

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : SAFETY AT SEA (AUSTRALASIA) LIMITED
as owner of the assets of
KHEMI TRADING COMPANY LIMITED

: Judgment Creditor

AND : 1. DAWN TAPAVALU
2. DAVID TAPAVALU

: Judgment Debtors

BEFORE HON. CHIEF JUSTICE WARD in chambers.

COUNSEL : Appleby for the Receiver
: Miss Tonga for the judgment debtors
: Miss Tapueluelu for the Bank of Tonga

Date of Hearing : 4 February 1999
Date of Ruling : 19 February 1999

RULING

On 18 December, 1990, Khemi Trading filed a writ claiming payment for materials supplied to the defendants to build a house. On 14 August 1991, final judgment was entered by consent for the plaintiff in the sum of NZ\$23,218.00 and costs of \$250 and interest at 10%. The total sum at that time was equivalent to T\$17,227.19 and in October 1991 the Bank of Tonga was ordered to pay the judgment creditor \$1,481.82 as garnishee.

By May 1993 the sum of \$10,500.37 remained outstanding and a writ of distress was issued on 20 August 1993 but no goods were seized as the defendants had gone abroad. Application was then made for a certificate of judgment under the Reciprocal Enforcement of Judgments Act but it is not clear from the file what happened to that application.

However, on 5 September, 1997, the judgment creditor applied for the appointment of a Receiver pointing out that the debtors were the owners of "property on land containing On 1R 24K more or less situated at Ha'aeiho as shown in Grant Deed Book 125 Folio 15 (the Land)". On 7 October, 1997, an Order was made appointing Dianne Warner as Receiver. For a reason not apparent on the Court file, there is then another Order by the same Judge dated 24 March 1998 setting aside that appointment and appointing the same person as Receiver as from that date.

By the time of her first report on 26 June 1998, the total judgment debt stood at \$20,615.05. In that report she advised the Court that she had ascertained the judgment debtors had placed a tenant in the property at Ha'ateiho since her appointment and had been paid five months rent in advance at \$1000.00 per month.

The Receiver also pointed out that the Bank of Tonga had a registered mortgage over the allotment and all properties thereon including the dwelling house. The debtors were in arrears on their repayments to the Bank and the Bank had advised her they wished to sell the property to recover the debt owing to it. It appears from her report that the Bank was proposing to sell the land and dwelling house, use the proceeds to clear the debt to it and the balance to be paid to the receiver as an ordinary creditor.

The mortgage arose out of a loan agreement made on 1 December, 1995, between the judgment debtors and the Bank under which the former promised the land upon a mortgage and all property on it including the dwelling house as security. The defendants executed a registered mortgage on 21 January, 1996, over the land. The balance of the loan account fell into arrears and the Bank demanded full payment on 25 March 1998. On 20 July 1998 the Bank moved for an Order that the Receiver should not deal with the property.

On 22 July 1998 the Court ordered the parties to file written submissions regarding the claim by the Bank and, in the meantime ordered that the rent from the Ha'ateiho property should be paid to the Bank in reduction of the debtors' loan account until further Order and subject to the Bank paying the insurance on the house. The matter was then adjourned sine die.

There followed an acrimonious correspondence between the Bank and the Receiver over the right to sell and/or lease the property and various applications that, as far as the file reveals, have not been resolved. The submissions I have received relate to the Orders sought in the application of the Receiver dated 16 October 1998, as follows:

- "A Empowering the Receiver to sell the land, buildings and any other chattels found on the land which are the property of the Judgment Debtor.
- B Timetabling the steps to be taken by the Receiver in that sale.
- C Directing the proceeds of sale be applied according to the following priorities:
 - (a) The proper remuneration, disbursements and costs of the Receiver in the receivership, including the costs of sale;
 - (b) Discharge of the mortgage to the Bank of Tonga;
 - (c) Discharge of the liability to the Judgment Creditor; and
 - (d) As to any balance by payment to the Judgment Debtors.
- D Indemnity costs of this application to be paid by the Bank of Tonga.
- E Such further order as the Court deems just."

It is not disputed that the Bank as a secured creditor takes priority for payment out of moneys received ahead of the judgment creditor as an ordinary creditor. The Receiver's submission is that she is empowered by the terms of the Order appointing her to collect moneys owed to the judgment debtors generally, including rent, to take control of the land and dwelling house and to sell.

Unfortunately, the terms of the Order appointing her do not set out her powers. It orders: "Ms Dianne Warner is appointed as Receiver of the Judgment Debtors as from the date of this Order."

The Receiver points to the terms of the application for the appointment, which sought: "the appointment of Dianne Warner as Receiver of the Judgment Debtors for collection on behalf of the Judgment Creditor of any moneys due to the Judgment Debtors including any rental payments payable to the Judgment Debtors in respect of the Judgment Debtors property ...and also if necessary for the sale of the Land until the amount of TOP\$16,977.19 plus interest at 10%per annum from 14 August 1991 until paid in full." In the face of such bald terms of appointment in the Order, she suggests the Court should assume the Order intended to give the powers sought in the application.

