

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO: HBC 262 of 2023

BETWEEN: **AMISHABEN NAVINCHANDRA VAGHELA** formerly of
Lot 34 Verrier Road, Namadi Heights, Suva, now
residing at 559A Great Western Highway, Greystances,
NSW 2145, Australia, Change Executive.

PLAINTIFF

AND: **HOME FINANCE COMPANY PTE LIMITED** a limited
liability company having its registered office at 371
Victoria Parade, Suva, Fiji **trading as HFC Bank.**

DEFENDANT

Appearances: **Messrs Saneem Lawyers for the Plaintiff**
Messrs Lajendra Lawyers for the Defendant

Hearing: **Tuesday, 31st October 2023**

Ruling: **Friday, 1st December 2023**

RULING

1. The Plaintiff filed an ex parte notice of motion and affidavit on 29 August 2023, seeking the following orders:

- a. An injunction restraining the Defendant or its servants or agents or howsoever from redeeming its lien over the Term Deposit of Dinesh Chandra Patel until the determination of this matter;
 - b. An order that the Defendant cease all charges, penalties and interest on the Plaintiffs account until the final determination of this matter.
 - c. Such further and / or other orders that this Court may deem just and expedient in the execution of the above relief.
2. The application was subsequently adjourned until 26 September 2023 and after being converted to inter-partes, it was listed on 12 September 2023.
 3. As directed by the Court, the Defendant submitted an affidavit of opposition within seven days, and the Plaintiff subsequently submitted an affidavit in reply to the opposition seven days later. Both counsel submitted arguments in accordance with the court's directive.
 4. As scheduled, the case was heard on 31 October 2023, and both counsels presented oral arguments in support of the written comprehensive arguments they had filed prior to the hearing.

Background Facts

5. The Plaintiff submitted a loan application to the Defendant bank in March 2017. The bank granted approval to the application, and on 29 March 2017, an offer letter outlining the terms of the loan was delivered to the Plaintiff. The specifics of the loan facility were outlined in schedule 1 of the loan offer (annexure "B" of affidavit in opposition of Jainendra Kumar).

6. The Plaintiff accepted the loan on 31 March 2017, and the Defendant Bank took the following securities in exchange:
 1. First Registered Mortgage over the residential property legally described as Lot 8 on DP 5165 as contained in Certificate of Title No. 20761, situated at Naranji Street, Tamavua and improvements thereon;
 2. Guaranteed Letter of Charge over Term Deposit funds of \$100,000.00 held in HFC Bank given by Dinesh Chandra Patel;
 3. Guarantee Limited to \$100,000.00 given by Dinesh Chandra Patel in support of item (2); and
 4. Registered Assignment over rental income generated from residential property situated at Lot 8, Naranji Street, Tamavua.
7. The Plaintiff had agreed, per the terms of the loan agreement, to repay interest in addition to all other charges and fees.
8. The loan was withdrawn, and the Plaintiff's loan account with Defendant Bank descended into arrears after several loan repayments.
9. The Defendant Bank subsequently issued demand letters and notices of arrears to the Plaintiff, but no satisfactory arrangement could be reached (annexure "C" affidavit in opposition of Jainendra Kumar).
10. In accordance with the terms of the loan agreement, the Defendant Bank exercised its powers of mortgagee sale after the Plaintiff's arrears persisted for nearly three years. The mortgagee sale was finalized on 8

February 2022, subsequent to the Bank granting the Plaintiff a few additional days from 6 December 2021 to redeem its debt.

