MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
COMMERCIAL CASE NUMBER 109 OF 2013

BETWEEN:

PREMIER LEAF LIMITED .....1ST PLAINTIFF
W.O. BAPU INVESTMENTS LIMITED.....2ND PLAINTIFF
W.O. BAPU (PRIVATE) LIMITED .....3RD PLAINTIFF
WALLI OMARJI BAPU (MALE) .....4TH PLAINTIFF
MRS. ROSE BAPU.....5TH PLAINTIFF
PRODUCE COMMODITIES EXPORTS
AND IMPORTS LIMITED .....6TH PLAINTIFF
-and-
FINCOM BANK OF MALAWI LIMITED.....1ST DEFENDANT
ODINGA HARA (MALE) .....2ND DEFENDANT

CORAM

HONOURABLE JUSTICE DR. M.C. MTAMBO
Nampota and Mpaka, Counsel for the plaintiffs
Goba, Counsel for the defendants
Kachimanga (Ms), Court Clerk

JUDGMENT

The plaintiffs are businesses owed by Mr. Walli Omarji Bapu, a seasoned commodity and real estate dealer, Mr. Bapu himself and his wife. The 1st defendant was a successor in title to the Fincom Bank of Malawi Limited which took over all assets and liabilities of the said Fincom Bank of Malawi Limited. The plaintiffs have taken out a Writ of Summons against the defendant seeking various declaratory orders and an order pursuant to two transactions for loan facilities between the parties. The defendant denies being liable to the plaintiffs as claimed or at all and also avers that the plaintiffs are not entitled to the declarations they seek.

Sometime in November 1995 the 6th plaintiff entered into an agreement with the 1st defendant to borrow various sums of money. Security documents in

the form of a debenture, assignment agreement, credit facility agreement and surety charges were executed by the 4th and 5th plaintiffs who were directors of Produce Commodities Exports and Imports Limited, the 6th plaintiff. The securities for the loans were title number Alimaunde 29/26-27 in Kanengo, Lilongwe which property belonged to W.O. Bapu Private Limited, the 3rd plaintiff and title number Mapanga 98 in the city of Blantyre which belonged to Mr. W.O. Bapu, the 4th plaintiff. The charges were to secure sums not exceeding USD 1,500,000. The surety charges were to operate as continuing security.

The loan agreement was called the Preferential Trade Area (PTA) Bank Export Finance Facility. Pursuant to the facility, the 1st defendant disbursed sums amounting to USD1, 500,000 in June 1996. The said sums were disbursed to Parkway Financial Services. The plaintiffs allege, which is denied by the defendants, that this was on the recommendation of the Bank, and more particularly Mrs. Mary Nkosi who was the Chief Executive Officer of the Bank at the material time.

It is claimed by the 6th plaintiff that it withdrew only K11, 345,507.98 from Parkway Financial Services, not the full loan provided. The 6th plaintiff alleges that nevertheless, the full USD1.5 million (MK22.4Million) loan was repaid in full.

The 6th plaintiff also applied for another tranche of USD1.3 million. It is the handling of the USD1.3 million that led to the main controversy herein. The 6th plaintiff alleges that the aforesaid USD1.3 million was not paid to it. The 1st defendant continued to exact interest on the sums until the 17th of June, 2000 when the USD1.3 million grew to USD1, 420,322.22. The 1st defendant proceeded to exercise its powers of sale under the two respective charges. It also appointed a Receiver Manager who took over the Mapanga property.

The plaintiffs ask this Court to determine the following issues:

1. Whether or not execution of the security documents was regular.
2. Whether or not there was full disbursement to the 6th plaintiff of the sums of USD1, 500,000 and USD1, 300,000.
3. Whether or not Parkway Financial Services was an entity registered as a Financial Services provider pursuant to section 3 of the Banking Act.
4. Whether or not the 1st defendant rendered a full account of the PTA facility from the time of its commencement to the end.
5. Whether or not the 1st defendant was in breach of fiduciary duty towards the 4th, 5th and 6th plaintiffs.
6. Whether or not it was the 6th plaintiff or the 1st defendant who occasioned the default herein.
7. Whether or not the appointment of the Receiver Manager was regular and lawful.

8. Whether or not the 1st defendant and the Receiver Manager were not negligent in the handling of the financial transactions herein and the property that was later seized.
9. Whether or not the receiver manager was an agent of the 1st defendant or the 6th plaintiff.
10. Whether or not the 1st defendant complied with provisions of section 24C of the Land Act in selling the Kanengo property.
11. Whether or not the purchasers of the Kanengo properties were agents of the 1st defendant
12. Whether or not the transfer of the Kanengo property to Mr. Badat was properly witnessed.
13. Whether or not the 1st defendant complied with section 68 of the Registered Land Act in respect of written notices when it was selling the Kanengo and Mapanga properties.
14. Whether or not the 1st defendant complied with the provisions of section 71 of the Registered Land Act in selling the Mapanga property.
15. Whether or not the sale of the Mapanga and Kanengo properties were done at a gross undervalue
16. Whether or not there were properties inside the warehouses in Mapanga and Kanengo.
17. Whether or not the financial transactions herein were unconscionable as to warrant reliefs under section 1 of the Loans Recovery Act.
18. Whether or not the plaintiffs are entitled to the damages as claimed in the statement of claim.

The 1st defendant argues that the plaintiffs' case is not supported by the law and evidence. It lists fifty issues for the Court's determination. Combining the issues presented by the parties, they total 59. This multiplicity and verbosity is unprecedented and has mostly led to the delay in the delivery of this judgment. The Court also takes some blame for not restricting the parties on the number of issues to present for determination. The unpalatable position we are in is probably because the matter was transferred to this Division from the General Division after languishing there for over ten years without any meaningful progress and due to its long delayed journey, I exempted the case from mediation. Mediation could have helped thrash out the issues. Anyway, that has been part of a learning process for all parties concerned including the Court. Some of the issues raised are merely argumentative, grossly unfounded and palpably uncalled for. As such, I will only address the issues which I find will be necessary for the resolution of the dispute. Some issues will be resolved by similar facts and findings.

The subject matter of this long and protracted action occurred over 13 years prior to the trial of the matter in 2015 and the 1st defendant blames the plaintiffs for inordinately delaying the prosecuting of the action with the result that prejudice has occurred to the defendants. The 2nd defendant, who is accused of negligence in the conduct of his duties as Receiver and Manager, was at the time of trial, permanently ill with total blindness and

could not read anymore. He could hardly remember anything. He was therefore excused from appearing in Court.

The 1st defendant asserts that the same is true with other key witnesses for them. Mr Jimmy Kayuni, who was at the material time the 1st defendant's Head of Credit Management, and key to knowledge of the issues involved in this matter, left its employ. Efforts to locate him have proved futile. Mr Billy Chiomba, who was at the material time the 1st defendant's Deputy Head of Credit Management, and also key to knowledge of the issues in this matter, had since passed away. And efforts to locate Mrs. Mary Nkosi, who was the 1st defendant's Chief Executive Officer, and bring her to testify, also proved futile. From my own knowledge of the availability of Mrs Nkosi, I wonder how far true this assertion is.

