

IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0045 OF 1996S
(High Court Civil Action No.HBC214 of 1996/L)

BETWEEN:

WESTPAC BANKING CORPORATION

Appellant

AND:

FIJI FOREST SAWMILLING LIMITED

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Mr Justice R. Savage, Justice of Appeal

Counsel:

Mr C.B. Young for the Appellant
Mr A. Singh for the Respondent

Hearing:

Wednesday 26 August 1998

Date of Judgment:

Wednesday 23 September 1998

JUDGMENT OF THE COURT

This appeal concerns payment of the proceeds of a fire insurance policy issued by the New India Assurance Company Limited over a hotel owned by the respondent (the Company) at Sigatoka which was destroyed in a fire. It had been mortgaged to the appellant (the Bank) to secure repayment on demand of advances and other bank accommodation, and the policy had been endorsed to provide that loss (if any) was payable to the Bank as mortgagee, whose receipt should be a sufficient discharge. The Bank sold the property in exercise of its power of sale under the mortgage on 29 November 1994, receiving sufficient to repay the amount then owing with a surplus of \$13,143.91 which it held on term deposit. Following litigation between the Insurer and the Company the latter's claim under the fire policy was settled at \$125,000 and an

order was made by consent on 12 June 1996 that this sum be paid to its solicitors "upon release of the assignment" of the policy by the Bank. (It may be arguable whether the simple endorsement on the policy to pay any loss to the Bank constituted an effective assignment, but nothing was made of the point in this Court, and in the event nothing would seem to turn on it.)

The Company had issued a summons against the Bank on 18 January 1996 seeking an order that it forthwith discharge and release the assignment of the policy upon the ground that its debts had been fully satisfied. Subsequently two applications were made by parties claiming against the Company asking for addition or joinder of themselves and others to the summons, and seeking an order that the money payable by the Bank be paid into Court to prevent its dissipation pending resolution of their claims. On 30 August 1996 *Sadal J*, made rulings on those two applications which are not relevant to this appeal. He also ruled that as the Bank had been fully paid it should discharge the policy, and made orders that it discharge and release the assignment thereof; and that one-sixth of its proceeds (less costs and expenses) be paid into Court. He also ordered that one-sixth of the abovementioned surplus of \$13,143.91 be paid into Court, and that the balance be paid to the Company. On 5th September His Lordship amended the order by adding a statement that the assignment of the policy "is hereby deemed to be discharged". This was done on the Company's application following the Bank's unsuccessful application for a stay pending appeal.

The Bank appeals against the orders made against it on 30 August 1996 and against the making of the amendment of 5 September 1996. As to the orders, the grounds may be summarised as:-

- (1) Error by the Judge in making them, when the only matters before him were applications for joinder by other parties, without the Company's summons against the Bank being heard;
- (2) A denial of natural justice in failing to give the Bank an opportunity to be heard on that summons; and
- (3) Error in concluding that the Company had paid all monies owing to the Bank when it was still liable contractually under its covenant in the mortgage to pay the Bank's costs in defending another action brought against it by the Company relating to the mortgage. (This is essentially the same as the fourth ground).

In respect of the amendment made to the order on 5 September 1996 a number of procedural failures were alleged as grounds of appeal, together with error of law in making it when there was no apparent mistake or omission on the face of the order.

The grounds of appeal that the Bank was not properly heard before the challenged orders were made and that there had been a denial of natural justice can be dealt with together. Mr Young relied on the notes made by His Lordship at the hearing on 7 August 1996 in which Mr Cowey appeared for the Bank and Mr Singh for the Company. They are abbreviated but contain an entry that Mr Singh submitted that the Bank had no interest in the policy, so it should be discharged. Mr. Cowie is reported as saying he had nothing to add. Mr Young also pointed to the decision of 30 August following these submissions, which opened with His Lordship's statement that there were two applications before the Court, and he mentioned the two requests for joinder

of additional parties. But he went on to discuss the fire policy which was the subject of the dispute between the Company and the Bank in the summons before him, as noted above ruling that the Bank had been fully paid and must discharge it. He then made the orders for payment of its proceeds and of the surplus from the mortgagee's sale, as indicated above.

Mr Cowey made an affidavit in support of the application for a stay of these orders in which he deposed that there were three applications for hearing, the first being the summons seeking a discharge of the policy, but that only the two relating to joinder of parties were dealt with; and that the Company did not address the Court on the summons; and that he was not given the opportunity to reply. However, in his ruling of 5 September refusing a stay His Lordship strongly refuted this assertion, stating that Mr Singh made a lengthy submission giving reasons why the assignment should be discharged and that Mr Cowey said he had nothing to add. This accords with His Lordship's notes referred to above.

