

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 166 of 2012

BETWEEN : **ECI ATELAITE KIKAU NABALARUA** of 28 Rakua Street, Suva,
University Dean.

Plaintiff

AND : **BANK OF SOUTH PACIFIC LIMITED** is a body incorporated under
Part X of the Companies Act and having its registered office at Level 12,
Suva Central Building, Corner of Renwick Road and Pratt Street, Suva, Fiji.
COLONIAL NATIONAL BANK a body corporate duly constituted under
the Companies Act Cap 247 of 3 Central Street, Suva, Fiji.

Defendant

APPEARANCE : **Mr D Toganivalu** of **Leweniqila Barristers & Solicitors** for the **Plaintiff**
Ms B Narayan of **Lateef & Lateef Lawyers** for the Defendant

DATE OF JUDGMENT : 6 June 2014

JUDGMENT

1. The Plaintiff instituted action against the Defendant by way of Originating Summons and sought the following orders:

(1) *THAT the Defendants registered mortgage 58351 on CT 17923 is unenforceable as the Defendant under the Credit Contract dated 29 December 2005 secured obligations where one of the mortgagors, Mr Nemani Nabalarua, was not a debtor for the sum of \$42,270.00; therefore*

the Defendant must discharge the mortgage pursuant to Section 44 of the Consumer Credit Act 1939; and or alternatively;

- (2) THAT the registered Mortgage 58351 and subsequent variation of Mortgage 590254 is void, pursuant to Section 45 of the Consumer Credit Act 1999, as it secures an amount that exceeded the sum of the amount of liabilities of the debtors; and or alternatively;*
- (3) THAT the mortgage is void as the contract document contravenes section 15 of the Consumer Credit Act 1999 in not sufficiently prescribing the kind of insurance financed under the contract as stipulated under item (N) of Schedule 1; and*
- (4) THAT the sum of \$201,867.68 is to be paid to the Plaintiff forthwith by the Defendant for mortgage payments made by the Plaintiff after the death of Mr Nemani Nabalarua, during the period May 2007 to date, inclusive;*
- (5) Special and General Damages;*
- (6) Interest;*
- (7) Such further and/or other relief as this Honorable court may deem fit;*
- (8) Cost of this action.*

Facts

2. By the Affidavit dated 12 June 2012, the Plaintiff inter-alia deposed.

2.1 The Plaintiff and her late husband Nemani Nabalarua the registered owners of the property at 38 Rakua Street CT 17923 (*Annexed to the Affidavit marked "EN1"*).

- 2.2 The Plaintiff and her late husband applied for a home loan in the sum of \$325,745.00 from the Defendant and they accepted the Letter of Offer dated 28 December 2005 on 29 December 2005 (“EN2”).
- 2.3 The said loan of \$325,745.00 included at sum of \$42,270.00 for Homepac Mortgage Protection Insurance and no document was with regard to the insurance and they didn’t sign an agreement to confirm this.
- 2.4 The Plaintiff and her late husband agreed to pay for the Homepac Insurance premium on the understanding and belief that in case of the death, the Plaintiff or her husband the remainder of the mortgage would be paid off by the Policy (*Mortgage No. 583515 registered on 6 March 2006 marked “EN3”*).
- 2.5 On 27 March 2006, the Plaintiff was verbally informed by Sefenaia Qalilawa to sign for another loan for additional premium of \$21,300 as for cover for Homepac Insurance (“EN4”). The Plaintiff’s understanding was it was an extension of the original Homepac Cover. The Defendant never informed her that this would supersede the original Homepac Cover which was signed on 28 December 2005.
- 2.6 Copy of the variation of Mortgage registered on 6 July 2006 annexed marked as “EN5”.
- 2.7 The Plaintiff was aware the Credit Contract had a clause stating that the Insurance was covered by Colonial Insurance and was never told by the Defendant there should be a separate document to be issued. In 2006 a further advance contract and variation of Mortgage was signed by the Plaintiff and her husband.
- 2.8 The Plaintiff’s husband died on 24 April 2007 and copy of the Certificate of Death was annexed marked “EN6”.

