

NATIONAL BANK OF FIJI

v

ABDUL KADEER HUSSEIN

[HIGH COURT, 1995 (Fatiaki J.) 9 February]

Civil Jurisdiction

A

Mortgage-mortgagees rights and remedies-how far only exercisable in a particular order-Property Law Act (Cap 130) Section 75.

B

Practice (Civil)-Mortgage action-requirements of High Court Rules Order 88

The Bank sought possession of mortgaged land. The mortgagor opposed the application on the ground that the Bank had not first exhausted its remedies under a debenture. HELD: Absent a contractual obligation to the contrary a mortgagee may exercise its rights, powers and remedies in such order as it thinks fit.

C

Cases cited:

ANZ Bank v. Shantilal (Suva Civ. 265/90)

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Bradford Old Bank v. Sutcliffe [1916] 2 KB 833

Four Maids Ltd v. Dudley Marshall Properties Ltd [1957] Ch 317

Lockhard v. Hardy (1846) 73 RR 373

Nationwide Building Society v. Bateman [1978] 1 WLR 394

Western Bank Ltd v. Schindler [1977] 1 Ch. 1

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Action for possession of land.

S. Parshotam for the Plaintiff

Defendant in Person

Fatiaki J:

This is an Originating Summons issued by the plaintiff bank in a mortgage action under Order 88 of the High Court Rules seeking an order for the delivery of possession of land and premises occupied by the defendant and subject to a registered mortgage granted by the defendant in favour of the plaintiff bank to secure repayment to the plaintiff bank of all loans, advances, charges and interest lent, made to, or payable by M. Ismail Industries Limited to the plaintiff bank.

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In such an action Order 88 r.3 expressly provides that the affidavit in support of the originating summons. Must :

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“(2) ... exhibit a true copy of the mortgage and the original mortgage ...

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- A (3) ... show the circumstances under which the right to possession arises and ... the state of the account between the mortgagor and mortgagee with particulars of -
- (a) the amount of the advance,
- B (b) the amount of the periodic payments required to be made,
- (c) the amount of any interest or installments in arrears at the date of issue of the originating summons and at the date of the affidavit, and
- C (d) the amount remaining due under the mortgage.”

There is little doubt in my mind that the affidavit in this instance falls well-short of complying with the mandatory terms of the above rule (per Goulding J. in Nationwide Building Society v. Bateman [1978] 1 WLR 394 at 396 and 398).

- D For instance, the original mortgage is not annexed to the affidavit nor has any serious effort been made in the affidavit to provide particulars of the “state of the account” nor in my considered view, does para.7 of the affidavit come anywhere near “showing the circumstances under which the right to possession arises ...”

- E No demand notice has been annexed to the affidavit yet that is the critical event upon which the mortgage monies becomes due and payable (see : Clause 1) and from when any default under the mortgage can be said to arise so as to entitle the plaintiff bank (as mortgagee) to exercise its powers under the mortgage including its rights under Clause 12. This is especially so in a third party mortgage situation where the mortgagor may not necessarily be related to or associated with the bank’s actual customer.

- F As was said by Bankes L.J. in Bradford Old Bank v. Sutcliffe [1916] 2 KB 833 at p.844 :

- G “In my opinion the document, both from its nature and from its language, indicates that the guarantors stipulated for a demand being made upon them before the bank could enforce the guarantee against them. The authorities from very early times are, I think, clear that in a case like the present an actual demand before action has always been considered necessary.”

Be that as it may Jayaratne J. acted on a similar affidavit in granting an order for possession under Order 88 in A.N.Z. v. Shantilal Civil Action 265 of 1990 and in the circumstances, I too shall proceed to deal with the merits of this application

notwithstanding the various shortcomings of the affidavit in support.

I begin with the decision of Goff L.J. in Western Bank Ltd. v. Schindler [1977] 1 Ch. 1 where his Lordship said of a mortgagee's right to possession of the mortgaged property at p.20 :

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"It has for a very long time been established law that a mortgagee has a proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property. This right has been unequivocally recognised in a number of modern cases : see, for example, Four Maids Ltd. v. Dudley Marshall Properties Ltd [1957] Ch. 317. ... It has nothing to do with default : see per Harman J. in the Four-Maids case where he said, at p.320 :

B

"The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted out of that right."

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In this instance not only has the mortgagee not contracted out of its common law right to possession but, in addition Clause 12 of the mortgage expressly empowers the plaintiff bank in the event of a default in repayment:

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- "(a) (to) enter into possession of the mortgaged land by receiving the rents and profits thereof ; or
- (b) distrain upon the occupier or tenant of the said land for the rent then due; or
- (c) bring an action of ejectment to recover the said land ... in the same manner in which the Bank might have brought such action if the principal sum were secured to the Bank by a conveyance of the legal estate in the mortgaged land."

