

**IN THE HIGH COURT OF FIJI AT SUVA**

**IN THE CENTRAL DIVISION**

**CIVIL JURISDICTION**

Civil Action No. HBC 11 of 2024

**BETWEEN:** **RADHIKA PRASAD**

**PLAINTIFF/APPLICANT**

**AND:** **WESTPAC BANKING CORPORATION**

**DEFENDANT/RESPONDENT**

**Date of Hearing : 20 June 2024**

**For the Plaintiff/Applicant : Mr Solanki. B**

**For the Defendant/Respondent : Mr Singh. K**

**Date of Decision : 4 October 2024**

**Before : Waqainabete - Levaci, SLTT, Puisne Judge**

## **RULING**

***(APPLICATION TO CONTINUE INTERIM INJUNCTIVE ORDERS)***

## **PART A - BACKGROUND**

1. The Plaintiffs filed an Ex-Parte Motion and Affidavit for which the Court had granted interim orders as follows:
  - a) **RESTRAINING ORDERS** that until further order of the Court, an injunction restraining the Defendant by themselves and/or by their servant and/or their agent from enforcing the Indemnity and Guarantee dated 12 May 2009 and Mortgage No. 720767 over Certificate of Title No. 14453;
  - b) **RESTRAINING ORDERS** that until further order of the Court, an injunction restraining the Defendant by themselves and/or by their servant and/or their agent from taking any action pursuant to Demand Notice dated 21 December 2023 or any such other notices for the recovery of \$697, 431.62 as claimed therein.
2. The Court had thereafter ordered the Plaintiff to serve on the Defendant Bank the application together with the sealed Interim Orders in order to hear both parties on the matter at hand.
3. The Question now before the Court is whether the interim injunction ought to continue or not on the facts when exercising its discretion.
4. The Plaintiff had sort and was granted interim injunction against the Defendant Bank from exercising their powers of sale over the property secured under mortgage, Mortgage No. 720767 over Certificate of Title No. 14453 and continued over time through 9 Business Lending Agreements with his son, who run Rewa Genuine Supplies.
5. When the Defendant Bank demanded payments from the Plaintiff as Guarantee of all the Business Lending Agreements, the Plaintiff refused to make any repayments arguing that he had not given any formal consent to the continued extension of his Guarantees and Indemnity of every other extension to the Business Lending Agreement.

## **PART B: THE AFFIDAVIT OF PARTIES**

### ***Defendants Affidavit in Opposition***

6. In the Defendant's Affidavit in Opposition to the interim Orders, they deposed that the son of the Plaintiff, who operated the business known as Rewa Genuine Moto Spares had entered into 9 Business Finance Agreements with the Defendants in 2009 continuing until 2017 for two Business Term Loans, a Business overdraft facility and a trade finance facility. They were secured by a registered mortgage over a Certificate of Title No 14453 and with an unlimited Guarantee and Indemnity from the Plaintiff.
7. Every Business Finance Agreement contained general conditions which extended the guaranteed obligations now or in the future.

8. The Defendants deposed that the unlimited Guarantee and Indemnity Agreement provided that the Agreement was continuing and irrevocable except where the Lender agreed in writing or subject to any agreed limit.
9. Hence the Plaintiff is alleged to be liable for all guaranteed monies and obligations.
10. The Defendant also deposed that the Plaintiff executed the Guarantee documents in front of a lawyer.
11. The Defendant also deposed that the Plaintiff obtained independent advise from a solicitor prior to signing the documents.
12. Despite several demands and requests for Plaintiff to pay the monies advance to the son's business under the Agreement, the Plaintiff refused or neglected to pay the sums.

### ***Reply to Defendants Affidavit***

13. In response the Plaintiff deposed that they were aware of the existence of the Business Lending Agreement but was unaware of the types and categories and only came to know in 2023 when his son provided him with all the banking documents.
14. The Plaintiff denies executing documents before a lawyer and only a bank officer at the Nausori Branch of the Defendant's bank. No legal advise was given or obtained nor was there any explanation of the implications of the documents signed despite the contractual legal obligation owing from the Defendant Bank.
15. The Plaintiff deposes he had no knowledge of the continued extension to the Business Lending Agreements nor was his consent obtained to continue his Guarantee over the extended business lending.

