ULAIYASI RADIKE v NBF ASSET MANAGEMENT BANK (ABU0039 of 2004S)

COURT OF APPEAL — CIVIL JURISDICTION

HENRY, SCOTT and MCPHERSON JJA

5, 15 July 2005

Agency — principal and agent — loan to buy property — mortgage — loan unpaid and property sold — whether agency existed between parties — whether sale of property made in good faith — notice of demand for payment — Fiji National Provident Fund — Court of Appeal Rules r 22(3) — Property Law Act (Cap 130) ss 75, 76, 77.

The Appellant obtained a loan from the Respondent to acquire land while the former was still an employee of the latter and gave the Respondent a registered mortgage over the property. The loan was deducted from the Appellant's pay. However, the Appellant was terminated from employment. The Appellant then asked the Respondent's assistance to apply for funds with the Fiji National Provident Fund (the Fund) to pay his debt to the Respondent. The fund assisted the Appellant from paying but the Appellant defaulted from payment. The fund and the Respondent sent the Appellant letters but the Appellant failed to communicate with them. The Respondent then served a notice of demand for the outstanding balance and proceeded to advertise the property for sale. The property was subsequently sold. The Appellant alleged that the Respondent acted as its agent to ensure that his credit balance with the fund was transferred to the Respondent to satisfy his indebtedness. The Appellant also alleged that the Respondent in selling the property had not acted in good faith. The issues were whether: (1) agency existed between the parties; and (2) good faith was exercised in the sale of the property.

Held — (1) There was no agency that existed between the parties. The Respondent was not the agent of the Appellant except in the very limited sense of acting as an intermediary in soliciting from the fund an offer to provide finance up to the amount available to him from the fund. Even if a relationship of principal and agent had come into existence between Mr Radike and the Bank, the Bank was not in breach of any obligation it owed to him in that capacity.

(2) The Respondent had the power to enforce the mortgage by possession and sale. However, the Respondent did not obtain an independent valuation preparatory to selling since the value of the property was too small to justify the cost. There was no reason to conclude that the Respondent did not act honestly or did not take reasonable precaution to obtain the true market value of the property, as it would be unreasonable for the Respondent to defer the sale hoping for improvement in the market considering that it was the delay of the Appellant that increased the mortgage debt through accruing interest that placed it beyond his capacity to discharge. The danger was real that the debt will overtop the proceeds of the sale. There is no way the Respondent Bank can be held responsible for what happened under the circumstances.

Appeal dismissed.

Cases referred to

Camfield Pastoral Co v Dixon [1972] Qd R 289; *Lysnar v National Bank of New Zealand Ltd (No 2)* [1936] NZLR 541; *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349; [1983] 3 All ER 54, cited.

S. R. Valenitabua for the Appellant

T. Seeto for the Respondent

[1] Henry, Scott and McPherson JJA. Uluiyasi Radike, who is the Appellant in this court, is the Defendant in proceedings in the High Court brought by the Plaintiff Bank for possession of land described as Lot 30 on DSS 1160 Narere Subdivision, Suva. It is the subject of registered lease LD Ref 4/16/6876. In September 1994, Mr Radike obtained from the Bank a loan of $3800, which was used to acquire the land and build a house on it. In return he gave the Bank a registered mortgage over the land. At that time Mr Radike was an employee of the Bank, but he left its service under a redundancy scheme in 1996.

[2] While he was an employee, the loan and interest payments were being met by deductions from Mr Radike's pay; but, when his employment was terminated, it was necessary to make some other arrangement for payment of principal and interest. The amount owing on the loan was then $3206.79. Mr Radike asked the Bank to assist him in applying to the Fiji National Provident Fund for funds to settle his debt to the Bank. The application was made and on 18 September 1998 approved by the Fund, but only to the extent of $3775, whereas on 28 September 1998 the total indebtedness to the Bank stood at $4570.11.

[3] This left a shortfall of $795.11, which was increasing with daily accruals of interest. In pointing this out in a letter dated 29 September 1998 to Mr Radike, the Bank asked him to make arrangements with its Mr Rajan Murti "at the earliest". Nothing happened. On 29 October 1998, the Fund wrote to the Bank referring to and enclosing a copy of its letter of 18 September 1998, which it noted "has not been answered to date". In that letter the Fund went on to say that the application was "therefore cancelled and put away", adding that Mr Radike might submit a new application "ensuring that the discrepancy of this one is not repeated".

[4] Again nothing happened. Then on 18 May 1999, the Bank served a notice of demand for payment of the outstanding balance of the account, which at that time stood at $4837.49. It then proceeded to advertise the property for sale in the Fiji Times, doing so on nine separate occasions between July 1999 and December 1999. Throughout this period, only one offer was received, which was dated 18 May 2000. It resulted in a contract consisting of offer and acceptance concluded on 12 June 2000 for sale of the land at a price of $6000. The property continues to be occupied by Mr Radike, his wife and children, although nothing has been paid on the loan since 1996. By 26 January 2001, when these proceedings were instituted, the indebtedness had risen to $5638.40. By July 2005, it must now be considerably more.

[5] As Appellant Mr Radike complains to us, as he did before Jitoko J in the High Court, principally about two matters. One is that he says the Respondent Bank had undertaken to act as its agent to ensure that his credit balance with the Fund was transferred to the Bank in satisfaction of his indebtedness to it. The other is that the Bank in selling the property for only $6000 had not acted in good faith or with reasonable care towards him.

