Kolo v Bank of Tonga

Court of Appeal
Burchett, Tompkins, Beaumont JJ
App 20/97

4 & 7 August, 1998

Practice and procedure - res judicata
Land - houses are personalty - not fixtures

The facts are set out in the judgment above.

Held:

1. The causes of action were not the same and nor were the issues. The matter was not barred by a res judicata.
2. In Tonga buildings in general are to be regarded as items of personal property rather that accreting to the land and thus forming part of the realty.
3. A house was capable of being pledged as an item separate from the land on which it stands.

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Ms Tapueluelu

Judgment

On 12 May 1989 the appellant Mr Kolo entered into a loan agreement with the respondent Bank. The amount of the loan was T$17,793, which Mr Kolo required for the purpose of fencing. He agreed to repay it at the rate of T$250-00 per month for the first 4 months and T$400-00 dollars per month thereafter, until repayment of the full amount and interest at 10% per annum "or such other rate as the Bank may from time to time charge to other customers on a like account." The agreement contained the following provisions:

"The Borrower pledges the following articles as security for the performance of this Agreement:

Mortgage over town-allotment at Hala'ovave,
Kolomotu'a plus Loan Agreement over house,
Car Reg T817 & T687 plus All trade stock.

and the Borrower agrees to preserve carefully the said articles hereby pledges as security. And the Borrower further agrees that he will not give away, sell or otherwise dispose of the said articles until he has received from the Bank a signed memorandum stating that the terms of this Agreement have been performed. In the

event of the failure by the Borrower to fulfil his obligations under this Agreement then the balance owing becomes payable on demand and the Bank is entitled to take possession of the said articles pledged as security without further process of Law and the borrower undertakes to give up control of the said articles on demand by the Bank."

Mr Kolo having defaulted in respect of the repayments due under the agreement, theBank took out a writ for T$18,812-41 and interest on 7 December 1992. This was not an action to enforce the security, but an action in debt. Judgment was entered by consent on 26 August 1993. A small part of the judgment appears to have been recovered by a writ of distress pursuant to which some goods were seized. The Bank then sought the issue of a further writ of distress in respect of Mr Kolo's house. In Bank of Tonga v. Kolo, an unreported judgment delivered 21 April 1995, Ward CJ ruled that the house could not be seized under a writ of distress. In the course of his judgment, he made it clear that this result did not flow, as it would in common law countries generally, from the nature of a house as being, in law, part of the land, and not a chattel. It was not disputed, and Ward CJ clearly accepted, that, in Tonga "buildings generally are eligible for seizure under distress." But just because buildings are here capable of being subjected to a writ of distress, the exemption provision which, in most countries, extends to items such as apparel and tools of trade, in Tonga includes houses. This is done under section 54 of the Magistrates' Courts Act which, by Order 26 Rule 7(2), applies to a writ of distress issued out of the Supreme Court. Section 54, as amended by the Magistrates' Courts (Amendment) Act 1991, reads relevantly as follows:

> "Distress warrants shall be issued as follows - ... (d) houses, fixtures, growing crops, the clothing of a person and his family, and, to the value of $200, the tools and implements of his trade shall not be taken under a warrant of distress...".

Comparing the exemption in section 54(d) with similar provisions overseas, Ward CJ commented:

> "The provisions under our law are wider because of the nature of land ownership in Tonga. I accept the reasoning of Dalgety J in Bank of Tonga v. Vaka'uta 19/91 [7 February, 1994] that properties such as houses and fixtures which cannot be subject to distress in England because they accrete to the land are considered severable from the land under our law and are properly described as goods and therefore subject to distress. Equally, although I question Dalgety J's use of Wolf v. Crutchley as authority for the proposition, I accept the word 'houses' means dwelling houses."

Ward CJ then rejected an argument that the protection of section 54(d) had been waived by Mr Kolo under the terms of the loan agreement. He said:

> "The agreement gives the Bank the right to possession but that is a long way from saying or allowing the implication that the Borrower realises and agrees that, if the Bank seeks distress, seizure of his house may take place under the writ in exclusion of the provisions of section 54(d)."

Accordingly, the Bank's attempt to recover under the judgment for debt by seizing the house pursuant to a warrant of distress failed.

The Bank next attempted to enforce its judgment by way of an order for possession of the house. But in Bank of Tonga v Kolo (unreported 17 November 1995), Hampton

CJ held that a judgment for debt in Tonga is not enforceable by an order or writ for possession, whether of land or buildings. In the result, the Bank failed again.

