

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 216 of 2010

BETWEEN : **FIJI DEVELOPMENT BANK** a body corporate having its Head Office at 360
Victoria Parade, Suva.

PLAINTIFF

AND : **ASENACA NATAGANE NAWAQALEVU aka ASENACA NAWAQALEVU** of 74
Domain Road, Suva, City Planner.

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. Mukesh Nand for the Plaintiff
Mr. Willy Hiulare for the Defendant

JUDGMENT

[1] The Plaintiff commenced this action by way of a Writ of Summons, issued on 13 July 2010.

[2] In the Statement of Claim attached thereto the Plaintiff, inter alia, submits as follows:

- (1) The Plaintiff is a body corporate established under Section 3 of the Fiji Development Bank Act (Chapter 214 of the Laws of Fiji).

- (2) Under Section 18 of the Act, the Plaintiff is empowered to carry on banking business including the power to lend money on such terms and conditions as it may determine.
- (3) Pursuant to the Loan Agreement, dated 2 May 2006, and variation of loan terms and conditions letter, dated 14 June 2006, entered between the Plaintiff and Defendant, the Plaintiff made certain loan facilities to the Defendant and as security for which the Defendant granted 1st Mortgage over CT9664 and adequate all risk insurance over CT9664 for at least \$180,000 to secure the loan.
- (4) The Defendant had defaulted in repaying the loan. Therefore, on or about 26 April 2007, the Plaintiff issued and served Demand Notice on the Defendant demanding full payment but the Defendant refused and or neglected to pay.
- (5) Thereafter, the Plaintiff exercised its rights under the securities and sold the mortgaged property with sale proceeds credited to the Defendant's account. However, the Plaintiff could not recover the full debt.
- (6) As at 27 May 2010, the Defendant had owed the sum of \$188,450.91 (ONE HUNDRED AND EIGHTY EIGHT THOUSAND FOUR HUNDRED AND FIFTY DOLLARS AND NINETY ONE CENTS) to the Plaintiff, with interest accruing thereon at the rate of 13% per annum as from the 28 May 2010.

[3] Accordingly, the Plaintiff claims the following reliefs against the Defendant:

- (i) Judgment against the Defendant for the sum of \$188,450.91 (ONE HUNDRED AND EIGHTY EIGHT THOUSAND FOUR HUNDRED AND FIFTY DOLLARS AND NINETY ONE CENTS) together with the interest at the rate of 13% per annum from 28th May 2010 until full payment.
- (ii) Costs of this action.
- (iii) Any other reliefs this Honourable Court deems just.

- [4] The Defendant filed her Statement of Defence on 27 September 2010, while the Plaintiff filed Reply to Defence on 14 October 2010.
- [5] On 26 February 2014, the Defendant filed a Summons seeking the leave of Court to amend her Statement of Defence. The Summons was supported by an Affidavit deposed to by the Defendant. An Affidavit in Response was filed by an Officer of the Plaintiff Bank, objecting to the application for amendment.
- [6] On 24 October 2014, Master Thushara Rajasinghe (as he then was), granted leave to amend the Statement of Defence filed by the Defendant on 27 September 2010.
- [7] Accordingly, the Amended Statement of Defence was filed in Court on 25 November 2014. Therein, the Defendant, inter alia, states as follows:
- (1) Although it is agreed that the Plaintiff exercised its rights under the securities and sold the mortgaged property with sale proceeds credited to the Defendant's account, the Defendant asserts that the Plaintiff failed to exercise its power of sale as mortgagee properly in all the circumstances.
 - (2) The Defendant alleges that the Plaintiff Bank unfairly sold the property on the following grounds that:
 - (i) That the buyer was one of the officers from BSP Bank which is another credit bank having connection with Fiji Development Bank (FDB).
 - (ii) That the sale price was lower in the sum of \$180,000.00.
 - (iii) That the sale price was below the recommended force market sale price of \$250,000.00 - \$300,000.00.
 - (iv) That the bank's conduct in the above (i); (ii) and (iii) amount to dishonest and fraudulent dealings.
 - (3) The Defendant submits the said sold price on forced mortgagee sale can be used as set off to pay the said remaining amount.

