IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL No ABU0027 of 1997S
(High Court Civil Action No 231 of 1992)

BETWEEN:

WESTPAC BANKING CORPORATION LTD

Appellant

AND:

ADI MAHESH PRASAD

Respondent

Coram: The Hon Sir Moti Tikaram, President
The Hon Sir Ian Barker, Justice of Appeal
The Hon Justice IF Sheppard, Justice of Appeal

Hearing: Wednesday, 11 November 1998, Suva

Counsel: Mr CB Young for the Appellant
Mr MA Khan for the Respondent

Date of Judgment: 8 January 1999

JUDGMENT OF THE COURT

This is an appeal from a judgment of the High Court (Sadal J) in which he refused to dissolve an *ex parte* injunction granted by him against Westpac Banking Corporation Limited ("the bank"). He restrained it from exercising its power of sale said to have arisen under a mortgage held over property owned by the respondent, Mr Prasad. The respondent has brought an action against three defendants in the High Court one of which is the bank. The appeal is not concerned with the causes of action brought by the respondent against the defendants other than the bank. In brief it is said that it failed to maintain the payment of premiums due under a policy of insurance whereby the building the subject of the respondent's loan was insured against fire. The property was destroyed by fire and was not covered by insurance. In the action against the bank the respondent seeks to recover the sum of $60,000 being the amount to which he would have been entitled under the policy had it been in force.

He seeks to set off the amount owed by him to the bank under the mortgage against this amount. The amount owing is approximately $40,000 so that, if he succeeds, he will be able to pay out the mortgage and will have a surplus over.

The mortgage given by the respondent to the appellant was executed on 11 April 1991 and registered with the Registrar of Titles on 18 April 1991. As the appellant submits, there is no complaint by the respondent about any misunderstanding of the contents of the mortgage. Clause 5 of the mortgage provides that the mortgagor, *ie* the respondent, will insure and keep insured such of the mortgaged premises as are of an insurable nature against such risks of loss or damage as the bank may from time to time require for the full insurable value in some insurance office approved by the bank and in the name of the bank. The clause contains the usual provisions about punctual payment of premiums and of other sums necessary for effecting and keeping up the insurance. It includes an obligation on the part of the respondent to hand to the bank every policy and receipt relating to the property and the policy is to be held by the bank as a further security for the payment of the moneys secured by the mortgage.

Clause 23 of the mortgage provides that the bank shall be at liberty from time to time, without further authority to debit and charge the account of the mortgagor (the respondent) with all costs, charges and expenses mentioned in the clause. The clause defines the expression "costs, charges and expenses". It includes any premiums for insurance.

So far as it is relevant to the case made by the respondent against the bank, the respondent's re-amended statement of claim filed on 15 August 1995 alleges that at all material times the relationship of banker and customer existed between the bank and the respondent. Paragraph 21 of the statement of claim refers to the mortgage about which there is no issue. Paragraph 22 refers to clause 5 which we have earlier set out. Paragraph 23 alleges that, on or about 28 June 1991, the respondent caused the premises, the subject of the mortgage, to be insured as required by clause 5 of the mortgage. It is said that the policy had endorsed upon it the bank's interest as mortgagee. Paragraph 24 alleges that, by virtue of clauses 22 and 23 of the mortgage, the bank had the power vested in it to pay insurance

premiums in respect of the policy. We have not referred to clause 22. It is a general provision to the effect that, if the respondent should make default in duly performing or observing any covenant or agreement on the part of the respondent contained or implied in the mortgage, it will be lawful for, but not obligatory upon, the bank, without prejudice to any other right, power or remedy under the mortgage to do all things and pay all moneys necessary or expedient in the opinion of the bank to make good or attempt to make good such default to the satisfaction of the bank. Clause 23 is a more specific provision dealing, *inter alia*, with insurance.

Paragraph 25 of the statement of claim alleges that the respondent had agreed with the bank through the bank's manager, Rakesh Prasad (also known as Rakeshwar Prasad), that during the currency of the mortgage, the bank would pay all premiums in respect of the renewal of the policy and debit the respondent's account in respect of such payments. Paragraph 26 alleges that some time in the month of June 1992 the insurance company, *ie* The New India Assurance Company Limited, the first defendant in the respondent's action, sent a renewal notice dated 11 June 1992 to the bank requesting payment of the premium for the renewal of the policy. Paragraph 27 alleges that the bank, in breach of its agreement with the respondent, failed to respond to the renewal notice referred to and failed to pay the premium due in respect of the renewal of the policy of insurance for the period 28 June 1992 to 28 June 1993. In the alternative, paragraph 28 alleges that, in all the circumstances, the bank owed a duty of care to the respondent to ensure the respondent's premises remained fully insured during the currency of the mortgage.

