

**IN THE SUPREME COURT OF FIJI**  
**[CIVIL APPELLATE JURISDICTION]**

**CIVIL PETITION: CBV0008 OF 2024**

[Court of Appeal No: ABU 0096 of 2020]

**BETWEEN** :        1.     **NIKO KIKI TIKOMAILEPANONI NADOLO**  
                              2.     **ILISEVA NASAU NADOLO**

***Petitioners***

**AND**                :        1.     **UMESH CHAND & PRASHANT NARAYAN**  
                              2.     **CHANDRA DEO & SURUJ WATI**

***Respondents***

**Coram**             :        The Hon. Mr Justice Brian Keith, Judge of the Supreme Court  
                              The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court  
                              The Hon. Mr Justice Alipate Qetaki, Judge of the Supreme Court

**Counsel:**                Mr K. Patel for the Petitioners  
                                      Mr D. S. Naidu for the First Respondents  
                                      No appearance for Second Respondents

**Date of Hearing:**        16<sup>th</sup> October, 2025

**Date of Judgment:**    30<sup>th</sup> October, 2025

**JUDGMENT**

**Keith, J**

[1]     I agree with the judgment of Arnold J. There is nothing which I can usefully add.

## Arnold, J

### Introduction

[2] Many home and other property owners have given mortgages over their properties to secure borrowings. Sometimes the owners (mortgagors) fall into arrears in their loan repayments. When that occurs, the lender (mortgagee) may move to protect its position by advising the mortgagors that, unless the arrears are cleared by a certain date, the mortgaged property will be sold. If the arrears are not paid, the mortgagee may then move to sell the property so as to recover the full amount of the mortgagors' indebtedness plus the mortgagee's costs. Mortgagee sales of properties are typically carried out by way of a competitive process such as a tender or an auction.

[3] Mortgagors have a right of redemption, whereby they are entitled to pay off the full amount owed to the mortgagee and bring the process of realising the security to an end. The question in this case concerns when it becomes too late for a mortgagor to exercise that right or, put another way, at what point in the realisation process the right is lost. In Fiji, this depends on the interpretation of section 72(1) of the Property Law Act 1971 (PLA). That section provides:

A mortgagor is entitled to redeem the mortgaged property at any time before the same has been *actually sold* by the mortgagee under his power of sale, on payment of all monies due and owing under the mortgage at the time of payment.

(Emphasis added.)

In issue is the meaning of the words “actually sold”.

[4] The Court of Appeal in the present case determined that “actually sold” means the point of time when the transfer of the mortgaged property to the new purchaser has been registered at the Registrar of Titles Office pursuant to the exercise of the mortgagee's right to sell the property.<sup>1</sup> This, the Court said, reflects the high priority given to the mortgagor's right to redeem the mortgaged property.<sup>2</sup> The Petitioners seek leave to appeal the Court of Appeal's finding.

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<sup>1</sup> *Nadolo v Chand* [2024] FJCA 94, at [24].

<sup>2</sup> At [25].

## **Factual background**

[5] I will not attempt to set out the full procedural history of this and related matters. It is complicated; and in any event, the record before the Court is incomplete. Rather, I will outline the factual background only to the extent necessary to understand the issues in the case.

[6] On 17 July 2008, on the application of the Second Respondents (the creditors), Finnigan J entered judgment in Civil Action No HBC 78 of 1995L against Mr Chand, the first named of the First Respondents, and three others (the debtors), jointly and severally, in the amount of \$50,951.02. The judgment was registered against the title of a freehold 18 acre agricultural property owned by Mr Chand in March 2013. When the judgment was not paid, the Second Respondents sought to enforce it against Mr Chand, he being the only one of the judgment-debtors with assets in Fiji.

[7] The Second Respondents made an ex parte application for an order for the sale of Mr Chand's property. On 20 September 2017, Ajmeer J granted this application and ordered the sale of the property. The Judge also ordered that:

- (a) the Second Respondents were to call for tenders in the local dailies;
- (b) the tender was to be closed within four weeks from the date of its advertisement;
- (c) the Second Respondents were at liberty to accept the highest tender received;
- (d) the Deputy Registrar of the High Court at Lautoka was to execute a transfer of the property and other incidental documentation on behalf of Mr Chand to enable registration of the transfer;

In addition, the Judge set out how the sale price was to be disbursed. The order was registered against the title of the property on 26 October 2017.

