Privy Council Appeal No. 110 *of* 1930.

William Abercrombie Shaw - - - - - *Appellant*

v.

Frederick Chater Jack - - - - - - *Respondent*

FROM

HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH APRIL, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD TOMLIN.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The respondent in this appeal was until June, 1926, an administrative officer of the Kenya Civil Service. He went to England on leave in March of that year. Shortly before his departure he arranged with the appellant, who was an advocate and solicitor practising in the Colony and having his office in Eldoret, for the investment of certain moneys during his absence. Somewhat intricate instructions were given by him to the appellant, which it is not necessary to consider in detail. The result, so far as this appeal is concerned, was that the appellant invested for him on the 25th August, 1926, a sum of £2,200 upon the mortgage of a farm in the Trans Nzoia district, belonging to a Mrs. Driscoll, and comprising 1,174 acres.

The respondent returned to Kenya as a settler in October, 1926, by which time the value of farm lands in this district was depreciating greatly. He was unable to realize his security, and in March, 1929, filed a suit against the mortgagor and brought the property to sale, when it fetched a little over £1,800. This left a deficit, as shown by the final decree in the suit, of about £660. The mortgagor was subsequently adjudicated a bankrupt, and

the respondent, being unable to recover anything from her estate, sued the appellant in the Supreme Court of Kenya, seeking to hold him responsible for the deficit on the ground of professional negligence. He also claimed an additional sum by way of damages, but this claim has been abandoned.

A considerable body of evidence was adduced at the trial, both oral and documentary, with the result that the suit was dismissed, the trial Judge holding that negligence had not been established, and that the security was adequate at the date it was taken.

The respondent appealed to H.M.'s Court of Appeal for Eastern Africa, the learned Judges of which reversed the decree of the Supreme Court and entered judgment for the respondent for 13,230·30 shs., being the amount claimed as the deficit under the mortgage decree, with interest at the rate of 6 per cent. from the date of that decree.

The judgment of the Court of Appeal was delivered by Sheridan J., his colleagues, Pickering C.J. and Thomas J., concurring. The conclusion at which they arrived was that it was the duty of the appellant to have had a professional valuation of the farm made before he advanced the money, that he had not done so, and that he was consequently guilty of negligence. They seem to have thought that it necessarily followed that he was bound to make good the respondent's loss, which they assessed at the sum above stated.

If the only issue in the case was whether the appellant had been negligent in this respect, their Lordships would have had no difficulty in agreeing with the conclusion of the Court of Appeal. They think that it was the duty of the appellant to have had a proper valuation made, and that what he did in this behalf was most perfunctory. If he chose to rely, as he evidently did, mainly upon his own general knowledge of farms in the Trans Nzoia district, he undoubtedly did so at his own risk, and if his judgment is shown to have been at fault, and the loss which the respondent suffered was the result of this breach of duty to his client, he could not escape the liability which the Court of Appeal placed upon him.

But it does not, their Lordships think, necessarily follow that the loss was the result of the appellant's negligence. There was admittedly a great depreciation in the value of farm lands in this district by the end of 1926, and their Lordships are satisfied on the evidence that this took place after August of that year, and that in August it could not reasonably have been foreseen. It is the appellant's case that at the time of the advance this particular farm was of such a value that £2,200 could safely be advanced upon it, and that the respondent's loss was ascribable solely to what has been referred to in the proceedings as the "slump" which took place within the next few months.

The learned Judges of the Court of Appeal do not appear to have addressed their minds to this aspect of the case, and have come to no clear conclusion as to the adequacy of the security

at the date of the mortgage. The trial Judge did, one of the issues he set before himself for decision being "(3) Was the security adequate for the amount advanced," and this he found, as above stated, in the appellant's favour. If this finding was justified by the evidence, as the appellant claims that it was, their Lordships think that the respondent's suit was rightly dismissed.

