

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 236 of 2022

IN THE MATTER of an application under
Section 71 of the Consumer Credit Act 1999.

BETWEEN : SANGEETA DEVI REDDY - BRIDGEMAN of Naitata, Navua, Director.

PLAINTIFF

AND : BANK OF BARODA a body corporate duly incorporate in india, having its
Head Office at Mandvi, Baroda, India and duly registered in Fiji under the
Companies Act 2015 and having its registered office at 86-88 Marks Street,
Suva, Fiji.

DEFENDANT

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Parshotam S. with Mr Kumar P. for the Plaintiff

Ms. Singh K. for the Defendant

DATE OF DECISION: 7th December, 2023

DECISION

*[Discharge of Mortgage, Release of Certificate of Title and Declaratory
Orders]*

Introduction

- (1) The Plaintiff's Originating Summons together with the Affidavit in Support is filed pursuant to Section 71 of the Consumer Credit Act 1999. The application relates to the Defendant failing to discharge its mortgage over certificate of Title No. 34005. The Plaintiff is now seeking for the following Orders:
 1. An Order be granted that the Defendant immediately undertake Discharge of Mortgage No. 844909 over Certificate of Title Number 34005;
 2. An Order for the Defendant to release the Certificate of Title Number 34005 to the Plaintiff;
 3. A Declaratory Order that the act of the Defendant is excessive, harsh, oppressive and unconscionable;
 4. An order that the Defendant pay the costs of this application on Indemnity basis; and
 5. Such further or other reliefs that this court deems just and expedient in the circumstances.
- (2) Affidavit in Opposition was filed by the Defendant Bank on 12th October, 2022 opposing the Plaintiff's application.
- (3) A Reply Affidavit was subsequently filed by the Plaintiff.

Material Facts

- (4) The Plaintiff is the registered proprietor of the property comprised in Certificate of Title 34005. On or about 2017 the Plaintiff took a loan for \$60,000 and mortgaged CT 34005 to the Defendant.
- (5) The Defendant thereafter registered its mortgage over the CT 34005

- (6) The Plaintiff was also a Director of Organic Earth Fiji Limited which had taken a separate loan facility from the Defendant. The Plaintiff had provided the Defendant with a Personal Guarantee in the loan taken by the Company.
- (7) The Plaintiffs loan facility pertaining to CT 34005 has been paid in full and this has been acknowledged by the Defendant.
- (8) The Defendant has failed to discharge the Mortgage and thus the Plaintiff has made this application to this Court seeking orders as per the Originating Summons.

Law

- (9) The Companies Act 2015 ["Companies Act"] at section 53 stipulates as follows:
 53. —(1) A Company may execute a document if the document is signed by—
 - (a) 2 Directors of the Company;
 - (b) a Director and a secretary of the Company; or
 - (c) for a Private Company that has a sole Director who is also the sole secretary of the Company, that Director.
 - (2) A Company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with this section.
 - (3) This section does not limit the ways in which a Company may execute a document, including a deed.
- (10) The preliminary objection related to the Affidavit in Opposition filed on behalf of the Defendant. Kusum Lata Chand deposes the Affidavit on behalf of the Bank. Kusum deposes that she is authorized by the Defendant Bank by virtue of her position as the above Branch Manager.
- (11) The Affidavit in Opposition is filed on behalf of the Defendant and there is no authority annexed from the Defendant for Kusum to swear the Affidavit. Any document signed on behalf of a company needs the sanction of the Company. This is clearly absent from the Affidavit and in absence of such authority to depose, the Court must strike out the Defendant's Affidavit on its entirety.
- (12) This sentiment has clearly been laid out in number of recent court decisions. In the matter of *Viani Bay Limited* Companies action No. 5 of 2021. His Lordship Justice Nanayakkara J stated as follows:

12.. I cannot this. The summons was filed by the Company. Marilyn deposed the founding affidavit on behalf of the Company. She filed the founding affidavit on behalf of the Company. Any document executed on behalf of the company/any action taken on behalf of the company need the sanction of the company. Consequently, in the absence of such written authority to depose an affidavit in support, the application must fail.

Law of Guarantee

- (13) In Halsbury's Laws of England 4th Edition Vol. 20, p.49, a guarantee is defined as:

"An accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated."

- (14) In the case of Fiji National Provident Fund v Irwin [2013] FJHC 408; Civil Action 28.2009 (15 August 2013), it was stated:

"The guarantor remains primarily liable to the creditor for the debtor's obligation."

- (15) Chitty on Contracts (Specific Contracts) 26th Ed. Spells out this principle as follows (p.1341):

"... Prima facie a surety does not merely undertake to perform if the principal debtor fails to do so; he undertakes to see that the principal debtor will perform. Important results flow this prima facie rule of construction. In particular it means that a surety is normally liable to the same extent as the principal debtor for damages for breach of the latter's obligation even though he has not in terms guaranteed the payment of damages."