Paragraph 29 alleges that, on or about 13 July 1992, the respondent's house erected on the land the subject of the mortgage was destroyed by fire. The insurance company had denied liability on the ground that the house was not covered by the policy because it had not been renewed. Paragraph 30 of the statement of claim alleges that, if the policy of insurance was not renewed, such failure to renew was the result of a breach by the bank of its contractual obligations to the respondent and/or the result of its negligence and failure to use due care and skill as a banker.

Appended to paragraph 30 are some particulars which complain that the bank failed to pay the premium and was thus in breach of the oral agreement the respondent had made with Mr Prasad. It is also alleged in the particulars that the bank failed to inform the respondent of the receipt of the renewal notice and failed to exercise due care and diligence by not exercising its rights under clauses 22 and 23 of the mortgage "when coupled with its agreement with [the respondent] to renew the said policy of insurance during the currency of the said mortgage". The particulars further allege that the bank failed to inform the respondent that it would not pay the premium for renewal of the policy. As mentioned, the amount claimed against the bank is $60,000 together with interest.

We have not found amongst the papers any amended defence filed by the bank after service of the re-amended statement of claim. It had filed a statement of defence on 22 June 1994 in which it said that the bank admitted paragraph 14 of the original statement of claim. That pleaded the mortgage and there is no issue about that matter. The balance of the defence says that the bank denies paragraphs 15, 16, 17 and 18 of the statement of claim and further says that it did not assume any obligation or duty to pay the premium under the policy. It further says that the respondent, as the mortgagor, was obliged under the mortgage and the terms of the loan to ensure that the policy was in force.

Presumably it is the bank's intention to use the defence filed to the original statement of claim as its defence to the re-amended statement of claim. This is a permissible course under the rules, but the paragraphing of the re-amended statement of claim is very different from the paragraphing of the original statement of claim. Furthermore, more paragraphs are pleaded in the re-amended statement of claim than were pleaded in the original statement of claim. Apart, therefore, from its general denials, the bank has not really answered, unless an amended defence has been omitted from the record, the re-amended statement of claim. We do not think anything turns on this because it is clear that the bank intends to defend the action and denies the essential allegations made against it.

On 18 October 1994, a summons was issued on behalf of the bank seeking an order that the proceedings against the bank be struck out on the grounds that the action was frivolous or vexatious or an abuse of the process of the Court. The application was supported by an affidavit of one

Chandra Kishor sworn on 30 September 1994. He said that he was the assistant manager of the bank's branch at Lautoka. He had read the amended writ of summons and statement of claim. He asserted that the bank did not owe a duty to pay the insurance premiums as claimed and had been informed by the respondent that "he would hold off paying insurance as he was finalising the sale of his house". He referred to the mortgage and particularly to clause 5 thereof.

On 16 January 1995, the respondent swore an affidavit referring to Mr Kishor's affidavit and asserting that the bank was obliged to pay the insurance premiums due under the policy. The respondent also said that he had made all arrangements with the bank's manager, Rakesh Kumar, who had agreed that all insurance premiums would be paid by the bank as long as the property remained mortgaged. On 21 February 1995 Mr Rakeshwar Prasad swore an affidavit in which he said that he was the manager of the bank's branch at Nadi. He said that he had read the respondent's affidavit sworn on 16 January 1995. He also said that, at the material time, to his knowledge, there was no one by the name of Rakesh Kumar employed by the bank as a manager, or in any other capacity, in Lautoka or elsewhere in Fiji. He said that, at the material time, he was the manager of the bank's Market Branch, which is apparently at Lautoka. He said that he did not make arrangements with the respondent to the effect that the bank would pay the respondent's insurance premiums so long as the mortgage was held by the bank.

On 1 May 1995 the respondent swore a further affidavit in which he referred to his earlier affidavit. He said that he had made all the arrangements with Mr Rakeshwar Prasad who was, at the time, the manager of the bank's Market branch, Lautoka, and who was "commonly known as Rakeshwar Prasad".

