IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0069 OF 2003S
(High Court Civil Action No. HBC 323 of 2001S)

BETWEEN:

NAIPOTE VERE
ESITA TAKAYAWA VERE

Appellants

AND:

NBF ASSET MANAGEMENT BANK

Respondent

Coram: Ward, President
Penlington, JA
Wood, JA

Hearing: Tuesday, 9th November 2004, Suva

Counsel: Mr. D. Sharma for the Appellants
Mr. T. Seeto for the Respondents

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

This is an appeal from an order for possession of a parcel of land contained in Certificate of Title No. 14692, being Lot 1 in Deposited Plan 3976 in the District of Naitasiri, Viti Levu, which was obtained upon the application of the Plaintiff Bank. It followed upon the issue and service of a notice to quit dated 7 June 2001.

Evidence was tendered at trial, in the Plaintiff's case, asserting that a sum of $52,161.95 was due to the Bank under a mortgage which secured a loan by it to the Defendants in the proceedings, and that there were repayment arrears of $5,887.35. It was

deposed that, on 29 March 2000, the Bank had made a demand for repayment, but that such demand had not been met.

In exercise of its powers for sale, arising under the terms of the mortgage and sections 77 and 79 of the Property Law Act, the Bank advertised the property for sale on four separate occasions. The highest offer received was one for $30,000, which was made by Alena Qasevakatini on 5 January 2000. It was accepted on 5 July 2000 but the sale did not proceed. The property was re-advertised, and on 16 October 2000 an offer from Torika Elo of $28,000 was accepted. It contained a provision for payment of the purchase price within 30 days, but that time frame was capable of extension by the Bank, at its discretion.

The defendants filed affidavits in response to the Bank's application, and provided submissions which advanced the following contentions:

(a) The property was worth more than the moneys recovered from its forced sale;

(b) The Bank had treated them unfairly;

(c) Although they were indebted to the Bank, they did not owe the sum claimed, and they would be in a position to repay the loan in October 2000 when the first Defendant received the full benefit of his Fiji National Provident Fund contributions;

(d) The sale was unlawful.

The defendants sought orders dismissing the Bank's summons, upon terms permitting them to reduce their indebtedness, from the FNPF funds and subsequent monthly repayments. No monies were paid into court by the defendants.

It was held by the trial judge that there were several factors that were determinative of the issues raised.

First, in accordance with the practice which has been followed, and accords with the principles recognized in *Westpac Banking Corporation Limited v. Adi Mahesh Prasad* (1999) 45 FLR 1, failing payment into Court of the whole sum owed under a mortgage, the Court will not restrain a mortgagee from exercising its powers under the mortgage.

Secondly, in accordance with the principle recognized in *Property and Bloodstock Limited v. Emerton* [1968] 1 Ch 94, once a contract of sale is entered into by a mortgagee, in exercise of its power of sale, the mortgagor's right of redemption is extinguished. As the property had been sold, there was nothing left to redeem.

Thirdly, the mortgage was entered into prior to the commencement of the *Consumer Credit Act 1999* and, as a result, that Act had no application.

The Appeal

There is a single ground of appeal to the effect that there was no evidence of the existence of a sale of the mortgaged property, of the kind that would have extinguished the appellants' equity of redemption.

While the appellants accept that there was evidence led to show that a tender had been accepted, from Ms Alena Qasevakatini, for the sale of the property for $30,000, on 5 July 2000, they submitted that this could not be relied upon, as that sale was not completed. A similar argument was advanced in relation to the tender, which was accepted on 16 October 2000, from Mrs. Torika Elo, and which provided for the full purchase price of $28,000 to be paid within thirty days.

It was accordingly submitted that the Learned Trial Judge erred in finding that the property had been sold, that the appellants had no equity to redeem, and that they were not entitled to assert any right to remain in possession of the property.

This ground of appeal cannot be sustained.

It is clear that the appellants were in default under the mortgage, and they admitted that to be the case during, the trial. They did not, at any time, pay the moneys required to redeem their equity into Court, nor did they place themselves in a position to pay out the mortgage, even though they were aware, at all material times, of the respondent's intention to exercise its power of sale under the mortgage.

The law, which applies in this case is well settled.

