IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0006 of 2017
(On Appeal from Court of Appeal Nos.: ABU 0050 & 0051 of 2014)

BETWEEN : **MOHAMMED ALAM**

Petitioner

AND : (1) **COLONIAL NATIONAL BANK**
(2) **REGISTRAR OF TITLES**
(3) **MOHAMMED SHAHEEM AIRUD KHAN**

Respondents

Coram : **Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Mr. A. Sen and Mr. G. O'Driscoll for the Petitioner**
Mr. S. Devan for the 1st Respondent
Mr. J. Pickering for the 2nd Respondent
Third Respondent in Person

Date of Hearing: **19 April 2018**

Date of Judgment: **27 April 2018**

JUDGMENT

Chandra J:

1. I agree with the reasoning and conclusion in the judgment of Keith J.

Keith J:

Introduction

2. In his written submissions, counsel for the petitioner reminded us of what Aristotle said about the need for justice and equity to coincide. I regret that this judgment will be more prosaic than Aristotle had in mind, but it does illustrate the tension which can arise when a mortgagee's power of resale clashes with the mortgagor's right to redeem the mortgage. An understanding of the facts of the case is important, and I trust that I will be forgiven for going into them in some detail. I take them from the exhibits which were before the High Court and the findings of fact made by the trial judge, Wati J.

The facts

3. The Plaintiff, Mohammed Alam, was the lessee of a property in Seaqaqa on the Island of Vanua Levu.[1] It had been built in 1994. It consisted of commercial premises on split levels on the ground floor and a residential flat on the first floor.[2] The assignment to Mr. Alam of the lease had originally been funded by a loan from the ANZ Bank, but Mr. Alam was persuaded to switch to a different lender, and in February 2000, he borrowed the sum of $141,400.00 from the First Defendant, the Colonial National Bank ("the Bank")[3], which he used to pay off his existing loan. The new loan was repayable by instalments of $1,250.00 a month, and it was secured by a charge on the property.

4. Mr. Alam fell into arrears with the mortgage repayments almost immediately. He did not pay any of the first seven instalments due under the mortgage. Accordingly, the Bank issued him with a notice of default under section 80 of the Consumer Credit Act 1999 dated 4 December 2000. Those arrears were waived in January 2001 when the Bank

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[1] The exhibits show that the Plainiff's name is Mohammed Alam Khan. However, I shall refer to him as Mohammed Alam because that is how he has been referred to and in order to avoid confusion with the Fourth Defendant.

[2] A full description of the property can be seen in a valuation report on the property included at pp 699-707 of the Record of the High Court.

[3] The Colonial National Bank was the trading name of the National Bank of Fiji Ltd.

agreed to restructure Mr. Alam's account. In addition to the loan relating to the property, the Bank had financed Mr. Alam's purchase of a motor vehicle, and the terms of the mortgage were varied in three respects in the restructuring of Mr. Alam's account: the arrears which had accumulated were waived; the repayments on the mortgage would continue to be $1,250.00 a month, but would be payable for the next 19 years; and the repayments on the loan for the purchase of the motor vehicle would increase to $400.00 a month, and would be payable for the next 27 months.[4]

5. The property had previously been insured by Tower Insurance. Towards the end of 2001, the Bank suggested to Mr. Alam that the property should be insured with insurers nominated by the Bank. Mr. Alam was content with that, and accordingly with effect from 1 January 2002 the property was insured with the Second Defendant, Queensland Insurance (Fiji) Ltd ("the insurers"), for $240,000.00, which was what the property had been valued at in August 1999.

6. Mr. Alam fell into arrears with the mortgage repayments immediately after his account with the Bank had been restructured. He did not pay the first two instalments due. Accordingly, the Bank issued him with another notice of default under section 80 of the Consumer Credit Act dated 5 February 2002. Thereafter Mr. Alam paid the instalments due under the mortgage sporadically[5], but despite that, and despite the fact that he had not remedied the default in the notice of default, the Bank took no further action in respect of the arrears. Indeed, the only step which the Bank took was to adjust Mr. Alam's repayment schedule to reflect the premiums payable under the policy of insurance: with effect from 30 April 2002, he was required to pay $1,394.00 a month.

7. The Bank's inaction at the time may well have been due to the fact that at about this time Mr. Alam was thinking about disposing of the property. There are in the Record of the High Court documents showing that various people were looking at the possibility of "purchasing" the property, more accurately described as taking an assignment of Mr.

[4] See pp 724-726 of the Record of the High Court.

