IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0044 OF 2003S
(High Court Civil Action No. HBC 312 of 2002S)

BETWEEN:

VIVRASS DEVELOPMENT LIMITED

Appellant

AND:

THE FIJI NATIONAL PROVIDENT FUND BOARD

Respondent

Coram: Tompkins, JA
Gallen, JA
Ellis, JA

Hearing: Wednesday 17th March 2004, Suva

Counsel: Mr H. Nagin for the Appellant
Mr G.P. Shankar and G.P. Lala for the Respondent

Date of Judgment: Friday, 19th March 2004

JUDGMENT OF THE COURT

Introduction

[1] The appellant commenced these proceedings against the respondent by writ of summons filed on 22 July 2002. On 24 July 2002 the respondent, by notice of motion, sought orders that the statement of claim be struck out and the action dismissed on the grounds that they disclosed no reasonable cause of action and were an abuse of process. By a decision delivered on 2 May 2003 Pathik J found the institution of the action to be an abuse of the process of the Court. The action was dismissed with costs

to the respondent which he fixed at $400. The appellant has appealed against that decision.

Background

[2] The appellant was at all relevant times the registered proprietor of the property comprised in certificate of title number 24128. In 1995 the appellant constructed on the property a building known as the Vivrass Shopping Plaza. Following an application by the appellant to the respondent for finance, the respondent granted the appellant a loan secured by a first mortgage no 425427 over the property. That mortgage was registered on 13 June 1997.

[3] The appellant became in arrears in respect of the payments due under the terms of the loan and secured by the mortgage. On 17 May 2001 the respondent served on the appellant a demand under the mortgage and advertised the property for sale pursuant to its powers under the mortgage.

[4] On 19 June 2001 the appellant as first plaintiff and an associated company as second plaintiff issued proceedings in action 277 of 2001 against the respondent as first defendant and a firm of valuers as second defendant. Amongst other relief, the appellant in that action sought an injunction to restrain the respondent from proceeding with a mortgagee's sale. On 21 June 2001 the plaintiffs in that action, on an ex parte application, obtained an interim injunction in the terms sought.

[5] On 3 July 2001 the respondent applied for an order to discharge the interim injunction. That application was heard on 10 and 11 July 2001. By a decision delivered on 10 August 2001 Pathik J discharged the interim injunction.

[6] On 3 December 2001 the respondent accepted an offer of $3.3 million from Challenge Engineering Limited ("Challenge") for the sale of the property, the formal agreement for sale and purchase being entered into on 10 December 2001.

[7] On 15 February 2002 the appellant applied for a second injunction seeking to restrain the respondent from proceeding with the sale to Challenge. That application

was set down for hearing on 4 March 2002 but before that day the parties reached a settlement which was recorded in written terms of settlement signed by them. A formal order by consent incorporating the terms of settlement was made by the Court on 4 March 2002. The terms of the court order were :

> 1. The First Plaintiff will pay to the First Defendant in reduction of the moneys secured by the Mortgage:-
>
> [a] $50,000.00 (FIFTY THOUSAND DOLLARS) on or before 4th March, 2002.
>
> [b] $30,000.00 (THIRTY THOUSAND DOLLARS) derived from rental of Vivrass Plaza on or before 31st March, 2002.
>
> [c] $30,000.00 (THIRTY THOUSAND DOLLARS) derived from rental of Vivrass Plaza on or before 30th April, 2002.
>
> 2. If the First Plaintiff defaults in payment of any of the sums stated in paragraph 1 on its due date (time being of the essence) then the First Defendant will be free to immediately complete the mortgagee sale of Vivrass Plaza in terms of the tender already accepted if that sale has not lapsed or otherwise proceed to mortgagee sale (in either event without the need to serve fresh Demand on the mortgagor) or to exercise any or all of the powers and remedies given by the mortgage or in equity or at law either separately or concurrently.
>
> 3. In lieu of injunction the First Defendant undertakes not to proceed with completion of the sale of Vivrass Plaza in terms of the tender accepted or to exercise any of its powers under the mortgage or the Property Law Act until the earlier of the following two dates:-
>
> [a] 1st May, 2002; or
>
> [b] the first date on which default is made under paragraph above.

[8] Although it was apparently the intention that the court order accord with the terms of settlement, it does not in some material respects. The heading of the terms of settlement reads:

> "TERMS OF SETTLEMENT
>
> (on the issue of Interlocutory Judgment only)"

[9] Clause 2 of the terms of settlement reads:

> "2. If the First Plaintiff [the appellant] defaults in payment of any of the sums as stated in paragraph 1 on its due date (time being of the essence) then the First Defendant will be free to continue with the mortgagee sale of Vivrass Plaza in terms of the tender accepted or otherwise (without the need to serve fresh Demand on the Mortgagor **and without prejudice to the rights of the First Plaintiff**) or to exercise any or all of the powers and remedies given by the mortgage or in equity or at law either separately or concurrently."

[10] The word emphasised are omitted from clause 2 of the order. Included in the order but not in the terms of settlement are:

> "if that sale has not lapsed or otherwise proceed to mortgagee sale in either event"

[11] The discrepancies are not explained. We return to them later in this judgment.

[12] The respondent failed to comply with the terms of clause 1 of the order. Accordingly the respondent proceeded to complete the sale to Challenge, with settlement on 30 June 2002. However, we were advised from the bar that settlement has not been completed because of a caveat on the title lodged by another party.

[13] On 28 May 2002 the appellant applied again for an injunction to restrain the respondent from proceeding with the sale to Challenge. Following a defended hearing Pathik J, by a decision delivered on 20 June 2002, dismissed the application.

