GUNAC (FIJI) LIMITED

A **v.**

WESTPAC BANKING CORPORATION

ARYAN BUILDING & MARINE SUPPLIES

v.

B **WESTPAC BANKING CORPORATION**
ADAM DICKSON
LILADHAR JERAJ

[HIGH COURT, 1989 (Fatiaki J) 13 January]

C Civil Jurisdiction

Companies-debenture-moneys payable "on demand"- whether time allowed for payment adequate - effect of appointment of receiver on powers of directors- receiver's power of sale- whether contractual or statutory- Land Transfer Act (Cap 130) Sections 77, 78, 79 & 80.

D The bank demanded repayment within 3 hours of sums owed to it by the two Plaintiff companies. The companies argued that the time allowed for repayment was unreasonably short, that it was shorter than the minimum period allowed by statute and that a receiver could only be appointed after a statutory power to sell had arisen. Allowing an application by the bank to strike out the companies' Statement of Claim the High Court rejected the Companies' submissions and
E HELD: (i) that the demand repayment period was reasonable and (ii) that given the terms of the debenture and deed between the parties the bank was entitled to appoint a receiver and to exercise its powers of sale.

Cases cited:

F *ANZ Banking Group Ltd v. Gibson* [1986] 1 NZLR 557
Attorney-General v. Halka 18 FLR 210
Cripps (Pharmaceuticals) Ltd v. Wickenden [1973] 2 All ER 606
Drummond-Jackson v. BMA [1970] 1 WLR 688
Gartside v. Sheffield, Young & Ellis [1983] NZLR 37
Lawson v. Hosemaster Machine Co. [1965] 3 All ER 1401
Moss Steamship Co. Ltd v. Whinney [1912] AC 263
G *Newhart Developments v. Co-Op Bank* [1978] 1 QB 814
Paramount Acceptance Co. Ltd v. Souster [1981] 2 NZLR 38

V. Parmanandam for the Plaintiffs
B.N. Sweetman for the Defendants

Interlocutory application in the High Court.
Fatiaki J:

The plaintiff companies (hereafter jointly referred to as the companies) maintained accounts with the defendant bank (hereafter referred to as the bank) from July, 1984. In respect of both accounts the bank provided overdraft facilities which were secured inter alia by debentures over the companies' assets and uncalled capital and additionally in respect of the 2nd plaintiff company by a registered first mortgage over its premises at Waimanu Road.

These above-mentioned securities were all executed on the 25th of August, 1984 and registered with the Registrar of Companies on the 12th of September, 1984.

The terms of the debentures are in a standard form used by the bank and includes the usual covenant that the mortgagor or company "will pay to the Bank on demand .... the moneys hereby secured ....". In this case being $40,000 and $50,000 respectively.

The original overdraft facilities provided by the bank in its letter of 4th July, 1984 in respect of each company was as follows:

(a) "Gunac (Fiji) Limited :-

Working account limit $20,000.
Fixed loan limit $20,000."

(b) "Aryan Building and Marine Supplies Limited:-

Working Account limit $10,000.
Fixed loan limit $40,000."

In a letter from the bank to the companies on the 8th November, 1985 the bank recorded the unacceptability of the then position of the accounts and the companies were requested to furnish 1985 Balance Sheets and Accounts. The companies were also requested to .... "kindly refrain from drawing further", at the risk of having cheques returned.

A further letter on the 2rid of October, 1987 to the directors of the 2nd plaintiff company recorded that the "debts are stagnant" and inter alia doubted the companies ability "to amortize the loan monies". The bank requested further accounts and a proposal as to how the 2nd plaintiff company intended to clear the bank's debt.

Finally on the 14th of December, 1987, by separate Notices of Demand under the hand of the Deputy Manager, the bank demanded payment of $60,448.33 from the 1st plaintiff company and $74,254.11 from the 2nd plaintiff company.

In each demand the company was given up to 1 p.m. on the same day to pay the above sums or "... the bank will take such action as it may be advised for recovery of the said moneys".

It is convenient at this stage to record that Narendra Kumar Aryan is a director and shareholder of the companies and was the relevant company official with whom the bank had always dealt in respect of the accounts maintained by the companies.

A

It was on him that both Notices of Demand were served at 10.25 a.m. on the 14th of December, 1987 and which in terms required the companies within 3 hours at most to find and pay a total of $134,702.49.

B Also on the 14th of December, 1987 by a formally executed deed, the bank acting pursuant to Clause 21 of the debentures appointed the 2nd-named defendants who are chartered accountants, as receivers of the companies (hereinafter jointly referred to as 'the receivers' and together with the bank as the defendants).

