COURT OF APPEAL

SOFRONOFF P
MORRISON JA
PHILIPPIDES JA

Appeal No 8816 of 2017
SC No 6661 of 2017

CHARU RAJ **Appellant**

v

NATIONAL AUSTRALIA BANK LIMITED **Respondent**
ABN 12 004 044 937

BRISBANE

TUESDAY, 6 FEBRUARY 2018

JUDGMENT

SOFRONOFF P: By an originating summons dated 4 July 2017, the respondent sought an order to recover possession of land of which the appellant, Charu Raj, was the registered proprietor. She and her husband, Niren Raj, were the respondents to the application. Ms Raj had mortgaged the land to secure the repayment of loans which were ultimately in the amount of $4,535,537.88. The appellant and her husband defaulted under the relevant facilities and securities. The bank delivered the necessary notices to recover possession. None of that is contentious.

On 10 April 2017 the bank, the appellant and her husband entered into a deed. Without prejudice to its rights to recover the property, by the terms of the deed, the respondent bank

agreed to accept $2,050,000 in exchange for the release of Ms Raj's property from the mortgage. Pursuant to clause 5 of the deed, the parties agreed that if the $2,050,000 was not paid on the agreed date, time being of the essence, then the appellant and her husband would deliver vacant possession of the property to the bank within 14 days of the due date for payment under the deed. They also covenanted that they would not oppose or defend any proceedings brought by the bank for recovery of possession of the property and would consent to the making of the appropriate orders for recovery of possession. The money was not paid by the due date which, as I said, was 10 April 2017. On 4 July 2017, the bank's solicitors issued their originating application for recovery of possession. On 1 August 2017, the matter came on for hearing before Justice Bond.

Having failed to honour their obligations under the original facilities and having failed to pay any money pursuant to the settlement deed, the validity of which has never been challenged, the appellant and her husband have then failed to honour the obligation imposed upon them by clause 5 because, rather than consenting to orders for the recovery of possession, they have opposed those orders and instead have sought an adjournment of the bank's application. The respondent bank, as the applicant before Justice Bond, relied upon two affidavits. They had been filed on the previous day and emailed to Mr Raj.

I should observe here that Mr Raj and his wife, Ms Raj, are both solicitors of the Supreme Court of Queensland. Mr Raj was admitted as long ago as 1990, while the appellant was admitted in January 2012. Mr Raj describes himself as a debt recovery and insolvency practitioner. He said that he had not yet read the affidavits upon which the bank relied when the bank sought leave to read them. Accordingly Justice Bond offered him the necessary time to read them. Later, during the hearing, Justice Bond asked Mr Raj whether he had now read the affidavits. Mr Raj said that he had no objection to their being received and Justice Bond granted leave for those two affidavits to be filed and read. Mr Raj read an affidavit of his own in support of his and the appellant's application for an adjournment.

Mr Raj, who made submissions on behalf of himself and his wife to Bond J, explained that he had two grounds for his application for an adjournment. The first ground was that he had

received offers of finance that would enable him to pay the $2,050,000 referred to in the deed. The second ground was that he needed "to obtain advice from Senior Counsel in relation to the deed". He explained that "there was misleading and deceptive conduct by the bank" in relation to the entry into the original facility. This new allegation against the bank had not been made the subject of any evidence. On the contrary, paragraphs 8 and 11 of Mr Raj's affidavit attributed some unspecified misleading conduct to two third party financiers, not the bank, who, according to him, had "misled" Mr Raj and his wife and had caused them "hardship". No explanation was offered below as to why legal advice had not been obtained in the many months since the facility had been entered into or since the deed had been entered into or even since the application for recovery of possession had been issued.

Unsurprisingly, Justice Bond was unable to find any basis upon which he could properly grant an adjournment. His Honour referred in his reasons to the bases for the application that I have set out. His Honour observed that there had been sufficient time between the time of service and 1 August within which to obtain advice or, if that advice could not be obtained, for the mortgagors to prepare some evidence to identify the steps they had taken and why they had been unable to obtain advice. In addition, there had been ample time to put forward evidence to show the basis for contending that there was something worth investigating that might lead to a defence to the claim. None of these things had been proved.

As for the second basis for the adjournment, his Honour concluded that offers of finance that might be made could not constitute any proper basis upon which an adjournment could be granted. This was the more so since the amount that Mr Raj hoped to obtain in this way was not the amount due to the bank but the amount of $2,050,000 the subject of the settlement deed that had never been consummated. Accordingly, his Honour refused the application for the adjournment, heard and determined the application for recovery of possession, and gave judgment for the applicant. Ms Raj appealed. In the meantime, Mr Raj, who had been an appellant, was rendered bankrupt and is no longer a party.

On 20 October 2017, Ms Raj applied to Justice McMurdo for a stay of Justice Bond's order. His Honour stayed the order pending the determination of the appeal. He did so, as the order

states, upon the appellant's undertaking to prosecute the appeal expeditiously. His Honour gave directions for the exchange of outlines and for the preparation of the appeal record. There were some delays but ultimately the steps were completed. At some point late in this process, the appellant told the respondent's solicitors that she wished to include further material within the appeal book that had not been before Justice Bond. The respondent objected to this. As late as 22 January 2018, the appellant told the respondent that she would make an application for leave to adduce this further material when the matter came on for hearing. The respondent's solicitors replied on 25 January 2018 objecting to this course. They reminded the appellant that the stay had been granted on an express undertaking to prosecute the appeal expeditiously. In reply, the appellant identified to the respondent solicitors the documents that she would seek to rely upon. Yesterday, on 5 February 2018, the appellant informed the respondent solicitors for the first time that she would now seek to rely upon two new affidavits; one of these was sworn by herself and the other by her husband. His affidavit deposes to his psychological state. He says he suffers from depression and anxiety to such a degree that during the hearing before Justice Bond, he:

> "Was not cognitive of the proceedings, could not understand what his Honour requested of me, could not remember the circumstances that led to the transaction before the court."

