IN THE HIGH COURT AT SUVA

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	:	**30 January 2024**
For the Plaintiff/Applicant	:	**Mr Solanki. B**
Date of Decision	:	**5th February 2024**
Before	:	**Levaci, SLTTW Acting Puisne Judge**

R U L I N G

(**EX-PARTE** ***APPLICATION FOR INJUNCTIVE ORDERS***)

PART A - BACKGROUND

1. The Plaintiffs filed an Ex Parte Motion and Affidavit seeking interim injunctive 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 application for interim injunctive orders stems from a Claim by the Plaintiff/Applicant seeking for permanent Injunctive Orders, discharge of mortgage by the Defendant, release of the Plaintiff from the Indemnity and Guarantee entered into on 23 June 2009, Declaratory orders for excessive, harsh, oppressive and unconscionable conduct and damages including aggravating damages for pain and suffering.

3. The Claim arises from allegations that the Plaintiff/Applicant entered as a Guarantor for his son who had taken a mortgage for their business from the Defendant/Respondent for which continued to be extended based on the overdraft facility that was entered between his son and the Defendant/Respondent without his knowledge or consent. The son continued to increase in obtaining overdrafts against the Indemnity and Guarantee Agreement signed by the Plaintiff/Applicant.

PART B: THE APPLICATION

4. In his Affidavit, the Plaintiff/Applicant deposes that he is a retired businessman and reside at my residential property at Kings Road, Davuilevu, Nausori. The said property description is Certificate of Title No. 14453 (Annexed hereto and marked "RP-1" is a certified copy of the said title). That I acquired the said property in 1995 outright with no loan or encumbrances. That this property where he resides together with his son and their family until they migrated to New Zealand in December of 2023.

5. That until 2009, the Plaintiff had operated a business called Rewa Genuine Motor Spares operating out of Nausori which he decided to transfer his business, Rewa Genuine Motor Spares (the "business") to his son Rajan due to poor health. In the same year his son Rajan approached the Defendants' Nausori Branch to secure certain funding to assist him in operating his business. That the Defendant did consider his request and provided him a Lender Arrangement dated 12 May 2009. That in this document, the Defendant offered to the Plaintiff's son, the following finance facilities:

(a) Business term loan	$11, 717.00
(b) Business overdraft	$50,000.00
(c) Business Term Loan	$69,150.00
(d) Import Revolving Facility	$50,000.00

6. That the total facility as per BFA dated 12 May 2009, was for the amount of $180, 867. 39. That since Rajan did not have sufficient Assets, the Defendant required a Guarantor and as security for the guarantee, a mortgage over my residential property. On 12th May 2009, the Plaintiff agreed to offer a personal Guarantee and security, against his property described. The Guarantee and Indemnity

and Mortgage Documentation, the mortgage specified that it was to cover the principal debt of $127,000 and interest rate at 12% per annum and the Guarantee and Indemnity document on the second page that the guaranteed obligation was in respect of the Lender Arrangement dated 12 May 2009.

7. In 2020 the Plaintiff became aware upon his own enquiry at the Nausori Branch of Westpac that Rajan was facing some financial difficulties meeting his repayment with the Defendant. The Plaintiff then went with Rajan to the bank and was informed by the bank officer that Rajan has a substantial debt with the bank. Later, brief meetings were held in 2021 and 2022, but very little information was provided to me by the bank on Rajan's debt situation.

8. In 2023, the Plaintiff met with the Defendant bank at their Suva branch and was informed by the bank officer that Rajan's debt with the bank was in excess of $750,000 and the bank would take steps to sell my property to recover the debt and sue me personally for any shortfall. That the bank officer did not provide any information to me any details on the debt.

9. Rajan had entered into a BFA date 20 September 2012 with the following finance facilities to Rajan:

   a) Business Overdraft $50,000 (Facility A)

   b) Business Overdraft $24,000 (Facility B)

   c) Business Term Loan $56,000 (Facility C)

   d) Business Term Loan $130,000 (Facility D)

   e) Trade Finance – Import $50,000 (Facility E)

10. The total facility is for $310,000 for which was Guaranteed against the Agreement he entered into on 12 May 2009.

11. On 28 August 2013 an undated signed Business Facility Agreement was signed by Rajan for a loan facility of $240,000 to purchase an industrial property with fees and charges. The personal Guarantee entered on 12 May 2009 was used as security on the same.

12. On 7 August 2014 another Business Facility Agreement was entered into with Rajan giving a business term loan of $160, 625.33 to amortise hardcore overdraft facility and Guaranteed against the Agreement the Plaintiff entered into on 12 May 2009.

13. On 9 October 2015 the Plaintiff claims another Business Facility arrangement was made with the Defendant for a business overdraft of $80,000 (increase of $30,000) to assist in capital requirements. No consent was obtained from the Plaintiff when the BFA was entered into as the Guarantee on 12 May 2009 was considered.

14. In reference to the earlier BFA, the Defendant offered another BFA on 12 November 2015 for a business overdraft facility of $110,000 (an increase of $30,000) to assist with working capital requirements.