C On the 15th of December, 1987 the companies issued separate generally indorsed Writs of Summons inter alia seeking restraining orders against the bank and the receivers.

On the same day the companies by its solicitor also issued separate interlocutory summonses supported by an affidavit sworn by Narendra Kumar Aryan seeking the same restraining orders and several declarations.

D

I say at once that I entertain grave doubts about granting an interim declaration on an interlocutory application particularly where the declarations sought are likely to finally determine the issues in the case.

These were subsequently followed by a Statement of Claim dated the 24th of E December, 1987 which on the face of it purported to consolidate the two hitherto separate actions.

On the 20th of January, 1988 the receivers entered separate appearances by their solicitors to the still separate actions and on the 11th of February, 1988 the bank did likewise by the same firm of solicitors.

F On this latter date the companies sought by summons a consolidation of both actions which was subsequently granted unopposed on the 3rd of June, 1988.

On the 7th of June, 1988 the companies sought and obtained an interim order of the court preventing the defendants from disposing of any of the assets under the debentures.

G

On the 10th of June, 1988 a consolidated Statement of Claim was filed and on the 7th of July the defendants filed a Statement of Defence to the consolidated Statement of Claim.

Thereafter on the 28th of July, 1988 the companies filed a consolidated affidavit sworn by Narendra Kumar Aryan on the 20th of July, 1988 in support of its interlocutory summons earlier filed on the 7th of June.

On the 1st of September, 1988 the receivers issued a summons pursuant to Orders 2 and 18 of the High Court Rules seeking to set aside the companies writs together with an affidavit sworn by Adam Dickson the first-named receiver opposing the further extension of the interim injunction granted to the companies on the 7th of June, 1988.

A

On the 7th of September, 1988 the banks filed an affidavit sworn by its Deputy Manager Noel Ryan in opposition to the companies consolidated affidavit of the 20th of July, 1988.

B

As at the 19th of October, 19.88 when the consolidated action came before me for hearing the following matters remained undisposed of:

(1) The plaintiffs' application for a permanent injunction; and

(2) The defendants' application to set aside the writs.

C

In view of the existence of an interim order of the court preventing the defendants from disposing of any of the assets under the companies' debentures and mortgage and the issues common to both applications, in particular, whether or not there was a serious question to be tried, it was agreed that the defendants should be heard first.

D

As earlier mentioned the defendants' application to set aside the writs was based on Order 2 rule 2 and Order 18 rule 18 of the High Court Rules.

In developing his argument learned counsel for the defendants argued firstly, that the companies' writs were irregular in that receivers had been appointed for the companies and neither company had the power nor standing to bring civil proceedings without the consent of the receivers.

E

Reference was made to the case of Lawson v. Hosemaster Machine Co. [1965] 3 All E.R. 1401 per Cross, J. to the effect that once a receiver is appointed by a debenture holder, the powers of the directors of the company are seriously qualified or limited, even suspended. (see also: per Atkinson, L.J. in Moss Steamship Co. Ltd. v. Whinney [1912] A.C. 254 at p. 263).

F

However of more direct relevance are the detailed provisions of Clause 21 of the debentures which in terms provide inter alia:

> "PROVIDED always that every such Receiver shall be the agent; of the Mortgagor .... and shall have .... the following powers:
>
> (xii) to take proceedings in law or in equity or in bankruptcy in the name of the Mortgagor or otherwise for all or any of the purposes aforesaid;"

G

Needless to say, the receivers' power to take proceedings under the above sub-para of Clause 21 is not limitless and in my view does not exclude a director of

the companies from separately instituting proceedings in the name of the company.

A I am fortified in my view by the dictum of Shar, L.J. in Newhark Developments v. Co-op. Bank [1978] 1Q.B. 814 at p. 819 where he said of a similarly worded power in the debenture there under consideration:

> "In so far as it is requisite and necessary for him, (i.e. the receivers) in the course of his dealing with the assets of the company, bringing them in and realising them, and so on, to bring actions as well, he is empowered
> B to do so by the debenture trust deed in the name of the company. That makes it possible for him to institute such proceedings without exposing himself to the risk of a liability for costs if those proceedings should fail. But the provisions in the debenture trust deed giving him that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the
> C company of their power, as the governing body of the company, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject to the charge.
>
> There is in the debenture deed itself a provision to the effect that the
> D receiver may carry on the business of the company or concur in carrying on its business, which itself demonstrates that there is not a total extinction of the function of the directors. It is only within the scope of its assets which are covered by the debenture, and only in so far as it is necessary to apply those assets in the best possible way in the interests of the debenture holders, that the receiver has a real function." (my underlining).

