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## DIN SHIU PARSHAD

*v.*

## AGRICULTURAL AND INDUSTRIAL LOANS BOARD

[SUPREME COURT, 1967 (Hammett J.), 3rd, 28th April] B

Civil Jurisdiction

*Interpretation—Ordinance—implied covenant for payment of rates by mortgagor—construction of covenant—Land (Transfer and Registration) Ordinance (Cap. 136) s.57 (b) (d), 58, 61, 62, 63—Local Government (Towns) Ordinance (Cap. 78) ss.124, 125, 125(2), 126.* C

*Interpretation—Ordinance—whether retrospective—Agricultural and Industrial Loans Board Ordinance (Cap. 200) s.23—Agricultural and Industrial Loans (Amendment) Ordinance 1964.*

*Mortgage—covenant for payment on demand—arrangement for payment of principal by instalments—no variation of mortgage registered—implied covenant for payment of rates by mortgagor—construction—Land (Transfer and Registration) Ordinance (Cap. 136) ss.57(b) (d), 58, 61, 62, 63—Local Government (Towns) Ordinance (Cap. 78) ss.124, 125, 125(2), 126—Agricultural and Industrial Loans Board Ordinance (Cap. 200) s.23—Agricultural and Industrial Loans (Amendment) Ordinance 1964.* D

The covenant to pay rates implied on the part of a mortgagor by section 57 of the Land (Transfer and Registration) Ordinance is intended to safeguard the security of the mortgage against the results of the mortgagor's failure to pay rates. The only logical and proper construction of the covenant is that the mortgagor is to pay the rates as they become due for payment. E

A mortgage contained a covenant that the principal sum would be paid on demand. An arrangement was arrived at between the mortgagor and the mortgagee whereby the loan was to be repaid by instalments.

*Held*: Whether or not the effect of section 58 of the Land (Transfer and Registration) Ordinance is that no variation of a mortgage may be made without the execution and registration of a formal variation, on the facts the arrangement made did not and was not intended to vary the covenants in the mortgage. F

*Semble*: The power given to the defendant Board by section 23 of the Agricultural and Industrial Loans Board Ordinance, as amended by the Agricultural and Industrial Loans (Amendment) Ordinance, 1964, to demand payment of a loan before repayment is due applies only to loans made on or after the date that the amending Ordinance came into effect. G

Action by a mortgagor seeking an injunction to restrain the mortgagee from exercising his power of sale.

*T. J. McNally* for the plaintiff. H

*R. G. Q. Kermode* for the defendant Board.

The facts sufficiently appear from the judgment.

HAMMETT J.: [28th April, 1967]—

The Plaintiff is the holder of Crown Lease No. 2615 comprising Lots 7 to 10 of Section 90, Suva Foreshore.

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On 19th October, 1956, he granted a Mortgage to the Defendant Board to secure the repayment of the sum of £8,000 which the Board had agreed to advance to him for the purpose of constructing a building on this land.

The Mortgage contained covenants that the Plaintiff would repay this £8,000 and any further advances made, upon demand and that he would
B pay interest at the rate of 6½% per annum.

At the time the Mortgage was executed it was understood that the monies secured by the Mortgage would be advanced by way of progress payments as the Plaintiff's building on the land was erected and that after it had been erected repayment of the principal and interest would be made by instalments.

C At first it was arranged that the instalments should be £120 a month but later this was, at the Plaintiff's request, reduced to £500 a year.

According to the Defendant Board, the Plaintiff fell into arrear with the payments he was to make and had been guilty of a number of breaches of other covenants under the Mortgage.

As a result, the Defendant Board made a demand in writing, dated 14th
D July, 1966, which was served on the Plaintiff on 19th July, 1966, requiring him to pay the balance of principal which was stated to be £4,211.19.7 and interest to date of payment, within one month of the date of service of the notice failing which the Defendant Board would exercise its powers of seizure and sale as Mortgagee.

