IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 155 OF 2014

BETWEEN : **GIANT ZIPLINE (FIJI) LIMITED** having its registered office at Level 3, Aliz Centre, Martintar, Nadi.

PLAINTIFF

AND : **BEACHCOMBER ISLAND RESORT LIMITED** a limited liability company having its registered office at 52 Narara Parade, Lautoka.

DEFENDANT

Counsel : Ms Natasha Khan for Plaintiff
: Mr Shailendra Krishna

RU L I NG

INTRODUCTION

[1]. This is my ruling on the question: whether or not to continue the injunctive orders I had granted ex-parte on 16 September 2014 to restrain the defendant company, as mortgagee, from proceeding with its power of sale under a certain mortgage given to it by the plaintiff-mortgagor company. No affidavit was filed by the defendant-mortgagee company at the time of the hearing. I base this ruling on the material in the sole affidavit before me, that of one Kevin Purser, a director/shareholder of the plaintiff company, which was sworn on 15 September 2014.

[2]. The defendant company, Beachcomber Island Resort Limited (**"BIRL"**), is a minority shareholder in the plaintiff company, Giant Zipline Fiji Limited (**"GZFL"**). Between October 2012 to March 2014, BIRL *"gave"* monies to GZFL on various occasions. Also, in October 2012, GZFL allotted 500 shares in the company to BIRL. Initially, there was no formal agreement between the parties to record the nature of their relationship. Purser would depose though that what they had was a friendly and a flexible arrangement.

[3]. Then, some seven months into their friendly and flexible arrangement, a Deed dated 09 May 2013 was executed by GZFL. Up to the time of the execution of the said Deed, BIRL had given a total of $289,000 to GZFL. That Deed records *inter-alia* GZFL's covenant to pay the monies it has, up to then, received from BIRL:

> *"at such time or times and in such manner as may at any time and from time to time be agreed in writing between the Mortgagor and the Mortgagee and in the absence of any such agreement on demand".*

[4]. GZFL also executed a mortgage in favour of BIRL on 09 May 2013 to secure the said monies. According to Purser, GZFL executed the said Deed and Mortgage under economic duress exerted by BIRL.

[5]. In July 2013 some more shares were allotted (or transferred) to BIRL.

[6]. From May 2013 to March 2014, after the signing of this Deed and Mortgage, BIRL "gave" monies to GZFL from time to time on an *ad hoc* basis as and when required.

[7]. An interesting twist to the relationship of the parties is that, at some point during their relationship, BIRL somehow managed to acquire management rights over the business of GZFL. This meant that BIRL was directly involved in the management of the accounts of GZFL.

[8]. Purser would depose in his affidavit that BIRL only gave management rights to BIRL because of pressure from BIRL. In March 2014, GZFL terminated the Management Agreement due to some alleged issues of mismanagement and lack of accountability. This was followed immediately by a demand notice and a legal notice by BIRL to GZFL and by an advertisement in the Fiji Times issue of 06 September 2014 calling for offers for the purchase of the mortgaged property.

[9]. It was then that Natasha Khan & Associates filed an urgent application ex-parte seeking injunctive orders to restrain BIRL, the mortgagee, from proceeding with a mortgagee sale.

[10]. The mortgaged property is described as *i*-Taukei Agreement for Lease No. 4/77/7214 in the Tikina of Sabeto in the province of Ba having an area of 12.2972 hectares. At this time, the onus is still on GZFL to convince this court that the Orders should continue ((see Fiji Court of Appeal Ruling in **Westpac Banking Corporation v Prasad** [1999] FJCA 2; [1999] 45

FLR 1 (8 January 1999)[21]; **Whittaker v National Bank of Fiji Ltd** [2009] FJHC 275; HBC155.2009L (9 December 2009).).

[11]. The period within which monies were lent and shares allotted and Deeds and mortgages executed spanned between October 2012 to March 2014. During that time, GZFL was set up to be the vehicle of a zip - line project in Sabeto in Nadi, GZFL did embark on the said project, and GZFL did complete the project.

GENERAL STATEMENT OF THE LAW

[12]. The power of sale given to a mortgagee under the provisions of the Property Law Act (Cap 130) and under the instrument of mortgage are wide. Where a mortgagor has defaulted in the payment of mortgage money or in the performance or observance of any covenant (express or implied) in the mortgage, or, where the mortgage instrument provides that money is payable on demand and the mortgagor has not paid money upon demand, the mortgagee may, pursuant to section 79(1) of the Act, proceed to sell the mortgaged property[1].

