NACANIELA SERU TUBUNAVERE and 2 Ors v COLONIAL NATIONAL Bank and Anor (HBC486 of 2000)

HIGH COURT — CIVIL JURISDICTION

PATHIK J

2 March 2007

Mortgages and securities — mortgages — default of payment — refinancing agreement — failure to meet conditions of loans — whether there was negligence for failure to exercise due care in conduct and process of loan transaction — power of sale by a mortgagee — whether Defendants breached their duty as trustee of the property.

The first Plaintiff (P1) mortgaged his property to the then National Bank of Fiji (Old Bank) and later failed to pay in due time. The second Defendant (D2) was charged with collecting mortgages for the Old Bank, and made a demand for the payment of the debt. The Plaintiffs entered into a refinancing agreement with the first Defendant (D1) in order to pay the mortgage. The Plaintiffs left security documents with D1 to prepare, complete and facilitate the execution of the same. The security documentation was not completed. D2, aware of the Plaintiffs' agreement with D1, followed up on the payment. When no payment was made, D2 sold the mortgaged property. The Plaintiffs claimed damages against the Defendants.

The Plaintiffs alleged that the Defendants were negligent for failure to exercise due care, attention and diligence in the conduct and process of loan transaction. The Plaintiffs further alleged that D2 sold the property without any fault of the Plaintiffs, thus breaching its duty as trustee of the property. At issue was whether the Defendants were negligent or breached their respective fiduciary duties or duties of care.

Held — (1) A mortgagee is not a trustee for the mortgagor in the exercise of its power of sale.

(2) It was the duty of the Plaintiff to fulfill conditions of the loan in time. The Plaintiffs having defaulted in paying the loan, there was nothing wrong in D2's exercise of its power of sale.

(3) Evidence showed that D1 followed proper standard banking practice and procedures in processing the refinance facility and it was not for the court to examine the practice as long as there was no negligence on the part of the bank. There was insufficient evidence of negligence.

(4) The Plaintiffs were not able to establish their claims against the Defendants applying the civil standard of proof.

Complaint dismissed.

Cases referred to

Belton v Bass, Ratcliffe and Gretton Ltd [1922] 2 Ch 449; *Golby v Commonwealth Bank of Australia* (1996) 72 FCR 134; *Nash v Eads* (1880) 25 Sol Jo 95; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794; *Timms v Commonwealth Bank of Australia* [2004] NSWSC 76, considered.

Commissioners of Taxation v English, Scottish and Australian Bank Ltd [1920] AC 683; *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390; 102 ALR 453; *Cuckmere Brick Co Ltd and Anor v Mutual Finance Ltd* [1971] Ch 949; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; 55 ALR 417; 4 IPR 291; *Laisenia Uluinayau and Anor v National Bank of Fiji* Action No HBC 0175 of 1994; *NBF Asset Management Bank v George Niumataiwalu* Action No HBC0437/98; *Royal Exchange Assurance v Hope* [1928]

Ch 179; *Tacirua Transport Company Ltd v Virend Chand* Civ App No 30 of 1994; *Warner v Jacob* (1882) 20 Ch D 220, cited.

S. Valenitabua for the Plaintiffs

B. Narayan for the first Defendant

R. Lal for the second Defendant

Pathik J. By writ of summons dated 18 October 2000, the Plaintiffs are claiming damages (both general and special), interest and costs against the Defendants arising out of alleged negligence on the part of the first Defendant (D1) in failing to exercise due care and attention and diligence in its conduct and process of the second (P2) and third Plaintiffs' (P3) loan transaction. It is alleged that the second Defendants (D2) sold the property due to no fault of the Plaintiffs thus breaching its duty as trustee of the property.

The issues

The issues for courts determination are as follows (as stated in the pretrial conference minutes):

> Whether the first and second Defendants were negligent?
> Whether the first and second Defendants breached their respective duties of care, if any?
> Whether the first and second Defendants breached their respective fiduciary duties if any?
> Whether the Plaintiffs, have settled this claim against the first Defendant previously. If yes, are the Plaintiff's estopped from bringing this action against the first Defendant and whether their claim is an abuse of the court process.
> Whether the Defendants are liable to pay damages to the Plaintiffs?
> If yes, what quantum of damages should be paid?