[8] The tender was advertised once - in the Fiji Sun on Monday 20 November 2017, with the tender to close on Friday 15 December 2017. The Petitioners' tender of \$110,000 was accepted. A sale and purchase agreement (SPA) between the Second Respondents

(described as the vendors) and the Petitioners (as purchasers) was signed by the Petitioners and by the Deputy Registrar of the High Court at Lautoka on 22 June 2018, acting as Mr Chand's duly appointed agent in accordance with Ajmeer J's order of 20 September 2017. The SPA provided that the date of settlement would be 90 days after it was made, or such other date as agreed by the parties. On the same day, the Second Respondents signed a transfer in favour of the Petitioners, which was also signed by the Deputy Registrar. Ajmeer J made a further order, ex parte, on 22 February 2019 relating to costs, interest and other sums payable by Mr Chand. As Mr Chand refused to provide the title for the property, the Petitioners applied for a dispensation of title, which appears to have been granted in late May 2019.

[9] Then in July 2019, Mr Chand took two steps:

- (a) He issued new proceedings against the Second Respondents and the Petitioners alleging fraud and deceit in relation to the process of sale of the property and the making of the SPA (Civil Action No 189 of 2019). In these proceedings (as amended), Mr Chand sought stays of the orders made by Finnigan J and by Ajmeer J until further order of the Court; the setting aside of Ajmeer J's orders of 20 September 2017 and 22 February 2019 or alternatively an order that he pay \$87,845.68<sup>3</sup> to the Second Respondents; the rescinding of the SPA; and damages for fraud, malfeasance and deception.
- (b) He applied in the present proceedings for an "interim and immediate stay" of the transfer of the certificate of title for the property to the Petitioners. In his Ruling of 21 September 2020 on this application, Ajmeer J identified four orders that were sought in the affidavits filed by or on behalf of Mr Chand. They were that the sale of the property not proceed as a result of non-compliance by the Second Respondents with the orders of the Court as to the conduct of the sale; that Mr Chand pay \$87,842.68 into Court or into the trust account of the Second Respondent's solicitors; the Second Respondents withdraw all caveats or charges against the titles; and the parties otherwise settle the Second Respondents' claim.

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<sup>3</sup> This is the total of the original \$50,951.02 that Mr Chand was ordered to pay by Finnigan J on 17 July 2008 and the additional amounts ordered by Ajmeer J on 22 February 2019.

For present purposes, a critical feature of these developments is that Mr Chand was prepared to pay the full amount owing to the Second Respondents and to place the funds with a stakeholder in the meantime.

[10] Mr Chand's fraud and deceit allegations against the Second Respondents are based on two principal allegations – that (i) the property was sold by the Second Respondents to the Petitioners at a significant undervalue in breach of the Second Respondents' obligations to him and (ii) there was collusion between the Second Respondents and the Petitioners in that respect.

[11] In relation to the sale at an undervalue, Mr Chand alleged that in 2015 the Second Respondents had obtained a valuation of his property. Although only two of the six pages in the document are in the Record, they show that the property was valued at \$110,000 on a "bare land" basis, so that improvements such as buildings were not taken into account, nor were chattels and crops. Mr Chand's solicitors commissioned a "kerbside" assessment of the property by a valuer in October 2019, a copy of which is in the Record. That assessment was between \$150,000 and \$175,000 and reflected the fact that there were three dwellings on the property. In addition, according to Mr Chand, the property was used for growing sugarcane and for several other business enterprises, all of which added to its value. Thus Mr Chand alleged that the property was sold at a significant undervalue (his claim alleged that the property's real value at the time of sale was \$250,000).

[12] In terms of collusion, Mr Chand alleged that the Petitioners offered the Second Respondents \$110,000 for the property a few months after the Second Respondents obtained their "bare land" valuation of \$110,000 in 2015. They did not accept that offer as they had not held a tender. It was claimed the similarity in the figures was not coincidental. Mr Chand alleged that the tender in December 2017 was run so as to ensure that the Petitioners were the successful tenderers. He emphasised that the advertising for the mortgagee sale was minimal and ineffective – one advertisement in one daily on a Monday morning – and was not in accordance with Ajmeer J's orders. In addition, the tenders were not opened in the presence of the Deputy Registrar, who would have provided independent supervision of the process.

[13] In light of these factors, the Second Respondents were alleged to be in breach of their obligations to Mr Chand, namely, to act in good faith in exercising the power of sale and to take reasonable care to achieve a proper price.<sup>4</sup>

### **Ajmeer J's 21 September 2020 Ruling**

[14] Ajmeer J heard argument on the application for interim orders in the present proceeding on 23 July 2020 and issued his Ruling on 21 September 2020.<sup>5</sup> The Petitioners, as purchasers of the property, were joined in the proceeding as “interested parties”.

