IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 190 of 2018

BETWEEN: **MERCHANT FINANCE LIMITED** a duly licenced financial institution having its registered office at Level 1 Ra Marama House, 91 Gordon Street, Suva.

PLAINTIFF

AND: **DAILY LOGISTICS & FREIGHT (FIJI) LIMITED** a limited liability company having its registered office at 69 Kings Road, Nausori.

1st DEFENDANT

AND: **DAISY SHEREEN FARINAH KHAN IQBAL** the lawful and duly appointed Administratrix of the Estate of Mohammed Sahid lqbal of 9 Dilkusha Road, Nausori, Company Director.

2nd DEFENDANT

AND: **DAISY SHEREEN FARINAH KHAN IQBAL** of 9 Dilkusha Road, Nausori, Company Director

3rd DEFENDANT

Counsel : **Plaintiff: Mr. A. Pal and Ms. S. Naidu**

: **Defendants: Mr. B. Solanki**

Date of Hearing : **22 and 23 .6.2020**

Date of Judgment : **21.8.2020**

Catch Words

Early termination clause- loan agreement- claim for principal and interest- loan offer-Bill of Sale- voluntary return- repossession- inaction of mortgagee -delay in sale-obligations of lender- act reasonably-equitable compensation- waste of property after repossession- no general duty of care for mortgagee-

Cases Referred

1. *Downsview Nominee Ltd v First City Corpn Ltd* [1993] AC 295
2. *Meretz investments NV v ACP Ltd* [2006] EWHC 74 (Ch),[2007] Ch 197

3. *Raja v Austin Gray* [2003] 1 EGLR91,[2002]EWCA Civ 1965
4. *Gray v Lord Ashburton* [1917] AC 26
5. *Cf Downsview Nominee Ltd v First City Corp Ltd* [1993] AC 295
6. *Close Brothers Ltd v AIS (Marine) 2 Ltd and another* [2018] EWHC 4061 (Admlty); [2018] All ER (D) 41
7. *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 4 All ER 484
8. *McDonagh v Bank of Scotland plc and others* [2018] All ER (D) 06 (Dec)
9. *PK Airfinance SARL & Anor v Alpstream AG & Ors* [2015] EWCA Civ 1318
10. *Barnsley and others v Noble* [2014] All ER (D) 29 (Oct)[2014] EWHC 2657 (Ch)
11. *Anglo Group plc v Winther Brown & Co Ltd* 72 ConLR 118; [2000] All ER (D) 294

JUDGMENT

INTRODUCTION

1. Plaintiff provided a loan facility to first Defendant and second and third Defendants were the guarantors to said loan. The loan was to purchase two capital assets for first Defendant to start and operate a business of container cartage service. Entire loan proceeds were used to purchase a used low- bed ten-wheeler Truck bearing registration number DY 675 and a trailer equipped with side- lifters bearing registration number DT 466. Both these items along with a previously purchased SUV were mortgaged as security for the said loan. They were under Bill of Sale in favour of Plaintiff. Defendants had voluntarily returned DY 675 and DT 466, few weeks after purchasing them. Plaintiffs had not taken any action after repossessed, for five months, and they were idling in the vehicle yard. When inquired by Defendants, the answer given by loan officer, was that there was 'backlog' of work with officer of the Plaintiff. It was unreasonable to delay the sale of such expensive movable items, and allow them to waste and deteriorate their value. At the time of grant of loan Plaintiff had certified to the valuation of the items, but could not recover even half of the price paid for DY 675 and DT 466 from sale. Items bearing registration, DY 675 and DT 466 were auctioned separately but sold together since the items were handed over with in less than two months from their valuation, the reduction of price below half of their value can only attribute to inaction of Plaintiff for sale and or *unreasonable* conduct of Plaintiff. Plaintiff claimed for shortfall on the loan account. Loan account contained, opening balance comprising, loan capital and interest charged for four years. In any early payment or exit clause must allow rebates on the interest charged to the account. The method adopted to charge the interest needed to be explained in order to prove the interest component of claim. Plaintiff's witness failed to give evidence other than producing a document, which he was unable to explain. He could not relate to early payment and how such early repayment dealt in terms of the loan offer and or loan agreement. Defendants had

counter claimed damages, for failure on the part Plaintiff to act reasonably and also for negligence. There is no *general duty of care* to the mortgagor[1] . Defendants are entitled for equitable compensation for loss of price of items that were repossessed and allowed to waste at their hand, due to inaction of Plaintiff's officers. Plaintiffs are estopped from denying their own valuation of the assets about a month before repossession due to voluntary return. Defendants claim for damages based on *unreasonable* actions of mortgagee, based on equitable compensation[2], is allowed.

FACTS

2. Most of the facts in this action were admitted and parties had filed an agreed bundle of documents in order to shorten the time and cost to the parties.

3. The only issue that both parties did not agree, contained in the said agreed bundle of documents was the date of the return of the securities under loan. This was also contained in pleadings and was the main issue relating to facts that needs determination.

