropriate one to follow in the light of our reasons for a decision on the interlocutory aspect.

We have reached a conclusion that the receivers were validly appointed. We have already intimated that they should get about their business on this basis.

Before the appeal came on for hearing before us on 10th November 1992, the respondent on 12th May 1992, filed what is termed a "Respondent's Notice" pursuant to rule 19(2) of the Court of Appeal Rules. This raised a contention upon which the respondent wished to rely and which had not been raised at the hearing . Indeed, the event to which the respondent adverted in the respodent's notice had not occurred by the time the hearing took place before the trial Judge. We believe that it operates to conclude the appeal in favour of the respondent. We shall explain why a little later.

In early 1987 BNZ agreed to become the bankers of the appellant. On 1st June 1987 the first plaintiff and its subsidiary companies all executed debentures in favour of BNZ over all their undertakings, property and assets to secure an overdraft facility of $2,800,000 and further advances. The fifth defendant executed guarantees of the loans. In February 1990 BNZ informed the appellant that it was selling its Fiji operations

to the Australia and New Zealand Banking Group (ANZ) and that all the appellant's banking operations after the sale would be with ANZ. A little later ANZ confirmed that the former banking facilities would continue. We shall return to this.

Thereafter, it is claimed by the appellant, and from about March 1990 the appellant accepted ANZ as its new bankers and had no further dealings with BNZ. This is disputed by the respondent, but for the purpose of deciding the appeal from a decision given on an interlocutory application made by the appellant we feel that it is proper that we should accept the appellant's version of any disputed facts.

On 18th January 1991 BNZ purported to appoint receivers and managers of the enterprise of the appellant in pursuance of the powers to do so contained in the debentures. The receivers took over control and management and full possession of all the business and activities of the appellant companies. Hence the proceedings and the application for an injunction.

The gist of the appellant's case was that it had ceased to do business with BNZ, that it owed no monies to BNZ, that it had transferred its indebtedness to ANZ, and that BNZ had no right or power to appoint receivers.

The matter was heard in April 1991. At a preliminary hearing in February the trial Judge decided that he would proceed

to hear the whole matter, that is to say, the substantive action, the application for interlocutory relief by the appellant, and the proceedings in which the respondent had obtained exparte relief, and to hear them all on affidavit evidence. Whether this was at the suggestion or with the consent of the parties does not appear. Later on it seems he made an order pursuant to O.29 r.5 of the High Court Rules, although it was apparently submitted that he could not do so. He also decided that there was only one issue to be decided, namely whether the receivers and managers had been legally appointed or not, although it was submitted that that was not the only issue to be decided at that stage. Anyway, that is the only thing he did decide, although he made certain orders that were later vacated by consent. On that issue he came to the conclusion that the receivers had been validly appointed, and gave judgment for the respondent on 23rd April 1991. The appellant appealed, the appeal being filed on 22nd May 1991. Among other grounds the appellant complained that the Judge should not have made an order that the matter be heard on affidavit evidence, particularly in light of the fact that no defence had been filed. We are not surprised.

On 31st May 1991, some eight days after the decision, a decree was promulgated, decree No. 21, "Australia and New Zealand Banking Group Decree 1991". It was the promulgation of this Decree and its effect that the respondent wished to raise in its Respondents' Notice, to which we have already made reference.

Because we believe that the operation of this Decree concludes the matter of the appointment of the receivers that we propose to deal with it first. We should add that it has never been suggested that the decree was not valid and operative.

The Decree is headed:

> *"A DECREE TO PROVIDE FOR THE TRANSFER TO AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED OF THE FIJI UNDERTAKING OF BANK OF NEW ZEALAND AND FOR OTHER PURPOSES INCIDENTAL THERETO AND CONSEQUENTIAL THEREON"*

Clause 2 provided that is should be deemed to have come into force on the appointed time. Clause 3(1) defined the appointed time as 30th March 1990. Hence its operation preceded the events relating to the transfer of the appellant's business from BNZ to ANZ; the clause went on to provide:

> *"3(2) Subject to the provisions of this section, where:*
>
> *(a) ...*
>
> *(b) any document whensoever made or executed;*
>
> *contains any reference express or implied to the BNZ such reference shall, on and after the appointed time and except where the context otherwise requires, be read, construed and have effect as if it were a reference to the ANZ*
>
> ...
>
> *(6) Without limiting or prejudicing the generality of any other provisions of this Decree any act or omission by the BNZ since the appointed time in relation to:*

(a) any customer of the business;
(b) the property;
(c) the undertaking, or
(d) any security;

shall on and after the appointed time be deemed to be an act or omission of the ANZ as the case may be provided always that this provision shall not affect or otherwise modify the position inter se of the ANZ and the BNZ."

