IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 50 OF 1991
(High Court Civil Action No. 517 of 1983)

BETWEEN:

CHANDRA KANT PALA — APPELLANT

-and-

AUSTRALIA AND NEW ZEALAND SAVINGS BANK LTD
AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD — RESPONDENTS

Dr. Sahu Khan for the Appellant
Mr. C. B. Young and Mr. B. C. Patel for the Respondents

Date of Hearing : 19th May, 1993
Date of Delivery of Judgment : 24th December, 1993

JUDGMENT OF THE COURT

In November 1979 the Native Land Trust Board executed a lease of native land whereby it leased the land to the appellant for a term of 99 years commencing on 1st April 1978. The lease was executed on 5th November 1979 and registered on 16th November 1979.

The appellant, described in the lease as a storekeeper, was apparently the managing director of Kings Duty Free Limited at Nadi. Statements of account with the bank of that business show that as at 1st March 1979 the account of the business with the Australia and New Zealand Banking Group Limited (ANZ), the second respondent, was overdrawn to the tune of $51,950.22. It is clear from the materials before the Court that the banking relationship had existed since before this time.

The appellant also had a savings loan account with the Australia and New Zealand Savings Bank Limited (ANZ Savings). It was established apparently for the purpose of financing the erection of a house on the land the subject of the lease, which the appellant was required to construct. While the exact dates of opening that account or of the making of the agreement to finance the lease are not in evidence, the evidence discloses that "drawdown" amounts in respect of that account commenced on 23rd March 1979 and as at some date after 20th August 1979, following various "drawdowns", the amount that had been advanced stood at $40,000.00 (record p. 85).

As the result of an application made by the appellant on a date unknown, the Native Land Trust Board, (NLTB) on 17th August 1978, provisionally approved of a lease to the appellant of the land for a period of 99 years from 1st April 1977 (record p. 107).

The applications for consent to mortgage, said to be pursuant to s.12 of the Native Land Trust Act (Cap. 115), which must now be Cap. 134, were executed by the appellant on 12th March 1979. Both referred to the document of approval mentioned above; the lease number was left blank; the lease had not yet been executed. One application sought approval for a proposed mortgage to ANZ Savings for a "principal sum of $40,000 together with any subsequent sum advanced," the other to a proposed mortgage to ANZ for a principal sum of $60,000 "together with any subsequent sum advanced" (record pp 109, 110); the term of each

mortgage was to date from March 1979. Consent was given by the Board on 16th March 1979. It was for a period of 3 calendar months, and provided that "if the mortgage transaction above referred to is not registered by the Registrar of Titles or the Registrar of Deeds, as the case may be, within that period (i.e. on or before 16.6.79) then the consent hereby granted will become VOID AND OF NO EFFECT."

On 12th March 1979, the same date as the applications for consent, the appellant executed two mortgages of the land, one in favour of ANZ Savings and the other in favour of ANZ (record pp. 117, 124): The mortgage to the ANZ Savings was expressed to be to the appellant "storekeeper" as the customer, and that to ANZ to Kings Duty Free Limited as the customer. Otherwise, so far as relevant they are in identical terms. They did not refer to a specific sum of money and were expressed to cover all sums of money that were then owing or which might thereafter become owing from the customer. We do not believe it necessary to refer to any terms of the mortgages. Thereafter the overdrawn account of Kings Duty Free continued to be operated as before, and there were the advances (drawdowns) mentioned earlier from the savings loan account.

The mortgages were not registered within the time limited, as will appear hereafter.

On 5th November 1979 the lease to the appellant was executed on behalf of the Board and it was registered on 16th November

1979 and given a number. On 28th and 29th November 1979 two fresh applications for consent to mortgage under s. 12 were executed on the same terms as those executed on 12th March, to which we have already referred, except that they referred to the registered number of the lease. Consent was given on 19th April 1980, to expire on 11th July 1980.

The mortgages which had been executed as previously mentioned were then lodged for registration and were registered on 21st April 1980.

Two separate demands for payment were made on behalf of the mortgagees on 21st December 1982, one to the appellant in respect of a sum of $33,712.00, and one for the managing director of Kings Duty Free Limited for $17,916.20 (record pp. 131, 132). In fact the demands were made on behalf of ANZ, but there is not the slightest doubt that no one was confused by this. In fact the position was made quite clear by a letter of 9th June 1983 (record p. 38). In fact no point has ever been taken that a proper demand was not made.