(4) Accordingly, the Defendant denies that she owes the Plaintiff the sum of \$188,450.91. She claims that the amount she owes the Plaintiff depended on the proper exercise by the Plaintiff of its mortgagee's power of sale.

[8] On 3 December 2014, the Plaintiff filed a reply to the Amended Statement of Defence.

[9] The Minutes of the Pre-Trial Conference record the following:

A. AGREED FACTS

1. It is agreed that the Plaintiff is a body corporate established under Section 3 of the Fiji Development Bank Act, Chapter 214 ("the Act") with perpetual succession and a common seal and is capable of suing and being sued.
2. It is agreed that under Section 18 of the Act, the Plaintiff is empowered to carry on banking business including the power to lend money on such terms and conditions as it may determine.
3. It is agreed that pursuant to loan agreement dated 2nd May 2006 and variation of loan terms and conditions letter, dated 14th June 2006, entered between the Plaintiff and Defendant, the Plaintiff made certain loan facilities to the Defendant and as security for which the Defendant granted 1st Mortgage over CT 9664.
4. It is agreed that the Defendant defaulted in repaying the loan. Therefore, on or about 26th April 2007, the Plaintiff issued and served Demand Notice on the Defendant demanding full payment.
5. It is agreed that the Plaintiff exercised its rights under the securities and sold the mortgaged property with sale proceeds credited to the Defendant's account.

B. DISPUTED FACTS

The parties dispute the following facts and figures:

1. It is disputed that the Defendant refused or neglected to pay the debt.
2. It is disputed that the Plaintiff failed to exercise its powers as mortgagee properly in all circumstances.
3. It is disputed that as at 27th May 2010, the Defendant had owed the sum of \$188,450.91 to the Plaintiff with interest accruing thereon at the rate of 13% per annum as from 28th day of May 2010.

C. ISSUES TO BE TRIED BY THE HONOURABLE COURT

1. Whether the Defendant owes the sum of \$188,450.91 to the Plaintiff being the debt balance outstanding as at 27th May 2010.
2. Whether the Plaintiff had failed to exercise its powers as mortgagee properly in all the circumstances.
3. Whether the sale price was below the recommended forced market price at that time.
4. Whether the forced mortgage sale price can be used to set off the alleged debt.

THE PLAINTIFF'S CASE

[10] The Hearing in this case commenced with Surendra Prasad testifying on behalf of the Plaintiff. He was the sole witness for the Plaintiff.

[11] During the course of the Plaintiffs' case the following exhibits were tendered to Court:

- P1** - Copy of the Loan Agreement, dated 2 May 2006.
- P2** - Copy of the variation of loan terms and conditions, dated 14 June 2006.

- P3** - Copy of the Demand Notice, dated 26 April 2007.
- P4** - Copy of Certificate of Title No. 9664.
- P5** - Copy of Mortgage No. 590343.
- P6** - Copy of letter sent by the Defendant to the Plaintiff Bank, dated 6 June 2007 (For Reconsideration of Demand Notice on Mortgage 590343).
- P7** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 11 June 2007.
- P8** - Copy of letter sent by the Defendant to the Plaintiff Bank, dated 20 June 2007.
- P9** - Copy of extract for advertisement to appear in the Fiji Times on 28 July 2007; Daily Post on 27 July 2007 and Fiji Sun on 27 July 2007.
- P10** - Copy of Tender Offer Letter from Russell Stone, dated 2 July 2007 (should be 2 August 2007).
- P11** - Copy of Tender Offer Letter from Mosmi Bhim, dated 13 July 2007.
- P12** - Copy of Tender Offer Letter from Vueti May, dated 3 August 2007.
- P13** - Copy of Tender Offer Letter from Ben Ralogaivau, (which is undated).
- P14** - Copy of extract for advertisement to appear in the Fiji Times on 1 September 2007; Daily Post on 31 August 2007 and Fiji Sun on 31 August 2007 and 11 September 2007.
- P15** - Copy of Advertisement in the Fiji Sun, on 18 January 2008.
- P16** - Copy of Advertisement in the Fiji Sun, on 2 February 2008.
- P17** - Copy of Advertisement in the Fiji Times, on 2 February 2008.
- P18** - Copy of Advertisement in the Fiji Times, on 9 February 2008.
- P19** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 31 July 2008.
- P20** - Copy of letter sent by the Defendant to the Plaintiff Bank, dated 4 September 2008.

