DONALD ROSS and Anor v PETER IAN KNIGHT and Anor

HIGH COURT — CIVIL JURISDICTION

SCOTT J

15 August 2003

[2003] FJHC 18

Mortgages and securities — sale and repurchase agreements — wire transfer balance to trust account — US$ reconversion — F$ devalued — Exchange Control Act (Cap 211) s 4(1) — Land Sales Act of Fiji 1974 — Reserve Bank Act (Cap 201) s 24(1).

The Plaintiffs agreed to buy the land of the vendors and deposited a cheque in US$ to Defendant as initial deposit. The balance of the purchase price was transmitted by three wire transfers converted into F$, except the last transfer which was retained in US$, to the trust account of Defendant at 3rd Party's branch. Defendant then requested for reconversion of the funds into US$ but the F$ was devalued later. Plaintiff then sought claims against the Defendant.

Held — Either the Defendant or the Bank, had they been more careful, could have prevented the sale of the remitted funds as well as the funds paid. Defendant and the Bank were equally to blame and should jointly make up Plaintiffs' loss.

Claim allowed.

No case cited.

D. P. Sharma for the Plaintiffs.

R. Smith for the Defendant.

H. Nagin for the 3rd Party.

Scott J. The minutes of a pre-trial conference held between the parties on 29 July 2002 so clearly and concisely set out the basic agreed facts that they can conveniently be substantially set out again in this judgment:

On or about 1 October 1996 the Plaintiffs, previously of Rancho Mirage, California, USA entered into negotiations to purchase a property in Savusavu, the property being described as CT 14636 Lot 1 on DP No. 4037 situated in the district of Cakaudrove, Vanua Levu.

The vendors were James and Mary Carrigan of Santa Barbara, California.

The Plaintiffs took possession of the property on 6 February 1997.

The first Defendant is barrister and solicitor practicing law under the name and style of Cromptons at Suite 10, Queensland Insurance Centre, Victoria Parade, Suva.

The third party is a trading Bank having its registered offices at ANZ House, Victoria Parade, Suva.

On 1 October 1996 the Plaintiffs executed an agreement for the purposes of the Lands Sales Act of Fiji, 1974 for the purposes of obtaining requisite consents for the proposed purchase.

The full purchase price of the property was to be US$350,000.00.

Clause 2 of the preliminary sale and purchase agreement required the Plaintiffs to pay a deposit of US$25,000.00 to be held in joined names of the vendors and the purchasers at the ANZ Bank, ANZ House branch, Suva.

The Plaintiffs engaged the Defendant as their solicitors for the purpose of handling the land purchase transaction and to advise them generally concerning the land and the purchase.

On 28 October 1996 the Defendant wrote to the Plaintiffs who were then in California, requesting the payment of the initial deposit of US$25,000.

The Defendant advised the Plaintiffs to make the deposit payable by way of a cashier's cheque to the vendors solicitors, Parshotam and Co. The Plaintiffs sent the cheque for US$25,000 under cover of a letter dated 20 October 1996 to the Defendant who on receipt on 2 November 1996 sent the cheque to Parshotam and Co.

The deposit was retained in United States currency.

The vendors and the Plaintiffs executed a sale and purchase agreement dated 26 February 1997 to purchase the property.

Clause 3.1 of the Agreement provided that the full purchase price for the property was US$350,000 and that the payment of the purchase price was to be made in United States currency as set out in Schedule 4 of the Agreement with the total purchase price to be paid in full on or about 23 December 1997.

The Defendant's trust account was maintained with the ANZ Bank. Because of the delays in the Plaintiffs' remittance of the balance purchase price and in an attempt to ensure that those delays did not endanger the Plaintiffs ability to complete purchase on the required date the Defendant instructed the Plaintiffs to wire the balance of the purchase price of the property in US currency as required by the Sale and Purchase Agreement to the trust account of Cromptons at the ANZ, Suva.

