

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

CIVIL APPEAL NO. ABU0122 OF 2006S  
(High Court Civil Action No. 305 of 2003L)

BETWEEN:            RAKESH KUMAR

*Appellant*

AND:                 HABIB BANK LIMITED

*Respondent*

Coram:              Byrne, JA  
                             Khan, JA  
                             Lloyd, JA

Hearing:             Wednesday, 12<sup>th</sup> November 2008, Suva

Counsel:             D. Naidu for the Appellant  
                             B. Narayan for the Respondent

Date of Judgment: Wednesday, 19<sup>th</sup> November 2008, Suva

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**JUDGMENT OF THE COURT**

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[1] The appellant Rakesh Kumar was the Branch Manager of the respondent Roxy Motorparts Limited ("Roxy") earning \$650.00 per month. He was also the registered proprietor of a sugar cane farm on Crown Lease No.470582 with an area of 1.9677 hectares on which was built his family home.

[2] In or about the year 2000 the respondent bank ("Bank") asked the principle debtor Roxy to reduce its indebtedness to below \$1,000,000.00 which would make it within the limit of authority of the General Manager of the Bank.

- [3] The Managing Director of Roxy, Mr Ramen Charan approached the appellant and asked him whether he would mortgage his Crown Lease to secure a debt to Roxy. The appellant refused but later he was persuaded to do so by the Bank Officers Mr Ashad Khan and Illyas Ahmad who were the Manager and General Manager respectively.
- [4] The trial judge found that at the time of the transaction with the Bank and the appellant, Dr Sahu Khan of Sahu Khan and Sahu Khan, solicitors in Ba acted for all three parties, i.e. the appellant, the Bank and Roxy.
- [5] It was also found by the Judge that the appellant had never made any application to the Bank for finance and it would appear that the arrangements to which we shall shortly refer were made by others, most probably between Roxy and the Bank.
- [6] The arrangement involved an advance by the Bank of the sum of \$150,000.00 on the security of a mortgage over the appellant's Crown Lease.
- [7] Of the \$150,000.00 advanced the following amounts were paid out for the benefit of the appellant. These were the sum of \$27,543.32 to the Colonial National Bank to discharge an existing mortgage over the appellant's land and \$366.35 for arrears of rental to the Director of Lands. The balance of \$120,000.00 was used for the benefit of Roxy to reduce its indebtedness to below \$1,000,000.00 as required by the Bank.
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- [8] The trial judge accepted that the appellant was told by those making the arrangements for finance, probably the Bank officers mentioned earlier and the representative of Roxy that his property would be required as security for a short time only, perhaps, 3 months. The trial judge found on the evidence that the repayments for the advance made by the bank was \$2,000.00 per month and that the wages which the appellant received per month was \$650.00. He also found

that the repayments to the bank were being made by the appellant but he was making them in the capacity of Manager for Roxy and was using Roxy's funds.

[9] Repayments to the Bank were made until 30 November 2001 after which no further payments were made and a notice of demand was not issued by the Bank until 29 July 2003.

[10] In these factual circumstances, the appellant filed a writ of summons on 3 September 2003 seeking declarations that mortgage number 489740 dated 17 August 2000 was null and void and that it was unreasonable and unfair for the appellant to pay back any moneys owed under the mortgage because such moneys were never advanced to the appellant and orders that the mortgage be reopened and varied so that the appellant does not have to pay back the moneys advanced to him and order that the Bank be restrained either by itself and or its agents or its employees and or its servants from exercising any powers whatsoever under the mortgage.

[11] The trial judge, Finnigan J, sitting at the Lautoka High Court heard the case and dismissed the appellant's claim and upheld the Bank's counter claim which sought orders for the payment of the balance owing under the mortgage.

[12] His Lordship also discharged the interim injunction which he had granted earlier restraining the Bank from proceeding to recover moneys from the appellant owed under the mortgage.

[13] In these factual circumstances, the plaintiff has appealed to this Court on various grounds of which only two were pressed on the hearing of the appeal and these were:

***“Unconscionable conduct on the part of the bank, in particular by failing to provide the appellant with the opportunity for independent legal advice in the circumstances of this case.”***

- [14] The other ground was an estoppel, namely that the Bank was estopped from exercising its rights under the mortgage having regard to the representation made to the appellant and relied on by him that the property would be required as security only for a short term in the order of 3 months.
- [15] Prior to the hearing of the appeal the court had to deal with a notice of motion filed and served by the appellant for an order that leave be granted to the appellant to adduce further evidence by way of affidavit evidence during the hearing of the appeal. Evidentiary support for this application was given by an affidavit sworn by the appellant.
- [16] The new evidence which was sought to be adduced was the evidence of Dr Sahu Khan sworn on 12 May 2007. It will be recalled that Dr Sahu Khan had acted for all 3 parties in these transactions.
- [17] Leave for the adducing of new evidence is rarely given and if given, it is done so on the satisfaction of strict rules. These rules were lucidly stated by Lord Denning in the English Court of Appeal in Ladd v. Marshall [1954] 1 All E/R 745 where his Lordship made the followings statement at page 748:

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***“In order to justify the reception of fresh evidence or a new trial 3 conditions must be fulfilled:***

- 1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;***
- 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;***

3. *The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible.*

[18] In his submission in support of the notice of motion to adduce fresh evidence, Mr Naidu for the appellant conceded that even though the new evidence was available at the hearing a forensic decision had been made not to adduce it.

[19] In these circumstances, clearly, the appellant fails to satisfy the first element of Lord Denning's above quoted test in that he cannot satisfy this court that the evidence which he proposes to call was not available at the date of the hearing.