- 2.9 The Plaintiff continued to make the mortgage payments although she was unemployed from June 2010 to January 2011.
- 2.10 Since 24 April 2007 to 2 May 2012, the Plaintiff had paid \$207,867.28 and continues to pay \$4,000.00 per month as Mortgage payment (*summary of transaction marked as "EN7"*).
- 2.11 On 13 September 2011, it was confirmed to the Plaintiff by Keven Yuen of the Defendant Homepac Insurance covers only the Plaintiff (*Email confirmation marked "EN8" copied to Jonathan Stevens*).
- 2.12 On 23 September 2011, on inquiry Steven had advised the Plaintiff on 27 September 2011, the Plaintiff's late husband was not covered under the Insurance. Further, it was informed the Plaintiff's late husband signed the letter of offer only as a guarantor since his name was on the title and the loan was approved only on the strength of the income of the Plaintiff. This fact was never informed to the Plaintiff or her late husband when the Letter of Offer was signed on 29 December 2005 (*Email correspondences marked as "EN9"*).
- 2.13 The representations made in this regard to the Defendant were futile and the summary of the meetings were detailed and the officers of the Bank and the Insurance Company were unable to give satisfactory answers (*Email correspondences marked as "EN10"*).
- 2.14 The Plaintiff had met several officers of the Bank and promises were made to review the Plaintiff's file.
- 2.15 Several email correspondences exchanged between the officers were marked as "*EN11*".

- 2.16 Finally, the Plaintiff instructed her Solicitors to write the Defendant to make good their undertaking under the Homepac Policy (*Letter annexed marked "EN12"*).
- 2.17 The Defendant replied to the letter stating that the Plaintiff was only covered under the Homepac Policy (*"EN13"*).
- 2.18 The Plaintiff further stated that the Defendants' refusal is incorrect and it's breach of Contractual obligation under the Mortgage and breach of the provision of Consumer Credit Act 1999.
3. In oppose to the Affidavit of the Plaintiff, Jonathan Stevens Manager Asset Management Unit of the Defendant (*BSP*) sworn Affidavit on 16 August 2012 and deposited inter-alia.
- 3.1 The Defendant admitted paragraphs 1 and 2 of the Affidavit of the Plaintiff.
- 3.2 Replying to paragraph 3 of the Plaintiff's Affidavit, the Defendant stated:
- 3.2.1 Housing Loan Offer Letter dated 28/12/2005 included a sum of \$42,270.00 to pay for Homepac Insurance Policy.
- 3.2.2 The allegations by the Plaintiff is denied and stated the Homepac Mortgage Protection Insurance was duly taken out by Colonial Life Ltd in the Plaintiff's name (*Policy annexed marked as "JS-1"*).
- 3.3 In response to paragraph 4 of the Plaintiff's Affidavit it was stated:
- 3.3.1 The Homepac Insurance was a separate matter the Defendant only provided in the Home Loan to fund for the premium of the Insurance it was the Plaintiff and her husband to arrange the same with Colonial

Fiji Life Limited. Since the Insurance Company does its own assessment to see if applicants are eligible for the insurance.

3.3.2 The Plaintiff's husband was not eligible for the Homepac Insurance since he did not have the financial ability to pay. The reason to include the Plaintiff's husband's name in loan offer letter was only to the extent of giving a 3rd party mortgage security for the loan as a 'Guarantor' since the title to the property CT 17923 was jointly held in both names. The Defendant stated the principle/single borrower had the eligibility to pay for the loan. The following documents were annexed:

- (a) *JS-2 – Loan application form dated 21/2/2005 by the Plaintiff only, and the assessment of the loan application. The Defendant further stated according to the assessment, the late husband was to provide personal unlimited guarantee on Mortgage Security.*
- (b) *JS-3 – Email correspondence dated 28/12/2005 advising that the Plaintiff had requested her late husband's name to be included in the Letter of Offer.*
- (c) *JS-4 – Copy of the second loan application form then signed by both the Plaintiff and her late husband on 28/12/05 and it was done at the request of the Plaintiff.*

3.3.3 JS-5 - The Plaintiff had the knowledge only she applied for the Homepac Insurance Cover and it is evident from the documents of Colonial Fiji Life Limited and all requirements under Homepac Insurance was fulfilled only by the Plaintiff.