- P21** - Copy of extract for advertisement to appear in the Fiji Times on 31 January 2009; Daily Post on 31 January 2009 and Fiji Sun on 31 January 2009 and 7 February 2009.
- P22** - Copy of Tender Offer Letter from Jonathan Stevens, dated 11 February 2009.
- P23** - Copy of Valuation Report carried out on 16 March 2009, by Professional Valuation Limited.
- P24** - Copy of Tender Offer Letter from Jonathan Stevens, dated 27 March 2009.
- P25** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 2 April 2009.
- P26** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 27 July 2009.
- P27** - Copy of letter sent by the Defendant to the Plaintiff Bank, dated 29 September 2009.
- P28** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 6 November 2009.
- P29** - Copy of letter sent by the Defendant to the Plaintiff Bank, dated 19 May 2010.
- P30** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 27 May 2010.
- P31** - Copy of Loan Account Statement from 1 January 2010 to 30 June 2010.
- P32** - Copy of Valuation Report, dated 25 April 2006.

[12] Surendra Prasad testified that he was a Bank Officer at Fiji Development Bank (FDB). He had been working at FDB for 26 years and had served in various branches. Currently he is serving at the Asset Management Unit, based at the head office in Suva. He has been attached to the said Unit for the past 4 years and currently serves as the Team Leader Recovery.

[13] The witness explained that the Asset Management Unit of the Bank gets involved to recover loans which are in default.

- [14] He testified that the Defendant's file had been transferred from Home Loans to the Asset Management Unit in 2007.
- [15] As per the terms of the Loan Agreement, dated 2 May 2006, a home loan had been granted to the Defendant in the sum of FJ\$240,000.00 [Plaintiff's Exhibit **P1**] to purchase a property at 13 Gomati Street, Tamavua, Suva [Certificate of Title No. CT 9664 – **P4**]. The loan was for a 20 year term and the monthly installment was FJ\$2,384.00 covering principal plus interest and insurance. As per the Agreement, the interest rate at the time was said to be 9.45% per annum.
- [16] The loan terms and conditions had been varied by document dated 14 June 2006 [Plaintiff's Exhibit **P2**].
- [17] The property at 13 Gomati Street, Tamavua, Suva (Certificate of Title No. CT 9664) was mortgaged to the Bank [Plaintiff's Exhibit **P5**].
- [18] However, since the Defendant had defaulted payment of the loan, a Notice of Demand was sent to her dated 26 April 2007 [Plaintiff's Exhibit **P3**]. The outstanding account balance as at 30 April 2007 was said to be FJ\$274,910.23.
- [19] On 6 June 2007, the Defendant transmitted a letter for reconsideration of the Demand Notice on the Mortgage [Plaintiff's Exhibit **P6**]. By Document **P7**, which is dated 11 June 2007, the Plaintiff Bank advised the Defendant that it is going to be impossible for the Bank to withdraw from the current situation unless concrete repayment arrangements are put in place to protect the Bank's interest.
- [20] The Defendant submitted a letter dated 20 June 2007, where she put forward a repayment proposal [Plaintiff's Exhibit **P8**]. However, the Bank had rejected this proposal.
- [21] Thereafter, the Plaintiff Bank had advertised the property for sale [Plaintiff's Exhibit **P9**]. Although, the Bank received offers for the property [Plaintiff's Exhibits **P10 - P13**], it did not award the tender to any of them as the offers were low.

