IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CIVIL APPEAL ABU 52 of 2018
High Court Civil Case No. HBC 89 of 2013

BETWEEN **CREDIT CORPORATION (FIJI) LIMITED** a limited liability company having its offices at Credit House, 10 Gorrie Street, Suva
Appellant

AND **MOHAMMED IMRAN QAMER** of Lot 34A, Kabi Place, Nakasi, Businessman
Respondent

Coram **A Qetaki, JA**
W Morgan, JA
P Andrews, JA

Counsel **Mr V Filipe, on behalf of the appellant**
Mr I Ramanu, on behalf of the respondent

Date of Hearing : **9 May 2024**

Date of Judgment : **30 May 2024**

JUDGMENT

Qetaki, JA

[1] I have carefully read and considered the judgment by Andrews, JA in draft and I agree with it, the reasoning and the orders.

Morgan, JA

[2] I agree.

Andrews, JA

Introduction

[3] The appellant, Credit Corporation (Fiji) Ltd (now known as Credit Corporation (Fiji) Pte Ltd), has appealed against the judgment of Lyone Seneviratne HCJ, given in the High Court at Suva on 31 May 2018.[1] In that judgment the High Court Judge dismissed the appellant's claim against the respondent, Mohammed Imran Qamer, for judgment in respect of the outstanding balance owed by the respondent to the appellant pursuant to a loan agreement.

[4] The essence of the High Court judgment lay in the Judge's finding that as the appellant had not realised its mortgage security for the loan, no cause of action had accrued to the appellant to sue the respondent. The appellant argues that the Judge was wrong to make that finding.

Background

[5] The background facts were not disputed. The respondent had two loan accounts with the appellant (subsequently re-written as one loan account), secured by way of:

[a] A first registered mortgage over the respondent's Instrument of Tenancy contract over a piece of land in Naitisiri ("the property"); and

[b] Registered Bills of Sale over three vehicles: CY361, DF079 and EC222 ("the vehicles").

[1] *Credit Corporation (Fiji) Ltd v Qamer* [2018] FJHC 456; HBC89.2013 (31 May 2018) ("the High Court judgment").

[6] The respondent was required to pay the appellant, inter alia, 60 monthly instalments of $4033.28. The respondent failed to make the required payments. The appellant served notices of demand, which were not satisfied. The appellant then began recovery action, which included:

[a] Advertising the property for sale by tender pursuant to mortgagee sale; and

[b] Repossessing and selling the vehicles CY361 and EC222.

[7] There were no potential buyers for the property and it was put in the hands of a real estate agent for sale. The evidence before the High Court was that no offer had been received as at the date of hearing. The appellant could not repossess the vehicle DF079. Counsel for the appellant advised this Court at the appeal hearing that appellant has still not been able to sell the property.

The High Court proceeding

[8] The appellant issued proceedings on 2 April 2013. In its statement of claim the appellant pleaded the amount owing as at 14 March 2013 as being $225,208.41, and pleaded that that sum was "likely to decrease following the sale of the vehicles and the property". The appellant's prayer for relief claimed for damages "to be quantified later upon sales of vehicles and property", together with interest and costs. The appellant also sought orders relating to repossession of the vehicle DF079.

[9] Orders for repossession of the vehicle DF079 were made on 19 April 2013 and the respondent was fined for contempt of court.

[10] The appellant filed an amended statement of claim on 27 June 2016: it pleaded its unsuccessful attempts to sell the property by mortgagee sale, and took account of the sales of the vehicles EC222 and CY361, interest, administration charges, and payments made. The appellant's prayer for relief sought judgment for $224,475.03 together with pre- and

post-judgment interest pursuant to ss 3 and 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, and indemnity costs.

[11] The respondent filed a statement of defence on 26 July 2016. In essence, the respondent pleaded that the appellant's allegations had already been dealt with by the Court, such that the appellant's proceeding was an abuse of process which ought to be struck out.

[12] The appellant's claim was heard on 18 April 2018. At trial, the respondent's defence focussed on:

[a] whether the appellant had proved that it had made payments totalling $9,718.84 to its lawyers (which it was claiming from the respondent);

[b] whether the appellant was entitled to institute and maintain an action against the respondent while still holding property as security for the loan; and

[c] his "categorical denial" of the appellant's claim that the respondent owed it $224,475.03, and his pleading that by introducing or renewing monetary claims that had already been dealt with, the appellant was completely depriving the respondent of his rights under the Fair Trading Act and the Consumer Act.

The High Court judgment

[13] The High Court Judge recorded that the respondent had not denied that he had obtained a loan, and that he had failed to repay it. He further recorded that none of the evidence given for the appellant as to the transaction and the appellant's recovery action was challenged by the respondent. He rejected the respondent's contention that the proceeding was an abuse of process because the matter before it had already been determined. He held that the substantive matter had not been dealt with, as the Court had only dealt with the appellant's application for orders concerning the vehicle DF079.

