[2014] UKPC 30

Privy Council Appeal No 0043 of 2013

JUDGMENT

Nelson and others (Appellants) v First Caribbean International Bank (Barbados) Limited (Respondent)

From the Court of Appeal of St Lucia

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Carnwath

Lord Hodge

JUDGMENT DELIVERED BY

Lord Hodge

ON

3 September 2014

Heard on 9 June 2014

Appellant	Respondent
Jacqueline Perry QC	Peter I Foster QC
	Renee T St Rose
(Instructed by CW Law Solicitors)	(Instructed by Charles Russell LLP)

LORD HODGE:

1.

This appeal concerns the remedies available in St Lucia to a bank which lends money secured by a hypothec. A landslip severely damaged the principal property which had been provided as security for a loan. The borrowers sought to surrender the secured property and have challenged the right of the lender to raise a personal action to recover the loan.

The factual background

2.

In 1998 the appellants (‘the Nelsons”) reorganised their finances by obtaining two loans from the respondent (“the bank’). The loans were for EC$258,000 and EC$12,000. The bank by letter dated 30 April 1998 offered to make the loans to the Nelsons subject to conditions. The larger loan was to be secured by a “first registered hypothecary obligation” over two properties. The hypothecary obligation was to be in the names of Eugene Nelson and Ferlyn Nelson, his wife.

3.
The elderly parents of Eugene Nelson (“the parents”) owned the first secured property at Black Mallet, Castries. It was a large of land with a dwelling house in which they and the Nelsons lived and from which Eugene Nelson operated his jewellery business. The property at Black Mallet at that time was worth considerably more that the sums to be borrowed. Shortly before the landslip it had a value of EC$550,000. The second property was a larger vacant plot at Piat, Grande Riviere in Gros Islet, which was owned by Mr and Mrs Eugene Nelson.

4.
The letter of 30 April 1998 also contained the following conditions:

i)
the larger loan had a term of twenty years, interest at prime rate plus 2% and monthly repayments of EC$2,840.80 amortized over a maximum 20-year period;

ii)
the smaller loan had a term of three years, interest at prime rate plus 2.5% and was to be repaid with monthly payments of EC$401.44 amortized over a 3-year period;

iii)
the Nelsons were required to assign to the bank a comprehensive insurance policy on the building “for full replacement of the structure” and in default the bank had the right to effect the insurance and increase the Nelsons’ debt to meet the cost;

iv)
the Nelsons were also to assign a life insurance policy in the name of Eugene Nelson in the sum of the larger loan;

v)
the offer was to be accepted by 15 June 1998 and the funds were to be drawn down by 30 June 1998.

The borrowers were invited to sign and return a copy of the letter if they accepted the terms. Each of the Nelsons signed the copy letter on 8 May 1998.

5.
The Nelsons obtained both property insurance and life insurance. On 8 June 1998 they and Mr Nelson’s parents entered into a hypothecary obligation which was registered on 25 June 1998 under section 51 of the Land Registration Act 1984 as amended. The hypothecary obligation recorded that the Nelsons were the principal debtors and the parents were sureties for the sum of EC$258,000. In clause 3 the Nelsons as principal debtors and the parents as sureties covenanted to “pay the debts on demand and in the meantime by instalments from time to time stipulated by the mortgagee.” In clause 5 of the document the Nelsons and the parents also created a security in these terms:

"And as security for the repayment of the debts with interest thereon at the agreed rate, the principal debtor and/or the surety hereby mortgages and hypothecates unto the mortgagee thereof accepting the mortgaged premises."

6.
Thereafter, the Nelsons obtained the loans, complied with their conditions and paid the stipulated periodic instalments. Unfortunately, in October 1999 a landslip made the larger property at Black Mallet uninhabitable and as a result greatly reduced its value. The Nelsons were not able to service the debts and made no further periodic payments. In 2000 the bank sought to recover under the property insurance policy, which the Nelsons had taken out, but was unsuccessful as it did not cover the risk of landslip and in any event the Nelsons had failed to maintain the policy in operation after May 1999 and had reinstated it only after damage from landslip had become apparent. The bank sought to persuade the Nelsons to execute a promissory note for the debts but they refused to do so.

7.
On 14 March 2007 the bank commenced proceedings against the Nelsons for EC$346,000 inclusive of interest in respect of the larger loan and EC$13,894.83 inclusive of interest in respect of the smaller loan. In February 2010 the Nelsons executed a statutory declaration in which they purported to surrender both the Black Mallet and Piat properties to the bank in satisfaction of the claims against them. The bank rejected this purported surrender of the properties.

The legal proceedings

8.
After trial in the High Court, Belle J in a judgment dated 14 July 2011 found the Nelsons liable to pay the bank EC$358,723.09 plus costs. The Nelsons appealed his judgment and the Court of Appeal (Pereira CJ (Ag), Baptiste JA and Mitchel JA (Ag)) in an oral decision dated 26 June 2012 held that the bank was entitled to recover the debts in a personal action but reduced the period in which the bank was entitled to receive interest to five years because the Nelsons' obligation to make earlier interest payments had prescribed under Article 2129 of the Civil Code.

