IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2229 OF 2001

BETWEEN:

RECEIVER MANAGER OF HARTZCO LTD.....PLAINTIFF

-and-

NATIONAL SEED COTTON MILLING LTD.....DEFENDANT

CORAM: HON JUSTICE A.C. CHIPETA

Mr Chagwamnjira, of Counsel for the Plaintiff

Mr Jussab, of Counsel for the Defendant

Mrs Katunga, Official Interpreter/Recording Officer

RULING

On 20th August, 2001 the plaintiff, who is the Receiver and Manager of Hartzco Limited, commenced an action, which the defendant has already indicated intention to defend. On the same day through an ex-parte application presented before Hon. Justice Twea, the plaintiff obtained an interim order of injunction against the defendants. This order restrains the defendants whether by themselves or their agents or servants or by whomsoever from disturbing the plaintiff's activities by trespassing on or occupying certain premises earlier sub-let by the same defendants to Hartzco Limited. The injunction was granted on condition that the plaintiff takes out an inter partes application within seven days thereof and also on the usual undertaking on the plaintiff's part as to damages in case it be subsequently held that the injunction was wrongly granted.

The plaintiff did duly the same 20th day of August, 2001 file in court the requisite inter partes summons for the injunction, which was made returnable on 18th September, 2001. Before that date could be reached, however, on 24th August, 2001 the defendant took out a summons to vacate the injunction that was granted ex-parte.

At the hearing of this latter summons, which commenced on 31st August, 2001, it was the prayer of the plaintiff that his inter partes application due on 18th September, 2001 be heard together with the defendant's application to vacate the injunction. Really the applications the two parties filed herein, if carefully looked at, are merely two sides of the

same coin. The plaintiff having obtained temporary relief through the interim injunction granted ex-parte, the aim of the inter partes summons was to give both parties to the case the opportunity to be heard before the court could decide whether to continue or to terminate the injunction. Likewise, the summons filed by the defendant to vacate the interim injunction was destined to end up with either a vacation (alias termination) of that injunction or with its continuation. It thus matters not, I think, that the plaintiff's application was due for hearing some three weeks after the date given for the defendant's application. The hearing I had in respect of the defendant's application and the present ruling do and will, apart from addressing the defendant's summons, serve to answer the concerns which that other application was meant to address.

It is thus my belief that the plaintiff has not been prejudiced in any way in having his application so overtaken by the defendant's in terms of hearing dates. The plaintiff in fact, while contesting the defendant's application, has as good as argued his own application and I will in this ruling freely refer both to the affidavits and exhibits the defendant has used in support of his application, and also to all the affidavits and exhibits the plaintiff has used in answering this summons, some of which happen to be those he was going to use if his inter partes application had been heard in its own right.

At this stage it is important, I think, to first appreciate the background to the present case and to the present scenario. It is quite plain from the totality of the papers on record that the present dispute relates to property comprising of part of Title No. Njewa 46/1 in the Lilongwe district of Malawi. The plaintiff's exhibit "HDC3" and the defendant's exhibit "SEJ1" are one and the same document, to wit, a sublease between the Defendant Company (as Lessor) and Hartzco Limited (as Lessee) of the very property at Njewa. This sub-lease is for a term of 10 years with effect from 1st August, 1995. It is stipulated in the sub-lease that it was entered into by the parties for agricultural purposes. It is clear that , in the absence of disturbances, this sub-lease was meant to run up to 31st July, 2005, a date that is yet to be reached for a number of years. For ease of reference I will hereafter in this ruling, simply refer to the property in question herein as Njewa Farm.

It also appears from the documents on record that the first five years of the sub-lease must have been relatively trouble free. There is certainly no indication of any existing problems between National Seed Cotton Milling Limited, as Landlord, on the one hand and Hartzco Limited, as tenant, on the other hand concerning that period. It further appears that over part of that period for its farming activities on Njewa Farm, Hartzco Limited secured loan/overdraft facilities from Finance Bank Malawi Limited (hereinafter simply referred to as the Bank.) This facility was to the tune of K7,200,000.00 and it was secured by a debenture exhibited as "HDC1" to the Plaintiff's first affidavit.

In the first few years of Hartzco Limited's business operations, all appears to have been going on well both as regards the sub-lease with the Defendant Company and as regards the debenture with the Bank. Problems regarding these two relationships only surfaced in or about early 2001 when the Directors/Shareholders of Hartzco Limited unexpectedly relocated to Zambia and abandoned their farm. In the process they deserted 4,000 chickens (layers) on Njewa Farm and 52 hectares of unharvested maize as well as 11

hectares of unharvested groundnuts.

It is this event that compelled the Bank to crystallize the debenture over Njewa Farm and to at the same time appoint the Receiver/Manager herein to manage the farm as a going concern for it to recover its dues for the remainder of the sub-lease Hartzco Limited had entered into. In due turn it is this action of the Bank and the activities of the Receiver/Manager on Njewa Farm that roused the curiosity and suspicion of the Defendant Company as Lessor of the land.

