IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 200 of 2010

BETWEEN	:	**RAAJESHWARAN NAIR (f/n Keshwan Nair)** of 105 Laucala Bay Road, Suva
		PLAINTIFF
AND	:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** a duly registered body having its registered office at Level 1 ANZ House 25 Victoria Parade, Suva.
		FIRST DEFENDANT
AND	:	**RAMESHWARAN NAIR (f/n Keshwan Nair)** last known address Melbourne, Australia, last known occupation Manager Projects and Transformation Pacific Operations Group previously known as Quest. Current address and occupation unknown to the Plaintiff
		SECOND DEFENDANT

BEFORE	:	**Hon. Justice Kamal Kumar**
COUNSEL	:	Mr A. K. Singh for the Plaintiff Ms B. Narayan for the First Defendant
DATE OF HEARING	:	15 August 2013
DATE OF RULING	:	1st November 2013

RULING

1.0 INTRODUCTION

1.1 On 21 May 2013 Plaintiff filed Summons for Interim Injunction seeking following Orders against the First Defendant:-

> ***"1. An Order for an injunction to restrain the Defendant Australia and New Zealand Banking Group Limited from transferring or conveying Certificate of Title No. 10153 Registered in the names of Raajeshwaran Nair and Raameshwaran Nair to Crystal Properties Limited pursuant to a mortgagee sale or in any other way whatsoever exercising its rights as mortgagee to transfer or to convey the aforesaid property to Crystal Properties Limited or to any other party or parties pursuant to or in the exercise of the power of sale as a mortgagee or in any way advertising or placing the aforesaid property on mortgagee sale until the determination of this action or until further order of this Court.***
>
> ***2. An order after inter parte hearing that the action herein be consolidated with High Court of Fiji Action No. HBC 290 of 2011S wherein the Plaintiff is Australia and New Zealand Banking Group Limited against the Defendant Crystal Properties Limited.***
>
> ***3. An order for costs in the action."***

1.2 Parties filed following Affidavits:-

Plaintiff

(i) Affidavit in Support of Raajeshwaran Nair, the Plaintiff sworn and filed on 21 May 2013;

Defendant

(i) Defendant relied on the Affidavit of Mohid Dean sworn and filed on 14 July 2010 (hereafter referred to as **"Dean's 1st Affidavit"**);

(ii) Affidavit in Reply of Mohid Dean sworn and filed on 8th July 2013 (hereinafter referred to as **"Dean's 2nd Affidavit"**).

1.3 Application for Interim Injunction was heard on 15 August 2013 on which date

Plaintiff and First Defendant handed in their submissions and made oral submissions by their Counsel.

2.0 BACKGROUND FACTS

2.1 The property known as Lot 4 on Deposited Plan No. 2337 containing 35.2 perches comprised and described in Certificate of Title No. 10153 was initially owned by Gopal Nair (f/n Krishna Nair) (hereafter referred to as the **"mortgage property"**).

2.2 Upon death of said Gopal Nair the mortgage property was on or about 11 May 2005 transferred to the Plaintiff and Second Defendant, the grandchildren of said Gopal Nair.

2.3 Plaintiff and Second Defendant are lawful brothers.

2.4 On or about 9 November 2005 First Defendant approved a loan in the sum of $230,000.00 to Plaintiff and Second Defendant.

2.5 At paragraph 6(i) of Dean's 1st Affidavit he stated that said loan was for purchase of a residential investment property at 105 Laucala Bay Road, Suva and to extend property by extending flats (**"1st loan"**).

2.6 However, offer letter ("Annexure A" of his said Affidavit) states the purpose of loan as "purchase residential investment property at Samabula".

2.7 The discrepancy is immaterial as it is undisputed fact that the loan was for purchase of and improvements to the mortgage property.

2.8 The loan by First Defendant to Plaintiff and Second Defendant was secured by mortgage over the mortgage property registered on 22 November 2005 (hereinafter referred to as **"the mortgage"**).

2.9 On or about 8 August 2006 First Defendant approved a loan of $350,000.00 to the Plaintiff and Second Defendant for construction of additional flats (**"2nd loan"**).

2.10 On or about 12 July 2007 First Defendant approved a further loan of $150,000.00 to the Plaintiff and Second Defendant to complete retaining wall and fencing (**"3rd loan"**).

