

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 33 of 2023

**BETWEEN:** CHACAL MARITIME ENGINEERING PTE LTD a limited liability company  
having its registered office at Floating Drydock off coast of Navutu, Lautaka  
in Fiji.

PLAINTIFF/APPLICANT

**AND:** FIJI DEVELOPMENT BANK a body corporate duly constituted under the Fiji  
Development Bank Act and having its principal office at 360 Victoria Parade,  
Suva in Fiji.

DEFENDANT/RESPONDENT

**BEFORE** : Hon. Justice Vishwa Datt Sharma

**COUNSEL:** Ms. Tikoisuva.M -for the Plaintiff

Mr. Lajendra. N - for the Defendant

**DATE OF DECISION:** Thursday 06<sup>th</sup> April 2023 - 9.30am.

JUDGMENT

*[Application seeking for a Quia Timet Injunction]*

## Introduction

1. The Plaintiff in these proceeding filed a Writ of Summons on 06<sup>th</sup> February 2023 and sought for the following orders:
  - (i) \$228,344.10 for the loss of business suffered by the Plaintiff as a result of the tender;
  - (ii) \$55,000.00 for the payments paid to the Defendant after the tender;
  - (iii) An order that the Plaintiff has equitable rights of redemption on its properties held in security by the Defendant;
  - (iv) An injunction order restraining the Defendant;
  - (v) Special damages;
  - (vi) General damages;
  - (vii) Costs on indemnity basis;
  - (viii) Post judgment interest and costs;
  - (ix) Any other relief which in the opinion of this Honourable Court is just and expedient.
  
2. The Plaintiff on 06<sup>th</sup> February 2023 also filed an Inter Parte Notice of Motion coupled with an affidavit in Support deposed by Rufus Thadeus D'Cruz pursuant to *Order 29 Rule 1(1) and Rule 2 (1) of the High Court Rules and the inherent jurisdiction of this Court* seeking for the following orders:
  - (a) The Defendant by itself and/or through its his servants and/or agents and/or Solicitors, and/or howsoever be restrained in the interim from selling, transferring, charging, mortgaging, assigning or disposing off or in any manner or form from dealing with the properties described as Floating Dry FT - Dock - Caisson Dock "FD6100" official number 004620, until further orders of the Court;
  
  - (b) The Defendant by itself and/or through its his servants and/or agents and/or Solicitors, and/or howsoever be restrained in the interim from selling, transferring, charging, mortgaging, assigning or disposing off or in

any manner or form from dealing with the properties described as Motor Tug, CV Ocean, official number 00412, until further orders of the Court;

- (c) The Defendant by itself and/or through its his servants and/or agents and/or Solicitors, and/or howsoever be restrained from selling, transferring, charging, mortgaging, assigning or disposing off or in any manner or form from dealing with the properties described as Floating Dry FT - Dock - Caisson Dock "FD6100" official number 004620, until determination of the claim by the Plaintiff;
- (d) The Defendant by itself and/or through its his servants and/or agents and/or Solicitors, and/or howsoever be restrained from selling, transferring, charging, mortgaging, assigning or disposing off or in any manner or form from dealing with the properties described as Motor Tug, CV Ocean, official number 00412 until determination of the claim by the Plaintiff;
- (e) Further that the costs of this application shall be paid by the Defendant; and
- (f) Any further relief this Honorable Court deems just.

3. The Defendant opposed the Plaintiff's application and filed an Affidavit in Opposition on 14<sup>th</sup> February 2023.

#### Background

4. The Plaintiff made an application for a loan from the Defendant. The loan was approved in the total sum of \$5,855,185.22. On 20<sup>th</sup> November 2018 the Defendant issued its formal Loan offer letter to the Plaintiff. The term of the loan was 10 years.
5. The Bank in consideration for the loan facility took the following securities:-

- (a) First Registered Debenture over all assets & undertaking of the company including its uncalled and paid up capital;
- (b) First Registered Ship Mortgage over Floating Dry Dock - Caisson Dock "FD6100" to be acquired from Japan;
- (c) First Registered Bill of Sale over Workshop Equipment;
- (d) Personal Guarantee given by the Director of the Company, Rufus T. D'Cruz for total liability;
- (e) Deed of Defeasance over directors Keyman's policy for Rufus Thadeus D'Cruz to be issued (minimum sum insured - FJD \$1M);
- (f) Adequate Marine Hull Insurance cover over (b) and relevant insurance cover over (c) above with Bank's interest noted thereon