On 2 July, 2001, after two written demands on the plaintiffs to settle the indebtedness were made by the 1st defendant's lawyers, Lawson & Company to no avail, the 1st defendant appointed the 2nd defendant the Receiver and Manager of the relevant and assets of the 6th plaintiff.

An example of an unnecessary issue is the plaintiffs' unfounded allegation that the appointment of the Receiver Manager flouted provisions of clause 8 of the Debenture dated 11 July, 1996 in that the Receiver was appointed in writing but not under the seal of the 1st defendant and no notification of such appointment was communicated to the 6th plaintiff. It must be mentioned that at no time before the commencement of the action was the regularity of the appointment questioned by the plaintiffs. No evidence was given by the plaintiffs to show that the appointment of the Receiver was not under seal. No issue relating to the seal was mentioned in any of the testimony given on behalf of the plaintiffs. Even exhibit WOB22, a letter written by the plaintiffs' lawyers then objecting to the appointment of the Receiver, did not challenge the appointment on the ground that it was not done under seal. In fact, the letter specifically referred to the Notice appointing the Receiver dated 2nd July 2001. This clearly suggests that the plaintiffs had received the notice.

It is further alleged by the plaintiffs that they at all material times kept and stored separate properties, merchandise, tools and equipment and other goods in the warehouse situate in Mapanga belonging to the 4th plaintiff. These properties were not returned or accounted for to the plaintiffs. This is denied by the 1st defendant who asserts that there were no such property in the premises.

The plaintiffs' evidence was adduced by Mr. Walli Omarji Bapu, his wife Mrs Rosely Bapu, and his daughter-in-law Mrs Mary Bapu

I was the evidence of Mr. Walli Bapu that he was Managing Director of Premier Leaf Limited, Bapu Investment Limited, W.O. Bapu (Pvt) Limited, and Produce Commodities Exports and Imports Limited. At the time Produce

Commodities Limited was entering into the transaction the subject matter of this action, its Memorandum and Articles of Association did not empower it to borrow this money. This is the second unnecessary and unfounded claim as, in cross examination, the witness conceded that contrary to what he stated in paragraph 7 of his witness statement, Produce Commodities Limited had power to borrow money under its Articles of Association. This was after he was referred the company's Articles. Further, the witness conceded that under clause 20 of the Articles of Association of W.O. Bapu (Private) Limited, the company, in which he and his wife are directors, has the power to borrow. The witness also conceded that he and his wife executed the security documents as directors of the relevant companies. It is a well-known principle of law that in the case of a trading company, there is an implied power to borrow money. The security documents had a clause that the borrower company director warranted that the company procedures had been followed prior to entering into the contracts. An appreciation of the indoor management rule/ the rule in **Royal British Bank v Turquand** (1843-1860) All ER 435 as applied by this Court in **National Bank of Malawi v Dairyboard Malawi Limited** [2008] MLR (Com) 45 also point to the fact that this issue was unnecessary.

The witness conceded that he authored a letter (exhibit RD 2) which authorized the 1st defendant to draw the whole USD 1, 500, 000.00 and transfer the same to Parkway Financial Services Limited. There was no indication in his letter issuing the authorization of the fact that it was the 1st defendant who recommended that he should do so. In addition, the witness conceded having made draw downs on the facility from Parkway. He also conceded that if there was any remaining balance on the funds transferred to Parkway, then the said balance must have been with Parkway and not the 1st defendant.

With regard to the two sums of USD 260, 634.94 and USD 9, 036.78, the witness conceded that the said sums were meant to service interest on the loan, and not the principal amount or the whole loan as alleged in paragraphs 28 to 24 of his statement, and he further conceded that the whole principal amount was still outstanding even after payment of the two sums.

On the issue of accounts, the witness was referred to exhibit RD 35, containing a complete historic account of the facility from its inception. He conceded that the 1st defendant was responding to his request for an account showing historic movement of the loan from the beginning and that the accounts sent by the 1st defendant shown in exhibit RD 35 showed the requested historic movement.

The witness was then referred to exhibits RD 27 and RD 28 which show that the intention to sell the Mapanga property was by the plaintiffs themselves at that time was to service the loan payment on which they had defaulted and that the default was occasioned by the plaintiffs themselves and not the 1st defendant. Then the witness was referred to exhibit RD 39, a letter he

wrote to the 1st defendant undertaking and promising to pay back the loan because he was in default. However, the witness stated that the default was caused by the 1st defendant. When asked why he undertook to pay a loan the default on which was not his fault, he stated that it was an oversight. The witness then told the Court that even in the face of the 1st defendant offering to reduce the loan, he failed to pay the loan back by 31st October 2000, contrary to his promise and agreement with the 1st defendant.

It was conceded by the witness that the 1st defendant's power of sale arose because Produce Commodities Limited defaulted in paying the loan. He was then referred to WOB 22. He conceded that the letter from his lawyers dated 6th August 2001, raising various objections to enforcement of the loan by the 1st defendant, was written way after the plaintiffs had defaulted on the loan and way after the plaintiffs had made promises to pay the loan and failed to fulfill the promises. He conceded that the issue of the two sums of USD 260, 634.94 and USD 9, 036.78 raised in the letter had already been discussed before at length between himself and the 1st defendant prior to the said letter. Further, he conceded that his lawyers did not demand for properties and goods for any of the plaintiffs other than the 1st plaintiff with respect to the Mapanga property in the letter of 6th August 2001.

The witness admitted that he was aware that the defendants first tried to sell the Mapanga property by way of auction without success before finally selling it by way of private treaty to Mr. Henry Bidon Shaba.

When counsel for the defendants, Mr. Goba, referred the witness to exhibit WOB37, the witness conceded that the transfer document being referred to, contrary to his assertion, was prepared by P. Chikungwa who also presented it for registration and that the same was not prepared and presented for registration by Mr. Ralph Kasambara, who only witnessed it.

After being referred to exhibit RD 46 (b), the witness conceded that he received notice from the Commissioner for Lands, addressing issues related to further demands and that the said Commissioner for Lands gave him 21 days within which to pay back the loan. However, he failed to pay back the loan even within the 21 days given to him by the Ministry of Lands. Furthermore, he conceded that the Ministry gave a go-ahead to the sale of the Lilongwe property after he failed to pay back the loan in the given 21 day period.

He stated that Reserve Bank of Malawi's response in exhibit WOB 10, on whether Parkway was a registered financial institution, though given in 2013, covered the period between 1995 and 2000 and that the money was transferred to Parkway in 1996, a time within the period Parkway was a registered financial institution.

The evidence of Mrs. Roselyn Bapu was that in 1996, she was requested by her husband to sign a debenture dated 11 July, 1996, a credit facility agreement dated 11 July, 1996, and an assignment agreement dated 11 October, 1996. In

cross examination, she conceded that she did not show the Court any documentary evidence to prove that she was doing business on the sold properties personally and not as a company. She conceded being a director in the 1st plaintiff. She was aware that their lawyers demanded goods and items for the 1st plaintiff only and that the demand did not include goods and items at Mapanga property. She was aware that the said demand did not mention any of her alleged personal property. She was aware their lawyers were requested to provide proof of ownership for the demanded properties and that they failed to provide the requested proof.

