

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION HBC NO. 183 of 2023

BETWEEN: **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**
ABN 11 005 357, trading as **ANZ BANKING GROUP LIMITED**
a duly constituted banking Corporation having its
registered office at ANZ House, 25 Victoria Parade, Suva
in the Republic of Fiji.

PLAINTIFF

AND: **BHAGWAN SINGH** and **LATA WATI** both of Lot 3, Kaka Street
Samabula, Suva.

FIRST DEFENDANTS

AND: **THE REGISTRAR OF TITLES** a statutory body established
pursuant to the Land Transfer Act of Fiji, 1st Floor Suvavou
House, Victoria Parade, Suva.

SECOND DEFENDANT

Appearances: **Messrs Neel Shivam Lawyers for the Plaintiff**

No Appearance and representation for the First Defendants

JUDGMENT

Introduction

1. The Plaintiff ("the bank") filed an application against the First Defendants via Originating Summons on 15 June 2023. The said application was filed pursuant to section 109(2) of the Land Transfer Act, Cap 131. The court was requested to order the removal of caveat number 910055, which

was registered by the First Defendants on property lot 116 of Native Lease no. 31062 situated on SO 6622, Tacirua – East Subdivision, Stage 3A (part of), TLTB No. 4/3/39463.

2. The affidavit of Fayzeen Farah Bano the Senior Recoveries Officer of the Plaintiff bank, located at level 2, ANZ House, 25 Victoria Parade Suva, , was also filed In support of the Plaintiff's Originating Summons. The affidavit was duly sworn on 14 June 2023.
3. The aforementioned application was duly served via substituted service subsequent to the court's granting of leave. The affidavit of service was also filed and no issues arose as to the service of the Plaintiff's application. Further, neither the first nor second named First Defendants appeared in court, nor were they represented by counsel. After confirming that the First Defendants had been duly served, the court proceeded to hear the matter on 7 December 2023. As directed by the court, Plaintiff's counsel also filed extensive written submissions in support of its application. I duly acknowledge the assistance rendered to the court by the counsel for the plaintiff by means of their written and verbal submissions.

Background

4. The Plaintiff relied on the affidavit of its Senior Recoveries Officer (Fayzeen Faro Bano), as mentioned previously at paragraph 2. Based on the aforementioned affidavit, the subsequent concise details can be ascertained:
 - i. The Plaintiff bank has registered the mortgage as the mortgagee of a property that is legally described as Lot 16 on SO 662, Tacirua

subdivision, stage 3A (part of), TLTB No. 4/3/39463 ("the property"), with the mortgage deed being registered on 5 April 2017.

- ii. The subject property was both liable for the mortgage and registered proprietor Sangita Devi Sagar, doing business as "Shiv Enterprises" ("the borrower").
- iii. The mortgage of the subject property was executed by the borrower as collateral for a loan amounting to \$1,086,500.00 (one million eighty-six thousand five hundred dollars).
- iv. The mortgage was initially registered on 5 April 2017, under the registration number 842471.
- v. Subsequently, the borrower committed multiple defaults, and the bank issued a default notice on 27 September 2021. Nevertheless, the borrower persisted in the delinquency and neglected to undertake the requisite measures to rectify the situation.
- vi. The borrower was subsequently informed by the bank on 26 October 2021 that it intended to exercise its powers to sell the property as a mortgagee. Nonetheless, while exercising its mortgagee sale right, the bank discovered, following a title inquiry with the titles office, that the First Defendants had registered Caveat No. 910055 ("the caveat") on the subject property on 17 November 2021.
- vii. That the First Defendants' interest in registering a caveat on the subject property arose from a Sale & Purchase Agreement ("the Agreement") executed between the First Defendants and the borrower for the sale of the subject property on 10 August 2021.

- viii. The Plaintiff bank was unable to exercise its mortgagee sale right in light of the First Defendants' caveat.
 - ix. The borrower has accumulated a debt to the plaintiff bank totalling \$1,146,201.80 (one million one hundred forty-six thousand two hundred one dollars and eighty cents). This debt will continue to grow at an annual interest rate of 7%. Consequently, the bank must exercise its mortgagee rights to reclaim the delinquent debt.
5. Hence, this present application for the court's decision.