[5] A complete record of Mr. Alam's payments to the Bank appears in the statement of his account entitled "Transaction History Listing" at pp 646-651 of the Record of the High Court.

Alam's lease. The Bank was aware of the interest of at least one of the potential buyers because there is an internal document dated 18 September 2002 in which the Bank discussed whether it should agree to the disposal of the property. The documents recorded that Mr. Alam had left the property, as business was very slow due to the drop in the local population caused by the expiry of sugar cane leases in Seaqaqa.[6]

8. The next event in the narrative was the catalyst for this litigation. On 26 October 2003, a fire seriously damaged the property. It had started in a supermarket next door and had quickly spread to Mr. Alam's property. Fortunately, no lives were lost, and the property was not totally destroyed. The Bank was notified of the fire, and it promptly submitted a claim under the policy to the insurers. Its loss adjusters asked Mr. Alam to obtain two quotations from local builders for the cost of reinstating the property. Mr. Alam did so, and their estimates came to $149,000.00 and $153,000.00 respectively.

9. The insurers initially declined the claim. They did so on the basis that there had been a material non-disclosure. The property had been insured as a residential dwelling, and the fact that part of the building was for commercial use had not been disclosed to the insurers. However, without prejudice to the insurers' contention that they were not liable under the policy, the Bank's brokers informed the Bank on 2 April 2004 that the insurers were prepared to settle the claim on the basis of a payment of $79,000.00. One of the exhibits shows that there were two other reasons why the insurers were not prepared to settle the claim at the full cost of reinstating the property.[7] First, the insurers considered that the building had been under-insured, and any claim under the policy would therefore be subject to the average clause. Secondly, the reinstatement/replacement clause in the policy required that the building be reinstated following a loss. The Bank's brokers thought that Mr. Alam had notified the insurers that he did not intend to reinstate the building, and accordingly any settlement of the claim would be based on the indemnity conditions stipulated in the policy.[8]

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[6] See pp 671, 736-737, 739, 741-742 and 790 of the Record of the High Court.
[7] See the Bank's brokers' letter to the Bank of 16 July 2004 at pp 776-777 of the Record of the High Court.
[8] The policy of insurance was not produced at the trial. Wati J was understandably surprised at that. I have therefore taken the terms of the policy from what was said in such correspondence as was produced at the trial.

10. The Bank initially decided not to accept the sum of $79,000.00 in settlement of the claim. It thought that the claim should be settled at the cost of reinstating the property, ie in the region of $149,000.00. It changed its mind when it became aware of the insurers' reasons for saying that they were not liable under the policy. Those reasons were one of the things which persuaded the Bank to accept the offer of $79,000.00. The others were that Mr. Alam had been in default under the terms of the loan, the cost of reinstating the property was considerable, supervising the works of reinstatement would be difficult because of the Bank's lack of experience in the field, and the resale value of the property once it had been reinstated would be "very minimal".[9] The Bank notified Mr. Alam on 16 November 2004 that it had agreed to settle the claim for $79,000.00.

11. Mr. Alam informed the Bank that he was not prepared to accept that offer[10], and the Bank's further efforts to persuade him to do so were unsuccessful. The Bank treated this as "non-co-operation" on Mr. Alam's part, saying in an internal note that it "cannot allow the debtor to continue to dictate terms"[11], and it decided to accept the offer without further reference to him. Accordingly, by an agreement dated 2 February 2005, the Bank accepted the sum of $79,000.00 from the insurers in full and final settlement of all claims under the policy, and that sum was credited to Mr. Alam's loan account with the Bank. The Bank did not dispute that it had done that without Mr. Alam's consent, its case at the trial being that it had been entitled to do that as only the Bank had been a party to the policy of insurance, and Mr. Alam had not been.

12. Immediately before the Bank accepted the insurers' offer of $79,000.00, the balance on Mr. Alam's loan account came to $205,192.52. The payment of $79,000.00 reduced that to $126,192.52. There was no evidence about what the arrears then were, but with the reduced value of the property and the recovery of only $79,000.00 from the insurers, the difference between the reduced value of the property and the sum outstanding on Mr.

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[9] See the Bank's internal memo of 16 July 2004 at pp 773-775 of the Record of the High Court.
[10] There was no finding by Wati J about how Mr. Alam had informed the Bank of that, but the fact that he did so was confirmed by Kevin Yuen, the manager of the Bank's Recovery Section: see para 123 of Wati J's judgment.
[11] See the Bank's diary note of 10 January 2005 at p 786 of the Record of the High Court.

Alam's loan account was substantial. Accordingly, the Bank decided to sell the property to recoup at least some of that shortfall, and an offer was received for $51,500.00.