[13]. Fiji Courts have long embraced the position in **Inglis v Commonwealth Trading Bank of Australia** (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64)[2] that the only way that a mortgagee can be restrained from

---

[1] The relevant sections under the Property Law Act are:

Mortgagor in default

77. If default is made in payment of the mortgage money or any part thereof, or in the performance or observance of any covenant expressed in any mortgage or in this Act declared to be implied in any mortgage, and such default is continued for one month or for such other period of time as is in such mortgage for that purpose expressly fixed, the mortgagee may serve on the mortgagor notice in writing to pay the mortgage money or to perform and observe the covenants therein expressed or implied, as the case may be.

Notice not required when money payable on demand

78. Where money secured by a mortgage is made payable on demand, a demand in writing pursuant to the provisions of the mortgage shall be deemed to be the notice in writing to pay the money owing provided for by section **77**, and no other notice shall be required to create the default in payment mentioned in section **79**.

Mortgagee may sell

79. -(1) If default in payment of the mortgage money or in the performance or observance of any covenant continues for one month after the service of the notice referred to in section **77**, the mortgagee may sell or concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots, by public auction or by private contract, or partly by the one and partly by the other of those methods of sale, and subject to such condition as to title or evidence of title, time or method of payment of the purchase money or otherwise as the mortgagee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale.

(2) No purchaser shall be bound to see or inquire whether default has been made or has happened, or has continued, or whether notice has been served, or otherwise into the propriety or regularity of any such sale.

(3) Where a transfer is made in purported exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by any unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

[2] Walsh J stated the rule as follows at 164–165:

exercising its power of sale is if the amount of the mortgage debt, if not in dispute, is paid into court, or, if disputed, the amount claimed by the mortgagee, is paid into court.

[14]. Neaves J in **Inglis** says that the rule is not an inflexible one. In other words, the court retains a discretion, in appropriate situations, to depart from the rule.

[15]. According to Neaves J, if *"the amount claimed by the mortgagee is "obviously wrong"*, or, if *"there is a serious question whether the mortgagee's power has become exercisable at all"*, or, where the *"mortgagor seeks to impugn the validity of the mortgage transaction itself"*[3], then the Court may exercise its discretion against following **Inglis**.

[16]. But long before **Inglis**, Australian Courts have applied the general rule for which the case is oft cited, as well as exercised a discretion, in particular situations, to depart from the rule (see **Harvey v McWatters** (1948) 49 SR (N.S.W.) 173 at 174 for example)[4].

[17]. In **Whittaker v National Bank of Fiji Ltd [2009] FJHC 275; HBC155.2009L (9 December 2009)**, Mr. Justice Inoke cites the Federal Court of Australian case of **Re Langworth Pty Ltd and Lindsay James Thompson v Metway Bank Limited [1992] FCA 449** (11 September 1992) where Cooper J cited cases supporting the view that,

> "if the mortgagor's damages claim is so closely connected with either the circumstances in which the mortgage was granted or with the demand for payment

---

A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this not be in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court.

...

In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.

[3] Neaves J said:

The rule is, however, not an inflexible one and the court has a discretion to depart from the full stringency of the rule and to mould its order so as to require payment into court of so much only as will suffice to give adequate protection to the mortgagee ... The ordinary rule will more readily be departed from where the amount claimed by the mortgagee is obviously wrong ..., where there is a serious question whether the mortgagee's power has become exercisable at all ... or where the mortgagor seeks to impugn the validity of the mortgage transaction itself."

[4] In **Harvey v McWatters** (1948) 49 SR (N.S.W.) 173 at 174, Sugerman J of the New South Wales Supreme Court distinguished between the ordinary case where the mortgagor should be required to pay the disputed sum into court from cases where the mortgagor should not be so required. He suggested that cases where the mortgagor should not be required to pay the mortgage sum into court should be cases where *"the existence of the power of sale or the question whether it is exercisable at all is in question"*.

made by the mortgagee so as to amount to an equitable set-off against the mortgagee's demand for payment, then the mortgagor might be entitled to the injunction sought without having to bring the amount claimed by the mortgagee into court or to otherwise secure it to the mortgagee".

[18]. In **Cunningham v National Australia Bank (1987) 77 ALR 632 at 638**, Jenkinson J said:

> *"If the claim for damages were so connected with the mortgages or any of them as to impeach the mortgagee's title, in the sense in which that concept is expounded in relation to equitable set-off, then it may be that the relief sought could be granted free of the condition that the amount secured be paid into court."*

[19]. In **Graham v Commonwealth Bank of Australia (1988) ATPR 40-908**, the mortgagor was claiming damages in respect of misleading conduct by the mortgagee. The claim was that the alleged misleading conduct did induce the mortgagor to enter into the loan transaction. French J granted an interlocutory injunction restraining the mortgagee from exercising its power of sale and adopted a broad view of the discretionary jurisdiction and granted the injunction on the condition that the mortgagor paid into court the sum of $34,000.00 in respect of arrears of interest out of a total of nearly $400,000.00 claimed as owing by the mortgagee under the security.

