FORSYTH AND ANOTHER v. BLUNDELL AND OTHERS[1]

Mortgages — Power of Sale — Duties of Mortgagee — Notice of Purchaser — After Sale — Before Completion — Grounds for Restraining Completion — Necessity to set Sale Aside — Real Property Ordinance 1925-1963, s.94(2) (*A.C.T.*).

In the recent case of *Forsyth* v. *Blundell,* the High Court of Australia had an opportunity to clarify the nature of the duty owed to a mortgagor, by a mortgagee exercising his power of sale. It has never been clear in this country whether a mortgagor seeking to establish a breach of that duty must show that the mortgagee has acted with reckless indifference to his interests or whether it is sufficient to establish only negligence.

In *Forsyth* v. *Blundell,* Blundell, the mortgagor of land under the Real Property Ordinance 1925-1963 (A.C.T.), complained that the mortgagee, Associated Securities Ltd (A.S.L.), had exercised its power of sale improperly and therefore sought a declaration to that effect, as well as an injunction to restrain the completion of the sale to the Shell Oil Co. Sometime before the date advertised for the auction at which the property was to be sold. XL Petroleum Pty Ltd had indicated that it might pay out the mortgage debt, approximately $120,000, or bid up to $150,000 at the auction. However A.S.L. sold to an agent for Shell by private treaty for $120,000, the reserve price set for the auction. This sale was not manifestly at an undervalue. However A.S.L. did not inform Shell of XL's attitude nor did it attempt to induce XL and Shell to compete.

After careful consideration of these facts, the trial judge in the A.C.T. Supreme Court, Fox J., decided that

> a reasonable mortgagee in the position of A.S.L. could and should have seen that Blundell might be better off.[2]

Turning to consider the legal position His Honour gave a lucid review of the relevant authorities and decided that in his view, the mortgagee was in breach of his duty to the mortgagor. At this stage it seemed that the confusion referred to above had been resolved and that negligence on the part of the mortgagee was established as sufficient to constitute a breach of the duty owed to the mortgagor. However, Fox J. also made an ancillary finding of recklessness on the part of A.S.L. It was on this finding that the High Court based its judgment, electing not to decide the issue and thus condemning it once more to limbo. Though judicial prudence in avoiding decisions on issues not strictly relevant is often desirable, there is such confusion and conflict in the authorities on this important point, that the need for guidance from the High Court may well outweigh the desirability of such caution.

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[1] [1973] 1 A.L.R. 68. High Court of Australia; Menzies, Walsh and Mason JJ.
[2] *Blundell and Another* v. *Associated Securities Ltd* (1971) 19 F.L.R. 17, 28.

It has long been established, in both English and Australian cases that a mortgagee who exercises his power of sale fraudulently or with reckless or wilful disregard for the interests of the mortgagor, is guilty of a breach of that duty.[3] These same cases also suggest that default not amounting to fraud or recklessness would not constitute a breach of duty. For example, in their judgments in *Kennedy* v. *De Trafford*,[4] Lords Herschell and Macnaghten expressed the view that a mortgagee who acts in good faith is not liable for mere negligence in the exercise of his power of sale. Similarly in *Pendlebury's* case, Isaacs J. states that a mortgagee cannot

> on any principle known to the law be liable for mere negligence, because that assumes a standard of care owed to another.[5]

The problem was considered by the Court of Appeal in *Cuckmere Brick Co.* v. *Mutual Finance Ltd.*[6] After commenting on the unsatisfactory state of the authorities, all members of the Court decided to follow a line of cases not cited in *Kennedy* v. *De Trafford,* in which mortgagees had been held liable for their negligence.[7] Consideration of these cases prompted Lord Justice Salmon to remark:

> It would seem, therefore, that many years before the modern development of the law of negligence, the courts of equity had laid down a doctrine in relation to mortgages which is entirely consonant with the general principles later evolved by the common law.[8]

The decision of *Cuckmere's* case, and particularly the remark just quoted, assert a standard of care which Isaacs J. denies in *Pendlebury's* case, thus raising doubts as to the law in Australia. It should be noted that since in *Pendlebury* there was recklessness, the comments of Isaacs J. were strictly *obiter*. Indeed this is so in many of the cases where doubts have been expressed as to the mortgagor's right to relief when the mortgagee has only been negligent. In some the defendants have acted recklessly[9] and in others they have acted quite properly.[10] On the

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[3] *Kennedy* v. *De Trafford* [1897] A.C. 180; [1895-1899] All E.R. Rep. 408; *Barns* v. *Queensland National Bank* (1906) 3 C.L.R. 925; 12 A.L.R. 238; *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd* (1912) 13 C.L.R. 676; 18 A.L.R. 124.

[4] [1897] A.C. 180, 185, 192.

[5] (1912) 13 C.L.R. 676, 700.

[6] [1971] Ch. 949; [1971] 2 All E.R. 633; [1971] 2 W.L.R. 1207.

[7] *Wolff* v. *Vanderzee* (1869) 20 L.T. 353; *Tomlin* v. *Luce* (1889) 41 Ch.D. 573; (1889) 43 Ch.D. 191; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879) 4 App. Cas. 391.

[8] [1971] Ch. 949, 967.

[9] *Barns* v. *Queensland National Bank* (1906) 3 C.L.R. 925; *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd* (1912) 13 C.L.R. 676; *Lukass Investments Pty Ltd* v. *Makaroff* (1964) 82 W.N. (N.S.W.) (Pt. 1) 226.