11. Upon the conclusion of the mortgagee sale, the Plaintiff's loan account was credited with the proceeds, leaving a residual debt of \$98,262.90. The Defendant Bank then notified the Plaintiff via letter dated 11 February 2022 that the certificate of title no. 20761 had been sold on 8 February 2022 and that the settlement proceeds in the amount of \$775,000.00 had been deposited into the aforementioned loan account. Additionally, the Bank notified the Plaintiff of the remaining debt balance of \$98,262.90 and provided the Plaintiff with a proposal outlining potential repayment strategies for said amount. In default of payment of residual debt and in order to recover the same, the Bank will proceed and realize the Term Deposit held as security in the name of Dinesh Chandra Patel (annexure marked "E" affidavit in opposition of Jainendra Kumar).
12. Subsequently, the Plaintiff made some arrangements with the Defendant Bank to settle the outstanding balance over a sixty-month period by making monthly payments of \$2,016.66. The Plaintiff complied with the arrangement by paying a mere \$1,488.57 and subsequently defaulted.
13. The Defendant Bank subsequently notified the Guarantor Dinesh Chandra Patel of the Plaintiff's default via letter dated 3 November 2022. The Bank extended an invitation to Dinesh Chandra Patel to either settle the outstanding balance in full or continue making monthly payments of \$2,016.66. The Guarantor was additionally notified that if neither of the options is selected, the Bank will pursue the recovery of the entire debt through the realization of the Term Deposit (annexure "F" affidavit in opposition of Jainendra Kumar).

14. A subsequent email correspondence ensued between the Plaintiff and Defendant Bank concerning the outstanding balance. Plaintiff had also initiated refinancing process with Fiji Development Bank at that time (annexure "G" affidavit in opposition of Jainendra Kumar).
15. Following over a year-long duration, the Plaintiff had yet to satisfy the outstanding balance of the debt. On 7 August 2023, the Defendant Bank subsequently issued additional demand notices to the Plaintiff and the Guarantor.
16. The Plaintiff and the Defendant Bank then retained their respective counsels. A correspondence was exchanged between counsels for the plaintiff and the defendant on 18 and 23 August 2023.
17. During the course of an ongoing correspondence exchange between the two counsels concerning the realization of the term deposit, the present application was filed in court by Plaintiff's counsel.

Law and Principles

18. In accordance with Order 29 Rule 1(2) of the High Court Rules 1998, the current application was filed to be heard ex parte. Nevertheless, as stated in the preceding paragraph, the Court exercised its discretion and mandated an inter partes resolution of the dispute.
19. The pertinent provision is as follows, as stated in Order 29 Rule 1(1) & (2) of the High Court Rules of 1998:

(1) "An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that

party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the Plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.

20. Lord Diplock established the principle governing interlocutory injunction in American Cyanamid Co. v Ethicon Ltd [1975] 2 WLR 316, [1975] AC 396. This case continues to be regarded as a preeminent authority on interim injunctions in Fiji. The preceding case established the following criteria that courts must observe in determining whether to grant or deny an interim injunction:

- i. Whether there is a serious question to be tried at the hearing of the substantive matter;*
- ii. Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and*
- iii. In whose favour the balance of convenience lie if the injunction is granted or refused.*

21. Further, in Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523, Kerr LJ at page 534 made the following statement:

"It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a

set of useful guidelines which apply in many cases. It must never be used as rule of thumb, let alone as a straitjacket...The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can be resolved by a trial."

22. In addition, the general rule established in Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161 at paragraphs 13 and 15 are as follows:

"A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court. 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 has commenced a redemption action, 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..."

In my opinion, the authorities which I have been able to examine establish that for purposes of the application of the general rule to which I have referred, nothing short of actual payment is regarded as

sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due..."

23. The following cases: Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd, Oceania International (NZ) Ltd, and Bayleys Real Estate (Fiji) Ltd, Civil Appeal No. ABU0039 of 2009; Ali's Civil Engineering Ltd v Fiji Development Bank and Another (Civil Appeal No. 60 of 2003); and Kim v Bank of Baroda [1999] FJHC 39; all adhered to the Inglis approach, which stated that prior to a restraint being considered and imposed on the mortgagee's rights under the mortgage, the full amount owed to the mortgagee as due must be paid into court.

24. In Fun World Centre (Fiji) Ltd v Bank of Baroda, Civil Action No. 169 of 2013, at page 19, paragraph 5.6, his Lordship Justice Kumar (as he was then) stated that the courts in Fiji have, over the years, applied both the principles in Inglis and American Cyanamid when dealing with applications for interlocutory injunctions to restrain mortgagee sale. The two principles do not contradict one another but rather supplement one another.

Analysis

25. An injunction is typically an equitable remedy, which is a form of judicial relief granted by the court at its discretion when monetary damages would be insufficient. Frequently, injunctions are issued to avert irreparable damage, such as loss of property or destruction of evidence. The Court's authority to issue injunctions stems from its inherent jurisdiction to administer justice. The courts exercise their discretion with caution

when granting this equitable remedy on the basis of plain and satisfactory grounds, in accordance with a set of guiding principles.

