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PACIFIC REALTORS (FIJI) LIMITED

v.

MOHAMMED KHAIRULLAH KHAN & OTHERS

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[COURT OF APPEAL, 1977 (Gould V. P., Marsack J. A.,) 21st, 25th March]

Civil Jurisdiction

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Damages—mortgagees advertised notice of sale when no legal right so to do existed—mortgagors in process of negotiating sale to third party—offer to purchase withdrawn—whether damages too remote—assessment of damages.

The respondents purported to take preliminary steps in the exercise of their power of sale as mortgagees by advertising the property for sale when no legal right existed so to do. The appellant company had, in fact, already found a purchaser and was negotiating the sale at a profit of $50,000. The prospective purchaser withdrew when the mortgagees' notice appeared.

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Held **1: The unjustified action of the respondents had eliminated any possibility of the sale being concluded on the agreed terms.**

2. The loss suffered by the appellant company was reasonably foreseeable and a serious possibility and therefore not too remote.

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3. The appellant company was entitled to $2,000.00 damages for loss of chance.

Cases referred to:

Hadley v. Baxendale **(1854) 9 Exch. 341; [1843–60] All E.R. Rep. 461.**
Aruna Mills Ltd v. Dhanrajmal Gobindram **[1968] 1 All E.R. 113; [1968] 2 W.L.R. 101.**

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Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd [1949] 1 All E. R. 997; [1949] 2 K.B. 528.
Chaplin v. Hicks [1911] 2 K.B. 786.

Appeal against the decision of the Supreme Court dismissing the appellant's claim for damages for breach of the contractual provisions of its mortgage.

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K. C. Ramrakha **for the appellant company.**
B. C. Patel **for the respondents.**

The following judgments were read: [25 March 1977]

Henry J. A.:

By mortgage No. 132841 dated April 1 1974, appellant convenanted to pay respondents the sum of $32,000 on demand provided that six months' notice in writing was given. Interest was payable at the rate of 10% per annum. In the

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Supreme Court it was held that, at the material time, no such demand had been made. This finding is not challenged. Respondents purported to take steps preliminary to the exercise of its powers of sale, which, of course, were not exercisable in the circumstances. Appellant obtained an interim injuction which halted any steps after the stage when the property had already been advertised for sale. Appellant was actually in the course of negotiating a sale of the property when the advertisement appeared. The prospective purchaser terminated negotiations by saying in a letter from its solicitor that the offer to acquire the property was withdrawn in view of the said advertisement. Appellant then brought the present action claiming damages in the sum of $50,000 for the loss of a prospective sale. The Supreme Court dismissed the claim with costs. The sole question on appeal is whether or not appellant has proved damage which is not too remote in law.

Some confusion appears to have arisen through the way in which the case for appellant was conducted in the court below. Counsel for appellant did not appear in the lower court. The statement of claim made it clear that appellant did not have a concluded contract but that a sale was in the stage of negotiation. It was not clear in the statement of claim whether the cause of action was in contract or in tort and some reference was made to this in the judgment. Moreover, on at least two occasions, counsel was noted as saying appellant's claim was for the loss of a sale. This was referred to by the learned judge and seemed to be one factor which played a part in the resultant dismissal of the claim. Indeed a ground of appeal was based on a claim that the learned judge erred in not holding that an enforceable contract of sale had been proved. The issues have now become clear. The basis of appellant's claim is now accepted as being for breach of the contractual provisions of the said mortgage in that steps were taken to exercise the power of sale when such power was not legally exerciseable. The learned judge held that the breach had been proved. This finding has not been challenged. The sole question is what damage, if any, has appellant proved to be recoverable as a result of such breach.

The price at which the appellant and its prospective purchaser were negotiating was $125,000. Appellant had purchased the property for $75,000 so the claim was for the difference. It is not now contended by counsel for appellant that it can recover that amount in full. It was conceded by counsel for appellant, and properly conceded in my view, that the sale depended upon a chance or contingency that, if the advertisement had not appeared, the sale would have eventuated. I shall deal with the facts before adverting to the relevant principles of law.

The prospective purchaser was an Australian limited liability company called Rampac Proprietary Limited which I shall call "Rampac". It was represented through-out by a Mr Steele who was formerly in practice in Sydney as a solicitor but had not renewed his practising certificate seemingly to devote himself to commercial pursuits. He was a nominee shareholder and director of Rampac. There was one other director who acted in consultation with Mr Steele. Mr Steele was familiar with the land. Negotiations were conducted with Mr Vijay Kumar on behalf of appellant. Mr Steele wrote to appellant on January 6, 1975 confirming that he had Rampac as a definite purchaser for the property. The price offered was $125,000 Fijian currency on a deposit of 10% upon exchange of contracts. The balance was to be paid in cash upon completion within 30 days. The letter then contained the following paragraphs, namely:

"Upon completion vacant possession is to be handed to the purchaser and the propety is to be free from all encumberances but subject to any easements. A

I would rely upon you to organise on my clients behalf all necessary applications to the Department of Lands, Central Monetary Authority and any other governmental or other authorities for consent to the transaction. The contract would be subject to such consents being obtained.