The bank's application to strike out the proceedings was dealt with in a judgment of Lyons J delivered on 13 October 1995. The bank's summons along with a similar summons taken out on behalf of the first defendant was dismissed.

On 18 December 1996, the respondent filed an *ex parte* summons seeking an order restraining the bank from exercising its power of sale or any other powers under the mortgage and restraining it also from selling or transferring the land the subject of the mortgage. The application was supported by an affidavit sworn by the respondent on 17 December 1996. He referred to the mortgage and to the pleadings. He said that the bank, on 11 October 1996, had demanded the payment of the sum of $38,457.64 being the balance of the amount due to the bank under the mortgage. The letter said that, in default of payment, it would proceed to a mortgagee's sale pursuant to the powers vested in it under the mortgage. He then referred to some correspondence and to the circumstances in which he and his family were living. Apparently, although the house was destroyed by fire, they are living in makeshift accommodation erected on the land. He said that he had no alternative accommodation to which he could go if he were required to leave. He gave an undertaking to abide by any order that the Court might make as to damages.

The evidence in support of the application for an injunction included a copy of an advertisement placed in the *Fiji Times* on 7 December 1996. The advertisement advertised a mortgagee's sale of residential property. The property was the property the subject of the mortgage. The sale was to be by tender made in writing. Tenders were to be lodged by 23 December 1996.

The summons was returnable on 19 December 1996. It was not served on the bank which was given no notice of the application. The hearing of the application for *ex parte* relief was held in chambers. No reasons appear to have been given for it. That course is not unusual provided the matter is brought back into the list within as short a time as possible after the making of such an order. The terms of the order were that the bank be restrained from exercising the power of sale or any other powers under the mortgage and from selling or transferring the land in question. It was also ordered that the application be called on 31 January 1997, that is some six weeks after the making of the order. The respondent's undertaking as to damages was accepted and noted in the order. It would appear that, in making the order, Sadal J relied on the affidavit of the respondent sworn on 17 December 1996. It does not appear that he was referred to the earlier affidavits to which we have referred.

It should be said at this point that this was not a case for the making of an *ex parte* order. The application for the injunction should have been made on notice to the bank. The application was dealt with on 19 December, four days before tenders closed. Notice of the application should have been required to be given even though it would have had to be short. Instead, the case proceeded *ex parte* so that the bank was not served with notice of it and was not given any opportunity of making any submissions in relation to it. Authorities to be referred to show that it is an extremely serious step to interfere with the exercise of a mortgagee's power of sale. The authorities show that it is quite unusual to grant an interlocutory injunction, let alone an *ex parte* injunction, to restrain the power except in very special circumstances. The original order should not have been made without notice to the bank. Indeed, there is, as we shall show in a moment, a real question whether it should have been made at all.

Although subsequent events have overtaken what occurred so that our criticism is no longer relevant to the matters we need to decide, we emphasise what we have said so that it may be taken into account in future matters. We add that, if in any case, whether it be a case involving a restraint on a mortgagee's power of sale or a different kind of case, the Court sees fit to grant an *ex parte* injunction, the matter should be adjourned for no longer than a day or so. A period of six weeks, which was the period in this case, was far too long. During the period of the adjournment, the defendant should be served with notice of the order and copies of the application and affidavits relied upon before the judge who granted the relief. This will have to be done quickly and expeditiously and may afford both parties insufficient time properly to prepare their cases as to whether the injunction should be continued. The court may have to consider granting a further adjournment to enable this to be done but at least the defendant will have had an opportunity of being heard. This enables it, if it be so advised, to make any submissions as to why the injunction granted *ex parte* should not be continued. When the matter comes back into the list, it will not be for the defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued.

We return to our account of the history of the matter. On 27 January 1997 there was taken out on behalf of the respondent an inter parties summons in which an order was sought that the interim injunction granted on 19 December 1996 be extended until the final determination of the action or until further order. The Court dealt with the matter on 31 January 1997. All parties were represented. It was ordered and directed that the interim injunction granted on 19 December 1996 be extended until 28 February 1997.

On 17 February 1997 Mr Gurudayal Sharma swore an affidavit which was filed on behalf of the bank. In the affidavit he said that he was the manager, Loans Management West, of the bank. He referred to the mortgage, to the fact that the respondent was in arrears with his payments under the mortgage and said that the bank was exercising its power of sale because of the respondent's default. The balance of the affidavit is argumentative and we do not refer to it.