[20]. Cooper J in **Re Langworth Pty Ltd** (supra) analyzed the above two cases and commented as follows:

> *19. If the approach reflected in* Cunningham *and* Graham *is correct,* ***an equitable set-off in respect of an amount less than that claimed by the mortgagee as owing gives rise to a different kind of dispute from a mere dispute between mortgagor and mortgagee as to what is the amount due under the mortgage****: the latter is, according to* **Harvey v McWatters (1948) 49 SR (N.S.W.) 173 at 174**, *"the ordinary case" in which the rule referred to in* Inglis *applies. Where an equitable set-off is raised, the mortgagor does not merely dispute the proper amount due under the mortgage, rather does he set up the existence of an "equitable ground for being protected against the (mortgagee's) demand":* **Rawson v Samuel (1841) Cr and Ph 161 at 179.**

[21]. Later, Cooper J would suggest a more stricter approach from what Neaves J would have us adopt. According to Cooper J, the rule in **Inglis** should be relaxed where the mortgagor has made out **"a strong enough case to show that there was a serious question to be tried as to whether it had a good equitable set-off that exceeded in amount the respondent's claim for payment"**:

20. I think Neaves J's view that the existence of jurisdiction to restrain a mortgagee from exercising his default powers without requiring the mortgagor to bring into court the amount claimed by the mortgagee as due under the mortgage is limited to cases in which the mortgagor sets up a claim which attacks the validity of the mortgage itself is open to doubt.

21. I therefore think that if the applicant here made out a strong enough case to show that there was a serious question to be tried as to whether it had a good equitable set-off that exceeded in amount the respondent's claim for payment, it may well have been open to the court to have granted the applicant an interlocutory injunction, without requiring it to bring the moneys claimed by the mortgagee into court.

[22]. But where there is a serious question to be tried and where the equitable set off amount does not exceed the mortgagee's claim, Cooper J opines that the court could insist on a lesser amount to be paid into court by the mortgagor in terms of the approach in **Glandore Pty. Ltd. v Elders Finance and Investment Co. Ltd. [1984] FCA 407; (1984) 57 ALR 186, at 191-2:**

If, on the other hand, the applicant made out a good case of an equitable set-off but for an amount less than the respondent's claim for payment, it may have been appropriate, to adopt the words of Morling J in **Glandore Pty. Ltd. v Elders Finance and Investment Co. Ltd. [1984] FCA 407; (1984) 57 ALR 186, at 191-2**, *"to mould an order so as to ensure adequate protection to the mortgagee and to otherwise do justice between the parties during the period pending the final hearing" by granting an interlocutory injunction, but on terms that the applicant brought into court the difference between the respondent-mortgagee's claim for payment and the amount of the first applicant's set-off.*

[23]. **Glandore Pty Ltd v Elders Finance & Investment Co Ltd** was a case where Morling J applied **Harvey v McWatters** at 135–136 as follows:

I do not think that the present case is a case of the kind to which the general principle in *Inglis' case* applies. It falls more easily into the second class of case discussed by Sugerman J in *Harvey v McWatters*. This being so I am not constrained by authority to require the applicants to pay into court the whole amount of the mortgage debt as a condition of obtaining interlocutory relief. Rather I think the proper approach is to mould an order so as to ensure adequate protection to the mortgagee and to otherwise do justice between the parties during the period pending the final hearing. Having regard to the fact that the value of the security held by Elders (at Elders' own valuation) is more than double the amount of the mortgage debt it is difficult to see how any prejudice will be suffered by Elders by the granting of interlocutory relief, provided the final hearing is not unduly delayed. During the course of argument it was agreed that the parties could be ready for a final hearing with three months. There is no suggestion that the secured property is falling in value and in those circumstances I do not think the applicants should be required to pay any part of the principal debt into court pending the final hearing. However it is not right that Glandore should have the use of the respondent's money without paying interest on it. There is already an amount of $307,000 unpaid interest and expenses owing to Elders and this must be paid as a term of the grant of interlocutory relief. Moreover, the unpaid interest must be paid to Elders, and not

into court. This will ensure that Elders has the use of the money pending the hearing, and will reduce the amount of its mortgage debt to about $1.5 million, for which it will have security in excess of $4 million. Because Elders does not appear to have any immediate plans for the sale of "Oonavale" and as the applicants will want some time to raise the $307,000 to pay Elders I propose to give them until 14 January 1985 to pay the unpaid interest and expenses (my emphasis).

[24]. The Fiji Court of Appeal in **Maganex Ltd v Akhil Holdings** Civil Appeal No. 13 of 1976 apparently has doubted the applicability of the rule in **Inglis** to equitable mortgages. This was noted by Mr. Justice Fatiaki in **Official Receiver v Tompkins** [1994] FJHC 187; Hbc0052d.94s (15 December 1994).