**Additional**

- (g) Undertaking by the Company to surrender as collateral to Fiji Development Bank (FDB) the relevant Foreshore Lease (s) for the Floating Dry Dock assigned area to be issued.
6. The Plaintiff loan Account with the Bank fell into arrears. Hence arrears notices were sent to the Plaintiff but there was no satisfactory arrangement coming from the Plaintiff.
  7. The Defendant allowed the Plaintiff numerous alleviations such as interest only payments, reduced repayments and freeze of interest were given to the Plaintiff in light of Covid-19 since November 2019.
  8. However, still the Plaintiff failed to take any advantage of these relief provided by the Bank and therefore its loan account to remain in arrears.
  9. On 28<sup>th</sup> October, 2021, the Bank had no alternative but proceed to issue a Formal Demand notice under the securities held by the Bank.

10. Even subsequent to above Demand Notice issued, the Plaintiff entered into several discussion with the Bank in order to endeavor to make arrangements towards its debt obligation to the Bank.
11. The Plaintiff proposed to the Bank that it will sell the "Tug Boat" to reduce its debt. However, this did not eventuate and materialized.
12. Further, all other attempts by the Plaintiff to sell the "Floating Dry Dock" and "Tug Boat" failed.
13. On or around 23<sup>rd</sup> May 2022, the Plaintiff after discussions with the Bank then provided the hereunder undertaking to the Bank:
  1. Pay FDB \$80,000.00 (Eighty Thousand Fijian Dollars) per month commencing 31<sup>st</sup> May 2022 to July 31<sup>st</sup> 2022. The payment is due on or before each month end; and
  2. After July 2022, request for a debt restructure or debt reduction via sale of security or the Company shall commence full monthly repayment (as per the Loan Offer Letter dated 20<sup>th</sup> November 2018) towards the debt. In the event the Company requests for a restructure of the loan account, the new loan term will commence with full repayment as per the approved loan restructure conditions.
14. However, the Plaintiff acknowledged that the above arrangements did not restrict the Bank from pursuing its rights under the loan offer letter and securities executed by the Company therein.
15. Unfortunately, the Plaintiff defaulted in its Undertaking to the Bank as the June 2022 payment in the sum of \$85,000.00 was dishonored and there was no payment for July 2022 at all.
16. The Bank hereafter wrote to the Plaintiff altogether a total of six (6) correspondence on 24/8/2022, 01/09/22, 16/09/2022, 03/10/2022, 27/10/2022 asking the Plaintiff to increase

its repayment from \$80,000 to \$125,400 per month so that the Plaintiff's loan with the Bank could amortize within the remaining term of loan of 6.25 years.

17. However, the Plaintiff disputed and the Bank notified the Plaintiff that it will now proceed to exercise its powers under the securities held by the Bank. Still time and again the Plaintiff being reminded to pay its debt due and failing will result in the Bank proceeding to exercise its powers over the securities.
18. The Bank had no alternative in absence of receiving any response from the Plaintiff that it issued a Demand notice and proceeded to advertise the *Dry Dock and Tug Boat* under *Mortgagee Sale* in the daily newspaper accordingly.
19. The Bank then proceeded to finalize its tender process and the subsequent acceptance of successful bidder.
20. On 23<sup>rd</sup> November 2022, the Bank wrote and advised the Plaintiff that the Bank's tender Committee has accepted an offer for purchase of the *Floating Dry Dock* and given 14 days' time frame to *redeem its mortgage*.
21. The Plaintiff loan account shows that it remained inconsistent all throughout and the loan account debt as at 31<sup>st</sup> January 2023 was in the sum of \$6,839,146.98. Instead of the Debt balance reducing as usual it has grown even beyond the principal amount of loan i.e. \$5,855,185.22.
22. Thus, Plaintiff's application seeking for *Quia Timet Injunction* accordingly.