At the conclusion of the trial all counsel wanted to file written submissions which the court allowed. The D1 and D2 filed theirs but the Plaintiffs did not but instead informed the court on 8 January 2007 that they do not intend to file any submissions.

I found the D1 and D2's submissions very helpful. Ms Narayan has very clearly set out the evidence, the issues for determination and has dealt with the points of law. Similarly, Ms Lal's submission in law is of great assistance.

Background facts

The background facts as stated in the Plaintiffs' statement of claim are, inter alia, as follows:

> That the First and Second Plaintiffs were at all material times the registered proprietors of a property situated at 15 Vetaia Street in Lami and described as Native Lease No 10433 being Lot 4, Section 9, Lami Subdivision (the Property).
>
> That the Third Plaintiff is the Second Plaintiff's husband and was at all material tunes intended to be a co-owner of the property in place of the First Plaintiff.
>
> That the *First Defendant* was at all material times a bank *(the New Bank)* whose business, inter alia, was and still is the provision of finance, on various terms and conditions, to approved borrowers for the purchase of properties whether real or personal.
>
> That the *Second Defendant* was established as an off-shoot of the then National Bank of Fiji (*Old Bank*) but of a separate entity charged with the function of collecting mortgage debts owed to the Old Bank, inter alia.

That the First and Second Plaintiffs were at all material times mortgagors of the property to the Old Bank and upon his retirement the First Plaintiff defaulted in his mortgage repayments to the Old Bank.

That in order to regularise the mortgage repayments the First Plaintiff offered and the Third Plaintiff agreed that the First Plaintiff's half-share in the property was to be transferred to the Third Plaintiff and in return the Third Plaintiff was to take over the First Plaintiff's half-share in the property.

That the Second and Third Plaintiffs, in order to settle the said mortgage debt to the Old Bank and substantiate the transfer of the First Plaintiff's half-share to the Third Plaintiff applied for a Re-finance facility to the National Bank of Fiji, Samabula Branch, the New Bank, which application was approved by a letter dated 27 August 1997 from the New Bank for an amount of $38,000 (Thirty Eight Thousand Dollars).

That the Second and Third Plaintiffs accepted the New Bank's offer and executed the said offer letter subsequent to which the security documents were left with the New Bank to prepare, complete and facilitate the execution of same but by February, 1998 the security documentation had not been completed.

That by 03.08.98 the security documentation had still not been completed by the New Bank but instead the First and Second Plaintiffs were served with a notice of demand from the Second Defendant demanding payment of the sum of $38,525.54 (Thirty Eight Thousand Five Hundred Twenty Five Dollars and Fifty Four Cents).

When the first Plaintiff (P1) and P2 made default in their loan repayment to the D2 the latter made a "demand".

Vis a vis the D1 and the Plaintiffs, the position is that in order to pay their debt (as demanded by the D2) the P1 and P2 agreed to transfer the property to the P2 and P3, who obtained finance from the D1.

The D2 says that during the period of transfer from the P1 and P2 to the P2 and P3, the P1 and P2 continued to be in default in mortgage repayments to the D2.

The D2 was aware of the arrangements between the Plaintiffs and continually followed up with the D1, as to when its debt would be paid.

It is alleged that there were extraordinary delays in payment by the P1 and P2, no repayments were received by the D2 for a period of about 2 years and 7 months. As a result the D2 advertised the subject property calling for tenders, the D2 accepted a tender on 21 October 1998 and thereafter the tender price was mutually varied to $44,000 and the property sold. Thereafter it evicted the P1 and accepted an arrangement from the P2 for the residual debt.

The D2 says that because of default in repayments on the part of the P1 and P2 it correctly exercised its power of sale. Therefore it says that the Plaintiffs' action must fail.

Consideration of the issues

Upon a careful consideration of all the evidence I find that after the letter of approval dated 27 August 1997 was signed the Plaintiffs waited for the bank to complete the legal documentation and relied on the bank (the CNB-D1) to do everything to protect their interests.

It is the P1's evidence that he was advised by D1 to have the transfer documentation done by his own solicitor if he wanted the transfer to be done quickly which he did but the transfer document is alleged to have been lost. There was also difficulty in having the applications to FNPF for the refinancing approved in time.

The P1 admitted receiving a notice of demand for payment of the outstanding debt from D2 dated 3 August 1998 before the sale of the property. When that was drawn to D1's attention he was told to write to D2.

