IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 103 OF 1979

BETWEEN:

MANICA MANN GEORGE (MALAWI) LIMITED.....PLAINTIFF

- and -

THE CITY CENTRE LIMITED.....DEFENDANT

ORDER

This is an application by the Sheriff of Malawi under Order 17, Rule 3, Rules of the Supreme Court. Mr. Baldev appears for the Sheriff, Mr. Wills for the execution creditor, and Mr. Savjani for the claimant. I have decided to determine summarily the question at issue, as I am empowered to do by Order 17, Rule 5(2).

The question at issue between the claimant and the execution creditor is whether, at the time of seizure of certain goods from The City Centre Limited, the defendant in Civil Action No. 103 of 1979, the goods seized were the property of the claimant as against the execution creditor.

The execution creditor recovered judgment against The City Centre Limited on the 13th March 1979, for the sum of K2,865.44 and K34 costs. A Writ of Fieri Facias was issued on 3rd April and the Sheriff, on the 17th May, seized various assets from The City Centre Limited. The claimant is a Receiver and Manager of the said The City Centre Limited.

It is common case that The City Centre Limited, on the 27th May 1977, issued a debenture in favour of the Commercial Bank of Malawi Limited, and that such debenture was registered with the Registrar of Companies on the 1st June and with the Deeds Registry on the 22nd June. The debenture was issued in consideration of the Commercial Bank of Malawi Limited granting to City Centre Limited overdraft facilities to the extent of K30,000. On the 17th April 1979, there was due and owing to the Commercial Bank of Malawi Limited the sum of K7,278.98, and the bank, in alleged exercise of its powers under the debenture, appointed the claimant as Receiver and Manager of all the property of the said The City Centre Limited. Such appointment was notified to the company on the same day and was advertised in the newspapers and the Gazette. The claimant took possession of the property and assets of the company.

2/...

The power to appoint a Receiver is contained in Condition 5 of the Conditions attached to the debenture. The Condition reads as follows:

> "5. AT ANY time after the moneys hereby secured have become payable under Condition 4 hereof the bank may, after giving notice in writing to the company, appoint by writing under the hand of any Manager, Accountant, Branch Manager or Branch Accountant of the bank, a Receiver or a Receiver and Manager of the company's business, and such Receiver or Receiver and Manager shall have power to sell the company's business as a going concern, and all or any of the property and assets comprised in this security for such consideration as he may think proper."

The Commercial Bank of Malawi Limited on the 17th April, 1979, under its common seal and purporting to be acting in pursuance of the powers conferred on the bank by "Condition 6", appointed the claimant to be the Receiver and Manager of the property, assets and chattels charged by the debenture. The affixing of the common seal was witnessed by the General Manager and the Secretary of the bank. The document is Exhibit DGL 5, referred to in the Affidavit of one, Lawrence, an employee of the bank. Mr. Wills submits that such appointment was defective because Condition 5 lays down a method of appointment which should be strictly followed and Exhibit DGL 5 did not comply with the Condition, in that it was not made under the hand of a Manager, but was made by the bank under seal. He argues that the writing is not the writing of the Manager but the writing of the banking corporation. He cited the case of Windsor Refrigerator Co. Ltd. And Another vs. Branch Nominees, Ltd. And Others - 1 All E.R. /1961/ 277. In that case Branch Nominees, Ltd., a bank's wholly owned subsidiary, held a debenture as security for a company's overdraft with the bank which conferred power, when the principal money had become payable, to appoint by writing a Receiver. Branch Nominees, Ltd. affixed its common seal to an undated deed appointing a Receiver, and the sealing was witnessed by two directors. The document, undated, was sent to a branch of the bank, and a few days later the bank's Branch Manager inserted therein the then date and delivered to the company a formal demand for payment, and on payment not being made, produced the document, handed it to the Receiver, and indicated that the Receiver was appointed.