[6] As regards the first of these matters, Jitoko J found that no relationship of principal and agent had come into existence between Mr Radike and the Bank. In his reasons for judgment, his Lordship said:

> It is true that the plaintiff had offered itself to be the point of contact for the defendant in dealing with the FNPF. However this was essentially for the convenience of the defendant. In my view it amounted to no more than an extension of a banker client relationship wherein the plaintiff as a banker gratuitously offered itself to assist one of its customers. But even if this Court were to find that there had been a special

relationship created which imposed on the plaintiff a duty of care, such care could not possibly extend to searching and trying to locate and find the defendant after he failed to respond to the plaintiff's letter of 29 September 1999.

[7] This is a finding of fact that there is no basis for upsetting on appeal. The Bank was not the agent of Mr Radike except in the very limited sense of acting as an intermediary in soliciting from the Fund an offer to provide finance up to the amount available to him from the Fund. With the help of Mr Murti, Mr Radike completed an application form for housing assistance from the Fund, which he himself presented at the office of the Fund in Suva. On 18 September 1998, the amount approved for payment by the Fund was $3775, whereas the amount needed to clear the debt to the Bank was $4570.11, producing the shortfall of $795.11. Mr Radike was informed of this by the Fund's letter of that date to the Bank, of which a copy was sent to him at PO Box 4463, Samabula, which is the address given in the Approval Notice of Lease. The Fund's further letter of 29 October 1998, cancelling that offer, but inviting a further application to be made, was also copied to Mr Radike at that address. He was kept in touch with what was happening, but failed to communicate with either the Bank or the Fund, with the consequence that the indebtedness remained undischarged and interest continued to accrue on it.

[8] Even if a relationship of principal and agent had come into existence between Mr Radike and the Bank, the Bank was not in breach of any obligation it owed to him in that capacity. It elicited the proposal made by the Fund by its letter of 18 September 1998 to pay $3775. The amount was not enough to discharge the existing indebtedness of $4570.11; but the Bank was not responsible for that state of affairs, except in the sense that loans it makes to the borrowers carry interest, which Mr Radike failed to pay after accepting redundancy in 1996. It was not that he was unaware of this and the total amount due was notified to him by the Bank's letter of 29 September 1998. He did nothing then or later to pay the shortfall without which the arrangement would not and could not go ahead. As an agent, if that is what it was, the Bank was entitled to be put in funds by its principal Mr Radike, sufficient to discharge the indebtedness. If he could not raise the whole amount from the Fund, he should have looked elsewhere for the difference and provided it to the Bank. Nothing that the Bank did or did not do, is shown to have caused or contributed to the amount that Mr Radike owes or owed to the Bank.

[9] This was the state of affairs that prevailed when the Bank decided to enforce its mortgage by possession and sale. There is no dispute about its power to do so. It is conferred by a combination of ss 75–77 of the Property Law Act (Cap 130) and clause 12 of the instrument of mortgage in this case. Despite references there to entering into possession of the land "by receiving the rents and profits thereof", it is settled that provisions in this form confer a right to recover possession on default. See *Lysnar v National Bank of New Zealand Ltd (No 2)* [1936] NZLR 541, followed in *Camfield Pastoral Co v Dixon* [1972] Qd R 289 at 300. The Bank here gave the requisite notice of demand and the default continued for the period specified in s 77 of the Act and beyond.

[10] It is nevertheless said that in selling the land the Bank as mortgagee failed in its duty to Mr Radike as mortgagor. It may be accepted that a mortgagee who sells is under a duty to act honestly and to take reasonable precautions to obtain the true market value of the property at the date of sale: *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349; [1983] 3 All ER 54. In the present case, the Bank

did not obtain an independent valuation preparatory to selling, for the reason that the value of the property was too small to justify the cost of doing so. It did, however, advertise the property in the Fiji Times on nine occasions between July and December 1999. Its efforts elicited only one offer that was not accepted until 12 June 2000. The price payable was only $6000, which was low for a property improved since purchase in 1994 by the addition of a two bedroom concrete residence of 45x25 feet. Mr Radike exhibits to an affidavit a certificate of valuation assessing the current market value as $27,500. However, that valuation was given on 30 October 2001, which was more than a year after the contract for sale was concluded in June 2000. Unluckily, the property market was seriously depressed at the time of that sale owing to events that had overtaken Fiji at that time.

[11] There is no reason to suppose that in selling the land the Bank did not act honestly or that it did not take reasonable precautions to obtain the true market value at the date of sale. When asked on appeal what else the Bank should have done to obtain a higher price, counsel for the Appellant was unable to specify anything that could have been done. We agree with the opinion of the learned judge at first instance that it would be unreasonable under the circumstances to expect the Bank to defer the sale any further in the hope of an improvement in the market. It was, after all, the delay on the part of Mr Radike that had brought about the increase of the mortgage debt through accruing interest that had evidently placed it beyond his capacity to discharge. There was a real danger, which may in fact be realised, that the indebtedness will overtop the proceeds of sale. It is all most unhappy, but there is no way in which the Bank can be held responsible in law for what has happened.

[12] In response to the Bank's summons for possession of the property, Mr Radike mounted a counterclaim in which he claimed damages against the Bank for what is alleged to be negligence on its part. For the reasons given, the counterclaim cannot succeed. In these circumstances it was accepted by counsel that it was appropriate to determine it. It was overlooked when judgment was given on 11 March 2004; but the learned judge later referred to it in his remarks on 1 October 2004 in granting a stay pending appeal and did so in terms that make it clear he had been intending to dispose of it. Mr Valenitabua for the Appellant raised no objection to this court exercising the power conferred on it by r 22(3) of the Court of Appeal Rules to make the order which in that respect should have been made in this matter at first instance.

[13] The order made by this court will therefore be to:

(1) Vary the order dated 31 March 2004 made on the Originating Summons dated 26 February 2001 by adding to it the following further paragraph:

> 2A. There will be judgment for the Plaintiff on the Defendant's Counterclaim.

(2) Dismiss the appeal with costs, which are assessed at $500.

Appeal dismissed.