Determination

- (16) The substantive issues that this Court needs to determine are:

- (i) whether the Defendant Bank should immediately undertake to discharge the Mortgage no. 844909 over Certificate of Title No. 34005;
- (ii) that the Defendant to release the Certificate of Title No. 34005 to the Plaintiff; and
- (iii) Whether the act of the Defendant is excessive, harsh, oppressive and unconscionable?

Preliminary Issue.

- (17) At the hearing proper on 30th August 2023, the Plaintiff at no stage of the proceedings raised any Preliminary Issue "that related to the Affidavit in Opposition deposed by Kusum Lata Chand on behalf of the Defendant Bank having any authority by virtue of her position as the Branch Manager and failing to annex any written authority thereof."

- (18) This issue has been raised in the Plaintiff's written submission furnished to Court only and no attention has been drawn to the Defendant Bank and/or its counsel representing the Bank. This tantamounts to misconduct on the part of the Plaintiff's counsel.
- (19) However, the affidavit in opposition is deposed by Kusum Lata Chand in her capacity as the holder of the Branch Manager with the Defendant's Bank and by virtue of her position, personal knowledge of the matters contained in the founding affidavit ascertainment of truth by reference to personal and files and records and others including not to be taken to be waiving any of the Plaintiff's privileges, that she has sworn this affidavit.
- (20) There is no need for Kusum Lata Chand to annex an authority from the Defendant Bank for the simple rational that she is a Natural person who held the overall position of the Banks Branch Manager and as well versed and had knowledge of the daily transactions of the Banks including matters of loan and documentation pertaining to the Plaintiff herein.
- (21) The Plaintiff is one of the Directors of Organic Earth (Fiji) Limited ['Organic'].
- (22) On 26th May 2015, the Bank issued a letter of offer to Organic, granting a loan facility of \$143,000. As part of the terms of offer, Organic mortgaged a property, which was a Native Lease No. 16044.
- (23) Organic gave a mortgage (no. 817213) on the property comprised and described in Native Lease No. 16044 being Lot 2 and 3 Matamakita Subdivision, Lami, having an area of 2 roods and 29.7 perches with improvement therein.
- (24) By Mortgage No. 817213 made between the Bank and Organic, the said property was charged to secure repayment to the Bank of all financial advances, charges, interest and other banking accommodation made by the Defendant Bank to Organic from time to time and on terms and conditions as contained therein.
- (25) The Plaintiffs Contention is that they have identified four (4) issues for this Court to determine:
1. Was there a Contract between the Plaintiff the Plaintiff and the Defendant for the purpose of the Consumer Credit Act?
 2. If so, was the contract unjust for the purpose of the Act?
 3. If so, was this an appropriate case for this Court to exercise its powers pursuant to Section 71 of the Consumer Credit Act 1999? and
 4. Was it unconscionable for the Defendant not to discharge the mortgage?
- (26) The Offer letter issued to Organic on 26th May 2015 is an approval for fresh Credit facilities. Clause 12.0 of the letter of offer clearly stipulates '*that the offer of loan facility shall be deemed to be an offer not only to the borrower, but also to each Guarantor.*'

(27) The letter of offer also clearly addressed the terms and conditions with regards to the security to be given to the Defendant bank as follows:

- 1st Registered Mortgage over Native Lease No. 16044
- Lots 2 and 3 Matamakita subdivision, Lamu
- Personal guarantees of both directors of the company
- D.P Note to be signed by the company.

(28) This meant that upon acceptance by the Guarantor, the Guarantor shall accept the facility offered and provide securities or guarantees on the usual terms required by the Defendant Bank. The Plaintiff accepted the Letter of offer and executed the same on 27th May 2015.

(29) The Guarantee documents signed by the Plaintiff clearly sets out the Plaintiff's obligations and the undertakings under the Guarantee. The Plaintiff in particular guarantees that the Debtor will pay the secured monies to the Defendant Bank.

(30) Pursuant to the Personal Guarantees executed on 24 June 2015, the Defendant obtained additional securities on the loan facility advanced to Organic.

(31) In the simplest of terms, this means that if Organic becomes unable to repay the debt, the individuals (guarantors) assume personal responsibility for the debt.

(32) At all material times, the Plaintiff acts a guarantor on account of M/S Organic Earth (Fiji) Ltd which is due and owing, the guarantee given by the Plaintiff is a continuing security.

(33) Pursuant to Clause 5.0 of the Letter of Offer dated 26 May 2015 to Organic, the securities (including the Guarantee given by the Plaintiff) are continuing securities. This means the securities will extend to secure any sum of monies that is owed to the Bank at any time by Organic. It states:

"The Securities detailed herein will be continuing securities. They will extend to secure any sum of money that at any time is owed by you."

(34) Clause 6 of the Guarantee clearly states:

"Every security (other than a security referred to in Clause 20) already executed, or which at any time in the future may be executed by the Guarantor in favour of the Bank, will be and remain a continuing security for the payment by the Guarantor of the secured moneys."