The other provisions of the clause we do not believe to be relevant. The Decree went on:

"Vesting of BNZ undertaking in ANZ

4. On the appointed time the undertaking of the BNZ in Fiji shall be deemed by virtue of this Decree to have been divested from the BNZ and vested in the ANZ absolutely.

Transfer of Contracts etc.

5.-(1) All property, security, contracts, agreements, conveyances, deeds, leases, licences and other instruments or undertakings entered into by or made with or addressed to the BNZ (whether alone or with any other person) in force at any time prior to the appointed time shall on and after that time to the extent that they were at any time before that time binding upon enforceable by or against the BNZ be deemed to be binding and of full force and effect in every respect infavour of or against the ANZ as fully and effectually as if, instead of the BNZ, the ANZ had been a party thereto or bound thereby or entitled to the benefit thereof.

...

Transfer of Business

6. Without prejudice to the generality of the foregoing provisions of this Decree, the following provisions shall have effect with relation to the business of BNZ:

(a) the relationship between the BNZ and a customer at any office or branch of the BNZ shall on and after

> *the appointed time be between the ANZ and such customer and shall give rise to the same rights and the same duties (including rights of set-off) as would have existed prior to that time as if such relationship had been between the ANZ and the customer, and so that any instruction, order, direction, mandate or authority given by such customer to the BNZ and subsisting or given after the appointed time shall, unless and until revoked or cancelled, be deemed to have been given to the ANZ;*
>
> *(b) any security held by the BNZ as security for the payment of debts or liabilities (whether present or future, actual or contingent) of any person shall be transferred or deemed to be transferred to the ANZ on the appointed time and shall be held by and be available to the ANZ as security for the payment of such debts and liabilities to the ANZ: and where the said security extends to future advances or to future liabilities of such person, the security shall as on and after that time be held by and be available to the ANZ as security for future advances to the said person by and future liabilities of the said person to the ANZ to the same extent to which future advances by or liabilities to the BNZ were secured thereby at any time prior to that time."*

We do not believe any other provisions are relevant here.

In spite of valiant efforts by counsel for the appellant to persuade us otherwise, we have reached the conclusion that the decree reaches out to and governs the activities that went on in this instance. In a way that simply validated what BNZ did here in relation to the receivers, it leaves no loopholes for the appellant. That is precisely what the Decree set out to do, to rectify any problems at all that might have been left behind as the residue of the transfer of business from BNZ to ANZ. If there was a problem of that sort in the present instance, we cannot see how it fails to be cured by the decree. It follows that if the receivers were not validly appointed by BNZ they must now be taken as having been so.

We do not wish it to be thought that we have reached a conclusion that the receivers were not validly appointed, at least for the purpose of the interlocutory proceedings, which, as we have said, is the only appeal that we propose to deal with.

One of the debentures is in evidence. There is nothing unusual about it. It was by deed, imposed a fixed and floating charge on the assets and property of the company (in this case the first plaintiff), provided for further advances, for demand and for the appointment of receivers; it was dated 1st June 1987. It was duly registered with the Registrar of Companies.

