IN THE FIJI COURT OF APPEAL

Civil Appeal No. 50 of 1986

Between:

BANK OF BARODA Appellant

- and -

AKHIL CHAND CHAUDHARY Respondent

Mr. B.C. Patel for the Appellant
Mr. V.M. Mishra for the Respondent

Date of Hearing: 13th November, 1986
Delivery of Judgment: 14th November, 1986

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the decision of Kearsley J. in which he refused to discharge an ex-parte interlocutory injunction restraining the appellant bank from exercising its powers of sale as mortgagee in respect of two mortgages granted to the bank by Bhagwanti, daughter of Shivratan, in her capacity as administratrix of the estate of Bhagirathi, her late husband.

The mortgages are over Native Lease No. 10396, comprised of 5 acres 24 perches, and 13 acres of Native Land known as Veisaru 2 C/N 7370, and secure the indebtedness of one Prem Chand, one of the widow's sons.

Another son of the widow, the present respondent, has issued proceedings challenging his mother's right to mortgage estate property in which he and some eight other beneficiaries have an interest. In short a breach of trust is alleged. The respondent's proceedings were not issued until the bank gave notice of demand and of its intention to exercise its powers of sale. The mortgages were given on the 14th December, 1984 and the bank's demand was made on the 11th March, 1986.

To hold the position until the substantive proceedings were heard the respondent applied ex-parte for an interim injunction restraining the bank from exercising its power of sale, and an order was made accordingly by Dyke J. on the 28th April 1986, effective until the 2nd May, on terms that a copy of the application for injunction be served on the bank. It should be mentioned that although the widow Bhagwanti has been a party to the proceedings from the beginning she has taken no part.

The injunction was subsequently extended, by consent, until the 10th August when the matter came before Kearsley J., who, after hearing full argument, extended it until final determination of the substantive proceedings. The appeal is against that decision.

In a very short decision, Kearsley J. determined that in the substantive proceedings there were serious questions to be tried and that it had not been shown that the respondent had no real prospect of succeeding on his claim. He then went on to consider where "the balance of convenience" lay in granting or refusing the injunction and came down on the side of the respondent. What appears to have swayed him in that direction is this reasoning as appears in his judgment:-

> " If the bank did exercise its powers of sale, it may be that the bank would not be held liable in damages but the administratrix would. Whereas, no doubt, the bank would be able to pay compensation to the plaintiff if it were found liable, it is very doubtful that the administratrix would be able to do so if she alone were found liable. "

We cannot follow the logic of that statement. If the bank is found not liable, not being a party to the breach of trust, no claim for damages could be made against it for the widow's breach. If the bank is found liable then there can be no question but that it has the resources to meet a claim by the respondent for damages. Kearsley J. then went on to consider the respondent's means and his ability to meet a claim for damages should he fail. He has no income or assets apart from his interest in the estate and the simple fact is that even at this stage the daily interest which has accrued on the mortgage debt (at $65 per day) in all probability already exceeds the value of the respondent's interest in the estate; and we were informed from the bar that the list of cases awaiting trial in Lautoka is such that it will be years rather than months before the respondent's claim will come to a hearing, with interest accruing in the meantime.

We turn now to the appellant's submissions. It is accepted by the appellant that there are serious questions to be tried in the substantive proceedings in respect of both mortgages, but it was submitted that in determining whether or not an injunction should follow Kearsley J. exercised his discretion on wrong principles, and on a misunderstanding of the law. If that is so then of course an appellate court is entitled to exercise an original discretion of its own. (See Hadmor Productions Ltd. v. Hamilton /1982/ 1 All E.R. 1042 and in particular Lord Diplock at P.1046.)

The error of law alleged is that Kearsley J. missed an intermediate step, in that having decided that there were serious questions to be tried moved then to a consideration of where the "balance of convenience" lay without first considering whether damages would be an adequate remedy to either party or both.

We agree with Mr. Mishra that the grant of an injunction is a discretionary remedy and that the exercise of the discretion is not governed by rigid rules, but for all that the court is required to consider whether damages would be an adequate remedy before ordering an injunction to issue. Kearsley J. failed to do that in any meaningful way.

It seems on balance that any loss the respondent might suffer if the bank is found to be at fault is pecuniary rather than the loss of an interest in land, but whichever it is, the quantification of his loss would present no problems. His interest in the estate, and the value of it, could be determined with some precision. There would be no prejudice to the respondent if the land is sold because the bank could well meet any claim for damages made against it, and indeed any claim made must of necessity be modest for the estate is modest.

On the other hand there would be no chance whatsoever of the bank recovering any significant part of its losses if the respondent should fail in his claim.

In our opinion this is the ideal case for leaving a potentially agrieved party to his remedy in damages.

The appeal is therefore allowed and the injunction discharged. The appellant is awarded costs to be fixed by the Registrar.

(We were informed by Mr. Patel that injunctions to restrain mortgagees sales, particularly where the mortgagee is a bank, are becoming very common and are causing concern in the commercial world. He invited us to lay down guidelines as to when injunctions should issue and when they should not.

That is not our task and we decline the invitation. However, there is one matter that concerns us and it is not limited to applications for interim injunctions, and we do not say that it arises in this particular case, and that is the unconcerned ease with which some deponents will swear to the truth of almost anything in affidavits if it suits their purpose. To wilfully make a statement on oath which the deponent knows to be false, or does not believe to be true is perjury, a serious crime. We give warning that in a proper case we will feel it our duty to refer the matter to the appropriate authority for investigation).

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Vice-President

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Judge of Appeal

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Judge of Appeal