The balance of the purchase price was transmitted in three lots, the first transfer by the Plaintiffs from USA by wire transfer was for US$295,994 which was deposited to the trust account of the Defendant at the 3rd Party's branch in Suva on or about 2 January 1998 and was converted by the 3rd Party in to Fiji currency amounting to F$455,370.

The second transfer of US$4,000 was deposited by the Plaintiff at ANZ Savusavu and converted to F$6,108.73 and that this sum was received into the Defendant's trust account on about 5 January 1998.

The third transfer of US$24,994 was sent by the Plaintiffs from the USA by wire transfer and paid into the trust account of the Defendant on or about 13 January 1998 but this last transfer was not converted by the ANZ Bank into Fiji $ but was retained in US$.

The Defendant wrote to the 3rd Party on 13 January 1998 asking for the funds that had been received from the Plaintiffs on 2 January and 5 January 1998 to be reconverted into US$ and that the 3rd Party replied by letter dated 21 January 1998 (document 82).

The Fiji$ was devalued on or about 20 January 1998.

As at the date of settlement of the purchase (on or about 30 January 1998) the sum of US$243,384.08 was obtained by reconverting funds in the Defendants trust account for the purpose of settling the purchase.

As will be seen from the statement of claim and in particular paras 26–29 the plaintiffs' claim against the Defendant falls into two main parts. The first claim is for a shortfall of US$56,609.92 which was the difference in the value of the converted funds after the re-conversion into US$ following the devaluation and which was needed to enable settlement to take place. The second claim is for the costs associated with the raising of a mortgage over the purchased property which the Plaintiffs said they were forced into by reason of the shortfall.

In addition to the agreed facts there was also an efficiently compiled agreed bundle of documents numbering 1–115.

Three basic legal propositions were also accepted. The first was that it was not necessary to determine whether the causes of action were in contract or in tort or in both: the liability, if any and the quantum of damages would be the same in either case. The second proposition was that absent liability by the Defendant the 3rd Party (the Bank) could not be found liable. The third proposition was that if it was thought that both the Defendant and the Bank were equally to blame for

what occurred then it would be open to the court to order the Bank to indemnify the Defendant to reflect the extent of the blame shared.

On 4 and 5 March 2003 both plaintiffs gave evidence. On 5 and 6 March I heard Kafoa Muaror, formerly an employee of Messrs Cromptons who was the solicitor who principally handled the Plaintiffs affairs on behalf of the Defendant. I also heard from his secretary Flora Tuitoga and from Cromptons Accountant, Mrs Va Inoke. On 6 March Mr Peter Knight, the Defendant gave evidence.

On 5 May I heard Rigamoto Motufaga of the Reserve Bank of Fiji (the RBF) Anne Grant who worked for the Bank at the material time and Satish Parshotam, a partner with Parshotam and Co, solicitors, who handled the sale of the property on behalf of the vendors, the Carrigans. Shiu Prakash, a Bank officer with the Bank who is responsible among other things for the processing of international trade payments also gave evidence.

At the conclusion of the evidence on 6 May counsel agreed to vary the normal order of speeches. Mr Sharma filed an excellent written submission. Mr Smith's helpful written submission was amplified in further oral submissions which together with Mr Nagin's oral submissions were recorded and transcribed. The transcript is not entirely accurate but is sufficiently correct.

As will be seen from the submissions and the evidence the Plaintiffs' case, put simply was that they had done exactly what they were instructed to do by Cromptons, their legal advisers, namely to deposit US$ in Cromptons trust account but that as a consequence of following these instructions the sum of US$56,609.92 had been lost and the additional cost of the mortgage over the property had been incurred.

To this case the Defendant only advanced two arguments. The first which was, as Mr Sharma pointed out, unpleaded, was that the Plaintiff somehow themselves contributed to the loss by their own default. Mr Muaror suggested that he had warned the plaintiffs that Cromptons would be closed during the Christmas holiday which was when the major remittance was made and it was also suggested by Mr Smith that when payment of the second amount of US$4,000 was made at the Savusavu branch of the Bank the 1st Plaintiff himself converted the US$ into Fiji $.

