

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD v AMIT KUMAR and Anor**

HIGH COURT — CIVIL JURISDICTION

5 SINGH J

1 January 2003

10 [2003] FJHC 326

**Mortgages and securities — mortgages — application for vacant possession — injunction to restrain Defendants from interfering — Property Law Act (Cap 130) s 77.**

15 A mortgage was executed between ANZ Banking Group Ltd (Plaintiff) and Amit Kumar and Sandhya Laxmi (Defendants). Plaintiff filed an application seeking vacant possession and an order restraining the Defendants from interfering with the improvements on the property. The Defendants contended that the original mortgage was not produced in Court and the mortgage only covered the Housing loan and not the other two loans. Therefore,  
20 the right of ejection depends upon them and there is no default. Also, Defendants submitted that the mortgages were covered by the Consumer Credit Act.

**Held** — (1) There are certain private documents which must be filed in a court or other public office and when they are thus filed, the copy issued by the court or other office may be treated as the original. The mortgage produced in court was the second executed copy  
25 of the registered mortgage.

(2) The mortgagee in the present case has its contractual powers under the mortgage to take proceedings for ejection and its powers under common law to enter into possession. These powers have not been removed by the mortgage. The mortgagee therefore is entitled to the possession.

30 (3) A mortgage is a contract between a mortgagee and mortgagor. The terms of mortgages vary depending on what the parties agree to. There is nothing in the Consumer Credit Act to show that legislature intended to streamline enforcement procedures to mortgages which already existed.

(4) There was a default in this case because notice was given and upon the Defendants failing to rectify the default, these proceedings were taken.

35 Application allowed.

**Cases referred to**

*Turnbull v Forman* (1885) 15 QBD 234; *Western Bank Ltd v Schindler* [1977] Ch 1, considered.

40 *Anil Tikaram* for the Plaintiff.

*Suresh Chandra* for the Defendants.

**Singh J.** This is an application under O 88 of the High Court Rules in respect of a Housing Authority Lease No 174744 being Lot 81 on Deposited Plan 4130.  
45 The Plaintiff is seeking vacant possession and an order restraining the Defendants from interfering with the improvements on the property.

I had before me three affidavits:

- 50 (1) Affidavit dated 10th July 2002 sworn by Sunil Kalyan on behalf of the Plaintiff.  
(2) Affidavit dated 7th August 2002 sworn by Amit Kumar one of the Defendants.  
(3) Affidavit dated 30th August 2002 sworn by Christopher Robin Griffiths.

Certain facts are not in dispute. It is agreed that mortgage number 391919 was executed on 16 February 1996. At the time of the execution of mortgage the Defendants were bank officers. It is also agreed that the Defendants have three accounts with the Plaintiff's bank. These are an overdraft account, a term loan  
5 account and a housing loan account.

The first preliminary issue raised by Mr D. Sharma was that the original mortgage was not produced to the court. The usual practice in O 88 applications is to annex a true copy of the mortgage and to produce the duplicate of the registered mortgage on hearing. The original is always kept at the titles office and  
10 if Mr Sharma's submission were correct, the Registrar of Titles would need to be subpoenaed on each occasion to produce the mortgage. Mr Sharma's query is answered by *Cross on Evidence*, 2nd New Zealand ed, p 574 where it states:

15 There are certain private documents which must be filed in a Court or other public office and when they are thus filed, the copy issued by the Court or other office may be treated as the original. Thus the second executed copy of a Memorandum of Mortgage registered under the Land Transfer Act 1952 is an original.

The mortgage produced in court was the second executed copy of the registered mortgage.

20 The next issue raised by the Defendants was that the mortgage only covered the housing loan and not the other two loans. Paragraph 12 of Sunil Kalyans' affidavit dated 10 July 2002 shows the state of the three accounts as at the date of issue of this action. In respect of housing loan it says, "arrears as at approximate date of issue of this action (instalments and interests) nil." The defendants submit that  
25 since there were no arrears on housing loan there was no default under the mortgage and the action is misconceived. The right to ejectment depends upon default say the Defendants.