- 3.3.4 There is no merit of the allegation that the Bank led the Plaintiff and her late husband to believe both of them were covered under Homepac Insurance.
- 3.4 Responding to paragraph 5, the Defendant admitted the second Letter of Offer dated 27/3/2006 was signed by the Plaintiff on 27/3/2006 and denied rest of the contents and stated as follows:
- 3.4.1 The Defendant had approved single premium of \$42,270.00 as shown in Letter of Offer dated 28/12/2005 and upon the application made by the Plaintiff to Colonial Life the single premium quoted was \$61,923 for both death and permanent disability policy and the Plaintiff provided the additional loan to the Plaintiff to meet the difference.
- 3.4.2 JS-6 – Consent by the late husband of the Plaintiff, written consent dated 27/3/2006 given by the Plaintiff's late husband to borrow additional funds to cater for the Homepac premium.
- 3.5 The paragraph 6 of the Plaintiff's Affidavit with regard to variation to the Mortgage was admitted.
- 3.6 Paragraph 8 of the Affidavit was admitted.
- 3.7 In response to paragraphs 9 and 10 of the Affidavit, the Defendant stated:
- 3.7.1 The loan was granted to the Plaintiff as she was having a lucrative job at the University of the South Pacific, the Defendant is unaware of the end of her employment and Bank is aware the Plaintiff is now employed by Fiji National University.

3.7.2 JS-7 – is the Default Notice dated 30/05/2011 in which the Defendant informed the Plaintiff that they will exercise the right of Mortgagee sale. Subsequently, several negotiations took place to restructure the loan. The Plaintiff without taking the opportunity instituted this action which is an abuse of the process of the court.

3.8 Paragraph 11 of the Plaintiff's Affidavit was admitted.

3.9 The contents of paragraph 12 of the Plaintiff's Affidavit were admitted except for the allegation that the assessment was never made available to the Plaintiff or her late husband.

3.10 The allegation made in paragraph 13 of the Plaintiff's Affidavit was denied.

3.11 The Defendant stated he is unaware of the contents of paragraph 14 of the Affidavit.

3.12 In response to paragraph 17 of the Plaintiff's Affidavit, the Defendant stated he is not aware of the Plaintiff's discussion with Qalilawa and Mr Naiyaga.

3.13 In reply to paragraphs 22 to 23 of the Plaintiff's Affidavit, the annexures "EN12" and "EN13" are self-explanatory.

3.14 Denying paragraph 24 of the Plaintiff's Affidavit, paragraphs 6 to 8 were repeated and stated there is a difference between Mortgage security and Mortgage Protection. Letter of Offer dated 28/12/2005 stated purchase of Homepac product was a different arrangement between the Plaintiff, her husband and Colonial Fiji Life Ltd and Homepac product is sold independently of the Bank.

4. The Affidavit in Reply dated 31/8/2012 was filed by the Plaintiff on 31 August 2012 and deposited inter-alia.

4.1 No issues raised by the Plaintiff with regard to paragraphs 1 to 5 of the Defendant's Affidavit.

4.2 Replying paragraph 6 of the Defendant's Affidavit the Plaintiff stated:

4.2.1 Replying to JS-1 annexed to the Affidavit sworn by Stevens on behalf of the Defendant dated 31 March 2006, the Plaintiff stated:

(a) *The Life Insurance cover was taken out after the original Letter of Offer signed in December 2005 and the Homepac Insurance premium was paid ("EN2");*

(b) *JS-1 was cited to the Plaintiff for the first time and reiterated paragraph 3 of the Plaintiff's Affidavit. Referring to emails marked "EN9", the Plaintiff stated when the Insurance Policy was requested the Defendant stated policy was lost and the Plaintiff is required to fill out a lost policy form;*

(c) *There is no acknowledgement by the Plaintiff JS-1 that she received the Policy of Insurance and she had agreed to the terms and conditions and she does not have Original copy of JS-1;*

(d) *The Plaintiff denied the allegation made in paragraph 6 of the Defendant's Affidavit that JS-1 dated 31 March 2006 supersedes the Letter of Offer dated and signed on 29*

December 2005 and agreed to pay the Homepac premium of \$42,270.00. Loan was granted in joint names.

4.3 The contents of the allegations made in paragraph 7 of the Defendant's Affidavit is denied and the Plaintiff stated:

(a) The Plaintiff's and her late husband's understanding was that Homepac component of the loan stated in the Letter of Offer dated 28 December 2005 was a key part of loan package.