Section 72(l) of the Property Law Act Cap.130 provides:

> *"A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all moneys due and owing under the mortgage at the time of payment."*

That the acceptance of a tender gives rise to a contract was noted in Halsbury's Laws of England (Vol. 4, 4th edition) where it is said, citing *Wimshurst v. Deeley* (1845) 2 CB 253; *Thorn v. Public Works Commissioners* (1863) 32 Beav 490 and *Tancred, Arrel & Co v. Steel Co. of Scotland* (1890) 15 App Cas 125 that:

> *"The unconditional acceptance of a tender gives rise to a contract."*

This statement of principle has been cited with approval by the High Court of Fiji in several cases, for example: *Laisenia Uluinayau & Merewai Uluinayau v. National Bank of Fiji* HBC No. 0175 of 1994 *Myong Chung Kim v. Fiji National Provident Fund Board*

HBC No. 568 of 1998 and *Jiten Singh v. Fiji National Provident Fund* Civil Action HBC No. 0073D & 2002B.

Further, as the Trial Judge noted, it was held in *Property and Bloodstock Limited v. Emerton* (1968) 1 Ch 94 that the entry into a contract for sale, by a mortgagee exercising a power of sale, whether conditional or unconditional, extinguishes the mortgagor's right of redemption, so long as the contract was still subsisting.

Dankwerts LJ, who delivered the leading judgment, and with whom Sellers LJ and Sachs LJ agreed, confirmed the correctness of the decision in *Lord Waring v. London and Manchester Assurance Co. Ltd.* (1935) 1 Ch 310, in a passage which has a direct relevance for the present appeal, in so far as his Lordship said (at 114 to 115):

> *"The actual decision of CROSSMAN, J., in Lord Waring's case was: (i) that a mortgagee's exercise of his power under s. 101(1) (i) of the Law of Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith; and (ii) that the fact that a contract for sale was entered into at an under-value is not by itself enough to prove bad faith. Counsel for the borrower contended in his initial argument that this case was wrongly decided and that we should overrule it. The decision has stood for thirty-two years without (so far as I know) any criticism. This, I would suppose, is a discouraging start for counsel's arguments, but counsel is certainly entitled to distinguish the case from the present one, because CROSSMAN, J., expressly stated at the beginning of his judgment that the contract was "an absolute contract, not conditional in any way", always supposing that the contract in the present case is really a conditional contract, and that, if it is, the fact that it is subject to a condition makes any difference, having regard to the express terms of s.101 (1) (i) of the Law of Property Act, 1925.*
>
> *In my opinion, CROSSMAN, J.'s decision in Lord Waring's case was plainly correct and cannot be successfully assailed."*

The contention in that case, that the borrower's equity of redemption was still operative, because, until the condition to which the contract was subject was performed, the contract was not complete and binding, did not meet with favour. It was noted that the

parties to the contract were still in agreement to complete the purchase. Further, it was noted, similarly to s.79 of the Property Law Act (Fiji) that the mortgagee's power of sale included a power to sell "subject to such conditions respecting title, or evidence of title, or other matter as the mortgagee thinks fit." Section 79 of the Property Law Act extends the express reference to conditions, to include conditions as to "the time, or method of payment of the purchase money."

It was, however, observed by Sachs L.J. that there was common ground between the parties that, upon the mortgagee entering into the contract, under the power of sale, "the mortgagor's right of redemption is suspended, not cancelled – for it would revive if the contract went off."

This decision has been applied and followed in a number of overseas jurisdictions, as well as within Fiji: see for example ***Howson v. Little*** (1948) NZLR 1073; ***Islam Ali v. Westpac Banking Corporation*** HBC 475 of 1997; ***NBF Asset Management Bank v. John Thomas Low and Vasiti Naikelekelevasi Low*** HBC 477 of 1999; and ***Ram Datt Prasad v. ANZ Bank*** (1999) 45 FLR 101, where the Court acknowledged the exception which exists, where the mortgagee has acted without good faith.

It has also been cited, as authority for the proposition mentioned, in several text book, concerned with property law, for example: Meggarry's Manual of the Law of Real Property eighth ed. at p.505; and Cheshire and Burns Modern Law of Real Property 16th ed. at p.763.

While the Court in ***Mohammed Isaq Khan v. Fiji Development Bank*** CA 149 of 1998 seems not to have accepted, as an exhaustive proposition, that the mere acceptance of an offer is sufficient to constitute a sale, that decision is distinguishable, in that there was no evidence of the existence of any agreement for sale. Additionally, there were issues as to a possible undervalue for any sale that had been made, and as to whether the mortgagee had taken adequate precautions to obtain the true market value of the property.