4. According to Plaintiff all three securities were returned on 27.10.2015 as per Tab 34 of agreed bundle of documents. There is no denial of that document. Plaintiff did not adduce any evidence to prove actual handing over of the items, Defendants state that DY675 and DT 466 were handed over in May or early June 2015 but Plaintiff failed to take any action and they were idling on the vehicle yard of Plaintiff.

5. Defendants in the statement of defence had denied handing over of the securities, though they admitted that due to coercion on their part for several times the employee of Plaintiff who dealt with the loan executed said document contained in Tab 34 after a lapse of five moths.

6. Third Defendant who gave evidence said that reply the guarantors received from Plaintiff's loan officer for delay in the sale of the items repossessed was her 'backlog' of work

7. The content of the agreed bundle are not admitted and where necessary parties required proving them through evidence.

8. The Plaintiff called Mr. Lal, consultant at the Plaintiff to give evidence on behalf of Plaintiff. He could not state evidence as to facts other than again refereeing to the documents and also giving evidence in general as he was not privy to any of the incidents in this action, where disputes arose.

---

[1] See Fisher and Lightwood's Law of Mortgage(14th Edi) p 688
See *Downsview Nominee Ltd v First City Corpn Ltd* [1993] AC 295; *Meretz investments NV v ACP Ltd* [2006] EWHC 74 (Ch),[2007] Ch 197; *Raja v Austin Gray* [2003] 1 EGLR91,[2002]EWCA Civ 1965
[2] *Gray v Lord Ashburton* [1917] AC 26

9. So Plaintiff's witness could not give evidence as to the disputed fact as to the return of the securities other than referring to the documents.

10. Defendants called Ms Daisy Iqbal, the third Defendant, and also the representative for her late husband who was the ex-second Defendant. She was a Director of first Defendant.

11. Plaintiff's evidence was that Defendants were granted a loan of $179,000 including interest for four years for the principal sum. This loan was granted as initial capital purchase for the first Defendant, to purchase a low bed Truck and a side lifter for the business of Container cartage service.

12. The amortization of the said loan as at date of loan on 12.5.2015, were as follow

    a. Amount Approved(capital) $128,000
    b. Total interest for 48 months $51,199.84
    c. Deposit $30,000.00
    d. Balance (Loan) $179,199.84 (as at the time of grant of loan)

13. According to the Plaintiff both low bed Truck and side lifter cum Trailer were voluntarily handed over by the Defendants within few weeks after purchase, from proceeds of the loan.

14. Defendant had returned the two securities brought from the proceeds of the loan first but kept the other vehicle which was SUV till July 2015. This was returned, after a bailiff visited the house of the third Defendant.

15. According to Mr. Lal though they had sought buyers for DY 675 and DT 466 through paper advertisements calling for public auctions and for private tenders they could only recover $74,000 for both low bed Truck and Side Lifter cum Trailer.

16. The remaining security which was the SUV was sold without advertisement for $13,000.

17. The reserve Prices for low bed Truck was $80,000and side lifter cum Trailer, $50,000 and SUV $20,000.

18. All three items were valued by Plaintiff on or around 10.4.2015 for following amounts

    a. DY675- Low Bed ten wheel Truck- $105,000
    b. DT 468 –Steelbro side lifter cum trailer-$50,000
    c. Nissan SUV $30,000

19. All three vehicles were sold on 13.1.2016 and sum recovered credited to the loan account accordingly.

20. The loan period was four years from 12.5.2015 and there was early termination of loan due to handing over of the securities to the Plaintiff.

21. There was early termination clause contained in the letter of offer for the loan and accordingly Plaintiff was entitled to thirty day interest from the amount outstanding on the early settlement date (see Clause 8 of Loan Agreement contained in Tab 21 and also Loan Offer under letter K).

22. The provisions contained in Loan Agreement and Loan Officer are different and in evidence Plaintiff's witness did not state under which document, interest rebate was given for early payment.

23. Plaintiff's only witness in his evidence, said their loan officers are skilled in valuation of vehicles. The valuations were certified by the said officers.

24. But, he did not state sharp depreciation of all three vehicles secured under Bill of Sale when they were sold under mortgagee sale. Low bed Truck and Side Lifter was not even used in any manner, after purchase, as to lower its value in any significant manner.

25. Third Defendant, gave evidence and said that she and her husband relied on the valuation of the assets by the Plaintiff's loan officer, when they were bought.

26. According to the evidence of third Defendant as soon as they sought for work, for the business of transportation of Containers, they had realized that players already in the service of container cartage, were not going to provide, any business for Defendants.

27. Third Defendant stated that two vehicles purchased from the loan from the Plaintiff were returned to the custody of the Plaintiff even without a single default.

28. Defendant stated that this was their first business and before that her late husband was a Taxi driver and they had migrated to NZ and there her late husband drove a heavy vehicle for the municipal council in NZ.

29. Upon the experience obtained in NZ, for seven years they had thought about starting a Container cartage service of their own where her late husband would be engaged as cartage driver.

30. Third Defendant said that they always dealt with one loan officer and after return of two vehicles bought for the business they had also returned the SUV used as family vehicle, which was also given as surety for the loan.