[14] On 22 July 2002 the appellant commenced these proceedings.

The appellant's claims

[15] The appellant's statement of claim in civil action 312 of 2002 dated 19 July 2002 pleads the factual background, the grant of the loan by the respondent to the appellant and the issue of the demand on 17 May 2001. It alleges that the "demand is bad in law" but gives no particulars in support of that allegation. It pleads the acceptance by the respondent of the tender of $3.3m from Challenge in respect of the property.

[16] It alleges that the respondent has breached its duty as mortgagee or acted negligently in accepting the tender in nine respects. It seeks the following relief:

[a] "An order restraining the defendant in by itself and/or through its servants and/or agents and/or howsoever from proceeding further with a mortgagee sale of the plaintiff's said property comprised in certificate 24128 to Challenge Engineering Limited.

[b] An order or a declaration that demand under mortgage issued by the defendant against the plaintiff is bad in law.

[c] Damages against the defendant in respect of the purported sale of the property at under value.

[d] Exemplary damages.

[e] Punitive damages.

[f] Cost of this action."

[17] It makes no reference to the settlement or the Court order of 4 March 2002. It pleads no particulars in support of the claims for general, exemplary and punitive damages.

[18] The appellant's statement of claim in civil action 277 of 2001 dated 19 June 2001 pleaded the factual background, the making by the respondent and acceptance by the appellant of an offer to purchase the property at $4.5m subject to valuation, the second defendant in that action providing a valuation of $3.5m and to the respondent making a revised offer to purchase at $3,134 ,000.00.

[19] The statement of claim alleges that the respondent and the second defendant conspired to defraud the appellant by attempting to obtain the property at a price less than the valuation. Six particulars of fraud and conspiracy are set out. The appellant sought by way of relief specific performance of the agreement to purchase at $4.5m, an order restraining the respondent from proceeding with a mortgagee sale and further consequential relief.

The judgment in the High Court

[20] In his judgment the Judge reviewed the facts in considerable detail. He referred to the settlement and the order which he described as being made by consent. He observed that it "finalized the matters in issue between the parties." He made no reference to the differences between the terms of settlement and the order, to which we have referred. Further we note that although the order does not state that it was made by consent, it is not surprising that the Judge thought so. There is nothing before the Court to indicate that the appellant consented to the changes that were made to the settlement terms in the order filed and sealed by the respondent.

[21] The Judge noted that the order being a consent order, is binding until set aside. It can be pleaded as an estoppel. The judgment refers to the principle of *res judicata*, citing the following passage from 16 Halsbury 4th ed paragraph 1528:

> In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties."

[22] The Judge went on to say that the issues are the same in both the actions and they have been determined resulting in a court order pursuant to the terms of settlement filed by consent. Therefore, in his opinion, the plea of *res judicata* should succeed. He also observed that the order and decision are sufficiently final and certain to give rise to issue estoppel.

Discussion

[23] We are unable to you to agree with the Judge that the defence of *res judicata* applied in the circumstances of this case. The cause of action and relief sought in the first action are different from the cause of action and relief sought in the second action. In the first, the appellant, in relied on an offer of 15, December 2000 by the respondent to the appellant to buy the Plaza for $4.5m subject to an independent valuation. Having obtained a valuation. the respondent reduced the offer in the manner we have indicated

above. The appellant sought by way of relief specific performance of that agreement. It also sought an injunction similar in terms to that sought in the second action, and the declaration relating to the demands similiar but not the same as the declaration sought in the second action.

[24] The second action is quite different. The statement of claim refers to the respondent accepting the tender of $3.3m from Challenge and pleads that in doing so the respondent breached its duty as a mortgagee or was negligent. It seeks damages (unspecified as to amount) on the grounds that the sale was at an under the value.

[25] It will be apparent from this brief summary that the causes of action are different and that the relief the appellant was seeking in each action is also different. Further all that the terms of settlement and consequential order decided was that the respondent was free to proceed with the sale to Challenge. It did not decide the appellant's claim for damages resulting from that sale.

[26] We do not consider that the terms of settlement and the consequential order prevents the appellant from pursuing its claim for damages. This is particularly so when regard is had to the phrase "but without prejudice to the rights of the first plaintiff" in clause 2 of the terms of settlement. But even the court order, omitting that phrase, would not in our view prevent the appellant pursuing its damages claim. The order expressly permits the respondent to complete the sale of the Plaza in terms of the tender already accepted but it does not either expressly or by implication inhibit the plaintiff from pursuing any remedy it may have as a consequence of that or any other mortgagee sale.

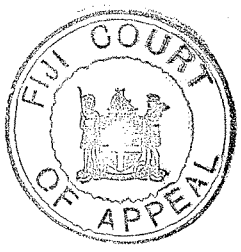
[27] When regard is had to the terms of settlement and the court order, it is obvious, as counsel for the appellant accepted, that the appellant cannot seeking an injunction to prevent the very sale that the terms of settlement and the order authorize.

Result

[28] The order made in the High Court that the action be dismissed with costs of $400 to the respondent is set aside.

[29] The prayer in the statement of claim seeking an injunction to prevent the sale to Challenge or otherwise to prevent the respondent exercising its power of sale under the mortgage is struck out

[30] The appellant is otherwise free to pursue its action. Once the terms of any sale are finally known, the appellant, if it elects to proceed with the action, will need to file an amended statement of claim setting out particulars of the damage and also, if it proceeds with the claim for exemplary damages, the grounds upon which it relies.



Tompkins, JA

Gallen, JA

Ellis, JA

Solicitors:

Messrs. Sherani and Company, Suva for the Appellant

Messrs. G.P. Lala and Associates, Suva for the Respondent