On 9 April 1997 the respondent filed a further affidavit in which he referred to Mr Sharma's affidavit. Some of the history of the matter is repeated in that affidavit and there is reference to the judgment of Lyons J delivered on 13 October 1995 refusing to strike out the case against the bank.

In the meantime the matter had come into the list on 28 February 1997 and had been further adjourned, this time to 11 April 1997 when it was fixed for hearing. On 25 April 1997, Sadal J delivered a ruling. The ruling refers to the fact that the application to be deal with is an application for the dissolution of the injunction granted *ex parte* on 19 December 1996. His Lordship said that there was a dispute concerning a policy of insurance. He referred to the respondent's allegation that there was a policy of insurance at the time of the fire and that the bank was to pay the insurance premiums in respect of the policy. The ruling continued:

> "There are matters that need to be tested by presentation of evidence. Courts are reluctant to interfere with the rights of the mortgagee under the mortgage terms but here I feel there are matters that should be resolved at the trial.
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> In these circumstances I am not prepared to dissolve the injunction which is to continue until the hearing and final determination of this action."

The Court record does not disclose precisely what was said before Sadal J. It does show that he was referred to the ruling made by Lyons J on 13 October 1995. Lyons J said that the authorities suggested that the Court should not make an order to strike out a proceeding unless it was shown that the statement of claim or the proceeding was unsustainable or was hopeless. Otherwise, the order should not be made. He said that it was more than obvious that, whilst the respondent's claim might not appear to be the strongest and would certainly need some hard evidence to support it, the statement of claim was far from one which could be described as unsustainable or hopeless. He added that the mere fact that a case appeared to be a weak one was not of itself sufficient to justify the striking out of the action. He also said that the power to strike out should only be exercised in plain and obvious cases where no reasonable amendment could cure the alleged defect. He said that it was obvious to him that there were matters of contest in the evidence that would be led in the matter and that the respondent must be given the opportunity to give evidence before Court by way of a hearing. He thought, accordingly, that the application should be dismissed.

We do not consider that the principles which apply in relation to an application to strike out proceedings or a pleading are necessarily the same as those which apply in relation to whether or not an interlocutory injunction should be granted. Subject to some special considerations which apply in relation to an application to restrain the exercise of a mortgagee's power of sale, the principles are those propounded by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The case is well known and we do not refer to it in detail. It is enough to say that Lord Diplock who delivered the judgment of the House of Lords made it clear (at 407) that the Court must be satisfied that the claim made by the plaintiff for the relief ultimately sought is not frivolous or vexatious; in other words, it should be satisfied that there is a serious question to be tried. If there is, the question becomes a matter of the balance of convenience.

Here we are satisfied that there is a serious question to be tried. We do not reach this conclusion in relation to each of the matters of defence raised by the respondent. It may be correct to say that a

number of them have no likely basis for success. But in two respects, we think the respondent has met the initial hurdle. Firstly, he relies on a conversation he had with an officer of the bank in which the officer is said to have told him that the bank would thenceforth pay the premiums under the policy and debit the amount of them to the respondent's account. The second basis upon which the respondent may succeed - and we express no concluded view about this - is that he contends - and his evidence is to this effect - that the bank received notice of the renewal of the policy on payment of the premium. The respondent claims that the bank did not communicate notice of the receipt of the renewal to him so that he knew nothing about it. Eventually the evidence may show that this is unlikely because the renewal notices went either to the respondent or to both the respondent and the bank. But that is by the way at the moment. All will depend upon the evidence led at the trial.

So far as the balance of convenience is concerned, there is no evidence from the bank which suggests that it will suffer any irreparable loss if the injunction is allowed to continue until the hearing. It does not suggest that the value of the property will decline over that period, or that, upon its sale, it is unlikely to recover less than it would recover if the sale were allowed to proceed immediately. On the other hand, the respondent has given evidence that he will be greatly inconvenienced if he is forced to vacate the premises. He has said that he has nowhere else to go and that he and his family would have no accommodation if they could not occupy the makeshift accommodation on the land which is the subject of the mortgage. The balance of convenience is thus very much in the respondent's favour.

Nevertheless, in a case of this kind, the respondent faces another problem. It stems from considerations such as are discussed by the High Court of Australia in *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161. The case is authority for the proposition that, as a general rule, an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage and, in particular, a power of sale, unless the amount of the mortgage debt, if this is not in dispute, is paid, or unless, if the amount is disputed, the amount claimed by the mortgagee is paid into court. The rule will not be departed from merely because the mortgagor claims to be entitled to set off an amount of damages claimed against the mortgagee.