The Plaintiff did not comply with this demand, but on 15th October,
E 1966, he issued the Writ in this action claiming a number of reliefs including an injunction restraining the Defendant Board from exercising its powers under the Mortgage, and an order for accounts.

The Plaintiff's Statement of Claim was signed by him in person. It is rather prolix and has eight paragraphs in the prayer for relief. Fortunately, at the trial he was represented by Counsel. I was then informed that the number of issues raised in the pleadings had, by agreement, been reduced.

F Mr. Kermode, for the Defendant Board, conceded that in arriving at the balance of principal and interest due under the Mortgage, the Board's staff might have made an error in their calculations. In order that the true position could be seen the Defendant had engaged a well-known firm of Accountants to make a fresh calculation of the sums of principal and interest due under the Mortgage and the position on 28th February,
G 1967, was, according to them, as follows:—

| | |
|---|---|
| Outstanding Principal ..... ..... ..... ..... | £4,184.15. 0 |
| Outstanding Interest ..... ..... ..... ..... | £ 190.19. 5 |
| Total | £4,375.14. 5 |

Mr. McNally for the Plaintiff stated that the last account received from the Defendant Board covered the period 1st January, 1966, to 8th July,
H 1966, and that provided he received a supplementary account bringing this up-to-date, he would withdraw his claim in this action for an account. Mr. Kermode gave his undertaking to supply such a supplementary account if called upon to do so and on this basis the Plaintiff's claim to an account was withdrawn.

During the course of the hearing Counsel for the Defendant Board indicated that what the Board sought in its counter-claim was in effect a decision of this Court that the Plaintiff was, in fact, in arrear with his payments at the time when its Notice of Demand was delivered on 19th July, 1966. I then asked to be shown a full and complete statement of the Defendant Board's account with the Plaintiff in order that I could ascertain the position. No full account was produced by either side although it had been stated that accounts up to 8th July, 1966, had been prepared.

It appeared that either no full and proper account had ever in fact been prepared or if it had, none was available to be produced before me by either side. I drew attention to the fact that the position in this case was that whilst the Plaintiff asserted that he was up-to-date with his instalments the Defendant Board denied this. No findings of fact on this issue could possibly be made by the Court unless and until either (a) one side or the other produced an account and the figures were scrutinized to see if they were correct and, if necessary, corrected or (b) the matter was referred to a suitably qualified person to take an account between the parties. I pointed out that there was no material before me upon which I could arrive at a decision of whether the amount demanded as the balance of principal due on 14th July, 1966, the date of the Demand Notice in this case, was correct or not. I further pointed out that unless and until an account was taken between the parties, it would not be possible for me to determine whether the Plaintiff was, on 14th July, 1966, in arrear or up-to-date with the instalments he had agreed to pay.

In reply to this Counsel for Defendant Board said that the Defendant's case was that it was immaterial whether or not the Plaintiff was in arrears at the date of the demand for repayment in July 1966. He submitted that quite apart from that issue the loan in this case was payable on demand and there were ample other grounds, which had been pleaded, that gave the Defendant Board the right to call up its loan. These grounds were then stated by Counsel for the Defendant Board to be as follows.

1. The Plaintiff's non-payment of rates due on the mortgaged property to the Suva City Council.
2. The Plaintiff's non-payment of rent due to the Crown on the Plaintiff's Crown Lease of the mortgaged property.
3. The Plaintiff's failure to pay the Insurance Premiums due on the mortgaged property.

and 4. The Plaintiff's failure to assign to the Defendant Board the rents of all tenants on the mortgaged property and his collection of such rents personally.

Counsel for the Plaintiff accepted this position and the case then proceeded on that basis, without further evidence or consideration of the accuracy or otherwise of the Defendant Board's accounts.

I will first deal with the issue concerning rates. There is no express covenant in the Mortgage that the Mortgagor would pay the rates payable on the mortgaged property. This is, however, one of the covenants implied in every Mortgage by virtue of section 57 of the Land (Transfer and Registration) Ordinance, Cap. 136, of which the material part reads:—

" In every mortgage there shall be implied against the Mortgagor the following covenants —

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(a) .....