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These contractual rights are further reinforced by the terms of Section 75 of the Property Law Act (Cap. 130) which provides :

"A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may distrain upon the occupier or tenant of the said land for the rent then due."

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In Shantilal's case (op. cit) Jayaratne J. speaking of the procedure under Order 88 said (at p.7) :

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A “Order 88 of the High Court Rules only deal with actions relating to mortgages. it gives mortgagees the right to claim possession without being the registered proprietor with or without foreclosures. To that extent Order 88 is available to him. Nothing can inhibit him from utilising Order 88.”

Furthermore in Schindler’s case (op. cit) Buckley L.J. recognised the utility of such a remedy when he said at p.9 :

B “A legal mortgagee’s right to possession is a common law right which is an incident to his estate in the land. It should not be lightly treated as abrogated or restricted. Although it is perhaps most commonly exercised as a preliminary step to an exercise of the mortgagee’s power of sale, so that the sale may
C be made with vacant possession, this is not its only value to the mortgagee. The mortgagee may wish to protect his security ... He might wish to take possession for the purpose of carrying out repairs or to prevent waste.”

D In this latter regard an executive of the plaintiff bank deposed in the affidavit filed in support of the Summons that the defendant had defaulted under the mortgage and was causing serious economic waste to the premises. Further that the bank had accepted an offer to purchase the mortgaged premises together with a cash deposit and the bank was required to give vacant possession of the property and finally, that a notice to quit was served on the defendant and despite its expiration the defendant continues to occupy the premises.

E None of the above matters were denied by the defendant in his affidavit filed in opposition other than to refer to a pending civil action instituted against the plaintiff bank concerning the same mortgage and, a somewhat cryptic claim that :

F “(6) The Plaintiff did not take its interest to safeguard the Debenture being the most valuable security in to exercise its powers under the said Debenture is a breach of its estoppel.”

G I confess to some difficulty in understanding the meaning of the above paragraph but in any event the mortgage makes it quite clear that the monies secured under it are the same as that secured by a debenture given by M. Ismail Industries Ltd. to the plaintiff bank over its entire assets, and continues :

“... any default thereunder (i.e. the debenture) shall be deemed to be a default hereunder (i.e. the mortgage) and the Bank may upon any default hereunder and thereunder exercise its rights, powers and remedies both thereunder and hereunder either together or separately and in such order as it may think fit.”

In the circumstances there was no contractual duty on the plaintiff bank requiring it first to resort to or enforce its debenture before seeking to exercise its rights and powers under the mortgage, nor, given the particular circumstances of the company's assets (i.e. "... Westpac Banking Corporation has ... locked and taken possession of the business premises ..."), can there be any justification whatsoever for this Court to intervene on the basis of estoppel or by implying a term as to the particular order in which the plaintiff bank may realise its securities.

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What is more it has long been settled since Lockhart v. Hardy(1846) 73 R.R. 379 that:

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"Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same. If he obtains full payment on the bond or covenant, the mortgagor becomes entitled to the estate, but if he obtain part payment only, he may go on with his foreclosure suit and foreclose for the remainder."

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Notwithstanding the above, the reality of this case, is that there are no readily available company assets upon which the bank's debenture could crystallise; nor is there an existing operating business which might justify the appointment of a manager/receiver under the bank's debenture. Quite simply, the only security available to the plaintiff bank to realise, is its mortgage over the defendant's personal property.

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Furthermore if the plaintiff bank were required to await the outcome of the defendant's claim in Civil Action No. 97/92, the Court would, in learned counsel's submission, in effect, be restraining the bank from exercising its powers and rights as a mortgagee without the usual protection afforded a mortgagee under such an order i.e. by payment into Court of the amount claimed by the bank.

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In my view the legality or otherwise of Westpac's actions in closing down the defendant's business operation (which is the subject of a separate Civil Action No. 414/90) is an irrelevancy, and the plaintiff bank should not be required to await the outcome of those proceedings nor, is it either just or proper to allow by a side-wind an injunction which the defendant has not seen fit to apply for in a properly constituted application.

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It need hardly be said that the defendant as a mortgagor is always entitled to redeem the mortgaged property at any time, before it is actually sold or transferred by the bank, upon payment of all moneys due and owing under the mortgage.

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In all the circumstances the order of this Court is that the defendant do deliver to the plaintiff bank vacant possession of all the property comprised in C.T.8063 situated at 2 Matanitobua Street on or before the 6th of March 1995 and further that the defendant, his servants, agents and employees be restrained from in any

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A way damaging, removing or interfering with the improvements on the said property in any way so as to diminish its value.

For the sake of completeness the defendant's Summons to Strike Out this action dated the 14th of November, 1994 is dismissed with costs to the plaintiff bank to be taxed if not agreed.

(Order for possession.)

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