2.11 All three loans were to be paid by monthly instalments by the Plaintiff and

Second Defendant as follows:-

(i) 1st loan : $1,737.26
(ii) 2nd loan : $3,143.49
(iii) 3rd loan : $1,490.33

2.12 On or about 23 April 2008 all three loan accounts with total balance of $773,015.25 had been amalgamated as one account (**"Amalgamated Account"**) as appears in paragraph 49 and Annexure "MD8" of Dean's 1st Affidavit.

2.13 Sometimes in January 2009 the Second Defendant who was at all material times employed by Quest (Fiji) Ltd, a subsidiary or related company of First Defendant moved to Australia to work at First Defendant's Head Office in Melbourne.

2.14 The Plaintiff and Second Defendant defaulted in their loan repayments and as a result First Defendant through its Solicitors served Notice of Demand dated 28 April 2010 on the Mortgagors.

2.15 Failing compliance with Notice of Demand First Defendant caused the mortgage property to be advertised in the local dailies on three occasions in June 2010 with tenders closing on 2 July 2011.

2.16 On 5 July 2010, that is after three days of close of tenders Plaintiff through his then Solicitors instituted this proceeding by filing Statement of Claim and Ex-Parte Notice of Motion for Interlocutory Injunction.

2.17 Notice of Motion was issued to be called as Inter-parte Motion on 15 July 2010 when parties were directed to file Affidavits and Submissions and Motion was listed for hearing on 10 August 2010.

2.18 On 10 August 2010 Plaintiff's Motion for Injunction was struck out by His Lordship Justice Hettiarachchi (as he then was) for non-appearance of Plaintiff or his counsel.

2.19 Plaintiff then filed Motion to re-instate the Motion for Injunction which was returnable on 20 August 2010 on which day Plaintiff's Notice of Motion for Injunction was re-instated. Injunction Application was adjourned to 31 August 2010 at 2.30pm for hearing.

2.20 On 31 August 2010 there was no appearance by Plaintiff or his Counsel and His Lordship Justice Hettiarachchi struck out the Application for Injunction.

2.21 On 6 September 2010 Plaintiff filed another Application to re-instate the Motion for Injunction and by Ruling delivered on 25 January 2011 His Lordship Justice Hettiarachchi (as then he was) dismissed Plaintiff's Application for re-instatement.

2.22 On 2 March 2011 Messrs Q.B. Bale & Associates filed Notice of Change of Solicitors on behalf of the Plaintiff.

2.23 On 7 April 2011 Messrs Chan Law filed Notice of Change of Solicitors for the Plaintiff.

2.24 On 27 April 2011 Plaintiff filed Notice to Act in Person.

2.25 On the same day Plaintiff filed Application to Amend Statement of Claim and after various adjournments leave was granted on 1st March 2013 for Plaintiff to file Amended Statement of Claim.

2.26 On 2nd April 2013 Plaintiff filed Amended Statement of Claim.

2.27 On 21 May 2013 Messrs Singh & Singh filed Notice of Appointment of Solicitors on behalf of the Plaintiff together with Application for Interlocutory Injunction.

3.0 BREACH OF REAL ESTATE AMENDMENT DECREE 2011

3.1 Plaintiff at paragraph 31 of his submission alleges that Solicitors for First Defendant by continuing to act for the First Defendant in the mortgagee sale transaction has breached the provisions of Real Estate Agents Amendment Decree 2011.

3.2 I tend to agree with First Defendant's Counsel's submission that the Decree is not applicable to the advertisement and receipt of tenders in this action as the advertisement and receipt of tenders took place well before the Decree was enacted.

3.3 The Decree does not stop Legal Practitioner from preparing the legal documents to convey the mortgaged property to the Purchaser (Section 2(ii)(6).

4.0 APPLICATION FOR INTERLOCUTORY INJUNCTION

4.1 First Defendant in its submissions highlighted that the Application before the

Court is second Injunction Application.

4.2 I have perused the Court records and it is undisputed that Plaintiff's First Application for Interlocutory Injunction was dismissed due to non-appearance of the Plaintiff or his Counsel and as such it was not dealt on merits.

4.3 Therefore there is nothing stopping the Plaintiff from filing fresh Application for Interlocutory Injunction.

4.4 During the course of oral submissions Counsel for the Plaintiff informed the Court that Plaintiff is not challenging the validity of the mortgage and First Defendant's right to exercise it's powers under the mortgage but is challenging the manner in which the tender process was handled and manner of awarding tender to the successful tenderer.