> ***As to (3)*** the defendants rely on the well-known rule enunciated by **Walsh J.** in **Inglis v. Commonwealth Trading Bank of Australia** (1972) 126 C.L.R. 161. The *'general rule'* however is not an inflexible one and has been relaxed where the creation, enforceability or validity of the exercise of the mortgagee's powers are directly challenged by the mortgagor.
> Furthermore in **Maganex Ltd. v. Akhil Holdings** *Civil Appeal No. 13 of 1976* (unreported) the **Fiji Court of Appeal** doubted the applicability of the *'general rule'* to equitable mortgages or interests. In this latter regard it is common ground that the 4th defendant Westpac holds an equitable mortgage over the assets of Union.

[25]. In **Vere v NBF Asset Management Bank** [2004] FJCA 50; ABU0069.2003S (11 November 2004), the Fiji Court of Appeal said *obiter* that fraud might be an exception to the general rule in **Inglis**.

> Demand was served upon the appellants in accordance with s.78 of the Act and there was no compliance with that demand, either by tender of the mortgage monies, or by payment into Court, an event, which (absent fraud) would have been a pre-condition to the appellants obtaining injunctive relief: ***Inglis v. Commonwealth Trading Bank of Australia*** (1972) 126 CLR 161 and ***Westpac Banking Corporation v. Adi Mahesh Prasad*** (1999) 45 FLR 1; Halsbury's Laws of England 4th ed. Vol. 32 para. 725. See also ***Daulat v. J. Santa Ram (Stores) Limited*** HBC 455 of 1997; ***Joe Colati v. Fiji Development Bank*** HBC 10 of 1998, ***Laisenia v. National Bank of Fiji*** HBC 17 of 1994; ***National Bank of Fiji v. Kuddeir Hussein*** HBC 331 of 1994; and ***Payne v. Cardiff*** RDC (1932) 1 KB 241.

[26]. In **Wernard Electrics Pty Ltd v Hatmax Mortgage Management Ltd** (unreported, NSWSC, Young J, 3186 of 1994, 27b July 1994) Young J said:

> It seems to me that the power of sale is not to be exercised in circumstances where there would be fraud on the power. It might be a fraud on the power to exercise it in circumstances where the mortgagee itself has been guilty of conduct which strongly contributed to the mortgagor's default, which default is the basis for the power of sale.

[27]. To succeed in restraining BIRL from exercising its power of sale, GZFL as mortgagor must establish (i) that there are serious issues to be tried (ii) that damages would not be adequate and (iii) that the balance of convenience lies in favour of granting an interim injunction.

[28]. In the circumstances presented in Purser's affidavit, the following are serious issues to be tried:

(i). whether the amount claimed by BIRL is "obviously wrong".

(ii). whether BIRL's power of sale has become exercisable at all".

(iii). whether the validity of the mortgage transaction itself can be impugned in whole or in part in the particular circumstances of this case.

Furthermore, the set of facts before me potentially, do raise the question whether or not there has been a fraud on the power.

SERIOUS ISSUES TO BE TRIED

Whether Amount Claimed by BIRL is obviously wrong?

[29]. There are several things in the facts before me that would tend to go towards supporting the argument that the amount claimed by BIRL is obviously wrong.

[30]. Firstly, as Purser deposes, BIRL's management of GZFL left much to be desired. The reasons why GZFL terminated that management agreement on 31 March 2014 were[5]:

(i) no proper reports were provided to Giant Zipline (Fiji) Limited in terms of invoicing, receivable and transfer records related to Rosie Tours, ATS, Beachcomber and Anchorage.

[5] The management rights that GZFL gave to BIRL were cancelled by the former on 31 March 2014 i.e. some four months after it began. That cancellation appears to have been caused by dissatisfaction on the part of Purser about BIRL's lack of accounting and lack of regulatory compliance. Purser explains the reasons as follows in his affidavit:

ON 31st March, 2014, GZFL cancelled BIRL's Management Contract for the following reasons:-

i) No proper reports were provided to Giant Zipline (Fiji) Limited in terms of invoicing, receivable and transfer records related to Rosie Tours, ATS, Beachcomber and Anchorage;

ii) Insufficient records on loan accounts being paid by Giant Zipline through direct payment made by Rosie Tours, ATS, Beachcomber and Anchorage;

iii) Non Compliance on FNPF registration and payment of members contribution;

iv) No sales representative report or daily activities; and

v) No proper documentation supplied to Giant Zipline (Fiji) Limited in relation to contracts, contacts and any other progress in marketing.

(ii) insufficient records on loan accounts being paid by GZFL through direct payment made by Rosie Tours, ATS, Beachcomber and Anchorage.

(iii) non-compliance on FNPF registration and payment of members contribution.

(iv) no sales representative report or daily activities; and

(v) no proper documentation supplied to Giant Zipline (Fiji) Limited in relation to contracts, contacts and any other progress in marketing.