It was Mrs. Mary Bapu's testimony that she had been working for Mr. Walli Bapu and his companies since May 1999 when she returned from the United Kingdom. Apart from her father-in-law, the companies that she worked for were: Premier Leaf Limited, W.O. Bapu (Pvt) Limited, Bapu Investments Limited, Produce Commodities Export & Import Limited, Ndolo Agencies Limited, and Wafa Export & Import Limited.

On or about the 2 July 2001, FINCOM put Produce Commodities Export & Import Limited into receivership and appointed Mr. Odinga Hara Receiver and Manager of the company. The appointment is dated the 2 July, 2001 and is marked exhibit RD42. There were various movable assets belonging to Rose Bapu, Produce Commodities, Bapu Investments Limited, Premier Leaf Limited, W.O. Bapu (Pvt) Limited and Mr. Walli Omaji Bapu himself on the date of appointment in the warehouse of Produce Commodities at Mapanga,

The witness claims that she took an inventory of all the assets in the warehouse in February /March 2001. She had checked prior to the appointment of the receiver that the assets were still there. The properties that were in Mapanga appear in a 2008 Inventory exhibited as WOB 23A to 23F. The properties belonged to all the plaintiffs in this action. She prepared these Inventories annually. In 2013, she prepared the 2013 Mapanga Inventory exhibited as WOB 24A to 24N. The 2013 Inventory was prepared after quotations were obtained from shops.

In cross examination, the witness stated that the inventory, though written in 2008, was prepared in 2001. However, the witness conceded that there was nothing in the exhibited inventory of 2008 that showed that the same was prepared in 2001. She also conceded that there was nothing in the exhibited inventory of 2013 which showed that the same was prepared in 2001. She conceded that the two inventories were prepared in 2008 and 2013. The year the exhibited inventory was made is seven years after 2001 when Mapanga property was sold, and that 2013, the year when the other inventory was prepared, is 12 years from 2001 when Mapanga was sold.

When asked about why the 2001 inventory alleged in paragraph 4 of her statement was not exhibited and shown to the Court, she said that it was the same only that the 2008 and 2013 copies show updated prices of the items as at those years. When asked whether she had recorded her 2001

inventory in her head or on paper, the witness told the Court that she recorded it on paper. And when asked whether she exhibited the said paper in Court, the witness conceded that she did not. She conceded not having shown the alleged 2001inventory she took in 2001.

The defence called one witness, one Richard Dimba. He was employed after the events the subject matter of this action had already occurred and as such, his evidence was not first-hand but gathered from the records of the company. For this reason, Mr. Nampota, learned counsel for the respondent, submits that the court should prefer the first-hand evidence of the plaintiff over that of the 1st defendant. He argues that Mrs Chioko could have been called to give evidence but the 1st defendant chose not to call her. Therefore, the Court should make the necessary negative inferences against the defence case. But this approach is a double edged sword in this matter. As is discussed elsewhere in this judgment, the plaintiffs also failed to call an important witness, Parkway Financial Services to support their contention that not all the loan amount disbursed to the 6th plaintiff was drawn from Parkway.

Mr. Dimba testified that in 1996 or thereabouts, the 6th plaintiff approached the 1st defendant for export finance in form of a Preferential Trade Area (PTA) Bank export finance facility. It was agreed by the parties that the facility would be secured and governed by conditions contained in the following documents: Surety Charge dated 22nd November 1995 over Title Number Alimaunde 29/26-7; Debenture dated 11th July 1996; Assignment dated 10th October 1996; Credit Facility Agreements dated 11th July 1996; and Surety Charge over Title Number Mapanga 98. In June 1996 or thereabouts, the 6th plaintiff requested for a sum of USD 1, 500, 000.00 under the facility and the same was approved and offered to the 6th plaintiff by the 1st defendant through a letter dated 28th June 1996. Part of the loan was to be used to settle a previous loan. By letter dated 26th June 1996, the 6th plaintiff expressly instructed the 1st defendant to draw the whole facility amount, after settlement of a previous loan with the 1st defendant, and place it with Parkway Financial Services Limited who would control the fund and monitor progress of purchases and exports. Parkway Financial Services Limited was owned by Mr. G.H. Kharodia of Kharodia, Petzold Mueller, who were auditors of the 6th plaintiff. By letter dated 11th July 1996, Mr. Kharodia confirmed the 6th plaintiff's request to transfer the facility amount as aforesaid. In the same vein thereafter, the 6th plaintiff proceeded to make draw downs on the facility from Parkway Financial Services Limited. By 28th January 1997, the 6th plaintiff had drawn down from Parkway Financial Services Limited the sum of MK 11, 345, 507.98

The PTA facility was due for payment on 4th December 1996 and as at that date the 6th plaintiff had defaulted. However, the facility was rolled over a further 90 days to expire on 4th March 1997. By 20th March 1997, the 6th plaintiff owed the 1st defendant the sum of USD 1, 287, 726.60 after the 1st defendant paid off the loan to PTA Bank on behalf of the defaulting 6th plaintiff.

In April 1997, the 6th plaintiff requested for a second amount under the facility in the sum of USD 1, 000, 000.00 to run for 180 days and the same was arranged for the 6th plaintiff by the 1st defendant to partially clear the debt of MK 19, 926, 281.40, on the understanding that the export proceeds of USD 635, 426.30 expected by the 6th plaintiff were to liquidate the remaining portion of the local debt.

On 3rd June 1997, the 6th plaintiff meet with the 1st defendant to discuss the USD 1, 000, 000.00 indebtedness. By 2nd September 1997, the local debt had been cleared in full. The PTA facility of USD 1, 000, 000.00 was reduced to USD 861, 587.35 by 23rd December 1997, and the said loan was again rolled over for a further period of 60 days. Eventually, the sum of USD 861, 587.35 was converted into a local debt on expiry after the 1st defendant again paid off the PTA Bank on behalf of the defaulting 6th plaintiff. The 6th plaintiff was at the same time arranging for another financing to clear its indebtedness.

A third PTA facility in the sum of USD 1, 300, 000.00 was arranged In March 1998 for the 6th plaintiff to expire on 6th September 1998 and the same was rolled over for a further 90 days. Prior to making arrangements for the USD 1, 300, 000.00 facility amount, the 6th plaintiff by telephone instruction, which were later confirmed in writing, requested that the sum of MK9, 287, 318.04 be placed on an interest earning short term deposit account where drawings would be made as and when requested. The 6th plaintiff subsequently failed to remit funds on the facility as expected by the 1st defendant. By letter dated 16th December 1998, after expiry of the PTA facility, the 1st defendant recalled the debt and the recalled amount was USD 1, 561, 710.26. By 27th January 1999, the PTA facility had been reduced to USD 1, 402, 517.97 and the 1st defendant engaged Messrs. Lawson & Co to recover the debt and the lawyers so did demand.

By letter dated 15th February 1999, the 6th plaintiff confirmed its intention to sell the Mapanga security property in order to settle the facility loan and the 2nd plaintiff instructed Trust Auctioneers and Estate Agents to sell the said property. By letter of 5th March 1999, the 2nd plaintiff further assigned the proceeds of the sale of the Mapanga property to the 1st defendant. By letter dated 15th February 1999, the 6th plaintiff requested for loan balances as at 30th September 1997 and 1998. The 1st defendant duly provided the same to the 6th plaintiff. Letters to that effect marked exhibit RD 29 were written to the 6th plaintiff by the 1st defendant. Upon the plaintiff's undertaking to liquidate the loan through sale of the Mapanga property, the 1st defendant instructed its lawyers to momentarily suspend legal proceedings as evidenced by their letter of 25th February 1999. The plaintiffs, however, failed to sell the Mapanga property due to non-availability of prospective buyers as the property market was depressed. This is evidenced in correspondence marked exhibit RD 31.

