

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 287 of 2023

BETWEEN: **FARIYA JESHMEEN NISHA** a.k.a **FARIYA JESHMEEN SINGH** of Lot
8 Valevatu Road, Caubati, Nasinu, Office Manager

PLAINTIFF

AND: **FIJI DEVELOPMENT BANK** is a corporate body duly constituted under
the Fiji Development Bank Act (Cap 214) and has its principal office at
360 Victoria Parade, Suva, Fiji

DEFENDANT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. A K Singh for the Plaintiff
Mr. Lajendra N. for the Defendant

Dates of Hearing: 12.11.2024

Date of Judgment: 11.02.2025

Catch Words

*Notification of Charge- registration –conditions- Fiji Development Bank Act 1966
Sections 22,24 , Personal Property Securities Act 2017- transfer subject to the Charge-
Floating Charge- sole beneficiary- full repayment*

Cases referred

Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others
[2005] 4 All ER 209,

Illingworth v Houldsworth [1904] AC 355

JUDGMENT

INTRODUCTION

- [1] Plaintiff filed this action by way of originating summons seeking order to produce Crown Lease No 14656(The Lease) at the office of Registrar of Titles for the purpose of registering a transfer to Plaintiff subject to a Notification of a Charge Registration No 582958 on the memorial of said lease (The Charge), in favour of the Defendant. The Charge also contained additional conditions to parties agreed. Accordingly Manager of Defendant was irrevocably appointed as attorney for 'all purposes connected with execution and registration of the Lease' The Charge was pursuant to a security of an advance provided by Defendant to the borrower.
- [2] The charge provided by borrower regarding lease No 14656 appointed the Manager of Defendant, as the attorney for 'all purposes' regarding the 'registration of the Lease'. Section 24 of Fiji Development Bank Act 1966 also read along with conditions of the charge.

FACTS

- [3] Defendant is the Development Bank in Fiji and it had provided an advance for late Hazrat Ali (the Borrower) an advance under certain conditions.
- [4] One of the Security for said advance provided by Defendant was Notification over CL 14656
- a. A first charge upon the crops of applicant growing and be grown and the produce and proceeds of same.
 - b. First charge on applicant's right title and interest over CL 14656 with improvements thereon and in all buildings, structures on or about such land.
 - c. First charge on all livestock, vehicles, machinery, engines , tools implements, equipment, boats and other vessels and all other chattels belonging to applicant and being from time to time on or about or used in connection with such land.
- [5] Plaintiff is the executrix and trustee of the deceased Borrower who was her father. She is the sole beneficiary of the estate of her father. Lease No 14656 belongs to the estate of her late father and Plaintiff had obtained the probate and registered her interest as executrix on the said title.
- [6] Plaintiff had requested to transfer Lease No CL 14656 to herself and permission was obtained from Director of Lands, and necessary tax was also determined.
- [7] Defendant is holding the originals of the certificate of title of CL 14756 and had consented to transfer the said property to Plaintiff only after clearance of outstanding amount of the advance granted.

- [8] Plaintiff filed this action by way of originating summons seeking an order from the court directing Defendant to produce the certificate of title for CL14656 for the transfer of the title to her.
- [9] Defendant in the affidavit in opposition state that Plaintiff cannot compel Defendant to allow the transfer to herself subject to the charge registered in favour of Defendant.
- [10] Both parties had , in the written submission considered the security provided to Defendant as mortgage (see paragraphs 18,21in affidavit in opposition and paragraphs 12,13,14,15,16,17,18,19, and 20 of the submissions where submissions made on the basis of mortgage. Defendant had also mentioned two UK cases regarding mortgages in the written submission).
- [11] Plaintiff in her written submissions had also considered the security provided to Defendant as mortgage in paragraphs 11, 14, 15, 16,17,18,19.
- [12] The certificate of title provided by Plaintiff does not show a mortgage registered in favour of Defendant and there was no evidence of mortgage being sought by Defendant as security for the advance granted to Borrower as a condition.
- [13] Accordingly, on the available evidence, there is no valid mortgage registered over CL 14656 and there is only a Notification of Charge registered.
- [14] Accordingly, submission made regarding mortgage is irrelevant for this action.
- [15] It is also admitted that the loan account was in arrears when Plaintiff obtained probate and she had paid it and reduced the outstanding debt to \$19,728.23 as at 19.01.2023 and payments are bi annual.
- [16] There were two letters of arrears sent by Defendant to Plaintiff on 19.1.2023 and 08.03.2023.