13. One of the Bank's internal documents recorded that Mr. Alam wanted to "enter into negotiations with the Bank to purchase the property on an ex gratia basis for around $20,000.00".[12] Of course, Mr. Alam was already the "owner" of the property, in that he was the lessee under the lease, and I assume that what was meant was that Mr. Alam was prepared to pay $20,000.00 towards the debt provided that the Bank would then be prepared to permit him to redeem the mortgage. That is what Wati J understood the position to be.[13] In the event, the Bank decided to advertise the property for sale. The prospective purchaser who had offered $51,500.00 did not renew his offer, and the only offer which was received was an offer from the Fourth Defendant, Mohammed Shaheem Airud Khan, for $33,333.00. The Bank made numerous attempts to see whether the prospective purchaser who had offered $51,500.00 for the property was still interested in buying it, but he did not respond to the Bank's inquiries.

14. The Bank decided to accept Mr. Khan's offer and reject that of Mr. Alam. That is not surprising. Mr. Khan's was the greater offer, and although the price paid by Mr. Khan would reduce Mr. Alam's indebtedness to the Bank, the indebtedness would still be there. It would then be for the Bank to decide whether to pursue Mr. Alam for the debt or to write it off. Accordingly, the Bank purported to exercise its power of resale as the mortgagee under the mortgage, and by a deed signed on behalf of the Bank on 20 May 2005, the lease was assigned to Mr. Khan for $33,333.00. The assignment purported to record that the transfer was registered by the Third Defendant, the Registrar of Titles, on 7 October 2005.[14] In the event, the Bank decided on 28 October 2005 to write off Mr. Alam's debt.[15]

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[12] See the Bank's diary note at pp 787-789 of the Record of the High Court. The note is dated 10 January 2005, but that cannot be correct since it refers to events which occurred after that date.
[13] See para 218 of Wati J's judgment.
[14] See p 796 of the Record of the High Court.
[15] See para 220 of Wati J's judgment.

15. Mr. Alam's counsel told us that Mr. Alam's offer of $20,000.00 had been just a negotiating stance. He had been prepared to increase the offer. Indeed, we were told that after Wati J's judgment Mr. Alam had increased his offer by the $33,333.00 which Mr. Khan had agreed to pay for the property. But the fact that his offer of $20,000.00 had only been a negotiating stance and that he had been prepared to offer more was not pleaded, nor was it part of Mr. Alam's evidence at trial.[16] Indeed, Wati J found that Mr. Alam had "only" been prepared to pay $20,000.00[17], and that is a finding which we cannot go behind.

16. Mr. Alam's case has always been that the Bank should not have agreed to settle his insurance claim without reference to him, let alone at so low a sum as $79,000.00. Had his claim been settled for a sum equivalent to the cost of reinstating the property, he would have been able to pay all the arrears, as well as a substantial sum towards the outstanding amount due on his loan account. In those circumstances, the Bank's power of resale as a mortgagee would not have been triggered. In order to ensure that the assignment of the lease did not go ahead in the meantime (thereby rendering nugatory his claim that the Bank had not been entitled to exercise its power of resale), he sought and obtained an interim injunction restraining the Registrar of Titles from registering the transfer of the property to Mr. Khan (notwithstanding that the assignment had purported to record that the transfer had already been registered).

Wati J's judgment

17. The principal focus of Wati J's judgment was on whether the Bank had been entitled to settle the insurance claim without reference to Mr. Alam, and whether the claim had been settled at an undervalue. Contrary to the case advanced both by the Bank and the insurers, she found that Mr. Alam had been a party to the policy, and his consent to the settlement of the claim should have been sought. Since he had not been prepared to consent to the settlement of the claim at $79,000.00, he should have been given the

[16] We can see Mr. Alam's evidence from two sources: Wati J's note of Mr. Alam's evidence (pp 900-916 of the Record of the High Court) and her summary of his evidence in her judgment (paras 43-87 of her judgment).
[17] See para 218 of Wati J's judgment.

opportunity of making his own claim against the insurers under the policy. Indeed, Wati J found that by settling the insurance claim without reference to Mr. Alam, the Bank and the insurers had engaged in misleading, deceptive and unconscionable conduct contrary to sections 54 and 55 of the Fair Trading Decree 1992. Moreover, Wati J rejected the insurers' allegation that there had been material non-disclosure on Mr. Alam's part, and she found that the claim had been settled at an undervalue. She held that the insurers had been obliged to settle the claim at $149,000.00 (though not at $240,000.00 which was what Mr. Alam had argued for).