The judgment is a judgment of Walsh J sitting at first instance. His judgment was upheld by the Full Court of the High Court of Australia which approved his reasons (126 CLR at 168-9). The Full Court developed no separate reasons of its own.

In the course of his judgment. Walsh J referred (at 166-7) to a number of English authorities. It was upon the principles which he derived from these that he based his judgment. We do not find it necessary to discuss the various authorities to which he referred except to say that they plainly suggest the conclusion to which he came.

In addition to these authorities, Walsh J referred (at 164) to *Halsbury's Laws of England* 3rd ed, vol 27 at 301 where it is said that a mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has commenced a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is the amount which the mortgagee swears to be due to him, unless, on the terms of the mortgage, the claim is excessive. Walsh J also said (at 164-5) that, if the debt had not actually been paid, the Court would not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard was provided to him by means of the plaintiff bringing in an amount sufficient to meet what was claimed by the mortgagee to be due. He added that the benefit of having a security for a debt would be greatly diminished if the fact that a debtor had raised a claim for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed. Walsh J thought that the fact that such claims had been brought provided no valid reason for the granting of an injunction to restrain, until they have been determined, the exercise by a mortgagee of the remedies given to him by the mortgage.

This matter had earlier been the subject of a decision by Sugerman J (later President of the NSW Court of Appeal) of the NSW Supreme Court in *Harvey v McWatters* (1948) 49 SR (NSW) 173. Sugerman J said that, where a mortgagor sought an interlocutory injunction to restrain his mortgagee

from selling, there was a distinction with respect to the terms that would be imposed as to payment into court between a case in which the power of sale was admittedly exerciseable and the only dispute was as to the amount due or the mode in which the mortgagee proposed to exercise the power, and a case in which the very matter in dispute was whether the power of sale was exerciseable at all. 12

Sugerman J said (at 176) that the real dispute in the case before him was whether the power of sale was presently exerciseable at all. The plaintiff's claim was that she had already paid more than sufficient to satisfy the instalments which had become due upon the terms that it was to be set-off in discharge of those instalments as they became due and that there was therefore no default. That claim was disputed and the amount was said by the defendant to have been paid on another account. His Honour said that the real nature of the dispute was not what amount was payable, there being an undisputed default, but whether a case for the exercise of the power of sale had arisen at all. After referring to some additional authorities, Sugerman J decided that he should require a lesser payment into court than would have been required if the ordinary rule had applied.

In Australia this problem has arisen since the decision in *Inglis*. The matter was dealt with by Morling J, sitting as a Judge of the Federal Court, in *Glandore Pty Ltd v Elders Finance and Investment Co Ltd* (1984) 4 FCR 130. His Honour discussed (at 133) the decision in *Inglis* and referred also to some other authorities including *Harvey v McWatters*. Morling J continued (at 135):

> "*Harvey v McWatters* was cited with approval by Sheppard J in *Brutan Investments Pty Ltd v Underwriting and Insurances Ltd* (1981) 39 ACTR 47; see also *Clarke v Japan Machines (Australia) Pty Ltd (No 2)* [1984] 1 Qd R 421 at 423 per Williams AJ. A useful discussion of the principles upon which interlocutory relief will be granted in cases of the present kind is to be found in Meagher, Gummow and Lehane, *Equity Doctines and Precedents* (2nd ed, 1984), par 316.
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> It is clear on the authorities that if the present case be regarded as one in which the mortgagor's real claim against the mortgagee is for damages only, interlocutory relief should be granted only upon terms that the amount of the mortgage debt is paid into court. The general rule referred to in *Inglis'* case would apply in such a case. But if it be not regarded as such a case, it is open to the court to grant the relief sought upon such terms other than payment of the full amount of the mortgage debt into court as the court thinks appropriate."

The decisions of the High Court in *Inglis* and of Morling J in *Glandore* were discussed by Jenkinson J of the Federal Court of Australia in *Cunningham v National Australia Bank Ltd* (1987) 15 FCR 495 where his Honour distinguished *Glandore* and applied *Inglis*.