9.
The Court of Appeal gave the Nelsons final leave to appeal to the Board on 25 March 2013.

The issues in this appeal

10.
There were four principal issues in this appeal. The Nelsons argued:

i)
that as a matter of construction of the contracts they had not undertaken personal liability in relation to the loans;

ii)
that the only remedy available to the bank was a hypothecary action under Article 1942 of the Civil Code;

iii)
that the bank was not entitled to claim the full sums due on the loans but at most the arrears which had accrued at the date of the commencement of the proceedings as there was no default clause in the loan contracts; and

iv)
that the Court of Appeal had not given them a fair hearing and had not produced a reasoned judgment.

The bank challenged each of those assertions. Further, the Nelsons sought to raise an issue whether all the debts had been extinguished by prescription and another issue whether the bank had failed to mitigate its loss by negligently failing to ensure that the properties were effectively insured. The bank challenged their right to raise those issues at this stage of the proceedings. The Board deals with each issue in turn.

Issue 1: Personal liability

11.
First, in the Board's view the facility letter, which contained the conditional offer of the loans and which the Nelsons accepted, must be read together with the personal obligations in the hypothecary obligation which the Nelsons and the parents entered into in fulfilment of one of the conditions of the facility letter. In other words the personal obligations of the Nelsons are to be discovered by reading the facility letter along with the personal undertakings in the hypothecary obligation. In the facility letter, which the Nelsons accepted and which was implemented by the bank's making of the advances, the bank gave the Nelsons a loan for consumption as defined in Article 1662 of the Civil Code. One loan was to be repaid over a maximum period of 20 years while the other was to be repaid within 3 years. The personal obligation of the Nelsons to repay the larger loan was amplified by clause 3 of the hypothecary obligation, in which they and the parents undertook to pay that loan together with interest and charges on demand.

Issue 2: Remedy

12.
Secondly, the submission that the bank was confined to enforcing its mortgage is erroneous in that it fails to distinguish between the law of obligations and the law of real rights. This is a fundamental distinction in civilian legal systems. Obligations are a juridical relationship between persons, namely the debtor and the creditor. Real rights are concerned with things, such as an owner's right to possess a thing which can be asserted against the world. See, for example, Marcel Planiol, "Treatise on the Civil Law" (12th ed. 1939), Vol. 1 Part 2, pp.268-273. A registered hypothec or mortgage over land is a real right which is accessory to the debt owed. Article 1908 of the Civil Code states:

"Hypothec is a real right, and is a charge upon immoveables specially pledged by it for the fulfilment of an obligation, in virtue of which charge the creditor may cause the immoveables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this Code."

Similarly, Planiol defined a mortgage or hypothec thus (Vol. 2 Part 2 p. 472):

"The mortgage is a real security which, without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold, in whosoever hands it is found, and get paid from the proceeds in preference to the other creditors."

13.
The hypothecary obligation contained both personal obligations of the Nelsons and the parents, and also the security. The former could be enforced by a personal action. See William Marler, The Law of Real Property - Quebec (1932) paras 940-941. The security was accessory to the loan and the bank had the option of enforcing the loan but not seeking to realise the security.

14.
Where a creditor seeks to realise the security, the Civil Code (Art 1942) provides:

“In order to secure his rights the creditor has two remedies, namely, the hypothecary action and the action to interrupt prescription. …”

This Article is concerned with enforcing or preserving a security and does not define exhaustively the remedies to enforce a debt. The object of the hypothecary action, as Article 1946 of the Civil Code states, is to have the holder of the immovable surrender it so that it can be sold. William Marler (para 942) stated:

“The pure hypothecary action is real and not personal. It does not arise from any personal obligation contracted by the holder of the immoveable towards the creditor, even when there is such an obligation. It is the exercise of the creditor’s right of hypothec, in virtue of which he may follow the immoveable hypothecated and cause it to be sold in the hands of whomsoever it may be, so that he is paid out of the proceeds.”

The action to interrupt prescription, to which article 1942 refers, is an action to secure recognition of the hypothec. It would be appropriate where the hypothecary creditor, who seeks neither payment nor surrender of the secured immovable, wishes to preserve his security against a third party holder of the immovable who might otherwise obtain an unencumbered title to it by liberative prescription. See Marler, para 975 and Article 2085 of the Civil Code.

15.
Further, as the bank did not pursue a hypothecary action, the Nelsons did not have the right to surrender the secured immoveables under Article 1960 of the Civil Code. In addition, no issue arises as to the extent of the destruction of the security subjects and the effect of that destruction on continued validity of the hypothec. Neither the purported surrender nor the damage which the landslip caused to the hypothecated property affects the bank’s right to pursue its personal action as creditor in a personal obligation.