I am unable to come to Fiji before the end of February, and if the property can be held open for my client until that time, I would prefer to exchange contracts whilst in Fiji after I have had the opportunity of conducting my own searches. B

Meanwhile kindly ensure that contracts and all necessary applications are ready for me on my arrival. One of the directors of my clients company will be with me in Fiji so all business can be transacted on the spot. I shall need an application form from the Central Monetary Authority to enable me to have the deposit transmitted to Fiji." C

Appellant acknowledged this letter "accepting the offer" and enclosing a form for approval of the Fiji Government to bring moneys into Fiji. On 27 January 1975 appellant wrote to Mr Steele advising him that a substantial sum was owing by it on the land and that the mortgagee had prematurely advertised the property for sale. Rampac was asked to complete the sale by mid-February with a further request to complete as early as possible "to save any further complications". Mr Steele replied by letter of 7 February 1975 that he was unable to expedite an exchange of contracts and added: D

"In view of the advertisement by the mortgagees' solicitors to sell the abovementioned property I am instructed to advise you that my client hereby withdraws its previous offer to acquire the property." E

The negotiations thus terminated without an enforceable contract being concluded.

In evidence Mr Steele said he believed funds were available by Rampac producing one third of the money required and by borrowing the other two thirds. No difficulty was anticipated in moving funds from Australia to Fiji or in Rampac being able to provide such funds from its own assets and turnover position which were detailed. As to borrowing two thirds witness in cross-examination said: F

"Two thirds of price was to be obtained from Sir John Linsdale in Hongkong and he would have been given security over land. We would have had to obtain consent of Central Monetary Authority to mortgage to Sir John Linsdale. Because area was small I believed that consent of Central Monetary Authority would not have been difficult. I am referring to Act which requires an extra Fiji buyer to get consent from Minister. I also understood that if company were to buy land and were to bring in money under $^1/_3$–$^2/_3$ basis which we believed existed, there would be no obstruction to getting consent to mortgage. In fact no application was made for consent of Central Monetary Authority to mortgage. I agree it is necessary." G

Witness realised, as is the fact, that any such contract as that intended, was subject to the consent of the Central Monetary Authority of Fiji and at least one other authority. H

The rule governing remoteness of damages is that stated by Alderson B. in *Hadley v. Baxendale* (1854) 9 Exch. 341 at page 354 where it was stated thus:

> **"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."**

The rule was exhaustively considered by their lordships in *The Heron II* [1969] A.C. 350, [1967] 3 All E.R. 686. For the purposes of the present case it is convenient to cite a passage from the judgment of Donaldson J. in *Aruna Mills v. Dhanrajmal Gobindram* [1968] 1 All E.R. 113 at p. 119 where the following appears namely:

> "With regard to remoteness of loss, until recently it could fairly be said that, subject to the decision in The Parana [1877], 2 P.D. 118, the law on remoteness of damage in contract had been codified by the decision in *Hadley v. Baxendale* [1843–60] All E.R. Rep. 461; [1854] 9 Exch. 341, as explained in the classic judgment delivered by Asquith L. J., in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* [1949] 1 All E.R. 997 at pp. 1002, 1003; [1949] 2 K.B. 528 at pp. 539, 540. Now the House of Lords in the *Heron II* [1967] 3 All E.R. 686 has held that The Parana is not to be considered as an exception. In the course of the speeches their lordships expressed varying degrees of enthusiasm for the *Victoria Laundry* decision [1949] 1 All E.R. 997; [1949] 2 K.B. 528; but, subject to two possible qualifications, it seems to me to remain unimpaired as the classic authority on the topic. These two qualifications are as follows. First, reference in the judgment to a loss being "reasonably foreseeable" should perhaps be taken as referring to the loss having been within "actual or assumed contemplation" (see the speech of Lord Reid [1967] 3 All E.R. at pp 694–696. Second, the phrase "liable to result" is not correctly paraphrased by the use of the expression "on the cards", but conveys the relevant shade of likelihood by its own wording (Lord Hodson [1967] 3 All E.R. at p. 708) or when defined (as it was in proposition in the *Victoria Laundry case* [1949] 1 All E.R. at pp. 1003; [1949] 2 K.B. at p. 540) as indicating that a loss is a "serious possibility" or "real danger" (see Lord Pearce [1967] 3 All E.R. at p. 711 and Lord Upjohn [1967] 3 All E.R. at p. 717), words which amongst others had the approval of Lord Morris of *Borth-Y-Gest* [1967] 3 All E.R. at p. 701."