E Furthermore at p. 821 where the learned justice said:

> "What, of course, the directors cannot do, and to this extent their powers are inhibited, is to dispose of the assets within the debenture charge without the assent or concurrence of the receiver, for it is his function to deal with the assets in the first place so as to provide the means of
> F paying off the debenture holders' claims. But where there is a right of action which the board (though not the receiver) would wish to pursue, it does not seem to me that the rights or function of the receiver are affected if the company is indemnified against any liability for costs (as here)."(my underlining).

G Newhart's case is factually distinguishable from the present which is more closely akin to that in the New Zealand case of Paramount Acceptance Co. Ltd. v. Souster [1981] 2 NZLR 38 in which the action was instituted by the company on the authority of 2 directors against the receiver and debenture holder.

In the Paramount case the New Zealand Court of Appeal accepted that the directors of a company under receivership, may institute proceedings for the company without the receiver's consent so long as the company was indemnified against

any liability for costs.

The New Zealand Court of Appeal also advanced an additional ground for permitting the action to continue (of particular relevance in this case) when it said at p. 43:

> "A further consideration in this case is that the action here concerns the validity of the contract made between the company and the debenture holder which has appointed the receiver. The receiver of the appellant should not be put in the uncomfortable and untenable position of determining whether those adversary proceedings should continue, and the company must have the right, independently of the receiver, to take such action as it things fit on all matters in dispute in respect of the alleged contract with the debenture holder."
> (my underlining).

Similarly in this case the plaintiff companies have sued both the debenture holder (Westpac Banking Corporation) and the receivers (Adam Dickson and Lalidhar Jeraj)

The allege in the consolidated Statement of Claim a breach of contract by the debenture holder (see paras. 19 and 20 and particulars (a) and (b) thereto); trespass by the defendants presumably in securing the company premises by changing and/or installing additional locks (see paras. 2q and 25); and a third allegation that the Notices of Demand and Deeds of Appointment of the Receivers were ineffective, null and void (see paras. 22 and 23 and prayer (b)).

I also note that there is no suggestion that the companies or directors seek to dispose of or deal with the assets covered by the debentures nor has any agreement or undertaking to indemnify the company as to costs been given by the director.

Nevertheless, I am satisfied that this present action is supported by authority and is not irregular in form nor in my view can it be said to be an abuse of the court's process as was argued by learned counsel for the defendants.

Needless to say the defendants (including the receivers) separately entered appearances in the action, unconditionally. There was filed on the 7th of July, 1988 a joint Statement of Defence to the companies consolidated Statement of Claim in which there was no demurer to the companies' locus in the action and the objection was first taken on the 1st of September, 1988 (some 8½ months after the issuance of the companies' writs).

I turn next to deal with defendants' argument under Order 18 rule 18 that the companies' consolidated Statement of Claim discloses no reasonable cause of action and are an abuse of the process of the court.

Such an application only permits and requires the court to examine the companies consolidated Statement of Claim without reference to extraneous affidavit evidence

other than the debentures, mortgage and correspondence which are expressly incorporated in the pleadings.

A The Fiji Court of Appeal in Attorney-General v. Halka 18 F.L.R. 210 held that the power to strike out a Statement of Claim given by Order 18 rule 19 (now rule 18) is one which is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law.

Further it is well settled that an application of this nature can only succeed
B where it can be clearly seen that the claim is obviously unsustainable even accepting the correctness of all facts pleaded in the Statement of Claim (per Pearson, L.J. in Drummond-Jackson v. B.M.A. [1970] 1WLR 688 at pp 695 and 696).

But this does not mean that the jurisdiction cannot be exercised whenever extensive
C argument is necessary to demonstrate that the question of law arising from the plaintiffs' case was so clearly untenable that it could not possibly succeed. (per Richardson, J. in Gartside v. Sheffield, Young & Ellis [1983] NZLR 37 at p. 45. (C.A)).

In this present case the companies raise 3 grounds or causes of action in their
D consolidated Statement of Claim as follows:

(A) Breach of Contract:

"Clause 19: The Defendant bank breached its contractual treaty with the Plaintiff in so far as it failed to afford the Plaintiffs a reasonable time to comply with its request dated
E the 2nd of October, 1987 and further failed to allow the Plaintiff a reasonable time to pay or find sources of alternative finance."

(B) Invalidity of the Bank's Notices of Demand and Deeds of Appointment of Receivers:

F "Clause 19: The Plaintiff companies say that the said notices were bad in law in so far as they failed to allow sufficient time for compliance in breach of Sections 77, 78 and 79 of the Property Law Act."; and

"Clause 23: The Plaintiffs deny that each of the said notices
G were effective in form and or substance to achieve an appointment of receiver in view of the purported crystalisation of the charged by the notices of demand served on the 10th of December 1987."