4.5 Both Counsel for the Plaintiff and the First Defendant relied on the principles stated in **American Cyanamid *v.* Ethicon Co. Ltd** [1975] 1AllER 504 in relation to Application for Interlocutory Injunction whereby the Court has to determine:-

(i) whether there is a serious question to be tried;

(ii) whether balance of convenience lies in favour of granting or refusing interlocutory injunction and in determining balance of convenience it must be considered whether damages would be an adequate remedy.

4.6 The applicability of the above principle in respect to Application for Interlocutory Injunction to restrain mortgagee sale was doubled in favour of principles in **Inglis *v.* Commonwealth Bank of Australia** (1971-72) 126 CLR 161; **Strategic Nominees Ltd. (In Receivership) *v.* Gulf Investments (Fiji) Ltd** [2011] FJCA 23; ABU 0039 of 2009.

4.7 I considered this issue in my Ruling in **Fun World Centre (Fiji) Ltd. *v.* Bank of Baroda** Civil Action No. 169 of 2003S (4 October 2013) and after analysing the relevant authorities of the Fiji Court of Appeal and this Court I formed the view that principles in ***American Cyanamid*** and ***Inglis*** does not contradict but supplement each other.

Serious Questions To Be Tried

4.8 First Defendant at paragraph 33 and 34 of Dean's 2nd Affidavit admit that there are triable issues to be determined by the Court.

4.9 First Defendant's Counsel during her oral submissions did concede that there is serious question to be tried but submitted that these questions are not a basis for restraining First Defendant from exercising its power of sale under its mortgage.

4.10 For avoidance of doubt I must make it clear that reference to "parties" in the Ruling will mean the Plaintiff and First Defendant only as Second Defendant has not been served and has not taken part in the proceedings upto this stage.

4.11 From the submissions of the parties it is apparent that the issues that need to be tried are:-

(i) whether the First Defendant acted in good faith towards the mortgagor during the tender process;

(ii) whether there has been collusion between the First Defendant by it's officers and the successful tenderer.

4.12 Since the parties have conceded that there is serious question to be tried I will not deal with this issue anymore and will consider the balance of convenience and principle in ***Inglis***.

Balance of Convenience

4.13 In **Warner v. Jacob** [1882] 20 Ch D 220 His Lordships Justice Kay stated as follows:-

> ***"The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. IF HE EXERCISES IT BONA FIDE FOR THAT PURPOSE, WITHOUT CORRUPTION OR COLLUSION WITH THE PURCHASER, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."***

4.14 The above principle has been adopted and applied by this Court.

Dean *v.* Australia and New Zealand Banking Group [2011] FJHC 477; HBC 156.2000L (29 August 2011)

Myong Chung Kim *v.* Fiji National Provident Fund [1998] FJHC 172: HBC 568j of 1998 (14 December 1998).

4.15 In **Pendlebury *v.* The Colonial Mutual Life Assurance Society Limited** (1912) 13 CLR 676, in dealing with mortgagee's responsibility in the conduct of sale of mortgaged property His Honour Justice Jacobs stated as follows:-

> ***"If the right to sell is a power which, as laid down in Warner v. Jacob (4) is given to him not as a trustee for the mortgagor but for his own benefit, it must carry with it the consequence that with respect to the way he carries out the sale, not merely is he not liable as for breach of trust, but also that he owes no duty of care to the mortgagor, so long as he is bona fide acting within the limits of his power. His rights under the power are adverse to the mortgagor. He cannot, therefore, on any principle known to the law be liable for mere negligence, because that assumes a standard of care owed to another. The mortgagee is however confined by the expressed and implied limits of his power and by nothing else. Lord Lindley said in Free Church of Scotland (General Assembly of) v. Overtoun (Lord) (5): - "There is a condition implied in this as well as in other instruments which create power, namely, that the powers shall be used bona fide for the purpose for which they are conferred." And in a later case, British Equitable Assurance Co. Ltd. v. Baily (6), the same learned Lord observed regarding the power of a company to alter its by-laws: - "Of course, the powers of altering by-laws, like other powers, must be exercised bona fide, and having regard to the purposes for which they are created, and the rights of persons affected by them." (page 700-1)***