From the look of things prior to the abandonment of the farm the Defendant Company had no idea that its lessee, Hartzco Limited, was operating on the Bank's finances and that it had issued a debenture to the said Bank. Similarly it appears that on its part too the bank too, before this event, did not know that National Seed Cotton Milling Limited had an interest in the land Hartzco Limited was working and borrowing funds for. It can be said therefore, in a way, that if it were not for Hartzco Limited's directors suddenly decamping and leaving a mess at Njewa Farm, the Defendant Company and the Bank would not have discovered each other's interests in Hartzco Limited and Njewa Farm at the stage they did.

The record shows that following the discovery herein there has been correspondence as well as meetings between the Bank and the defendant and also between the Receiver/Manager and the Defendant. These contacts took place between May and August, 2001 and one of the fruits they have produced is the present case. In this communication the Bank and the Receiver/Manager have throughout towed the same line, based on rights arising from the debenture, while the Defendant Company has towed a different line, based on property rights as per the sub-lease. There has been persistent conflict between the two sides and the relationship between them has not been very cordial, to say the least.

The record also shows that a few days prior to 20th August, 2001 matters came to a head between the parties herein when the Defendant Company engaged some twenty or thereabouts Security guards for the sole purpose of overseeing Njewa Farm and preventing the plaintiff or anyone claiming to work the land under his mandate from any further dealings with the property. It is in the light of this development that the plaintiff rushed to court with an ex-parte application for injunction against this intervention by the defendant, which relief he duly obtained. The defendant thus stands estopped or restrained from continuing to deploy Security guards on this farm, but thinks that the plaintiff does not deserve this protection. The defendant accordingly prays that this injunction should be dissolved.

In challenging the injunction granted, Mr Jussab, learned Counsel for the Defendant Company, began by referring to the principles that govern the grant of injunctions as per the locus classicus case of Ethicon Ltd. -vs- American Cynamid Co. (1975) A.C. 396. In so alluding to the governing principles, with reference to Note 29/1/8 of Order 29 rule 1 of the Rules of Supreme Court and by further reference to the case of R -vs- Kensington (1917)1 K.B. 486 Mr Jussab emphasized the fact that apart from the need for an applicant to show that he has a good arguable claim to the right he seeks to protect, he also ought to ensure that in the presentation of his application he places all material facts before the

court and that none of them is suppressed. Stemming from this premise the Defendant's stand was that in obtaining the injunction herein, the Plaintiff in his ex-parte application suppressed a number of material facts. The defendant thus claims that if it were not for this suppression of facts the plaintiff would not have been granted this injunction and that it therefore ought not to be allowed to continue.

A look at the Order and rule referred to and at the authorities cited indeed makes it pointedly clear, and on this Mr Chagwamnjira, learned Counsel for the plaintiff, could not afford to differ, that where an order of injunction has been secured through suppression of material facts the court ought not to bother with recourse to the merits, but to set it aside outright. I am on this point, duly satisfied, that should I in this case find that the plaintiff obtained his order through such type of suppression of facts the only course open to me will be to vacate the injunction herein.

The first point taken up by the Defendant Company as an example of suppression of material facts is the one concerning the debenture Hartzco Limited issued to the bank. Referring to Clause 2.6 of the Sublease between the defendant and Hartzco Limited which forbade the latter from assigning, underletting, transferring, or charging the property in question without the prior written consent of the Lessor, the defendant contended that the debenture herein was issued by Hartzco Limited in direct breach of that term of the sub-lease. The plaintiff, it was argued, ought to have disclosed this to the court in his ex-parte application.

In responding to this point the plaintiff argued that the sub-lease has no requirement for obtaining consent when the lessee is issuing a debenture, which was described as a floating charge. On a reading of the material clause the plaintiff argued that where charges are referred to, the clause refers to specific charges and not to debentures. The plaintiff maintained that debentures being different from such other types of charges and not having been singled out for consent, cannot just be drafted into the category of dealings that require consent. The plaintiff proceeded to point out that in the presentation of his application he duly exhibited both the sub-lease and the debenture to the affidavit in support and that he cannot therefore be accused of suppressing the fact that no consent was sought for the debenture, his stand being that none was required in this case.

I have at length considered the arguments advanced by both sides on this issue and I have also carefully examined the material exhibits. It has struck me after this exercise that there is some fundamental argument concerning this point which both sides have omitted to raise. It is my feeling that the argument so omitted has a great bearing on the outcome of the question whether blame is being properly laid at the door of the plaintiff for allegedly concealing the fact that Hartzco Limited issued the debenture herein without its Lessor's written consent.

Whereas an examination of the Sub-lease reveals that its commencement date is 1st August, 1995, it will be noted that this sub-lease was only executed on 12th May, 1997.