31. She and her late husband had not communicated with loan officer through letters hence handing over of the vehicles were not evidenced by letters. She said that they had inquired several times of the failure to recover debt through sale of the vehicles by Plaintiff, but was informed that there were some 'backlog' of work to be completed before sale of those items.

32. Third Defendant denied the date stated in the voluntary return as the date of repossession of the vehicles. They are counter claiming for the differences of the values of the items sold on the basis of Plaintiff's own valuation at the time of purchase of them as they were returned voluntarily, less than two months from the valuation.

ANALYSIS

33. Plaintiff's claim was based on the shortfall of the loan account of first Defendant where second and third Defendants were guarantors to said account.

34. Plaintiff had provided a loan to purchase two main capital items for first Defendant to provide container cartage service. The ten wheel truck registered as DY675 and trailer with side lifting was bearing registration DT 466.

35. Both these items were valued by the Plaintiff by their officers who according to evidence of the witness called were competent in valuation for $105.000 and for $50,000 respectively.

36. Plaintiff repossessed both the abovementioned items from voluntary handing over of the same by Defendants, but were allowed to idle them for more than five months.

37. Plaintiff had sold DY 675 and DT 466. They were advertised sometime earlier without success. Initially where an offer for higher price that what was recovered in subsequent sale. This price was accepted but the sale did not proceed.

38. Plaintiff's only witness could not explain facts contained in the documents including how outstanding amounts in the loan account were calculated, and how rebates on loan interest were granted for early settlement of loan.

39. There is no dispute that substantial part of the loan was recovered through mortgagee sale of the securities, which were movable and also under Bill of Sale.

Since the Plaintiff had charged the loan account entire interest for four years, this must be adjusted in terms with agreed terms.

40. The interest for the loan for entire period of the loan was calculated and added to loan account at the time of the grant of loan.

41. The Plaintiff failed to prove how any early settlement of loan dealt in terms of the agreed terms between the parties to this action contained in the agreed bundle of documents.

42. There was ambiguity as to the calculation of early repayment. The loan offer and loan agreement had different methods for such rebates on the interest for early settlement.

43. Plaintiff's witness could not state which was applied and how the rebate on interest of loan capital was calculated.

44. The sale of DY 675 and DT 466 were advertised in papers more than once. Settlement of the sale proceeds were on 13.1.2016. Both low bed Truck and the Trailer with side lifters were sold together to a price of $74,000.

45. The remaining mortgaged security which was a SUV was sold without advertisement for $13,000.

46. The recovered sum was credited to loan account.

47. Since the loan was for 48 months from 15.5.2015 and substantial amount of the said loan was settled early Plaintiff could not recover entire interest of the loan which was added to the loan account at the beginning. The Plaintiffs were entitled to early termination fee, but this clause is not clear due to;

    a. There is ambiguity as to what is the position of early termination when entire sum is not recoverable through sale.
    b. There is conflict between provisions contained in the loan offer and loan agreement which were signed and executed on the same day.

48. For an early termination there is specific provision contained in the loan offer under 4 K (Tab9) and also in Loan Agreement Clause 8 (Tab21). There was a difference between the two and Plaintiff did not explain which clause was selected and which manner it was applied.

49. Both Loan offer acceptance and also Loan Agreement bears same date 12.5.2015. It should also noted that loan offer was dated on a date in April (exact date which has got deleted in copying) irrespective of date of offer the contract was made at the

time of acceptance and this was on 12.4.2015. This is the same day Loan Agreement was entered.

50. So Plaintiff had acted unreasonably by deliberately allowing conflicting clauses relating to early repayment, and also not explaining the application of the same at the hearing.

51. Plaintiff's witness could not explain the entries in loan account and how balances, contained in the loan account were arrived at. The burden of proof of the remaining debt was with the Plaintiff.

52. Plaintiff's books of account relating to the loan indicated rebate of loan due to early settlement. There was a previous rebate of $37761.18 on 31.1.2016 but this was later reversed though cross entry and, reduced to a rebate of $29,056.47. Plaintiff's witness could not explain how this was calculated and under which clause it was applied.

53. So, there is ambiguity as to the calculation of interest component of the loan. This does not mean Plaintiff could not charge interest for their opportunity cost or otherwise but any such interest needs to be stated clearly and also proved in court to substantiate the claim of the Plaintiff.

54. Plaintiff's claim in this action contained balance of loan capital and also interest component. The amount recovered, through sale of the securities were less than the capital of the loan. This shortfall was due to Plaintiff's unreasonable actions, which is dealt separately.

55. The loan account cannot deviate from the conditions contained in the loan offer and or agreement. The burden of proof of the loan amount was with the Plaintiff and witness called for the Plaintiff could not explain how the amounts were calculated in terms of the loan contract.

56. Plaintiff in the evidence did not explain the reason for material differences in the Early Termination clause in loan offer which was accepted on the same date of the loan agreement.

57. There are significant differences on the said Early Termination and they are reproduced in full below:

Early Termination Fee (4 K in Loan Offer accepted on 12.5.2015)

> *" In the event the Borrower repays the loan prior to expiry of the Term of the Loan, an early termination fee will be charged that is calculated at thirty(30)*

days interest on the outstanding principal balance to be calculated at the fixed interest rate."

