IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0012 OF 1996
((High Court Civil Action No 316 of 1992)

BETWEEN:

BRITISH AMERICAN INSURANCE CO. LTD.

APPELLANT

- A N D -

AMBIKA NAND F/N PURNA NAND

RESPONDENT

Mr P. Knight for the Appellant
Dr. M.S. Sahu Khan for the Respondent

Date and Place of Hearing: : 12 February, 1977, Suva
Date of Delivery of Judgment: : 14 February, 1997, Suva

JUDGMENT OF THE COURT

The Appellant is a company at present under the statutory management of the Fiji Commissioner of Insurance. The Respondent entered into a table mortgage with the Appellant on 6 September 1982 agreeing to repay the principal sum advanced of $30,000 together with interest thereon at the rate of 13.50% p.a. by way of monthly instalments of $456.83. The first monthly instalment was due on 1 September 1982 and the final instalment on 1 August 1992.

Throughout the whole term of the mortgage the Respondent failed to make the regular monthly instalments he had undertaken to pay to the Appellant. In fact during one period

between 7 May 1984 and 14 February 1988,' a period of nearly 4 years, the Respondent made no payments either of principal or of interest. Consequently in 1992 when repayment of the mortgage fell due, the question arose as to the calculations to be applied to take account of the serious failures by the Respondent to make payment of the monthly instalments as provided in the table mortgage.

The Appellant calculated that the balance amount required to repay the mortgage was $65,530.41. That figure resulted from the Appellant charging interest at 13.50% on the balance of principal and interest outstanding from time to time; thus compound interest was included in the Appellant's calculations.

The Respondent challenged the Appellant's right to charge compound interest and calculated that the amount required to repay the mortgage as at 2 November 1992 was instead $47,493.37.

In an effort to resolve this conflict on 2 December 1992 the Respondent's Solicitors, by a letter sent not without prejudice, put the following proposals to the Appellant's Solicitors.

1. The Respondent would pay to them the sum of $65,530.41;

2. The Appellant would be entitled to draw immediately on the amount acknowledged to be owing by the Respondent viz: $47,493.37;

3. The balance would be held in the Appellant Solicitor's trust account pending determination of the correct amount to repay the mortgage;

4. Those funds so retained could then be utilized to effect a final settlement.

5. The Appellant would give the respondent a registrable discharge of the mortgage.

We consider such a proposal was both reasonable and responsible, it certainly deserved at least an acknowledgement which was not forthcoming from the Appellant's Solicitors.

The proceedings issued by the respondent to resolve the impasse were heard by Sadal J. on 14 May 1993. He ordered the

filing of written submissions. Although both Counsel had filed submissions by 9 July 1993 as directed, the Judgment itself was not delivered until 3 November 1995. We are at a loss to understand why judgment took so long to deliver in what was a simple case. In the Court below, the amount required to repay the mortgage was fixed at $33,838.73. It is against that decision the Appellant now appeals. It is not necessary to consider the formula used by the Judge to calculate that figure of $33,838.73. Counsel for the Respondent conceded that it is wrong. We agree.

At issue is whether the Appellant is entitled to charge compound interest on the balance outstanding from time to time. Mr Knight for the Appellant referred us to Halsbury (4th Edition), Volume 32 para 506 -

> ***"506. Compound interest. The mortgagor can validly agree to pay compound interest; thus he can agree that interest in arrear is to be capitalised and is to bear interest at the same rate as the original advance. However, the mortgagee may not charge compound interest except under an agreement to that effect. The agreement may be either express or implied from the nature of the dealings. A mere intimation by the mortgagee that he intends to charge compound interest is not enough; there must be assent by the mortgagor, and assent by the mortgagor to the appropriation by the mortgagee as between capital and interest can be inferred from the facts where, for instance, the advances are made in the course of a trade or business in which compound interest is allowed. Thus, if the relation of bank and customer exists between mortgagee and mortgagor, and the mortgage is to secure a current account, the mortgagee is entitled to make up the account with yearly or half-yearly rests, and charge future interest on the aggregate balance of principal and interest appearing at each rest."***

Interestingly Dr. Sahu Khan for the Respondent also relied on this same statement of the law and submitted that the Respondent mortgagor had not agreed either expressly or impliedly to pay compound interest. While the mortgage document expressly refers to the monthly payments being calculated **"on a Table basis"**, that term does not of itself imply, as now suggested by the Appellant, that compound interest can be charged.