[20] Accordingly we dismissed the notice of motion and proceeded with the substantive hearing of the appeal.

[21] As we said before, the first ground upon which the transaction was attacked was that the Bank's conduct in this transaction was unconscionable by reason of the fact that it did not give the appellant an opportunity to obtain independent legal advice.

[22] Normally a Court of Equity will intervene and set aside a transaction when the stronger party has taken unfair advantage of the weaker party. As Deane J said in Commercial Bank of Australia v. Amadio (1982 -1983) 151 CLR 447 at 474:

*"Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce or retain the benefit of a dealing with the person under a special disability in circumstances where it is not consistent with equity or good conscientious that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to release against unconscionable dealing may take a wide variety of form and are non susceptible to being comprehensively catalogued. In Blomley v. Ryan Fullagar J listed some examples of such disability:*

*“Poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.”*

*“As Fullagar J remarked the common characteristic of such adverse circumstances “seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.”*

- [23] In the present case no disability in the sense in which Deane J spoke in the quotation above was found to be present in the appellant.
- [24] Absence of independent legal advice would form part of the disability to which Fullagar J referred in the quotation above. Regarding this, we first point out that there is no evidence that the appellant was prevented from seeking independent legal advice by the Bank when the mortgage was executed. So he could have got it had he wanted to get some. Secondly, the appellant had his own lawyer in Dr Sahu Khan who it could reasonably be assumed would have given him objective legal advice on the mortgage.
- [25] In the circumstances in which this transaction was effected, namely, the execution of the mortgage in the presence of his solicitor, (although there is some doubt on the evidence whether Dr Sahu Khan actually was present), the absence of evidence of any particular infirmity in the appellant, the lack of evidence to suggest that the Bank refused the appellant any opportunity to obtain independent legal advice, the fact that the appellant did have access to Dr Sahu Khan, the fact that the appellant had earlier entered into another mortgage with the Colonial Bank of Fiji and the fact that the appellant held a responsible position with Roxy all militate against a conclusion that the Bank acted unconscionably toward him in the taking of this mortgage.
- [26] Accordingly, we reject the ground of unconscionability as a basis for impugning the efficacy of the mortgage in this case.

[27] The next ground upon which the appellant relies is an estoppel. This ground is based on the appellant's allegation that the bank misrepresented to him that the mortgage will only be for a short period of 3 months. The trial judge did find that misrepresentation of this kind had been made to the appellant but he did not find that it had been made by the Bank. The judge said in relation to this matter:

***"It seems and I except that the plaintiff was told by those making these arrangements that his property would be required as security for a short time only perhaps 3 months."***

[28] In paragraph 16 of his submissions, the appellant's counsel, Mr Naidu, said:

***"The trial judge has held that before the mortgage was executed, the bank made a representation to the appellant that his property would be required as security for a short time of only perhaps 3 months."***

[29] Of course, this is quite wrong and it is obvious to this court that when the trial judge made reference to "those making the arrangements" he was obviously referring to the representatives of the Bank and Roxy both.

[30] The appellant's counsel argued that the estoppel in question was a promissory estoppel and that the Bank was now estopped from asserting that the mortgage was beyond the duration of 3 months contrary to what is stipulated in the mortgage document itself.

[31] Promissory estoppel is an equitable doctrine which applies where one party to a contract by words or conduct makes a clear and unequivocal representation which leaves the other to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance. The party making this representation will then be not allowed to enforce those rights where it would be inequitable for him to do so having regard to the dealings which have thus taken

place between the parties: See Hughes v. Metropolitan Railways (1877) 2 App.Cas. 439 at 448

[32] The application of the doctrine is based on equitable principles resulting from the promisor not fulfilling his promise in circumstances where the promisee or the representee had acted in reliance upon the promise or representation to his detriment.

[33] As far the requirement of detriment in promissory estoppel, Deane J had this to say in Legione v. Hatley (1982 – 1983) 152 CLR 406 at p. 437.

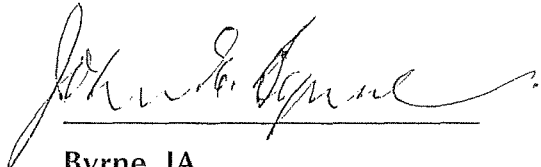
***“... a person will not be estopped from departing from any assumption or a representation unless as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption were permitted ....”***

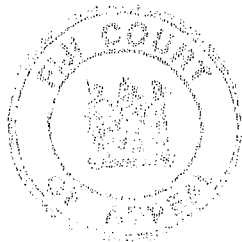
[34] We are unable to see how this ground can be made out in the circumstances of this case. In the first place, it is not clear from the finding of facts by the trial judge whether it was the Bank or Roxy who made the representation in question. Secondly, although we accept that the appellant would have incurred detriment if he was required to repay the mortgage, the evidence shows he did not make any repayment himself. But we emphasise that the estoppel ground fails at the threshold with the lack of evidence that the Bank made the alleged representations.

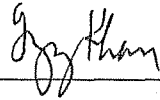
[35] It seems to us, when the full circumstances of this case are properly evaluated there was nothing untoward or unconscionable in the Bank's conduct which induced the appellant to execute the mortgage. It is more than likely that the appellant, being an employee of Roxy, had some arrangement with Roxy for the giving of the mortgage.


[36] We dismiss the appeal and order that the appellant pay the respondent's costs.



  
Byrne, JA



  
Khan, JA

  
Lloyd, JA

Solicitors:

Pillai Naidu and Associates, Nadi for the Appellant  
Lateef and Lateef, Suva for the Respondent