[15] Having set out the background to the application, Ajmeer J began his discussion by noting that the application was for an interim stay on the sale and transfer of the property to the Petitioners pending the determination of Civil Action No 189/19, which alleged fraud and deceit on the part of the Petitioners and the Second Respondents. The Judge pointed out that by virtue of the definition of “mortgage” in the Land Transfer Act 1971, the registration of the charging order on the property’s title meant that it was deemed to be a mortgage, hence the question of the mortgagee’s right of redemption arose. There was no challenge to the Judge’s analysis on this point, either in this Court or in the Court of Appeal.

[16] Accordingly, Ajmeer J said, the decision for him became whether the right of redemption had been lost as a result of the making of the SPA, as counsel for the Petitioners argued. The Judge referred to section 72(1) of the Property Law Act 1971 and to the Court of Appeal’s judgment in *Vere v NBF Asset Management Bank*.<sup>6</sup>

[17] In *Vere’s* case, the Court referred to a decision of the UK Court of Appeal in *Property & Bloodstock Ltd v Emerton*,<sup>7</sup> especially the judgment of Danckwerts LJ. In *Property & Bloodstock* the question was whether the mortgagor’s right of redemption remained after the mortgagee had entered into a contract to sell the mortgaged property. The

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<sup>4</sup> See, for example, *Ram Dutt Prasad v ANZ Banking Group Ltd* (1999) 45 FLR 101 (HC), at p 106.

<sup>5</sup> *Deo and Wati v Kumar* [2020] FJHC 780.

<sup>6</sup> *Vere v NBF Asset Management Bank* [2004] FJCA 50.

<sup>7</sup> *Property & Bloodstock Ltd v Emerton* [1968] Ch 94 (CA).

Court approved two propositions drawn from the judgment of Crossman J in *Lord Waring v London and Manchester Assurance Co Ltd*,<sup>8</sup> namely that:<sup>9</sup>

- (a) a mortgagee's exercise of his statutory power of sale by entering into a contract to sell the mortgaged property is binding on the mortgagor before completion of the sale unless it is proved that the mortgagee exercised the power in bad faith;
- (b) the fact that a contract for sale was entered into at an undervalue is not by itself sufficient to prove bad faith.

In addition, Sachs LJ also noted that it was common ground between the parties that when a mortgagee enters into an unconditional contract for the sale of the mortgaged property, the mortgagor's right to redeem is suspended, not cancelled, because it would revive if the contract did not proceed.<sup>10</sup>

[18] Counsel for the Petitioners argued that Mr Chand was not entitled to redeem the property because there was an SPA between the Petitioners and the Second Respondents, which was ready to settle. However, the Judge described the SPA as being "undated" and apparently conditional; he noted that the property had not yet been actually transferred, and that Mr Chand had deposited the full amount owing to the Second Respondents into court. The Judge held that in those circumstances, Mr Chand was entitled to redeem the property.

[19] Moreover, although the Judge did not actually make findings of fraud or impropriety on the part of the Second Respondents or the Petitioners, he held that the various concerns that Mr Chand had raised about the issues of sale at an undervalue and an inappropriate tender process meant that the SPA was invalid.

[20] Ajmeer J ordered that:

- (a) Mr Chand was entitled to redeem the property;
- (b) the "undated" SPA was rescinded;

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<sup>8</sup> *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310.

<sup>9</sup> *Property & Bloodstock Ltd v Emerton*, above n 7, at pp 114-115 per Dankwerts LJ, with whom Sellers LJ and Sachs LJ agreed.

<sup>10</sup> At pp 122-123.

- (c) the judgment in favour of the Second Respondents was to be satisfied with the \$87,842.68 Mr Chand deposited into court;
- (d) those funds were to be released to the Second Respondents;

The Judge also made an order for costs against the Second Respondents and the Petitioners in favour of Mr Chand.

### **Court of Appeal decision**

[21] The Petitioners appealed Ajmeer J’s decision. Morgan JA delivered the principal judgment in the Court of Appeal, with which the other members of the Panel agreed.<sup>11</sup> Having gone through the background, the Judge identified two features that were common ground between the parties.<sup>12</sup>

- (a) First, all the money due was available for payment to the Second Respondents, who did not take part in the appeal for that reason.
- (b) Second, in accordance with Ajmeer J’s order, a transfer of the property had not been registered at the Registrar of Titles Office.

[22] After stating that two of the grounds of appeal were without substance, Morgan JA identified the only issue that the Court needed to consider as being whether Ajmeer J was correct to conclude that Mr Chand was entitled to redeem the property. This came down to whether the property had been “actually sold” within the meaning of section 72(1) of the PLA. As to that, the Petitioners argued that they held a valid and unconditional SPA in relation to the property so that it was “actually sold”; Mr Chand submitted that it was not “actually sold” until a transfer was registered at the Registrar of Titles Office, when his right of redemption would be lost.