- [22] The Bank re-advertised the property four times [Plaintiff's Exhibit **P14**]. However, no offers had been received. Thereafter, the Bank engaged a Solicitor for the sale of the property, who called for tenders on behalf of the Bank [Plaintiff's Exhibits **P15 - P18**]. Yet again, no offers had been received for the property.
- [23] Thereafter, the Bank placed the property on 'Private Sale', via newspapers, websites and notice boards, etc.
- [24] On 31 July 2008, the Plaintiff wrote to the Defendant advising her that the Bank had now received an offer for FJ\$180,000.00 which it intends to accept [Plaintiff's Exhibit **P19**]. The outstanding debt balance as at this date was FJ\$315,751.91. The Defendant had responded by letter dated 4 September 2008 [Plaintiff's Exhibit **P20**].
- [25] The Plaintiff had advertised the property for sale once again in January and February 2009 [Plaintiff's Exhibit **P21**]. The witness testified that pursuant to these advertisements, that an offer had been received for FJ\$180,000.00 from one Jonathan Stevens [Plaintiff's Exhibit **P22**].
- [26] The Plaintiff had conducted a professional valuation of the property and obtained a Valuation Report [Plaintiff's Exhibit **P23**]. As per the said report, the valuation of the property as at 16 March 2009 was FJ\$207,000.00.
- [27] Based on this valuation, the Bank had negotiated with Jonathan Stevens who agreed to increase his offer to FJ\$191,000.00 [Plaintiff's Exhibit **P24**].
- [28] On 2 April 2009, the Plaintiff had written a letter to the Defendant informing her that the Bank intends to accept the above offer. The Defendant had been granted a final 14 days to pay the total debt together with interests and other costs, which amounted to FJ\$352,886.50 at that point in time [Plaintiff's Exhibit **P25**].
- [29] Witness Surendra Prasad testified that the Bank had received no response from the Defendant. Therefore, the Bank accepted the offer and sold the property for FJ\$191,000.00.

- [30] Pursuant to selling of the property, if there remains a residual debt, the Bank will move to recover the debt. Accordingly, on 27 July 2009, the Plaintiff wrote to the Defendant that pursuant to their letter dated 2 April 2009, the Bank has completed the sale and transfer of the property for FJ\$191,000.00. Following the Mortgagee Sale process, the sum of FJ\$177,886.87 remains as residual on the account. The Defendant was requested to make necessary arrangements as to how she intends to settle this sum within 14 days. She was informed that in the event of failure to do so, the Bank will be left with no other option but to file legal action against her [Plaintiff's Exhibit **P26**].
- [31] By letter dated 29 September 2009, the Defendant wrote to the Plaintiff informing that she could only afford to pay FJ\$250.00 per month [Plaintiff's Exhibit **P27**]. The Plaintiff responded, by letter dated 6 November 2009, stating that it notes that the Defendant is agreeable to pay the residual debt at the rate of FJ\$250.00 per month from her salary, which will be received without prejudice for the time being [Plaintiff's Exhibit **P28**].
- [32] However, the witness testified that the Defendant had only made 3 such payments of FJ\$250.00. On 19 May 2010, she had informed the Plaintiff that since she is no longer employed and since she is unable to find any permanent employment, she is not in a position to commit to making consistent repayments until such time her circumstances improve [Plaintiff's Exhibit **P29**].
- [33] The witness said that on 27 May 2010, the Defendant was informed that the Plaintiff had referred the matter to their Solicitors. The outstanding debt balance as at 30 April 2010 stood at FJ\$188,450.91 [Plaintiff's Exhibit **P30**]. The statement of accounts tendered to Court as **P31** confirms that the outstanding debt balance as at 4 May 2010 stood at FJ\$188,450.91.
- [34] The witness testified that prior to the loan being approved and given to the Defendant the Plaintiff had called for a Valuation Report. The Valuation Report dated 25 April 2006 was tendered to Court as Plaintiff's Exhibit **P32**.
- [35] That was the case for the Plaintiff.