Issue 3: The bank’s entitlement

16.
Thirdly, the bank was entitled to sue for the sums outstanding on the two loans as the Nelsons had defaulted on their obligation to make the periodic payments. Article 999 of the Civil Code provides that a creditor may place a debtor in default by a written demand or the commencement of a suit. Article 1001 provides for a claim for damages for non-fulfilment of an obligation once there has been a default. Because this third issue was not raised in the courts below, there was no evidence of a written demand. But the raising of the action which is the subject of this appeal was sufficient to place the Nelsons in default. The bank is therefore entitled to seek the full sums due under the loans as damages for breach of contract.

Issue 4: The Court of Appeal’s approach

17.
Fourthly, the Board sees no basis for criticising the Court of Appeal for not producing a written judgment. The Nelsons advanced seven grounds of appeal which can be focused under four headings:

i)

that the bank was obliged to raise a hypothecary action under Article 1942 of the Civil Code, and that the damage to the hypothecated property had extinguished the hypothec (grounds 1, 4, 6 and7);

ii)
that the facility letter was not a contract (ground 2);

iii)
that the bank had failed to prove the correctness of the sums which it claimed (ground 3); and

iv)
that the smaller loan had prescribed and that instalments of interest on the larger loan had prescribed (ground 5).

The Court of Appeal had read each party's skeleton arguments before the hearing. In the discussion which followed the members of the Court pointed out, unexceptionably, that the Nelsons had signed the facility letter, obtained a loan and were obliged to repay it and also that there was no obligation on a creditor to enforce its security rather than sue on its debtor's personal obligation. In relation to the third heading, Pereira CJ (Ag) and Mitchel JA (Ag) pointed out (a) that the Nelsons had not given evidence that the bank's figures were wrong and (b) that the judge at first instance, after hearing the bank's witnesses, had stated that, subject to one discrepancy, he was satisfied on a balance of probabilities that the sums claimed by the bank were due. The Court considered the defence of prescription and held (a) that the smaller loan had not prescribed and (b) that interest payments due more than five years before the action was raised on 14 March 2007 had prescribed.

18.
In the Board's view, the Court of Appeal was correct to state that the interest payments due before 14 March 2002 had prescribed as Article 2111 of the Civil Code has a five-year prescription for interest payments. The Court was also correct in holding that the smaller loan had not prescribed. The Board interprets the loan agreement as requiring repayment of the loan by the end of the three-year period and does not construe the instalments as separate debts for the purposes of prescription, except in relation to the interest component of the instalments to which Article 2111 of the Civil Code applies. The smaller loan reached its date of maturity on 30 June 2001 and the outstanding principal sum became due at that date. Under Article 2121(4) of the Civil Code the six-year prescriptive period for such a claim, being of a commercial nature, ran from the date of maturity. Thus the bank had until 30 June 2007 to raise proceedings in relation to that loan, and did so in time.

Prescription

19.
The Board cannot adjudicate upon the wider argument on prescription in relation to the larger loan which Ms Perry QC sought to raise at the hearing. It is not open to the Nelsons to advance a defence of prescription before the Board which they did not advance at earlier hearings of this case. At first instance counsel for the Nelsons did not argue after trial that the claims had prescribed. In the Court of Appeal the challenge was confined to (a) the smaller loan and (b) interest payments. Further, if the Nelsons had wished to argue that the bank had placed them in default in respect of the larger loan and had thereafter failed to sue for damages in a timely manner, they would have had to explore in evidence when the bank demanded repayment of the loan. There was, as the Board has said, no evidence of any written demand for repayment, which Article 999 of the Civil Code requires in this context as an alternative to the commencement of a suit.

20.
In any event, the Board questions whether Article 2121(4) applies to a claim for damages following on a contractual default as that Article speaks of the six-year prescriptive period running from "maturity". Article 917A provides no alternative answer as it imports only the English common law in relation to obligations and not the English statutory provisions on limitation. While it is not necessary or appropriate for the Board to decide the point as it has not heard full submissions, it appears very arguable that claims for damages for breach of a contractual obligation are subject to the thirty-year prescription under Article 2103 of the Civil Code. See, by way of analogy, Senez v Montreal Real Estate Board [1980] 2 S.C.R. 555, which concerned a similar issue in the Quebec Civil Code as it then was worded.

Mitigation of loss

21.
Finally, the Nelsons led no evidence at first instance in support of their assertion that the bank had been negligent in relation to the property insurance policy. The primary obligation to obtain property insurance rested on them and not the bank. There was no evidence to support a view that the bank owed its customers a duty of care to ensure (a) that the insurance policy covered landslip and (b) that its customers renewed the policy in a timely manner. There is also an unaddressed issue of causation as the policy was not in force when the landslip first occurred. The issue of the bank's negligence was not raised before the Court of Appeal. The Board sees no basis for asserting this defence as a counter claim at this stage of the proceedings.

Conclusion

22.
The Board will humbly advise Her Majesty that the appeal should be dismissed.