The P1 blamed D1 for the delay in processing the legal documentation. He alleged negligence on P1's part. The P1 failed to mention to D1 that there was a second loan application with FNPF.

The P1 accepted that the sum of $7600 was required by D1 as deposit/equity contribution towards the refinancing facility of $38,000 approved by D1. He further accepted that the refinance facility of $38,000 only covered the debt amount owed to D2 and nothing else.

The P1 further confirmed in cross-examination that at the time the transfer document was prepared by his lawyer, Native Land Trust Board rental was in arrears on the property in question and it was required to be cleared to get NLTB consent to the transfer. The P1 accepted that it was his and his children's obligations to clear the NLTB arrears to enable transfer to be effected as that did not form part of the loan sought from D1.

Assuming that when the P1 was advised by the bank officer that the transfer document was lost as alleged by him, he took no steps to get another transfer document signed.

Furthermore, P1 accepted that a caveat was lodged by Lami Town Council in 1996 because town rates were not paid. Without payment transfer could not be effected and payment of town rates was the Plaintiffs' obligation if they wanted the transfer to be completed quickly.

While refinance facility was being sought from D1, the Plaintiffs were not making any payments to D2 under the mortgage.

The evidence of PW2 (Ateca Sivoidaveta) and PW3 (Anare Masitabua) have been analysed at length in Ms Narayan's submission.

For the D1 *Isikeli Taoi* testified as to the bank's practice in providing a refinancing policy. He told the court as to what the Plaintiffs were required to do in regard to this in arranging deposit through FNPF.

The legal section of the D1 advised DW1 about the cause of delay. These were as follows:

> The main cause of the delay was that the application to FNPF by the Third Plaintiff was rejected on the basis that he was not the legal owner of the Property (letter dated 30 September 1998, document No 103, p 328 of the Bundle of Documents) which he said he had conveyed to the Third Plaintiff which is when the Third Plaintiff had informed him that he was not happy with the First Plaintiff transferring the ownership of the property to his son Sakiusa as well since he was not contributing towards payment of the loan in any way.
>
> Hence there seemed to be differences among the Plaintiffs as to the ownership of the Property and since the title to the Property was not in order FNPF initially rejected the Third Plaintiff's application.
>
> There were also NLTB arrears on the Property which was the Plaintiffs' obligation to clear so that NLTB gave Consent on the proposed Transfer but the Plaintiffs were delaying clearance of same.
>
> There was also a Caveat lodged by the Lami Town Council in 1996 due to arrears in payment of town rates so the transfer could not be effected until the arrears were paid and Caveat removed which was again the Plaintiffs' obligation as it did not form part of the loan sought.
>
> DW1 stated that until the NLTB arrears were paid by the Plaintiffs and the proposed transfer completed and FNPF approval was received the First Defendant was not obliged to and could not finalise the security documentation and release the loan funds.
>
> Whilst there was delay in the Transfer being effected the Second Defendant in the meantime had advertised the Property far mortgage sale.
>
> DW1 stated that the second loan was approved on the basis that the Plaintiffs had finally resolved their differences regarding the ownership of the Property and the First

Plaintiff later informed the Bank via his letter dated 19/02/99 (pages 289 and 290 of the Bundle of Documents) that he was giving his consent for the Property to be purchased by the Second and Third Plaintiffs only.

This had the effect of cancellation of the previous loan and a new loan application was made only by the Second and Third Plaintiffs. A fresh application to FNPF was also made as required. (This is the second application to FNPF that was referred to by the Third Plaintiff in his examination-in-chief).

However whilst the second loan application was processed the Property had been sold by the Second Defendant under mortgagee sale.

The FNPF approval was finally received in June 1999 (letter dated 9/06/99 from FNPF refers).

DW1 stated that the Second and Third Plaintiffs had then requested the First Defendant to extend the loan facility to them to enable them to look for another Property to purchase. In this respect we wish to draw the court's attention to the letter dated 11 June 1999 (page 317 of the Bundle of Documents) which was written by the Second and Third Plaintiffs to the First Defendant and in which they stated as follows:

> We agreed to cancel the application of the approved loan of $42,000.00 for the purchase of the above property.
>
> However we would be grateful if the same facility is available and for us to look for another property.
>
> Any inconvenience caused is regretted.