As against this, however, the debenture herein, it will be noted, was issued by Hartzco Limited to the Bank on 6th January, 1997, some five months earlier than the sub-lease. The picture emerging therefore is that from 1995 to May, 1997, assuming Hartzco Limited was already in occupation of Njewa Farm, the relationship it had with the defendant as Lessor was probably merely an informal one and that Clause 2.6 now featuring only came into being in May, 1997 well after Hartzco Limited had already issued this debenture to the bank. I have in the prevailing situation therefore asked myself whether in such circumstances, even if Clause 2.6 explicitly required Hartzco Limited to obtain consent before issue of debentures, it would have been practically possible for Hartzco Limited to comply in advance with that future term. In the light of this I believe I need not first go into a discussion of whether this Clause required consent for charges other than debentures or for both. The point I find material to bear in mind is that at the point in time Hartzco Limited was issuing the debenture it could not have been expected to dream the terms that were going to be incorporated in a formal lease with the defendant that was going to come into existence five months down the line. This, in my view, is and remains so regardless of the fact that by the time the sub-lease came into being its effect was backdated to 1st August, 1995.

In the light of my above observation it seems to me that if one pays attention to the dates the two material instruments herein were executed in relation to each other, the argument advanced by the defendant that the plaintiff suppressed the fact of absence of consent in relation to the debenture automatically falls away. It does so on account of the fact that, strictly speaking, the debenture came into existence earlier in time than the sub-lease. Njewa Farm therefore ends up caught in the debenture, not by virtue of any direct reference to it in the debenture as an existing asset at the time of its issue, but by virtue of its nature as a floating charge in that it can even crystallize over assets a borrower acquires subsequent to its issue.

It was also the defendant's argument that on application for injunction order another fact the plaintiff ought to have disclosed but did not disclose was that the defendant had entered a caution in the Registry forbidding the registration of any dealings or the making of any entries in relation to Njewa Farm without its prior consent. The defendant has exhibited the said caution as "SEJ2" to its affidavit in support of the summons to vacate injunction.

In regard to this point the plaintiff argues that the entry of the caution herein was a fact unknown to him. The defendant, he said, did not serve him with notice of this entry of caution and that since knowledge of the existence of this development was exclusive to the defendant, the plaintiff could not be said to have suppressed it.

A look at exhibit "SEJ2", the caution, indicates that it was only executed on 29th June, 2001 and that it was entered in the register of the Lilongwe Land Registry on 3rd July, 2001. There is indeed no suggestion or indication that the defendant took steps to alert the plaintiff of this entry of caution on the register. Further, there is no suggestion, when and why, if at

all, on or after 3rd July, 2001 the plaintiff could have been expected to inspect the register in order to discover this caution.

As earlier indicated the sequence of events appears to suggest that prior to the desertion of Njewa Farm by the Directors/Shareholders of Hartzco Limited, the bank and the Defendant Company did not know of each other's interests in Hartzco Limited and its assets. Per the affidavits and exhibits on record (See: exhibit "HDC2" of the plaintiff's original affidavit) the plaintiff was appointed Receiver and Manager of Njewa Farm in terms of the debenture on 8th May, 2001 and he was then personally introduced to the defendants some four days later on 12th May, 2001. (See affidavits dated 28th and 31st August, 2001 respectively by Dick Chagwamnjira and Salim Faruqi). This being the case, the chances, it seems to me, are that the plaintiff would have been inclined to inspect the register closer to these times rather than later. There certainly does not seem to be any special reason why the plaintiff could be expected to develop the interest to search the register on or after 3rd July, 2001. The caution not having been hinted at in all the contacts between the plaintiff and the defendant, it does appear to me that indeed the plaintiff might well have been unaware of its existence and as such the expectation that he should have mentioned it in his application for injunction does not appear justified in the circumstances.

Even, however, if somehow the plaintiff became aware of it, I am not certain whether its disclosure in the application was going to have any real bearing on the question whether or not the defendant should be allowed or stopped from deploying Security guards at Njewa Farm. I take it that the deployment of these guards had more to do with the defendant as Lessor asserting its rights under the sub-lease, than with the question whether or not it had entered a caution on the register. All in all I do not see how the argument about non-disclosure of registry of caution can be said to advance the defendant's complaint herein in any way.

A further point the defendant has accused the plaintiff of suppressing is one in relation to the restrictions on registration of dealings with the property without the consent of the head lessor by virtue of certificate of lease from the Malawi Government (i.e. the Head Lessor) to the Defendant Company which is exhibit "SEJ3" to the affidavit of Mr Jussab, of Counsel, filed in support of the present summons. The argument advanced as I understand it, was that as even the defendant needs consent of its lessor to register dealings covering this property, the debenture herein did not only offend the sublease, involving the defendant, but even the head lease and that this should have been disclosed in the plaintiff's application.