THE DEFENDANT'S CASE

[36] The Defendant testified herself and relied on the evidence of one other witness, namely Paula Raqeukai.

[37] During the course of the Defence case the following exhibits were tendered to Court by the Defendant:

- D1** - Copy of letter sent by the Plaintiff Bank to the Defendant, dated 12 February 2007.
- D2** - Copy of Bank Statement for the period 1 January 2006-30 June 2006.
- D3** - Copy of letter sent by the Defendant to the Plaintiff Bank, dated 28 September 2006.
- D4** - Copy of Email correspondence.
- D5** - Copy of Email correspondence.
- D6** - Copy of Email correspondence.
- D7** - Copy of Valuation Report, dated 1 May 2009, by Pacific Property Consultants.

[38] The Defendant testified that she was employed as a Lecturer in Town Planning at the University of the South Pacific (USP). In 2006, she was working at the Suva City Council as City Planner (Town Planner).

[39] She admitted that she took a loan from the Plaintiff Bank to purchase a property for investment purposes (Certificate of Title No. CT9664). She also admitted that she executed the Loan Agreement and the mortgage over the said property. Further the Defendant admitted that she had defaulted to pay the loan and explained the reasons that gave rise to the said default in payment.

[40] She tendered to Court as Defence Exhibit **D1**, a letter sent by the Plaintiff, dated 12 February 2007, whereby she was informed that the interest on investment loans had been increased to 13% per annum.

- [41] The Defendant also tendered in evidence a copy of the Bank Statement for the period 1 January 2006 - 30 June 2006 [Defence Exhibit **D2**].
- [42] As per Loan Agreement P1, the first installment payment was due to be paid to the Plaintiff in September 2006. However, by letter dated 28 September 2006, the Defendant requested that this payment be deferred to October 2006. This was due to the fact that they were settling into the property with costs incurred for establishing a new home [Defence Exhibit **D3**].
- [43] The Defendant testified that she was unable to secure any tenants to rent out the property at that point in time. She said that she had notified the Bank in this regard. The email correspondence between the Defendant and the Bank were tendered to Court as Defence Exhibits **D4 - D6**].
- [44] Paula Raqekai testified on behalf of the Defendant. He was a Lecturer in Property and Land Management at the USP. He was a Land Economist and Property Valuer. He had over 25 years' experience as a Valuer.
- [45] He testified regarding the property market in Fiji between the periods 2007 to 2010. He said that in 2006 the property market was booming. However, in the aftermath of the coup in December 2006, the market became stagnant.
- [46] He tendered to Court a Valuation Report dated 1 May 2009, which was conducted by Pacific Property Consultants [Defence Exhibit **D7**]. He had conducted this valuation on the instruction of the Defendant.
- [47] In cross examination, the witness said that he was the sole proprietor of the said Pacific Property Consultants. He further stated that he had received instructions from the Defendant to conduct the valuation on 28 April 2009. However, later in evidence, he said that the instructions were not given in 2009 but after this case was filed in Court in 2010. He admitted that sometimes reports can be backdated.
- [48] That was the Defendant's case.

[49] At the conclusion of the hearing both Counsel for the Plaintiff and Counsel for the Defendant were granted time to file written submissions. Accordingly, the parties filed detailed written submissions, which I have had the benefit of perusing.

ANALYSIS AND DETERMINATION

[50] From the facts of this case the primary issues for determination by this Court are the following:

1. Whether the Defendant owes the sum of \$188,450.91 to the Plaintiff being the debt balance outstanding as at 27 May 2010.
2. Whether the Plaintiff had failed to exercise its powers as mortgagee properly in all the circumstances.
3. Whether the sale price was below the recommended forced market price at that time.
4. Whether the forced mortgage sale price can be used to set off the alleged debt.