Following these successive failures, the Bank issued fresh proceedings, in which it sought to enforce its security in respect of the house. In those proceedings, Lewis J (as he then was) found in favour of the Bank, and ordered that the house be delivered up to it. It is against this order that Mr Kolo now appeals.

The first matter urged on Mr Kolo's behalf is that the Bank's claim is barred by a res judicata. But the previous proceedings related to a claim in debt, not a claim upon the security. The causes of action are simply not the same. Nor does any issue which was decided against the Bank before arise now. Finally, it cannot be said that there was anything unreasonable in the course taken by the Bank of suing in the first instance, upon a simple cause of action in debt, and only when it became necessary bringing later an action upon the security. This argument advanced for Mr Kolo cannot succeed.

Mr Kolo then relied on section 54(d) of the Magistrates' Courts Act as a defence to the bank's claim. But section 54(d) does not relate to claims to enforce securities, but to writs of distress issued to enforce judgments. Accordingly, this argument also cannot succeed.

Of more significance was an argument that the house forms part of the land to which it is attached, and thus falls within the jurisdiction of the Land Court under section 149 of the Land Act, so as to be excluded from the jurisdiction of the Supreme Court by clause 90 of the Constitution.

Clause 90 of the Constitution reserves to the Land Court, and on appeal to the Privy Council, "cases concerning titles to land". Thus the appellant's argument raises a constitutional question of great importance. The Constitution directs attention to "titles to land", rather than to the incidents of the possession of land. In commercial practice, that is how the constitutional limitation has been understood. Buildings, as Ward CJ pointed out in the judgment to which reference has already been made, have been regarded as items of personal property rather than as forming part of the realty. Because of the Constitution of Tonga, and because of Tonga's traditions, the intricate law of fixtures and of accretions to land which applies elsewhere is not wholly appropriate to Tonga. Although all the implications have not yet been worked out, and their working out should be left to the process of development of the law of Tonga case by case, we think that the broad proposition stated by Ward CJ should be accepted. That means that it was open to Mr Kolo to pledge his house to the bank as an item separate from the land on which it stood.

We should add that we do not think there is anything in the decision of Martin CJ in *Nakau, Receiver of Moana Trading Company v Fua* (unreported, 4 September 1989) which is contrary to this conclusion. That was a case where, in an action by the receiver of a company for possession of property he alleged to belong to the company, certain land was found by Martin CJ to be held in trust for the company. He then found that the buildings on the land had been paid for by the same company for which he had decided the land was beneficially held. In that situation, he found "as a fact that [the buildings] are fixtures - they cannot be moved and therefore form part of the land." He then made "a declaration that the buildings on the land comprised in lease [he specified the number] are the property of [the company]." This declaration was made in the Supreme Court, not in the Land Court. It will be seen from this brief reference to the case, first, that no question of severance arose since the beneficial title to the land and the buildings was in the same

entity, the company, and secondly, that there was no rejection of the Supreme Court's jurisdiction on any ground that the ownership of the buildings should be regarded as involved in a question of title to the land reserved exclusively to the Land Court. In fact, the right to the buildings was considered as a separate issue.

Finally, the appellant argued that the words in the Loan Agreement "plus Loan Agreement over house," typed into the loan agreement form after the printed words "Borrower pledges the following articles as security for the performance of this Agreement", made the document, not the house, the security. This would be a fantastic reading of the language, and could not have been intended. When words, even if somewhat inept, convey a clear meaning, the Court should not stumble over pedantic difficulties. In our opinion, it is clear that the intention of the parties was to include the house among the items of property which would constitute security for the loan. An equitable mortgage thereby arose, capable of enforcement through court order. Indeed, as is pointed out in **Butt on Land Law**, Second Edition (1988) at 379, "an equitable mortgage will arise from an ineffective attempt to create a legal mortgage ...: provided the money has been advanced, the agreement is specifically enforceable and an equitable mortgage is created." In the same text book at 381, authority is cited for the proposition that an equitable mortgagee should be accorded "the right which he would have had if the mortgage were legal, in order that the remedies of the mortgagee might correspond as nearly as possible with those of a legal mortgagee." See also **Halsbury's Laws of England**, Fourth Edition Volume 32 paras 444 and 673, which indicate that the appropriate mode of procedure on the part of the equitable mortgagee who desires to enforce his security is to seek a court order. That is exactly what the respondent Bank has done here. In our view, the remedy granted at first instance was within the power of the Supreme Court, and was suitable to the circumstances.

Accordingly, the appeal should be dismissed with costs.