4.16 At page 701 His Honour spoke of two extreme views in respect to mortgagee's responsibilities as follows:-

> ***"Two extreme views may be mentioned to be put aside. To say that so long as he exercises his power with the real object of getting his debt paid he is absolved, is too low a standard of responsibility, because that loses sight of his obligation to deal fairly with the mortgagor's residual property. On the other hand, to make him answerable for mere carelessness in realization, however anxious to act fairly by the mortgagor, is placing the standard too high and would not only be cutting across principles, but would become a serious impediment to, and, by recoil, impose a heavy burden upon, needy borrowers. The mortgagee, when***

the permitted time arrives, is not bound to wait for his money, merely because the mortgagor might profit by delay. And as ex hypothesi he is engaged in a lawful endeavour to get back money which is overdue, he cannot be expected to further increase the advances of the mortgagor by expending further sums for his sole possible benefit, in the shape of a higher surplus price."

4.17 His Honour further stated as follows:-

"It would be so grossly unfair to the mortgagor who is unable to protect himself that the Court would find it difficult to resist the conclusion that the mortgagee had no intention of observing Lord Lindley's rule in the British Equitable Case (1) already quoted. By "recklessness" then, I understand a disregard of the mortgagor's interest, ignoring his property in the possible surplus, in short, not caring whether its fair and proper value was obtained or not, as distinguished from the mere want of care or prudence in the course of honestly trying to conserve it.

The first is not compatible with good faith in enforcing the power of sale; the second is entirely consistent with good faith in carrying out its purpose, though lacking in skill or attention.

The question in the present case is whether the evidence shows a reckless disregard by the respondents of the appellant's interest as mortgagor."

4.18 In ***Pendlebury's*** case:-

(i) The mortgagee advanced a sum of £600 against an Agricultural lease which at time of lending was valued at £1,250.00 by mortgagee's valuer;

(ii) Some eighteen months after the loan was granted mortgagor defaulted in its agreed repayments and as a result mortgagee exercised its power of sale;

(iii) The mortgaged property being agricultural land was located in outskirts of Melbourne in the Parish of Curyo, County of Karkarooe;

(iv) The mortgagee engaged an auctioneer to sell the mortgaged property by auction;

(v) The auction sale was advertised in Angus and Age two dailies circulated in Melbourne;

(vi) No mention was made in the advertisement about the standing crops and the fertility of the land and type of soil;

(vii) The advertisement only stated that land was situated about seven miles from Curyo Railway Station (no direction was given);

(viii) It was well known fact that land to north-west of Curyo was (where mortgaged land was situated) very good whilst land to the east was very poor;

(ix) Mr Gill an employee of the mortgagee at the time of mortgagee sale arranged the auction sale and oversaw all the dealings to the extent of fixing reserved price, arranging Solicitor for the bidder;

(x) Mr Gill fixed the reserve price at £714 which comprised of £674 (debt), $-£30 (commission) and £10 (charges);

(xi) Mr Gill prior to successful bidder made his bid disclosed reserve price to him;

(xii) At the time of sale mortgaged property estimate value of mortgaged land was £1,920.00 to £2,000.00 (**page 695 of the Judgment**);

(xiii) It was alleged that mortgagee acted in reckless disregard to mortgagor's interest during sale of the mortgage property by inadequate advertisement (i.e. failure to advertise in local community newspaper) and fixing price far less than the value of the mortgaged property;

(xiv) Mortgagor initiated proceedings after the property was sold to the successful bidder who then on **sold** the mortgaged property;

(xv) The trial judge held that the mortgagee acted bona fide and that there was no collusion between mortgagee and the successful bidder;

(xvi) On mortgagor's appeal to the High Court of Australia it was

found that the mortgagee through Gill acted in total disregard to mortgagor's interest and allowed mortgagor's appeal by setting aside the trial mortgages owner and resulting the matter to Supreme Court ascertain the amount mortgaged property would have been sold for and gave judgment for the mortgagor for the difference of amount to be ascertained and £714.00;

4.19 ***Pendlebury's*** case and principle was also considered and applied in **Australia and New Zealand Banking Group Ltd. *v.* Bangadilly Pastoral Company Limited** (1978) 52 ALJR 529.