In these circumstances, and without more specific evidence supporting Mr Cowey's version of what took place at the hearing, we cannot go behind His Lordship's clear account, and the first two grounds of appeal cannot succeed. It may be that there was a misunderstanding of the situation by Mr Cowey, but the judge plainly thought the position was clear and that the summons for discharge was before him as well as the two for joinder. We consider nothing would be gained by speculating upon this. The fundamental issue raised in this case is that postulated in the third ground of appeal set out earlier, and that has been fully canvassed in this court. In these circumstances, and in the light of the way we determine the matter, as appears later in this judgment, we do not think that any more need be said in respect of the first two grounds of appeal.

The appeal over the orders made centred on the Bank's claim to be entitled to retain the surplus from the sale of the mortgaged property and the proceeds of the fire policy and to apply them in payment of its legal costs, both existing and future, in defending the Company's action against it. That action was commenced in the High Court on 5 September 1994, alleging misconduct by the Bank over the sale and its failure to render proper accounts. The Company rightly conceded that it remains liable under the personal covenants in the mortgage, which has not been discharged.

The Bank relies on Cl.23 of the Mortgage in its standard form reading as follows:

"23(a) That the Bank shall be at liberty from time to time without further authority than these presents to debit and charge the account of the Debtor or the account of the Mortgagor with all costs charges and expenses hereinafter mentioned and the same shall be covered by this security and shall be portion of the moneys hereby secured and the Mortgagor will indemnify the Bank against the same.

(b) That the expression "costs charges and expenses" shall for the purposes of this covenant include all costs charges expenses and payments legal or otherwise which the Bank or any attorney of the Mortgagor herein appointed may incur sustain make be put to pay or be liable to pay in connection with -

Here are set out 8 sub-clauses of which the relevant one relied on by Mr Young is as follows:

(vii) the exercise or attempted exercise of any right power authority or remedy conferred on the Bank or any attorney of the Mortgagor under or by virtue of this security or by statute;

and in relation to any actions or proceedings arising out of or concerned with any of the above matters or any other matter connected with this security and whether or not the Debtor or the Mortgagor are parties thereto shall include not only all legal costs charges disbursements and expenses incurred by the Bank against which the Mortgagor or the Debtor may by any order of any court be liable to indemnify the Bank but also notwithstanding any such order or any order of any court under which the Bank will not otherwise be entitled to recover the same all legal costs charges disbursements and expenses which the Bank has paid or may pay to its solicitors or to any other person including the Debtor and the Mortgagor and in the case of payments to the Bank's solicitors on a solicitor and own client basis."

The possibility that this clause might constitute a clog on the equity of redemption was not advanced by counsel, and so does not arise for our consideration. It enables the Bank to debit the mortgagor with costs charges and expenses of an unspecified amount over an indefinite period. In an affidavit opposing the Company's summons the Bank's Legal Manager deposed that the costs it might incur in the Company's action against it could amount to \$37,000 if the matter went as far as the Supreme Court, excluding V.A.T. and disbursements. The Bank's contention that it was entitled to retain all the policy proceeds and the surplus on the sale, totalling \$138,000, to cover these contingencies appears to be quite unreasonable, particularly when contrasted with the mortgagor's right to redeem the mortgaged property on payment of all moneys due and owing under the mortgage "at the time of payment" (S.72 of the Property Law Act (Cap.130)). However, the mortgagor's personal covenant to meet these additional payments must be recognised as continuing until final discharge of the mortgage. It can be sued for them, but the immediate question is whether the Bank has the right to retain and apply the moneys in dispute towards their satisfaction.

With regard to the sale surplus of \$13,143.91, S.81 of the Property Law Act deals with the application of the purchase money following a mortgagee's sale:

“81. The purchase money arising from the sale by the mortgagee of any mortgaged property shall be applied as follows:-

- (a) first, in payment of the expenses of and incidental to the sale and consequent on the default;*
- (b) secondly, in payment of the moneys which are due or owing under the mortgage;*
- (c) thirdly, in payment of subsequent mortgages or encumbrances, if any, in the order of their respective priorities; and*
- (d) fourthly, the surplus, if any, shall be paid to the mortgagor.*

We are satisfied that the words “due and owing” in sub-clause (b) mean “presently due and owing”, a view supported by the absence of any reference to future liabilities, by contrast with clause 6 of the schedule relating to the application of insurance proceeds discussed below. Such a meaning is also consistent with the provision for redemption in S.72(1) - viz: “due and owing at the time of payment”, and it is difficult to see how the satisfaction of subsequent mortgagees could be realistically achieved under S.7(c) on a wider interpretation of those words. Accordingly the surplus should have been paid to the Company pursuant to S.7(d). Unless a claim under Cl.23 had accrued due at the commencement of proceedings to recover this surplus, the Bank cannot rely on a defence of set-off (Richards v. James (1848) 2 Ex 471, cited under O18 r.7 of the Supreme Court Practice), while in 42 Halsbury’s Laws of England (4th Edn) at para.451 there is the statement that a bank is not justified in setting off against its customer’s balance a debt from the customer before it has actually fallen due, citing Rogerson v. Ladbroke (1822) 1 Bing 93. Similar considerations would apply to the insurance proceeds.