(b) There was no indication by the Defendant that the Plaintiff and her late husband to undertake their own negotiations with the Insurer. The premium to be paid was included in the Mortgage had with the Defendant marked as "EN2".

4.4 Referring to JS-3 of paragraph 7(ii) (b) of the Defendant's Affidavit, the Plaintiff denied her husband was retired. They were joint owners of the property mortgaged.

4.5 The Plaintiff referred to JS-4 stated in paragraph 7(ii) (c) of the Defendant's Affidavit and stated the said document was signed by the Plaintiff and her husband being joint owners of the Mortgage Property.

4.6 With reference to JS-5 of paragraph 7(iii), the Plaintiff denied the allegations and stated:

(a) JS-5 shows an application for a Homepac loan and despite her signature it contains further alteration and handwriting which does not belong to the Plaintiff and changes are not initialed by her;

- (b) *The Plaintiff further stated she agreed since the Bank had informed her Homepac Insurance was Mortgage Protection in case of death of herself or her husband insurance would cover the mortgage;*
- (c) *The Homepac Insurance cover was taken after discussions with the Bank which was included in the Mortgage and Letter of Offer;*
- (d) *The Plaintiff stated she and her husband were on the understanding that upon signing the Letter of Offer which included Homepac premium they and the Defendant were bound by the contractual obligations;*
- (e) *The Letter of Offer was signed the Defendant make believing the Plaintiff and her late husband that they were covered by the Homepac Insurance;*
- (f) *When the Letter of Offer was drafted by the Defendant and signed by the Plaintiff and her late husband, the Defendant's argument that application was only signed by the Plaintiff does not have any merit.*

4.7 As to paragraph 8(1) of Steven's Affidavit, I deny the allegations contained in and say as follows:

- (a) *I reiterate that the initial Letter of Offer signed by my husband and I on 28 December 2005, specifically under paragraph 12 entitled "Special Conditions" does not contain a provision that the Homepac cover would only apply to the Plaintiff. As such the Bank's allegation otherwise is without merit whatsoever;*

- (b) *It is again reiterated that the Letter of Offer was signed by the Plaintiff and her late husband and therefore, the Homepac insurance covered both of them and that in the event of death of either of them, the Homepac cover would clear the remaining mortgage;*
- (c) *The Plaintiff stated she did undergo medical tests in February 2006 but according to the assessors notes contained in “JS-5” the test was incomplete and despite this the Bank still allowed them to borrow the extra funds for the premium. Her husband had to consent to taking the loan as the Registered Mortgagor and Owner of the Property for which the Homepac covered.*

4.8 The Plaintiff had denied the allegation in paragraph 8(ii) of Steven’s Affidavit and stated covered in the first and second Letter of Offer under the Homepac Insurance and further stated as follows:

- (a) *That the Defendant did make representations that they were acting as agent for Homepac Insurance and that at no time was she specifically informed by the Defendant, that her late husband and she had to arrange separately for Homepac Insurance and as the Defendant arranged the Homepac Insurance there was no need to make a separate arrangement;*
- (b) *“JS-6”, is the document that is written consent of the Plaintiff’s husband agreeing that she sign the second offer on his behalf which is a variation to the mortgage. It was her understanding that written consent had to be obtained from her husband as a Registered Mortgagor of the Property to sign the Letter of Offer on his behalf to pay for the remainder of the Homepac Premium;*

- (c) *In signing the second Letter of Offer for both the Plaintiff and her husband was on the understanding that this second Letter of Offer covered the full Homepac Premium as initiated in the first Letter of Offer of 28 December 2005 that was signed by both of them;*
- (d) *The Plaintiff reiterated that both she and her husband as signatories for the first Letter of Offer in 2005 were both covered and that the second Letter of Offer merely covered the rest of the Homepac Insurance Premium of which she signed on behalf of her husband with his written consent;*
- (e) *As to the first Letter of Offer, the second Letter of Offer did not outline any special conditions which specifically stipulated the cover of the Homepac Insurance and it was therefore their understanding that both of them were covered under the Homepac Insurance.*

4.9 It was the understanding of the Plaintiff that the Defendant as the agent of Colonial Fiji Life Limited had an internal arrangement whereby the premiums for Homepac was added to the loan. In line with the practice of agents, it was known that a commission from selling the Homepac product was paid by Colonial Fiji Life Limited to the Defendant. Therefore, the Defendant cannot suggest that they were not acting as agents for Colonial Fiji Life Limited, because their conduct does not show that level of independence.

