

(1932) 04 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 110 of 1930

William Abercrombie Shaw

APPELLANT

Vs

Frederick Chater Jack

RESPONDENT

Date of Decision : 19-04-1932

Acts Referred:

Citation : (1932) AIR(PC) 194

Hon'ble Judges : George Lowndes, Lord Tomlin, Lord Blanesburgh, JJ.

Advocate : B. Bensley Wells, Walter Greaver, Blanco White, Leslie Scott, for the Appearing Parties.

Judgement

Sir George Lowndes, J.

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 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 1920, by which time the value of farm lands in this district was depreciating greatly. He was unable to realise 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. (After discussing the evidence their Lordships held that the respondent had not discharged the burden of proving that the security was not reasonably adequate for the advance and proceeded). Their Lordships are also told that mortgage transactions in the Colony are governed by the Indian Transfer of Property Act, 1882, under S. 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 of 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 inquiry 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.