Just like in the case of non-disclosure of the existence of a caution on the Register, the plaintiff's complaint here was that the lease between the Malawi Government and the Defendant Company is exclusive to the two parties to it, and that he only became aware of it on its exhibition in the present application after he had already obtained the injunction. The plaintiff wondered in the result how he could have suppressed that which he did not know about.

On this point I have likewise searched the correspondence and minutes of meetings exhibited in the case record over the period of May - August, 2001 between the plaintiff and the defendant. In these I see nothing to suggest that the plaintiff was at any point made aware or that he otherwise became aware of the restrictions in the head lease herein. Besides this I also here fail to appreciate the significance the mention of these restrictions would have had vis-a-vis the question whether the court should or should not have permitted the defendant to deploy guards on Njewa Farm. I take it in so deploying the guards the defendant was merely purporting to act by virtue of rights under the sub-lease and not necessarily

by virtue of the restrictions binding it under the head lease. I hold therefore that ignorant as the plaintiff appears to have been of these head lease restrictions, he cannot fairly be blamed for not disclosing them in his application. Further as the debenture issued was a floating charge at a time when the sub-lease had not even been drawn up, the question of restrictions on registration of dealings in the head lease could not have featured in any way.

Before I can move on to the next item the defendant alleges that the plaintiff suppressed in his application I find it necessary to revisit the chronology of events in this case as disclosed by the affidavits and exhibits proffered by both parties. Coming from the background that before the farm was abandoned by its Directors the Lessor (i.e. the defendant) and the bank did not know of each other's interests in Hartzco Limited and its assets, the indicators are that as late as 27th April, 2001 (See: exhibit "SEJ9" of Mr Jussab's supplementary affidavit) the bank was still ignorant of the defendant's interest in Njewa Farm. Hence the bank's indications in the letter it wrote to Cheetah Malawi Limited, of intent to advertise the farm herein for sale.

By 8th May, 2001, however, by letter from the bank's lawyers to the Defendant Company, herein exhibited as "HDC1" to the affidavit in opposition sworn by Mr Changwamnjira on 28th August, 2001, it is clear that by then the bank had become aware of the defendant's interest in the farm. The letter clearly expresses the bank's anxiety for an appointment and for a resolution of the colliding interests of the parties in this property. On the part of the Defendant Company it would appear that it was this letter and possibly the newspaper advertisement of appointment of Receiver/Manager that first opened the eyes of the defendant to the existence of a debenture that had by then already affected Njewa Farm.

It is not in dispute that these gestures of reconciliation made by the Bank were not reciprocated to or otherwise reacted to by the defendant. The affidavits further show that it did not make any difference that four days later (i.e. on 12th May, 2001) the Bank's

lawyer travelled from Blantyre to Lilongwe and introduced the Receiver/Manager, who through personal efforts hereafter followed up on these approaches to the defendant (See: supplementary affidavit of Salim Faruqi per exhibits “FS1” to “FS3”). It appears that no effort was spared to explain to the defendant that the plaintiff’s involvement in Njewa Farm was temporary and in any event limited by the balance of the sub-lease term for purposes of recovering the bank’s money, and that as a non-Agriculturist the plaintiff was using contractors to manage the farm.

From the look of things in large measure the Defendant Company opted to ignore all the overtures made to it by the bank, its lawyers, and the plaintiff. As it appears, from 8th May, 2001 when the first approach was made to it, it took the defendant up to 27th June, 2001 to venture into the first step to communicate with the plaintiff. On that day through a letter exhibited as “SEJ5” to the first affidavit of Mr Jussab the defendant, inter alia, informed the plaintiff that it had given Hartzco Limited notice of termination and forfeiture of lease, without further elaboration. A look at exhibit “SEJ4” under the same affidavit actually shows that the notice referred to bore the same date as that in “SEJ5” and that it was to run for two months from that date. There follows under Mr Jussab’s supplementary affidavit exhibit “SEJ8”, which is an affidavit of service, to the effect that notice of termination was sent to the Managing Director of Hartzco Limited using his Zambian address through the post, the fax, and e-mail.

Beyond this, however, Mr Jussab’s supplementary affidavit through its exhibit “SEJ7” shows that on 4th July, 2001, exactly a week after the termination notice and without any reference thereto, the Defendant again wrote to the very Hartzco Limited Managing Director in Zambia, demanding payment of arrears of rentals and seeking settlement of these arrears “so that we are in line.” The letter makes reference to

rental for the quarter starting 1st June, 2001 as being due on 31st May, 2001 and refers to that date as if it was a future date.

Under the same head of suppression of material facts the defendant claims that at the time of applying for injunction the plaintiff did not disclose to the court the fact that the defendant had terminated its sub-lease with Hartzco Limited by letter of 27th June, 2001. As regards the service of the said notice on the Managing Director in Zambia, the move was defended by reference to S 137(4) of the Companies Act (Cap 46:03). The defendant argued that since the plaintiff concedes that the Directors of Hartzco Limited had relocated to Zambia and that since none of the notices transmitted thereto had returned undelivered or untrasmitted, it must be deemed that they were duly served on the said Managing Director. Carrying on from here the defendant argued that if the plaintiff informed the court that the sub-lease between the defendant and Hartzco Limited had been terminated, the court would not have granted the injunction the plaintiff sought.