(35) Clause 15 of the Guarantee further clearly states:

"Until the Bank has received all of the secured moneys in full, the Guarantor is not entitled on any grounds to:

- (a) *Claim the benefit of any security now or in the future held by the Bank for the payment of the secured monies."*

- (36) In the case of *Fiji Development Bank v Moto* [1995] FJHC 166; HBC 0055.95s (22 November 1995), the Court held that:

"There a direct contractual relationship between the defendants and the plaintiff bank but the contract itself provided that "... the guarantee shall be a continuing guarantee ..." (Clause 1); and "... shall be enforceable notwithstanding that any ... security shall be still in circulation ..." (Clause 2); and further, "... shall be a principal obligation ... and shall be independent of and in no way affected by any other security ..."

- (37) Coming back to Answer the Four (4) issues identified by the Plaintiff for this Court to determine:

(a) There in fact is a direct Contractual relationship between the Defendant Bank and the Plaintiff, but the Contract itself provided that "...the guarantee shall be a continuing guarantee and enforceable not withstanding that any security shall be still in circulation, shall be a principal obligation and shall be independent of and in no way affected by any other security..."

- (38) The contractual relationship between the parties provided that the guarantee shall be a continuing guarantee, and therefore it cannot be an unjust for the purpose of the Consumer Credit Act.

- (39) Section 71 of the Consumer Credit Act 1999 does not come into effect. The reason being that the Defendant Bank has not re-opened a transaction and/or closed any previous dealings and create a new obligation. The Defendant Bank in fact has granted a loan facility to organic. The Plaintiff has provided a guarantee to that loan facility and the guarantee is not a limited guarantee and is a continuing security for the Defendant Bank for the Existing Loan.

- (40) It was not unconscionable for the Defendant Bank not to discharge the mortgage.

- (41) Despite the Plaintiff's position being that the debt sum of \$60,000.00 has been paid in full, the Plaintiff acts a guarantor on account of M/S Organic Earth (Fiji) Ltd which is due and owing. The guarantee given by the Plaintiff is a continuing security. (Reference made to letter of 26.05.2015 which states 1st Registered mortgage 16044 and Personal Guarantee).

- (42) The Plaintiff accepted the Letter of Offer dated 27 May 2015 and executed the following:

(i) *Mortgage No. 844909 for the loan advancements between the Plaintiff and the Bank also clearly stipulates "any indebtedness owing to the Bank or that may become owing to the Bank under any contract or guarantee to be secured by the said Mortgage;*

(ii) *By virtue of Clause 5.3 of the said Mortgage (No. 844909), the Plaintiff is bound to perform the obligations under the contract/Guarantee. In the present instance, the Guarantee was accepted and executed on 24 June 2015;*

(iii) *Clause 9.12 of the Mortgage (No. 844909 also confirms that the Mortgage is a continuing security for all monies secured. Mortgage No. 844909 is*

security for payment to the Bank of the Loan facility, and for performance of your clients' continuing obligations under this Mortgage, including any Guarantee provided:

(iv) The Defendants actions are well in compliance with the provisions of the Letter of Offer, Mortgage and Guarantee duly executed by the Plaintiff.

- (43) In refusing to discharge, the mortgage, the Defendant at all material time, has exercised its legal rights under the continuing security documents and continues to do so.
- (44) The Defendant's loan facility granted to an entity of which the Plaintiff is a director of remains unpaid. The Plaintiff has provided a guarantee to that loan facility. The guarantee is not a limited guarantee and is a continuing security for the Bank.
- (45) For the aforesaid reasons, I have no alternative, but proceed to Dismiss the orders sought in the Plaintiff's Originating Summons in its entirety filed on 10th August 2022.

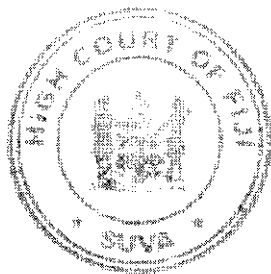
Costs

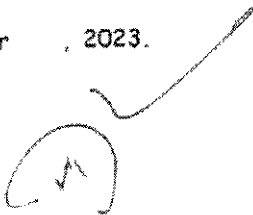
- (46) The matter proceeded to a lengthy Hearing with parties filing documentations and written submissions and argued the pending application before Court at Length.
- (47) It is only appropriate and fair that I order the Plaintiff to pay the Defendant a sum of \$2000 as summarily assessed cost within 14 days timeframe accordingly.

Orders

- i. The Plaintiff originating summons filed on 10th August 2022 seeking orders therein is accordingly dismissed.
- ii. The Plaintiff to pay the Defendant a sum of \$2000 as a summarily assessed costs within 14 days timeframe.

Dated at Suva this 7th day of December , 2023.




Vishwa Datt Sharma
JUDGE

CC: KUMAR LEGAL, SUVA
NEEL SHIVAM, SUVA