[31]. I am not inclined to go into detail on these allegations. Suffice it to say at this point that the legal notice sent by Krishna & Company for and on behalf of BIRL to GZFL, which I reproduce below, would cite the same accounting and compliance issues:

> **ON** 26th May, 2014, Messrs Krishna & Company on behalf of BIRL issued GZFL default notice as minority shareholder, major creditor as well as mortgagee. The purported breaches outlined were as follows:
>
> 1). Failure to obtain a valid insurance including Workman's Compensation, Fir/Material Damage, flood, Cyclone and Public Liability;
> 2). Failure to obtain a valid business license, the necessary completion certificate from Town and country Planning, National Fire Authority- Fire Safety Compliance Certificate, Ministry of Labour, Industrial Relations and Employment- certificate of Prior Approval for New Work Places, National Occupational Health and Safety Registration;
> 3). Failure to obtain a valid work permit with Giant Zipline as your employer;
> 4). Failure to pay or maintain current Fiji National Provident Fund payments;
> 5). Failure to pay or maintain its Vat payment;
> 6). Failure to make call or make proper entries in the corporate Minutes Book; and
> 7). Failure to provide yearly accounts, that is , balance sheet, profit and loss and trading accounts for year ending 31st December, 2012 and 31st December, 2013.

[32]. Notably, as Ms Khan argues, the above accounting and compliance issues raised by Messrs Krishna & Company[6] were incurred between November

---

[6] Mr. Krishna did submit that the reason why BIRL was taking steps to exercise its power of sale was because of the above non-compliance issues on the part of GZFL. Following GZFL's termination of the management agreement, BIRL instructed its solicitors on 24 April 2014 to send a demand for payment to GZFL's accountants, Aliz Pacific and later a demand letter. Purser would describe the related events as follows:

ON 24th April, 2014, BIRL emailed a demand letter asking for immediate payment of $100,000.00 failing which they could exercise their right to the mortgage. The said notice was sent as an attachment to an email to GZFL's accountants, Aliz Pacific.

Aliz Pacific cannot find the said notice nor is the attachment any longer available in their computer network, however a reference to the same in another email is annexed hereto and marked **"KP 10".**

THEREAFTER on 6th May, 2014, BIRL again e-mailed our accountant stating that they would accept $450,000.00 for its shareholding, the same is part of **"KP 10".**

ON 9th May, 2014, GZFL wrote to a demand notice to BIRL asking for payment of $117,371.60 (this was the amount we could ascertain) that was taken by BIRL from agents, Rosie Tours and ATS Pacific during BIRL's management of our business, which payments ought to

2013 and March 2014. This was the period when GZFL was under the management of BIRL. Importantly, this meant that there is no proper accounting possible at this time simply because the management that should be accountable for these things (BIRL) is pointing the finger at the other direction.

[33]. Apart from the above, I also heard submissions that BIRL, whilst managing GZFL, did divert revenue from the business to other areas rather than applying them towards the loan debt. At this point, all I can say is that these submissions do raise serious issues to be tried.

[34]. In addition to the above, in the peculiar circumstances of this case, I still wonder whether all or any part of the monies given by the mortgagee to the mortgagor may be treated as a capital contribution rather than as a loan. I say that because the monies (or a portion of it), arguably, may be treated as consideration for the shares allotted. If that were to be the case, the monies would be treated as capital contribution, and, in which case, that money (or portion of it) cannot be regarded as a loan by BIRL. And therefore a mortgage given to a shareholder related to it may be impugned as offending the principle in **Re Exchange Banking Co (1882) 21 Ch D 519**[7]. In that regard, the Deed and the mortgage in this case, potentially, may just operate against that principle in **Re Exchange Banking Co** (see footnote 2).

[35]. On the other hand, if the monies (or portion of it) was genuinely an advance by the minority shareholder/mortgagee to the company, that money or whatever relevant portion of it must remain as debt owing to the minority shareholder, secured under the mortgage.

---

have been put into our bank account but was for same reason made to BIRL's bank account. A copy of the said letter is annexed hereto and marked **"KP 11"**.

[7] A company is required by law to maintain its capital. Because of that, it cannot return capital to its members. The policy reason behind such a rule is to protect creditors. Creditors are said to give credit to a company on the faith that its capital will be applied only for the purposes of the business. This means that creditors even have a right to insist that such capital be kept and not returned to the shareholders. As Lord Jessel MR said in **Re Exchange Banking Co (1882) 21 Ch D 519**.

> It follows then that if directors who are quasi trustees for the company improperly pay away the assets to shareholders, they are liable to replace them. It is no answer to say that the shareholders could not compel them to do so. I am of the opinion that the company could in its corporate capacity compel them to do so, even if there were no winding up... directors in each case are to be declared jointly and severally liable and not only jointly liable....
>
> The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. [He...] gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than by a winding-up order. It follows then that if directors who are quasi trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them...