### **Part C: LAW AND ANALYSIS ON THE APPLICATION**

16. The Plaintiff's concerns arose from when the Defendant Bank's continued increasing Business Lending Agreements whilst extending the Guarantee Agreement by the Defendant without his consent.
17. In their submissions, Counsel for the Plaintiff argued that in determining whether or not to continue an injunction, reference was made to American Cynamid Co -v- Ethicon Ltd [1975] UKHL 1; (1975) A.C 396 which provides the guiding principles of granting injunctive relief which included: balance of convenience and that an applicant must establish a prima facie case by being satisfied there is a prima facie case. The Plaintiff argues there are serious issues to be tried as the Plaintiff alleged he was not properly advised of the documents he was signing from the witnessing lawyer.

18. Counsel for Plaintiff argued that the Agreements were not variations but completely new loans as well as the ones where the Agreement was extended and varied. Reference was made to the case of National Australia Bank Ltd –v- John Albert Rose [2015] S APCI 0033 where Warren CJ, Ferguson and McLeisha JJA where NAB funded the joint venture between Rice and Rose where Rose signed the loan documents on behalf of the company and guaranteed by Rose as well, signed before a banking manager. When the properties were later re-possessed and sold, the NAB issued demands for payments against Rose as Guarantor. In that case the Court of Appeal held that the warning notices were not sufficient to alert a person prior to execution and that NAB had breached their standard procedures. Reference was made to Carpenters Fiji Ltd –v- Singh [2007] 30; HBC 41.2004 (25 September 2007) where Singh J held that once the credit limit from the principal agreement of \$20,000 was surpassed, the defendant was discharged to his liability beyond \$20,000 basing his determination on the principle that:

“[18] that any substantial departure made by a creditor without the surety’s consent from the terms of the principal contract will discharge the surety because it makes an alternation in the surety’s obligation”

19. Similarly Lord Keith Burnes -v- Trade Credit Ltd [1981] 2 ALL ER Lord Keith decided on the same grounds.
20. Reference was also made to Jimmy Harry Vivloios ad Coomera Lakeside Development Pty Ltd and George John Nowak -v- Westpac Banking Corporation [2010] QCA 230 on similar facts it was held that there was no evidence that the Bank knew that the Appellant would rely on the disclosed valuation and no evidence that the Bank acted unconscionably. A similar decision arose in Westpac Banking Corporation -v- Daniel Carl Schwerdtfeger and Ors [2016] QSC 173 where Aitkinson J held that the defendants offered no credible evidence to support the claim that the alleged representations were made by the plaintiff’s agents.
21. For these issues the Plaintiff argued that there were indeed serious questions to be tried. Furthermore there were good prospects of success.
22. In the Defendants submissions, they argue that the documents signed by the Plaintiff contained a warning that the Plaintiff was entering into a financial risk in which they were required to understand. Furthermore the Memorandum of Common Agreement required the signee to obtain legal advise prior to signing. The obligations also included wording to the effect holding him now and in the future included any further Agreements by the mortgagor would automatically extend his guarantee.
23. The Memorandum of Agreement also contained provisions that warned the Plaintiff of the likely hood of non-payment and re-possession of property if the Mortgagor and the Guarantor fails to make repayments. The argument that the Plaintiff is not liable is submitted by Defendant as baseless and has no prospect of success. That all the BFA entered into a continuation of the existing facility.
24. The Defendant therefore argued there was no serious question to be tried. That the Plaintiff was made aware from the beginning his obligations regarding the Agreement. He had signed the Guarantee knowing full well of the consequences.

25. The Defendant also argued that the right of the Mortgagee to exercise Mortgagee sale is unfettered. The Defendant argued that the Plaintiff has not given any undertaking for damages. The Bank is settled to repay damages but not the Plaintiff.
26. Reference was made to Arvin Prakash -v- Fiji Development Bank where the Acting Chief Justice determined that mortgagees remedy for power of sale on default including power of sale remains unfettered. He argued that despite it being a commercial loan against a commercial property, the right of the Banker to exercise his mortgagee power of sale remains the same. Finally the Defendant submits that there are only three limbs to determine an interim injunction and the interest of justice is not included.
27. In reply the Plaintiff submitted that the warning notice is contested as it was not able to assist the Plaintiff in the manner in which he was required to sign the documents. Furthermore there was no information to the Guarantor when there were variations to the Lender Agreement. The word continuing guarantee' refers to the continuation of the Guarantee until the amount in the mortgage in which he consented to guarantee is finally paid off. Not for future guarantees.
28. In these cases there are a number of issues contended by the Plaintiff. The Plaintiff contends he is entitled to reliefs.
29. In arriving at a determination the Court firstly refers to Holm -v- Brunskill [1878] 3 QBD 505 Corron LJ held:

“The true rule in my opinion is, if there is an agreement between the principals between the contract agreed, the surety ought to be consulted, and if he has not fully consented to the alteration, although in cases in which it is without inquiry evident that the alternation is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudiced to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, to allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and if has not so consented he will be discharged.”

30. In that case above, there was a change in tenancy on the mortgage property without the surety's knowledge which entitled the Appellant to be discharged as surety of the mortgage when he had not consented to the alteration.
31. In the matter before the Court, there has been allegations of extension of the Guarantee over the property mortgaged as a result of further Business Finance Agreements entered into by the Mortgagor.

32. There are cases submitted by counsel that determined in common law the principle that a contract was rendered unenforceable where there was a variation to the Guarantee without the consent of the Guarantor i.e. Carpenters Fiji Ltd -v- Chandra [2007] FJHC 30 which Singh J held had been given effect in section 11 of the Indemnity, Guarantee and Bailment Act.
33. I find that the Plaintiff has satisfied me that there is a serious question to be tried. There are a number of issues that require the Court to determine at trial.
34. There is therefore an arguable case and is a serious question to be tried. As to whether there are prospects of success, there is determined at trial depending on the evidences. Case law from Australia relied upon by the Plaintiffs have shown otherwise.
35. Current precedents in Fiji also reflect the requirements stipulated under section 11 of the Bailment, Guarantee and Indemnity Act of Fiji.
36. The onus is therefore on the Plaintiff to prove his evidences against the particulars of claim.
37. In so far as to whether damages is an adequate remedy, Plaintiff argues it is not so and there are larger losses if the injunction is not granted. He has argued that as Guarantor his position is uniquely different to that of the Mortgagor given that it is his property that is taken as security.
38. I find in this instance that damages are not sufficient as an adequate remedy and relief for the Plaintiff and not this interlocutory injunction. Given that the mortgage agreement nor the debt owing is not challenged the Defendant has the power to effect his mortgagee power of sale for the purposes of recovering his losses. How much in default owing against the Mortgagor is not contested.
39. However given the basis in which the Guarantor's cause of action is raising issues of misrepresentation, fraudulent lending contracts with the mortgagor, non-compliance with section 11, acting contrary to procedures, unconscionable conduct, original debt has been fully paid off and stress suffered, the court finds that damages is not an adequate remedy at this stage. I am mindful and refer to the case of Prasad -v- Zarshbina Company Ltd [2013] FJHC 245; HBC 16 of 2013 in which Master Tuilevuka had referred to powers of the Mortgagee to exercise their powers where there are challenges to the enforceability of security.
40. Despite reassurances by the Mortgagee that they are capable to pay damages, there are exceptional circumstances that can fetter the mortgagees powers. This is one of them. Even though the mortgage is not denied there are challenges that the monies owing in arrears for which the mortgagee wishes to exercise their powers, is fully paid.
41. These are the reasons that the Court finds, when weighing the balance of convenience, it would be appropriate to restrain these powers in the interim until the conclusion of the matter.
42. The issue to be determined at trial is whether that total amount in default owed by the Mortgagor is the sum owing now by the Guarantor based on his cause of action.

43. Finally, on a balance of convenience, the court finds it is appropriate to continue the interim injunction until trial.

**PART D: Orders of the Court:**

44. The Court orders as follows:

- (a) That the interim injunction restraining the Defendant by themselves and/or by their servant and/or their agent from enforcing the Indemnity and Guarantee dated 12 May 2009 and Mortgage 720767 over Certificate of Title No. 14453 is continued until the finalization of this proceedings.
- (b) Costs in the Cause.

   
Justice Senileba L.T.T. Waqainabete-Levaci