He says that he was:

> "Utterly hopeless and without any understanding of what I was required to do."

And that he was:

> "In a complete state of confusion."

The hearing was on 1 August 2017. On 24 August 2017, Mr Raj attended his general practitioner. Dr Manfield's report dated 25 August is annexed to Mr Raj's affidavit. It is, of course, hearsay. Dr Manfield does not say that, in his opinion, Mr Raj was incapable on 1 August 2018. Rather, he explains that his patient had been suffering from depression and anxiety and had suffered in that way since at least 2013. He further said that his patient's condition in those respects was severe. The result, said Dr Manfield, is such that:

> "[T]he affected individual becomes almost paralysed in their cognitive function, leading to extreme difficulty with even the most simple functions in their work, and difficulty with forcing themselves to even attend their workplace."

Symptoms of this kind that attend acute anxiety and depression are widely recognised and it may be accepted that Mr Raj suffers from them. The appellant herself swears that she did not appreciate her husband's condition until the morning of 1 August at the hearing and that she did not understand that her husband:

> "[W]as suffering extremely severe levels of anxiety and depression, and severe levels of stress, which would impede is (sic) ability to represent both of us be for (sic) the Court at the hearing at first instance."

The appellant also swears to a further offer of compromise that had been made by the bank, and which she purported to accept. That settlement was also not consummated. The appellant submitted that there was evidence of a contract between herself and the respondent, evidenced by the exchange of emails. The correspondence does not actually evidence a contract. The offer made on behalf of the bank was that it was expressly made as one in respect of which the offer would lapse if not accepted by noon on 16 May 2017. The offer was, in fact, accepted at 12.19 pm by email. Nevertheless, there was evidence that both parties agreed to a date for the settlement of this second attempted compromise. It never took place. The appellant does not explain why this is so.

This is plainly a case in which it could not possibly be inferred, having regard to the facts that I have related, that the settlement did not take place because of any default on the part of the bank. Obviously there is a *Jones v Dunkel*[1] point here, but it is not necessary to pursue this line any further. It is sufficient to say that the evidence falls far short of proof of a breach of contract on the part of the respondent, nor is there any evidence that the appellant was or is now ready, willing or able to honour her obligations under the alleged contract. This material relating to the further compromise could not, in my respectful view, possibly constitute a basis upon which either to adjourn the bank's application or constitute an answer to its application for judgment.

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[1] (1959) 101 CLR 298.

As I have said, if the material was capable of justifying a factual finding that Mr Raj had been incapable of conducting the proceedings on 1 August 2017, then that would justify a conclusion that his Honour's discretion, through no fault of his own, miscarried. It would simply be a case where the appellant has not yet had her opportunity for her case to be heard before a court. The problem, however, is that even if the material were capable of justifying such a conclusion about Mr Raj, the only result would be that his Honour's judgment in favour of the respondent bank would be set aside and his Honour's decision to refuse the adjournment would be set aside. The consequence would be that the appellant would need to justify either an application for an adjournment today or to resist the bank's application today. For the reasons that I have given, none of the material sought to be led in evidence is capable of doing either of those things. Therefore, there is no point in admitting it into evidence. I would reject the application to adduce further evidence for those reasons.

I therefore proceed to consider the appeal on the grounds advanced by the appellant. The appellant puts forward two grounds of appeal: first, she contends that Justice Bond erred in principle because he failed to grant an adjournment "so as to ensure the appellant was properly represented" in circumstances in which she submits she was represented by her husband alone. She submits she had no opportunity to be represented by a legal practitioner other than her husband and had not obtained legal advice from anyone else. These are factual contentions that were not raised below and cannot be raised now. In any event, they appear to be groundless, because the appellant acquiesced in her husband's representation of her interests at the hearing. In addition she does not say now that there was some possible answer to the bank's claim that her husband had overlooked. I would reject this ground.

The second ground amounts to a repetition of the first ground, but in different language. However, the appellant contends that Justice Bond failed to take into account as a relevant consideration that the appellant needed to get proper legal advice from an independent legal practitioner as to the substantive application.

To the extent that this is a different ground, it too is flawed, because it relates to a matter of fact that was not raised below. As part of this second ground, she also contends that the learned judge failed to take into account as a relevant consideration that the respondent would have suffered no prejudice by an adjournment that could not be remedied by an order as to costs. This is beside the point. Unless a proper basis had been shown, giving rise to an occasion upon which to exercise the discretion, the position of the bank need not be considered. The bank was entitled to have its application heard and determined unless legally coherent reasons were advanced that might justify an adjournment; only at that point would its own position have become material. In my view, this ground should also be rejected.

Notwithstanding Mr Kissane's able argument, this appeal is entirely without substance, as was the application for the adjournment made to Justice Bond. I would dismiss the appeal with costs.

MORRISON JA: I agree.

PHILIPPIDES JA: I also agree.