The evidence is clear that any sale to Rampac was subject to a number of contingencies so the highest plane on which appellant can put its case is for "the loss of chance" to make the contemplated sale. Such a loss, if it comes within the rule in *Hadley v. Baxendale,* is recoverable. In *Chaplin v. Hicks* [1911] 2 K.B. 786 Vaugham Williams L. J. said:

> **"It was said that plaintiffs chance of winning a prize turned on such a number of contingencies that it was impossible for anyone even after arriving at the conclusion that the plaintiff had lost her opportunity by the**

> breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiffs pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of a prize might depend makes the calculation not only difficult but incapable of being carried out with precision..... I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in its assessment of damage."

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The learned judge did not make a clear finding that a cause of the cessation of negotiations was the action of respondent's attempt to exercise the power of sale. He said he came to the conclusion that the negotiations for sale were at such an early stage that it could not be safely said that a sale was likely to take place. The learned judge then turned to the question of remoteness of damage. He held that in view of counsel's assurance as to the basis of the claim being on a sale the claim must fail. The learned judge did allude some other action on the wrongful attempt to exercise the power of sale which he said might have damnified appellant. These observations did not resolve the matters which, it is now clear, were the real issues. First is the question whether or not the actions of respondent were a cause of the discontinuance of negotiations. I think the proper finding is that they were. Next the question is what damage, if any, ought appellant to recover for the breach?

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The property was sold by respondents to appellant for a sum of $75,000 with a short-term mortgage back for $32,000 upon which interest was payable at the rate of 10% per annum. It was an unimproved section in Lautoka for which a large sum of money had been paid and on which outgoings were payable by appellant. It is a fair inference that respondents knew the potential of the land either for re-sale or development. Why acquire an unimproved section at that price?

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Appellants name is not without importance nor is the fact that respondents are described as "landlords of Lautoka". Appellant as a reasonable inference, to the knowledge of respondents, would require early re-financing if development were intended or if the property were to be held as a speculation for re-sale. It is a further fair inference that respondents would know the likely adverse effect of advertising a forced sale might have on dealings of any kind with such a property when default has been made. Adopting the tests referred to above in the *Aruna Mills* case I am of the opinion that any damage, which is proved to have flowed from the breach of contract, is not too remote.

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The remaining question is whether the case should be sent back for assessment of damage or whether this Court should assess them. The contingencies have been sufficiently adverted to above and need not be repeated. Other possibilities were also mentioned. It is sufficient to say that precision is impossible that the chances must be assessed as best the Court can assess them. I consider that this Court should make that assessment so that the litigation may be terminated. Negotiations were at an early stage. Any contract would be subject to conditions concerning consents and the raising of finance. Even if the contract was not expressed to be subject to raising finance it was not likely to be concluded before finance was assured. There is no evidence to indicate whether market conditions changed between the time of commencement of negotiations and the discontinuance of them, or indeed at any time since. Nor is it known whether the said section is still held by appellant. No such factor has been taken into account.

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I assess damages at $2,000. I would allow the appeal with costs and set aside the judgment in the Court below and remit the case to the Supreme Court to enter judgment for $2,000 together with costs. The other members of the Court, having concurred in this judgment, orders are made accordingly.

MARSACK J. A.

I am fully in agreement with the judgment proposed by Sir Trevor Henry. The uncontested facts are that the respondents advertised a mortgagees' sale over the appellants' property when they had no legal right to do so; that at this time the appellants were negotiating with a company known as Rampac for the sale of the property at a price which would have shown them a profit of some $50,000; that a definite offer was made by Rampac at this figure, and accepted by the appellants, subject only to exchange of contracts between the parties and the obtaining of the necessary Government approval. Before completion the mortgagees' advertisement for sale appeared, and as a direct result of that Rampac's offer was withdrawn. There is thus no doubt that the unjustified action of the respondents eliminated any possibility of the sale being concluded on the agreed terms. Though the learned trial judge says that the negotiations between the parties were at such an early stage that it could not safely be said that a sale was likely to take place, I am of the opinion that the likelihood could be put on a much higher level than that. In any event, I am satisfied that the appellants would be entitled, as my brother Henry has expressed it, to some compensation for "loss of a chance".

The assessment of damages in such a case, depending as it does on some contingencies, is always a difficult matter. On full consideration I am led to the conclusion that Mr Justice Henry's estimate is a proper one; and as I have said I support his judgment accordingly.

GOULD V. P.

I have had the advantage of reading the Judgment of Henry J. A. in this appeal and am in agreement with his reasoning and conclusions, and with the orders and assessment of damages he proposes. There is nothing which I can usefully add.

The opinion of the members of the Court being unanimous, the appeal is allowed with costs, and the case is remitted to the Supreme Court to enter judgment for the plaintiff company for the sum of $2,000 and the costs of the action.

Appeal allowed; damages assessed at $2,000.00