In reaction to this the plaintiff denies engaging in the suppression alleged. To begin with he argues that the notice of termination was never served on him despite all the efforts he had made to notify the Defendant’s Company that he was now operating in place of Hartzco Limited by virtue of his appointment under the debenture. In support of this argument the supplementary affidavits of P.G. White and S. Faruqi, both sworn on 31st August, 2001, are quite emphatic that up to that day neither the bank nor the

Receiver/Manager had seen or been served with any letter of termination of lease.

The plaintiff however proceeds to acknowledge that by a letter dated 27th June, 2001 the defendant merely advised him that it had given notice of termination of lease to Hartzco Limited. The plaintiff here dwells on the point that the letter he got simply referred to a notice of termination and not to an actual termination. This, the plaintiff says, he disclosed under paragraph 15 of the affidavit in support of the application for

injunction and he therefore denies the allegation that he suppressed anything material in this regard.

It is in fact the plaintiff's contention that the defendant's option to deny him service of this notice as Receiver/Manager and its attempt to instead effect service on Hartzco Limited's director in Zambia amounts to service on a defunct director. Referring to p. 398 of Butterworth's 3rd edition of Cases and Materials in Company Law the plaintiff quoted the learned authors of that book as pointing out that the appointment of a receiver or a Receiver/Manager for a Company puts an end to the power of its directors to manage the business until such time as such appointee has discharged his functions. The plaintiff's stand therefore was that the Defendant Company should rather have served the notice on him and not on an abscondee director, if the notice was to be considered valid.

Be this as it may a point the plaintiff emphasized was that under the sub-lease notice of termination is supposed to be two months long. His argument then was that even assuming that service of such notice on the Director in Zambia was otherwise valid, going by the date of the notice i.e. 27th June, 2001, the notice was supposed to run up to or about 27th August 2001. The plaintiff's complaint therefore was that the Defendant did not even have the patience to respect its own notice in that it sent in Security guards to oversee the farm on or about 18th August, 2001 well before the notice could be deemed to have expired. This, he argued, was unlawful even if the notice were otherwise accepted to be a valid one. He then proceeded to discuss the law regarding forfeiture of leases and the lesse's right to relief under the Registered Land Act (Cap 58:01) of the Laws of Malawi, which as might soon become clear I need not go into now.

After examining the notice of termination addressed to Hartzco Limited (exhibit "SEJ4") and the letter advising the plaintiff about it (exhibit "SEJ5"), I am not left in any doubt that the plaintiff indeed never had actual sight of the notice of termination of Sub-lease in this case. As already pointed out in fact the plaintiff was not even put in the know by exhibit "SGJ5" as to when the notice had been given or even about the duration of its operation. A look at paragraph 15 of the affidavit filed by the plaintiff in support of his application for injunction shows that he did not conceal from the court the fact that he had been advised of such notice. This being the case, it seems to me that the plaintiff having disclosed all he knew of the said notice at that point in time, the allegation that he suppressed material information under this head is without substance and of no help to the defendant.

Further than this, the way I see it, there is no way the plaintiff could have been expected,

on the limited information he had, to say that the sub-lease in question had been terminated. To begin with it has to be recalled that he was contending that he was the rightful party to be served with such notice if indeed issued and he was not so served. Secondly, as already pointed out, the letter advising him of the notice lacked material detail for him to say affirmatively that the sub-lease had indeed been terminated. Thirdly, as now appears with exhibit "SEJ4" on the record, even if copy of this notice had been made available to the plaintiff, dated as it is 27th June, 2001, the notice was still running and so the termination of the sub lease could not have been taken as having taken effect by the time the defendant chose to send guards onto the farm as it did, even assuming there was no contest on point of validity of the notice. Further, besides the appearance that the defendant behaved too hastily even on its own notice, exhibit "SEJ7" the defendant's own letter of 4th July, 2001 does not auger well with the stand the defendant has taken that it duly terminated the sub-lease. As I have ventured to show earlier in this ruling, this letter, if understood

strictly, since it was demanding rentals and hinting at a continuing relationship without any regard or reference to the said notice of termination, was in effect by implication cancelling the termination notice. However, whichever way one looks at this, the point remains, as earlier pointed out, that the plaintiff did not in this regard suppress any material fact as he fully disclosed all he knew and the attack on him on this point is therefore not justified.