(C) Trespass by the receivers:

"Clause 24: On or about the 16th of December, 1987 the

> receivers secured the premises of the Plaintiff thereby precluding entry by the Plaintiffs it servants and offices to the premises. The said securing of the premises constituted a trespass by the receivers acting at the instigation of the Defendant Bank for which it was and is vicariously liable."

Dealing firstly with Breach of Contract. As pleaded, the companies say that the requirement to afford reasonable time to meet a Notice of Demand is an implied term of the debenture and mortgage and the 3 hours given was wholly inadequate and unreasonable and constituted a breach.

As earlier noted the debentures and mortgage are payable on demand. (see: Clause 1 of each document). The law in regard to such a clause is clear and has been recently restated by the New Zealand Court of Appeal in A.N.Z. Banking Group (NZ) Ltd. v. Gibson [1986] 1 NZLR 557 which held:

> "Payment 'on demand' required that the companies be given a reasonable time to comply. What is a reasonable time must depend on the circumstances of each case, bearing in mind the pre-emptory nature of an 'on demand' obligation."

In that case the companies were required to obtain $128,000 within 2 hours of demand.

In the New Zealand Court of Appeal, Richardson, J. in a scholarly analysis of the relevant authorities from several Commonwealth jurisdictions stated at p. 565:

> "In my view the only proper justification for allowing any time for payment after the actual demand is made is the practical commercial consideration that the borrower is not expected to have large cash sums immediately at hand. However, he is expected to pay from resources which are presently accessible to him but have to be converted into immediate cash or utilised within the same time to obtain financial cover. It is the time reasonably required to achieve that, always bearing in mind that it is a demand liability, which must be met. And further time to negotiate a loan with a third party is not comprehended within that reasonable time. The test is objective and produces the certainty which commercial parties require in order to be clear from the outset as to their rights and obligations."' (my underlining)

Learned counsel for the defendants also referred to the English case of Cripps (Pharmaceuticals) Ltd. v. Wickenden [1973] 2 All E.R. 606 in which demand was made at about 11 a.m. and the receiver was appointed about midday giving barely an hour within which the company was required to find the money.

It was held in that case:

"(iii) .... where money was repayable on demand, all a creditor had to do was to give the debtor time to get the money from some convenient place; he was not obliged to give the debtor time to negotiate a deal which might produce the money ...."

A

In the present case it is not disputed that the companies were given about 3 hours, after service of the Notices of Demand, within which to find the money and it was only thereafter that the receivers were appointed by the bank.

B

Holland, J. at first instance in the ANZ Banking Group case reported in [1981] 2 NZLR 513 in holding that the 2 hours there given was a reasonable time was compelled by the following factors (at p. 530) :

C

" .... that there was no indication at any stage ever given to the bank that the demand would or could be met; that this was a commercial transaction between two trading corporations; that the companies had the advantage of skilled and competent advice; that the demand for payment was not made precipitately without prior negotiations or threats but following several months of expressed statements of concern as to the position."

D

Similarly in the present case even accepting that the facts pleaded by the companies in the consolidated Statement of Claim are true and correct, I would have no hesitation in holding that the Notices of Demand were validly served and the receivers properly appointed.

E Clause 1 of the debentures and mortgage states:

"That the mortgagor will pay to the Bank on demand which demand may be made at any time the money hereby secured ..... unless there is an agreement in writing to the contrary between the mortgagor and the Bank...." (my underlining).

F No such agreement in writing to the contrary has been pleaded or provided by the companies.

Furthermore the facts pleaded cannot and do not give rise to a collateral contract for valuable consideration nor do they cumulatively amount to an unequivocal representation that the moneys secured by the debentures and mortgage were no

G longer to be treated as payable on demand or that the bank would take no action to enforce its securities arising from some form of unpleaded promissory estoppel.

At most the bank was willing to give the companies time to provide the accounts and proposals it had sought in its letter of the 2nd of October, 1987, in order to enable it to assess the position. It is noteworthy that in this letter the bank recorded ".... we need assurance that our loans are not at risk".

Dealing next with the companies second cause of action namely that the Notices of Demand were in breach of Sections 77, 78 and 79 of the Property Law Act. (hereinafter referred to as the Act). A

In this regard learned counsel for the companies argued that as the Notice of Demand on the 2nd-named plaintiff company specifically included and referred to a Registered Land Transfer Mortgage No. 224790 the bank was required by statute to give a month's notice in its demand and not the 3 hours it purported to give. B

Reference was made to Clause 35 of the debentures and Section 80 of the Act which specifically prohibits the variation or negativing of Sections 77, 78 and 79 of the Act in the case of a mortgage of land.