[51] The onus is on the Plaintiff, to prove on a balance of probabilities that the Defendant owed the sum of \$188,450.91 to the Plaintiff being the debt balance outstanding as at 27 May 2010.

[52] The Defendant contends that the Plaintiff had failed to duly exercise its powers as mortgagee in all the circumstances and also that the sale price of the property was below the recommended forced market price at that time.

[53] It is agreed between the parties that pursuant to Loan Agreement, dated 2 May 2006, and variation of loan terms and conditions letter, dated 14 June 2006, entered between the Plaintiff and Defendant, the Plaintiff made certain loan facilities to the Defendant and as security for which the Defendant granted 1st Mortgage over CT 9664.

- [54] It is also agreed that the Defendant defaulted in repaying the loan. Therefore, on or about 26 April 2007, the Plaintiff issued and served Demand Notice on the Defendant demanding full payment.
- [55] It is further agreed that the Plaintiff exercised its rights under the securities and sold the mortgaged property with sale proceeds credited to the Defendant's account.
- [56] The Loan Agreement, dated 2 May 2006 (P1), stipulated the terms and conditions under which the home loan of FJ\$ 240,000.00 was being granted to the Defendant. The contract provided that the Defendant provides security in the form stated therein. Accordingly, the property at 13 Gomati Street, Tamavua, Suva (Certificate of Title No. CT 9664) was mortgaged to the Bank.
- [57] The Mortgage Agreement (P5) provided that in the event of a default the Plaintiff was entitled to exercise its rights in terms of Clause 6 of that agreement, which included the mortgage sale of the property.
- [58] Since the Defendant had defaulted payment of the loan, a Notice of Demand was sent to her dated 26 April 2007 (P3). The mortgage sale of the property took place on or about April 2009. This was nearly two years later. Surendra Prasad, the Bank Officer testified as to all measures the Plaintiff had taken during this period to obtain the best available price for the sale of the property. However, the property market in Fiji was stagnant at the time. This was even confirmed by the witness called for by the Defendant, Paula Raqeukai.
- [59] In the circumstances, this Court cannot agree with the contention of the Defendant that the Plaintiff had failed to duly exercise its powers as mortgagee in all the circumstances and also that the sale price of the property was below the recommended forced market price at that time.
- [60] In ***NBF Asset Management Bank v Ulaiyasi Radike*** [2004] FJHC 531; HBC039J.2001S (11 March 2004); His Lordship Justice Jitoko held:

“...The right to sell the mortgaged property, after the default by the mortgagor is in the first instance, derived from statutes. Under section 79 of the Property Law Act, the mortgagee is permitted to sell the property if default payment of the mortgage money continues after one (1) month of the service of the notice that is required to be given under section 77 of the same. Secondly, the powers to sell may be conferred upon the mortgagee by the terms of the mortgage instrument. Finally, the sale can be with the concurrence of the mortgagor.”

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*“In a mortgagee sale, the power to sell is given to the mortgagee to exercise first and foremost, for his own benefit to enable him to realise his debt (see: Warner v. Jacob (1882) 20 Ch D220 at 234; Farrar v. Farrar Ltd. (1888) 40 Ch D395 at 398). All that is required of the mortgagee is a duty to act bona fide in the conduct of the sale. As Lindley L.J. said in Farrar’s case at p.411, that if in the exercise of his power the mortgagee **“acts bona fide and takes reasonable precautions to obtain a proper price”** the mortgagor has no redress even though more might have been obtained if the sale had been postponed. In Cuckmere Brick Co. v. Mutual Finance Ltd. [1971] Ch 949, Salmon L.J. added, at p.966:*

“It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it

The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.”