As is well known, it is a rule of pleading that full particulars of any negligence must be pleaded. A party who has not pleaded negligence cannot be allowed to call evidence of the alleged default. Mr Sharma's objection was, as I find, well taken. Even if it was not, I do not find that the evidence supported Mr Smith's contention or the suggestion made by Mr Muaror. Not only was there nothing in writing in the nature of a notice that Cromptons would be closed over the Christmas vacation but furthermore the Plaintiffs', who struck me as obviously honest and straightforward, denied that they had received any warning at all of the type suggested. Furthermore, it was not the sending of the money over the Christmas vacation which was the cause of the loss; this matter will be examined further.

So far as the Savusavu transaction was concerned I accept that the first plaintiff did all that he could to pay US$ into Cromptons Trust Account — see documents 78. In my view neither of the arguments advanced by the Defendant to answer the Plaintiffs' claim succeeded. In truth I do not think they were advanced with any very great hope of success. The central issue in this case, as it seems to me, was whether the Defendant was responsible for the Plaintiffs loss, whether the Bank was entirely to blame for what occurred or whether the Defendant and the Bank were both at fault.

The Defendant's case against the Bank was that the Plaintiff had, as previously instructed (see document 54) wired US$295,944 to Cromptons trust account on 31 December 1997 (document 77). The funds arrived in Suva on 2 January 1998. It was not disputed that upon receipt of the funds Anne Grant telephoned Cromptons. The Defendant suggested that by so telephoning Cromptons the Bank was following an established and known practice upon the existence of which Cromptons was entitled to rely and which was to seek the beneficiary's instructions upon receipt of such remittances (see document 93). In view of the fact that Cromptons was closed on the day that Anne Grant telephoned she was unable to obtain these instructions. Without waiting for instructions from Cromptons and, as it was argued, in breach of the established practice she decided to "convert" that is sell the remitted funds and purchase Fiji$ in their place. The proceeds of this sale (less Bank charges) were then paid into Cromptons trust account. The Defendant's case was that had the Bank followed the established practice then the loss which occurred would not have taken place. Cromptons would, if Anne Grant had awaited instructions, have advised the Bank to retain the funds in US$. They would not then have been converted into Fiji$ and therefore would not have suffered devaluation.

The Bank's answer to these arguments was threefold. First, it denied that it was under any obligation at all to seek instructions from Cromptons after receipt of the remittance. If, in fact, it had at any time advised that a remittance had been received then this advice was given simply as a courtesy. Second, the Bank maintained that it was under a duty to the RBF to dispose of the funds remitted by converting into Fiji$ as soon as possible and that retaining the remittance for an indefinite period pending instructions from Cromptons was not an available option. Third, it suggested that since Cromptons trust account was denominated in Fiji$ it in fact did what was apparently required of it when it converted the remitted funds into Fiji$.

The principal proponent of the existence of a settled practice requiring clients to be advised the receipt of foreign funds was Mr Knight. I do not doubt for one moment that he believed that such a practice existed. The evidence however of Anne Grant was that there was no such practice and certainly no rule to that effect. Mr Satish Parshotam a wholly independent witness of considerable experience in these matters had not heard of such a practice either. Mr Shiu Prakash who explained that the Bank handled several hundred remittances each day denied that such a practice existed or could possibly be workable.

In my opinion the resolution of this important question depends largely on what is meant by the word "practice". Where a good and long established relationship between a Bank and its customer exists undoubtedly habits are established. In time these habits become settled into practices. But these practices will not become inflexible rules or accepted trade practices or terms of a contractual relationship merely on the basis of convenience and past good relations. Although a somewhat reluctant witness, Mr Prakash finally admitted that a remittance of US$295,000 is fairly, large even by the Bank's standards. As I find it, Anne Grant thought it sensible in view of the nature of the remittance to contact Cromptons to notify them of its arrival. When she failed to make contact with Cromptons she decided to sell the US$ and pay the proceeds into the account designated in the telegraphic transfer (document 77). I do not accept that by proceeding to sell the funds the Bank breached the terms of any contract between itself and Cromptons or acted negligently in relation to them. The question which arises however is whether by acting as it did the Bank followed

the instructions given to it by the Plaintiffs. Before answering that question the Bank's duty to the RBF must first be looked at.