#### Determination

23. The issue for this Court to determine is "*whether the Fiji Development Bank as mortgagee should be restrained from proceeding with the mortgage sale of the Plaintiffs Floating FT- Dock - Cassion Dock "FO 610" official number 004620 and Motor Tug, CV Ocean, official number 004122?"*
24. The Law in this area is well settled.

25. The Courts have time and again in various case authorities have expressly stated that it is a serious step to interfere with the statutory powers of a mortgagee.
26. The law in Fiji in respect of restraining a mortgagee from proceeding with mortgage sale is a combination of principle developed in two (2) leading cases in this area:

- (i) *Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161*; and this case is a leading authority on the court interfering with the power of a mortgagee which states the general rule to be as follow:

"As a general rule an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage and, in particular a power of sale unless the amount of mortgage debt, if this be not in dispute, be paid or unless, if the amount is disputed, the amount claimed by the mortgagee be paid into court, and this rule will not be departed from merely because the mortgagor claims to be entitled to set off the amounts of damages claimed against the mortgagee.

The rule, as it affects the exercise by a mortgagee of the power of sale, is stated in the following terms in Halsbury's Laws of England, 3rd ed., vol. 27, p. 301:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee swears to be due to him, unless, on the terms of the mortgage, the claim is excessive."

- (ii) *American Cyanamid Co v Ethicon Ltd [1975] AC 396*.

Granting of an interlocutory (interim) injunction is still governed by equitable principles. There is no doubt that in an appropriate case, the Court is empowered to restraint a mortgagee exercising power of sale. *American Cyanamid Co. v Ethicon Ltd [1975] AC 396* case, has been relied upon many a time with several proportions supported by a number of authorities. These authorities support certain principles associated in the *Cyanamid* case that would be considered on the

"*Balance of Convenience*" and that "*Damages would be an adequate remedy*" to the Plaintiff.

27. In accordance with the "*Inglis principle*", it is a mandatory requirement that all the monies that are due and payable under the mortgage as per the mortgagee claim needs to be paid into the Court by the Mortgagor before this court will consider the injunction application.
  28. The evidence before this court is that the Plaintiff is in **substantial arrears** owed under the loan account to the Defendant Bank. As at 31<sup>st</sup> January 2023, the Plaintiff has a closing balance of \$6,839,146.94, which is now due and owing to the Bank.
  29. Applying the *Inglis Principle* herein, a sum of \$6,839,146.94 is the total sum that is required to be paid into the Chief Registrar's interest bearing account in Court before the Plaintiff can seek to injunct the Defendant Bank from exercising its mortgagee power.
  30. Notably, the Plaintiff has at no time informed Court either it is going to make any payment or has the ability to pay unto Court the said payment owed to the Defendant as to comply with the requirements of *Inglis Principle*
  31. The failure on the part of the Plaintiff to make payments into Court is **fatal and is a ground alone for refusal of the interim injunction orders** sought against the Defendant herein.
  32. The Principle developed in *American Cyanamid* are a guide only. However, it will equally apply herein in addition to the "*Inglis principles*".
    - (a) Whether there is a serious question to be tried;
    - (b) Whether damages are an adequate remedy; and
    - (c) Whether the balance of convenience favours the refusal or grant of the interim injunction.
- (i) *Whether there is a serious question to be tried?*
33. On or about 23<sup>rd</sup> May 2022, the Plaintiff signed a letter of undertaking with the Defendant Bank to pay \$80,000 a month from 31 May 2022 to 31 July 2022 after which the Plaintiff could either request a debt Re-structure or debt reduction via sale of security or continue



with normal monthly loan repayment. In the event of default the Defendant could proceed with recovery without notice to the Plaintiff.

