

In the High Court of Fiji  
at Suva  
Civil Jurisdiction  
Civil Action no. HBC 140 of 20 18

Home Finance Company Limited  
Plaintiff

v

Evalyne Rajani Lata Kumar  
Aka Evalyne Rajni Lata aka Evelyne Kumar  
Defendant

Counsel: Mr Devanesh Sharma for the plaintiff

Mr I. Fa for the defendants

Date of hearing : 2<sup>nd</sup> October, 2018

Date of Judgment: 19<sup>th</sup> October, 2018

### JUDGMENT

1. By originating summons filed on 16<sup>th</sup> May, 2018, together with affidavit in support, the plaintiff seeks vacant possession of the defendant's property under Or 88. The defendant filed affidavit in opposition on 3<sup>rd</sup> July, 2018. The plaintiff filed affidavit in reply on 19<sup>th</sup> July, 2018. Both parties have attached several documents to their respective affidavits. On 5<sup>th</sup> July, 2018, fixed the matter for hearing on 2<sup>nd</sup> October 2018.

#### *Summons for consolidation*

2. On 1<sup>st</sup> October, 2018 the defendant filed summons for consolidation of this action and ***Evelyne Rajani Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumar v Home Finance Company Limited***, (Civil Action No. HBC 68 of 20 18) and moved that the hearing on 2<sup>nd</sup> October, 2018 be vacated for the reasons that " *some common question of law or fact arises in both the matter*" and "*the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions*".
3. The defendant, in her affidavit in support of her summons stated that she instituted action in Civil Action No. HBC 68 of 2018, against the plaintiff in the present case. This case and HBC 68 of 20 18 arise out of the same transaction.

4. Mr Fa, counsel for the defendant submitted that in both proceedings, the parties are the same and the causes of action arise out of third party mortgage no 787288. The validity of that mortgage is a common question of law. The present action would be redundant, if the plaintiff is successful in HBC 68 of 20 18. Any prejudice caused could be met by an order for costs. It was finally submitted that there was no time limit to filing an application for consolidation.
5. Mr Sharma, counsel for the plaintiff opposed the application. He submitted that the defendant did not pursue her application for an interim injunction in HBC 68 of 20 18. She took no steps to challenge the mortgage registered from 2013, until the plaintiff, as mortgagee, moved to exercise its powers to sell the property. She made this application a day before the hearing . She is represented by Fa & Company in this case, while the writ in HBC 68 of 2018 was issued by Jackson Bale Lawyers. No consent is annexed from Jackson Bale Lawyers to make this application. A mortgagee is entitled to seek vacant possession under Or 88. The plaintiff will be prejudiced, if the hearing is vacated.
6. On 2<sup>nd</sup> October, 2018, I declined the summons for consolidation and made order that the case proceed to hearing for the following reasons. Firstly, the defendant filed this summons on the day before the hearing. The *Supreme Court Practice*, 1988, Vol 1, paragraph 4/9/5 states an "application must be made as soon as possible". (emphasis added)
7. Secondly, as Mr Sharma quite correctly pointed out the there is no consent from Jackson Bale Lawyers, which issued the writ in HBC 68 of 20 18 to make this application. In this context, I would cite the *Supreme Court Practice*, (*op. cit*), paragraph 4/9/1 :

*There may, however, be further circumstances which will militate against an order being made. Two actions cannot be consolidated where the plaintiff in one action is the same person as the defendant in another action, unless one action can be ordered to stand as a counterclaim or third party proceedings in another action. Moreover, as one firm of solicitors will usually be given the conduct of the consolidated action on behalf of all plaintiffs, it is generally impossible to consolidate actions in which different solicitors have been instructed(Lewis v. Daily Telegraph (No.2) [1964] 2 Q.B. 601) unless all plaintiffs agree that one firm of solicitors shall act on their behalf, or unless there can be a partial consolidation. (emphasis added)*

8. Thirdly, the defendant did not pursue her summons for an injunction filed in HBC 68 of 2018, to restrain the plaintiff from taking possession of her property by way of a mortgagee sale. That case is at the discovery stage. It has not been fixed for trial. Finally, a mortgagee is entitled to seek vacant possession under Or 88.