As already seen, the remitted funds arrived on a Friday. After Anne Grant failed to make contact with Cromptons the US$ were sold at the then prevailing rate. The proceeds of sale (less commission) were placed into Cromptons trust account. The Bank was keen to persuade me that it was under an RBF obligation to deal with the incoming US$ in that manner.

Exchange control in Fiji is managed by the RBF. The principal Act is the Exchange Control Act (Cap 211). Under s 4(1) of the Act only authorised dealers are allowed to retain foreign currency. The Bank is an authorised dealer.

In his closing address Mr Nagin put the Bank's case quite succinctly. He referred to Ex 3P (1) — A Reserve Bank of Fiji brochure which is put out to explain exchange control policies. The fourth paragraph of p 1 of the brochure reads:

> An exchange control approval from the Reserve Bank of Fiji is required when applications fall outside the Banks delegated authority.

Commenting on that paragraph, Mr Nagin is recorded as saying:

> This was the problem in this case. There was no requirement satisfied and that is why the money had to be converted.

I am afraid that I do not agree.

The Bank's principal expert on these matters was Rigamoto Motufaga. Ms Motufaga told me that she had worked for the reserve Bank for fourteen years. She told me that in 1998 no solicitors held foreign currency accounts in Fiji. Nowadays quite a few firms hold these accounts having obtained RBF approval. Neither then nor now can foreign currency be paid into a Fiji $ account. If foreign currency funds are received to the credit of a Fiji account then they must be converted into Fiji $ if they are to be paid into that account.

Ms Motufaga was shown document 113. She agreed with its contents. I accept that this letter from the RBF correctly states the position. Companies incorporated in Fiji require prior permission from the RBF to retain foreign currency. The point at issue however is not whether permission is required to "retain" foreign funds for any substantial length of time but whether the retention of foreign funds for a few days pending clarification of the position is something which dealers in foreign currency, including the Bank, are allowed by the RBF to do.

Ms Motufaga confirmed that the Bank, as a licensed foreign exchange dealer could hold foreign currency. If foreign currency was unexpectedly received without arrangements having been made in advance then the Bank could either apply to the RBF to hold the funds in a US$ account or it could return the funds to the remitter. If the Bank was in doubt as to what to do it could apply the RBF for directions. If foreign funds were converted by mistake into local currency then they could be reconverted without fresh RBF approval since re-conversion in these circumstances was within the Bank's delegated powers.

Anne Grant told me that there was no risk to the remitter in holding the US funds: "the only risk in holding it was that if the value of the US$ fell then Cromptons would complain".

Anne Grant also told me that it was not at all unusual for instructions to be given to retain foreign funds in the currency in which they were remitted.

In November 1996 Parshotams wrote to the Bank (document 26). They explained that there was a need to retain the enclosed US$ funds pending obtaining government approval for certain transactions to be completed. Parshotams asked the Bank to open a monthly term deposit account denominated in US$ pending approval being granted. Without any difficulty the Bank agreed.

In the present case a large sum of US$ came into Fiji. On the face of it there was a foreign exchange gain to Fiji, not a foreign exchange loss. Owing to a lack of clear instructions and preparations (a matter which will have to be revisited) there was an apparent inconsistency between the denomination of the funds remitted and the account into which the Bank was instructed to pay them. While some definite decision had to be taken what to do about these funds I do not accept that the only option open to the Bank was immediately to sell them. In view of the fact that the funds were received on a Friday and Cromptons were back at work the following Monday I do not accept that the Bank would have fallen foul of the RBF if it had retained the remitted funds (which were in any event already several days past their value date) over the weekend in order to obtain clarification (possibly after faxing them on Friday) from Cromptons, or indeed, the remitters.