Whether Mortgagee's Power Has Become Exercisable At All?

[36]. I acknowledge that BIRL had a proper interest in being repaid the monies it had lent, except its capital contribution where applicable.

[37]. I note that sometimes, a formal shareholder's agreement, rather than a Deed or a Mortgage is entered into in a situation where a company borrows money from a shareholder. That is all I will say here at this time.

[38]. Purser deposes in his affidavit that, initially, the parties had a friendly and a flexible arrangement with BIRL. The arrangement was that GZFL would be allowed up to 5-years to re-pay the debt. It was hoped that the time frame would give breathing space to GZFL to make a profit and put it in a better position to pay. The repayment amount was to be agreed too thereafter between the parties. BIRL would recant from this arrangement and demand repayment even before GZFL went into operation.

[39]. The allotment of 500 shares by GZFL to BIRL in October 2012, to quote Purser, was done **"in lieu of the said arrangement"**[8]. Purser deposes that the friendly arrangement would see BIRL advancing some $280,000 in successive payments to GZFL between October 2012 to May 2013[9].

[40]. It is not clear to me at this time what Purser means when he says "in lieu of" but this is fodder for speculation that the $280,000 initially paid by BIRL, or part of it at least, is arguably, capital contribution on the part of BIRL on account of which he was allotted the 500 shares.

[41]. In all the circumstances of this case, where the demand and the legal notice were made barely a month after the mortgagor company went into operation and shortly after it had completed its project, and considering the issues about the accounts and the compliance issues, there is a serious issue whether the power of sale has become exercisable at all, or was being exercised in good faith.

---

[8] At paragraph 4 of his affidavit, Purser deposes:

4. IN lieu of the said arrangement, GZFL was to allocate 500 shares to BIRL in good faith and as a gesture of its appreciation to BIRL, this was duly complied with. A copy of share certificate and Company Resolution dated 16th October, 2012 is annexed hereto and marked "KP 1". No monies have ever been paid for these shares.

[9] At paragraph 5 of his affidavit, Purser deposes:
FROM *sometimes in October, 2012 till May, 2013, Beachcomber Island Resort Limited (BIRL) advanced GZFL approximately $280, 000.00 as per the friendly agreement.*

[42]. Purser even alleges that a Mr. Brendan Hannon, a director-shareholder of BIRL, had bragged at some point in time that he will one day own the land/company in question (mortgaged property)[10]. Whether that is to be believed or not, and if believed, whether it is of any consequence to any issue in this case, are issues for trial. Indeed, whether that, if established, gives context to the whole conduct of the mortgagee/shareholder/manager in this case as amounting to a deliberate systematic attempt to clog GZFL's equity of redemption, as Ms Khan would argue, is a matter I reserve for trial. I will say here that it would appear to be still good law the principle laid down by the House of Lords in **G and C Kreglinger v New Patagonia Meat and Cold Storage Company Ltd** [1914] AC 25 which precludes a mortgagee who was a lender of money from stipulating for any collateral advantage as part of a mortgage transaction.

Whether Validity of Mortgage Transaction Can Be Impugned In Whole or In Part?

[43]. The mortgagor alleges all along that the mortgagee had exerted economic duress on it to enter into the mortgage arrangement. From where I sit, this is another serious issue to be tried. **James O'Donovan**, in his book **Lender Liability** Sweet & Maxwell, Jan 1, 2005 observes and cites cases in authority for the proposition that a loan contract or collateral security can be vitiated on grounds of economic duress by the lender:

> *A loan contract or collateral security can also be vitiated on grounds of economic duress where the borrower, guarantor or mortgagor is induced to enter into the contract by illegitimate pressure in the form of unlawful threats or unconscionable conduct. Economic duress involves more than driving a hard bargain. It involves an attempt to exercise powers in a way that is not authorised by the existing contractual arrangements or the general law so that the borrower, guarantor or mortgagor is left with no alternative but to submit to the illegitimate pressure of the lender. It is easier to establish economic duress if the lender is not acting bona fide in the honest belief that its conduct is lawful. However, economic duress is not confined to cases where the lender is guilty of breach of contract or some other legal wrong. As it can be founded on unconscionable conduct, it can arise where a lender is threatening to enforce its strict legal rights simply to extract far reaching concessions or impose long term obligations which were not contemplated by the original agreement between the parties.*

[10] This is deposed to in the affidavit of Kevin Purser as follows:
SOMETIME about the time that the management agreement was signed, Brendan Hannon, in a state of intoxication, had said to me that he will own GZFL one day. Because he was intoxicated I did not pay much heed to the same however, I am now of the opinion that the same has been his intention all along and that is why BIRL has acted in the manner that it has been .