It was held in the High Court that the procedure adopted by Branch Nominees, Ltd. was invalid to effect the appointment of a Receiver under the debenture because the document of appointment was ineffective as a deed and could not be regarded as an appointment under hand validly made on behalf of the debenture holders. This decision was the subject of an appeal to the Court of Appeal, and Mr. Wills has referred to the judgment of Lord Evershed, M.R. in that Court, particularly to that part of the judgment which appears on page 281 where, after referring to a passage in the judgment in the court below, in which it was said that there was no reason to think that the directors who put their names on the appointment were authorised to do anything else than to witness the affixing of the seal, and it could not be assumed that they had any authority to bind the company by a document under hand or were purporting to do so, the learned Master of the Rolls continued by saying that it seemed to him that the question was not whether the directors, when

3/...

they put their names to the document, were purporting to execute a document under their hands as agents for the company, or had any authority so to do; the question was could the document be taken to be an instrument of the company in writing? He held that it could.

Now as far as I understand Mr. Wills's argument, he only relies on that case as authority for the proposition that the witnessing of the affixing of the common seal of a company on a document does not make the document a writing under the hand of the persons who put their names on it as witnesses of the affixing of the seal. I agree with him. It seems clear to me that where a director puts his name on a document as evidencing the affixing of the seal of a company, the document is a document of the company and is not a writing of the director, nor is it under the hand of the director. But I do not see that this in any way advances the execution creditor's case. The document of the 17th April is a deed, and on the face of it regular. It is true that Condition 5 enables the bank to appoint a Receiver without a seal; it is allowed to do so under the hand of a Manager. But the question I have to answer is, can it only appoint under the hand of a Manager? Is it precluded from appointing by deed? It is clear, I think, that the intention of Condition 5 is to allow the bank an easier method of appointing a Receiver than would be normally available to it.

The method of appointing a Receiver must accord with the formalities required by the debenture. In the instant case it seems to me that the company, i.e. the bank, did comply with the formalities. The bank used a form of doing so by means of executing and delivering a deed instead of having a writing signed by a Manager for it. The appointment was made by the bank as required by the debenture, and it seems to me immaterial that it was done by deed instead of merely by writing. It did it under seal instead of by hand of an Agent. I think it would be unduly pedantic to say that this was not a compliance with Condition 5 of the debenture.

The second point taken by Mr. Wills is that the appointment is defective because the bank purported to exercise it in pursuance of the powers conferred by Condition 6 endorsed on the debenture instead of stating the appointment was made by virtue of the powers contained in Condition 5. Condition 6 deals with the powers of a Receiver and opens by stating that a Receiver shall be the Agent of The City Centre Limited, but may be removed at any time by the bank, who may appoint another in its stead. It then goes on to spell out the powers to be enjoyed by a Receiver.

It is Mr. Wills's argument that the intention was not to appoint a Receiver under Condition 5, but to appoint a substitute Receiver under Condition 6, or that in any event such an interpretation is open. It is clear from the affidavits before me that there never was an appointment prior to that made on the 17th April. When I read the notice in its entirety, and when I construe it as a whole, it seems clear to me that the intention was to appoint a Receiver pursuant to the powers contained in Condition 5, and indeed it seems to me when I look at the debenture, it is only under Condition 5 that a Receiver, whether the first or a substitute, may be appointed.

4/...

The third point taken by Mr. Wills, and it is not a point on which he places much reliance, arises out of the use of the phrase in the notice that Holman is to be "the Receiver and Manager of the property, assets and chattels charged" by the debenture. Mr. Wills argues that the power in Condition 5 is to appoint a Receiver to be the Receiver of the company's business. As I see it, the use of the words "the company's business", where it is first used in Condition 5, is descriptive of a Manager only, and a reading of Conditions 5 and 6 show that a Receiver is to be a Receiver of the property charged by the debenture.

I find in favour of the claimant. The execution creditor will pay the costs of this application of both the claimant and the Sheriff.

Made in Chambers this 28th day of June, 1979, at Blantyre.

J. J. SKINNER
CHIEF JUSTICE