Similar sentiments were expressed in Tse Kwang Cam v. Wong Chit Sen [1983] 3 All ER 54 (Privy Council), Parker Tweedle v. Dumbar Bank [1990] 3 WLR 778; and China and South Sea Bank v. Tan Sam Gin {1990} 1 AC 536.

In my view the duty of the mortgagee to act bona fide includes good faith and reasonable care. While he is entitled to sell the mortgaged property at any time, he must ensure that he is at the same time paying due regards to the interests of the mortgagor. For example, in Standard Chartered Bank Ltd. v. Walker {1982} 3 All ER 938, the Court held that there must be sufficient time allowed to permit proper advertisement to be made so that the best price obtainable can be obtained. It may also be necessary for the mortgagee to delay the sale if there are clear signs that the property market was improving rapidly and substantially as the Court held in Dimmick v. Pearce Investments Pty Ltd. (1980 43 FLR 235).”

[61] **Tubunavere v Colonial National Bank** [2007] FJHC 129; Civil Action No. 486.2000 (2 March 2007); His Lordship Justice Devendra Pathik stated:

"It is clear law that a mortgagee is not a trustee for the mortgagor in the exercise of its power of sale (Cuckmere Brick Co. Ltd & Anor. v Mutual Finance Ltd [1971] Ch. 949 CA, Warner v Jacob 20 Ch. D 220 at 224); applied in our Courts in NBF Asset Management Bank v George Niumataiwalu Action No. HBC0437/98 and Laisenia Uluinayau & Anor v National Bank of Fiji, Action No. HBC 0175 of 1994).

In **Cuckmere** (supra) **Lord Salmon L.J** at 965 said:

"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so."

The following passage from the judgment of Sir George Jessel MR in Nash v Eads (1880) 25 Sol Jo 95 (which was quoted as authority by Russell J in Belton v Bass, Ratcliffe and Gretton Ltd [1992] 2 Ch 449 at 465) is pertinent:-

"The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the court would not look into his motives for so doing. If he had a right to sell on 1 June, and he then said, "The mortgagor is a member of an old country family, and I don't wish to turn him out of his property and will not sell it at present", and then on 1 July he said, "I have had a quarrel with the mortgagor and he has insulted me; I will show him no mercy, but will sell at once" - if all this was proved, the court could not restrain the mortgagee from exercising his power of sale, except on the terms of payment of the mortgage debt. The court could not look at the mortgagee's motives for exercising his power... He, like a pledgee, must conduct the sale property, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he was not in urgent need of money, or because he had a spite against the mortgagor."

[62] As such, considering all the facts and circumstances of this case, including the documents tendered by both parties, I am of the opinion that the Plaintiff has succeeded in proving on a balance of probabilities that Defendant owes the sum of \$188,450.91 to the Plaintiff, being the debt balance outstanding on the Loan Agreement, as at 27 May 2010.

[63] Accordingly, I enter Judgment in favour of the Plaintiff in the sum of \$188,450.91 (ONE HUNDRED AND EIGHTY EIGHT THOUSAND FOUR HUNDRED AND FIFTY DOLLARS AND NINETY ONE CENTS) against the Defendant.

[64] I do not deem it appropriate to make any order in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act No. 7 of 1935 (Chapter 27), for interest to be paid on the above sum for any part of the period between the date the Plaintiff filed this action until the date of this judgment.

[65] However, in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Act No 46 of 2011, I order post judgment interest at 4% per annum on the judgment sum (\$188,450.91) from the date of this judgment until the date of settlement.

FINAL ORDERS

- a. Accordingly, I order the Defendant to pay the Plaintiff the sum of \$188,450.91.
- b. I also order that the Defendant pay interest at 4% per annum on the judgment sum (\$188,450.91) from the date of this judgment until the date of settlement.
- c. I make no further order with regard to costs.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 21st Day of March 2019

Solicitors for the Plaintiff : Nands Law, Barristers & Solicitors, Suva.
Solicitors for the Defendant : HM Lawyers, Barristers & Solicitors, Suva.