Through a meeting held on 3rd August 1999, the 6th plaintiff instructed the

1st defendant to debit the 1st plaintiff's FCD account and credit the 6th plaintiff's account with the sum of USD 260, 634.94. The same was confirmed through the 1st defendant's letter of 4th August 1999 and 6th plaintiff's letter of 17th August 1999. The 1st defendant proceeded to debit the 1st plaintiff's account by USD 236, 951.41 between August and September 1999. All debited funds as stated were credited to the 6th plaintiff's account as is evidenced in exhibit RD 33, an account statement.

Vide various letters, the 6th plaintiff demanded an account of the facility from its inception in 1996 which are exhibited as RD 34. By letter dated 13th October 2000, the 1st defendant provided the 6th plaintiff with a complete historical account of the facility. This can be seen in exhibit RD 35.

As at 13th July 2000, the 6th plaintiff owed the 1st defendant the sum of MK77, 072, 303.69 in local currency which included USD 1, 300, 000.00 principal of PTA facility, USD 120, 322.22 outstanding interest and MK25, 290.88 legal fees less USD 24, 893.86 on the 1st plaintiff's account. Thus, by letter dated 28th January 2000, the 1st defendant instructed its lawyers again to proceed to recover the debt and the said lawyers, by letter dated 12th April 2000, re-demanded payment of the debt from the 6th plaintiff.

As exhibit RD 38 shows, prior to selling of the properties, the 1st defendant sought the professional opinion of Messrs. Knight Frank regarding the values of the properties

Between August and October 2000, the 1st defendant again tried to give the 6th plaintiff a further chance to liquidate the loan, which the 1st defendant had offered to reduce, by 31st October 2000. But the 6th plaintiff failed to do so. This is evident in correspondence marked exhibit RD 39.

By letter of 1st November 2000, the 1st defendant gave the 6th plaintiff notice of foreclosure. The notice are reflected in exhibit RD 40.

After appointment of a Received to sell the charged properties by way of auction and having failed to do so, the security properties were subsequently sold by private treaty. The Lilongwe property was sold to Mr. Rahman and the Blantyre property was sold to Mr. Shaba. Due to court battles and administrative interference by the plaintiffs, formalities on the transfer of the Lilongwe property to Mr. Rahman excessively delayed. As a result, Mr. Rahman later decided to sell his interest in the land to another person.

Sometime in 2003, after the Lilongwe property had already been sold to Mr. Rahman by private treaty, the plaintiffs sought to purchase the same at MK3, 250, 000.00. However, their offer could not be accepted as the property had already been sold and they could not redeem it.

Further, when Mr. Rahman decided to sell the property to another person and the sale of the property was advertised in April 2006, none of the

plaintiffs expressed interest to buy the property. The argument that the 1st defendant in exercising the power of sale did not have regard to the interest of the 6th plaintiff was completely dispelled by the Commissioner of Lands. Exhibit RD 46 evidences this fact.

At all material time, there was no property on the secured properties in Lilongwe and Blantyre which belonged to the other plaintiffs. In addition, it was only the 1st plaintiff who, by letter dated 9th September 2002, demanded what it claimed to be its property. However, upon being requested to provide proof of ownership, the said 1st plaintiff failed to do so.

The clarity and lack of doubt regarding the indebtedness of the 6th plaintiff to the 1st defendant was already established and disposed of by the High Court, Hon. Justice Tembo in a Ruling dated 23rd July 2002.

The law governing this matter can be deciphered from the provisions of the various security documents, the Companies Act, the Registered Land Act, and the Land Act.

Clause 8 in the Debenture dated 11th July 1996 signed between the 6th plaintiff and the 1st defendant in relation to the appointment of Receiver provides:

> "At the request of the company or at any time after the moneys hereby secured have become payable hereunder, the Bank may after giving notice in writing to the company appoint by writing under the hand of any official mentioned in Condition 8(a) above or under the seal of the Bank a receiver of all or any part of the security assets at such remuneration as the Bank may think fit (and such remuneration may be fixed at the time of appointment or at any time subsequently and from time to time) and may in like manner from time to time remove the Receiver and appoint another in his stead".
>
> The Receiver shall be the agent of the company for all purposes and the company alone shall be responsible for his acts or defaults and for his remuneration costs charges and expenses to the exclusion of liability on the part of the Bank and shall have the following authorities and powers (in addition to or without limiting the general or other powers conferred upon him by law)...
>
> **PROVIDED ALWAYS** that the Receiver shall in the exercise of his powers authority and discretions conform to the directions and regulations from time to time given by the Bank and shall not be responsible nor shall the Bank be responsible for any loss occasioned as a result.

Section 69 of the Registered Land Act dealing with appointment, powers, remuneration and duties of receiver provides:

"(1) The appointment of a receiver under the powers conferred by section 68 shall be in writing signed by the chargee.
(2) ...
(3) A receiver appointed under this section shall be deemed to be the agent of the chargor for the purposes for which he is appointed; and the chargor shall be solely responsible for the receiver's acts and defaults unless the charge otherwise provides".

Section 98 (1) of the Companies Act on Receivers appointed out of court provides:

"(1) A receiver of any property or undertaking of a company appointed out of court under a power contained in any instrument shall, subject to section 99, be deemed in relation to such property to be an agent and officer of the company and not an agent of the persons by or on behalf of whom he is appointed, and he shall act in accordance with the instrument under which he is appointed and under any directions of the court made under this section".

A reading of these two provisions answers the question whether or not Mr. Odinga Hara was the agent of the chargor or charge. He was not the agent of the 1st defendant but the plaintiff.

However, learned counsel for the plaintiffs Mr. Nampota submits that these are not the governing provisions because instead of appointing a mere receiver, the 1st defendant appointed a Receiver and Manager. He relies on the case of **Ndinde Estates v CBM Farms** 11 MLR 69 which held that where a receiver appointed by a debenture is a receiver and Manager, he is an agent of the debenture holders for the entire management of the company. The directors and shareholders have become *functus officio*. In that case he is the agent of the debenture holder. On the other hand if the receiver is in mere receiver, his duties are to hold the properties of the company in order to collect the debt. He is therefore the agent of the company.

In the **Ndinde case**, the debenture provided in clause 5 that the receiver would be a receiver and manager. He was therefore deemed to be the agent of the debenture holders. The receiver manager was therefore charged with the responsibility to manage the overall portfolio of the company. The directors and shareholders were rendered *functus officio*. It was held that the Legal Practitioners appointed by the Receiver could therefore not act in the best interests of the Directors of the Company.

The plaintiffs submit that it is clear therefore from the foregoing that the receiver and manager herein Odinga Hara was an agent of the 1st defendant. The 1st defendant gave instructions to the receiver manager who refused to take any instructions from the plaintiffs.

With regard to the issue of notice, section 68 of the Registered Land Act on Chargee's Remedies provides:

"(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may—

(a) appoint a receiver of the income of the charged property; or (b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection".