There is a further point which the Defendant Company has alleged that the plaintiff suppressed in his application for injunction. This complaint relates to Clause 4.1.5 as read with Clause 4.1 of the Sub-lease. These provisions are to the effect that if the lessee (in this case Hartzco Ltd) allows his interest in Njewa Farm or in any of its goods to be taken into execution, then the Lessor (in this case the Defendant) has the right, on giving due notice, to re-enter the property. It was the defendant's argument that the appointment of a Receiver/Manager for the property herein under the debenture meant that Hartzco Limited (the lessee) was under receivership. This "receivership", it was argued, quite independently of any other reason, was a sufficient ground for termination of the sub-lease and that the Plaintiff should have disclosed this in his application for injunction.

On this part the plaintiff argued that there was in this case no execution over the farm or over the goods of the lessee as envisaged in the sub lease. The appointment of the Receiver/Manager (the plaintiff), it was contended, was in this case no ground for terminating the sub-lease.

The appointment, it was argued, was not for purposes of winding up Hartzco Limited, but rather for purposes of restructuring and managing it and that therefore the plaintiff's office of Receiver/Manager is essentially different from that of an Interim Receiver. The plaintiff went further and argued that

having exhibited the complete sub-lease to the affidavit in support of the relevant application he did not suppress the clauses depicted by the defendant herein.

I must confess that I have experienced some difficulties in trying to follow the complaint of the defendant under this head. Firstly, the words “taken into execution” as used in Clause 4.1.5 of the sub-lease, appear to me to refer to a process of enforcement of a judgment whereby a successful litigant reaps the fruits of his judgment. See: Re A Company (1915)1 Ch. 520 and in particular the dictum of Phillimore, L.J. at p. 527. Should I be correct in holding this understanding of “execution” then since the crystallization of the debenture over Njewa Farm is not by virtue of any suit and/or judgment, I would hesitate to rush and call the Bank’s appointment of a Receiver/Manager for Hartzco Limited as being or being the equivalent of the “taking into execution” of that Company’s property or goods.

Even, however, if such event were properly to be described as an execution, it is clear from Clause 4.1.5. that the Lessor’s right of re-entry is dependent on the giving of due notice, to wit, two months notice.

In this case, as already observed, the plaintiff was merely advised by separate letter that notice of termination of sub lease had been given to Hartzco Limited. As it has turned out the notice given made no reference to Clauses 4.1.5. and 4.1. The position therefore is strictly that the plaintiff had no idea, as at the time of making the application, which clause(s) of the Sub-lease the defendant had based its notice on. Further, as also earlier observed, such notice as was given had not even expired by the time the defendant purported to exercise the right of re-entry through deployment of guards to protect Njewa Farm. In the circumstances I quite fail to see how the plaintiff

could have been expected to feature clauses 4.1 and 4.1.5 of the sub lease in his application for injunction. My view is that in not so singling out these clauses the plaintiff did not suppress any material fact as the defendant claims.

Earlier on in this ruling I had occasion to discuss Clause 2.6 of the Sub-lease. That discussion was had in the context of the need or the absence of need for consent vis-a-vis the debenture Hartzco Limited issued to the Bank. This time round Clause 2.6 features again but in a different context. In further challenging the injunction the plaintiff obtained herein, the defendant has alleged that contrary to this clause the plaintiff (Receiver/Manager) has sub-let Njewa Farm to Chitipi

Farms Limited and that he has done so without obtaining the defendant’s written consent.

In support of this assertion the defendant has exhibited “SEJ11,” a letter from Chitipi Farms Limited to the plaintiff, complaining of the interruption of their agriculture operations on the farm by the defendant’s guards and seeking a speedy and effective solution. The words the defendant has capitalized on in this letter are to the effect that these disturbances with their consequent delays on the farming activities might have negative repercussions and make Chitipi Farm Limited’s occupancy of the farm economically unrealistic and force it to review future occupancy of the farm.

The defendant’s argument is that this “occupancy” by Chitipi Farms Limited is in fact a

sub-letting of Njewa Farm by the plaintiff and that it is a subletting without consent. The defendant claims that on this basis it was justified in taking the steps to deploy guards to guard against this breach of Clause 2.6 of the sub-lease so as to ensure that the occupants of the farm are not dealing with it as their own. This, it says, was done only to assert its rights as Lessor of the property and

that the plaintiff could not therefore have succeeded in his application for an injunction had the court been mindful of the fact that he was in breach of Clause 2.6. In law just as in equity, it was so argued, no relief can be granted in respect of an unlawful or illegal activity or deed basing on the maxim ex turpi causa actio non oritur. The defendant thus prayed that on basis of this breach of Sub-lease term the injunction must be vacated.