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<sup>11</sup> *Nadalo v Chand* [2024] FJCA 94.

<sup>12</sup> At [10].

- [23] Morgan JA referred to, and distinguished, the decision of the Court of Appeal in *Vere v NBF Asset Management Bank*. The Judge considered that it did not assist the Petitioners because the case did no more than note the observations of Sachs LJ in *Property & Bloodstock Ltd v Emerton* that there was common ground between the parties in that case that upon the mortgagee entering a contract under a power of sale, the mortgagor's right of redemption was suspended, not cancelled, because it would revive if the contract was not implemented. In any event, in *Vere* there was no tender of the full amount of the judgment sum.
- [24] Morgan JA went on to discuss the decision of Fatiaki J (as he then was) in *Mohammed Isaq Khan v Fiji Development Bank*,<sup>13</sup> where it was held that the words "actually sold" meant that a mortgagee retained the right to redeem until such time as a transfer of the sale of the mortgaged land is registered by the Registrar of Titles Office. Morgan JA agreed with this interpretation of section 72(1), saying it reflected the high priority given to a mortgagor's right to redeem a mortgaged property.
- [25] Accordingly, Morgan JA concluded that Ajmeer J was correct to reach the decision he did. However, he considered that it was unnecessary for Ajmeer J to consider the validity of the SPA and that he should not have reached a view about that matter without a full hearing of the issues.
- [26] In the result, the Court of Appeal upheld the orders made by Ajmeer J, with the exception of the order rescinding the SPA, which it set aside. The Court ordered that each party should bear its own costs on the appeal. The effect of these orders was that the Petitioners had a SPA but it could not be completed.
- [27] The Petitioners now seek leave to appeal to this Court against the Court of Appeal's decision.

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<sup>13</sup> *Mohammed Isaq Khan v Fiji Development Bank* [2000] FJHC 7; [2000] 1 FLR 11.

### **Should leave to appeal be granted?**

[28] As is well known, under section 7 of the Supreme Court Act 1998, this Court may only give leave to appeal in a civil case if the case (i) raises a far-reaching question of law; or (ii) a matter of great general or public importance; or (iii) a matter that is otherwise of substantial general interest to the administration of civil justice. In this case the meaning of section 72(1) is obviously important. The mortgagee's right of redemption is fundamental. Accordingly, the question is whether there is an arguable case that the interpretation adopted by the Court of Appeal is wrong.

### **Discussion**

[29] To repeat, section 72(1) provides:

A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all monies due and owing under the mortgage at the time of payment.

[30] One question that arises immediately is whether the words “actually sold” are unique to the Fijian legislation or whether they have wider currency. Although I have not been able to research the position fully, the words are the same as those in the equivalent New Zealand provision, which may mean that the Fijian provision was derived from the New Zealand provision or that both provisions have some other common source. In any event, the wording of section 72(1) of the Fijian PLA is identical to the wording in the equivalent subsection in successive versions of the Property Law Act that were current in New Zealand for just over 100 years – section 70(1) of the Property Law Act 1905, section 70(1) of the Property Law Act 1908, and section 81(1) of the Property Law Act 1952. The equivalent provision in the current New Zealand Act, the Property Law Act 2007, no longer contains the word “actually” – section 97(1) of that Act provides:

The current mortgagor or any other person entitled to redeem mortgaged property may redeem it in accordance with this subpart at any time before it has been sold, under a power of sale, by the mortgagee or a receiver.

[31] Moreover, besides section 72(1), sections 72(2) – (4) of the Fijian PLA have the same wording as sections 81(2) – (4) of the New Zealand Property Law Act 1952, which suggests that the Fijian provisions were modelled on the New Zealand provisions. Accordingly, it is of interest, although by no means decisive, to know how the New Zealand courts have interpreted the identical language.

[32] Against this background, I propose to structure my discussion under three headings – prior decisions of the Fijian Courts, the interpretation of the New Zealand provision and practical implications.