Early Termination (Clause 8 of Loan Agreement dated 12.5.2015)

(a) The Borrower has the option to terminate this Contract before the end of its term in accordance with this clause 8, provided it is not in default under any provision of this Contract.
(b) The option in sub-clause (a) shall be exercised by written notice from the Borrower to MF, a sum of money calculated in accordance with sub-clause(c) (Discharge Amount).

(c) The Discharge Amount shall be the Amount Financed and Interest Charges less the following amounts;

i. All moneys previously paid to MF by way of instalments; and
ii. A rebate of the Interest Charges specified in the Schedule at the date of early termination being the amount derived by

- Multiplying interest Charges at part C of the Schedule by the sum of all the whole numbers from on to the number of complete months still to elapse until the date contemplated for the payment of the last instalment(both inclusive) ; and

- Dividing the product so obtained by the sum of all whole numbers from one to the number which is the total number of complete months from the date on which payment of the first instalment is due to the date contemplated for the payment of the last instalment (both inclusive).

58. Clause 8 of the Loan Agreement calculation of 'Discharge Amount' this can be calculated by deduction of instalments paid and also deduction of 'rebate' on 'Interest Charges specified in the Schedule' but there was no schedule in the Loan Agreement contained in Tab 12.

59. Plaintiff's witness, during the course of his evidence, admitted that he had had not dealt with the Defendant and or specific loan granted and recovery of the said loan through sale of the securities obtained.

60. It is admitted that the Team Leader- Loans Department at the Plaintiff Company, was the person who had dealt with the Defendants in this matter. According to evidence for Defendants both vehicles meant for container cartage were handed over in May or early June and the SUV was also handed over as soon as a bailiff visited them in July, 2015.

61. So Plaintiff's position that all vehicles were handed over on a same day cannot be accepted as correct in the analysis of evidence. Third Defendant in her evidence stated that despite several reminders vehicles remained at the vehicle yard of Plaintiff after repossession without any action regarding them.

62. The documents relating to handing over of vehicles were signed on 27.10.2015. This was not the date of returning vehicles to Plaintiff to auction and recover loan. Third Defendant stated clearly how she and her late husband saw repossessed ten-wheel truck and trailer in the vehicle yard and repeatedly inquired as to the sale and recovery of the loan.

63. Her evidence is reliable and can be accepted as the only person who had direct knowledge of the repossession of the three vehicles by Plaintiff. The witness called for Plaintiff had not witnessed to the disputed facts and was not involved in the loan granted to the first Defendant.

64. Apart from absence of direct evidence from Plaintiff as to repossession there were circumstantial evidence that all three vehicles were not returned on the same day as recorded in the documents, on 27.10.2015. Plaintiff had admitted that they engaged a bailiff and he was used only to repossess SUV. If all the vehicles were returned on the same day there was no reason to engage a bailiff to recover only SUV.

65. Third Defendant stated that they had immediately after commencement of the business knew the unviability of their business and returned the two vehicles purchased from loan within few weeks from purchase of the items. She and her husband were not people with business acumen, and had thought that they were only obliged to return the items that were purchased from the loan granted by Plaintiff. This was justified to some extent as both ten wheeler truck and trailer were valued by Plaintiff more than $155,000 and if recovered, would have covered debt at time.

66. SUV which was not bought from the loan and used as a family vehicle was not returned immediately after obtaining loan but later when a bailiff visited their house and requested the return of the same in July, 2015.

67. It was an admitted fact that bailiff visited for a repossession of only one vehicle and this was for the SUV, and this proves that other two items were already repossessed as stated by third Defendant.

68. Third Defendant said that SUV was returned to Plaintiff in July about two months after return of the other two sureties. This evidence was accepted as correct position in the analysis of probability. Plaintiff's witness could not state as to facts other than what was in the records as he did deal with the loan or repossession at any time.

69. Third Defendant was truthful and her version of the events are proved on balance of probability. So, the màterial dispute between the parties as to the facts was held in favour of the Defendants.

70. All the material documents in the grant and also recovery of the loan had loan offer's signature. Plaintiff's witness admitted this position and his lack of knowledge as to the time of the vehicles were repossessed under Bill of Sale. According to documents both low bed Truck, Side Lifter (Trailer) and SUV were voluntarily returned on 27.10.2015 and this cannot be accepted in the analysis of evidence. I accept the version of the Defendants that both Truck and Trailer which were valued by the Plaintiff for over $150,000 were returned to the Plaintiff by late May 2015. By this time there was no default of payment by Defendants. If Plaintiff had acted swiftly to recover the money from proceeds of the sale of the vehicles, at least loan capital of $128,000 could have been recovered fully.

71. Defendants were new to the business of container cartage and they had not kept any records of the correspondence, but the oral evidence of third Defendant is accepted as correct in the analysis of evidence on balance of probability.

72. Defendants were claiming for breach of duty of care in the delay in the sale. It is axiomatic that vehicles depreciate in value over time and this will be more if they are not used, irrespective of that, there is no common law duty of care for mortgagor.