[14] The Judge found that the appellant had not tendered any payment receipts or other evidence in support of its claim for payments of $9,718.84 to its lawyers, and had given no reason for not doing so. He therefore concluded that the appellant had failed to establish those payments.

[15] With respect to the appellant's entitlement to issue proceedings against the respondent for the sum owing under the loan, the Judge referred to the evidence given for the appellant as to its efforts to sell by the property by mortgagee sale, and on the open market, and its evidence that once the judgment sum had been settled by the respondent, the property would be released to him.

[16] The Judge rejected the appellant's submission that under the mortgage, the property was a continuing security until discharged, which would not occur until the arrears had been paid, and accounts settled to appellant's satisfaction. The Judge recorded the appellant's submission that it had not been able to sell the property by mortgagee sale, but held that that did not free the appellant from its obligations under the mortgage and bill of sale.

[17] The Judge said (at paragraph [11] of the High Court judgment):

> *… The court is of the view that before instituting these proceedings to recover the amount stated in the statement of claim the [appellant] should have had recourse to a mortgagee sale and thereafter filed this action for the balance amount if any. For the above reasons the court holds that no cause of action has accrued to the [appellant] to sue the [respondent] for the amount claimed in the statement of claim.*

[18] The High Court Judge dismissed the appellant's claim and ordered it to pay $5,000 as costs (summarily assessed) to the respondent.

The appellant's appeal

[19] The appellant's Notice of Appeal, filed on 19 June 2016, set out three grounds of appeal, which may be summarised as follows:

1. The Judge erred in law and fact in finding that no cause of action had accrued against the respondent;
2. The Judge erred in law and fact when he failed to appreciate that once the respondent admitted having obtained a loan, the respondent was entitled to "begin", and that the respondent had the burden of proving he had not breached the loan, or to prove a claim under Fair Trading Act or Consumer Act; and
3. The Judge erred in law and fact when he failed to simply reduce the judgment sum by $9,718.84, if he was not satisfied that the appellant had paid that sum to its lawyers.

[20] Mr Filipe did not pursue the second ground of appeal at the appeal hearing.

Did the Judge err in finding that no cause of action had accrued?

Submissions

[21] Counsel for the appellant submitted that the High Court Judge erred in holding that the appellant could not issue proceedings against the respondent under the loan until it had realised its security. He also submitted that the Judge was wrong to reject the appellant's evidence that once the judgment sum had been settled by the respondent, the mortgaged property would be returned to him.

[22] Counsel submitted that the proceeding before the High Court was for an "account", under the terms of the loan contract between the appellant and the respondent. He submitted that the appellant's cause of action for account accrued when demand was made on the respondent,[2] and the respondent had never denied that demand had been made. He referred the Court to the judgment of Lord Templeman for the Privy Council (on appeal from the Court of Appeal of Hong Kong) in *China & South Sea Bank Ltd v Tan*[3] as authority for his submission that a mortgagee is at liberty to decide whether to realise a security, sue the debtor or a surety, or do nothing. In other words, he submitted, a mortgagor is not obliged to exercise its powers in any particular order.

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2 Citing *Halsbury's Laws of England* Vol 28, 4th ed, at pp316-317.
3 *China & South Sea Bank Ltd v Tan* [1990] 1 AC 536, at 545.

[23] In the present case, he submitted, the appellant's cause of action in respect of the loan accrued when demand was made, but the appellant could have sat back and done nothing regarding the sale of the mortgaged property: it was not obliged to take any particular steps, and the Judge erred in holding otherwise.

[24] Counsel for the respondent submitted that the Judge did not err. He submitted that the appellant had misunderstood *China & South Sea Bank Ltd v Tan*; that Lord Templeman's judgment was to the effect, only, that the fact that the appellant had not sold the secured property did not constrain its right to exercise its right of sale; in other words, the appellant could not be forced to sell, it could sit back and do nothing. He further submitted that that did not necessarily mean that the appellant could issue proceedings against the respondent "without ever selling or discharging the property". He submitted that to do so would be "prejudicial to the respondent in terms of consumer rights protection laws".

[25] In his oral submissions to this Court, counsel for the respondent submitted that it is the law in Fiji that if a mortgagor defaults, and demand is made, a mortgagee sale of the relevant security is mandatory before any proceeding can be issued against the debtor. He was not able to refer the Court to any statutory or judicial authority to that effect.