(i) *Prior decisions of Fijian courts*

[33] As I have said, the Court of Appeal in the present case considered that *Vere's* case did not assist the Petitioners as it did no more than note an observation of Sachs LJ in *Property & Bloodstock Ltd v Emerton* and, in any event, there was no tender of the full judgment sum in *Vere's* case. With respect to the Court of Appeal, I do not think its earlier decision in *Vere* can be dismissed so lightly, for the following reasons:

- (a) First, the Court of Appeal in *Vere* explicitly approved the proposition endorsed by the UK Court of Appeal in *Property & Bloodstock Ltd v Emerton* that a mortgagee's exercise of the power of sale by auction or private contract was binding on the mortgagor before completion unless it was proved that the power had been exercised in bad faith. The Court noted that the decision had been applied and followed in Fiji<sup>14</sup> and elsewhere, including in New Zealand,<sup>15</sup> and had been accepted in leading texts.<sup>16</sup>
- (b) Second, the Court of Appeal in *Vere* noted the lack of evidence in *Khan* that the mortgagee had actually entered into a contract for sale of the mortgaged property at the time of the mortgagor's offer to pay the full amount owing and, further, that there were issues about whether the mortgagee had fulfilled its obligations to the mortgagor in its attempted sale process. By contrast, the Court of Appeal

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<sup>14</sup> For example, in *Ram Dutt Prasad v ANZ Banking Group Ltd*, above n 4, at p 106.

<sup>15</sup> The New Zealand case cited was *Howson v Little* [1948] NZLR 1073.

<sup>16</sup> The examples were *Megarry's Manual of the Law of Real Property* (8<sup>th</sup> ed) at p 505 and Chesire and Burns *Modern Law of Real Property* (16<sup>th</sup> ed) at p 763.

accepted that in the case before it, the mortgagee had entered into a contract for the sale of the mortgaged property. So *Khan* was distinguishable. (That said, it is correct that the mortgagor in *Vere* had not tendered the full sum owing under the mortgage as had occurred in *Khan*.)

[34] Moreover, *Vere* is not the only case decided after *Khan* in which the Court of Appeal endorsed the proposition from *Property & Bloodstock Ltd. Nakuta v Housing Authority* is a further example.<sup>17</sup> Having referred to section 72(1), the Court of Appeal said in *Nakuta*:<sup>18</sup>

A mortgagor's right to redeem is extinguished once a contract of sale has been entered in to by the mortgagee. As the property is sold, there is nothing left to redeem.

The Court cited *Property & Bloodstock Ltd* as authority. The Court went on to apply *Vere*, which it cited for the proposition that:

Failing payment into court of the whole sum owed under a mortgage, the court will not restrain a mortgagee from exercising its powers under the mortgage.

As these extracts suggest, timing matters.

[35] Besides *Vere* and *Nakuta* there are numerous High Court decisions where the proposition in the extract from Dankwerts LJ's judgment in *Property & Bloodstock Ltd* has been applied. Examples are *Ali v Westpac Banking Corporation*,<sup>19</sup> *Ram Dutt Prasad v ANZ Banking Group Ltd*,<sup>20</sup> *Credit Corporation (Fiji) Ltd v Buksh*,<sup>21</sup> *ANZ Banking Group Ltd v Palu*,<sup>22</sup> *Fun World Centre (Fiji) Ltd v Bank of Baroda*<sup>23</sup> and *Prakash v Fiji Development Bank*.<sup>24</sup>

[36] What, then, about *Khan's* case? There, Fatiaki J held that a mortgagee may exercise the right of redemption at any time until the transfer of the mortgaged land by the mortgagee under the power of sale has been registered by the Registrar of Titles Office.

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<sup>17</sup> *Nakuta v Housing Authority* [2012] FJCA 39, [2012] 2 FLR 155.

<sup>18</sup> At [15].

<sup>19</sup> *Ali v Westpac Banking Corporation* [1997] FJHC 168.

<sup>20</sup> Above, n 4, at p 106.

<sup>21</sup> *Credit Corporation (Fiji) Ltd v Buksh* [2010] FJHC 137, at [20]-[23].

<sup>22</sup> *ANZ Banking Group Ltd v Palu* [2011] FJHC 608 at [17]-[18].

<sup>23</sup> *Fun World Centre (Fiji) Ltd v Bank of Baroda* [2013] FJHC 519, at [4.1]-[4.18].

<sup>24</sup> *Prakash v Fiji Development Bank* [2020] FJHC 366. This case adopted the reasoning from *Fun World*: see paras 4.1-4.21.

Given that the Court of Appeal adopted its reasoning in the decision under appeal, I will examine the decision in more detail.