34. No doubt the Plaintiff made payments of up to \$86,000 on or around May 2022 and \$80,000 on or around 7 July 2022.
35. On or around September to October 2022, the Plaintiff advised the Defendant Bank of the progress on the sale of the FT Dock with buyers from New Caledonia, Cruz Holding Pte Ltd also offered to purchase the Tug Boat.
36. This was pursuant to the letter of undertaking agreed between the parties where the Plaintiff chose the option of selling a security to reduce the Banks Loan debt.
37. Having perused the undertaking annexure "RD-14" in the Plaintiff's Affidavit in Support the above was not at all a condition of the undertaking. However, the undertaking also clearly stated that, the company acknowledge that the above arrangement does not restrict the Bank from pursuing its rights, under the mentioned loan offer letter and securities executed by the Company.
38. The Plaintiff does not challenge the powers of the Bank under the Mortgagee Sale. #
39. However, the Plaintiff is stating that it has the right to equity of redemption i.e. It is entitled to redeem its mortgage. This is the basis on which the Plaintiff has made this application seeking for injunctive order.
40. The Plaintiffs loan account with the Defendant Bank remains in substantial Arrears. The debt is not denied by the Plaintiff. However, in essence the Plaintiff is seeking for more time in order to sell the securities and settle the Banks debt. The Plaintiff was given more time, time and again, but still failed in its obligation to ensure either to reduce the Bank's debt or settle the debt.
41. Subsequently, Demand notices were issued under the mortgage and the mortgagor has failed to act in accordance with the Demand Notice.

42. Therefore, I find that there is *no serious question before this court to be tried as such in any circumstances.*

*(ii) Damages is an adequate Remedy.*

43. Whether damages are an adequate remedy or not will only become applicable if there is a serious issue to be tried?

44. This Court found that there is in fact no serious question to be tried.

45. The Plaintiff's claim is seeking for redeeming its mortgage and damages per se.

46. Therefore, Damages would then be an adequate remedy for the Plaintiff.

*(iii) Balance of Convenience*

47. Lord Diplock in *American Cyanamid* case at page 408 stated as follows:"

*"It is where there is doubt as to the adequacy of the respective remedies no damages available to either party or to both that the question of balance of Conveniences arises."*

48. The Plaintiff's outstanding loan with the Bank as at 31<sup>st</sup> January 2023 stood in the sum of \$6,839,146.94. The Plaintiff has failed to act in accordance with the mortgage Demand Notice and the debt remains unpaid to the current.

49. The Plaintiff has not challenged the existence of the impending Mortgage but has raised equity of redemption rights in order to seek the Injunctive Ruling against the Defendant.

50. I find that the Plaintiff has failed to make out a case against the Defendant Bank in order to allow this Court to accede to its application seeking to Restraining the Bank from exercising its bona fide Mortgage powers and Rights.

51. The Balance of Convenience therefore favours the Defendant in the refusal to grant the injunction order sought in the Plaintiff's application.

**In Conclusion**

52. There is no evidence before for this Court that the outstanding loan of \$6,839,146.94 by the Plaintiff as at 31<sup>st</sup> January 2023 will be paid into Court in terms of the condition laid down in *Case of Inglis v Commonwealth Trading Bank of Australia [1972] 126 CLR 161*.
53. Further, upon a careful consideration and application of the principles set out as a guide in *American Cyanamid Case-*
- (a) *There is no serious question to be tried by this Court.*
  - (b) *Plaintiffs remedy (if any) lies in damages, and*
  - (c) *The balance of convenience favours the Defendant Bank FDB. Therefore, Plaintiff's injunction application is accordingly refused.*
54. The Defendant Bank is at liberty within its Mortgage Rights to exercise its powers given by the statute and the Common Law.
55. The Plaintiff has failed to make out a case favoring any grant of Interim Injunction orders as sought therein.
56. The Plaintiff's Injunction application before this court fails.

**Costs**

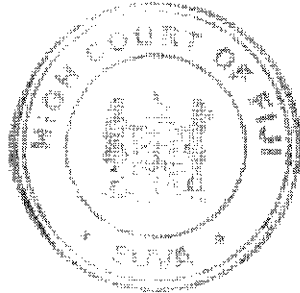
57. The Application proceeded to full hearing. It is only appropriate that I grant a summarily assessed costs of \$1,000 against the Plaintiff.

**ORDER**

- [1] The Plaintiff Inter Parte Notice of Motion seeking for Quia Timet injunction filed on 06<sup>th</sup> February 2023 fails and is accordingly dismissed.
- [2] There will be Summarily Assessed Costs of \$1,000 against the Plaintiff.

[3] Substantive Writ of Summons coupled with the Statement of Claim to take its normal cause henceforth.

Dated at Suva this 06<sup>th</sup> day of April, 2023.



Vishwa Datt Sharma  
JUDGE

CC: TIKOISUVA LAW, SUVA  
LAJENDRA LAWYERS, SUVA