4.10 As to paragraph 9 of Steven's Affidavit, there was no comment as it is an admission of paragraph 6 of the Affidavit sworn on 12 June 2012 by the Plaintiff.

4.11 As to paragraph 10 of Steven's Affidavit, denied contents therein and repeat the paragraph 7 of the Plaintiff's Affidavit sworn on 12 June 2012.

- 4.12 As to paragraph 11 of Steven's Affidavit, is an admission of paragraph 8 of the Affidavit sworn on 12 June 2012 by the Plaintiff.
- 4.13 As paragraph 12(i) of Steven's Affidavit, was admitted by the Plaintiff.
- 4.14 As to paragraph 12(ii) of Steven's Affidavit, the Plaintiff admitted she was in arrears in her mortgage repayments but stated that this has no bearing on the issues in this matter. The amount owing to the Defendant is equivalent to 4-5 months repayments which occurred during the months of July to December 2010 after finishing her contract from the University of the South Pacific on 30 June 2010. Since January 2011 the Plaintiff has been employed by the Fiji National University as a College Dean and continues to pay loan repayments by direct debit to the Defendant from August 2011 up till to date and this is shown in Annexure "EN-7" of the Affidavit sworn on 12 June 2012 by the Plaintiff.
- 4.15 Furthermore, it should be noted that in the Letter of Offer dated 28 December 2012 marked "EN-2" to Affidavit sworn on 12 June 2012, there is a paragraph number 14.8 titled "Default" and it states the following: *"Should you encounter financial difficulties and cannot meet your repayments, kindly contact the Bank to make arrangements suitable to both you and the Bank"*. In this regard, the Plaintiff always kept the Defendant updated with any repayment issues faced. Also the fact that the Plaintiff tried to maintain regular payments, over and above the minimum repayment amount, through fortnightly direct debit arrangements of \$2000 since August 2011 till to date, as seen in the transaction history marked "EN-7" the Affidavit, is indicative of the commitment to honor the Plaintiff's financial obligations in repaying this mortgage despite this ongoing legal proceedings. The Defendants are merely attempting to taint the Plaintiff's character and divert this Honorable Court's attention away from the real issues in this case.

- 4.16 These Court proceedings were initiated only after the Plaintiff received no satisfactory answers to the questions she posed to the Defendant. Numerous meetings were organized and no resolution was found.
- 4.17 As to paragraph 13 of Steven's Affidavit, it is an admission of the paragraph 11 of the Affidavit sworn on 12 June 2012 by the Plaintiff.
- 4.18 As to paragraph 14 of Steven's Affidavit, denied the allegations contain therein and repeated the paragraph 12 of the Affidavit sworn on 12 June 2012 by the Plaintiff.
- 4.19 As to paragraph 15 of Steven's Affidavit, the contents therein are denied and stated that the Plaintiff was not comfortable with the responses provided by a junior staff and that she had a right to seek clarification and redress from the senior management of the Defendant Bank. Furthermore, the Plaintiff sought clarification and assistance from the Senior Managers at the Defendant Bank and the Chief Executive Officer of BSP Life to resolve the issues in question. It was stated that these discussions were conducted in a transparent manner and that there was nothing out of the order in pursuing this court of action.
- 4.20 As to paragraph 16 of Steven's Affidavit, the contents therein are denied and further stated that the Plaintiff's discussions with Mr Sefanaia Qalilawa, was conducted in his capacity as her Personal Banker and signatory in the documentation provided in the Affidavit. At the material time, Mr Qalilawa was employed with the Defendant Bank as the Branch Manager at Pacific House, and as such he became the Plaintiff's personal banker for the period in question and up to the time he left the employ of the Defendant in 2011. The Plaintiff is unaware of the reasons for his exit from the Defendant Bank; however, stated that the reference to "*misconduct*" on the part of Mr Qalilawa is an attempt by the Defendant to detract this Court from the real issues in question in these proceedings.