73. *"A mortgagee in possession is not liable for waste as such."*[3](see Cf Downsview Nominee Ltd v First City Corp Ltd [1993] AC 295 at 315. The absence of duty of care under common law is not to allow mortgagee to act unreasonably and let the property mortgaged waste, so as to deteriorate the value.

74. In this action Plaintiff had valued through their experienced officers in valuation of such assets , according to the evidence of Mr. Lal, two items bought from the loan $105,000 and $50,000 respectively on 10.4.2015 and both these items were repossessed virtually in the same condition at the time of purchase in May or June, 2015 by Plaintiff. But, to amazement, Plaintiff could recover only $74,000 for assets they valued for $155,000 on 10.4.2015. The delay of sale, was due to backlog of work to loan officers and reduction of price can only be attributed to delay.

75. Defendants claimed for damages in common law duty of care from mortgagee. This claim needs to be struck off *in limine*.

---

[3] See Fisher and Lightwood's Law of Mortgage(14th Edi) Liability for deliberat and negligent damage to the property- 29.6 General duty p 655

76. Defendants had failed to establish that there was common law duty of care or liability under tort between mortgagee and mortgagors. (See Fisher and Lightwood's Law of Mortgage (14th Edi) p 688 (See *Downsview Nominee Ltd v First City Corpn Ltd* [1993] AC 295; *Meretz investments NV v ACP Ltd* [2006] EWHC 74 (Ch),[2007] Ch 197; *Raja v Austin Gray* [2003] 1 EGLR91,[2002]EWCA Civ 1965.)

77. Defendants' main contention is that Plaintiff had acted negligently. (i.e breach of duty of care). The particulars of negligence are given in paragraph 22 of the statement of claim and state as follow

   a. The Plaintiff, their officers and agent, knowing that the security properties, namely (a) One Nissan Truck Registration No DY675, (b) One Steelbro Sidelifter Registration Number DT 466 and (c) Nissan Serena Wagon Registration No HU 193 were sold below true value of the properties.
   b. Plaintiff having possession of above vehicles failed to take immediate steps to have vehicles sold.
   c. Plaintiff did not carry out adequate advertising.
   d. No advertising for SUV.
   e. Acted in bad faith in not taking reasonable precautions to obtain true value for securities.

78. Book 'Fisher and Lightwood's Law of Mortgage (14th Edi) at p 691 stated (30.24)

> 'If the mortgagee decides to exercise his power of sale, he is under specific duty to take reasonable care to obtain the best price reasonably available for mortgaged property at the time, which will normally equate with the current market value. This duty arises in equity, rather than in tort or contract.'

79. I accept the third Defendant's evidence that both items bearing registrations DY 675 and DT 466 were repossessed to Plaintiff as they were kept in the Plaintiff's vehicle yard depriving Defendants, their use. Sine these items were movable properties and were under Bill of Sale Plaintiff had the opportunity to sell them immediately without allowing them to waste in the vehicle yard.

80. Plaintiff and its officer, repossessed voluntarily returned securities but they were kept in vehicle yard of the Plaintiff irrespective of signing of the documents relating to handing over of the items five months later on or around 27.10.2014.

81. Mortgagee is not a trustee to the said items it had taken in to possession. Once items were in their possession which were under Bill of Sale they cannot be kept to waste, without taking necessary steps to expedite the sale. This was more so regarding deteriorating or depreciating high valued items such as items they held in their

vehicle yard without any action due to 'backlog' of work. This was unreasonable for the Defendants.

82. Third Defendant in her evidence said that she and her late husband immediately realised that their business was not going to get any cartage services from the existing players in the market, hence decided to return two capital assets that were purchased from the loan proceeds of Plaintiff. Both truck and side lifter-trailer were held in vehicle yard of Plaintiff since then and Plaintiffs did not have any access to said items. Movable properties under Bill of Sale, obtained all the legal requirements for sale from physical handing over and repossession of Plaintiff.

83. Third Defendant in her evidence said that she and her late husband used to see these two items in the Plaintiff's vehicle yard without being advertised for sale. Several times had inquired about why they were not put on sale and the answer the received was that there was 'backlog' of work. This was not a reasonable ground to let valuable items to waste in vehicle yard of Plaintiff.

84. Plaintiff as the mortgagee once repossession of mortgaged items cannot wait without taking any action because of workload or inefficiency and let items to depreciate considerably during that time.

85. The mortgagor and or guarantor cannot be held responsible for any devaluation due to delay due to inefficiency or backlog of work. This is not the same as taking a decision as to sale of the items, which they are entitled as mortgagee, but simply inaction or disregard the mortgagor as well as guarantors of the loan was unreasonable.

86. While Plaintiff as mortgagee can exercise its discretion as to date of sale, by the same token it cannot hold properties in their possession inactively, blaming 'backlog' of work. If this happens and value of the property had deteriorated significantly, it was due to their own fault a reasonable sum was not recovered and it is not equitable to claim for such a fall in value from parties which had equitable interest in the said property including guarantors.