18. When it came to the Bank's power of resale, Wati J found that its power of resale had been *triggered*. She had in mind the second notice of default under section 80 of the Consumer Credit Act, and said that the default had not been remedied. But Wati J went on to find that the Bank had not been entitled to *exercise* its power of resale. She expressed that finding as follows, though I have added a few words of my own in square brackets to make her words even clearer:

> "I however do find that if the Bank opted to settle [the insurance claim] without reference to [Mr. Alam], it should have waited for [Mr. Alam] to make a separate [insurance] claim and suspended it[s] rights of mortgagee sale until finalization of the [insurance] claim or accepted a proper value of the loss. After having accepted a proper value of the loss, if the monies were outstanding and [Mr. Alam] was not able to pay the entire monies outstanding then [the Bank] could have proceeded to conduct mortgagee sale and apply the proceeds to reduce the debt. The shortfall could have been subject to a claim [against Mr. Alam] personally."[18]

19. An important feature of Wati J's judgment is that she did not give Mr. Alam a remedy for what she found to have been the Bank's premature sale of the property to Mr. Khan when it should have waited either for the insurers to increase its offer to $149,000.00 or for Mr. Alam to make his own insurance claim. Crucially, she found that even if the insurers had been prepared to settle the claim at $149,000.00, Mr. Alam would still not have been in a

[18] Para 210 of Wati J's judgment.

position to redeem the mortgage. Her reasoning went like this. The balance on Mr. Alam's loan account on the day when the $79,000.00 was paid to the Bank was $205,192.52. Wati J thought that that sum should be reduced to $194,042.50 to reflect the fact that the loan account included the loan for the car. If the insurers had paid the Bank $149,000.00, the mortgage loan account would have been reduced to $45,042.52. Wati J found that Mr. Alam had only been prepared to pay $20,000.00 to redeem the mortgage, and there would still have been a not insignificant shortfall. Consistently with that view, she discharged the interim injunction, thereby freeing the way for the transfer of the property to Mr. Khan to proceed.

20. For its part, the Bank had counterclaimed for the sum due to it under the loan account. Wati J recognised, of course, that it would have to give credit for the $33,333.00 payable by Mr. Khan for the assignment of the lease, but with interest the resulting sum had to be increased to $20,681.15. She entered judgment in favour of the Bank against Mr. Alam for that sum. As for Mr. Alam's claim against the insurers for settling the case at an undervalue without reference to him, she entered judgment in favour of Mr. Alam against the insurers for the sum of $105,987.75, being the difference between the sum of $79,000.00 which the claim was settled for and the sum of $149,000.00 which it should have been settled for, ie $70,000.00, plus interest of $35,987.75.

The judgment of the Court of Appeal

21. Appeals against Wati J's judgment were pursued by Mr. Alam and the insurers. The Court of Appeal (Basnayake JA, Lecamwasam JA and Hamza JA) dismissed the appeals. The principal judgment was given by Basnayake JA. There were many grounds of appeal, and although the Court of Appeal must be taken to have considered them all, of course, only a few of them were specifically addressed by Basnayake JA. When he came to Mr. Alam's appeal, Basnayake JA noted what Wati J had said about the notices (which I take to mean the notices of default) and that even if the insurers had settled the claim at $149,000.00, there would still have been an outstanding amount on the loan account. Basnayake JA noted that Mr. Alam had allowed his indebtedness to the Bank to mount

without taking any steps to repay the loan, and the Bank would have been entitled to fear that its chances of recovering the debt were diminishing. He added that in addition the Amended Statement of Claim had mis-stated Mr. Alam's indebtedness at the time of the fire, saying that it was $100,000.00 when it had in truth been $180,580.09. In these circumstances, Basnayake JA thought that Mr. Alam had not come to equity with clean hands.

22. As for the insurers' appeal, Basnayake JA addressed three points: the fact that the policy of insurance was not produced in evidence, Wati J's finding on the allegation that there had been material non-disclosure on Mr. Alam's part, and the reliance which Wati J placed on a report from loss adjusters recommending settlement of the claim at $145,000.00. Again, no other topic relevant to the current appeal was explicitly addressed, though since one of the grounds of appeal had attacked Wati J's finding that the insurance claim had been settled at an undervalue, the Court of Appeal must be taken to have rejected that argument, since the appeal would otherwise have had to be allowed. In any event, the insurers are not appealing further. We were told that they had paid Mr. Alam the sum for which Wati J had given judgment against them for. They are not a party to the current application for special leave to appeal to the Supreme Court, and the only application for special leave to appeal to the Supreme Court is that of Mr. Alam.