4.21 As to paragraph 17 of Steven's Affidavit, the allegations contain therein are denied and repeated the paragraph 15 and 16 of the Affidavit sworn on 12 June 2012 by the Plaintiff.

4.22 As to paragraph 18 of Steven's Affidavit, the allegations contained therein are denied and reiterate paragraph 17 of the Affidavit sworn by the Plaintiff.

4.23 As to paragraphs 19 and 20 of Steven's Affidavit, no comments were made.

4.24 As to paragraph 21 of Steven's Affidavit, the contents therein are denied and repeated paragraph 24 of the Affidavit and further reiterated as follows:

(a) The Plaintiff admit that the Mortgage as security and the Mortgage Protection Insurance are two different products and despite it clearly stating in the Letter of Offer that the Homepac product is a separate arrangement the conduct of the Bank indicated otherwise;

(b) Homepac application process and assessment was undertaken with the Bank and was sold to the Plaintiff and her husband as the Registered Mortgagors by the Defendant Bank. As such, in signing the Letter of Offer on 28 December 2005, she and her husband and the Defendant were and remain legally and contractually bound by the obligations contained therein in particular Homepac Insurance.

5. This matter was taken up for hearing on 24 November 2012 and the Plaintiff filed the written submissions and both parties made oral submissions.

Analysis and Conclusions

6. To arrive at my conclusion, I have considered all the Affidavits; annexures and the submissions made before this court.

7. The Plaintiff relied on the Section 44, 45 and the Section 15 and submitted that the Defendant acted in contravention of the said sections and orders are sought as per originating summons.
8. This court had to decide:
 - 8.1 As to whether the Mortgage is void as the contract document contravenes Section 15 of the Consumer Credit Act 1999 is not sufficiently prescribing the kind of Insurance financed under the contract, under Item (N) of the Schedule I.
 - 8.2 As to whether the registered Mortgage No. 58351 on CT 17923 is unenforceable pursuant to Section 44 of the Consumer Credit Act 1999.
 - 8.3 As to whether the registered Mortgage 58351 and subsequent variation of Mortgage Bond 590254 is void pursuant to Section 45 of the Consumer Credit Act 1999 as it secures an amount that exceeded the sum of the amount of liabilities of the debtors.
 - 8.4 If the above questions are answered in affirmative as to whether the Plaintiff is entitled to the reliefs claimed.

LAW

9. The Plaintiff submitted that Consumer Credit Act 1999 as stated in the preamble provides set of codified principles and guidelines to help the parties involved in transactions know their rights and obligations.
10. I observe the act provides the legal framework for the provision of credit ensuring that debtors are protected and allowed to make informed decisions before entering into credit contracts including mortgages and insurance contracts. The Act had provided most provisions in favour of the debtor since the Debtor does not have any bargaining power

when terms and conditions are laid down by the lender. If the Debtor does not agree for the terms the resultant position is no credit to the Debtor. The provisions in the Consumer Credit Act provides to minimize such situations. The intention of the legislature is clear. It is to protect the natural persons who seek financial services or otherwise. The Consumer Credit Act defines the consumer as:

“Consumer means a natural person who acquires goods or services for personal, domestic or household purposes.”

11. In this case the Plaintiff is entitled to make her claim under the provisions of the Consumer Credit Act.

11.1 Section 15 of the Consumer Credit Act states:

“Matters that must be on contract document:

15. The contract document must contain the matters specified in Schedule 1.

The legal binding agreement was created between the Plaintiff, her late husband and the Defendant on signing of the Letter of Offer dated 28 December 2005 (*signed on 29 December 2005*) (*which is annexed to the Affidavit of the Plaintiff dated 12 June 2012*) "EN-2". The Letter of Offer is admitted by the Defendant in his Affidavit. I conclude that the terms and conditions of the Home Loan facility contains therein and it formed a contract document between the parties and it is within the meaning of Section 2 of the Consumer Credit Act which states *“means a document or documents setting out the terms of the contract”*.

As such, I further conclude that "EN-2" must meet requirements under Schedule I referred to in Section 15 of the Consumer Credit Act 1999. I note that there was no

submission made by the counsel for the Defendant in this regard for consideration by this court.