87. In a recent UK case *Close Brothers Ltd v AIS (Marine) 2 Ltd and another* [2018] EWHC 4061 (Admlty); [2018] All ER (D) 41 (Sep) the law relating to mortgagee's obligations towards assets taken in to possession was summarised as follows;

> "12. It is, I think, helpful to consider the relevant principles applying the relationship between a mortgagee and mortgagor with respect to the sale of property of which a mortgagee has taken possession in the exercise of its rights under the mortgage deed. At the hearing for summary judgment Mr. Rivalland submitted and I accepted that the relevant authorities demonstrate the following:

a. The mortgagee of a ship owes the same duty of care in relation to the sale as any other mortgagee owes, see _Gulf and Fraser Fisherman's Union v Calm C Fish Ltd_ [1975] I Lloyds Rep 188.

b. The mortgagee owes a duty **in equity to take reasonable care to obtain the best price reasonably obtainable at the time**, see _Tse Kwong Lam v Wong Chit Sen_ [1983] 1 WLR 1349 at 1355 and others, which has been equated with the true market value _Cuckmere Brick Co v Mutual Finance Ltd_ [1971] Ch 949.

c. Although the timing and the manner of sale is a matter for the mortgagee, he will be liable to the mortgagor if he **fails to act with reasonable care to obtain a proper price.** The property must be fairly and properly exposed to the market, absent cases of real urgency, see _Silven Properties Ltd v Royal Bank of Scotland_ [2003] EWCA Civ 1409.

d. The mortgagee will not be adjudged to be in default unless he is "plainly on the wrong side of the line". A true market value can have an acceptable margin of error, _Michael v Miller_ [2004] EWCA Civ 282 where a bracket between £1.6 million and £1.9 million was permissible.

e. The mortgagee must behave as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold, see _McHugh v Union Bank of Canada_ [1913] AC 299. (Cases predating McHugh are to be treated with caution for the reasons that appear in Cousins The Law of Mortgages 3rd ed. at 26-52ff).

f. **If the mortgagee breaches his duty, the remedy is not common law damages**, but an order that the mortgagee account to the mortgagor, not for what he actually received, **but what he should have received**.

g. The mortgagee must act fairly towards the mortgagor. He can protect his own interests but **he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor. He must take reasonable care** to **maximise his return from the property**, _Palk v Mortgage Services Funding plc_ [1993] Ch 330.

h. **The mortgagee owes the same duty to a guarantor**, _Standard Chartered Bank Ltd v Walker_ [1982] 1 WLR 1410; _China and Southsea Bank Ltd v Tan_ [1990] 1 AC 536.

i. The mortgagee's duty, to take care to sell for the best price reasonably obtainable, is not delegable. He does not perform his duty merely by

appointing a reputable agent to conduct the sale, see *Raja v Austin Gray* [2002] EWCA Civ 1965 at [34].

j. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off the debt": Lightman J sitting in the Court of Appeal in *Silven Properties*.

k. A sale at just above the sum required to discharge the mortgage may be looked at carefully by the court, although there may well be occasions when that is the proper price or true market value, as suggested by Fisher and Lightwood's Law of Mortgage at 30.254.

l. The mortgagee cannot sell to himself, either alone or with others, or to a trustee for himself, nor to anyone employed by him to conduct the sale unless the sale is ordered by the court and he has obtained permission to bid, *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 409, and

m. Where the mortgagee sells to a "connected" person, the burden of proof is reversed and the mortgagee must prove that he took reasonable care to obtain the best price, *Saltri III Ltd v MD Mezzanine SA Sicar & ors* [2012] EWHC 3025.

n. The reason for considering whether the mortgagee and the purchaser are or may be "connected" is the need to guard against unconscious bias as well as the risk of other forms of skulduggery, Australia & New Zealand Banking Bangadilly (1978) 139 CLR 195, quoted with approval in *Alpstream AG & ors v PK AirFinance SARL & ors* [2013] EWHC 2370."(emphasis added)

88. Plaintiff before the purchase of two capital assets which were purchased entirely from the proceeds of the loan had valued them at $155,000. Plaintiff's witness said their staff who had valued the said assets had sufficient experience to value them, hence Plaintiff is estopped from the said valuation at the time of purchase. Soon after purchase same items were returned voluntarily in the month of May, 2015. So the value of the said two properties had deteriorated to a value of $74,000 or below half at the hands of Plaintiff. The principle sum loaned was $121,000. The Plaintiff could not even recovered principal sum loaned even though both these items and SUV valued by Plaintiff for $30,000 were sold.

89. Plaintiff as the Bill of Sale holder had the right to sell the items, as soon as they were returned to the vehicle yard of Plaintiff and taking physical possession of the items. These items were movable properties and once voluntarily handed over and repossessed Plaintiff could sell them, as the *manager* of the securities. Plaintiff is legally obliged to take reasonable care of the securities that were repossessed. This

was not done by Plaintiff when it allowed the properties to idle and waste in the vehicle yard due to 'backlog' of work.