23. It is necessary to add one thing. Mr. Alam was anxious to preserve the *status quo* pending the hearing of his application to the Supreme Court for special leave to appeal. He did not want the property to be transferred to Mr. Khan before his application for special leave could be determined. That again would have rendered nugatory his claim that the Bank had not been able to exercise its power of resale. He therefore applied to the Supreme Court for a stay of the judgment of the Court of Appeal. That would not have been enough, of course. It was Wati J who had discharged the original interim injunction, and the Court of Appeal's judgment had not affected that. What Mr. Alam's legal team should have applied for was a fresh interim injunction. That was recognised by Calanchini J who heard the application. He doubted whether the Court had the power to resurrect an interim injunction once it had been discharged by the High Court and

which had not been the subject of any comment by the Court of Appeal. However, he added that if such a power existed, he would have dismissed the application on its merits.

24. Although the way has therefore been clear at all times since Wati J's judgment for the transfer of the property to Mr. Khan to proceed, it has not done so. The Registrar of Titles is waiting for the outcome of this litigation before deciding what to do.

Clean hands

25. One of the maxims of equity is that "he who comes into equity must come with clean hands". As far as I can tell, no-one argued – whether before Wati J or in the Court of Appeal – that Mr. Alam should be denied equitable relief because he did not come to court with clean hands.[19] The Court of Appeal appears to have seized upon that idea on its own, and apparently without any warning to Mr. Alam or his legal team that it might deny him equitable relief on that ground.

26. But apart from that, it is difficult to see how the matters relied upon by Basnayake JA could possibly amount to a lack of clean hands on Mr. Alam's part. It was *not* said in the Amended Statement of Claim that Mr. Alam's indebtedness at the time of the fire had been $100,000.00. It said that his indebtedness had been "in the vicinity of $100,000.00 (though the actual amount owed is not known to the plaintiff)".[20] It is true that Mr. Alam had allowed the indebtedness under the mortgage to accumulate, but that could not justify the invocation of this maxim. Otherwise any mortgagor who falls behind with his mortgage repayments will automatically be denied equitable relief. In my opinion, this part of Basnayake JA's judgment should respectfully be put to one side.

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[19] There was nothing in the pleadings about clean hands, nor in Wati J's judgment, nor in any of the parties' written submissions, whether in the High Court or the Court of Appeal.

[20] Para 26 of the Amended Statement of Claim at p 159 of the Record of the High Court.

The triggering of the Bank's power of resale

27. Before considering whether the Bank's power of resale had been triggered, it is necessary to identify the relevant terms of the mortgage and whether its power of resale was qualified by statute. The relevant terms of the mortgage[21] were as follows:

- Clause 5.1: "An event of default occurs if … you … do not pay the whole or any part of the secured money when it is due …"

- Clause 5.2: "If an event of default occurs, you are in default under [the] agreement between you and us, and we may … require that you immediately pay us the secured money; and … deal with the property as if we own it to the extent permitted by law (such as … leasing or selling it in any way and to any person …)"

- Clause 5.5: "We will not exercise our rights, powers and remedies under this clause 5 unless: (a) we have given you all relevant notices required to be given by law; and (b) the relevant notice period and any postponement period have elapsed; and (c) the default specified in the notice has not been remedied."

It is to be noted that clause 5.2 entitled the Bank to require Mr. Alam to pay the whole of the balance of the loan if he defaulted in any payment, and the Bank's power of sale under clause 5.5 arose if the default specified in the notice given by the Bank to Mr. Alam had not been remedied. There is a term about insurance which is also relevant, but I shall return to that later.

28. Mortgages are governed by Part 8 of the Property Law Act (Cap 130). Two provisions are relevant for present purposes. They provide, so far as is material:

[21] The mortgage is at pp 629-642 of the Record of the High Court. Page 2 of the General Conditions is missing, but I have assumed that there are no conditions on that page which are relevant to this case.

- Section 77: "If default is made in payment of the mortgage money or any part thereof, … and such default is continued for one month or for such other period of time as in such mortgage for that purpose expressly fixed, the mortgagee may serve on the mortgagor notice in writing to pay the mortgage money … "

- Section 79(1): "If default in payment of the mortgage money … continues for one month after the service of the notice referred to in section 77, the mortgagee may sell … the mortgaged property … "

The mortgage in the present case fixed a different period of time for the purposes of section 77. It provided for 7 days. So the effect of these provisions, subject to the provisions of the Consumer Credit Act, was that, if Mr. Alam was more than 7 days in arrears with any of the instalments due under the mortgage, the Bank was entitled to sell the property, provided that (a) it had served on Mr. Alam a notice requiring him to pay the arrears, (b) a month had elapsed since the service of that notice, and (c) he had not paid off the arrears during that time.