[37] The plaintiff had purchased some land with finance from the defendant bank in 1986. He fell behind on his loan payments and, in response to demand notices from the bank, decided to subdivide the land so as to increase its saleable value. He received approval to subdivide in October 1997. In September 1997, when the plaintiff's debt was \$70,923.95 the Bank advised him that it had received an offer of \$50,100 for the property, which it proposed to accept. In mid-October 1997, the plaintiff wrote seeking further time to complete the subdivision, but the Bank rejected this and advised that it was proceeding to accept the offer. In early-March 1998, the plaintiff wrote again to the Bank indicating that he had a purchaser for the property at \$70,000. In August 1978, the plaintiff again offered to redeem his mortgage for the full amount then owing. The Bank rejected this offer on the basis that it had an unconditional agreement to sell the property, so that the equity of redemption was lost. The plaintiff then issued proceedings against the Bank (apparently alleging that the bank as mortgagee had breached its duties to him) and sought an injunction to prevent the Bank from selling or transferring the property before the case was determined. He attached a cheque for the full amount of the debt to his affidavit, which sum was later paid into court.

[38] The bank said in the proceedings that by the time the offer of full payment was made, it had entered into a sale and purchase agreement for the property. But that was not consistent with what it had said in contemporaneous correspondence with the plaintiff, and the bank did not exhibit any documentary material to substantiate its claim, such as tender documents, a signed sale and purchase agreement and so on.

[39] Although he did not make a firm finding on the point, Fatiaki J was concerned about whether the Bank had met its obligations to the mortgagor, in the sense of taking reasonable precautions to obtain the true market value of the property, particularly in light of the approval for subdivision of the property.

[40] In terms of the meaning of section 72(1), Fatiaki J discussed both *Lord Waring v London and Manchester Assurance Co Ltd* and *Property & Bloodstock Ltd v Emerton* but then went on to say:

On the law however, I confess a preference for the scholarly judgment of Walsh J in *Forsyth v Blundell* (1972-1973) 129 CLR 477 where a mortgagee had acted in disregard of the interests of the mortgagor to obtain the best price reasonably available by failing to pursue a scheduled auction where a firm offer of a lesser amount had been received.

[41] The majority in *Forsyth v Blundell* held that a mortgagee could be restrained from completing a sale and purchase agreement in relation to the mortgaged property where the mortgagee had not exercised its power of sale in good faith but rather with what was described as “calculated indifference” to the interests of the mortgagor. Walsh J delivered the principal judgment. He accepted the principle stated in *Lord Waring v London and Manchester Assurance Co Ltd* and approved in *Property & Bloodstock Ltd v Emerton*.<sup>25</sup> However, he noted that what was being argued in the case before the court was that a sale and purchase agreement between the mortgagee and a purchaser would be binding on the mortgagor before completion *even if the mortgagee acted in bad faith* unless either (i) the mortgagee acted in collusion with the purchaser or (ii) the purchaser had knowledge at the date of the sale of facts affecting the propriety of the sale. The Judge rejected that submission. In the result, where a mortgagee acted improperly in relation to a sale of the mortgaged property to an innocent purchaser, the mortgagor could take action to challenge the contract before its completion on account of the impropriety, despite the purchaser’s ignorance of it. However, the normal rule in such a case was that the mortgagor would have to deposit the amount outstanding under the mortgage (or security for that amount) in court.<sup>26</sup>

[42] Where does this leave matters? In my view, the following points summarise the law that has been adopted by Fijian courts over many years in this area:<sup>27</sup>

- (a) First, a mortgagee will not generally be restrained from exercising the power of sale unless the mortgagor pays into court the amount the mortgagee says is owing under the mortgage. To allow a restraint without the payment would undermine the value of the security.

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<sup>25</sup> At p 499.

<sup>26</sup> At pp 504-506. See also *Inglis v Commonwealth Trading Bank of Australia* (1972-1973) 126 CLR 161 at 164-165 per Walsh J and p 169 per Barwick CJ.

<sup>27</sup> Scott J in *Ram Dutt Prasad v ANZ Banking Group Ltd*, above n 4, provides a helpful summary at pp 105-106.

- (b) Second, in exercising the power of sale, a mortgagee must act in good faith and owes a duty to the mortgagor to take reasonable care to obtain a proper price for the mortgaged property. Sale at an undervalue does not, of itself, justify a conclusion that the mortgagee has breached its duties to the mortgagor and is, in any event, the type of loss that would be readily compensable in damages rather than justifying stopping the sale from being completed.
- (c) Third, a court will only intervene on behalf of a mortgagor to prevent completion of a contract of sale between the mortgagee and a third party where it is satisfied that the contract was brought about by fraud or impropriety on the part of the mortgagee. In that situation, the mortgagor may not be required to pay into court the full amount owing under the mortgage.