The Bank is not seeking to rely on a defence of set-off to the Company's claims for these moneys. As noted above it maintains that it is entitled to hold on to all of them until the mortgagor's contingent liabilities have been satisfied. In the light of S.81(d) of the Property Law Act cited above, this contention is untenable with regard to the surplus on sale, which must go to the Company.

In respect of the proceeds of the fire policy received by the Bank, Mr Young relied on Clause 6 of the Schedule of covenants and conditions implied in mortgages by S.68 of the Property Law Act:

“(6) That in the event of the said buildings and erections or any of them being destroyed or damaged by fire, all moneys received by the mortgagee under any insurance in respect of any such destruction or damage shall be applied, at his sole option, either in or towards rebuilding or repairing the buildings and erections so destroyed or damaged, or in or towards payment of the principal, interest and other moneys for the time being covered by the security, notwithstanding that the same or any of them may not have accrued due under the terms of the mortgage:

Provided that, if the mortgagee applies the said moneys in or towards payment of the principal and other moneys as aforesaid, the mortgagor shall have the right to pay off the whole amount remaining due under the mortgage at any time within two months after the application of the said moneys has been made.”

The Bank clearly could not exercise its option to reinstate as the property had been sold. Nor can it apply the moneys received towards payment of principal and interest because there was nothing owing under these headings after the sale. The only object towards which they could be applied was “other moneys for the time being covered by the security, notwithstanding that the same or any of them may not have accrued due under the terms of the mortgage”. This would

be wide enough to cover the liabilities specified in Clause 23 of the Mortgage, but the moneys in payment of which the proceeds may be applied are qualified in Clause 6 by the words "covered by the security". "Security" must mean something different from "mortgage" which is used elsewhere in the clause, clearly as a reference to the mortgage contract itself. As *Isaacs J.* pointed out in *Royal Insurance Co Ltd v. Mylius* [1926] 38 CLR 487 at p.489, when mortgagees insure tangible securities against the risk of fire, they insure not their debt but their security, and not as mere creditors but as holders of the security. The emphasis is on the property as tangible security for the debt, and we think that the word is used in this sense in Clause 6, so that "moneys for the time being covered by the security" mean moneys in respect of which the mortgaged property is for the time being charged. But since that property has been sold, there is no money "covered by the security", and therefore nothing under Clause 6 towards which the Bank could apply the proceeds. All it has left covering the mortgagor's obligations under Clause 23 of the mortgage is the latter's personal covenant, in respect of which it can sue for debt when the stated contingencies happen and the amount has been ascertained.

For these reasons we think *Sadal J's*, orders regarding payment of the money should stand.

As to the amendment made by him on 5 September 1996, deeming the assignment to be discharged, we expressed the view at the hearing that it was an unusual way of dealing with the release and discharge which he had ordered the Bank to effect on 30 August 1996. The whole question of discharging the assignment of the policy (if there ever was an assignment) is academic. The policy was spent when the Bank received the proceeds in accordance with its terms, and the only question remaining is whether it is entitled to retain them. Instead of

confining its summons to orders for discharge and release of the assignment, the Company should have sought recovery of both the surplus on sale and the policy proceeds from the Bank.

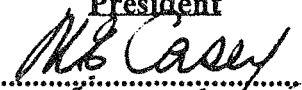
In view of our conclusion that the Company is entitled to these moneys, it would be prolonging the litigation needlessly to require fresh proceedings to be issued. The essential matters have been adressed in argument in this Court and we are satisfied that the appropriate course is to dismiss the appeal, thereby permitting the High Court orders regarding payment to stand. Counsel informed us that the Bank has paid the moneys in accordance with them.

Decision

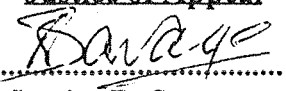
The appeal is dismissed with costs of \$1,500 to the respondent inclusive of disbursements.



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Sir Moti Tikaram
President



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Sir Maurice Casey
Justice of Appeal



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Justice R. Savage
Justice of Appeal

Solicitors:

Messrs. Young & Associates, Lautoka for the Appellant
Messrs. Singh & Fatiaki, Lautoka for the Respondent