On 21st February 1990 BNZ entered into an agreement with ANZ to sell its business to ANZ. The relevant portions of the agreement provide as follows:

> *"11.1 From completion of the Fiji Completion Date, ANZ shall take over and assume all BNZ's rights in and to the Fiji Business as at the Fiji Completion Date. In that regard:-*
>
> *(a) no separate document or written assignment shall be required;*
>
> *(b) BNZ, at ANZ's expense, shall:-*
>
> *...*
>
> *(ii) comply with all reasonable requirements on the part of ANZ to further advise customers of the transfer to ANZ of the Fiji Business as at the Fiji Completion Date.*
>
> *(c) BNZ shall hold the assets of the Fiji Business as at the Fiji Completion Date, and any securities*

relating to them, on trust for ANZ and shall, if and when called upon by ANZ to do so:-

(i) execute a formal deed of assignment in favour of ANZ in respect of particular assets and any securities relating to them;

(ii) execute a formal discharge in respect of any such securities;

(iii) take such action, at the expense of ANZ, towards the enforcement of payment in respect of the assests of the Fiji Business, as ANZ may reasonably require; and

(iv) grant to ANZ a continuing power of attorney in the form set out in Schedule 2 (which shall not be revoked by BNZ where ANZ is using the same for the proper purposes of this Agreement) to sign on behalf of BNZ any of the documents referred to in sub-paragraphs (i) and (ii) above, and form the purposes of, inter alia, discharging contracts, transferring securities (including mortgages), reconveying property and issuing receipts, and in the event of any failure by BNZ to comply with its obligations in terms of Clause 11.3, to institute, to pursue and enforce claims and proceedings on behalf of BNZ in the terms of Clause 11.3 ...

...

The Fiji Completion Date mentioned in the said Agreement is the 7th of March, 1990."

A power of attorney in favour of ANZ was executed by BNZ on the same day, 21st February 1990 giving ANZ the necessary power to execute any documents "necessary to give effect to the sale and transfer of the banking interests of (BNZ) in Fiji pursuant to an Acquisition Agreement between (BNZ) and ANZ dated 21st February 1990" (record p. 204). Presumably completion took place on 7th March 1990.

Now, in our opinion, the position as a result of this is perfectly clear. As from completion BNZ was to hold its assets upon trust for ANZ. Unless requested by ANZ to do so, there was no requirement upon it to execute any document assigning any of its assets to ANZ. No such request was made in relation to the debentures the subject of these proceedings, so far as the evidence goes. True, it was required pursuant to the terms of the agreement, if called upon to do so, to notify customers of the acquisition in the terms of clause 11.1 (b)(ii) as set out earlier herein. It did so by letters dated 27th and 28th February 1990. Each of those letters said much the same thing:

> *"This is to formally advise you of the decision of the Bank of New Zealand to sell its operations in this country to the ANZ Banking Group.*
>
> *I would like to assure you that all existing services currently available through the Bank of New Zealand will remain in place following the sale. All loans and credit arrangements will also remain intact. A further condition of the sale is that all staff of the Bank's operations retain their positions which will ensure the continuation of the service we offer to our clients. In essence, it will be business as usual.*
>
> *If you have any questions relating to the sale please do no hesitate to contact me."*

But that does not affect the legal position. The legal position, so far as concerns the debentures involved, was that BNZ was the owner of the legal chose in action, which it held in trust for ANZ. May be there was, by the agreement, an equitable assignment of the legal chose in action. But, as legal owner, BNZ was probably the only one who could give a valid notice or take any other steps to give effect to the debentures or

exercise the powers given to the mortgagee under it. We do not believe that the letter we have just referred to would amount to notice to the mortgagor of the equitable assignment. It would not matter anyway.

For these reasons we are of the opinion that BNZ was legally entitled to give the notice that it did to the appellant under the debentures and to exercise the powers therein. It was acting in its capacity as trustee or agent for ANZ when it did so, no doubt acting on instructions from ANZ. But the debenture was still alive, and the circumstances were such that the proper entity was entitled to exercise the powers given under it. BNZ was that entity.

No doubt the Australia and New Zealand Banking Group Decree was intended to make legally watertight the sale of the business of BNZ to ANZ and to tie off any loose ends. In this case we believe that there had already been a proper and valid exercise of the power to appoint receivers.

While for the reasons which we have given we believe that in this appeal on the interlocutory aspect of the proceedings the appeal could be dismissed, we also believe, as we said earlier, that what we have said may well furnish reasons for finally disposing of all the matters under appeal. In order to

enable the parties to consider what should now be done, we have already stood both summons and the proceedings No. 34 of 1991 over to a date to be fixed. We now fix 1st February 1993 as the date, but the matters will be listed for mention only on that date.

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr. Justice Arnold Amet
Judge of Appeal