Harvey v McWatters, *Inglis* and *Glandore* were discussed by Kearney J of the Supreme Court of the Northern Territory in *Midland Montagu Australia Ltd v O'Connor* (1992) 109 FLR 285 at 298-9. Kearney J referred, in the course of his discussion of the matter, to a decision of French J of the Federal Court. *Graham v Commonwealth Bank of Australia* [1988] ATPR 49,753 at 49,757, 49,758. There, French J considered that the applicants in that case had shown a serious case to be tried and noted that a forced sale was likely to be disastrous for them. French J thought that each case was to be judged on its own facts despite an inability on the part of the mortgagor to pay the mortgage debt into court. It needs to be noted that the judgments of the Federal Court may have been affected by views concerning the provisions of the *Trade Practices Act* 1974 (Aust). Neither the decision in *Harvey v McWatters*, which preceded *Inglis*, nor the decision in *Brutan*, was affected in this way.

The present case has a history which extends over several years. We shall say something about that in a moment. Subject to that matter, this case would appear to be governed by *Inglis* and by the English authorities to which Walsh J referred in his judgment in that matter. If it were not for that history and one were dealing with the matter afresh, we would have little doubt that the appropriate course would have been to refuse to grant interlocutory relief. That is because, no matter what view one takes about the cases which have come after *Inglis*, this is a case where the mortgagee's power of sale is not in question. It is a case where the respondent seeks to bring a case against the bank for damages for its failure to insure the property which was the subject of the mortgage. In ordinary circumstances it would not have been a case for interlocutory relief.

The account of the facts and circumstances of the case which has been given shows that the proceedings were commenced in 1992. The application for interlocutory relief, albeit misconceived as an appropriate application to make *ex parte*, was dealt with at the end of 1996, some two years ago. We were informed during the hearing of the appeal that it is likely that the action will be given a final hearing in the early months of next year. It is not clear to us that the point now so strongly relied upon by the bank was raised before Sadal J when the matter came into the list on 11 April 1996. Of course, it may have been, but we have not the benefit of a complete record and there is no

suggestion in the submissions of the parties that the point was taken. The grant of interlocutory relief is a discretionary matter. The question we have to decide is whether his Lordship's discretion miscarried. Objectively speaking, it may have done. But, in the absence of a clear indication that the point now relied upon was taken before him, we would not be prepared to take the view that it was. In other words, Sadal J did not have the assistance that we have had.

The question we have to determine is whether his decision was in error. Upon the basis of the matters that appear to have been argued before him, it was not. Applying the principles which usually apply to applications for interlocutory relief, this was a case where it was open to his Lordship to hold that there was a serious question to be tried and that the balance of convenience favoured the respondent. Adding into the equation the fact that the matter will probably have a final hearing within the next three or four months, we think that the appropriate course is the dismissal of the appeal. But we propose to vary the orders made by Sadal J by reserving leave to the bank to apply to a Judge of the High Court for an order dissolving the injunction in the event that any one of the following circumstances should arise:

(a) the respondent does not prosecute the principal proceedings with due diligence;

(b) the case is not fixed for a final hearing so as to commence on a date earlier than 1 May 1999; or

(c) the bank contends, upon the basis of evidence filed on its behalf, that the value of the land, the subject of the mortgage, is declining.

Additionally, we propose to direct the Registrar of the High Court to take steps to fix a date for the hearing of the principal proceedings as early as possible and certainly no later than 30 April 1999.

Subject to those variations, the appeal will be dismissed. The costs of the appeal will abide the outcome of the trial of the principal proceedings.

In summary, the orders of the Court are:

(1) The orders made by Sadal J on 19 December 1996 be varied by adding thereto the following further orders:

(i) Leave be reserved to the respondent bank to apply to a Judge of the High Court for an order dissolving the injunction in the event that any one of the following circumstances should arise:

(a) the respondent does not prosecute the principal proceedings with due diligence;

(b) the case is not fixed for a final hearing so as to commence on a date earlier than 1 May 1999; or

(c) the bank considers, upon the basis of evidence filed on its behalf, that the value of the land, the subject of the mortgage, is declining.

(2) The appeal be otherwise dismissed.

(3) The costs of the appeal be costs in the principal proceedings.

(4) The Registrar be directed to take steps to fix a date for the hearing of the principal proceedings as early as possible but no later than 30 April 1999.

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Sir Moti Tikaram
President

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Sir Ian Barker
Justice of Appeal

.....
Justice Sheppard
Justice of Appeal

Solicitors:
Messrs Young & Associates, Lautoka, for the appellant
Messrs Khan & Associates, Suva, for the respondent

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