(b) that he will pay all rents, rates, taxes and other outgoings from time to time chargeable against the mortgaged property."

Under cross-examination the Plaintiff admitted that for the past four
B or five years he has not paid the rates due from him on the mortgaged property as they became due. He said that each year the Suva City Council sued him for his arrears of rates which totalled about £600 to £700. He gave evidence that after the Council obtained Judgment against him he arranged to pay the sum due by instalments and that at present only £400 of the arrears remain unpaid and outstanding.

C Counsel for the Plaintiff contends that the covenant to pay rates implied by section 57(b) requires the Plaintiff to pay all the rates, etc., chargeable against the mortgaged property without any stipulation of the time within which they must be paid. He submits that the method of payment is one that does not concern the Mortgagee but is a matter that solely concerns the Mortgagor and the City Council. He says the Plaintiff has no intention of not paying his rates — they will all be paid eventually and in
D due course — and no question of a breach of this implied covenant therefore arises.

This is a novel and rather interesting argument. It is quite true that the implied covenant does not prescribe any particular time within which the Mortgagor is required to pay his rates. It is merely a covenant that he will in fact pay them. This, the Plaintiff says, he is doing by instal-
E ments with the consent of the Council after the Council had obtained Judgment for them and that is sufficient compliance with the covenant.

Under the provisions of section 57(d) of the Land (Transfer and Registration) Ordinance there is a further implied covenant against the Mortgagor that the Mortgagee shall be entitled to make good any default by the Mortgagor in paying rates, etc., and to add any such sums paid
F to the principal due under the Mortgage. If the construction which should be placed upon the implied covenant to pay rates under section 57(b) is that sought by the Plaintiff, i.e., that he has an indefinite time within which to pay the rates, were to be applied, the power of the Mortgagee to make good any default would be rendered almost, if not entirely, nugatory.

G It is well established that where no time for performance is fixed by a contract, the law implies an understanding by each party to perform his part of the contract within what is a reasonable time having regard to the circumstances of the case.

The Suva City Council levies rates under the provisions of the Local Government (Towns) Ordinance, Cap. 78, and under sections 124 and
H 125 of that Ordinance rates are payable within the time fixed in the Demand Note. Under section 125(2) overdue rates become a charge on the property. In addition to the Council's rights to distrain or sue for the rates due, the land itself may be sold to recover unpaid rates three years in arrears (under the provisions of section 126).

The covenant to pay rates, implied against a Mortgagor, is clearly intended to safe-guard the security of the mortgage over the property against the results of the Mortgagor's failure to pay his rates, either when due or certainly at least within three years of when they became due, because by then the Council would have the right to have the land itself sold to pay the arrears of rates. It would be an entirely pointless and worthless covenant if there was no time limit at all within which the Mortgagor could comply with it. I do not, therefore, accept the construction sought to be placed by the Plaintiff upon the implied covenant to pay rates. In my view the only logical and proper construction is that the Mortgagor is to pay all rates, etc., as they become due for payment. Rates are due for payment on the date specified in the Demand Notice.

The Plaintiff has admitted that over a period of four or five years he has not paid his rates as they became due and I hold that he has been in each of such years in breach of the covenant to pay his rates.

As far as the rent due to be paid by the Plaintiff on his Crown Lease is concerned similar considerations apply. The Plaintiff under cross-examination admitted that in fact he has been at times in arrears with his payments of rent on his Crown Lease. He says that the Defendant Board did, however, at times agree to pay this for him. This may well have been so but I hold as fact that the Plaintiff was on his own admission from time to time in breach of his covenant to pay his rent.

The Plaintiff covenanted in clause 3 of the Mortgage to pay punctually all the premiums due on the insurance on the mortgaged property. In cross-examination he conceded that he had in fact been in arrear with the payment of such premiums and that the Defendant Board agreed to pay them for him. This again may well be so, but I hold as fact that the Plaintiff was on his own admission in breach of his covenant from time to time.