29. On the face of it, the mortgage was governed by the Consumer Credit Act as well as the Property Law Act. That was the assumption on which the Bank proceeded. The first page of the conditions of the mortgage referred to the Consumer Credit Act, and the two notices of default were described as notices under section 80 of the Consumer Credit Act. However, Calanchini J questioned that in his judgment on the application for a stay. At [26] and [27] he said:

> "Under section 11 the Consumer Credit Act is presumed to apply to all credit contracts unless the creditor can show that it falls into one of the exempt categories. Section 6(1) of the Act specifies four requirements all of which must be satisfied before the Act will apply to a credit contract. One of those requirements is set out in Section 6(1)(b) and Section (5)

> which when read together provide that more than half the credit must be provided or must be intended to be provided for the purpose of personal, domestic and household purposes.
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> In the present case, putting aside any issue relating to non-disclosure of the real purpose for which the credit was required, it appears not to have been disputed that the credit was provided for the purpose of constructing a building of three levels. The first level was a store, the second level a commercial pool room and the third level a residence. It would appear that the Act does not apply if more than half of the borrower's purpose is for business or investment."[22]

30. Although the Bank's case was that the property was used for commercial purposes, it has never sought to prove that the mortgage was not a credit contract to which the Consumer Credit Act applies. It was the insurers who raised that argument in its grounds of appeal to the Court of Appeal. The contention before Wati J was that the fact that the property was used for commercial purposes meant that the insurers had been entitled to avoid the policy on the ground of non-disclosure of a material fact. But leaving that aside, what the Bank would have had to establish was that more than half of the mortgage loan was intended to be used by Mr. Alam for purposes other than personal, domestic or household purposes.

31. It is difficult to identify what more than half of a loan is for if it is obtained to replace a loan for the acquisition of a building with mixed uses, and it may be that the appropriate way of determining that question is to ask what the predominant use of the building was. Was it a commercial building with ancillary residential accommodation, or was it a residential building with an ancillary commercial use? Alternatively, is it just a matter of looking at whether the square footage attributable to the living quarters is less than the

[22] In fact, the credit had not been provided "for the purpose of constructing the building". It had been provided to enable Mr. Alam to repay his loan from the ANZ Bank because he had been persuaded to change lenders, though that does not affect any of the issues which the case raises.

square footage attributable to the commercial space? Either way, it is a matter of evidence. Having said that, the evidence before Wati J included the valuation report on the property. That shows that this was a commercial building with ancillary residential accommodation, and that the square footage attributable to the commercial space was much greater than the square footage attributable to the living quarters. In the circumstances, we should proceed on the assumption that the Consumer Credit Act did not apply to Mr. Alam's mortgage, and that any notices of default purportedly served under section 80 of the Consumer Credit Act should be treated as having been served under the terms of the mortgage. Having said that, the fact that they should be treated as having been served under the terms of the mortgage rather than under section 80 of the Consumer Credit Act does not affect the outcome of the case.

32. The only two notices of default served on Mr. Alam were the ones dated 4 December 2000 and 5 February 2002. The first of those can be put to one side. Mr. Alam's liability to pay the arrears to which that notice related was expressly waived by the restructuring of his loan account in January 2001. The relevant notice for present purposes is the later one. The contention advanced on behalf of Mr. Alam is that it would be surprising if a notice given in February 2002 to a mortgagor to pay arrears which had accumulated over only two months could have triggered the mortgagee's right to sell his property over three years later in October 2005 when no steps had been taken by the mortgagee in the intervening period to require the mortgagor to address the question of those or subsequent arrears – at any rate, by the service of a further notice of default.

33. It is unquestionably the case that Mr. Alam made a number of payments to the Bank over the years after the service of the second notice of default on him. There was no evidence of him having identified what those payments were for, ie whether any of them were in respect of the arrears to which the second notice of default related. In those circumstances, it was open to the Bank, under the usual principles relating to the apportionment of payments, to apportion those payments to such of the mortgage

instalments or arrears as it chose. Indeed, that is what clause 13.1 of the mortgage terms provided:

> "We will use any amount we receive as payment under the mortgage as required by law, but otherwise we may do so in any way we decide appropriate."