### *Originating Summons*

9. The hearing on the substantive matter was concluded before me on 2<sup>nd</sup> October, 2018. The defendant was given time to file written submissions on 12<sup>th</sup> October, 2018 and the plaintiff to file written submissions in reply on 17 October, 2018. Neither party filed written submissions on the given dates.
10. The plaintiff seeks an order for the vacant possession of the defendant's property in CT No. 29212, Lots 9 & 2 on DP No. 1888 & 5394 situated at 4 miles, Nasinu, containing 1 rood and 16 perches with all improvements thereon, (the property) and an injunction restraining the defendant from interfering or removing the improvements thereon.
11. The affidavit in support filed on behalf of the plaintiff company states that the plaintiff advanced a sum of \$135,000.00 to Modern Investment Services Limited, (MISL) for the purpose of working capital. The list of securities in the Offer Letter of 24<sup>th</sup> August, 2012, contains the request for a first registered mortgage over the defendant's property, which was to be a collateral to a deed of debenture.
12. The affidavit continues to state that the defendant's property was required to secure the "*additional business loan advance of \$135,000.00*". On 18<sup>th</sup> June, 2013, the plaintiff wrote to MISL and sought formal execution of the security documents. Upon execution by the defendant, the plaintiff registered Mortgage No. 787288 over the property, which became a second ranking mortgage, as the plaintiff had a first registered Mortgage No. 724810 over the property. When the defendant's business loan account No. 5511 LI5.1 fell into arrears of \$17,963.63, the plaintiff issued a demand notice on 9<sup>th</sup> December, 2007, and eviction notice to the defendant, exercising its rights to proceed with mortgage sale. The plaintiff states that the defendant and her family continue to illegally occupy the property. The plaintiff has accepted a tender for the sale of the property and the prospective purchaser requires vacant possession.

*The determination*

13. The defendant has not challenged the loan nor the sums of monies advanced by the plaintiff to MISL. It is not in dispute that the defendant executed a primary and secondary mortgage of her property.
14. The case for the defendant, as set out in her affidavit in reply to the originating summons is that she executed the second registered mortgage no.78788 under duress, as the plaintiff threatened to impose a "5 penalty on all MISL's accounts". The threat was made in order to obtain a second registered mortgage, although it was not part of the securities contained in the terms and conditions of the letter of offer of 24 August, 2012. The defendant further states that this "amounted to duress, unconscionable conduct, undue influence and an overall reckless disregard for (her) rights as the owner of the property", which renders that mortgage null, void and unenforceable and the Notice of demand of 9 May, 2017, issued by the plaintiff unlawful.
15. The defendant alleges that the threat was made to her by the plaintiff in its letter 18<sup>th</sup> June, 2013, The letter addressed to the directors of MISL reads as follows:

*Re:Execution 01 of Outstanding Security Documents*

*Modern Investment Services Limited was approved additional funding of \$135,000 for working capital loan requirement on 1710812012. This was settled on 1410912012 upon execution of Letter of Offer on 2710812013 given urgent need for funds and security documents were to be signed later.*

*HFC(Mr.Bimal Jagrup) visited your office for execution of legal documents which was refused by the director pending consultation of solicitors.*

*Please note that Letter of Offer was accepted under company's common seal prior to release of funds and now we are formally seeking execution of security documents and return within 14 days. Failure to comply with the security requirements will prompt HFC to apply +5 penalty 011 current pricing 011 group accounts. Also note that financials for 2012 FY is outstanding which is to be provided within 14 days .... (emphasis added)*

16. Schedule 2 of the letter of offer of 24 August, 2012. identifies the securities taken to secure the additional loan facility of \$135,000 and includes a "*First Registered Mortgage*" over the property. Clause 7.3 of this letter of offer also imposes a 5 penalty, in the event of breach of any of its terms and conditions.