ANALYSIS

- [17] Plaintiff is seeking an order from the court to 'produce crown lease No 14656 at the office of the Registrar of Titles for the purpose of registering a Transfer of the Plaintiff being sole beneficiary of the Estate 'of her father.
- [18] Defendant had granted an advance to Plaintiff's late father and one of the security for the said loan was first charge on CL14656 as stated earlier as facts.
- [19] Contrary to the submission of both parties there Defendant is not a mortgagee of CL 14656 and there is no evidence of such mortgage sought by Defendant when the advance was approved on 19.12.2005 and or subsequent to that. There is only a notification of a charge registered on the title and the same was

sought as security when said advance was approved. (see annexed B to affidavit of Defendant)

[20] So the issue to be determined by the court is whether Defendant can refuse the title of CL 14656 being transferred to Plaintiff as sole beneficiary upon her request as executrix of the estate of her late father , without settling the outstanding debt of the estate of her father.

[21] Notification of Charge is annexed to the affidavit in opposition marked as 'C'. There are conditions attached to advance to the borrower, on first page and additional conditions schedule. This will be dealt later in this judgment.

CHARGE

[22] Notification of a Charge on the property is not as same as mortgage on the property. So the law relating Charge registered on a certificate needs to be considered and Defendant's submissions as well as UK cases on mortgagee's rights to refuse transfer of a property cannot be considered as legal position regarding the Charge in this action.

[23] A Charge can be either fixed or floating and legal implications arising from that can differ. Halsbury's Laws of England (Volume 14) paras 1-467; Volume 14A (2023) states,

“The essence of a **floating charge** is that it is a charge, not on any particular asset, but on a fluctuating body of assets which remain under the management and control of the chargor; and **the chargor has the ability to dispose** of and deal with the charged asset and, if necessary, to remove it from the security without first requiring the permission or consent of the chargee; the essence of a fixed charge is that the charge is on a particular asset or class of assets which **the chargor cannot deal with free from the charge without the consent of the chargee.**

Deciding whether a charge is fixed or floating involves:

(1) construing the instrument of charge to establish the intention of the parties with regard to their mutual rights and obligations in respect of the charged assets; and

(2) characterising the charge thereby construed as a matter of law.

It is clear that any label that might be attached to a charge in a particular instrument does not prevent the court from declaring it to be otherwise.”¹(footnotes deleted)(emphasis added)

[24] The Notification of Charge annexed to the affidavit in opposition, had not indicated whether it was a floating charge of fixed charge. But conditions of the charge and additional conditions show characteristics of a fixed charge regarding CL 14656 and chattels on it including livestock.

[25] UK House of Lord decision Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others [2005] 4 All ER 209, held p 229

‘In Re Bank of Credit and Commerce International SA (No 8) [1997] 4 All ER 568 at 576, [1998] AC 214 at 226 Lord Hoffmann, speaking of English law, said that a charge is a security interest created without any transfer of title or possession to the beneficiary. ‘

[26] The submissions of parties did not submitted any judicial pronouncement relating legal position regarding a charge in Fiji.

[27] The Notification of Charge registered on the Lease, refers to Section 22(3) of Fiji Development Bank Act 1966.

[28] Sections 22 and 23 of Fiji Development Bank Act 1966and it state;

22.–(1) Where a farmer is desirous of obtaining an advance from the Bank under the provisions of this Part, he may make application in such form as the Bank may from time to time prescribe and the Bank may require the particulars in such form to be verified in such manner, whether by way of statutory declaration or otherwise, as it may consider fit.

(2) The Bank shall consider each application on its merits and may, in its absolute discretion -

(a) refuse any advance;

¹ Halsbury's Laws of England > Companies (Volume 14 (2023), paras 1-467; Volume 14A (2023), paras 468-919; Volume 15 (2023), paras 920-1445; Volume 15A (2023), paras 1446-1924) > 2. Companies Registered under the Companies Acts > (23) Borrowing and Securing Money > (ii) Floating Charges

(b) grant any advance without any security;

(c) grant any advance secured in the manner provided in sections 24 and 25; or

(d) grant any advance on any other form of security which the Bank may consider fit either in lieu of or in addition to the form of security referred to in paragraph (c).

(3) Where the Bank decides to grant to a farmer an advance under the provisions of paragraph (c) or (d) of subsection (2) and the form of security required by the Bank **creates a charge on any land held by that farmer as a tenant, the Bank shall forthwith cause a notice specifying the land to be so charged to be served on every lessor or landlord of such land whereupon, the provisions of any Act** or of any covenant or condition to the contrary notwithstanding, the consent of every such lessor or landlord to such charge shall be deemed to have been granted unless notice to the contrary is served by such lessor or landlord on the Bank within twenty-one days of the service on him of the notice first hereinbefore mentioned.

(4) The Bank on making an advance under the provisions of this section may require the farmer to sign a receipt in the prescribed form.