[10] *Kennedy* v. *De Trafford* [1897] A.C. 180; *Farra* v. *Farras, Ltd* (1888) 40 Ch.D. 395; *Colson* v. *Williams* (1889) 61 L.T. 71; *Cuckmere Brick Co.* v. *Mutual Finance Ltd* [1971] Ch. 949.

other hand there are cases where negligence has been regarded as sufficient to constitute a breach of the mortgagee's duty, the most recent being *Cuckmere's* case.[11] Since the High Court in *Forsyth* v. *Blundell* based its decision on a finding of recklessness, there is (in this area of the law) considerable uncertainty which still remains despite clarification by Fox J.

Although it was the expressed intention of both members of the majority in the High Court not to decide the *Cuckmere* issue, both appear to have been influenced by the very assumption which the Court of Appeal in that case was at pains to discredit; namely that recklessness amounting to bad faith is necessary for a breach of duty.

This influence is obvious when, after the Court had found A.S.L. guilty of such a breach, the question arose as to the appropriate remedy. Should Blundell be confined to his rights against the mortgagee A.S.L. or should the contract with Shell be set aside despite an undisturbed lower court finding that Shell had no notice of the breach? The contract with Shell had not been completed and Blundell was seeking an injunction to prevent completion.

Walsh J. felt that there was no reason why Blundell's interest in the property should not prevail over Shell's. Not only did Blundell have a prior legal interest[12] but even if there had been competing equitable interests then Blundell's as the prior interest would, all other things being equal, prevail.[13]

It was argued on behalf of Shell that if a mortgagor has any remedy as a result of negligence in carrying out a sale, this must be limited, in all cases, to holding the mortgagee liable to account for the loss suffered. Walsh J. felt it was unnecessary to decide that point because of the finding of recklessness. But having said that he, in effect, did take a position on the point by specifically approving as both correct and applicable, the decision in *Waring* (*Lord*) v. *London and Manchester Assurance Co.*[14] upheld in *Property and Bloodstock Ltd* v. *Emerton*[15] that a mortgagee's exercise of his power is binding on the mortgagor, even before completion, unless it can be proved that the power was exercised in bad faith. The result is that in the event of a remedy being granted to a mortgagor able to establish only negligence, the remedy would be limited to holding the mortgagee liable for damage.

The proposition relied on is less authoratitive when one considers that in both these cases the mortgagee had exercised his power quite properly, even forbearingly, yet the mortgagor was claiming he had a right to redeem the mortgage at any stage before completion. It seems that the English courts assumed that only proof of bad faith would

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[11] *Tomlin* v. *Luce* (1889) 43 Ch.D. 191; *McHugh* v. *Union Bank of Canada* [1913] A.C. 299.

[12] Real Property Ordinance 1925-1963, s. 93(1) (A.C.T.). The mortgagor retains a legal interest in the mortgaged property.

[13] *Rice* v. *Rice* (1853) 2 Drew. 73; 61 E.R. 646.

[14] [1935] Ch. 310.

[15] [1968] Ch. 94, 115, 120, 123.

entitle the mortgagor to restrain the sale. Since however, the facts with which they were concerned did not point to improper conduct by the mortgagee, the remarks are *obiter* and it is doubtful that a situation in which a mortgagee would be held liable for mere negligence was contemplated. Certainly it is hard to see why a mortgagor should not be able to restrain completion of a sale once it is found that the mortgagee has breached his duty, whatever standard is applied. Of course the mortgagor's right to restrain completion of a contract for the sale of Torrens title land will be affected in jurisdictions where there is an equivalent of section 43A of the Real Property Act 1900-1970 (N.S.W.).[16] However the High Court did decide that section 94(2) of the Real Property Ordinance[17] does not give a purchaser from a mortgagee exercising a power of sale more protection than he would have under the general law.

In order to adhere firmly to the principle in *Waring's* case, Walsh J. had to equate the notion of recklessness with that of bad faith. This position, when compared with the view taken by Menzies J. in his dissenting judgment underlines the confusion inherent in the use of such concepts as *good faith, negligence* and *recklessness,* whose limits are undefined and perhaps undefinable. Menzies J. was the only member of the High Court who disagreed with the Supreme Court's finding of recklessness. He extended the concept of good faith to cover the duty alleged in *Cuckmere's* case, saying that

> To take reasonable precautions to obtain a proper price is but a part of the duty to act in good faith.[18]

However he coupled this liberal approach to the law with a very conservative view of the facts, declining to regard A.S.L.'s behaviour as anything but quite proper and as a result would have denied the relief sought by Blundell.

The decision of the High Court not to decide whether a mortgagee is in breach of his duty to the mortgagor if he is only negligent in carrying out the sale leaves the law on this point in a state of uncertainty which can only be resolved by a further decision of that court.

MARGARET STONE*

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[16] This section provides, so far as is relevant, "For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registerable, or which when appropriately signed by or on behalf of that person would be registerable under this Act shall, before registration of that dealing, be deemed to be a legal estate".

[17] This section provides, so far as is relevant, "All sales, contracts, matters and things made, done or executed in pursuance of the last preceding sub-section shall be as valid and effective as if the mortgagor . . . had made, done or executed them . . ."

[18] [1973] 1 A.L.R. 68, 70.

* B.A. (Syd.).