However, application of this provision is negated by provisions under the Surety Charge dated 11th July 1996 over Title Number Mapanga 98 signed between 4th plaintiff, 6th plaintiff and 1st defendant. Clause 5 provides that the requirements of section 68 of the Registered Land Act:

"...requiring the giving of a notice and restricting exercise of the power of appointment of a receiver or to sell shall not apply to this Charge and the statutory powers conferred on charges by the said section 68 shall be exercised by the chargee with respect to the whole or any part of the charged property.

would not apply to the contract.

The security documents for the Lilongwe Alimaunde property, being the 1st defendant's standard document, had a similar provision.

The plaintiffs did not ask the Court to determine an issue relating to the question whether it is legal to negate the provisions of the Registered Land Act. I will therefore not delve into that issue. I will accept that the parties agreed to negate the application of the requirement of notice. Nevertheless, as appears elsewhere in the judgment, notices of foreclosure were given to the borrower plaintiffs.

There is contention whether the 2nd defendant was obliged to sell the charged properties by public auction as opposed to private treaty. Section 71 of Registered Land Act provides-

" (1)A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by installments, subject to such reserve price and

conditions of sale as the Registrar may approve, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby".

It was held in the Supreme Court of Appeal case of **New Building Society v Fremont Gondwe** Civil Appeal No.21 of 1994 (unreported) that that any contract dealing with the sale of charged property which does not comply with provisions of section 68 and 71 is bad for illegality and is unenforceable in a court of law.

Chatsika J.A stated as follows in the judgment-

"In the present case, when one considers the provisions of sections 68 and 71 it becomes abundantly clear that the object of the legislature which is manifested in the real intentions of the sections of the Act under review was for the protection of the public interest, namely, to ensure that those who deal with charged property do so with full regard of the rights of other persons owning that property. Having come to this conclusion it must follow, as a matter of course, that any contract dealing with the sale of charged property which does not comply with provisions of section 68 and 71 is bad for illegality and is an enforceable in a court of law".

The Judge went on to say that

"the chargee is required under this section (section 71(1) to sell the charged property by public auction and have any reserve price approved by the Land Registrar."

Learned counsel for the plaintiffs Mr. Nampota submits that he is mindful of the fact that the case of **New Building Society v Mumba** [2001-2007] MLR (Com) 243, 248/Mtambo SC, JA. held contrary views in 2006. The Court held that section 71 of the Registered Land Act that allows a chargee to sell either by private treaty or by public auction, or to concur with any person to sell by public auction only. He is not restricted to sell by public auction only. He distinguishes this case from that of **Fremont Gondwe** on the following grounds: the time the sale the subject matter of this action was taking place, the ruling case was the **Gondwe** one, not **Mumba's** which had not yet been decided; there was no dispute whatsoever as to whether the mortgage money was paid out by the New Building Society in the **Mumba case** while there is a dispute of how much was paid out to the 6th plaintiff in the instant case; in the **Mumba case**, the amounts payable were openly made available to the chargor by the charge whereas in the present case, nobody is aware of how much currently the 6th plaintiff owes to the 1st defendant; the property in the **Mumba case** was sold in good faith while the current properties at Mapanga and Kanengo were not sold in good faith. Further, Mr. Shaba who bought the property by private treaty was in fact a landlord to the lawyers for the 1st defendant. It is not surprising therefore that the sale was done at such gross under value because the 1st defendant lawyers had an interest in the sale to

Mr. Shaba. This was not the case in the **Mumba case**.

I should observe here that a lot of what learned counsel says are distinguishing features is evidenciary in nature and the plaintiffs needed to bring such evidence to the Court. For example, no evidence was adduced that Mr. Shaba was Mr. Kasambara's landlord. Of course, I am aware of that fact but I do not think that this is a matter that comes within the realm of judicial notice.

I am unable to agree with the submission that I should follow an over-ruled case. I cannot apply a case which was wrongly decided. Mr. Nampota's submission may have made sense if the case involved an act of parliament as opposed to a decision of a court.

Whether the 2nd defendant was obliged to furnish a statement of affairs after his appointment can be answered by Section 101 of the Companies Act. It provides -

> "(1) Where a receiver is appointed of the whole or substantially the whole of the undertaking of any company on behalf of the holders of any debentures secured by a floating charge, the provisions of sections 228 and 277 shall apply as regards the submission of a statement of affairs and of periodical accounts by the receiver as if the company had been ordered to be wound up under this Act and as if the receiver had been appointed liquidator.
>
> (2) If any person makes default in complying with the requirements of this section he shall be liable to a fine of ten Kwacha for every day during which the default continues".

I will address this issue in the examination of itemized issues below.

There have been arguments and submissions by the plaintiffs that the loan and security transactions and the conduct of the defendants is harsh and unconscionable contrary to the Loans Recovery Act and I should reopen them. Section 3 of the act provides:

> "(1) Where proceedings are taken in any court for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may reopen the transaction..."

The case at hand does not involve the recovery of money lent or the enforcement of an agreement or security. This is another issue that should not have been raised and wasted everybody's time.

Another point of contention is whether the defendants flouted the provisions of section 24C dealing with Restriction of sale of private land to persons who are not citizens of Malawi. It provides as follows:

> "(1) Without prejudice to the requirements of section 24A or any other provision of this Act, no person shall sell, whether by private transaction or by tender, auction or other means, any private land to a person who is not a citizen of Malawi, unless—
> (a) the intention to sell the private land has been published in a newspaper in daily circulation in Malawi not less than twenty-one days before the date of sale, specifying the price, location and size of the private land, any developments thereon and any other particulars sufficient to identify the land;
> (b) following the publication referred to in paragraph (a), no person who is a citizen of Malawi has made an offer, or has been able, to purchase the private land at a price that is not lower than the published price; and
> (c) the purchaser, if not a citizen of Malawi, has purchased the private land at a price that is not lower than the published price.
> (2) Notwithstanding any provision to the contrary in any other written law, no title to private land shall pass under any sale made or purportedly made in contravention of subsection (1), but registration of title upon such sale shall be prima facie evidence of validity of title to the land".

For the sake of completeness and mopping, I will address some important issues which can help in the complete disposition of this matter. They are the following:

Whether the 1st defendant was under a duty to make sure that the 5th plaintiff, as wife director, sought independent advice before executing the security documents

The relationship between the 1st defendant and the plaintiffs in the circumstances was not fiduciary in nature. On the facts and circumstances surrounding the transactions in issue, there was no 'inequality of bargaining power.' The person who obtained the loans in issue was Produce Commodities Limited, the 6th Plaintiff, a wealthy and reputable limited liability company. The sureties for the loan were W.O. Bapu (Private) Limited, the 3rd plaintiff, a fully-fledged company, and Mr. Walli Bapu, the 4th plaintiff. Between the 1st defendant and the three said persons, no evidence has been given by the plaintiff to prove that there was 'inequality of bargaining power.' The contracts in issue contained standard terms which were not unfair and they did not involve transfers of property for a consideration which was grossly inadequate. There was no undue influences

or pressures brought to bear by the 1st Defendant.