Discussion

[26] The High Court Judge did not cite any authority for his finding that the appellant was required to have realised the mortgaged property before issuing proceedings for the debt, or his holding that no cause of action had accrued to the appellant to sue for the debt. While it may be accepted that it is the usual course for a mortgagee to realise a security and then issue proceedings claiming any outstanding balance, that does not alter the fact that the cause of action against the debtor accrues at the time demand is made. As Lord Templeman said in *China & South Sea Bank v Tan*:[4]

> *… The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities, or sue the surety. All these remedies could be exercised*

[4] Fn3, above, at p 545.

at any time or times simultaneously or contemporaneously or successively or not at all.

[27] In the present case, there was no dispute that the appellant advanced a loan to the respondent, secured by the mortgage and bills of sale. Nor was there any dispute that the respondent defaulted on his obligations, that demand was made for repayment, and that the respondent did not then (or subsequently) make the required payment. I have concluded that the Judge erred in holding that no cause of action had accrued to the appellant to sue for the debt. The cause of action accrued when demand was made. Thereafter, the appellant was free to take such recovery action as it considered appropriate.

[28] It was accepted that the appellant had attempted to effect a mortgagee sale of the property, without success, and had then placed the property in the hands of real estate agents, again without success. I am in no doubt that the appellant was not required to complete a mortgagee sale before taking any other steps. The appellant was free to seek judgment for the (acknowledged) debt against the respondent. Then, once payment was made, the appellant would be obliged to discharge its mortgage security.

[29] I have concluded that the appellant has established that the High Court Judge erred in holding that the appellant's cause of action against the respondent did not accrue until after a mortgagee sale was concluded. Save for the High Court Judge's finding that the respondent had not proved a claim as to payment of $9,718.84 to its solicitors, the appeal should be allowed, the High Court judgment set aside, and replaced by judgment entered for the appellant in terms of its prayer for relief.

[30] I observe that the matters at issue in this proceeding are covered by appropriate clauses in the mortgage, which appear not to have been brought to the Judge's attention. These provide:

> *11. <u>THAT</u> upon default by the Mortgagor in the payment when due of any part of the principal interest or other moneys hereby secured or in the observance or performance of any covenants condition or agreement herein expressed or implied the whole of the principal interest and other moneys then remaining hereby*

secured shall (at the option of the Mortgagee) become immediately due and payable.

12. *THAT neither the exercise by the Mortgagee of any powers or remedies hereby expressly or impliedly conferred upon nor the failure of the Mortgagee to exercise any such power or remedy shall extinguish the right or claim of the Mortgagee to recover from the Mortgagor by action in any court of law any principal interest and other moneys which may be owing hereunder to the Mortgagor or prejudice or take away the right of the Mortgagee to exercise any other rights powers or remedies of the Mortgagee hereunder and that nothing herein contained shall in any way merge abridge or otherwise prejudice any rights remedies powers claims or demands at law or in equity of the Mortgagee under or by virtue of any other security heretofore or hereafter given to or held by the Mortgagee for any moneys hereby intended to be secured.*

[31] Clause 11 confirms that the cause of action arose upon demand being made, and clause 12 confirms that the appellant was not required to complete a mortgagee sale before issuing proceedings against the mortgagor for the debt. The two clauses reflect the principles set out in *China & South Sea Bank v Tan*, and confirm that there was no impediment against the appellant suing the respondent to recover the debt owed by the respondent, notwithstanding that a mortgagee sale had not occurred.

[32] Counsel were given the opportunity to make further written submissions in relation to clauses 11 and 12. As at the time of preparing this judgment, no submissions had been received from counsel for the appellant. Counsel for the respondent reiterated his argument that the appellant was required to exhaust the public tender process to sell the secured property, that it had followed that process, but not exhausted it. Counsel for the respondent also repeated his submission that the appellant was required to "ascertain the entitled amount before coming to court".

[33] I reject those submissions. As set out above, the appellant was not required to complete a mortgagee sale before taking any other steps. The appellant was free to seek judgment for the (acknowledged) debt against the respondent once the respondent failed to satisfy the demand. Then, once payment was made, the appellant would be obliged to discharge its mortgage security.

ORDERS

(1) The appeal against the judgment of the High Court is allowed.

(2) The High Court judgment (including the order for costs against the respondent) is set aside.

(3) Judgment is entered against the respondent in favour of the appellant in the sum of $214,756.19.

(4) The respondent is ordered to pay to the appellant pre- and post- judgment interest on the sum of $214,756.19, pursuant to ss 3 and 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.

(5) In the event that the appellant has paid the respondent the costs ordered in the High Court, the respondent is ordered to reimburse the appellant within 14 days of the date of this judgment. The respondent is ordered to pay costs to the appellant in respect of both the High Court and the appeal to this Court totaling $5,000.00 summarily assessed.

Hon. Justice A. Qetaki
JUSTICE OF APPEAL

Hon. Justice W. Morgan
JUSTICE OF APPEAL

Hon. Justice P. Andrews
JUSTICE OF APPEAL