IN THE FIJI COURT OF APPEAL
Civil Appeal No. 54 of 1986.

Between: BANK OF NEW ZEALAND Appellant

- and -

ANIL KUMAR & ANOR. Respondents

B.C. Patel for the Appellant
Dr. M. S. Sahu Khan for the Respondents.

Date of Hearing : 13th November, 1986

Delivery of Judgment: 14th November, 1986

JUDGMENT OF THE COURT

Speight, V.P.

This is an appeal against the decision of Kearsley J. wherein he refused to discharge an ex parte interlocutory injunction granted by Dyke J. whereby the appellant bank had been restrained from exercising its power of sale under a mortgage granted to it by the respondents.

The original application by Respondents (as Plaintiffs) was made ex parte on 7th July, 1986 to a Judge in Chambers - there was urgency, in that a mortgagee's sale by tender had been advertised, to close on 15th July.

The Statement of Claim set out that in June 1985 the Respondents had executed an "on demand" mortgage over their shop property securing the sum of $20,000. From the supporting affidavit, and from a reply affidavit subsequently filed in support of an application to dissolve the interim injunction, it appears that each party alleges that there were other matters involved apart from the simple "on demand" contract.

Respondents allege that there was a collateral agreement, possibly even in writing, the effect of which was that the Bank would treat the mortgage as an instalment mortgage which could be kept on foot by monthly payments of $310. The Bank denied this, but has said that in any event such instalments had not been kept up to date, and additionally the Respondents were also in default in not producing a guarantee from a third party which had been a condition of the agreement to lend. It was also alleged that in breach of a clause in the mortgage, there had been a second mortgage obtained from another bank without the appellant's consent. Respondents deny these claims.

An interim injunction was granted ex parte by Dyke J. on 8th July, 1986 restraining the sale "until further order of the Court." Complaint has been made that this is not in accordance with usual practice, which is to make an ex parte order for a limited period only, leaving it to a plaintiff to apply further. However that may be, no

difficulty can arise, for the restrained party has a simple procedure available to apply to the Court for dissolution and that is what the Bank did.

This came before Kearsley J. sitting at Lautoka, by way of a Chambers application upon grounds set out in an affidavit of the manager of the local branch of the Bank. Apart from some general averments as to the Bank's general policy on repayment instalment requirements the specific matters advanced in support of the application were set out in para. 7:-

> "7. The Plaintiffs in their statement of claim and by the Affidavit in Support of injunction tried to show victimization at the hands of the Defendant Bank without full disclosure of facts, in that:-
>
> (a) They do not disclose the fact of the execution of the second mortgage as mentioned in paragraph 19(b) of the Statement of Defence. The Defendant is pressurized to have same registered.
>
> (b) they do not disclose the fact of non-execution of a guarantee by the Second Plaintiff's father, one Ram Dulare. The Bank's Diary note is annexed hereto and marked "A". Such a guarantee was a part of the loan transaction.
>
> (c) They do not disclose the fact of not reducing in reality their debt by monthly payment of $310.00 as alleged. The fact of such payments are contained in paragraph 19(a) of the Statement of Defence. The Bank's statement is annexed hereto and marked "B".

The case on appeal includes, in some detail, a record of counsels' submissions to Kearsley J. based on these papers.

In particular it is clear that the sole argument advanced was that there had been material non-disclosure at the ex parte stage - see Rules of the Supreme Court, Order 29/1/18. After some contest from counsel for Respondents, counsel for the Bank specifically abandoned the claim that there had been non-disclosure in respect of late payments of monthly instalments - leaving only the question of alleged failure to advise Dyke J. of non-consent to the second mortgage and non-execution of collateral guarantee.

Kearsley J. delivered a written judgment in which he dismissed the application. He confined himself to the non-disclosure complaint made on behalf of the Bank.

In respect of the second mortgage he pointed out that the Respondents had deposed that consent had been given and that it might well be proved that that was so. However even if it was not he said it was clear that the Respondents claimed that they believed it was so, and accordingly they could not be held to have concealed this - the obligation is to disclose material matters one knows of - hence there was no clear proof of non-disclosure of this item. Similarly with the absence of guarantee. The alleged promise of a guarantee antedated the execution of the mortgage document, yet reference to it was not incorporated at execution. Accordingly there was valid grounds for doubting that it was an agreed condition and if so, duty to disclose did not arise. In any event Respondents claim that any delay in

supplying a guarantee only related to the particular form which is to be signed and so this can scarcely be material. The learned Judge, despite counsel's abandonment also considered the late payment of instalments, and doubted whether they were indeed late. Obviously even without counsel's concession he was unmoved by that complaint.

Now in this Court Mr. Patel, who was not originally acting as counsel, mounted a very attractive argument to the effect that the Judge had not approached the matter on orthodox American Cyanimid lines. That he did not place on the original Plaintiffs the task:-

(a) of showing that there was a serious question to be tried.

(b) of considering the adequacy of damages should the Bank be in the wrong.

(c) of then and only then moving to questions of balance of convenience.

He made appropriate references to leading authorities, including those that caution against too readily interfering with clear rights on the basis of specious affidavits.

All this was well done, but in our view it overlooked the special feature of this case which was emphasised by

Dr. Sahu Khan on behalf of Respondents, namely that this was an appeal against the refusal by Kearsley J. to dissolve the ex parte injunction on the sole grounds of non-disclosure. It was not an appeal against the original injunction granted by Dyke J.

Therefore the Appellant is tied to the matters canvassed before Kearsley J. namely:-

(a) The Bank manager's affidavit in support.

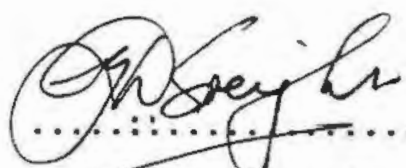
(b) Counsels' submission.

(c) The grounds considered and ruled on by the Judge.

It may be that there was and is a serious question to be tried on the question of the true construction of the various exchanges between the parties, and on a document alleged to be in existence which we have not seen. It might also be the case that balance of convenience would favour keeping this business on foot pending litigation. These are however mere speculation, and Kearsley J. may have justifiably assumed that the Bank did not wish at that stage to contest these points. The matter stands for determination as an appeal against

the decision on the grounds argued before the learned Judge, and in our view the conclusions reached by him on those points were correct.

Appeal dismissed with costs.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Vice-President

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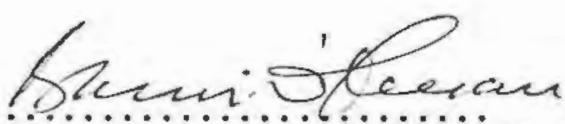
Judge of Appeal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Judge of Appeal