In answer to this allegation the plaintiff has outright denied sub-letting the farm herein to anyone. His argument is that as Receiver/Manager appointed to run Njewa Farm for the remainder of the sub-lease term, he has merely employed Managers to run the farm on his behalf. It is his claim that doing so does not amount to sub-letting of the farm even on a stretched definition of that term, and that the arrangement does not therefore require the consent of the defendant as per Clause 2.6 of the sub-lease. The plaintiff in fact adds that the appointment of the Managers for the farm is a fact previously made known to and acknowledged by the defendant (See: exhibits SF1 to SF3 and affidavit of Salim Faruqi). He thus argues that the defendant is now merely twisting things in order to find an excuse for its unjustified re-entry. The plaintiff, however, reveals that as an alternative to the current arrangement whereby he relies on Managers to run the farm for him, the Bank's lawyers already wrote to the defendant (See: exhibit HDC5A) seeking consent to indeed sub-let the farm, and that to date he is still awaiting a response thereon. In short the plaintiff argues that he has not or indeed not yet sub-let Njewa Farm as alleged by the defendant.

I should observe that although earlier on in this ruling I held that between the sub-lease and the debenture the latter was issued earlier in time, the position in regard to Clause 2.6 of the sub-lease as against the act of appointment of the Receiver/Manager under the debenture is quite different. Certainly by 8th May, 2001 when the Bank appointed the Receiver/Manager herein, Clause 2.6 was already in existence and had so been in existence and operational for many years. This Receiver/Manager, as I have also already found, was introduced to the Defendant Company at a very early stage after his appointment. The clear understanding then was that the defendant was the Lessor of Njewa Farm. Now since the Receiver/Manager was purporting to come in to fill in for Hartzco Limited for the remaining term of the sub-lease, he was definitely bound by the provisions of the sub-lease, including its Clause 2.6 now under discussion. On this basis therefore I find that the plaintiff did not have and does not have power to sub-let Njewa Farm to anybody else, without first obtaining the written consent of the Defendant. Thus, should it turn out to be true that the plaintiff has indeed sublet the farm herein to

Chitipi Farms Limited without first securing the requisite consent, I will have to find the defendant's complaint that the plaintiff has breached Clause 2.6 proved.

Let me here mention that as I go through this case I throughout bear in mind that the real culprit in this case, if I may use that expression, is Hartzco Limited. As I have earlier pointed out, it is that Company that on the one hand issued the debenture which has in due course of time led to the appointment of the present Receiver/Manager to safeguard the heavy financial interests of the Bank following the risk the desertion of the farm exposed these to. It is also this same Company that on the other hand entered into a Sub-lease containing the Clause 2.6 herein with the defendant in relation to the property in question. The present clash of interests between the parties to this case is thus a direct consequence of the irresponsible conduct of the directors of Hartzco Limited. In a way therefore, both the parties to this matter somehow appear to me to be victims of Hartzco Limited's machinations.

The situation I have now is that the defendant alleges that the plaintiff has without consent sub-let Njewa Farm to Chitipi Farms Limited while the plaintiff denies at all engaging in any such sub-letting. Exhibit "SEJ11" which the defendant relies on as evidence of the alleged sub-letting is, in my assessment, not as explicit as the defendant seems to interpret it. I am all too aware that it makes reference to "occupancy" by Chitipi Farms Limited, but I think I first need to assess whether "occupancy" in this case positively means that the farm has been sub-let as alleged by the defendant and that it does not mean anything else.

In this regard I bear in mind that over the period May - August, 2001 the parties have had more than one contact in relation to this farm. It appears to me that the manner in which the parties have interacted in the period, especially after discovering each other's interests in the farm, will have some influence on the manner in which the letter "SEJ11" is understood. I do apprehend that an attempt to interpret this

letter in isolation of the background whence it came might well prove idle and bring about absurd results.

I now think it will be unnecessary for me to repeat myself here, but it is clear that much as the defendant to a large extent adopted a mute attitude against the advances of the bank, of the bank's lawyers, and of the plaintiff as Receiver/Manager of Hartzco Limited, it can certainly be stated with some confidence that on the plaintiff's part the best efforts were exerted to explain to the defendant the meaning and purport of the plaintiff's involvement on Njewa Farm under the debenture and to allay the fears the defendant might as a result entertain regarding the balance of the sub-lease. Indeed in these contacts and correspondences it comes out quite clearly, especially through the exhibits (SF1-SF3) attached to the supplementary affidavit of Salim Faruqi, that much as the defendant remained throughout opposed to their presence on the farm, the defendant did acknowledge that the plaintiff was using Managers or Contractors to run the farm. Viewed from this background the letter "SEJ11" dated 24th August, 2001,

to me, does not appear to proclaim a sub lease in defiance of the Lessor's rights. Rather the letter appears to come in as a cry in anguish by the agents or servants of the plaintiff at the extremity of the hard line adopted by the defendant despite countless efforts on the part of the Plaintiff to demonstrate the sincerity of his mission and that of his agents on the farm. On account of this I find myself entertaining doubts whether on the available evidence it can be affirmatively concluded that the Plaintiff has sub-let this farm to Chitipi Farms Limited. In the result I do not see how I can hold that the Plaintiff, as alleged by the defendant, has breached Clause 2.6 through sub letting without consent and so I must dismiss this argument of the defendant.