Most importantly, it should be noted that amongst the three persons involved in the loan transaction with the 1st defendant, *viz.,* Produce Commodities Limited, who actually borrowed the money, W.O. Bapu (Private) Limited and Mr. Walli Bapu, who acted as sureties, there is no Mrs. Roselyn Bapu the wife. In other words, Mrs. Roselyn Bapu the wife did not put up any property as security for the loan in the first place. On that score alone, there is no basis on which the 1st defendant should have asked her to seek independent advice before signing the security documents only in her capacity as director.

Of equal importance too in this regard is the fact that the value of the security pledged was not higher than the debt owed to the 1st defendant. Actually it was the other way round in that the debt owed was more than the value of the security given. See exhibits RD32 (c) and RD 38.

Accordingly, I find that, on the facts of the present case, the 1st defendant was not under a duty to make sure that the 5th plaintiff, as wife director, sought independent advice before executing the security documents.

Whether the 6th plaintiff effected draw-downs from Parkway Financial Services Limited that did not amount to USD 1, 500, 000.00 and whether as at 11th March 1998 the 6th plaintiff had repaid the sum of USD 1, 500, 000.00 in full

The 6th plaintiff effected draw-downs from Parkway Financial Services Limited that amounted to USD 1, 500, 000.00 and as at 11th March 1998 the 6th plaintiff had not repaid the sum of USD 1, 500, 000.00 in full.

As is rightly submitted by learned counsel for the defendants, Mr. Goba, the letter written by the 6th plaintiff exhibited in RD 2, authorizing the transfer of the whole facility to Parkway, is very specific. It states as follows in the second paragraph: "we would like to **draw** the whole facility amount ... and place it with Parkway..." It is very clear on the instruction in RD2 that the 6th plaintiff drew the whole facility amount. Instead of keeping it themselves, they chose Parkway to keep their whole drawdown. USD 1, 500, 000.00 at that time was K22, 839, 750.00. RD3 clearly shows the deductions that the bank made on that amount and why before disbursing the balance of K13, 468, 464.27 to Parkway as per the 6th plaintiff's wishes.

It cannot, therefore be said, on balance of probabilities that the 6th plaintiff did not draw down the whole amount from Parkway. In addition, the 6th plaintiff did not call any officer from Parkway to give evidence showing that not the whole amount was drawn down and why. It is the defendants' contention that failure to call such a crucial and material witness works against the 6th plaintiff. The court will assume that the only reason why such a witness was not called is that the evidence is adverse to the party who should have called him.

Whether the sum of USD 1, 300, 000.00 was again transferred to Parkway Financial Services Limited without the authority of the 6th plaintiff and whether this transfer to Parkway was the cause of the 6th plaintiff's indebtedness to the 1st defendant on that sum

The sum of USD 1, 300, 000.00 was never transferred to Parkway Financial Services Limited at all and as such, it cannot be the cause of the 6th plaintiff's indebtedness to the 1st defendant.

The plaintiffs allege, and they purported to testify, that the 1st defendant also transferred the loan sum of USD1, 300, 000.00 to Parkway without authority. Exhibit WOB19, 6th plaintiff's letter to the 1st defendant was sought to be relied on in that regard. However, contrary to what the plaintiffs allege, WOB19 is not inquiring about the transfer of the sum of USD1, 300, 000.00. It is requesting about the transfer of the sum of "approximately K13, 000, 000.00" to Parkway. Evidence has shown that the 6th plaintiff was in that letter requesting for an explanation on the transfer of the initial K13, 468, 464.27 (exhibit RD3) that the 6th plaintiff itself drew and authorized to be transferred to Parkway.

Whether the 6th plaintiff sought an account of all the funds the 1st defendant credited to Parkway Financial Services Limited from the date of the facility to the date the 1st defendant exercised foreclosure and whether the 1st defendant wrongfully failed to render a true and full account as requested

There was no time at which the 6th plaintiff sought an account of all the funds the 1st defendant credited to Parkway Financial Services Limited from the date of the facility to the date the 1st defendant exercised foreclosure and that there was never a time when the 1st defendant wrongfully failed to render a true and full account as requested. The evidence has clearly shown the type of accounts on the loan facility that the 6th plaintiff requested. There was nothing specifically related to "funds credited to Parkway." Mr. Richard Dimba actually took extensive time to explain that the 6th plaintiff requested for statements on the facility that showed historic movements from its inception. Further, evidence has shown that the 1st defendant provided the requested accounts to the 6th plaintiff. Further, evidence has also shown that after the requested accounts had been given to the 6th plaintiff, the said plaintiff never made any demand for further details or further accounts statements.

In addition, at all material times the 1st defendant communicated to the plaintiffs about every detailed step taken or anything required to be done on the loan facility with the ultimate result that the plaintiffs were at all material time aware of what was happening on the loan. Evidence to that effect is abundant: See exhibits RD1, RD10, RD12, RD13, RD14, RD 20, RD35, RD36 and RD39.

Whether the 1st defendant undertook to debit the 1st plaintiff's and 4th

plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9, 036.78 in order to satisfy the indebtedness of the 6th plaintiff on the facility

The 1st defendant did not undertake to debit the 1st plaintiff's and 4th plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9, 036.78 in order to satisfy the indebtedness of the 6th plaintiff on the facility. Evidence has shown, and the 4th plaintiff actually conceded in cross-examination, that the 1st defendant undertook to debit the 1st plaintiff's and 4th plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9, 036.78 in order to satisfy only the outstanding interest on the loan facility; and not the indebtedness of the 6th plaintiff on the loan facility. Evidence has also shown, and the 4th plaintiff actually conceded in cross-examination, that the payment of the two sums left the principal amount of the loan still outstanding. Actually, this fact was also found by the Court in Civil Cause Number 3538 of 2001, a matter between the parties herein on the same issues (exhibit RD49).

Whether the 1st defendant debited the 1st plaintiff's and 4th plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9, 036.78 but did not credit the account of the 6th plaintiff

The plaintiffs are alleging that the 1st defendant debited the 1st plaintiff's and 4th plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9, 036.78 but did not credit the account of the 6th plaintiff. As such, it should be noted that the onus of proving that allegation squarely rests on the plaintiffs. The 1st defendant does not dispute the fact that it debited the 1st plaintiff's and 4th plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9, 036.78 for purposes of settling the outstanding interest on the loan. So the issue of debiting the said accounts for that purpose is settled.

The contentious issue, however, is with respect to whether the said sums were credited to the 6th plaintiff's account in order to show that the interest had been settled on the 6th plaintiff's loan account. It is the 6th plaintiff who alleges that the same was not done and accordingly the onus of proving that fact banks on the 6th plaintiff. The evidence given by the plaintiffs has not shown any bank statements on their said account to prove that the two sums were not credited to the 6th plaintiff's account. All that the 6th plaintiff has done is to allege the fact, without giving any evidence in support, and try as much as possible to shift the burden of disproving the allegation to the 1st defendant, which should not be the case, by making inferences from documents filed by the 1st defendant.

The 1st defendant asserts that the two sums were credited as agreed. In that regard, the 1st defendant has tendered into Court exhibits RD32, RD33 and RD36 with regard to the two sums.

Accordingly I find that the 1st defendant debited the 1st plaintiff's and 4th plaintiff's FDC accounts with the sums of USD 260, 634.94 and USD 9,

036.78 and credited the account of the 6th plaintiff.