15. On 31 March 2016 the Defendant offered another Business Finance Agreement to Rajan as follows:

a)	Business Overdraft	-	$130,000 for working capital;
b)	Business Term Loan	-	$150,000 for purchase of stock and to pay Radhikas Prasad personal home loan debt;
c)	Trade Finance	-	import - $50,000 for importation of spare parts from suppliers;
d)	Business Overdraft	-	$22,000 to assist with working capital requirements;
e)	Business Overdraft	-	$118,000 to assist with the purchase of taxi and spare parts business;
f)	Equipment Finance	-	$20,000.00;
g)	Business Term Loan	-	$311,000 (increase of $50,000) to purchase commercial property in Manoca, Nausori;
h)	Business Overdraft	-	$50,000 to meet working capital requirements.

16. Another Business Finance Agreement was entered with the Defendant on 26 September 2016 for a business term loan of $144,000 to inject cash flow into the business cheque account. No consent was obtained from the Plaintiff.

17. That on 5 June 2017 another Business Finance Agreement was offered for $184,000 to assist to purchase stock and to pay off Radhika Prasad's personal home loan debt. The increase in facility was to inject funds into the business cheque account to stabilize cash flow. No consent was obtained from the Plaintiff.

18. The Plaintiff denies that any home loan was still in existence against his residential property and was unsure why another loan was obtained to clear a non-existing mortgage debt.

19. He argues that there are serious issues to be tried as he should not be held liable for further advances that were made by the Defendant to Rajan.

20. He also deposes that on a balance of convenience the Defendant will exercise his mortgagor rights and sell his residential property before the claim is determined at trial.

Part C: LAW AND ANALYSIS ON THE APPLICATION

21. The Plaintiff relies upon Order 29 Rule 1 (2) of the High Court Rules. It states –

> "(2) where the applicant is the plaintiff and the case if one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons".

22. In the case of Prakash Chand -v- Raj Pal and Fiji Sugar Corporation HBC 171 of 2011 Inoke J held that –

> "[5] Order 29 Rule 1 [2] of the High Court Rules requires the plaintiff to show that there is urgency in bringing the application and that serious mischief or harm is likely to result if the court does not intervene: Whittiker -v- National Bank of Fiji Ltd [2009] FJHC 180; HBC

155.2019L (31 August 2009); <u>Focciola -v- Nasau</u> [2010] FJHC 119; HBC064.2010L (8 April 2010).
[6] I am satisfied that unless I intervene now there is likely to be serious mischief or harm done to Prakash Chand."

23. In this instance, the concern by the Plaintiff is that the Defendant will exercise their mortgagee right of sale and sell the property, for which was held as a security for the mortgages entered by the Plaintiffs son.

24. In <u>Dorsamy Rao, Sammogam Goundar, John Bharat and Subramani -v- Mirriapan Goundar, Miniratnam Reddy. Amuni Nair and Subarmani</u> HBC 308 of 1996 Pain J in determining an application for interim injunction made ex parte and stated –

"Order 29 rule 1 (2) enshrines one of the basic principles of civil jurisprudence. That is the audi alteram partem rule. Both parties should be given the opportunity to be heard is given, It has been repeatedly said that ex parte applications for interim injunctions will only be granted in cases of real and critical urgency. Both the pre-requisites contained in Order 29 rule 1 (2) must be satisfied before an ex parte order can be made. Otherwise the application must be on notice.
The present case has not shown to be one of urgency. A critical need has not been shown for the Defendants to be immediately stopped from assuming office and managing the affairs of the Branch. Indeed the granting of the injunction would mean that there would be no officers to manage those affairs until the Plaintiffs action is finally determined. Moreover there is nothing to show that irreparable or serious mischief would be caused by the delay in proceeding on notice. There can be none to the Plaintiffs personally. They have no standing other than as members of the Branch unless and until a further meeting is held and they are elected to office."

25. In The Supreme Court Practice 1988 (Sweet and Maxwell, London, Vol 1) page 472-473 para 29/1/2 states :

"The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, to restrain the defendant from doing some act. Very exceptionally it may be mandatory, requiring an act to be done: see para 29/1/5. A cross undertaking from the plaintiff to be answerable in damages if the injunction proves to have been wrongly granted is almost always required see para 29/1/12. The principle to be applied in application for interlocutory injunction have been authoritatively explained by Lord Diplock in <u>American Cynamid -v- Ethicon Ltd [</u>1975] All ER 504 H.l. They may be summarized as follows: (1) The plaintiff must establish that he has a good arguable claim for the right he seeks to protect; (2) the Court must not attempt to decide the claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. (3) If the plaintiff satisfies these test the grant or refusal of an injunction is a matter for exercise of the Courts discretion on the balance of probabilities."

26. This law is well settled and applied in the precedent case of <u>Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd</u> [2004] FJCA 59; ABU0011.2004S & ABU0011A.2004S (26 November 2004).

27. In <u>Lakshmi Prasad Pandy & Another -v- Narend Singh</u> CA (21 March 1996) p 135 to 137 held that:

"Lord Diplock in p.509 (in <u>American Cynamid Co -v- Ethicon</u> (Supra) stated the object of the interlocutory injunction- He said:

> "the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiffs need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiffs undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The Court must weight one need against another and determine where the "balance of convenience lies."