The evidence establishes that a safe margin in the case of a mortgage on farm lands in this part of the Colony is about a half, so that in the particular case, if the farm was worth approximately £4,400, the transaction could not be attacked. Counsel for the respondent does not dispute that under the circumstances above stated it was upon him in the first instance to show that this was not the fact, but he contends that the burden, so far as it lay upon him, was sufficiently discharged by certain facts as to which there is no dispute, and that the affirmative evidence as to value on behalf of the appellant is at least inconclusive.

First of all, it is admitted that when ultimately sold, apparently about the beginning of 1928, the farm fetched only £1,820 or thereabouts. This, however, is obviously no test of its value in August, 1926. The general depression in the district (the respondent speaks of it as "a heavy slump") had affected values: the farm had been lying derelict for over a year and was infested with cooch; and, as one of the respondent's chief witnesses admits, "auction sales are no indication of value of a farm," and their Lordships think this must be specially applicable to a forced sale under a mortgage decree. It is also, in their opinion, material that the sale was held without notice to the appellant, though it was obvious that he would be vitally interested in the result.

In the next place it is admitted that the farm had been on the books of two local agents since April, 1926, for sale at the price of £6,000, including stock, etc., valued at something over £500, but that no offer had been received for it. In June or July it was auctioned, but only two bids were received, the highest of which was £1,200. The auctioneer, a Mr. Davis, was called by the respondent and said that he understood the reserve then was £3,000, and there is no doubt that the price was reduced in the books of one of the agents, a Mr. Pharazyn, who was also called for the respondent, to this figure somewhere about the same time.

Their Lordships think that there would have been more force in these facts if they had been put in cross-examination to the appellant's witnesses. It is obvious that some other explanation was possible than that the £3,000 then represented the outside value of the farm. It is, for instance, clear that the owner, Mrs. Driscoll, was in extreme need of cash to take her to England, and she may have been ready to sell at a considerable sacrifice for this purpose. She did in fact sail as soon as the mortgage was put through. One of the witnesses called for the appellant was a Mr. Martin, who had been at the time of the mortgage in charge of a local sub-office of the appellant. He had been looking after Mrs. Driscoll's affairs before the mortgage.

had signed the particulars of the farm in one of the agent's books, had given instructions for the auction, and was said to have authorised the reserve of £3,000. He had also written to the appellant on the 30th July, 1926, that he had seen Mr. Pharazyn, who had told him that the valuation of the farm—*i.e.*, the land alone—was about £4 an acre, equivalent to a total value of approximately £4,800. At the time he gave his evidence he had left the employ of the appellant and was a member of the firm of solicitors who were acting for the respondent. Despite these facts no question was put to him in cross-examination about the abortive auction or the reduction of the price of the farm from £6,000 to £3,000.

The most important witness perhaps for the appellant was a Mr. Kirk, the other agent who had been entrusted with the sale of the farm in April, 1926. He had deposed that he knew the whole of the Trans Nzoia district, including the mortgaged farm, thoroughly: that he thought £6,000 was a reasonable price to ask for the farm in April, 1926: that in his opinion the land was worth from £3 to £4 an acre at the end of August, and that it was not unreasonable at that time to advance £2,200 upon the security of it. No question was put to him in cross-examination about the auction, nor indeed was any attempt made to discredit his evidence at all, except as to the date when the "slump" commenced, and on this he was emphatic that there was no sign of it in August, 1926.

On this state of the evidence their Lordships would be unable to hold that the respondent had discharged the burden of proving that the security was not reasonably adequate for the advance.

But apart from any question as to the burden of proof, which may be of little importance after the evidence on both sides has been fully heard, their Lordships are not prepared to dissent from the conclusion come to on this question by the trial Judge. In the opinion of Mr. Pharazyn, who may be regarded as the respondent's principal expert, and in whose business the respondent had thought it desirable to invest some part of his savings, the land was worth from £3 10*s.* to £4 per acre. It is true that in cross-examination he was unable to agree that at £4 the value would give "an ample margin" for the advance of £2,200, but as an expert called for the respondent he could hardly be expected to go as far as this, nor was any attempt made in re-examination to elucidate this somewhat equivocal opinion. Mr. Martin, who could, under the circumstances already referred to, hardly be criticised as a partisan of appellant, evidently thought that at that figure the advance was a safe one.