Proceedings were commenced by the appellant on 22nd August 1983. In them the appellant sought declarations that the mortgages were null and void, and that the banks were not entitled to exercise any rights under them. They first came before the Court on 13th April 1984. They were eventually heard by Sadal J. on 24th October 1989. His Lordship delivered

judgment on 5th July 1991, and he dismissed the plaintiff's claim. An appeal to this Court was heard on 19th May 1993.

On analysis, we think that really only one problem emerges, and we have given what we believe is the solution to it.

There is no doubt that the land was native land within the meaning and provisions of the Native Land Trust Act Cap 134 (the Act). The Board is empowered to grant leases of such land. Leases must be executed under the seal of the Board and registered, (ss 8, 10). Section 12, to which we shall come, requires consent of the Board for dealings with the lease. Prima facie that means what it says, so that it postulates there being a lease in existence. Section 10 of the Act imposes certain requirements as to form, conditions and covenants necessary in respect of leases, and requires registration. This would strengthen the view that s.12 means what it says. There may be some suggestion in the authorities to which we were referred that it is possible to acquire some equitable interest in the nature of an "equitable lease," before there is a lease, a concept with which we are not familiar, and then make some agreement in relation to that, which agreement is caught by s.12. We do not agree, but it does not matter, because here there was no suggestion that there was any such an entity (it is difficult to think of a word other than animal), nor that there was any purported dealing with it. How such a thing could arise when the Board is only empowered by s.8 to grant leases or licenses, and

both must be executed under seal, we fail to understand. How there could exist any kind of a lease without the agreement of the lessor by a person who has nothing to lease, we are at a loss to understand. But it is unnecessary to spend any more time on it.

We must say that, without wishing to show any certainty about the matter, the regulations made under the Act seem to make provision for a period between approval by the Board of the grant of a lease and the execution of the lease itself. Regulation 12 relates to this. It provides for certain actions to be taken. Reg 12(2) provides that "No tenancy of native land shall be taken to subsist by virtue of any notice served in pursuance of paragraph (1) unless ...." certain requirements are complied with. If that regulation was intended to operate to elevate an applicant for a lease to the status of a lessee so as, inter alia, to cause s.12 of the Act to operate, then there is not the slightest evidence in this case that the requirements of the regulation were complied with. It is most unlikely that the regulation was so intended to operate, since the applicant for a lease, whether in possession or not, has nothing that he can alienate or deal with, or so it seems to us. There is nothing to suggest that the "provisional approval" of 17th August 1978 by the secretary of the Board to the application of the appellant, operated as an approval within the terms of reg 12, or was intended to do so. We need not pursue this any further.

The simple result of all this is that the appellant had no property on the lease that could be the subject of the two mortgages that were executed on 12th March 1979, and the mortgages simply did not operate upon any. This no doubt explains why fresh consents to mortgage were sought by the appellant after the lease to the appellant was executed and registered. The earlier consents had expired anyway.

Section 12 of the Act, so far as relevant, provides as follows :

> *"12.-(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:*
>
> *Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease."*

An interesting argument could be advanced that s.12 does not apply to mortgages which do not purport to do anything more than charge land in favour of a mortgagee. At common law mortgages usually took the form of a transfer of the property concerned by the mortgagor to the mortgagee with a right of redemption given to the mortgagor which enabled him to get the property back. There was no transfer involved in the mortgages here in question. There was in fact no charge given by the appellant over the lease

or his interest in the land. All the mortgagor did by the documents was to "covenant and agree" to pay any monies owing by the customer to the mortgagee, and they set out certain conditions that were to apply. That mortgage documents did provide that:

> *"AND for the better securing to the Bank the repayment in manner aforesaid of all moneys hereby secured or intended so to be the Mortgagor hereby mortgages to the Bank the land above described."*

Whether such a provision might have any effect, and if so what, we have no idea. We do note that s.63 of the Land Transfer Act (Cap 131) provides:

> *"63. A mortgage registered in accordance with the provisions of this Act shall have effect as a security, but shall not operate as a transfer of the land, or of the estate or interest therein, charged."*