(ii) *Judicial interpretation of the New Zealand provision*

[43] The interpretation of s 72(1) adopted by the Court of Appeal in *Vere and Nakuta* is consistent with the approach that has been adopted by the New Zealand courts to the identically worded provision in its property law legislation. The decision of Randerson J in *Davison v Westpac Banking Corporation* provides a helpful illustration.<sup>28</sup>

[44] In that case, the plaintiffs were trustees of a family trust that owned a residential property in Auckland. Westpac held a mortgage over the property. They fell into arrears. In exercise of their rights as mortgagee, Westpac sold the property at a public auction to a Mr Watson, whose family trust became the registered owner.

[45] The plaintiffs issued proceedings against Westpac alleging that (i) in going ahead with the auction, Westpac denied them the opportunity to redeem the property and that (ii) Mr Watson and his fellow trustees had not obtained an indefeasible title by reason of fraud in terms of section 62 of the Land Transfer Act 1952. In relation to redemption, the plaintiffs made various efforts prior to and on the day of the auction to obtain the

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<sup>28</sup> *Davison v Westpac Banking Corporation* CP 490/98, 5 November 1998. Strangely given its importance, this case does not appear to have been reported.

bank's agreement to their efforts to organise funds through a friend so that they could redeem the mortgage, but all without success.

[46] Randerson J began by considering when the land at issue had been "actually sold" so that the right to redeem was lost.<sup>29</sup> The Judge said there was no dispute that the right remained at least up to the fall of the auctioneer's hammer. But the mortgagors' contention was that it extended beyond that up to the point of completion by settlement of any sale resulting from the auction. The Judge discussed a number of cases, including *Howson v Little*, which was the New Zealand case referred to in *Vere*,<sup>30</sup> *Lord Waring v London and Manchester Assurance Co Ltd* and *Property & Bloodstock Ltd*. From those and other cases Randerson J concluded that several principles emerged, including that ordinarily, the mortgagor's right of redemption will be lost once the mortgagee enters into a binding contract of sale in exercise of powers under the mortgage, certainly where the contract is unconditional and generally even where it is conditional, although this may depend on the precise nature of the condition.

[47] The Judge went on to point out the importance of maintaining the integrity of the auction process and the difficulties that could result if the right to redeem extended beyond the fall of the hammer, especially given the successful bidder's obligations under standard auction conditions, eg the obligations to pay a deposit and to sign an unconditional sale and purchase agreement. Accordingly, in the instant case, the right to redeem was lost at the fall of the hammer.<sup>31</sup> The Judge noted that if the mortgagee had wrongfully denied the mortgagor the opportunity to deposit the necessary funds before the auction, as the mortgagor had alleged, the mortgagor would still have in personam rights against the mortgagee notwithstanding the sale.<sup>32</sup> This decision has been applied subsequently.<sup>33</sup>

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<sup>29</sup> At p 9.

<sup>30</sup> See para [33](a) and n 15 above.

<sup>31</sup> The judgment also contains a useful discussion of fraud under the Land Transfer Act at pp 19-24.

<sup>32</sup> At p 21, point 6.

<sup>33</sup> A reported decision in which *Davidson* was discussed and applied is *Bhana v Westpac Banking Corporation* (2003) 5 NZCPR 114 (HC) at [14]–[25].

(iii) *Practical implications*

[48] The Court of Appeal in the present case did not discuss the practical implications of their judgment. Dobson JA when expressing his agreement with Morgan JA's judgment said:

Where a party contracts to buy a property where the vendor is being forced to sell by exercise of powers vested in mortgagees (or creditors in an equivalent position) they should be taken to appreciate that the process may be disrupted by the vendor exercising legal rights to resist the forced sale, until the transaction is complete in all respects.

[49] An interesting feature of *Davison v Westpac Banking Corporation* is that ultimately the sale and purchase agreement was settled at 12.20pm and the purchaser's family trust was registered on the title at 1.17pm the same day. In other words, registration in New Zealand is a speedy process. Counsel for the Petitioners, Mr Patel, told us from the Bar that this was not the case in Fiji. The system in Fiji is a manual one and it can take up to six months to get title depending on the workload in the Registrar's office. Mr Patel submitted that, as a consequence, the approach adopted by the court in *Kahn* and in the decision under appeal created real risks for a person purchasing a property at a mortgagee sale. I agree with that submission.

## **Conclusion**

[50] In my view, the Court of Appeal was wrong to interpret section 72(1) as meaning that the right to redeem will not be lost until the transfer to the new purchaser(s) is registered by the Registrar of Titles Office. This is because the interpretation:

- (a) is contrary to the long-standing approach adopted by the Fijian courts, including the Court of Appeal, even after the decision in *Khan*;
- (b) was adopted without any convincing explanation of why a new interpretation of s 72(1) was required;
- (c) creates significant practical difficulties in view of the fact that the Registrar of Titles may take some time to register a transfer.