4.20 Brief facts of the Bangadilly case is as follows:-

- Glenthorne Pty Ltd, owner of property known as Bangadilly Farm sold it to Talga Pastoral Co. Ltd (**"Talga"**);
- Talga gave a first mortgage back to the owner to secure balance purchase price of $342,000.00;
- Talga gave a second mortgage to Plaintiff;
- Talga then entered into a contract of sale of Bangadilly Farm with Hall Investments Ltd **("HIL"**) of which Mr and Mrs. Hall were directors and shareholders for $470,000.00;
- HIL paid $200,000.00 towards the purchase price;
- Contract of Sale was not performed by Talga and HIL sought specific performance of the contract;
- Subsequently upon payment of 1st mortgagee's debt, mortgage was transferred to Halco Products Pty Ltd (**"HPPL"**) in which Mr and Mrs Hall were shareholders;
- Soon after HPPL served demand on Talga and proceeded for sale of mortgaged property by auction;
- Prior to the auction Halco Roll-Up Doors Pty Ltd (**"Halco"**) in which Mr and Mrs Hall were directors and major shareholders changed its name to Bangadilly Pastoral Co. Pty Ltd **("Bangadilly Pastoral"**) and passed a resolution to bid for mortgaged property at $265,000.00;
- At the auction the Auctioneer on instruction of either Mr Hall or Mr Pritchard (Halco's Company Secretary) fixed reserve price of mortgaged property at $250,000.00;
- Bangadilly Pastoral then bid for mortgaged property at $265,000.00 and purchased the mortgaged property;
- The second mortgagee ANZ Bank was not at anytime informed of transfer of mortgage from GIL to HPPL and auction of the mortgaged property;
- Second mortgagee instituted proceedings to set aside the sale of the mortgaged property to Bangadilly Pastoral by Halco;

- The trial judge dismissed the proceedings and second mortgagee appealed to High Court of Australia;
- The High Court after analysing the facts which is stated in the judgment of His Honour Justice Aickin found that lack of good faith on part of Halco, Bangadilly Pastoral, Mr Hall, their Solicitor Mr Thomson and the Auctioneer and due to "absence of conscious planning, deceptiveness and collusion" resulted in sale of mortgage property at gross undervalue.

In ***Bangadilly's*** His Honour Justice Jacobs in respect to intended sale to a close associate of the mortgagee stated as follows:-

> ***"....the facts must show that the desire to obtain the best price was given absolute preference over any desire that an associate should obtain a good bargain. When those circumstances exist it may not be sufficient that steps are taken in the conduct of the sale which would suffice to support the validity of the sale when there was no conflict of interest. The steps taken or not taken in the conduct of the sale cannot be considered separately from the conflict of interest. Although conscious planning, deceptiveness or collusion to prefer the close associate would be conclusive of a lack of bona fides, it does not follow that a failure to conclude that any of these elements were present leads to a conclusion that the sale was bona fide unless it would be otherwise invalid even if no conflict of interest were present. The inevitable conflict of interest which arises on a sale to a close associate may be not only consciously but also unconsciously resolved in favour of the associate. The closer the association, the greater the conflict and the greater the possibility of unconscious preference. For this reason, if certain associations are found to exist, for example, where the purchaser is trustee for the mortgagee, the sale cannot be allowed to stand in any circumstances.***
>
> ***I am prepared to assume that in some circumstances not easily conceivable a sale by a mortgagee to a company as closely associated with that mortgagee as was the purchaser company in the present case might be a sale which could be allowed to stand. But before that could be so, it would need to appear from the objective facts that there was no shortcoming in the courses followed by the mortgagee or those acting on its behalf."***

His Honour Justice Aickin in delivering the leading judgment at page 539

stated:-

> ***"The nature of the duties of a mortgagee in the exercise of his power of sale has been the subject of recent decisions both in Australia and in the United Kingdom. The general principles have been re-examined and restated, though at least one area of doubt remains unresolved. Many of the cases were the subject of examination by the Court of Appeal in Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd., [1971] Ch. 949 where it was held that a mortgagee in exercising his power of sale owed a duty to the mortgagor to take reasonable care to obtain a proper price (or, in Salmon L.J.s words, "the true market value")."***

His Honour further stated as follows:-

> ***"In Forsyth v. Blundell (1973), 129 C.L.R. 477 this Court had to consider the nature of a mortgagee's duty. Walsh J. at p. 493 said: "In the authorities there are to be found conflicting views on the question whether the obligation cast upon the mortgagee is simply that he should act 'in good faith' (which means, in my opinion, in the language used in most of the authorities, that he should act without fraud and without wilfully or recklessly sacrificing the interests of the mortgagor)..."***

Pendlebury's case was also considered in **Latec Investments Ltd & Ors *v.* Hotel Terrigal Pty Limited** (1965) 113 CLR 265 when the sale by mortgagee to its subsidiary was set aside because of lack of good faith and fraud conducted on the mortgagor by the mortgagee and the purchaser.