28. In this instance I find urgency in the matter being dealt with as there is a serious mischief in the sense that the property of the Plaintiff will be seized and sold without the case proceeding.

29. Therefore in considering the principles of interim injunction, there is a serious question to be tried as the Plaintiff has claimed for damages and injunction on the basis that no consent was issued for the continuous issuance of Business Finance Agreement facility to the son Rajan without his consent.

30. The Plaintiff has offered an undertaking for damages, which the Court accepts.

31. I find that awarding of damages will not adequately compensate the Plaintiff as he currently resides in the personal property and the property is his only asset and security which was used for the Business Facility Agreements which he Guarantored initially but does not agree to the other BAF which his son entered into without his knowledge or consent.

32. I have to weigh out where the balance of convenience lies with the Plaintiffs application for restrain against the Mortgagees power to sell. According to the case of <u>Skerlec -v- Thompkins</u> [1994] FJLR 22; [1994] 40 FLR 303 (15 December 1994) considered:

> "<u>s to (3)</u> the defendants rely on the well-known rule enunciated by Walsh J. in *Inglis v. Commonwealth Trading Bank of Australia* (1972) 125 CLR 161. <u>The general rule however is not an inflexible one and has been relaxed where the creation, enforceability or validity of the exercise of the mortgagee's powers are directly challenged by the mortgagor.</u>
>
> The plaintiffs for their part whilst not necessarily challenging the security documents have sought to raise doubts as to the genuineness of their creation, the method and manner in which the loan funds raised thereby were applied or utilized, and the role and actions of the receivers after their appointments. There is a further, as yet, unpleaded submission which raises the legality of the defendant's mortgages insofar as they purport to charge several protected crown leases without the prior written consent of the Director of Lands (See: Section 13 of the Crown Lands Act Cap. 132).

This submission although clearly set out in the plaintiff's written submissions has been either over-looked or ignored by the defendants.

Be that as it may having regard to the rather unusual circumstances of the case and mindful that it is no part of the court's function at this stage to seek to determine complicated legal or factual issues I hold that there is nothing improper in the court's exercise of its discretion restraining the exercise by the defendants or their agents of their powers under the securities." (underlining my emphasis)

33. In Prasad -v- Zarshbina Company Ltd [2013] FJHC 245; HBC 16.2013 (17 May 2013) Tuilevuka Master stated:

"48]. In **Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd (1988) 20 FCR 540 at 545; 97 ALR 315**, the Federal Court of Australia said:

24. It does appear, however, that the requirements of the rule may be relaxed where the mortgagor's proceedings involve an attack upon the enforceability of the security documents. (See **Harvey v. McWatters** [1948] NSWStRp 58; (1948) 49 SR (NSW) 173.)

25. .... But as we have observed, the traditional rule was apparently relaxed where the mortgagor attacked the enforceability of the security. The powers of this Court under s.87 of the Act enable the mortgagor to obtain in an appropriate case orders varying the terms of agreements or to declare them void as a consequence of the contravention of the provisions of the Act by the mortgagee. This may strengthen the inclination of the Court in an appropriate case to refrain from requiring the applicant to provide adequate security for its indebtedness before restraining a mortgagee from exercising its powers. (see **Glandore Pty. Ltd. v. Elders Finance and Investment Co. Ltd.** [1984] FCA 407; (1984) 4 FCR 130 per Morling J. pp 133-136; **Cunningham v. National Australia Bank** (1987) 77 ALR 632; cf. **Mainbanner Pty. Ltd. v. Dadincroft Pty. Ltd.**, Unreported, (Federal Court of Australia, Pincus J, 8 March 1988.))

26. As a matter of discretion the relaxation of such a requirement in this Court usually would be restricted to cases where the allegations which ground the plea for the use of the Courts powers under s.87 are clearly arguable and not merely colourable and to cases which show an obvious nexus between the allegations of misleading or deceptive conduct in contravention of s.52 of the Act and the formation of the security documents sought to be varied or rendered unenforceable by the exercise of those powers (my emphasis)."

34. The application before this Court challenges the enforceability of the security documents and seeks orders to render it unenforceable on the basis that the Guarantor was not aware or did not give any consent to the Business Facility Agreement being entered into between the Mortgagor and the Defendant but for the initial Guarantor agreement he entered into in May of 2009.

35. The Plaintiff relies on section 11 of the Indemnity, Guarantee and Bailment Act Cap 232 which states:

"Any variance made without surety's consent in the terms of the contract between the principal and the creditor discharges the surety as to transactions subsequent to the variance".

36. I find on this basis on a balance of convenience, there are proper grounds to impose interim injunctions against the Defendants from dealing with the property by exercising their power of sale whilst the proceedings are on foot.

PART D: Orders of the Court:

37. **The Court orders as follows:**

    (a) That the Defendants are restrained 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;

    (b) That the Defendants are restraint until further orders of the Court;

    (c) The matter is adjourned for mention;

    (d) Costs in the cause.

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Mrs Senileba LTTW- Levaci

Acting Puisne Judge