Whether the plaintiffs stored separate properties, goods, merchandise, tools and equipment and other goods in the warehouse at Mapanga 98 property

Evidence has shown that at the material time, the only demand made for property allegedly separate from the security properties was the one that was made by lawyers for the 1st plaintiff in exhibit RD47, only with regard to alleged separate properties for the 1st plaintiff on the Lilongwe premises. There was no demand for separate goods or items on Mapanga 98 in exhibit RD47 for any of the plaintiffs. Even so, the evidence has also shown that the lawyers for the 1st plaintiff were requested to provide proof of ownership for the demanded properties and they failed to provide the requested proof. The 4th plaintiff and the 3rd witness for the plaintiffs, Mary Bapu, were very adamant in cross-examination on this point even in the face of unyielding evidence to the contrary. However, the 5th plaintiff was very honest and conceded that she was aware of these issues.

It is not difficult to conclude that the evidence by the plaintiffs is fabricated. First, the plaintiffs failed to show the Court the original 2001 inventory on which the exhibited inventories are allegedly based. Mary Bapu conceded that the said original inventory was not shown. Most importantly, the plaintiffs did not indicate in their List of Documents that they used to have such a document and now they no longer have it. There is only one most probable inference from this picture: that the alleged original 2001 inventory does not exist and has never existed at all. The sad result of this fact is that the exhibited inventories of 2008 and 2013 were only made in those years way after the Mapanga property had been sold and therefore cannot, in all probability, be true inventories of the alleged properties or true inventories of the properties at Mapanga 98. Further, it is also a sad result of this fact that most likely Mary Bapu was not telling the truth when she said she personally contacted the Receiver in 2001 with an inventory made in that year, which has been shown not to be real.

The foregoing reality is further supported by inconsistencies in the two inventories. Mary Babu insisted that the inventories were the same and that the only difference was the values of the properties as updated in those years. However, a close examination of the inventories will quickly show that the only differences in them is not only the values but the content and quantity of the items too. The 2008 inventory shows that the 1st Plaintiff owned one Hessian to be returned. On the other hand the 2013 inventory shows that the 1st plaintiff owned 7175 Hessian to be returned. The 2008 inventory shows that the 2nd plaintiff owned 43.8 Mulanje Cedar, no 20mm Galvanised pipes, fifty 75" Galvanised Pipes, no Ladder used on H/V Transmission line and no 50mm galvanized pipes. On the other hand, the 2013 inventory shows that the 2nd plaintiff owned 200 Mulanje Cedar, seventy five 20mm Galvanised pipes, no 75" Galvanised Pipes, 1 Ladder used on H/V Transmission line and five 50mm galvanized pipes. The 2008 inventory shows that the 3rd plaintiff owned no 500 gallon farm boiler, no

150 farm boiler and no jiggery machine. On the other hand the 2013 inventory shows that the 3rd plaintiff owned one 500 gallon farm boiler, one 150 farm boiler and one jiggery machine. The 2008 inventory shows that the 4th plaintiff owned one 500 Gallon farm boiler and one 150 Gallon farm boiler. On the other hand the 2013 inventory shows that the 4th plaintiff owned none of the aforesaid properties. The 2008 inventory shows that the 5th plaintiff owned no Rice Grader. On the other hand the 2013 inventory shows that the 5th plaintiff owned one Rice Grader. Contrary to what Mary Bapu tried to tell the Court, the inventories are not one and the same and their differences do not only lie in their values of the property but also contain varied contents and quantities of the items.

Whether the 2nd defendant failed to comply with provisions of section 101 of the Companies Act in that he failed to furnish a statement of affairs and account of the company verified by a statutory declaration of the directors of the company

The 2nd defendant did not fail to comply with provisions of section 101 of the Companies Act because there was no need or requirement that he should furnish a statement of affairs and account of the company verified by a statutory declaration of the directors of the company. Section 101 of the Companies Act is very clear. It provides that where a receiver is appointed of the whole or substantially the whole of the undertaking of any company on behalf of the holders of any debentures secured by a floating charge, the provisions of sections 228 and 277 shall apply as regards the submission of a statement of affairs and of periodical accounts by the receiver as if the company had been ordered to be wound up under this Act and as if the receiver had been appointed liquidator.

On the facts of the present case the Receiver was not appointed of the whole or substantially the whole of the undertaking of a company. First, the Notice of Appoint of Receiver, exhibit RD42 [a], clearly states that the Receiver was appointed to enter upon and take possession of the Security Assets. The same is the case with the Notice filed with the Registrar on the appointment (RD42 [b]). The security assets in this case are clearly defined in the security documents filed with the Court and given in evidence by both parties. None of them defines security asset as the whole undertaking of the company or substantially the whole undertaking of the company. Actually, the Court painstakingly asked the parties during trial to show where the security documents gave the whole undertaking of the company as security and the search proved that there was no such provision in the security documents. As such, the requirements under section 101 do not apply to the present case.

Even had it been that section 101 applied, which was not the case, and the 2nd defendant failed to do so, the legal consequence for such a default was nothing more than a fine of ten Kwacha for every day during which the default continued. In addition, it would be the plaintiffs who would shoulder the responsibility and consequences of such default because the 2nd

defendant was for all purposes their agent.

Furthermore, as regards the giving of notice to foreclose generally, the 1st defendant gave such notices: exhibits RD24, RD25, RD26, RD32(a), RD32(g), RD32(i), RD37(b), RD39(d) and RD40. Counsel for the plaintiff attempted to suggest that the other corporate plaintiffs were not given notices. However, evidence clearly shows, and Mr. Richard Dimba was emphatic on this point, that notices were duly given to the 4th plaintiff, who was at all material time the managing director of all the corporate plaintiffs and who dealt with the 1st defendants on behalf of all the corporate plaintiffs. As such it is clear that in such circumstances all the relevant corporate plaintiff had relevant notices through the 4th plaintiff.

Whether at all material times up to the date of sale, the 3rd plaintiff carried business on the Lilongwe property.

There was no time at which the 3rd plaintiff carried business on the Lilongwe property. No evidence was adduced to support this claim.

Other issues and matters

Furthermore, it has been argued by the plaintiffs that the appointment of the Receiver Manager run contrary to provision of section 28(2) of the Consumer Protection Act as such appointment was not consistent with the instruments embodying the contract between the parties. The appointment was therefore illegal, null and void.

I do not appreciate how section 28 of the Consumer Protection Act comes to the aid of the plaintiff since the companies which borrowed the money cannot be termed a consumer. The lending was not procured for personal use or consumption. It was a borrowing in the course of business.

I find that the 1st defendant did not fail to furnish a detailed account of the facility. It as much as possible complied with the 6th plaintiff's request. There are some discrepancies which have been clarified by the 1st defendant as where the said sums were disbursed. Therefore, the statement as it stood was comprehensive. Consequently, the 1st defendant did maintain a detailed statement of the 6th plaintiff's facility.

It is my finding that the plaintiffs never stored separate properties, merchandise, tools and equipment and other goods in the warehouse at the Mapanga property. As the 1st defendant correctly argued, there was no demand for separate goods or items on Mapanga in the letter marked exhibit RD47 for the plaintiffs except Premier Leaf. The evidence has also shown that the plaintiffs failed to provide proof of ownership for the demanded properties. Mrs Mary Bapu, testified that the inventories, although dated 2008 and 2013, years after the Mapanga property had already been sold, were based on an original inventory which she prepared in 2001 before the property was sold. Tellingly, the original inventory list was not produced

before this Court. There are too many inconsistencies in the inventories which were produced before this Court. In addition, some of the items now being claimed are machines that, if they were on Mapanga property, would have been fixtures and part of the security premises.