4.21 It is undisputed fact that one of the Directors of the successful tenderer is Partner in the law firm of Messrs Parshotam Lawyers which firm is in the panel of lawyers for the First Defendant Bank.

4.22 It was submitted by Plaintiff's Counsel that even though the mortgagee sale was handled by another firm of Solicitors, a legal practitioner who is in the panel of Solicitors for mortgagee bank cannot tender for purchase of property sold by the said mortgagee/Bank.

4.23 I do not see anything wrong in a legal practitioner in the panel of mortgagee/Bank's panel of Solicitors from tendering for purchase of property advertised by the said mortgagee/Bank **provided** the empanelled Solicitor is not privy to the details of mortgagor's dealing with the mortgagee/Bank, there is no impropriety or collusion between the said Solicitor and the mortgagee/Bank whatsoever. ***Bangadilly Pastoral*** case (Supra)

4.24 In **Apple Fields Ltd *v.* Damesh Holdings Ltd** [2004] 1 NZLR 721 Lord Scott of Foscote delivering Judgment for the Privy Council stated as follows:-

> ***"It was established by Farrar v. Farrars Ltd (1888) 40 Ch D 395, and is now well accepted, that there is no general rule that a company in which a mortgagee is interested cannot purchase the mortgaged property on a mortgagee sale. As Lord Templeman said in Tse Kwong Lam at p 1355:***
>
> > ***"The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time."***

4.25 In ***Farrar's*** case the mortgagee during the negotiation for sale of the mortgaged property took shares in the Company which successfully bid for the mortgaged property at the auction. It was argued by the mortgagor's counsel that the mortgagee could not purchase the property himself either directly or as a shareholder in the purchaser company.

4.26 The Court of Appeal whilst agreeing with the submission that a mortgagee cannot sell mortgaged property to himself held that in the absence of any fraud or impropriety in the sale of the mortgage property there is nothing wrong in a mortgagee purchasing the mortgaged property as a director/shareholder of the purchaser or in association with any other person(s).

4.27 The First Defendant referred to the case of **Dean *v.* ANZ Banking Group Ltd.** [2011] FJHC 477; HBC156.2000L (29 August 2011), **NBF Asset Management Bank *v.* Niumataiwalu** [2000] FJHC 205; HBC0427J.98S (24 January 2000) and **Nair *v.* Westpac Banking Corporation** [2011] FJHC 686; HBC 236.2010 (4 October 2011) on the manner of mortgagee's exercise of its power of sale.

4.28 The above cases do not discount the fact that where there is any evidence of any impropriety such as fraud or collusion the sale will be set aside.

4.29 In all these cases the mortgagor was not able to provide evidence to support the allegation of fraud.

4.30 In light of the above principles I take the following factors in assessing the balance of convenience:

(i) It is undisputed that the Plaintiff and Second Defendant obtained credit facilities from the First Defendant secured by

the mortgage property;

(ii) Default has been made in payment of the mortgage debt;

(iii) Formal Demand has been served on the mortgagor and they have failed to comply with the Demand;

(iv) Several tenders were received including that of the Second Defendant, the co-mortgagor for $860,000.00;

(v) Debt level at the time of mortgagee sale (2010) was in the vicinity $848,000.00 to $860,000.00;

(vi) Tender from the successful Tenderer Crystal Properties Limited was received for the sum of $873,000.00;

(vii) At time of tender the mortgaged property was valued by Fairview Valuation as follows:-

(a) In August 2009 for $1.1m (valued at request of First Defendant);

(b) On 10 August 2010 for $1.25m (valued at request of Plaintiff).