The Bank's third argument was that it merely followed normal practice by "converting" the remitted funds into Fiji$ given that the specified account, Cromptons trust account, was denominated in Fiji$. At this point some inconsistencies between the evidence of Anne Grant and Shiu Prakash emerged.

Whereas Anne Grant had come across instances of telegraphic transfers containing specific instructions to retain the remitted funds in the currency remitted Mr Prakash told me that:

> If the plan was to hold the amount in US$ we would not be able to comply with the request. We would convert the funds.

He also asserted that:

> Only if a customer has a foreign currency account will we get instructions to retain the amount in foreign currency.

This evidence contradicts that of Ms Motufaga who, it will be remembered, told me that the receiving Bank had the option to return the funds to the remitter. The evidence is also inconsistent with the Bank's agreement to withhold US$24,994.00 pending further instructions (document 82) notwithstanding that Cromptons did not, as a matter of fact, at that time have a foreign currency account.

Where both Anne Grant and Shiu Prakash were at one was in their assessment that the instructions given by the Plaintiffs in document 77 were clear; that they clearly instructed the Bank to convert the remitted funds in to Fiji$ and to pay the proceeds (less commission) into Cromptons trust account. I disagree.

At the end of his evidence Mr Prakash conceded that the process of "conversion", so frequently alluded to in evidence, was actually a euphemism for a process of sale and purchase. The Bank sold the US$ and purchased Fiji$. Mr Prakash agreed that a profit was made on that transaction by the Bank which then paid the balance after deduction of the profit into Cromptons trust account. In my view document 77 is not an authority to sell the US$: it was merely an instruction to put US $ into Cromptons trust account. If that instruction could not for whatever technical reason be complied with then in my view there was a clear duty imposed on the Bank either to advise the Plaintiffs or to advise Cromptons.

A jeweller who is given instructions to set rubies into a bangle is not free, without further instructions, to decide to substitute garnets.

As I find, the Bank did not follow the Plaintiffs' instructions and did not advise either the Plaintiffs or Cromptons that it was not intending to do so. If it had advised either Cromptons or the Plaintiffs that it could not carry out the instructions contained in document 77 as they stood then I have no doubt that arrangements could speedily and easily have been put in place to hold the funds in some form of temporary holding US$ account. If they had been held in such an account they would not have been affected by the ensuing devaluation. In my judgment the Bank must bear a substantial part of the blame for what happened. The question is whether the Bank's default absolves the Defendant.

In cl 2.2 of the Land Sales Act agreement (document 7) the parties agreed:

> That they will effect best endeavors to ensure that the (deposit) is held by the ANZ Bank in US currency and not Fiji currency …

On 28 October 1996 (document 20) Cromptons were aware that US$25,000 deposit was to be paid by way of cashiers cheque made payable to Parshotams & Co — escrow account.

On the same day (document 21) Mr Muaror explained to the Plaintiffs that the manner of payment was designed "to avoid complications in relation to currency fluctuations".

On 31 October the cheque (document 22) payable to Parshotams escrow account was sent by Mr Muaror to Parshotams.

On about 4 November Mr Muaror received a copy of document 26 in which Parshotams instructed the Bank to open a US currency monthly term deposit account.

On 26 February 1997 Mr Muaror received a letter from Parshotams (document 45) the final paragraph of which referred to possible foreign exchange losses which could result from the transfer of foreign currency.

Clauses 1, 3.1 and 3.3 of the Sale and Purchase Agreement (document 47) all emphasise that the transactions between the parties were to be effected in US$. Clause 25.1 specifically dealt the consequences of any forced conversion of these funds into Fiji$ as a result of a direction given by the RBF.

On several occasions Cromptons received US$ from the Plaintiff and forwarded them to Parshotams (for example document 70).

As is clear from Mr Muaror's letter of 13 January 1998 (document 81) and as also emerged from his evidence, no approach of any kind was made by Cromptons to the RBF either directly or through the Bank for permission to retain the funds soon to be remitted in US$ prior to their arrival in Fiji.