Law and Analysis

6. Section 106 of the Land Transfer Act, Cap. 131, allows any person who is entitled to or has a beneficial interest in any land to register a caveat. The provision states:

*Any person -
claiming to be entitled or to be beneficially interested in any land subject to the provisions of this Act, or any estate or interest therein, by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or
transferring any land subject to the provisions of this Act, or any estate or interest therein, to any other person to be held in trust,
may at any time lodge with the Registrar a caveat in the prescribed form, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest either absolutely or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat.*

7. Notwithstanding section 106 of the Land Transfer Act, a person who is also entitled to or has a beneficial interest in the subject land may also apply to the court for the removal of the aforementioned caveat; the relevant provision is section 109(2) of the Land Transfer Act, Cap 131 which reads as follows:

(2) Any such applicant or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, and the court on proof of service of the summons on the caveator or upon the person on whose behalf the caveat has been lodged and upon such evidence as the court may require, may make such order in the premises, either ex parte or otherwise as to the court seems just, and, where any question of right or title requires to be determined, the proceedings shall be followed as nearly as may be in conformity with the rules of court in relation to civil causes.

8. In Merchant Finance & Investment Company Limited v Dairy Foods Ltd & Supreme and Auto Care Holdings Ltd, Civil Action No. HBC 333 of 2013, Master Rajasinghe (as he was then), having considered the nature and scope of sections 106 and 109 of the Land Transfer Act in light of the Fiji Court of Appeal decision in Cambridge Credit (Fiji) Limited v WFG limited (Vol 21 FLR 182) and Griffith CJ's decision in Municipal District of Concord v Coles (1906) 3 CLR 96 at 107, adopted the view that section 109(2) of the Land Transfer Act has two limbs.

The first limb to resolve is whether the caveator has any caveatable interest as defined under section 106 (a) and (b) of the Land Transfer Act. Once that is considered, the second limb is to determine whether the caveatable interest is capable enough to forbid or restrain the registration of any person as transferee or proprietor, or of any instrument

affecting such interest and estate in the property as claimed by the caveator.

9. Additionally, section 79 of the Property Law Act delineates the rights of the Plaintiff, in their capacity as mortgagee, to transfer the subject property if the mortgagor fails to repay the loan. The section specifies:

79. -(1) If default in payment of the mortgage money or in the performance or observance of any covenant continues for one month after the service of the notice referred to in section 77, the mortgagee may sell or concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots, by public auction or by private contract, or partly by the one and partly by the other of those methods of sale, and subject to such condition as to title or evidence of title, time or method of payment of the purchase money or otherwise as the mortgagee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale.

(2) No purchaser shall be bound to see or inquire whether default has been made or has happened, or has continued, or whether notice has been served, or otherwise into the propriety or regularity of any such sale.

(3) Where a transfer is made in purported exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause had arisen to authorize the

sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by any unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

10. In addition, caveatable interests cannot impede the Plaintiff or the bank's right to redeem the delinquent debt through mortgagee sale until the entire amount is paid into Court.

According to the ruling in Prasad v Australia & New Zealand Banking Group Ltd (1999) FJHC 29; (1999) 45 FLR 101, it was reiterated that the High Court of Fiji had always adhered to the long-established principle that the mortgagee cannot be prevented from exercising their power of sale merely because the mortgagor has initiated a redemption action, the amount owed is in dispute, or the manner in which the sale is being organised. However, the mortgagee will be restrained if the mortgagor remits the sum demanded in court, which corresponds to the amount the mortgagee asserts is owed to him.

11. Moreover, 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...”

12. 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.

13. It is pertinent to note that no court has the authority to compel a person, 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...