(viii) Based on above the market value of mortgaged property at the time of the mortgagee sale would have been in the vicinity of $1.1m to $1.25m;

(ix) Tender advertisement required the tender to submit tender with Bank cheque of $100.00;

(x) Tenders closed on 2 July 2010;

(xi) On or about 2 July 2010 successful tenderer submitted tender which was questioned by the Plaintiff Counsel in following respects:-

(a) Amount of tender equals the debt due at the time of tender plus two months interest;

(b) Tender amount was written in pen whereas the tender is typed. It is alleged by Plaintiff that the tender amount was completed after the tenderer spoke to First Defendant's officers;

(c) Tenderer's cheque was attached as against the Bank cheque as required in the advertisement;

(d) Tender is dated 2nd July 2010 being the closing date of the tender;

(xii) In paragraph 5 of his e-mail dated 11 July 2011 to the First Defendant Mr Subhas Parshotam Director for tenderer company stated as follows:-

> ***"I am being asked to commit to making payment of $873,000.00 (a lot of money) and some basic information on the property will be of immense help" (part of Annexure "RN7" of Raajeshwar Nair's Affidavit sworn on 21st May 2013)***

(xiii) I notice that both the tender deposit of $100.00 and deposit for purchase of the mortgage property were receipted on 21 July 2010 and was paid by Tenderer's Cheque Nos. 00731 and 00732.

First Defendant in Dean's 2nd Affidavit stated that receipt for tender deposit was received late by the Solicitors for the First Defendant. Whilst it may be so, this matter calls for further investigation.

(xiv) It is also apparent from the e-mails annexed to Annexure "RN7" of Raajeshwar Nair's Affidavit that the successful tenderer at the time of tender did not have finance ready to purchase the mortgage property and was negotiating with the First Defendant to obtain finance (part of Annexure RN7 of Raajeshwar Nair's Affidavit). On 15 October 2010 some 4 months after close of tender Mr Subhas Parshotam on behalf of Tenderer e-mailed First Defendant's Solicitor on following terms:-

> ***"I am sorry to report that the bank (ANZ Bank) on my side is not ready to disburse funds. My loan application was intermingled with the Group borrowings (Parshotam Group) and the credit review of the accounts also coincided with this. As such, fresh valuations of other properties and a whole host of other issues came up.***
>
> ***Kalpesh Sundarlal - who is my Relationship Manager - has advised that he has been in communication with Mohid on this delay. Once again, I am hopeful for imminent settlement."***

4.31 Even though the validity of First Defendant's mortgagee and the fact that Plaintiff and Second Defendant mortgagor defaulted in their loan repayments is not disputed I am of the view that there is need to examine in more detail as to whether there was any impropriety in awarding the tender to the Crystal Properties Ltd given the fact that the mortgage property is being sold for $873,000.00 (approximately 70% of the market value) at the time of sale and in light of the matters stated in paragraph 4.30 (xi) (xii) (xiii) hereof at the trial of this action. ***Pendlebury***, ***Bangadilly Pastoral***, ***Latec Investments***, ***Warner v. Jacobs***

4.32 First Defendant submitted that damages would be adequate remedy and as such no injunction should be granted.

I would uphold that submission if I did not find that there is a need to examine fully the allegation of collusion and impropriety in awarding the tender to the successful tenderer as aforesaid.

4.33 First Defendant by its Counsel submitted that based on the principle in **Inglis *v.* Commonwealth Trading Bank of Australia** (1971-72) 126 CLR 161 the Plaintiff should deposit the debt owing by the mortgagor to First Defendant with Court for the Court to exercise its discretion in favour of restraining First Defendant's power of sale.

4.34 It is well established that the general rule as stated in First Defendant's submission is applicable where the validity of the mortgage or mortgagees exercise of powers of sale is not questionable.

4.35 The general rule in ***Inglis*** had been established well before the decision in ***Inglis***.

4.36 In **Glandore Pty Ltd *v.* Elders Finance and Investment Co. Ltd** (1984) 57 ALR 186 his Honour Justice Morling after reviewing His Honour Justice Sugarman's decision in **Harvey *v.* McWatters** (1948) 49 SR (NSW) 174 stated as follows:

> ***"It is clear on the authorities that if the present case be regarded as one in which the mortgagor's real claim against the mortgagee is for damages only, interlocutory relief should be granted only upon terms that the amount of the mortgage debt is paid into court. The general rule referred to in Inglis' case would apply in such a case. But if it be not regarded as such a case, it is open to the court to grant the relief sought***

upon such terms other than payment of the full amount of the mortgage debt into court as the court thinks appropriate."

4.37 In **Propst *v.* ANZ National Bank Limited** [2012] NZHC 1012 (11 May 2012) His Lordship Justice Gilbert in dealing with Application to restrain mortgagee's power of sale under the heading Legal Principles stated as follows:-

"The Plaintiff must show that there is a serious question to be tried. The Court must consider where the balance of convenience lies and whether overall justice is best served by granting or withholding the injunction in all of the circumstances of the particular case."

