

**FIJI FOREST SAWMILLING CO LTD v WESTPAC BANKING CORPORATION (HBC214 of 1996L)**

HIGH COURT — CIVIL JURISDICTION

5 GATES J

20 July, 15 October 2001, 20 January 2004

10 **Mortgages and securities — mortgages — default — payment out of monies held in court — whether mortgagee bank had the right to hold insurance proceeds as security pending action — High Court Rules O 22 rr 8(1), 9.**

The Applicant was the owner of a property which was mortgaged to the Respondent bank. In 1993, the subject property was destroyed by fire. When the Applicant defaulted in the payment, the bank sold the property in order to pay for the debt. The proceeds of the sale were applied to various liabilities secured by the mortgage and left a balance. The mortgage sale and other matters were the subject of different proceedings. The insurer was also sued by the Applicant until it was settled by an agreement where the insurer would pay \$125,000 after the assignment to the bank had been discharged.

20 On 18 June 1996, the Applicant issued an originating summons and sought the discharge and release of the fire policy assigned to the bank. However, the bank opposed the order on the ground that it will incur substantial costs in defending the pending action. On 30 August 1996, the court ordered that one-sixth of the fire insurance proceeds and one-sixth of the \$13,143.11 balance mortgage sale proceeds to be paid to the court. The mortgagee bank appealed but was dismissed.

25 On 21 June 2000, the Applicant took out a summons and sought payment with interest because the Respondent already received payment for all its debt and the mortgage having been discharged, all the terms and conditions of the mortgage no longer have any effect. On the other hand, the Respondent maintained that it was enabled by clause 23 of the mortgage instrument to hold the balance until all expenses relative to its security had been recovered.

30 **Held** — The balance comprising of insurance proceeds and mortgage sale proceeds were to be paid out to the Respondent bank for the mortgagor's account in the manner appropriate for a mortgage sale. The bank was entitled to hold onto a proportion of the balance to meet further costs related with the implementation of its security and to resist legal challenges that may arise.

35 Application dismissed.

**Cases referred to**

40 *Bristol & West Plc v Bartlett* [2003] 1 WLR 284; [2002] 4 All ER 544; [2002] EWCA Civ 1181; *Cumper v Potheary* [1941] 2 KB 58; [1941] 2 All ER 516; *Peal Furniture Co Ltd v Adrian Share (Interiors) Ltd* [1977] 1 WLR 464; [1977] 2 All ER 211; *Westpac Banking Corporation v Fiji Forest Sawmilling Co Ltd* CBV0003/1999S, cited.

*S. R. Valenitabua* for the Plaintiff

45 *K. Kumar* for the Defendant

**Gates J.**

**Decision**

50 Monies ordered to be paid into court; payment out; O 22 rr 8(1) and 9 of the High Court Rules; court's discretion to be exercised judicially; change in character of litigation; declaration of Supreme Court as to nature of items coming

within term “security”; longevity of security; mortgagee’s right to hold sufficient funds pending finalisation; terms of mortgage instrument; need for certificate to be issued by mortgagee; orders appropriate after Supreme Court’s decision and present circumstances; payment out to bank which must still account to  
5 mortgagor.

[1] The Plaintiff applies for payment out of monies held in court. Sadal J’s order of 30 August 1996 for payment into court of part of the proceeds of fire insurance and the balance monies of a mortgagee sale was taken on appeal by the mortgagee bank [the Respondent]. The appeal was dismissed by the Court of  
10 Appeal. Because of subsequent events affecting the utility of the primary judge’s orders, further appeal was also dismissed by the Supreme Court.

[2] But in the Supreme Court the bank had its stance as mortgagee more fully recognised and a significant declaration was made in its favour. The decision elucidated what could come within the security of a mortgage and for how long  
15 that security could be held: *Westpac Banking Corporation v Fiji Forest Sawmilling Co Ltd* (unreported CBV0003/1999S); *Bristol & West Plc v Bartlett* [2003] 1 WLR 284; [2002] 4 All ER 544; [2002] EWCA Civ 1181.

### Background

[3] The Applicant [Fiji Forest] owned a property on which stood the Sigatoka Hotel, Fiji Forest had mortgaged the property to the bank. In 1993 the hotel was destroyed by fire. The bank demanded payment of monies secured by the mortgage, and after default by the mortgagor, the bank sold the property in order  
20 to meet the debt. That sale was registered on 13 December 1994.

[4] After applying the sale proceeds to various liabilities secured by the bank’s mortgage, the bank’s solicitors were left with a balance of \$13,143.91. The mortgage sale and other matters were challenged in different proceedings, and the insurer was also sued by Fiji Forest. This last action was settled by the insurer agreeing to pay out \$125,000 which was to be paid after the assignment to the  
25 bank had been discharged.  
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### This action

[5] On 18 June 1996 Fiji Forest issued an originating summons seeking the discharge and release of the fire policy assigned to the bank. The bank opposed  
35 the order sought, principally on the ground that:

although there was a surplus on sale of the mortgaged property, substantial costs were likely to be incurred in defending the pending action by the Respondent and so the Bank wished to hold on to the insurance proceeds as security for those costs especially as the Respondent had no other assets but pending claims against it.  
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[6] The bank’s legal costs were estimated at \$47,000 exclusive of VAT and disbursements. These costs took into account potential appeals to the Court of Appeal and to the Supreme Court. The Supreme Court subsequently found (at 26) that “The course which the bank should have taken was to issue a certificate  
45 under clause 21 of the mortgage instrument, and to have released the balance over the amount so fixed to the company”. The Court of Appeal had held that it was unreasonable for the bank to hold \$138,000 “against a remotely possible future liability of \$47,000”. The Supreme Court agreed with this criticism.