As to the question of whether or not the 2nd defendant in exercise of his powers as Receiver and Manager took possession of all the property belonging to the plaintiffs particularized in paragraph 42 of the Statement of Claim I reiterate that the position was in substance, that of Receiver only and not manager. The Receiver never took possession of all the property belonging to the plaintiffs particularized in paragraph 42. Thus, although the form of appointment was Receiver and Manager, the Court cannot ignore the substance.

It is my finding that the 2nd defendant did not fail to comply with provisions of section 101 of the Companies Act because he was not in fact a Receiver and Manager. The Receiver was not appointed of the whole or substantially the whole of the undertaking of a company. The letter marked exhibit RD42 [a]) clearly states that the Receiver was appointed to enter upon and take possession of the Security Assets. The same is the case with the Notice filed with the Registrar on the appointment. The receiver had defined instructions limited to a specific act. Thus, there was no need or requirement that he should furnish a statement of affairs and account of the company verified by a statutory declaration of the directors of the company.

The defendants contend that were not told jointly and severally and they never knew of any properties in the warehouse that belonged to the plaintiffs and was not the property of the 6th Plaintiff. The plaintiffs allege that by seizing such properties aforesaid the defendants thereby expressly and by implication undertook to take due and proper care of the various property and goods of the plaintiffs whilst under their charge and control and to redeliver the said goods and property to all the five plaintiffs. This issue does not arise at all. The defendants cannot have seized properties that never existed in the first place and which were not demanded by the plaintiffs upon production of proof of ownership.

I have already found that the plaintiffs did not leave any of their separate goods in the Mapanga property on the appointment of the Receiver and Manager. It can therefore be concluded that the 2nd defendant did not act contrary to clause 9 (g) of the debenture as alleged. The plaintiffs have not suffered loss and damage in the form of loss of value of the goods and property and damages for loss of use of the said goods as particularized in paragraph 42 and 45of the Statement of Claim.

The issue of whether or not by letter dated 7th May 2003 the 1st defendant's legal practitioners rejected the offer of Mrs Mary Bapu to purchase the Lilongwe property, Title Number Alimaunde 29/26-27, and proceeded to sale the said property to Badat Ibrahim Mohamed, is totally misconceived. By their letter of 21st January 2003 (exhibit RD45[a]), the 4th plaintiff's

daughter-in law communicated her offer to buy the Lilongwe property. However, the offer could not be accepted because, at that time, the property had already been sold to Mr. Rahman and the equity of redemption had been extinguished (exhibit RD 45 [b]). By virtue of section 31(2) of the Registered Land Act, Mr. Rahman, who had paid the purchase price, had become the owner of the property at the time the plaintiffs sought to buy the property and their offer was rejected. Details of the sale to Mr. Rahman are exhibited under RD43 (c), (d) and (e). The sale to Mr. Badat was made by Mr. Rahman and not the defendants. Details of this process are clearly shown in exhibit RD44. The Court accepts the 1st defendant's explanation that the transfer documents of the sale of the property by Mr. Rahman to Mr. Badat appeared as if it was the 1st defendant transferring to Mr. Badat only because registration formalities of the transfer between the 1st defendant and Mr. Rahman had not been completed.

The Lilongwe property was not sold at a gross under value. Before selling, the defendants sought professional advice from Knight Frank, who valued the property at around K7.5 million (exhibit RD38). The defendants tried to sell the property at that suggested price by way of public auction with no success. Ultimately, the property was sold by private treaty. The plaintiffs should have called a witness to support their argument that the property was sold at a gross undervalue and not rely on conjecture. They never did, being content to ask the Court to make inferences from stated facts. I refuse to make such inferences.

It is clear to me that the advert in the local media dated 1st April 2006, inviting citizens of Malawi to buy the Lilongwe property pursuant to section 24C of the Land Act was not an action of the 1st defendant. Actually, the 4th plaintiff conceded in cross-examination that it was not the 1st defendant who put up the advert. On the contrary, Messrs P. Chikungwa put up the advert of the sale. Mr. Rahman had already bought the land and it was actually Mr. Rahman who wanted to sell it to Mr. Badat, a non-Malawian citizen. The daughter of the 4th plaintiff, and none of the plaintiffs, responded to the advert to express interest in purchasing the land at that time.

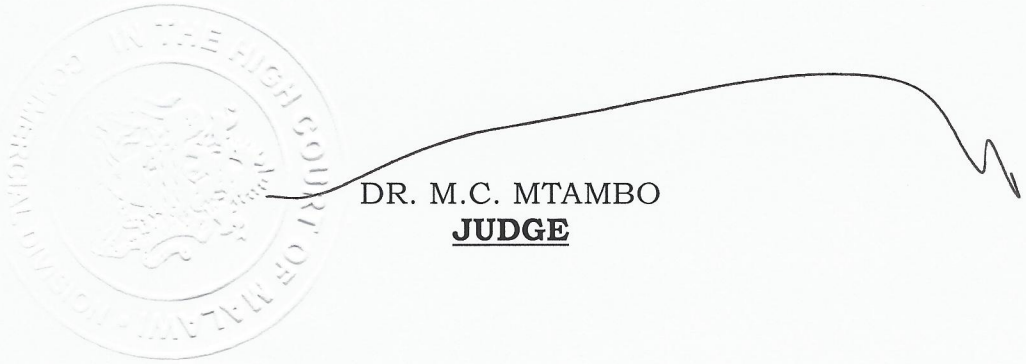
With respect to the plaintiffs' contention that the transfer document of the Lilongwe property is null and void because it was not independently witnessed as Mr. Ralph Kasambara, who witnessed it, was acting for both the 1st defendant and the purchaser, the plaintiffs did not bring any evidence to prove that Mr. Ralph Kasambara was acting for Mr. Badat, the purchaser of the property in the relevant transfer document marked exhibit WOB37. The sale to Mr. Badat was in fact a sale from Mr. Rahman to Mr. Badat, and not from the 1st defendant to Mr. Badat. Mr. Kasambara represented neither Mr. Badat nor Mr. Rahman, the actual parties to the transaction. In addition, the tranfer document itself does not show that it was Mr. Kasambara who prepared it and presented it for registration.

Conclusion

In the circumstances, the plaintiffs have failed to prove their case on a balance of probabilities. The plaintiffs would have done well in the presentation of their case if they had called an auditor to deal with the financial claims and not just depend on the word of witnesses and submissions by counsel which have in many cases been shown to be inaccurate and untrue.

The defendants have succeeded to defend themselves on all the plaintiffs' claims and would be entitled to costs under the principle costs follow the event. However, although it was asserted that bank records are destroyed after 7 years, the evidence has shown that the 1st defendant was not very much up to date in keeping its records which could have gone a long way to satisfy the plaintiffs' belated queries. For this reason, I order that each party pays their own costs.

Pronounced at Blantyre this 13th day of March, 2018.



DR. M.C. MTAMBO
JUDGE