90. Mortgagees need to act *reasonably* in the sale of vehicles *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 4 All ER 484 at 492- 493

> "A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security. He is entitled to remain totally passive. **If the mortgagee takes possession, he becomes the manager of the charged property:** see *Kendle v Melsom* (1998) 193 CLR 46 at
>
> 64. He **thereby assumes a duty to take reasonable care of the property secured**: see *Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626 at 637 , [1993] AC 295 at 315 per Lord Templeman; and this requires him to be active in protecting and exploiting the security, maximising the return, but without taking undue risks: see *Palk v Mortgage Services Funding plc* [1993] 2 All ER 481 at 486 , [1993] Ch 330 at 338 per Nicholls V-C.
>
> [14]
> A mortgagee **'is not a trustee of the power of sale for the mortgagor'**. This time-honoured expression can be traced back at least as far as Jessel MR in *Nash v Eads* (1880) 25 Sol Jo 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed: see *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633 at 646 –647 , [1971] Ch 949 at 969 . A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative restatement of this principle is to be found in *Raja (administratrix of the estate of Raja (decd)) v Austin Gray (a firm)* [2002] EWCA Civ 1965 at [55], [2003] Lloyd's Rep PN 126 at [55] per Peter Gibson LJ. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: see *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 , [1990] 1 AC 536 . It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 at 59 , [1983] 1 WLR 1349 at 1355.

Further,

> "When and if the mortgagee does exercise the power of sale, **he comes under a duty in equity (and not tort) to the mortgagor** (and all others interested in the equity of redemption) **to take reasonable precautions to obtain 'the fair' or 'the**

true market' value of or the 'proper price' for the mortgaged property at the date of the sale. and not (as the claimants submitted) the date of the decision to sell. If the period of time between the dates of the decision to sell and of the sale is short, there may be no difference in value between the two dates and indeed in many (if not most cases) this may be readily assumed. **But where there is a period of delay, the difference in date could prove significant.** The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off his debt: see *Palk*'s case [1993] 2 All ER 481 at 486 –487, [1993] Ch 330 at 337 –338 . He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale. **The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have** received: see the *Standard Chartered Bank* case [1982] 3 All ER 938 at 942 , [1982] 1 WLR 1410 at 1416 .

91. Above quoted decision was applied in *McDonagh v Bank of Scotland plc and others* [2018] All ER (D) 06. In this case it was held that if the properties are sold together in mortgagee sale, there should be justification for the sale through evidence for the court to determine that the sale was reasonable in equity.

92. Plaintiff cannot bundle two items auctioned separately, in one sale without sufficient justification as to bundling and also the combine price needs justification. If not a mortgagee sale can become evasive and items can change hands without a value being assigned to such item, which is unreasonable.

93. The reasonableness in such an action can be determined through evidence, but Plaintiff had failed to do so as the witness called had no knowledge about the sale and or why two items were sold together for such a low value. This goes to transparency and or good faith of the mortgage in the sale of the items. Once this is ignored, the validity of the sale and amount recovered become tainted with unreasonableness.

94. *PK Airfinance SARL & Anor v Alpstream AG & Ors* [2015] EWCA Civ 1318 (21 December 2015)

"**A mortgagee who sells the mortgaged property owes a duty** (i) to **act in good faith** and for proper purposes, and (ii) to **take reasonable care to obtain a proper price, to:**

a) the mortgagor (here AAL/Betastream);

b) any subsequent mortgagee of the property i.e. one whose security ranks after that of the first mortgagee: Tomlin v Luce [1889] 43 Ch D 191; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, 311F-H;

c) a co-mortgagor i.e. someone who mortgages his property as security for an advance made to the mortgagor of other property for which advance the latter is primarily liable, such as Caelus: *Gee v Liddell* [1913] 2 Ch 62; and

d) **a guarantor of the mortgagor's debt**: *Standard Chartered Bank v Walker* [1982] 1 WLR 1410, 1415 E-G; *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536. 544A, 545D; **Raja v. Austin Gray** (A Firm) [2002] EWCA Civ 1965 [55].

All of the above are persons who have an interest in the equity of redemption. If the mortgaged property is sold too cheaply the mortgagor's interest in it is impaired. A subsequent mortgagee has an interest in the mortgaged property since it stands as security for him also. A co-mortgagor such as Caelus has also been held to have an interest in the mortgaged property of the principal debtor (here the Blue Wings aircraft). In Gee v Liddell he was said to have an "interest in [and] a charge upon the estate of the principal debtor". **A guarantor has a contingent interest in the mortgaged property.** On payment by him of the debtor's debt to the creditor/mortgagee the guarantor will be subrogated to the rights of the latter, including his security in the property. On that account he also has a recognised interest in the equity of redemption before payment has been made."(Emphasis added)

95. Plaintiff had sued mortgagor as well as the guarantors of the loan, for the balance of loan account after mortgagee sale. Plaintiff needed to act reasonably in the sale of the mortgaged properties and also needs to act in good faith towards guarantors. If not they can claim for equitable relief for unreasonableness and bad faith of the mortgagee relating to the mortgagee sale.

96. *Barnsley and others v Noble* [2014] All ER (D) 29 (Oct)[2014] EWHC 2657 (Ch) held that a party can seek equitable compensation and not for profits of the other party. So Plaintiff's claim under equity is restricted to their loss and cannot be calculated from the books of accounts from Plaintiff. Plaintiff's loss or gain from the mortgagee sale and or loan account is not the basis of Defendant's claim.