The last complaint of the Defendant Board concerned the alleged breach by the Plaintiff of his arrangement for the Board to collect the rents of his, the Plaintiff's, tenants of the mortgaged property. This was not a covenant in the Mortgage. It was merely a subsequent arrangement made between the parties. The breach of such an arrangement did not of itself give rise to any right of foreclosure or sale.

I now refer to the Plaintiff's contention that although the Mortgage itself stated that the sum secured was payable on demand, this was not so. The Plaintiff firstly contends that the Mortgage secured not the repayment of a loan of £8,000 which had been made, but of advances to be made in the future by way of progress payments as his building was erected. It is clear that this was so from the terms of the Mortgage itself. The covenant by the Plaintiff that he would repay this £8,000 and all further advances upon demand could not therefore be of any effect until after the sum of £8,000 had in fact been advanced. There is no evidence of when this total of £8,000 was advanced.

It is next submitted that after the execution of the Mortgage the Defendant Board agreed to accept repayment of the principal sum due and payment of interest by instalments. It is the contention of the Plaintiff that the agreement for him to repay the principal by instalments amounted to a variation of the covenant in the Mortgage that the principal was repayable on demand.

The Defendant Board concedes that arrangements were made for repayment of the loan by instalments but it is not agreed that there was any variation of the covenant to repay the loan on demand. In the first place it is submitted by the Defendant Board that none of the several arrangements to accept repayment of the principal by instalments, which are admitted, amounted to and were intended to be a variation of the conditions of the Mortgage. The Board further contends that by virtue of section 58 of the Land (Transfer and Registration) Ordinance no such variation may be made informally but only by the execution and registration of a formal form of variation. I am not entirely persuaded that the effect of section 58 is that no variation of the terms of a Mortgage is possible without the execution and registration of a formal form of variation under the provisions of this section. The section certainly makes provision for the execution and registration of an agreement to vary a Mortgage but it does not provide that unless a purported variation is effected in this way and registered it shall be of no effect.

The third contention of the Defendant Board is based on the construction of section 23 of the Agricultural and Industrial Loans Board Ordinance (Cap. 200) which, in 1956, at the date of the execution of the Mortgage in this case read:—

> "23. The Board may at any time accept payment of the whole or any part of the principal and interest of a loan before the time when such repayment or payment is due upon such terms and conditions as the Board may think fit."

In 1964, by the Agricultural and Industrial Loans (Amendment) Ordinance, 1964 this section was amended to read as follows:—

> "23. The Board may at any time accept *or demand* payment of the whole or any part of the principal and interest of a loan before the time when such repayment or payment is due upon such terms and conditions as the Board may think fit."

It is submitted that by this amendment the Board was given power to treat all Mortgages given by them, whether they were stated to be payable on demand or not and whether they were made before or after the amending Ordinance in 1964, as Mortgages payable on demand. On this basis the amendment in 1964 would not only be given retrospective effect but would also give the Board power unilaterally to break any previous contractual obligations it might have entered into to accept payment by instalments or on a specified date in the future of loans it had made on the security of a Mortgage.

I do not think this is a construction that must necessarily be placed upon the section as amended in 1964. I find it difficult to believe that the Legislature intended to endow this statutory body with the power unilaterally to break any solemn obligations which it had already entered into under seal. If this effect had been intended, the Legislature could and I feel would, have said so in unambiguous and unmistakable terms. The enlarged powers given the Board by the amendment in 1964 were discretionary powers which it would seem can only be exercised in respect of loans made on or after the date that the 1964 Amendment Ordinance came into effect. But even if this view is not correct, it is clear that

section 23 does not make any special provision for the enforcement of any demand made thereunder. I am by no means persuaded that the effect of this amendment is to give the Board as Mortgagee under a Mortgage not payable on demand all the rights given by the Land (Transfer and Registration) Ordinance to a Mortgagee under a Mortgage that is made payable on demand especially where the Mortgage was made before the 1964 amendment came into effect.