The learned Judge had the witnesses before him, and his opinion as to their respective weight and credibility cannot lightly be set aside. He regarded both Mr. Kirk and Mr. Martin as important and reliable witnesses, and no criticisms on their evidence are made by the Court of Appeal. On their statements

it is reasonably clear that the land was worth in August, 1926, something in the neighbourhood of £4 per acre, or a sum which may fairly be taken to be the double of the sum advanced. Their Lordships are therefore unable to say that the learned Judge was wrong in finding that the security was adequate.

It was urged in the Court of Appeal that the appellant must have known that the personal covenant of the mortgagor was valueless, and that this of itself was sufficient to entitle the respondent to recover the damages claimed. There is no doubt that the lady's affairs, mainly owing to trouble with a drunken husband, were involved, and that her financial position must have been known to the appellant. But in addition to the farm land she had a half share in a shop, which in the past had been a profitable concern. There were stock and moveables still on the farm of some value, and 175 acres were under maize, from which a crop of 2,000 bags was expected, at the current price of 9*s*. 6*d*. per bag. It is not disputed that she was a hard-working woman, and if she had not been impelled by family reasons to leave for England it is not unreasonable to suppose that she would have been able to meet her liabilities. By the terms of the mortgage deed six months' interest was paid in advance, and the principal could be called in by three months' notice after the 31st December, 1926, or earlier, if the farm was not properly cultivated. This was in accordance with the respondent's instructions by which (see his letter of the 4th March, 1926) he expressed the wish that the mortgage should run only till the 31st March, 1927. Had the respondent taken steps then to get the property sold, it is at least possible that no loss would have occurred. The mortgagor's bankruptcy did not supervene till November, 1928.

Their Lordships are also told that mortgage transactions in the Colony are governed by the Indian Transfer of Property Act, 1882, under section 90 of which the personal covenant of the mortgagor can only be enforced after the property has been sold by the Court. Its value therefore as a means of speedy realization is obviously of little account.

It has also been pointed out that the insufficiency of the personal covenant, though referred to in the plaint as " of no commercial value," is not charged as negligence. Para. 14 states that the negligence " consisted in the defendant making the said advance with knowledge that the security was not in accordance with the plaintiff's instructions and was inadequate for the amount involved or alternatively making that advance without due and proper enquiry as to the sufficiency of the security." It is not suggested that any question as to the personal covenant was raised in the respondent's instructions for the mortgage, or that any reference was made to it at either of the interviews which the respondent had with the appellant after the former's return to Kenya in November, 1926, and at which it is clear that the mortgage was discussed, and their Lordships feel little doubt

that but for the " slump," to which the loss was in fact due, nothing would have been heard about it.

Under these circumstances, and having regard to the wide margin allowed for, their Lordships do not think that the personal covenant was of much importance, or that the decree of the trial Judge can be impugned on this ground.

It has also been contended before the Board that in making the advance the appellant was actuated more by a desire to meet the necessities of the mortgagor, who was also his client, than by a regard for the interests of the respondent. But their Lordships think that if the conclusion come to by the trial Judge as to the adequacy of the security was justified, as they hold it was, this consideration even if it had been brought home to the appellant, would have been immaterial. The loss which the respondent incurred was due, not to the negligence of the appellant, but to the " slump " for which he was not responsible, and this in truth is the real answer to the respondent's claim.

For the reasons given their Lordships will humbly advise His Majesty that this appeal should be allowed ; that the decree of the Court of Appeal should be discharged, and that of the trial Judge restored. The respondent must pay the costs of the appellant in the Court of Appeal and before this Board.

In the Privy Council.

WILLIAM ABERCROMBIE SHAW

v.

FREDERICK CHATER JACK

DELIVERED BY SIR GEORGE LOWNDES.

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