It is clear from the evidence that the Plaintiffs could not solve their internal problems about the transfer to the P3 as well as failure on their part to fulfil their obligations in getting the necessary loans approved in time and paying their debt in regard to rates and paying deposit to D1.

It was too late when the Plaintiffs obtained the loan funds as the property was already sold. It is the duty of the Plaintiffs to fulfil the conditions of the loan in time. Here it was also the duty of the mortgagors/plaintiffs to continue with their normal repayments towards their debt pending the processing of the refinance facility. This they failed to do as a result the D2 had to exercise their power of sale.

The D1's second witness (DW2 — Solomone Turagavou) gave a detailed account of where the delay lay. At first there was delay until May 1998 in obtaining the NLTB consent on the part of the Plaintiffs and then it was found that there was a caveat against dealings in the property in 1996 by the Lami Town Council and then the Plaintiffs had not cleared the town rates which was the Plaintiffs' obligation.

This was a lengthy case lasting a few days. The Plaintiffs thought that they could prove their case.

I must say that this was a weak case for the Plaintiffs and this they should have known. The picture that I get of the Plaintiffs on the evidence before me is that they thought that they could sit back and relax and the bank (the D1) would do everything for them.

It is abundantly clear from the evidence adduced that, as already stated, there were certain obligations on the part of the Plaintiffs but they were not fulfilled. By expecting the Defendants to do things which were the Plaintiffs' obligation has landed them in dire straits. The blame for the delay in meeting the bank's requirements lay squarely on the doorsteps of the Plaintiffs. The Defendants cannot be blamed at all for they can only do so much and no more.

On the facts as I find them there was no negligence as alleged on the part of the Defendants.

The Plaintiffs have failed to discharge the burden of proof in proving negligence against the Defendants.

What constitutes negligence and what avoids it depends on the facts and circumstances of each case.

I find on the evidence that the D1 followed proper standard banking practice and procedures in the processing of a refinance facility and it is not for the court to examine the practice as long as there is no negligence on the part of the bank.

In regard to what constitutes "negligence" the following passage from the judgment of *Harman LJ* in *Orbit Mining & Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794; [1962] 3 All ER 565 is pertinent:

> It is never possible to lay down a rule as to what constitutes negligence and what avoids it. Each case depends on its own facts. Perhaps the most help is to be got from the decision of the Privy Council in *Taxation Commissioners v English, Scottish & Australian Bank* [1920] AC 683 at 688 in which Lord Dunedin says: *If therefore, a standard is sought, it must be the standard to be derived from the ordinary practice of Bankers not individuals*. (emphasis added)

Each case has to be determined on its own circumstances. There was no undertaking by first Defendant that the loan will be given to the Plaintiffs unconditionally but was subject to the terms and contained in the bank's letter of approval dated 7 August 1997. One of the conditions therein was the approval of deposit funds of $7600 from FNPF in the absence of which the bank was not obliged to provide the loan which all the Plaintiffs acknowledged and accepted in their evidence.

On the evidence before me I find that no liability has been established against first Defendant. This is not a case where "fiduciary relationship" or "duty of care" exists.

The law on this aspect has been examined by the New South Wales Supreme Court in *Timms v Commonwealth Bank of Australia* [2004] NSWSC 76 whereby in determining the Plaintiffs claim of breach of fiduciary duty and negligence against the Defendant bank the Supreme Court at [169] said:

> *Cases in which a Bank leading to a customer comes to occupy a fiduciary position in which it must prefer the customer's interests to its own are rare. Fiduciary responsibility arises only where the Bank's role is seen to extend beyond that of finance provider into the area of advice, as in Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390; 102 ALR 453. (emphasis added).

The Supreme Court further at [170] said:

> In *Golby v Commonwealth Bank of Australia* (1996) 72 FCR 134 at 136 Hill J said: "*Although, as Mason J in Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96; 55 ALR 417 at 453; (1984) 4 IPR 291 at 328 *suggested, the categories of fiduciary relationship are not closed, the relationship of Banker and customer is not one of the accepted fiduciary relationships. It is not a critical feature of a Banker/customer relationship that the Banker undertakes or agrees to act for or on behalf of or in the interests of the customer in the exercise of some power or discretion affecting the interests of the customer in a legal or practical sense … Absent therefore some special feature, such as the giving of advice in Smith, there is no reason to erect a fiduciary relationship between Banker and customer when the relationship is essentially one founded in contract*". (emphasis added)

The Supreme Court further at [171] said:

> The central test for the existence of fiduciary duty emerging from the joint judgment of Davies, Sheppard and Gummow JJ in *Commonwealth Bank of Australia v Smith* is whether the Bank has, by its actions, endangered in the customer an expectation

inconsistent with the Bank's acting in its own interests to protect its position as lender. Such an expectation may arise where "the customer may fairly take it that to a significant extent his interest is consistent with that of the Bank in financing the customer for a prudent business venture" (emphasis added).