[51] The proper interpretation of section 72(1) is that the entry into an unconditional contract for sale and purchase by a mortgagee in exercise of the power of sale means

the property is “actually sold”, so that the contract will generally be effective to prevent the exercise of the right of redemption, although the right may revive if the contract is not in fact completed. The same will generally apply where the contract is conditional, although that may depend on the precise nature of the condition. But if the court is satisfied that the mortgagee has conducted the sale in a way that amounts to fraud or impropriety the court can intervene to stop the sale (assuming it is not already completed). That can include directing the Registrar of Titles not to register the transfer.

[52] In this case, although Ajmeer J described the SPA as “undated”, it was executed on 22 June 2018, which was before Mr Chand proffered to the amount owing under the mortgage. In general, this would mean that the right to redeem was lost. However, Mr Chand alleged fraud and impropriety in conducting the sale on the part of the Second Respondents as lenders/vendors and the Petitioners as purchasers. Ajmeer J apparently had concerns about their conduct as he set the SPA aside, but that was based on the affidavit evidence before him, not on evidence given at a full trial. Perhaps for that reason, the Judge did not make any firm findings as to Mr Chand’s allegations.

[53] In addition, it appears that the funds paid in by Mr Chand have been paid to the Second Respondents in satisfaction of the judgment against him pursuant to Ajmeer J’s order, so that the creditors have received the full amount owing to them. I note that Second Respondents did not appear either on the appeal to the Court of Appeal, or on the present Petition. If that is so, Mr Chand has, in effect, exercised his power of redemption.

[54] Given that I have concluded that the Court of Appeal’s interpretation of section 72(1) is incorrect, the normal course would be to refer the matter back to the High Court for a trial of Mr Chand’s allegations against the Petitioners and the Second Respondents. If Mr Chand was successful, the SPA would likely be brought to an end, although if the court concluded only that there had been a sale at an undervalue, Mr Chand’s sole remedy might be a damages award; if he was unsuccessful, the SPA would, in principle, remain in force but that would be subject to what is said below. Depending on resolution of any issues as to timing, a finding that the SPA was validly made could mean that Mr Chand had lost his right of redemption before he proffered the full amount owing.

[55] That said, there are complicating factors. The SPA was entered into as a result of Ajmeer J's order of 20 September 2017 that the property be sold to satisfy the judgment debt. However, Mr Chand satisfied the judgment against him by paying the necessary funds into court, and the funds have been released to the Second Respondents. This was pursuant to Ajmeer J's order of 21 September 2020. It is difficult to see how that could be undone in a way that would reinstate the SPA.

[56] Further, as I noted earlier, the Second Respondents are identified as the "vendor" in the SPA and have certain obligations in that capacity. They will be unable to perform those obligations now. As well, Mr Chand has continued to own and operate the property; given the passage of time, and especially if he has developed the property further, its value is likely to have increased beyond its value when the SPA was entered into. So the property today may be rather different to the property as it was at the date of the SPA. Given these factors, it is not obvious that it would be possible to implement the SPA at this stage.

[57] In any event, it may be that the Petitioners would prefer to leave matters as they are rather than go through a further trial at which their integrity, and that of the Second Respondents, will be challenged. But they may feel that they are entitled to have the status of the SPA resolved whatever the practical difficulties with that course.

[58] Accordingly, I would grant the Petitioners leave to appeal and invite submissions from all the parties as to what, if any, other orders should be made in light of the matters just discussed. The submissions should be filed and served by 3 pm on Friday 28 November 2025. Any updating of factual matters should be by way of affidavit rather than simply counsel's submissions. The Petitioners' submissions should, of course, make it clear whether they wish to proceed to a trial of Mr Chand's allegations, or to leave things where they stand at present. The question of costs on the Petition will be addressed when the final orders are made.

**Oetaki, J**

[59] I have read and considered the judgment of Arnold J in draft, and I agree with it and the reasoning.

**Orders of the Court:**

1. *Leave to appeal is granted.*
2. *All parties should file and serve such submissions and updating affidavits as they choose to make on what orders the Court should make in the light of its judgment by 3.00pm on Friday 25 November 2025.*



*Brian Keith*

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**The Hon Mr Justice Brian Keith**  
JUDGE OF THE SUPREME COURT

*Terence Arnold*

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**The Hon Mr Justice Terence Arnold**  
JUDGE OF THE SUPREME COURT

*Alipate Qetaki*

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**The Hon Mr Justice Alipate Qetaki**  
JUDGE OF THE SUPREME COURT