97. In each of the valuations of Plaintiff's officer, stated as follow ;

> "I certify that I have inspected the above mentioned vehicle and confirm that the engine and chassis numbers are correct. Also the distance travelled by the vehicle is consistent with it's condition. I also certify that after due inquiry that the value of the vehicle is as mentioned above and I consider the vehicle to be suitable as security for the advance that has been applied for."

98. Defendants who was new to container cartage service. are reasonable to believe on the said valuation when they returned items worth more than $155,000 voluntarily within two months from such valuation and weeks after loan was granted to purchase the same capital assets for the first Defendant. So, they were suffice to cover the principle loan amount without interest component, considering margin of error in the recovery through sale. (see A true market value can have an acceptable margin of error, *Michael v Miller* [2004] EWCA Civ 282 where a bracket between £1.6 million and £1.9 million was allowed).

99. I do not wish to calculate any interest component as no evidence was adduced as to the method of calculation of early termination, but suffice to state whatever the clause applied there needs to be interest component calculated under agreed terms between the parties. What is more favourable to Defendant can be applied as there was ambiguity in loan offer and loan agreement as regard to early settlement.

100. Defendants under equitable compensation counterclaim for entire shortfall in the loan account of first Defendant. There should be provision for margin of error in the sale and it is not possible to calculate equitable compensation from available evidence. (see *Anglo Group plc v Winther Brown & Co Ltd* 72 ConLR 118; [2000] All ER (D) 294).

101. Plaintiff contends that in terms of clause 6.5 of Schedule to the Loan Contract indicate expressly that sale of properties under Bill of Sale can be in one lot or in separate pieces, but this does not absolve Plaintiff acting reasonably. Plaintiff can sell the items together specially considering the complimentary nature of the ten wheel truck and trailer but Plaintiff had valued them separately with separate reserve prices. More important aspect was the price for two items obtained.

102. So, if the Plaintiffs acted reasonably there was no reason why they could not have recovered a sum of at least the capital of the loan amount as the vehicles were returned within weeks from the grant of loan and purchase of the said vehicle and also valuation by Plaintiffs.

103. Mr Lal also had no direct knowledge of when the vehicles were returned by the Defendants to the Plaintiff. This is critical to the Defendants case as Ms Daisy lqbal, in her unconverted evidence confirmed that the vehicles (DY 675 and DT 466) were returned at the end of May or early June 2015 and the vehicle registration no. B4IDIE was returned in August 2015. Thus, all three vehicles were available to the Plaintiff to sell much earlier.

104. Furthermore, Mr Lal could not explain in any detail as to why the two vehicles (DY 675 and DT 466) had been auctioned for a combined value of just $74,000 when the reserve price for the two vehicles had been set at a combined value of $155,000. This is also critical to the Defendant's case as it claims that the vehicles were sold at

substantially below value, a value that had been given by the Plaintiff Company itself.

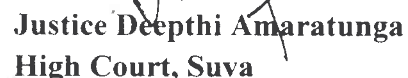
CONCLUSION

105. The main issue of contention according to pleadings of the parties was the date of return of mortgaged securities. Third Defendant, Ms Daisy lqbal's evidence was truthful and accepted as truth as to the date of return of the items purchased from the loan, in the analysis of evidence. She was a credible witness despite the fact, her late husband was the principal person in the first Defendant Company's business. She was involved in the business as a Director and knew sufficiently, to give evidence as to the facts in dispute. In the analysis of evidence it is proved that the Defendants had returned the ten wheeler low bed Truck bearing registration DY 675and its sidelifter trailer bearing registration DT466 in late May 2015 or early June, 2015. The remaining secured item SUV in July 2015 after a bailiff visited the home of guarantors to loan. Plaintiff had delayed processing the sale of the items voluntarily returned for considerable time and their value had deteriorated significantly. Plaintiffs are estopped from denying their valuation for the said items and their witness said that the valuation were done by competent people in their staff as to valuation of such assets. So the exceptionally low values recovered under mortgagee sale can only be attributed to delay .Defendants are entitled for equitable compensation in the purported shortfall in loan account due to the unreasonable actions of Plaintiff. There is there is no issue as to the claim of the principal loan amount of $121,000. Though there is ambiguity as to the loan interest and the rebate, there is no dispute that some interest needs to be paid, though cannot be calculated with evidence provided. Defendants had handed over two valuable assets worth more than $155,000 in May or June 2015. So these items were sufficient to payback fully the principal sum of the loan with margin of error. Though no interest component is not fully known it was sufficiently covered by SUV valued for $30,000. So Plaintiff's claim is set off against the Defendant's equitable compensation. No cost granted considering circumstances of the case.

FINAL ORDERS

a. Plaintiff's claim for balance in the loan account is set off under equitable compensation of the Defendants.
b. Defendants' claim based on negligence is dismissed.
c. No costs.

Dated at Suva this 21st day of August, 2020.



Justice Deepthi Amaratunga
High Court, Suva