That may only apply if a mortgage does, in terms, charge the land in question. The mortgages refer to the appellant as the "proprietor" of the land comprised in the lease, which he wasn't, and make no reference to his interest as lessee at all. However, this aspect was not raised, and this Court is not prepared to hold on this aspect that these so-called mortgages were not "dealings" with the lease within the terms of s. 12 at all. Even if they qualified as mortgages of the lease, a real question might arise as to whether a charge on the interest of the appellant as lessee amounted to a dealing with the land. It will be noticed that the wording of s. 12 in terms precludes any dealing by a lessee with <u>the land comprised in the lease.</u> In

addition, it can be noted that s. 5 of the Act expressly forbids alienation by an owner of native land in any way and expressly forbids the owner from charging or encumbering the land. It might also be noticed that, unlike s. 12, s. 5 provides that the instrument by which a proscribed activity is attempted shall be null and void. We note however that the form of mortgage required by s. 65 of the Land Transfer Act does not specify any charge over whatever is being mortgaged, and merely requires the land to be specified in it. So the niceties of these matters need not be pursued, because the problem, if any, of what might amount to a dealing within the meaning of s. 12, and whether the so-called mortgages amounted to such, were not touched upon before the Judge nor before us, and we say no more. We feel that we should proceed, as the parties did upon the basis that consents pursuant to s. 12 were required for the two mortgages executed by the appellant here. It can be noted that the form upon which the applications for consents were made refers to s. 12. We are at a loss to understand the reference to Cap 115.

The factual position is perfectly clear. The appellant had applied for and was given provisional approval for a residential lease from the Board to himself in 1978. By March 1979 the parties had agreed that he would give the banks a mortgage over the lease to secure an overdraft for the business and the loan to be made to him. They put in train the necessary steps to apply for consent and on the same day executed the mortgages for which consent was being sought. That consent was to lapse and did lapse after three months. The lease by then had not been

executed or registered, so that the parties put the thing on hold until it had. As soon as it had been executed and registered the parties re-activated the whole business, sought fresh consents, obtained them, and then registered the two mortgages within the time limited by the consents.

Unless by operation of law the two mortgages could not be effective, (were dead as it were), there is no way in which the appellant could possibly argue that they now were not binding on him and effective. He himself signed applications for consent to mortgage in respect of those two mortgages and after obtaining it, they were registered. There is no suggestion that the parties intended fresh mortgages or that any attempt to have new ones executed was so much as even contemplated. Of course the parties intended that they should become operative. The consent was given to each mortgage transaction described in the two applications, which, as we have said, was, by the parties, intended to refer to those already executed. It would simply be impossible to deny otherwise, and no attempt was made to do so. The consent only required registration for its completeness, and the mortgages were registered. Therefore, as we said earlier, unless those mortgages had somehow died before the second applications were made, and could not be revived, then there simply is no problem.

We pause here to note that the defence of estoppel was raised as a defence. Quite clearly the parties intended that the mortgages should become operative when it was possible for them

to do so. The fact that further consents were sought after a lease had been granted, and that they were not lodged for registration until after this time would put paid to any such suggestion. We do not believe any such suggestion was made. The gravamen of the submission, as we understand it, was that "the mortgage became effective immediately under its terms," a quotation from the submission that was made to us. It was upon that basis, it was submitted, that they were promptly and irrevocably spoilt by s. 12. Notwithstanding the inevitable inference that their operation was to await the execution and registration of a valid lease, that was what happened in law, it was submitted, as the result of the statute. Estoppel will not run against the statute. So it could not be used as a defence to this submission.

Unless the mortgages were killed by s. 12 they did not die. As mentioned, we assume s.12 applies. They were executed at the time consent was applied for in March 1979. If the mortgages, at the moment of execution, "dealt with the land comprised in the lease", or if they did that at any stage before consent was given, then those were not lawful dealings. That is to say, they did not effect what was attempted, and the dealings effected by them were null and void. We assume this means that the attempted dealings were null and void.

Two things can be said. The first is that they were, at the time of execution, not intended to deal with the lease or the land. The parties were perfectly aware of the necessity for

consent. The documents were executed with the intention that they should become operative, or a dealing, when consent was obtained. The appellant has never suggested otherwise, nor, naturally enough, could be. If it is necessary to categorise the effect in law of the documents, they were executed in escrow. Unless the granting of conditional consent to them on 16th March 1979 caused them somehow to become effective, as it were, then they remained in escrow until such time as they could. As we have pointed out, the so-called consents of 16th March 1979 were not consents at all - there was no lease in respect of which the Board had power to give consents. So they were nothing, "as if they had never been born", or perhaps a still-birth. It is difficult to see how mortgages, intended by the parties to become operative as soon as consent to them had been given and they could be registered, should become operative by no consents being given.