26. It is important to note that no court has the authority to compel an individual, particularly a mortgagee, to forgo the exercise of a legally protected right. Marshall JA reaffirmed the following in Strategic Nominees Ltd (In receivership) (supra), at paragraphs 7–9:

“It follows that with the mortgagee’s power of sale, there is no balance of convenience arising out of a contested issue which will be resolved on trial.

Securitisation of loans together with guarantees of debts have now for a very long time been at the centre of commercial lending by banks and other financial institutions. They are important legal mechanisms essential to the flow of lending required in a market economy.

Because of their importance equity and common law courts have always insisted that the mortgagees remedies upon default including power of sale remain unrestrained by the courts...

27. The Plaintiff's primary objective in seeking injunctive relief in this case is to prevent the Defendant or mortgagee from exercising its right to collect the \$100,000.00 guarantee that Dinesh Chandra Patel provided under the terms of the mortgage.
28. In accordance with the Inglis principles, the Plaintiff is obligated to remit to the Court the full amount owed to the Defendant under the mortgage. In this case, the Plaintiff has neither remitted payment to the court nor undertaken to do so in the event that ordered to do so. Under the given conditions, it is therefore atypical to pursue the injunctive relief that is being requested, with due consideration to the mortgagee's legal and contractual rights.

Serious Issue to be Tried

29. With respect to this matter, the Plaintiff argues that the purchaser and the Defendant engaged in collusion and that the property was sold below its true value.
30. The affidavit presented informs the court that the account of the plaintiff had fallen into arrears starting from 2017. She was granted a three-year grace period to refresh her account; however, she neglected to do so. The Plaintiff received a number of demand and arrears notices, all of which the Defendant had the option to exercise; however, the Defendant refrained from doing so and granted the Plaintiff additional time to fulfil her requests.
31. Plaintiff's counsel notified the Defendant in November 2021 that the Plaintiff possessed a prospective purchaser and furnished an unsigned sale and purchase agreement. The Plaintiff failed to furnish the Defendant with a signed sale and purchase agreement, as per their request.
32. The Defendant provided the Plaintiff with an additional opportunity to redeem the debt in December 2021; however, she was unsuccessful once more. The property was subsequently advertised for sale on the open market by the defendant. Additionally, Rolle Associates assessed the value of the property at \$870,000.00, and the property was ultimately sold to the highest bidder.
33. According to the material facts, the Plaintiff was presented with multiple opportunities to redeem the debt, including the attempt to locate a purchaser for the property; however, these efforts were in vain.

34. From my perspective, the Plaintiff has not managed to convince this court that the injunctive relief sought is warranted due to a substantial issue that requires trial.

Damages Inadequate Remedy

35. The relief sought and the substantive application filed have been duly considered. The Plaintiff is essentially suing the Defendant for general and special damages. Evidently, as a financial institution, the Defendant could satisfy the Plaintiff's claim.
36. The principle established in American Cyanamid (supra) is unequivocal regarding the matter: an injunction will be denied if damages are sufficient compensation. Lord Diplock made the following statement in American Cyanamid (supra), paragraph 2, page 408.

"...If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should be normally be granted, however strong the plaintiff's claim appeared to be at that stage..."

37. In light of the aforementioned, the requested injunction should be denied.

Undertaking as to Damages

38. According to the affidavit material presented in court, the plaintiff has neglected to provide an undertaking as to damages. She attached a copy of title crown lease no. 4664 to her affidavit. Nevertheless, a careful examination of the aforementioned title reveals that it is the property of another person.

39. The Plaintiff has failed to provide proper undertaking hence an injunction cannot be granted.

40. The application that the Plaintiff is seeking is without merit and fails to meet the guideline principles.

Conclusion

41. Based on above discussions, the Court orders as follows:

- i. The Plaintiff's application for interlocutory injunction is declined and dismissed.
- iii. The Plaintiff to pay the Defendant summarily assessed costs of \$1500.00 within 21 days from today.



High Court – Suva

Friday, 1st December 2023