To the extent that the Bank relied on the second notice of default as triggering its power of resale of the property, it has to be treated as apportioning the payments made by Mr. Alam after the service of the second notice of default to mortgage instalments or arrears other than the arrears to which that notice of default related. In any event, though, there is authority for the proposition that where a notice of default has been served in respect of arrears which were later paid, but there were subsequent arrears, the original notice of default covered any future arrears and a further notice of default was not required.[23]

34. But the fact remains that a very long time elapsed before the Bank purported to exercise its power of resale following the service of the second notice of default. As far as my researches have revealed, there is no principle that a notice of default lapses if no action is taken on it within a reasonable time despite the mortgagor having failed to remedy the default. What is well established is that the mortgagee may be treated as having waived its reliance on a notice of default if its conduct is consistent only with an intention on its part no longer to rely on it. But in accordance with general principles about the doctrine of waiver, that intention has to be both clear and unequivocal, and the mortgagor has to have altered his position in reliance on that conduct, or at least acted on it.

35. In my opinion, this case is some distance from one in which it can properly be said that the mortgagee has waived its reliance on a notice of default. The Bank knew within a short time of the second notice of default that Mr. Alam was trying to dispose of the property, and there was little point in issuing another notice of default in order to preserve its power of resale if Mr. Alam was going to sell the property himself. Things changed,

[23] *Morton v Suncorp Finance Ltd* (1987) 8 NSWLR 235.

of course, after the fire. There would have been little point in the Bank pressing Mr. Alam for the arrears at that time simply to preserve its power of resale when no revenue was coming in – whether from the businesses being carried on in the building or by way of rent from any of Mr. Alam's tenants in the building (if he had any). Far better to wait for the settlement of the insurance claim and assess things then. In short, the Bank's decision not to take any steps for some time to enforce the second notice of default could not be read as the Bank no longer intending to rely on that notice if need be.

36. Moreover, Mr. Alam would have been alive to all that. In particular, he would have known that if the arrears kept on mounting (as they did), there would come a time when the Bank would want to realize its security in order to recoup what it could from the loan. In particular, even if he had been alive to the possibility of the Bank losing its power of resale if it took no steps to enforce the second notice of default, he would also have realized that the Bank could preserve its position simply by serving a further notice of default on him. In short, he did not do anything as a result of the Bank not relying on his failure to remedy the default set out in the second notice of default, let alone alter his position as a result of that.

37. I would not want this judgment to be regarded as allowing mortgagors in every case to wait many years before acting on a notice of default which a mortgagee has failed to remedy. It is just that in the particular circumstances of this case the lapse of time cannot be regarded as amounting to a waiver by the Bank of its reliance on the second notice of default. But for the reasons I have given, it was, in my opinion, open to Wati J to conclude that the second notice of default had triggered the Bank's power of resale. I therefore reject the attack by Mr. Alam's legal team on that finding.

The exercise of the Bank's power of resale

38. There is, of course, a distinction between the triggering of the Bank's power of resale and its exercise. Just because the Bank had the legal right to sell the property did not mean that it should have exercised that right. That was the distinction which Wati J rightly

recognized. The search for principle in this area of the law, though, has proved elusive, and it is not entirely clear what the criteria are for determining whether the exercise by a mortgagee of its power of resale in a particular case was permissible.

39. Having said that, what is clear is that well before the fire Mr. Alam had fallen into arrears, and the Bank's power under clause 5.2 of the mortgage to require Mr. Alam to pay the whole of his debt to the Bank had arisen, with the consequence that the Bank could exercise its power of resale if Mr. Alam was not able to repay the whole of the debt. On the other hand, if Mr. Alam's inability to pay the whole of the debt to the Bank had arisen because of some conduct on the part of the Bank for which the Bank can fairly be criticized, it may well be appropriate to treat the Bank as not having been entitled to exercise its power of resale. That was the approach taken by Wati J, and I agree with it. Accordingly, the attack on that approach by the Bank's legal team has to fail.

40. So was there conduct on the part of the Bank for which the Bank could be fairly criticised? Wati J found that there was – in two respects. The Bank settled the insurance claim for a sum less than the value of the claim, and did so without Mr. Alam's consent. I can dispose of the first criticism of the Bank relatively briefly. Wati J's finding that the insurance claim should have been settled for $149,000.00 was the subject of one of the insurers' grounds of appeal to the Court of Appeal. Although the Bank was pursuing its own appeal, it supported the insurers' grounds of appeal. The insurers' appeal having been dismissed by the Court of Appeal, their challenge to Wati J's finding about the insurance claim having been settled at an undervalue has to be treated as having failed as well. There has been no application by the insurers for special leave to appeal, nor any cross-appeal or respondent's notice in respect of this finding by the Bank. That is the end of the matter. Wati J's finding has to stand.