It follows that nothing operated to give effect to the two documents until the time arrived at which the parties intended them to become operative; whether that was upon the granting of valid consents or upon registration of the mortgages is immaterial.

Naturally enough the appellant had to rely on the operation of law somehow to give efficacy to the mortgages that the parties did not intend them to have, and which intention was clearly demonstrated by the evidence. Counsel for the appellant was able to refer us to no principles of law which, at least in this case,

caused that to happen. We do not believe there are any, and we so decide.

We believe that somehow the appellant sought to bring in public policy to vitiate the transactions. He failed. In any event that would catch up the actions of the Board, and it would certainly need to be given an opportunity to be heard.

We might add that in our opinion the wording of s. 12 would not give it any destructive effect on documents that tried to effect a dealing that had no consent. It says nothing about the documents; it renders the dealing null and void. It simply means that the document concerned does not operate to carry out the transaction it was intended to effect. As earlier mentioned, one can compare its terms with those of s. 5 of the same Act, which refers not to the dealing, but to the instrument.

It is clear beyond argument that the transaction to which the documents of mortgage related could not be effected because there was no lease, and that the parties had to wait until there was one, they intended that the documents which were not able to come into operation before should now be used to effect the transactions. The appellant, of course, could not and did not attempt to deny this. In legal terms it can be said that the parties intended that the mortgages which had been executed in escrow should continue to be so held until they could be made operative by the giving of consent. That is exactly what happened.

That disposes of this aspect of the appeal.

Somehow it was suggested that the parties had "dealings in pursuance of the mortgages" before the consent of the Board was obtained or without such consent. Attention was drawn, for example, to the "drawdowns" of the moneys that made up to $40,000 advanced by ANZ Savings; we have already referred to them (record p 85). What this suggestion means is quite unclear; in argument counsel referred to it as "performance of the mortgage." But the submission or suggestion or whatever it was is quite misconceived. So far as concerns operations on the overdrawn account of Kings Duty Free Limited, those operations simply continued; there is no suggestion that the signing of a mortgage document by the appellant securing his own property in favour of the bank had anything to do with it. The fact that there was an agreement that ANZ Savings should make a loan to the appellant of $40,000 and that he would give a mortgage to secure repayment merely meant that ANZ Savings was prepared to make the loan on the basis that security would be provided. The fact that advances were made before the mortgage became effective in law neither affects the validity of the loan and the advances nor of the mortgage in any way at all.

If it were correct to infer that the overdraft facilities were continued to be made available to the business, and the advances made under the loan agreement, in anticipation that mortgages executed would become operative in the way the parties

intended and by the means they adopted, then that is exactly what happened.

It was also claimed that the agreement for advances to be made from the two banks was that ANZ Savings would advance $40,000 and ANZ $60,000, that the consent of the Board was given to mortgages of these amounts, that the two mortgages in fact executed were unlimited as to amount, and that this made them null and void.

The consents in fact given were for the two respective sums mentioned "together with any subsequent sum advanced" (record pp 176, 183). Each of the consent forms also bears the following paragraph:

> *"This consent is granted only in respect of the transaction described and on the land referred to. If there is any variation whatsoever then this consent is void and of no effect."*

This is printed in capital letters on the form (ibid).

Quite clearly the consents given by the Board was unlimited as to amount. It is not suggested nor could it be, that because the mortgage documents did not pick up those exact words it rendered the consents void. Quite clearly the parties agreed to mortgages for the two sums mentioned. If the necessity had ever arisen it may have been possible for the appellant to argue that his indebtedness was respectively limited to these two amounts.

The necessity did not arise. Perhaps even the appellant might have been able to seek rectification of the mortgage documents. There is no way in which the transactions or the documents became null and void on this ground.

We might mention that the Fiji Court of Appeal in the case of Jai Kissun Singh v Sumintra Vol. 1970-3 FCA p.68 seemed to have reached a similar sort of conclusion to that which we have. In so far as it did we accept its correctness.

The Judge at first instance dismissed the appellant's action with costs. We will dismiss the appeal with costs.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal

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Sir Edward Williams
Justice of Appeal