There is one matter which arises out of the Plaintiffs' claim for special damages. It has been rightly pointed out by counsel that this should have been pleaded (B Leake and Jacob's, *Precedent of Pleadings*, 1975, 12th ed, Sweet & Maxwell) on the authority of Court of Appeal case of *Tacirua Transport Compnay Ltd v Virend Chand* Civ App No 30 of 1994 where it was held that:

> … unless special damage was contained in the statement of claim, evidence to establish them could not technically be relied on at the trial …

The Plaintiffs not only did not provide any particulars of any special damage but they have also failed to establish any damage suffered by them. How can the P3 claim loss when he did not own the property and also was neither a customer nor a mortgagor with the D2.

Also P2 and P3 did not have any direct dealings with D1 regarding the first loan and hence they are not entitled to allege negligence against D1 on the basis that they placed reliance on it regarding processing of the security documentation.

Having found that no liability has been established against the D1 it is not necessary to comment on the point raised during the trial that a previous action relating to the same debt was settled in court between the same parties and hence the Plaintiffs are estopped from bringing the present proceedings as an abuse of the process of the court.

The D2's position

On the evidence before me I find that P1 and P2 defaulted in their loan repayments to D2 resulting in D2 exercising its power of sale.

It is clear law that a mortgagee is not a trustee for the mortgagor in the exercise of its power of sale (*Cuckmere Brick Co Ltd and Anor v Mutual Finance Ltd* [1971] Ch 949 (*Cuckmere*); *Warner v Jacob* (1882) 20 Ch D 220 at 224); applied in our courts in *NBF Asset Management Bank v George Niumataiwalu* Action No HBC0437/98 and *Laisenia Uluinayau and Anor v National Bank of Fiji* Action No HBC 0175 of 1994).

In *Cuckmere* (above) Lord Salmon LJ at Ch 965; All ER 643 said:

> It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so.

The following passage from the judgment of Sir George Jessel MR in *Nash v Eads* (1880) 25 Sol Jo 95 (which was quoted as authority by Russell J in *Belton v Bass, Ratcliffe and Gretton Ltd* [1922] 2 Ch 449 at 465) is pertinent:

> The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the court would not look into his motives for so doing. If he had a right to sell on 1 June, and he then said, "The mortgagor is a member of an old country family, and I don't wish to turn him out of his property and will not sell it at present", and then on 1 July he said, "I have had a quarrel with the mortgagor and he has insulted me; I will show him no mercy, but will sell at once" — if all this was proved, the court could not restrain the mortgagee from exercising his power of sale, except on the terms of payment of the mortgage debt. The court could not look at the mortgagee's motives for exercising his power … He, like a pledgee, must conduct the sale property, and must sell at a fair value, and he could not sell to himself. But he was

not bound to abstain from selling because he was not in urgent need of money, or because he had a spite against the mortgagor.

In law I do not see anything wrong in the exercise of its power of sale by the mortgagee accepting a tender. An unconditional acceptance of a tender gives rise to a contract. This contract can be varied by modifying or altering its terms by mutual agreement (see *Royal Exchange Assurance v Hope* [1928] Ch 179).

Therefore, in this case the D2 was in law permitted to vary the tender price. The issue about varying arose only after the court raised it, but the Plaintiffs were not disputing this issue.

Conclusion

In the outcome, having considered the voluminous evidence adduced in this case, for the reasons given hereabove, the Plaintiffs have not established their claims against the Defendants applying the civil standard of proof.

As already stated there is insufficient evidence of negligence against the D1. Nor have the Plaintiffs established any breach of the powers of the D2 as mortgagee in exercising its power of sale.

Therefore, the Plaintiffs fail in their action against the Defendants which is dismissed with costs against the Plaintiffs in the sum of $500 payable to *each* of the two Defendants.

Complaint dismissed.