This is an action based on mortgage so the terms of the mortgage have to be considered. One of the considerations for which the mortgage was executed was  
30 "in consideration of all other sum and sums of money now or which may hereafter become due or owing from the Customer or the Mortgagor to the Bank". It goes on and the relevant portion of cl 1 reads:

35 THAT the mortgagor will on demand in writing pay to the Bank all and every sums and sum of money loans and advances made by the Bank or which may hereafter be lent or made by the Bank ... [The underlining is for emphasis.]

The words of the mortgage are wide enough to encompass moneys due under any account. Additionally Annex A to the affidavit of Christopher Robin Griffiths sworn on 30 August 2002 refers to the three accounts. In "General Conditions" contained in that annexure is the clause:  
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- (i) All facilities are repayable on demand ...

The Defendants were bank officers and they signed acceptance of these conditions. The mortgage therefore is a mortgage repayable on demand. It is not  
45 disputed that some moneys are owing by the Defendants. Clause 12 of the mortgage provides that upon default in payment the mortgagee may enter into possession or bring an action of ejectment to recover possession of the land.

In addition the mortgagee has certain statutory powers under the Property Law Act Cap 130. Section 75 of that Act gives a mortgagee power to enter into possession by receiving rents or profits or to distress upon any tenant on the land  
50 if there is default in payment under the mortgage. Section 79 gives the mortgagee power to sell if there is default in payments or in performance of any covenant

and such default continues for a period of thirty days after service of notice under Section 77. At common law the mortgagee had the right to possession of mortgaged property — see *Weston Bank Ltd v Schindler* [1977] Ch 1 where at p 20 Lord Goff said:

5 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.

Hence the mortgagee in the present case has its contractual powers under the mortgage to take proceedings for ejection, the statutory powers under the  
10 Property Law Act and its powers under common law to enter into possession. These powers have not been negated by the mortgage. The mortgagee therefore is entitled to the possession.

Third Mr Sharma submitted that the Consumer Credit Act is now in force. He argued that even though the mortgage was executed before the  
15 Consumer Credit Act came into force, nevertheless, its provisions relating to enforcement of mortgages applied to these mortgages.

The starting point is s 14 of the Interpretation Act which reads:

20 Where any written law, or part thereof, came or comes into operation, on a particular day, it shall be deemed to have come or shall come into operation immediately on the expiration of the day next preceding such day.

Section 22 of the Interpretation Act enables subsidiary legislation to operate retrospectively it as long as it is not beyond the commencement day of the main Act.

25 In *Turnbull v Foreman* (1885) 15 QBD 234 at 236 in discussing effect of legislation it is stated:

Unless the language used is clear to the contrary, an enactment affecting rights must be construed prospectively only and not retrospectively so as to affect rights accrued before the Act passed.

30 Bowen LJ in the same case at 238 said:

Where the legislature mean to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so, or, to put the same thing in a somewhat different form, if  
35 the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights ...

A mortgage creates certain rights and obligations not least of which in this case is the mortgagee's right to re-enter after default. The mortgage in cl 13 refers to s 77 of the Property Law Act and the period of one month is reduced to one day.

40 If what Mr Sharma is submitting is correct, then that is asking me to rewrite cl 13 of the mortgage. That would be a gross violation of the rights of the mortgagee to give an early default notice.

A mortgage is a contract between a mortgagee and mortgagor. The terms of mortgages vary infinitely depending on what the parties agree to. There is  
45 nothing in the Consumer Credit Act to show that legislature intended to streamline enforcement procedures to mortgages which already existed. Accordingly I conclude that this submission fails.

I therefore hold that there was default, a notice was given and upon the Defendants failing to rectify the default, these proceedings were taken. Order 88  
50 has been complied with. In its affidavit in support, the Plaintiff also asked for an injunction restraining the Defendants from interfering with improvements to the

property. This type of order is regularly asked by applicants under O 88. In the originating summons the Plaintiff failed to refer to the order under which it was seeking the injunctory relief. I do not consider that an experienced counsel like Mr Sharma would be prejudiced or misled by such omission. Such omission I hold was not fatal in view of the application for it under the affidavit.

For above reasons, I grant the following orders:

- (a) That the Defendants or current occupants forthwith deliver vacant possession of the land comprised in Housing Authority sub-lease No 174744 being Lot 81 on DP 4130.
- (b) That the Defendants, their servants or agents or employees are restrained from interfering with improvements on the said property.
- (c) Costs to be taxed if not agreed.

*Application allowed.*