41. Different considerations apply to the settlement of the claim without Mr. Alam's consent. I must here go back to the terms of the mortgage and a term about insurance which I said I would have to return to later. Clause 4 of the mortgage required Mr. Alam to insure the property. Clause 4.3 provided, so far as is material:

> "You must immediately notify us and the insurer if a claim or anything that could lead to a claim occurs under an insurance policy relating to the property.
>
> You must … allow us to control, compromise and settle any claim or possible claim (including to conduct legal proceedings against the insurer) …"

Wati J found that the Bank had "started off on the correct track. It started consulting [Mr. Alam] but when he refused, it stopped the consultation process and settled the claim without informing [Mr. Alam]."[24] Although that appears to be a criticism of the Bank for settling the insurance claim without further reference to Mr. Alam, she had previously said, after referring to clause 4.3 of the mortgage, that "the Bank is permitted to settle a claim but in good faith without compromising the rights of … the owner of the property".[25] However, she did not then go on to say that the Bank *had* settled the claim in bad faith, and the basis of her finding that the Bank had acted in breach of the Fair Trading Decree related to the Bank's failure to consult Mr Alam over the settlement figure proposed by the insurers.[26] So looking at her judgment as a whole, it looks as if the actual criticism of the Bank was that it had settled the insurance claim at an undervalue, but that it had not done so in bad faith. It had only acted unconscionably in failing to consult with him over the settlement.

42. It is unnecessary for me to reach any conclusion on that issue, because the crucial question is whether such conduct for which the Bank can properly be criticised was the reason why Mr. Alam was unable to pay off his indebtedness. It is here that the arithmetic becomes so important. I am prepared to assume in his favour that his indebtedness to the Bank was much greater than it would have been if the insurers had settled his claim for $149,000.00 rather than $79,000.00. The issue was then whether he

[24] Para 184 of Wati J's judgment.
[25] Para 169 of Wati J's judgment.
[26] Para 211 of Wati J's judgment.

would have been able to pay off his indebtedness. After going through the figures, Wati J concluded that he would not have been able to. There was no challenge to her calculations. Indeed, the Court of Appeal thought they were correct, as do I. The area of controversy relates to whether the amount which Mr. Alam was prepared to pay to satisfy the debt should have been increased by the additional $33,333.00 which his legal team say he would have been prepared to pay. For the reasons I have already given, I do not think that this can be brought into the calculations.

43. For these reasons, it was, in my opinion, open to Wati J to conclude that the Bank had been entitled to exercise its power of resale. I therefore reject the attack by Mr. Alam's legal team on that finding.

44. I should add that I have not been left with the sense that Mr. Alam has been unfairly treated. He had allowed the arrears to accumulate, and as a result the Bank had become entitled under the terms of the mortgage to call in the loan and to exercise its powers of resale in the event of the indebtedness remaining outstanding. The $79,000.00 which his insurance claim was settled for was paid to the Bank, and that reduced his indebtedness to the Bank by that amount. The additional sum needed to settle his insurance claim at the level which Wati J thought was appropriate was $70,000.00, and that was paid to Mr. Alam pursuant to the judgment he obtained against the insurers. But had that sum been paid to him when it should have been, he would still not have been able to pay off his indebtedness.

Conclusion

45. In my opinion, questions of general legal importance have been involved in this appeal, namely whether a notice of default lapses if no action is taken on it within a reasonable time despite the mortgagor having failed to remedy the default, and what are the criteria for determining whether the exercise by a mortgagee of its power of resale is permissible. Although it has in the event not been necessary for me to determine either of those issues, I think that special leave to appeal should be granted to Mr. Alam. In accordance with

the Supreme Court's usual practice, I would treat the hearing of the application for special leave to appeal as the hearing of the appeal, but for the reasons I have endeavored to give, I would dismiss the appeal. In the circumstances of the case, I would make no order for costs, leaving it to the parties to bear their own costs.

Chitrasiri J:

46. Having read the judgment of Keith J in its draft form, I am inclined to agree with the findings and the reasons given therein.

Orders of the Court:

1. *Special leave to appeal granted.*
2. *Appeal dismissed.*
3. *No order for costs.*

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Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

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Hon.Mr. Justice Brian Keith
Judge of the Supreme Court

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Hon. Mr. Justice Kankani Chitrasiri
Judge of the Supreme Court