In our opinion, there is not even **"a mere intimation by the mortgagee"** that compound interest was to be charged. Nor can the Appellant imply that compound interest can be charged as is the case with commercial Bank loans. The analogy is not appropriate. A table mortgage does not imply that compound interest can be charged. We are satisfied that the Appellant is not entitled to charge compound interest. It would have been easy for the Appellant to have included a provision authorising compound interest in the mortgage document itself. It did not do so.

During an adjournment of this hearing, we asked Mr Knight to calculate the principal and interest outstanding as at 2 November 1992 but excluding the compound interest previously included. Both Counsel agree this figure is $46,886.65. The Respondent's calculation included in the original proposal of

settlement previously referred to was $47,493.37.

Accordingly we find that the principal and interest due on 2 November 1992 is $46,886.65.

Mr Knight also seeks an order for interest on the amount due under the mortgage from 2 November 1992 until repayment of the mortgage. He relies on the principles applicable to tender referred to in Halsbury (4th Edition) Volume 32 paras 601 and 602:-

> ***"A mortgagor who desires to discharge the mortgage debt must tender to the mortgagee the full amount that is due in legal currency and produce the same before the mortgagee unless he waives the production, or refuses to accept money then available for immediate payment. Where a mortgagee has unequivocally refused a proposed tender, a formal tender is not necessary, at any rate where the mortgagor has the money or the control of it. The tender must be unconditional, but may be under protest."***
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> ***"...For the purpose of stopping interest running the tender need not be such a tender as would afford defence at law. If the amount tendered was all that was due, the mortgagee must bear the costs of a subsequent suit for redemption."***

Dr Sahu Khan in reply referred to para 1027 of the same volume:-

> ***"A tender of the amount due on the mortgage at a time when the mortgagee is bound to receive it stops interest from running if the mortgagor keeps the money ready to pay over to the***

> ***mortgagee. For this purpose there must be an actual tender. Even if there has been a tender by a borrower of the amount due for principal and interest; that tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is ready for payment at any time. The mortgagor should pay the money into court if there are any proceedings pending in which this can be done; if he makes a profit, as by placing the money on deposit, he must account for this to the mortgagee. A mortgagee is not entitled to interest if by his own default he delays payment off, but unavoidable delay in revesting the property in the mortgagor is not such a default."***

Counsel for the respondent further submitted that the tender of the full amount as originally demanded by the Appellant could not be classified as conditional because of the uncertain legal position of the Appellant. Even now, because it is under the statutory control of the Fiji Commissioner of Insurance, the exact status of the Appellant appears uncertain. In the meantime, the Respondent, so we have been informed from the bar, has been paying interest on the $47,493.37 that he borrowed 4½ years ago in order to repay the mortgage upon the terms proposed.

We consider that in such circumstances there was a proper tender; that the amount required to repay the mortgage "...has been set aside and (is) ready for payment at any time" over the last 4½ years. That repayment was never made is solely the responsibility of the Appellant. See Barratt v. Gough - Thomas, [1951] 2 All E.R. 48,49.

Accordingly the Appellant is not entitled to interest as from 2 November 1992.

The appeal is allowed; the amount required to repay mortgage no. 201344 is declared to be $46,886.65; we order costs to the Respondent, to be taxed if necessary.

R.J. Barker J.A.

Sir Ian Barker
Judge of Appeal

I.R. Thompson J.A.

Mr Justice I.R. Thompson
Judge of Appeal

Dillon J.A.

Mr J.D. Dillon
Judge of Appeal

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