

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

CIVIL APPEAL NO. ABU0029 OF 2002
(High Court Civil Action No. 093 of 2000)

IN CHAMBERS

BETWEEN: TANIELA VERE SULIANA
of Davuilevu Agriculture Sub-division,
Stage 1, Lot 2, Davuilevu

Applicant/Appellant

AND: NBF ASSET MANAGEMENT BANK

Respondent/Respondent

Mr S. Valenitabua for the Applicant/Appellant
Mr T. Seeto for the Respondent/Respondent

Date of Hearing: Monday, 2nd September, 2002
Date of Decision: Thursday, 5th September, 2002

DECISION

This is an application for leave to appeal out of time from the judgment of the High Court given on the 8th of February 2002. The application is supported by an affidavit sworn by the Appellant and filed on the 24th of July 2002.

The action was commenced by Originating Summons and affidavit in support filed on 7th March 2000. The application was made under Order 88 Rule 3 of the High Court Rules 1988, being an Action by a mortgagee for possession under the mortgage. The Respondent

(Original Plaintiff) asked for possession of land and premises described in Instrument of Tenancy 011 known as Stage 1 Lot 2 on DP No. 5922 Davuilevu Sub-division. It also asked for an injunction restraining the Appellant from interfering with improvements on the property. The Summons was resisted by the Appellant, who filed an affidavit in opposition to the affidavit filed by the Respondent.

The High Court (Pathik J.) gave judgment on the 8th of February 2002. He ordered possession, and found that there was no basis upon which the Appellant could resist the application. The Order for possession was sealed on the 22nd of February 2002, so that the time for any appeal ran from that date. It expired on the 5th of April 2002. The application to appeal out of time was filed on the 24th of June 2002.

REASONS FOR THE DELAY

According to the Appellant, he was not told about the High Court decision until sometime in March 2002, by his former Counsel. He then saw Mr Valenitabua sometime in March but was not able to instruct him to lodge an appeal until 23rd of April 2002, when he found sufficient funds to pay a deposit on account of fees. That is the only reason put forward for the delay, and for not complying with the rules.

THE MORTGAGE

The subject land was mortgaged to the Respondent to secure repayment of all advances, charges, interest and other banking accommodations made by the mortgagee (the

Respondent) to the mortgagor (the Appellant). The affidavit sworn and filed by Laisenia Takala on the 7th of March 2000 gives details of the advances made to the Appellant in compliance with Order 88(3) of the High Court Rules. As at 7th of March 2000, (date of issue of Proceedings) the total debt stood at \$222,297, and the daily interest accrued at \$52.62. The Respondent made demand under its Mortgage No. 5555 on the 7th of May 1997, and the Appellant defaulted. Thereafter, the Bank advertised the subject property for sale under the mortgage, and called for tenders, and has accepted a tender, but is unable to complete the sale because the Appellant continues in occupation.

JUDGE'S FINDINGS

Pathik J., arrived at the following conclusion:-

" To conclude, on the facts and circumstances of this case and on the authorities NBF is well within its rights to apply under Order 88 of The High Court Rules for the Orders sought in the Originating Summons. The argument put forward by the defendant to prevent the mortgagee from exercising its power of sale and from obtaining vacant possession are without merit and an abuse of the process of the Court. The defendant who owes a large sum of money to NBF and has been in default with no hope of paying the debt has the audacity to say to the effect that NBF is to be blamed for the failure of his farm project.

For these reasons I conclude that the defendant has not convinced me on the facts and authorities that I ought to make an Order in his favour."

THE PROPOSED APPEAL

The Appellant's proposed Petition of Appeal raises three grounds of appeal as follows:-

" 1. THAT the Learned Judge of the High Court erred in law and in fact in not properly considering the Bank's deprivation of the Appellant of motor vehicle No. CC 545 and the consequences thereof.

2. THAT the Learned Judge of the High Court erred in equity in considering only the law regarding the rights of mortgagees.

3. THAT the Learned Judge of the High Court erred in law and in fact in failing to consider that the Respondent as mortgagee breached its fiduciary duty to the Appellant when the Respondent deprived the Appellant of the vehicle No. CC 545 and left the farm and accumulating debt with the Appellant."

In my view none of the grounds of appeal have any chance of success. The motor vehicle which was bought with monies lent to the Appellant by the Respondent was secured by a Bill of Sale. It is not disputed that the Appellant defaulted in making repayments and the Respondent was entitled to seize the motor vehicle. I cannot see how it can be said that the Respondent breached its "fiduciary duty" to the Appellant when it seized the motor vehicle. The truth of the matter is that the Appellant borrowed from the Respondent, well beyond his capacity to repay, and he can hardly complain if the Respondent decided to enforce its security. It may well be, as Counsel for the Appellant submits, it was very unwise of the Respondent to make further advances to the Appellant, as they did, when the Appellant was already in default. But that is not breach of a fiduciary duty. There was no evidence before Pathik J. of any unfair bargaining between the Respondent and the Appellant, or that the Respondent had taken unfair advantage of its position to the detriment of the Appellant. I have carefully read the various cases cited by learned Counsel for the Appellant, I do not find that they assist the Appellant. Mr Valenitabua provided the Court with the report of Hayward v Bank of Nova Scotia, a judgment of Potts J. in the Ontario High Court (February 13th 1984). The facts of that case bear no resemblance to the facts of the present case. The headnote reads:-

" The plaintiff had transacted her banking business with the defendant bank for over 40 years. She was approached by P with a proposal to invest in the purchase of an "exotic cow", being a cow implanted with fertilized ova from valuable European strains of cattle. P was a customer of the defendant bank and behind in his financial obligations. The plaintiff, who knew nothing of the exotic cow business, went to the bank to discuss the investment, and the defendant's manager, who did have substantial knowledge of the business, recommended the investment despite evidence available at the bank's regional office that the exotic cattle business was risky. A loan application was granted, and money was advanced and invested. On subsequent occasions, the manager approved further loans without warning of the risks. P then became bankrupt, and the cows purchased by the plaintiff could not be identified. In an action against the bank, held, the bank was in breach of a fiduciary duty in not advising the plaintiff of the risks of the business, or urging her to seek independent advice. Consequently, the plaintiff was entitled to damages."

There is no evidence in the present case that the Bank advised the Appellant to make any investments, knowing that they were risky. In Hayward supra Potts J. observed:-

" Throughout time, the courts have attempted to define the term "fiduciary" and to establish steadfast rules as to its application. Unfortunately, this goal has not been attained. A concise summary of the present situation can be found on p. 73 of L.S. Sealy's article "Fiduciary Relationships", [1962] Cambridge L.J. 69. He notes that:

The word "fiduciary," we find, is not definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations ...

Courts must examine each case individually to ascertain the existence of a fiduciary relationship. Intention and conduct of the parties or wording of a contract all assist a court in determining the nature of the obligations being assumed."

I am unable to see, on the facts of the present case, anything in the intention or the conduct of the parties, giving rise to fiduciary duties of the kind now being proposed on behalf of the Appellant. The relationship here was that of a lender and a borrower, untainted by any fiduciary duty owed to the borrower by the lender.

PREJUDICE TO THE RESPONDENT

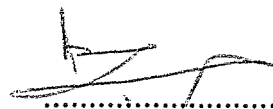
Clearly further delays will prejudice the Respondent. Mr Valenitabua concedes as much. Prejudice will, in my view be substantial, and must weigh in the exercise of what is a discretionary power.

ORDER

In all the circumstances, leave to appeal out of time is refused.

The Respondent is awarded costs, fixed at \$500.




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Jai Ram Reddy
President