As must be quite plain now the defendant has advanced many arguments under the present summons with a view to demonstrating that the injunction the plaintiff obtained qualifies for discharge. Actually underlying all the arguments and virtually operating as an undercurrent force to them all was the defendant's wide assertion that as a matter of fact the plaintiff fell short, in the ex-parte application he presented to court, to make out a case fit for the grant of an injunction order. In this regard in effect, without too pointedly saying so, the defendant was arguing that the Plaintiff did not quite deserve the interim injunctory relief he got. It is the defendant's allegation that the plaintiff's application did not meet the minimum criteria for the grant of injunctions. In this regard apart from contending that the plaintiff failed to show that he had a serious claim to the right he was seeking to protect, the defendant asserted that in this case the balance of convenience did not lie in favour of granting an injunction to the Plaintiff. The defendant claimed that an injunction being an equitable remedy the court needed to consider whether the relief sought by the plaintiff was not objectionable on equitable grounds. Basing on the many iniquities the defendant has attributed to the plaintiff in this case, as discused under the various heads

of suppression and breach above, the defendant held the view that the plaintiff's hands are badly soiled and that as a result he does not deserve to come to equity to seek a remedy.

Turning the argument around the plaintiff said that actually it is the defendant whose hands are unclean as he comes to court. Citing, among others, the aloofness the defendant displayed to all advances made to it by and on behalf of the plaintiff, and subsequent hurried and strong-handed manner of re-entry by the defendant, even contrary to the terms of its own notice, the plaintiff alleged that the faults of the defendant, in its way of handling this matter, are so compounded that the plaintiff cannot be blamed for resorting to the protection of a court order as he did. The sub-lease, per the plaintiff, is still valid and intact and his claim is that the

injunction was necessary for checking the defendant's unjustified deployment of guards on the farm. His prayer therefore is rather that the injunction should continue.

I must acknowledge that the argument raised by the Defendant Company at this point is quite forceful and fundamental. As I understand it in plain language the thrust of the

argument is that the injunction herein was granted on flimsy grounds. As such I think for me to effectively resolve the concern I must try and put myself in the shoes of the judge who handled the application. It is, I believe, by so re-examining the application as against the governing principles that I should be in a position to tell whether or not the order complained of was or was not granted in line with the minimum criteria governing this area of remedies.

It appears to me that in carrying out this exercise I cannot do any better than to revert to Order 29 of the Rules of Supreme Court and the rules under it since it constitutes the foundation for applications of this type. From rule 1 of that Order and the notes thereunder and also from the holding of Lord Diplock in the famous American Cyanamid Case (supra) the principles a court ought to follow when it is faced with this type of application are clearly and authoritatively laid out. To begin with a court ought to consider whether the applicant has shown that he has a good arguable claim to the right he seeks to protect and, in trying to decide this point, a court ought always to bear in mind that it should not attempt to decide the applicant's claim on the affidavits.

In this case through his ex-parte application the plaintiff indicated that he was lawfully on Njewa Farm by virtue of a legitimate appointment under a debenture and that he was doing his best to see to the recovery by the bank of its heavy investment on the farm while not jeopardizing the interests of the defendant as Lessor of the property. The application went further to project the image that while the plaintiff was trying to so conduct himself procedurally the defendant was however being rather heavy handed and unprocedural in its reaction to his work and that this was frustrating the plaintiff's debenture rights. To my mind the application ably raised serious questions concerning the struggle for superiority between his debenture rights and the defendant's leasehold rights and thus duly satisfied the first applicable principles.

I note that once an applicant passes through the first hurdles, it remains in the discretion of the court to decide whether to grant or to refuse the injunction sought, depending on the balance of convenience. As already observed earlier in this case both the parties to the matter are victims of the conduct of the directors of Hartzco Limited. In the absence of any judicial decision to the contrary, I take it that the Plaintiff and the Bank that appointed him have a right to pursue their debenture-based-right and that they should be entitled to pursue those rights legitimately. In like manner, I take it that since the Defendant Company has property rights over Njewa Farm by virtue of the sub lease, they too should be entitled to legitimately pursue the same. Now while avoiding trial of the

plaintiff's claim on affidavits, where the application projects, as it did in this case, that the plaintiff was being procedural and principled in the pursuit of his rights while the defendant was resorting to show of force without paying particular regard to relevant procedures in the pursuit of its property rights, I end up finding myself agreeing with Hon. Justice Twea's conclusions that the balance of convenience in this case lay in favour of granting the interim injunction as he did.

At the end of it all, the defendant having duly failed to raise convincing reasons for the

discharge of the interim injunction herein I direct that it remains in force pending the outcome of the action between the parties herein. I accordingly dismiss the defendant's summons to vacate injunction with costs.

Made in Chambers this day of 24th April, 2002 at Blantyre.

A.C. Chipeta

JUDGE