23.-(1) Subject to the provisions of subsection (2), every farmer to whom an advance is granted under the provisions of paragraph (c) of subsection (2) of section 22 shall observe the following covenants and conditions, which covenants and conditions shall be deemed to be implied in any notification registered under the provisions of this Part:-

(a) that the farmer **shall repay such advance**, together with interest thereon, at the rate and at the times specified by the Bank either at the time of making the advance or at any subsequent time, and shall pay all expenses of enforcement and realization incurred by the Bank in connexion with or arising out of the loan;

(b) that the farmer shall produce at such intervals as may be required by the Bank an account showing the manner in which the advance has been expended, and such account may be verified on oath or in such other manner as may be required by the Bank;

- (c) that the farmer shall at all times uphold and maintain cultivation on the land specified in the notification, and maintain in a good state of repair and condition all buildings, fixtures, improvements, chattels and other property specified in the notification, so that the security for the advance does not deteriorate in value;
- (d) that the farmer shall permit the Bank by its authorised officers to enter into and upon the land specified in the notification to view and inspect the state of repair of the buildings, fixtures, improvements, chattels, crops and other property the subject of any charge created under the provisions of this Part;
- (e) that the farmer shall furnish to the Bank full information as to any sale of the produce of the land specified in the notification and shall dispose of the purchase money from such sale in accordance with the written directions of the Bank, and shall inform the Bank of any contract for the sale of such produce immediately upon entering into such contract;
- (f) that the farmer shall, if the Bank so directs, give an order on the purchaser of any produce referred to in paragraph (e), or on the person to whom such produce is delivered to be marketed, to the effect that the money, or such portion thereof as the Bank may direct, arising from the sale of such produce shall be paid to the Bank, and any money or any part thereof so paid may at the discretion of the Bank be applied towards repayment of the advance and interest thereon or be paid to the farmer;
- (g) that the farmer shall furnish to the Bank in writing full information as to the letting by him of any land, or of any buildings upon the land, specified in the notification, and shall dispose of the rent derived from such land or buildings in such manner as the Bank may direct in writing;
- (h) that the farmer shall, if the Bank so directs, given written instructions to the tenant of any portion of the land, or of any buildings upon the land, specified in the notification, to pay any sum due or accruing due by way of rental of such land or buildings, or such part thereof as the Bank may direct, to the Bank, and any money so paid to the Bank may be applied towards repayment of the advance and interest thereon or be paid to the farmer;

- (i) that the farmer will pay all rents, rates, taxes, insurance premiums and other outgoings from time to time chargeable against the land specified in the notification;
- (j) that, when the land specified in the notification is leasehold, the farmer will observe and perform all the covenants and conditions contained in the lease or implied by law;
- (k) that the farmer will, at all times during the continuance of the charge, duly and promptly comply with the provisions and requirements of any Act relating to or to the use of the land, buildings or other property the subject of any charge created under the provisions of this Act;
- (l) that the farmer will not during the continuance of the charge remove, from the land specified in the notification, any buildings or other structural improvements erected thereon;
- (m) that the farmer has good right and absolute authority to create a charge under the provisions of this Act over the land, buildings, fixtures, improvements, chattels, crops and other property specified in the notification, and that he will at any time after the creation of the charge make, do and execute all such further acts, deeds and assurances for the further assurance of all or any of the said property unto the Bank and enabling the Bank to obtain and retain possession of the same as may by the Bank be lawfully required;
- (n) that the Bank shall be entitled to make good any default by the farmer in compliance with the covenants and conditions contained in this section and that the Bank shall be entitled to add the sum or sums so paid to the principal moneys due under the charge and the same shall bear interest at the rate set out in the notification.

(2) Where the Bank accepts in respect of an advance made to a farmer any form of security under the provisions of paragraph (d), of subsection (2) of section 22 the covenants and conditions set out in paragraphs (a) to (n) inclusive of subsection (1) shall also be deemed to be implied in such form of security and any reference to "the notification" in the provisions of those paragraphs shall be construed as a reference to the document or documents securing such advance.²

² Subsection (2) amended by Personal Property Securities Act 2017 (with effect from 31.5.2019)