An example of economic duress is where the lender threatens to withdraw a loan facility which is not in default simply to compel a guarantor of the facility to provide further security.....
.....Even a forced variation of the mortgage to allow the mortgagee to acquire an interest in the secured property after redemption constitutes duress because it is a clog on the equity of redemption.

[44]. The general test for economic duress is the same in a lender-mortgagee/borrower-mortgagor situation as it is in any other commercial situation (see **Gilmour v Kubs** [2007] FJHC 116; HBC 655J.1998S (30 January 2007) where Mr. Justice Jitoko discusses the general principles[11]).

---

[11] Jitoko J said:

Economic duress which the law now recognises as a category of duress , deals with commercial pressure that is brought to bear on one of the parties, to such an extent that he was effectively deprived of his freedom to exercise his own will. On this the Law Lords in ***Pao On*** case added, at p.635:

> *"...Their Lordships agree with the observation of Kerr J in Occidental Worldwide Investment Corporation v. Skibs A/S Avanti [1976] 1 Lloyds Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent." This conception is in line with what was said in this Board's decision in Barton v. Armstrong [1976] AC 104, 121 BY Lord Wilberforce and Lord Simon of Glaisdale - observations with which the majority judgment appears to be in agreement. In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in Maskell v. Horner [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not."*

The American jurisdiction had long recognised that a contract maybe avoided on the ground of economic duress . But, as the Privy Council noted in ***Pao On***, for commercial pressure to constitute economic duress, it must be to such as extent

> *"that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have confronted with coercive acts by the party exerting the pressure."*

The Court added, at p.636:

> *"American judges pay great attention to such evidential matters as the effectiveness of the alternative remedy available, the fact or absence of protest, the availability of independent advise, the benefit received, and the speed with which the victim had sought to avoid the contract."*

This trend, recognising that commercial pressure may constitute duress the pressure of which could render a contract voidable, was followed in *Occidental Worldwide Investment Corporation* (supra) in *North Ocean Shipping Company Ltd. v. Hyundai Construction Co. Ltd.* [1979] QB 705.

The danger of the possibility of equating every commercial pressure as amounting to **duress** was highlighted by the New Zealand Court of Appeal in **Pharmacy Cure Systems Ltd. v. The Attorney General [2004] NZLR**. It first referred to an article **"Economic Duress - an Essay in Perspective"** (1947) 45 Mich L Rev. 253 by Professor Dawson, who at p.289 warned that

> *"the history of generalisation in this field offers no great encouragement for those who seek to summarise the results in a single formula."*

The Court however added:

> *"Nevertheless, generally speaking, to be capable of giving rise to duress the particular threat will be illegitimate because what is threatened is in and of itself a legal wrong, or because the threat is wrongful or because it is contrary to public policy. As Treitel puts it, "Whether the threat actually gives rise to duress must then be considered by reference to its coercive effect in each case: no particular type of threat is regarded either as ipso facto having such an effect, or as being incapable, as a matter of law, of producing it."*
> *However as the reach of " duress " has broadened, so as to encompass economic duress and, in a sense, business compulsion, the danger of courts inappropriately conflating impropriety and generalised "unfairness" may become a concern. This lead the drafters of the American Restatement Second (Contract) to suggest that a distinction might be drawn between those things which are in themselves "so shocking" that the courts will not enquire into the unfairness of the resultant exchange, and, on the other hand, improper threats combined with resultant unfairness (see paras 186 and 318)."*

On the other hand the Court acknowledged that there remains still, at least as far as the Commonwealth jurisdictions is concerned, no distinct agreement on the question on how serious or grave should a threat have to be to justify the victim succumbing. Should there be objective test that the threat is of sufficient gravity as to overcome the will of ***"a person of ordinary firmness";*** or subjective test requiring only the threat to deprive the victim of the exercise of his free will. The NZ Court of Appeal in the Pharmacy Cure case concluded that:

[45]. According to Purser, GZFL only signed the Deed because BIRL had laid it down as a condition for further advances, which, at the time, GZFL was in need of and because BIRL was then starting to demand payment of monies already lent[12] which GZFL was not in a position to oblige.

[46]. According to Purser, Hannon had assured him that the said Deed was a mere formality which did not detract from the original friendly arrangement between them[13], however, this proved not to be the case as he would show later in his affidavit.

[47]. Following the above, BIRL would advance more monies to GZFL *"on an ad hoc basis, as and when required as per the terms of the original friendly agreement"*.

[48]. On 30 July 2013, GZFL transferred some more shares to BIRL. Purser would describe the circumstances under which the transfer of these shares were made as follows:

> 11. **IN** July, 2013, I urgently needed some monies and approached BIRL to advance the same. I was informed by Brendan Hannon of BIRL that they were not willing to advance any more monies unless I was to transfer additional shares in GZFL to BIRL.
> 12. **THE** project was near completion by this time and a lot of monies had been invested in the same and the financier, despite our agreement, was wanting to pull out of the arrangement, therefore and under duress on 30th July, 2013, I transferred my 1000 shares to BIRL. Annexed hereto and marked **"KP 4"** and **"KP 5"** are the Company Resolution and transfer of shares.