Whilst the duties and powers of Receivers appointed by the court are generally similar, the submissions of both sides have, to some extent, failed to distinguish the position of a Receiver appointed in execution of a judgment as in this case and the appointment of a Receiver at any other stage of the proceedings.

This appointment was by way of execution under O26 r 10. It is an order to enable a judgment creditor to obtain payment of his debt when the nature of the property is such that ordinary execution will not reach it. Land is an obvious case for such an order.

The general powers of the Receiver are given by the Court and are to receive the assets and moneys of the judgment debtor. It is usual where there is an intention to empower the Receiver to sell the land, to grant such power specifically. I do not accept it can be assumed in this case simply because the application upon which the Court acted in making the Order seeks such a power. On the contrary, the fact it was before the court at the time of the application and was not specifically ordered suggests the Court did not intend the grant of such a power. That does not, of course, mean the Receiver can never sell but that she needs to make a specific application to the Court.

By the general terms in which it is couched, I accept it does embrace the general duty to receive the moneys due to the judgment debtor and so the Receiver had the right to receive the rent for the property. I am uncertain, therefore, why the Court on 22 July 1998, having been advised of the Bank's notice of prior claim but the Bank having not, at that time, served any notice on the mortgagors of its intention to take possession, ordered that the rents should be paid to the Bank in reduction of the debtors' loan account.

It is clear that the Receiver's application to sell the property must be refused in light of the Bank's interest. The Receiver refers to the Bank's suggested lack of skill or expertise in selling this property. I do not consider that, even if it is true (and I have no evidence to support such a claim), is a valid reason to displace the Bank's right as Mortgagee.

Passing to the priority of payments, it is not disputed that the proceeds of any sale or other disposal of the property must go to satisfy the Bank's claim in full before the judgment creditor receives his share and any remaining sum will then go to the judgment debtors. The question upon which the Receiver seeks an order is the position of her remuneration. The Order appointing her was also silent on that matter.

The Receiver points out that she was appointed by the Court and priority should be given to her remuneration. If no such protection is given, Receivers will be very reluctant to consent to be appointed. I accept the force of such an argument.

As has been stated, her appointment was for the purpose of execution and this was at the application of the judgment creditor. Her duties are to receive and account for all money under the receivership and to pay such sums as the Court shall certify are properly due. The balance will then be ordered to be paid to the judgment creditor. The priority of the Receiver's remuneration is achieved by ordering it to be paid out of receipts in priority to any other creditor. They are in effect the costs incurred in execution of the judgment creditor's security and are payable by him before he is paid out.

Those are orders relating to the costs of a Receiver arising from the receivership in the case in which he was appointed. In the present application the Bank does not appear as a party to the action for which execution is sought but as a body having a prior legal claim on the judgment debtor's property. As has not been disputed, the judgment creditor will only benefit from the value of the property if there is any surplus after the Bank has satisfied its interest. It is out of any such money that the Receiver shall receive her remuneration in priority to any claim against the judgment debtors and before payment of the judgment creditor.

The Receiver has also applied for indemnity costs against the Bank. Her submission is that the Bank has unnecessarily caused extra expense by its attitude and reluctance to co-operate with the Receiver. I do not think in view of my decision in this case that such an application can succeed. However it does require me to refer to one aspect of the case that has caused me concern.

Following the Court Order on 22 July 1998, the Bank served a notice on the judgment debtor on 9 October 1998 of its intention to take mortgagee's possession. At about the same time the tenants in the property left without notice or on short notice. The Bank then took possession of the property "in order to protect the Bank's interests for the time being" and refused the Receiver's request to return the keys.

When the Bank took that action it was aware of the appointment of the Receiver and that the Court had ordered that only the rent should be paid to it. The duties of the Receiver were to act as Receiver of the judgment debtors' property. It was clear the question of who had the possession or the control of the property was in sharp dispute. That dispute had already been taken to the Court by the Receiver and, although the Bank had obtained an Order to receive the rent, the matter had otherwise been adjourned for the filing of submissions. If the Bank perceived any need to protect its interest in any other way, the proper course was to seek directions from the Court.

That action was indicative of the unfortunate and unnecessary confrontation between the Bank and the Receiver which has certainly delayed resolution of this matter. In those circumstances, I order that the Bank shall pay its own costs of these proceedings. The Receiver's costs to be part of her remuneration payable as I have already ruled out of the receipts in her receivership in this action.

It appears from the written submissions that the Bank intends to sell the mortgaged property and, in order to give some finality to this matter, I shall order it should do so. I am not aware of the present state of the judgment debtors' loan account nor do I know the value of the property although the papers before me suggest it is reasonably substantial. The Bank has notice of the judgment creditor's claim and must use its best endeavour to dispose of the property in a manner that ensures a proper price is paid.

Counsel have asked me to order that the property must be re-advertised seeking fresh tenders and I do so order. I also order that the Receiver must be kept fully informed of the details of the sale. On completion, the Bank shall pay any funds, remaining after full satisfaction of its interest, to the Receiver who shall then account for them to the Court in the usual way.



Gordon Ward

NUKU'ALOFA : 19th February, 1999

CHIEF JUSTICE