17. Clause 7.3 titled "*HFC'S DEFAULT RIGHTS*" provides as follows:

*A. On Defaults as to Repayments*

*If repayments are not made within this period or if you fail to perform or observe any other terms and conditions to this Loan Facility, then you will be in breach of the Loan Facility conditions in which event HFC has the rights set out in schedule 3.*

*You may also be liable to the following penalties without any further notice should you fail to meet the repayments by the respective due dates;*

- a. Arrears Fees [Please refer to facility schedule]*
- b. Default interest rate which will be an additional 5 per annum on the Interest Rate then applicable to the respective accounts will apply on the amount in default immediately upon the account going into default and will continue until the full amount in default has been paid off.*  
(under lining mine)

18. In my judgment, the defendant's contention that the imposition of a 5 penalty was a threat which left her, as owner of the property and "*director*" of MISL with "*no alternative.but to agree to execute*" the second registered third party mortgage on 19 August,20 13 is baseless. The alleged threat was contained in the letter of offer relied on by the defendant.

19. In my judgment, it was lawful for the plaintiff to impose the penalty, in terms of clause 7.3, as MISL was in default of repayment.

20. The affidavit in reply filed on behalf of the plaintiff has drawn my attention to its subsequent offer letter of 4<sup>th</sup> June 2014, signed by the defendant. The offer letter of 4<sup>th</sup> June,20 14 identifies a second registered guaranteed mortgage over the property, in its list of securities.

21. The plaintiff states that it issued another offer letter for the purpose of revolving overdraft on the MISL cheque account with the limit of \$200,000.00 and the defendant agreed to provide a second registered mortgage over the property. The requirement for the registered mortgage over the defendant's property was additional security, which was required in order to secure the advance of \$135,000.00 made to the defendant's business.
22. Significantly, the defendant did not challenge the second registered mortgage executed on 19 August, 2013 until a period of five years lapsed. The allegation of duress is made after the plaintiff proceeded to mortgage sale. The defendant, in her affidavit in reply states that the mortgagee sale proceedings were initiated under the second registered mortgage by the plaintiff's default notice of 9 May, 2017. The writ in HBC 68 of 2018 was issued subsequently on 14th March, 2018, on behalf of the defendant, as provided in the defendant's affidavit in support of 1<sup>st</sup> October, 2018.
23. The defendant, in her affidavit in reply states that "*she refused to agree*" to the second registered mortgage. The second paragraph of the letter of 18<sup>th</sup> June, 2013, referred to above provides that when a representative of the plaintiff "*visited (the defendant's) office for execution of legal documents (it). was refused by the director pending consultation of solicitors*".
24. The only reasonable conclusion that the Court can draw is that the defendant had subsequently obtained independent legal advice. The defendant has not contended at any stage that she did not obtain independent legal advice. Mukesh Nand, Barrister and Solicitor, Commissioner for Oaths states that "*the signature of (the defendant) was made in my presence .. and I certify that the contents hereof was read over and explained to the Mortgagor in the English language and (she) appeared to fully understand the meaning and effect thereof. in (his) presence*".
25. In the result, I find and hold that the defendant's contention that the secondary mortgage was executed by her due to a threat and duress on the part of the plaintiff is unfounded. I conclude that the defendant had willingly agreed to provide a second registered mortgage over her property.

26. Peter Millet QC in *A ec Lobb(Garages) Ltd v Total Oil GB Ltd*, [1983] 1 All ER 944 at pg 960 as follows:

*.. I accept that commercial pressure may constitute duress and render a transaction voidable, provided that the pressure amounts to a coercion of the will which vitiates consent: see Pao On v Lau Yiu[1979]3 All ER 65, .. Economic duress, however, is still a form of duress. A plaintiff who seeks to set aside a transaction on the ground of economic duress must therefore establish that he entered into it unwillingly(not necessarily under protest, though the absence of protest will be highly relevant) that he had no realistic alternative but to submit to the .. demands's that his apparent consent was obtained by improper pressure exerted .. and that he repudiated the transaction as soon as the pressure was relaxed.*  
(emphasis added)