14. Regarding the present case, it is indisputable that the Sale & Purchase Agreement executed on 10 August 2021 between the First Defendants and Sangita Devi Sagar trading as "Shiv Enterprises" ("the borrower"), the mortgagor, and the registered owner of the subject property creates a caveatable interest in the property for the First Defendants.
15. The First Defendants entered into the agreement with the registered proprietor and mortgagor without the consent of the Plaintiff bank, which held a first registered mortgage on the subject property from 5 April 2017. Prior to engaging into the agreement, had the First Defendants performed their due diligence, they would have discovered the bank's first registered mortgage on the property. However, it is currently inconclusive whether the First Defendants were cognizant of the Plaintiffs registered mortgage and chose to disregard it when they entered into the agreement with Shiv Enterprises, based on the evidence presented thus far.
16. The matter of whether an unregistered or registered subsequent encumbrance can impede a mortgagee's right to a mortgaged property was deliberated in the Supreme Court case of Auto Care

Holdings Ltd v Jims Enterprises Ltd and Others (Civil Action No. HBC 323).

Justice Corea stated the following in the case:

“in such situation the later rights holder cannot injunct the former who is the mortgagee from exercising the statutory right of the mortgagee and proceeding with the mortgage sale. In Kerabee Park Ltd v Daley Karabee Park Pty Ltd v Karinya Investment Pty Ltd (1978) NSWLR 222 it was held:

“that a subsequent encumbrance registered or unregistered has no right to interfere in, object to, a proper exercise by a mortgagee of the mortgagees power of sale and would have no ground on which to seek the intervention of the court, notwithstanding that registration of the transfer to the purchaser would discharge or defeat all mortgage interests in the land whether registered or not.”

17. I acknowledge, regarding the first limb, that the First Defendants possess a caveatable interest in the subject property by virtue of the sale and purchase agreement established with Shiv Enterprises, also known as Sangita Devi Sagar.
18. With respect to the second limb, the Plaintiff cannot be restrained by the First Defendant's caveatable interest, as the Plaintiff registered the mortgage first.
19. Furthermore, with respect to the Inglis principle, there is insufficient evidence to suggest that the loan amount due to the bank had been deposited with the court. Therefore, I remain unconvinced and fail to identify any legitimate justification for restricting the Plaintiff's right to conduct a mortgagee sale on the subject property.

20. It is appropriate to grant the Declarations and Orders requested in the Originating Summons filed by the Plaintiff considering the current circumstances.

Orders

21. The Court makes the following Declarations and Orders:
- i. A Declaration that the Plaintiff's Mortgage No. 842471 registered on 5 April 2017 against Native Lease No. 31062 constitutes a first charge on the mortgaged property in priority to Caveat No. 910005.
 - ii. A Declaration that the Plaintiff is entitled to proceed with mortgagee sale of the mortgaged property legally described as Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of), TLTB No. 4/3/39463 pursuant to its Mortgage No. 842471.
 - iii. An Order that Caveat No. 910055 lodged by the First Defendants and registered against Native Lease No. 31062 be removed forthwith.
 - iv. An Order under section 168 of the Land Transfer Act of Fiji, Cap 131 that the Second Defendant forthwith remove and / or cancel Caveat No. 910055 lodged by the First Defendants affecting the land, legal description of which is Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of), TLTB No. 4/3/39463 pursuant to its Mortgage No. 842471.
 - v. An Order under Section 168, Section 21(1) and Section 24 of the Land Transfer Act of Fiji, Cap 131 that the Second Defendant make and enter all such memorials of instrument being the cancellation of Caveat No. 910055 affecting the land, legal description of which is

Native Lease No. 31062 being Lot 16 on SO 6622 in Tacirua East Subdivision – Stage 3A (part of), TLTB No. 4/3/39463.

- vi. That the First Defendants, either jointly or severally to pay summarily assessed costs of \$1500.00 to the Plaintiff within 21 days.



A handwritten signature in black ink, appearing to read "Samuela D Qica". The signature is written in a cursive style with some loops and is positioned above a horizontal dotted line.

Samuela D Qica
Acting Judge

High Court – Suva

Wednesday, 17th January 2024