After considering the evidence in this case I am completely satisfied that the arrangements made for repayment of the principal by instalments did not and were never intended to vary the covenants in the Mortgage. They were facilities for payment made by the Defendant Board by way of indulgence and in exercise of the Board's discretionary powers under the Ordinance (Cap. 200) by which the Board was established. There is no evidence before me whatever that at any time the Plaintiff and the Defendant Board agreed that the various repayment arrangements they made from time to time were to be treated as variations of the general terms of the Mortgage. In my view especially having regard to the provisions, in this regard, of the 14th covenant of the Mortgage, they cannot properly be regarded as anything more than indulgences granted to the Plaintiff from time to time as his financial position and ability to pay varied.

But quite apart from the provisions of the first covenant whereby the money advanced was made payable on demand, the Defendant Board relies on the 13th Covenant in the Mortgage which reads:—

> "That upon default by the Mortgagor in the payment when due of any part of the principal interest or other moneys hereby secured or in the observance or performance of any covenant condition or agreement herein expressed or implied the whole of the principal interest and other moneys then remaining hereby secured shall (at the option of the Mortgagee) become immediately due and payable."

I have held as fact that the Plaintiff was in breach of the implied covenant to pay rates quite apart from any other breaches of covenant. Under the 13th Covenant the whole of the principal and interest due under the Mortgage thereby became immediately due and payable.

The breach by the Plaintiff of his covenant to pay the rates on the Mortgaged property had extended well over the period allowed by section 61 of the Land (Transfer and Registration Ordinance as varied by the 10th Covenant in the Mortgage.

The money due under the Mortgage having become due and payable a demand in writing dated 14th July, 1966, was as is required by section 62 of the Ordinance, served on the Plaintiff on 19th July, 1966.

The Plaintiff has conceded that he received the demand and that he did not comply with it within the one month allowed by section 63 of the Ordinance and has still not done so. Although the Plaintiff has contended that the sum stated to be due by way of principal and interest in this demand dated 14th July, 1966, is incorrect, he has conceded that a substantial sum was due from him and that he has not paid that sum either.

The Plaintiff has not, either in his pleadings or in the course of his evidence, stated what sum he alleges is due if the sum demanded of

him is not correct. He has brought no evidence to show that the sum demanded of him as being due on 14th July, 1966, is not correct.

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In these circumstances the Plaintiff has failed to discharge the onus of proof that rested on him to show he is entitled to the injunction he seeks in his first prayer. In his second prayer he seeks an "order" that the Defendant Board has unlawfully threatened to sell the Mortgaged property. This appears to be a claim for a declaratory Judgment. This is a discretionary matter and in the circumstances of the case is an "order" which I consider to be inappropriate and one which I am not prepared to make.

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The Plaintiff's claims in the third and fourth paragraphs of his prayer have been withdrawn and in my opinion he is not entitled to the reliefs he claims in the remaining paragraphs of his prayer.

C

In these circumstances the Plaintiff's claim is dismissed with costs.

The Defendant Board has filed a counter-claim in which it seeks an "order" that the Mortgage and collateral Bill of Sale may be enforced by foreclosure and sale. Its further claim for Judgment for the principal and interest due under these securities was withdrawn at the hearing.

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The "order" sought appears to be a declaration or a declaratory Judgment. This is a discretionary remedy. As I have already indicated there has been no evidence laid before me of what is the true state of the account between the parties. I am not able to say, on the evidence before me, what was the correct amount of principal and interest due at the time the demand for payment was made in July 1966. No argument has been led or heard on the question of what the position would be if the amount demanded was not the correct amount then due under the Mort-

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gage. The remedies of a Mortgagee lie under the terms of the Mortgage deed and the provisions of the Land (Transfer and Registration) Ordinance. If the Defendant Board should be in doubt whether it ought to exercise its powers of sale under the Mortgage as a result of having made a defective demand, it is open to it to consider whether it should not have a full and proper account drawn to date and make a further demand for the correct sum now due. In these circumstances I do not think this

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is an appropriate case in which a declaratory Judgment should be given. I do therefore dismiss the counter-claim.

*Claim and counter-claim dismissed.*