27. Jitoko 1 in *Gilmour v Kubs*, 2007 FLR 47 at pg 57 referring to the case of *Pao On v Lau Yiu*,[1979]3 All ER 65stated :

*Economic duress, which the law now recognises as a category of duress, deals with commercial pressure that is brought to bear on one of the parties, to such an extent that he was effectively deprived of his freedom to exercise his own will. On this the law lords in Pao On case added at AC 635; All ER 78:*

*Their Lordships agree with the observation of Kerr J Occidental Worldwide Investment Corporation v Skibs AIS Avanti [J 976] I Lloyds Rep 293 at 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent. ... In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. Al these matters are, as was recognised in Maskell v Horner [1915] 3KB 106, relevant in determining whether he acted voluntarily or not.*

*.. But as the Privy Council noted Pao On, for commercial pressure to constitute economic duress, it must be to such as extent;*

*that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have confronted with coercive acts by the party exerting the pressure.*

28. In *Gilmour v Kubs*, 2007] FJHC 116, HBC 6551.1998S(30 January 2007) as cited by Mr Sharma, it was stated:

*In the end the Court is required to look at all the circumstances in which the allegation of duress took place and enquire whether the Kubs protested, whether there were alternative remedies; whether the Kubs had the opportunity and access to independent advise, including legal; and whether they took steps to avoid the contract.*

29. The principle to be derived from the authorities I have cited is that a plaintiff who seeks to set aside a transaction on the ground of economic duress must establish that he entered into it unwillingly, he had no alternative course open to him such as an adequate legal remedy, his apparent consent was obtained by improper pressure exerted, after entering the contract he took steps to avoid it as soon as possible and he was not independently advised.

30. I have found that the defendant has failed to establish these requisites.

31. I do not find it necessary to deal with the contention that the account and debt is that of MISL, not hers. The defendant is a director of MISL. It is for that reason she gave a primary and secondary mortgage on her property. I note that the directors had given an unlimited guarantee, as stated in the letter of offer of 24th August, 2012.

32. Mr Fa contended that the plaintiff has several other securities to realize the debt. In *Ram Prasad vs ANZ Banking Group Limited* (HBC 0121199S) it was held that. "*a mortgagee, so long as part of the mortgage debt remains unpaid may pursue any or all of the remedies available to the mortgagee at the same time.*"

33. In my judgment, the plaintiff, as mortgagee is entitled to obtain vacant possession of the property, in terms of clause 5.3 of the Mortgage no 787288. The plaintiff's contractual rights are fortified by section 75 of the Property Law Act, which empowers a mortgagee to enter into possession of the mortgaged property, upon default in payment of the mortgage money or any part thereof.



34. The defendant has not paid the monies due to the plaintiff nor redeemed the mortgage. The plaintiff, as mortgagee has the right to claim possession.

35. In *Naipote Vere and Esita Takayawa v NBF Bank*, Civil Appeal No. ABU 0069 of 2005, the Court of Appeal stated.

*It is clear that the Appellants were in default under the Mortgage and they admitted that to be the case during, the Trial. They did not, at any time, pay the monies required to redeem their equity into Court; nor did they place themselves in a position to payout the Mortgage even though they were aware, at all material times of the Respondent's intention to exercise its Power of Sale under the Mortgage.*

36. The summons for vacant possession succeeds.

### 37. Orders

- (a) I order the defendant to give vacant possession of the property in CT No. 29212, Lots 9 & 2 on DP No. 1888 & 5394 situated at 4 miles, Nasinu, containing 1 rood and 16 perches with all improvements thereon to the plaintiff on or before 4pm on 2<sup>nd</sup> November, 2018.
- (b) The defendant is restrained from interfering or removing the improvements on the property.
- (c) The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 1500.



*A.L.B. Brito-Mutunayagam*

**A.L.B. Brito-Mutunayagam**

**Judge**

**19<sup>th</sup> October, 2018**