4.38 Further in ***Glandore's*** case his Honour Justice Morling at page 192 stated as follows:-

"Having regard to the fact that the value of the security held by Elders (at Elders' own valuation) is more than double the amount of the mortgage debt it is difficult to see how any prejudice will be suffered by Elders by the granting of interlocutory relief, provided the final hearing is not unduly delayed. During the course of argument it was agreed that the parties could be ready for a final hearing within three months. There is no suggestion that the secured property is falling in value and in those circumstances I do not think the applicants should be required to pay any part of the principal debt into court pending the final hearing."

4.39 First Defendant's submission on undertaking as to damages is answered by His Honour Justice Morling's statement in the preceding paragraph.

4.40 In the instant case the mortgage property as at 9 April 2013 is valued at $1.5m against the debt of approximately $850,000.00 and as such the First Defendant will not be prejudiced if mortgagee sale is delayed for a short period of time.

4.41 Whilst I am of the view that mortgagee should not be unnecessarily restricted from exercising its power of sale at the same time Court will not and should not under any circumstance condone any impropriety by way of collusion between the mortgagee and the successful tenderer in awarding tender in particular to close associates of the mortgagee and if there is any evidence of such collusion or impropriety then the sale should be set aside.

4.42 In the interest of justice I am inclined to restrain the First Defendant from

exercising its power of sale under Mortgage No. 577277 over property comprised in Certificate of Title No. 10153 and performance of the Contract of Sale entered between First Defendant and Crystal Properties Ltd. until the hearing of the substantive matter which I intend to set down for hearing within six (6) months from date of this ruling.

4.43 I have also been referred to following cases in respect to Caveat lodged against the mortgaged property and Application by First Defendant to remove caveat lodged by successful tenderer:

> **"1. <u>Australia and New Zealand Banking Group Limited *v.* Crystal Properties Ltd.</u> HBC 290 of 2011S (17th January 2013);**
>
> **2. <u>Australian and New Zealand banking Group Limited *v.* Saleshni Prasad</u> HBC 21 of 2011S (29th April 2013);**
>
> **3. <u>Australian and New Zealand Banking Group Limited *v.* Raajeshwaran Nair</u> HBC 22 of 2011S (9th May 2013);**
>
> **4. <u>Australian and New Zealand Banking Group Limited *v.* Chandrika Prasad</u> HBC 24 of 2011S (29th April 2013);**

4.44 These cases were dealt with by the Court on the basis of the facts before the Court and does not in any way affect the ruling in this case.

5.0 APPLICATION TO CONSOLIDATE THIS ACTION WITH ACTION NO. HBC 290 OF 2011

5.1 Action No. HBC 290 of 2011S dealt with Application by First Defendant to remove Caveat lodged by successful tenderer pursuant to Section 109(2) of Land Transfer Act (Caveat Action).

5.2 The Caveat Action has been concluded and there is nothing left to be consolidated with this proceeding.

5.3 If Plaintiff wishes to join the successful tenderer as a party to the proceedings then Plaintiff should file proper joinder application which will have to be dealt with by the Court on merits.

5.4 Accordingly Application to consolidate Action No. HBC 290 of 2011S with this action is refused.

6.0 CONCLUSION

6.1 I make the following Orders:-

(i) First Defendant Australia and New Zealand Banking Group Limited is restrained from transferring or conveying Certificate of Title No. 10153 Registered in the names of Raajeshwaran Nair and Rameshwaran Nair to Crystal Properties Limited pursuant to a mortgagee sale or in any other way whatsoever exercising its rights as mortgagee to transfer or to convey the aforesaid property to Crystal Properties Limited or to any other party or parties pursuant to or in the exercise of the power of sale as a mortgagee or in any way advertising or placing the aforesaid property on mortgagee sale until the determination of this action or until further order of this Court.

(ii) Plaintiff's Application to consolidate High Court Action No. HBC 290 of 2011S with this Action is dismissed;

(iii) This matter is adjourned to 19 November 2013 at 9.30 for further directions;

(iv) Cost of the Application for Interlocutory Injunction and Consolidation by Notice of Motion dated 21 May 2013 be costs in the cause.

KAMAL KUMAR
JUDGE

At Suva

1 November 2013