[7] On 30 August 1996 Sadal J had ordered inter alia that one-sixth of the fire insurance proceeds and one-sixth of the \$13,143.11 balance mortgage sale proceeds be paid into court. Accordingly this was done.  
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**This application**

[8] Fiji Forest took out a summons on 21 June 2000 seeking payment out to itself of \$23,023.98 and interest.

5 [9] Order 22 r 8(1) of the High Court Rules provides:

Subject to paragraph (2) money paid into Court under an order of the Court or a Certificate of the Registrar shall not be paid out except in pursuance of an Order of the Court.

[10] Rule 9 provides that:

10 Payment out of moneys in Court shall be made to the person entitled...

[11] Of the court's discretion in the matter the Supreme Court Practice states:

15 The Court has a complete discretion, to be exercised judicially, whether to allow a payment into Court to be paid out back to the Defendant, and if so on what terms, and it will do so where since the date of the notice of payment in the character of the litigation has entirely changed (*Peal Furniture Co Ltd v Adrian Share (Interiors) Ltd* [1977] 1 WLR 464; [1977] 2 All ER 211.

20 [12] It is sufficient to say in summary that there must be good reasons for seeking an order for payment out: *Cumper v Potheary* [1941] 2 KB 58; [1941] 2 All ER 516 at 522.

**Applicant's case**

25 [13] Fiji Forest claims that the bank has received payment for all of its debt. Further it says the mortgage being discharged all terms and conditions are now of no effect. This argument was firmly rejected by the Supreme Court. The company claimed there is no impediment to a payment out to itself of the balance proceeds from the insurance and from the mortgagee sale. Fiji Forest does not support that part of the High Court order that appeared to hold up the result of this action until a probate matter was first decided among former shareholders of the company. This part was not supported by the bank either.

30 [14] Mr Valenitabua for Fiji Forest argues that the \$23,023.98, if due to the company, could not form part of the deceased shareholder's estate, and therefore should not influence the court's discretion.

**35 The bank's case**

[15] The bank maintained that it was empowered by clause 23 of the mortgage instrument to retain balance monies until all expenses in connection with the enforcing of its security had been recovered. Clause 23(b)(viii) provided:

40 (viii) the assisting or defending of the title of the Mortgagor or the Bank in relation to this security;

45 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 would 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.

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Clause 27 also provided:

27. THAT those presents shall be a continuing security and shall not be considered as wholly or partially discharged by the payment at any time hereafter of any of the moneys hereby secured or by any settlement of account or by any other matter or thing whatsoever and shall apply to the present or any future balance of the moneys hereby secured until a final discharge hereof has been given to the Mortgagor.

[17] The Supreme Court held that:

the Bank was entitled to retain sufficient of the disputed moneys to cover the amount of the “moneys hereby secured” as defined by the mortgage, but no more. The “moneys hereby secured” would include the liability of the Company arising under clause 23 of the mortgage.

[18] The bank has incurred substantial legal costs in relation to the mortgagee sale proceedings and the subsequent litigation. Jone Vuli, a loans manager with the bank, deposed that the company has not traded for more than 10 years, a fact not challenged by the company in its affidavit material. If paid out to the company, there would be a risk the monies held in court could not be recovered. That was the position prior to the Supreme Court appeal.

## 20 Appeal to the Supreme Court

[19] Meanwhile the Supreme Court delivered its judgment on the original orders of Sadal J. After an extensive review of the nature, effect and longevity of the security held by the bank the court concluded (at 27):

We have been informed from the Bar Table that pursuant to the orders of the trial judge, and other orders of the High Court, the Bank has already paid to or on account of the company all the disputed moneys. Other information in the Record Book suggests that the company is presently insolvent. In these circumstances any order of this Court in relation to the disputed moneys is not likely to have any practical consequence. Nonetheless the Bank is entitled to have its legal rights appropriately recognised.

## Conclusion

[20] Clearly the bank was entitled to hold onto a proportion of the balance monies so as to meet further expenses associated with enforcement of its security and to resist legal challenges. In deciding the issues this way the Supreme Court disagreed with the primary judge’s reasons for the payment in, and to some extent those also of the Court of Appeal. However these financial needs should have been quantified and a certificate issued. But the bank is entitled to have the monies presently in court, to deal with them, and then to submit its final account of the further expenses to the company.

[21] In the result I believe the appropriate and just order to be made now is as follows:

- (1) The Plaintiff’s application is dismissed.
  - (2) The balance monies held in court consisting of insurance proceeds and mortgagee sale proceeds are to be paid out to the Respondent, these to be accounted for to the mortgagor in the usual manner appropriate at the conclusion of a mortgagee sale.
  - (3) There will be no order as to costs.
- Orders accordingly.

*Application dismissed.*