[49]. BIRL would make further advances to GZFL following the above share transfers[14]. And shortly after these transfers, BIRL would again insist that a Supplementary Deed be entered into and that the mortgage-debenture be up-stamped from $300,000 to $900,000.

[50]. Purser says he was unwilling to accede to that condition at first.

"The modern formulation appears to address this issue by a hybrid formulation: the threat must have left the particular victim "no reasonable alternative" ... Whether there was a reasonable alternative will depend on all the relevant circumstances, including the characteristics of the victim, the relations of the parties, and the availability of professional advise to the victim."

[12] At paras 6 and 7, Purser deposes:

***AFTER** the shares were transferred and same monies advanced by BIRL, I was approached by Brendan Hannon to formalize a loan agreement. I was also advised if the same was not done, BIRL would stop advancing monies.*

***AT** that stage, BIRL started demanding the entire monies advanced to GZFL.*

[13] Purser deposes:

8. ..... I was advised by Brendan Hannon that the same was a formality and would not change the original agreement, a copy of the Deed is annexed hereto and marked **"KP 2"**.

[14] See paragraphs 13 to 18 of Purser affidavit.

15. .... BIRL had security of $300,000.00 and had managed to coax 1500 shares from GZFL. In any event BIRL had only advanced a further sum of approximately $130,000.00 since the initial mortgage had been signed.

[51]. When he refused the above conditions, BIRL would withhold further advances. GZFL finally relented as it needed money to complete the project[15].

[52]. Purser says that the last cash advance by BIRL to GZFL was made in mid to late October 2013. The business was scheduled to commence in November 2013.

[53]. Where one party threatens breach of contract unless the contract is re-negotiated, this can amount to economic duress. This is a serious issue to be tried in the circumstances of this case.

BALANCE OF CONVENIENCE

[54]. In this case, I take into account that the mortgagee is also a minority shareholder of the mortgagor company. Surely, it also has an interest in protecting the interests of the mortgagor company if the injunction is continued.

[55]. I also take into account the fact that the demand and legal notice by GIRL were sent barely a month after its management of the mortgagor company was terminated - and the submission that the mortgagor company had been making regular payments of $10,000.

[56]. I think that, when one considers that the mortgagee in this case is actually a minority shareholder of the mortgagor company, whether damages to the company will be an adequate remedy can be downplayed a little.

BIRL'S APPLICATION & UNDERTAKING AS TO DAMAGES

[57]. GZFL has given the following undertaking as to damages as follows:

> **UNDERTAKING AS TO DAMAGES**
>
> **The** Plaintiff Company is a substantial company. I hereby give my personal undertaking on behalf of the Plaintiff Company to abide by any order this Honourable Court may make as to damages in the event this Honourable Court

---

[15] Purser deposes:

15. **UPON** my refusal, BIRL refused to advance more monies.
16. **HOWEVER,** I desperately needed the monies for completion of the project and BIRL knew the same. Therefore on 5th September, 2013, under extreme pressure, I signed the Supplementary Debt Deed and up-stamped mortgage. The Company Resolution to this effected is annexed hereto and marked **"KP 6".**
17. I am unable to annex the Supplementary Debt Deed as the same is being held by Messrs S.B Patel, in lieu of fees. GZFL has disputed the fees being charged. However, a search conducted at the Registrar of Deeds on the 11th day of September, 2014 shows that the mortgage has still not been up-stamped. A certified true copy of the search is annexed hereto and marked **"KP 7".** However a search at the Companies office indicates that an up-stamped mortgage was presented there, copy annexed and marked **"KP 8".**

should hereinafter be of the opinion that the Defendant shall have sustained any by reasons of this order sought by the Plaintiff Company. A copy of the Real Estate valuation of the GZFL together with projected cash flow is annexed hereto and marked **"KP 18"**.

[58]. I would, in the circumstances of this case exercise my discretion against putting the mortgagor to very close scrutiny on this requirement considering that I have relaxed the **Inglis** rule (see above) in the particular circumstances of this case.

CONCLUSION

[59]. I have taken into account the submissions of Mr. Krishna in that no statement of claim has yet been filed. I am of the view that I still have a discretion which I must exercise guardedly in the interest of justice of the case to extend the time to Ms Khan to file a proper statement of claim.

[60]. The injunction is to continue until further orders. Case adjourned to **Thursday 12 February 2015 at 10.30 a.m.** for further directions on the filing of a statement of claim and pleadings and also to take this matter to a speedy trial.

.....

Anare Tuilevuka
JUDGE
11 February 2015.