13. The Plaintiff had made special reference to Item (N) of the Schedule I to the Consumer Credit Act 1999 which states:

“(N) Insurance financed by contract-

If the credit provider knows that the debtor is to enter into a credit related insurance contract and that the Insurance is to be financed under the credit contract –

- (a) The name of the insurer;*
- (b) The amount payable to the insurer;*
- (c) The kind of Insurance and any other particulars prescribed by the regulations;*
- (d) If the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business a statement that it is to be paid if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium.”*

The Letter of Offer dated 28 December 2005 is issued in both names of the Plaintiff and her late husband was accepted by the Defendant as joint borrowers and Mortgagors and terms and conditions were applicable for both of them.

The Plaintiff's position was that the insurance covers both the borrowers cannot be denied. The Defendant's argument was that as per Clause 14.3 of the Letter of Offer, the purchase of Homepac product is a separate matter between the borrowers and Colonial Life Limited. In such event the Defendant would have issued a separate letter to that effect to the

Plaintiff. Such condition cannot be a part of the Letter of Offer which made the Plaintiff to believe the Insurance covered both of them. The Plaintiff alleges that the Policy of Insurance was never given to her. I accept her position in absence of any acknowledgement provided by the Plaintiff. The insurance policy was not issued to her as stated in her Affidavit, the Plaintiff's requests were turn down stating that the Policy is not available. The argument by the Plaintiff that obtaining of the Homepac Insurance is independent to the loan cannot be accepted by this court. Obtaining of Homepac Insurance is a condition in the Letter of Offer dated 28 December 2005 the premium is part of the loan granted to the Plaintiff. In absence of evidence that the amount of the premium was informed to the Plaintiff by the insurance company and further granting a loan subsequently to meet the balance of the premium (*2nd Letter of Offer dated 27 March 2006 "EN4"*), the conclusion this court can arrive at is that the Defendant had acted contrary to the Section 15 as requisites of Schedule 1 Item (N) of the Consumer Credit Act 1999. The 2nd Letter of Offer is for the loan granted to meet the Insurance premium. It was consented by the late husband of the Plaintiff by JS-6, the argument by the Defendant that the said letter supersedes the first Letter of Offer has no merits. It is an extension to the offer letter marked "EN2". The documents filed in this case clearly shows the Plaintiff was well aware of the conditions of the policy and acted in concert with the Insurance Company.

14. It is also default of the duty of the Defendant his failure to inform the Plaintiff and her late husband in the Letter of Offer whose interest is protected under the Homepac Insurance cover is once again contrary to provisions of the Section 15 of the Consumer Credit Act 1999. The notes made on the credit appraisal form is privy to the Bank and normal practice of a Bank such credit assessments are not made available to the customers and the Defendant's argument, terms of the insurance policy is known to the Plaintiff cannot be considered by this court, which was only stated in the assessment made in the credit approval (*JS-2 page stating Request Summary up to Credit Approval*).
15. The terms and conditions imposed in the Letter of Offer dated 28/12/2005 forms the credit contract between the parties as I concluded in the preceding paragraphs it is that, the

Defendant failed in its duty by not complying with the provisions enumerated in the Section 15 of the Consumer Credit Act 1999. Accordingly, I determine the Defendant had acted in violation of Section 15 of the Consumer Credit Act and the Plaintiff is entitled to refund of the insurance premium of \$42,270 + \$21,300 totaling to \$63,570.00.

16. However, the Plaintiff had not established to the satisfaction of this court the Defendant had acted in contrary to Section 44 and 45 of the Consumer Credit Act 1999, as such I determine that the registered Mortgage 58531 and subsequent variation of Mortgage 590524 is valid and in force and a binding agreement which secures the loan except the insurance premium.

My orders are:

- (a) *The Defendant is ordered to pay the Plaintiff \$42,270.00 and \$21,300.00 respectively together with interest from the date of the payment to the insurance company at the rate of interest applicable to the loan up to the date of this Judgment and further interest at the same rate up to the date of payment;*
- (b) *The Defendant is ordered to pay summarily assessed costs of \$2,500.00 to the Plaintiff within 30 days from this Judgment.*

Delivered at Suva this 6th Day of June 2014.



A handwritten signature in black ink, appearing to read "C. Kotigalage".

.....
C. KOTIGALAGE
JUDGE