The contrast between the manner in which Cromptons, (in the person of Mr Muaror) dealt with the upcoming remittance and the manner in which Mr Satish Parshotam made arrangements for the payment into his account of the remitted funds could hardly be more pronounced. Rather than doing nothing, Mr Parshotam instructed the Bank to open a US$ account (document 26). His evidence was that he did not even have to obtain approval from the RBF. He also told me that if he:

> wanted to retain the transaction in foreign currency then if I received funds I would instruct the remitter to place a legend on the TT to contact the remittee and to retain the remittance in the foreign currency. That is incorporated into the TT.

This sort of instruction was presumably the sort of instruction which Anne Grant had previously referred to.

Unfortunately, Mr Muaror who admitted that he had not previously handled a settlement involving foreign currency transactions did none of these things. In my respectful opinion the Defendant should have ensured that he did.

As I see it, either the Defendant or the Bank, had they been more careful could have prevented the sale of the remitted funds as well as the funds paid in at Savusavu. In my assessment the Defendant and the Bank were equally to blame and should jointly make up the Plaintiffs' loss.

Calculating the currency loss seems quite straightforward. US$299,994 were sold but after the devaluation of the Fiji$ only US$243,384 could be repurchased. Therefore, US$56,609.92 were lost. In the absence of any good reason not to order the Defendant and the Bank jointly to repay that sum that must be the amount awarded under this head of loss.

The question of the mortgage is not quite so clear. I was told that the mortgage has now been redeemed but no exact calculations were placed before me. The cost of servicing the loan and associated costs would, prima facie be recoverable. The only remaining reasons for not compensating the Plaintiffs fully for the actual value of their loss were advanced by Mr Smith. Both reasons seemed to me to be rather recherche.

The first submission was that the devaluation which occurred on 20 January 1998 was a novus actus interveniens and that accordingly the proper measure of damages (if default was found) was the extent only to which the remittance after re-conversion had diminished in value immediately prior to that date (about $3,000). I cannot accept this submission.

In the first place the novus principle is concerned with forseeability. In my opinion, given the documents already referred to and especially the correspondence from Satish Parshotam, it was perfectly clear and well known that currencies fluctuate and that foreign currency transactions carry a significant element of risk. A devaluation is no more than a very large currency fluctuation. In my view, bearing in mind Fiji's devaluation following the 1987 coup, it cannot seriously be argued that devaluation was a risk which it was impossible to prepare to avoid.

In the second place had Cromptons unconditionally instructed the Bank to reconvert the converted funds into US$ immediately following their "conversion" then the Plaintiffs would have been wholly unaffected by the devaluation.

In the third place, the devaluation is really rather irrelevant to the Plaintiffs loss. The Plaintiffs lost US$56,609.92. That sum was not devalued. I do not think that an agent who wrongfully sells his principal's chattel can be heard to complain if it costs him more to buy it back than he obtained when he sold it.

The final suggestion arises from s 24 (1) of the Reserve Bank Act (Cap 201). This section specifies that Fiji currency is legal tender for the payment of any amount in Fiji. From this premise Mr Smith somehow drew the conclusion (para 10 of his closing written submission) that the Bank was only liable, if at all, to repay the amount of Fiji$ into which the US$ were "converted". I cannot agree. In my view the amount lost by the Plaintiffs throughout remained the same: $US 56,609.92. If the Bank had at any time agreed to pay the Plaintiffs a sufficient amount of Fiji$ to enable them to purchase the amount of US$ lost then I am sure the plaintiffs would have been quite delighted.

In the absence of any evidence or detailed submissions directed at refuting the Plaintiffs claim for the mortgage interest and ancillary expenses as set out in Mr Sharma's final written submission I find in favour of the Plaintiffs against the

Defendant and award them the sum of US$56,609.92 plus US$24,040.50 plus F$2000 plus costs to be taxed if not agreed. I further order the Bank to indemnify the Defendant to the extent of one half of the total sum awarded.

Claim allowed.