The critical question appears to be whether, at the time of the order for possession, namely 10 November 2002, the contract for the sale to Ms Elo was still on foot. This seems not to have been explored to any extent at trial, although it has since been asserted by the respondent, in the submissions, that the reason why Ms Elo had not paid the purchase price, to that time, was due to the continued occupation of the property by the appellants.

We were also informed in the course of the oral arguments that the contract is still on foot, and will be settled once vacant possession is given. In those circumstances, His Lordship was not in error in applying the decision in ***Property and Bloodstock Limited v. Emerton***, and in holding that the equity of redemption was incapable of exercise.

Conclusive of this appeal is the principle that a mortgagee is entitled to enter into possession of mortgaged land where there is default in payment of mortgaged money, or any part thereof; s.75 of the Property Law Act (Cap.130). The right to enter into possession or to bring an action for ejectment, upon default in the payment of any money, was also expressly contained in clause 12 of the mortgage, in this case.

Demand was served upon the appellants in accordance with s.78 of the Act and there was no compliance with that demand, either by tender of the mortgage monies, or by payment into Court, an event, which (absent fraud) would have been a pre-condition to the appellants obtaining injunctive relief: ***Inglis v. Commonwealth Trading Bank of Australia*** (1972) 126 CLR 161 and ***Westpac Banking Corporation v. Adi Mahesh Prasad*** (1999) 45 FLR 1; Halsbury's Laws of England 4th ed. Vol. 32 para. 725. See also ***Daulat v. J. Santa Ram (Stores) Limited*** HBC 455 of 1997; ***Joe Colati v. Fiji Development Bank*** HBC 10. of 1998, ***Laisenia v. National Bank of Fiji*** HBC 17 of 1994; ***National Bank of Fiji v. Kuddeir Hussein*** HBC 331 of 1994; and ***Payne v. Cardiff*** RDC (1932) 1 KB 241.

Although the only ground of appeal which was identified in the notice of appeal, (to the effect that there was no contract of sale in existence that would have extinguished the

equity of redemption) must be dismissed in the circumstance earlier outlined, a further argument was advanced during the oral submissions.

In substance it involved a submission that, as a matter of conscience or fairness, despite the admitted breach of the mortgage, and despite the absence of the tender of the balance due or of payment into Court, the Appellants should have been allowed more time, and an additional opportunity, either to reduce the arrears, or to refinance the loan.

In this regard, our attention was drawn to the correspondence between the appellants and the respondent, and to the statement of the account. The correspondence shows that despite the Appellants having substantially fallen into arrears with their monthly repayments, the Respondent permitted them extra time to refinance, by way of several letters commencing on 7 December 1999 up until 20 April 2000. During that time letters were also sent by the Appellants to the Respondent, referring to their attempts to obtain $16,000, or $18,000, which could be paid towards reduction of this debt.

Letters were sent by the Respondent, on 1 June 2000 and 26 June 2000, on a without prejudice basis, asserting in clear terms that, unless the Appellants arranged finance by 30 June 2000, it would proceed with the proposed mortgagee sale.

It was however asserted, although there was no admissible or acceptable evidence of it, that the Respondent had dissuaded the Colonial National Bank of Fiji from approving a loan to the appellants, and that the Respondent had not accepted payments which were tendered after 4 May 2000. The first of these assertions involved inadmissible hearsay, and there was no evidence of moneys having been tendered and refused. Moreover the bank statement, which showed that very little had been paid between September 1997 and December 2000, also revealed only sporadic payments between 9 January 2000 and 10 February 2000, and nothing thereafter.

In these circumstances, we fail to see how the submission which is now advanced can avail the appellants. They had every opportunity to refinance, yet at no time did they

do so. The Respondent was not bound to accept offers to reduce the arrears, or to accept a sum of money which may have partially reduced the balance of the debt after it was called up. It was entitled to require payment of the full amount which was due and secured by the mortgage, and failing that, to sell the property and to commence proceedings in ejectment. It's powers were properly exercised, a contract of sale was lawfully executed. It remains on foot, and the Respondent was entitled to the orders which were made, particularly in circumstances where the debt was continuing to grow as further interest instalments fell due.

Orders:

1. Appeal dismissed.

2. The Appellants to pay the Respondent's costs, assessed at $1,000.

Ward, President

Penlington, JA

Wood, JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. R. Patel and Company, Suva for the Appellants
Legal Officer, National Bank of Fiji, Suva for the Respondent

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