In my view there is no arguable or serious question of law raised on this ground which would constrain me to permit it to go to trial and extend the interim injunction. C

Even accepting that Sections 77, 78 and 79 of the Act cannot be varied or negatived by agreement in this instance, nevertheless, in my view the requirement that default must continue for a month only arises where the mortgagee seeks to sell the land and not otherwise such as where he intends to appoint a receiver (see: the first 4 lines of Section 79(1) of the Act). D

With regard to the validity of the Notices of Demand, Section 78 of the Act specifically provides:

> "Where money secured by a mortgage is made payable on demand (as in this instance by Clause 1 of the registered mortgage) 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." (my underlining). E

In my view the bank's Notice of Demand dated the 14th of December, 1987 was a valid demand in writing pursuant to the debentures and mortgage and marked the date from which the mandatory statutory period of one month began to run before the bank could lawfully exercise its right to sell the land under Section 79. F

Section 82 of the Act which only empowers a mortgagee to appoint a receiver ".... when(it) has become entitled to exercise the power of sale (conferred by Section 79)....." is irrelevant and has no bearing on the appointments under consideration. It does not preclude an appointment under the terms of a debenture nor is it included in Section 80 of the Act. G

Whilst I accept that at the time of appointing the receivers, the bank had not become statutorily entitled to sell the land, nevertheless the receivers were appointed by the bank in a deed dated the 14th of December, 1987 pursuant to

Clause 21 of the debenture and not pursuant to a statutory right under Section 82 of the Act.

A

Clause 21 in clear and express terms empowers the bank to appoint a receiver in writing at any time after the moneys become payable.

The moneys in this instance were payable on demand and demand was made and expired at 1 p.m. on the 14th of December, 1987. No further notice was needed and time began to run from then.

B

The receivers were appointed by deed pursuant to Clause 21 and although specifically empowered by the debenture:

"(v) to sell .... all or any of the mortgaged premises....",

C

which includes land in the case of the 2nd plaintiff company, the first indication of an exercise of that power by the receivers arose by virtue of a newspaper advertisement dated the 25th of May, 1988 (some 5 months after the Notices of Demand had been served on the companies) inviting written tenders for the purchase of the land of the 2nd plaintiff company situated at 354 Waimanu Road.

D

In my view the existence in a debenture of a power in a receiver to sell land does not and cannot mean that the mere appointment of a receiver under the debenture invokes the power to sell in breach of the one month statutory notice required by Section 79 of the Act.

E

It was argued by learned counsel for the company that as the Land Transfer mortgage did not expressly empower the bank to appoint a receiver therefore the appointment of a receiver under the mortgage must be governed by Section 82 of the Act and therefore could only made after the power to sell the land had arisen. (i.e. 1 month after the demand was made.)

F

I accept that there would be some force in that argument had the only security document involved been the registered mortgage over the 2nd plaintiff company's land.

However, the mortgage was not the only security involved and more importantly the receivers' appointment was not in exercise of a statutory power but was by way of a deed which expressly stated that the appointment was made according to the power of the bank to make the appointment under Clause 21 of the

G

debentures.

Clearly the bank did not exercise its statutory power to appoint receivers, which power it did not have on the date of their appointment on the 14th of December, 1987, and in the face of the Deeds of Appointment this court cannot infer from the mere existence of a power to sell in the debenture that the appointment was other than by deed.

The third and final cause of action, namely, trespass may be quickly and shortly disposed of.

A

By virtue of the deed of appointment the receivers were jointly and severally invested with "all the powers, authorities and discretions .... under the debenture whether in law or in equity by statute or otherwise".

By Clause 21(i) of the debenture the receivers were empowered to take possession of collect and get in the whole or any part of the mortgaged premises. Furthermore by (xiv) the receivers could "do all such other acts and things without limitation as such Receivers shall think expedient in the interests of the Bank".

B

In this regard and in the circumstances of this case the securing and protection of the assets and business premises and records of the companies would have been of primary importance.

C

Needless to say the appointment of the receivers being valid they were deemed to be agents of the companies for whose actions the companies alone were contractually responsible. (See: Proviso to Clause 21). In the circumstances, this cause of action must inevitably fail.

For the foregoing reasons I am of the view that the companies' consolidated statement of claim discloses no reasonably arguable cause of action and is therefore struck out with costs. The interim injunction granted on the 7th of June, 1988 is accordingly discharged.

D

(Application granted; Plaintiffs' Statement of Claim struck out.)

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