- [29] Personal Property Security Act 2017, had not addressed the issue whether Defendant is obliged to transfer the Lease subject to the Charge. So the provisions contained in Fiji Development Bank Act 1966 is applicable and when it is silent common law can be applied.
- [30] Defendant had not relied on Fiji Development Bank Act 1966 in the submissions, but Plaintiff in the written submission had relied on Section 24 of Fiji Development Bank Act 1966.
- [31] Section 24 of Fiji Development Bank Act 1966, is relevant for the determination of the issue relating the legality of Defendant's request to repay remaining debt before allowing transfer of the Lease.
- [32] Plaintiff cannot compel Defendant to transfer the Lease subject to the charge to her as sole beneficiary of the estate of her late father. By statutory provision such registration is precluded.
- [33] Section 24 of Fiji Development Bank Act 1966 states
- “24. Subject to the provisions of this Act and Personal Property Security Act 2017, any advance granted to a farmer, together with interest thereon and all costs, **charges** and expenses properly incurred by the Bank in making or securing the advance or preparatory or incidental to the enforcement of the security, shall, **until repayment in full, subject only to any prior registered** estate, interest, charge, encumbrance or right registered under the provisions of this or any other Act, be –
- (a) a first charge upon the whole of the crops specified in the notification, whether such crops are then or are intended to be thereafter sown or grown on the land specified in the notification, and the produce of such crops or the proceeds thereof if and when sold and converted into money such crops, on severance from the land;³
- (b) a first charge on all the right, title and interest of the farmer in the land specified in the notification and in all buildings, structures, improvements and fixtures from time to time on or about such land;
- (c) Charge on all collateral belonging to the farmer and specified in the notification⁴” (emphasis is mine)
- [34] In *Illingworth v Houldsworth* [1904] AC 355 at 357, HL, per Lord Halsbury LC; *Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, CA. In the Court of

³ Personal Property Securities Act 2017 , consequential amendment

⁴ Personal Property Securities Act 2017, consequential amendment

Appeal, Romer LJ at 295 gave the most often cited description of a floating charge as being a charge which has the following characteristics:

- (1) it is a charge on a class of assets present and future;
- (2) that class is one which, in the ordinary course of the business of the entity, would be changing from time to time; and
- (3) by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the person may carry on its business in the ordinary way as far as concerns the particular class of assets.

[35] The Notice of charge is relating to CL 14656 class of assets relating to said land, and they all relate to the Lease. So the charge registered on CL 14656 is fixed to the land and its dealings. This is clear from appointment of irrevocable attorney to deal with registration of the Lease.

[36] Notice of Charge signed by borrower and Defendant contained following additional conditions

‘2.The Farmer hereby **irrevocably appoints** the Manager for the time being of the Bank the attorney of the Farmer for **all purposes connected** with the **execution and registration of the Lease** of the hereinbefore described land.’

[37] From the above condition borrower as well as personal representative of the estate of the borrower such as Plaintiff as executrix had ‘irrevocably’ appointed the Manager of Defendant Bank for ‘all purposes’ regarding registration of transfer of CL14656. So Plaintiff as executrix is bound by the said irrevocable appointment of attorney relating to registration of the Lease.

[38] Further in additional condition parties had agreed, that

“4. That the Farmer will promptly furnish to the Bank in writing such information concerning the livestock of the Farmer as the Bank shall from time require and if so notified by the Bank will not sell other otherwise dispose of any livestock without the proper written consent of the Bank and then only in accordance with such conditions as the Bank shall require...”

[39] When considering the above two additional conditions in my mind Plaintiff cannot compel the Defendant to transfer CL14656 to herself as sole beneficiary as the Manager of Defendant is irrevocably appointed as attorney for registration of the Lease.

[40] Even if I am wrong on the above Section 24 of Fiji Development Bank Act 1966, quoted earlier in this judgment, read with abovementioned additional conditions

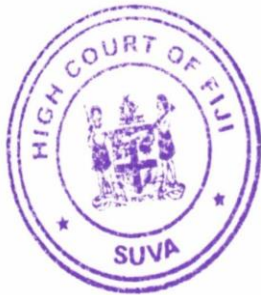
contained in the Charge precludes transfer of the Lease to any third party including to Plaintiff as sole beneficiary without full settlement of advance. So Defendant's request for full settlement of advance prior to transfer of the title of the Lease to Plaintiff is in accordance with law. This is the position of Defendant and this was communicated to Plaintiff. Said communication had failed to state the reasons or law and this had resulted this litigation.

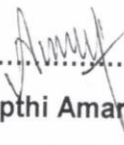
CONCLUSION

[41] So Plaintiff cannot obtain an order of the court to compel Defendant to transfer the title of the Lease subject to the Charge. Plaintiff as executrix is bound to the conditions of the Charge agreed by her late father, who was the Borrower. Personal Property Securities Act 2017 is silent on transfer of the title subject to a charge and Section 24 of Fiji Development Bank Act 1966 is clear on that issue. So Plaintiff cannot seek transfer subject to the Charge. Accordingly application is dismissed. Considering circumstances no costs granted.

FINAL ORDER

- a. Originating summons dismissed.
- b. No costs.




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Deepthi Amaratunga
Judge

At Suva this 11th February, 2025.

Solicitors

A K Singh Lawyers
Lajendra Lawyers