

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 210 of 2012

BETWEEN : Bank of Baroda

PLAINTIFF

AND : The Official Receiver

FIRST DEFENDANT

AND : The Registrar of Titles

SECOND DEFENDANT

AND : The Attorney-General of Fiji

THIRD DEFENDANT

COUNSEL : Mr. D Sharma for the Plaintiff
Ms. A Vuibau for the Defendant

Date of Judgment : 22 August 2013

JUDGMENT

1. The Plaintiff, Bank of Baroda, by its originating summons dated 1 August 2012 is seeking following orders from the court:

a. That the Second Defendant be directed to complete the registration of Mortgage over Crown Lease No. 18103 being Lot 4 on Plan SO.781-Nausori

Industrial Subdivision in favour of the Plaintiff and forthwith return the said Mortgage and the relevant Crown.

b. That the Plaintiff and/or its agents be allowed to exercise the Plaintiff's powers under its Mortgage including selling the land in Crown Lease 18103.

c. That the costs of any sale be deducted from the sale proceeds received from the sale of Crown Lease 18103.

d. Such further or other relief as this Honourable Court deem just.

2. Govind Prasad Mukherjee, Chief Manager of the Plaintiff bank filed an affidavit sworn on 1 August 2012 in support of the originating summons and affidavit in response to the affidavit of Viliame Katia sworn on 15 November 2012.
3. Torika Goneca, Deputy Registrar of Titles, the second Defendant in this matter filed an affidavit in response sworn on 15 November 2012.
4. Viliame Katia, the Deputy Official Receiver, filed an affidavit in response, sworn on 15 November 2012, on behalf of the 1st and the 3rd Defendants.

Plaintiff's Case

1. The Plaintiff in its affidavit deposed that the Plaintiff has lent and advanced certain sums of money to Sun Court (Wholesalers) Ltd, (the company) and obtained several securities to secure the loan.
2. On 29 March 2007 company executed mortgage over a property in favour of the Bank as further security for loans advanced to the company.
3. The said mortgage was duly registered in the companies Registry pursuant to Section 98 of the Companies Act (Cap 247).

4. The Company was issued approval notice of lease dated 9 May 1996 by the Director of Land over the land described in Lot 4 on DSS 191A – Nausori Industrial subdivision having an area approximately 32.8 perches.
5. The company had also executed an authority to complete mortgage dated 29 March 2007 authorizing the Plaintiff to complete the original and duplicate of the mortgage given by the company with appropriate title details upon issuance of a formal lease to the property by the Director of Lands and to register the said mortgage under the Land Transfer Act.
6. Subsequent to the issuance of approval notice, Director of Lands issued formal Crown Lease 18103.
7. The company defaulted in its repayments to the Plaintiff and the Plaintiff issued Demand Notice and exercised its rights under the securities to recover the debts owed by the company.
8. After disposing the rest of the securities, the company still owes substantial debts to the Plaintiff.
9. On 31 October 2011, an order was made by the Suva High Court to windup the company and Official Receiver was appointed.
10. The Plaintiff further deposed that, unknown to the Bank, the Director of Lands had issued and registered Crown Lease No. 18103 in favour of the company in lieu of the approval notice. The Crown Lease was collected by a director of the company and only gave to company solicitors after the winding up order was made.
11. The Plaintiff after obtaining the possession of the Crown Lease had lodged its mortgage for registration with the second Defendant, who had requested the Plaintiff to obtain a court order for registration.

12. The Plaintiff is seeking to register its mortgage to conclude a mortgage sale of Crown Lease 18103. The Plaintiff further deposed that out of all creditors of the company, the only secured creditor is the Plaintiff's Bank and court has the power to make an order to sanction the registration of the Mortgage as no prejudice would be caused to the other creditors.
13. Viliame Katia the Deputy Official Receiver on behalf of the 1st and 3rd Defendants deposed that he is prepared to oblige by any order that may be issued by the court but brought to the notice of the court that the mortgage was granted and executed over an unregistered land and the company has been wound up at the time the mortgage was lodged for registration on Crown Lease 18103. He further deposed that he may have custody over and right to sell over an unregistered mortgage.
14. Torika Goneca, the Deputy Registrar of Titles on behalf of the 2nd Defendant deposed that he is also prepared to oblige by any court order in this regard and appraised the court that mortgage was granted and executed over an unregistered land and the company had been wound up at the time the mortgage was lodged for registration in Crown Lease 18103.

The Determination

15. The Official Receiver as the liquidator on behalf of the company under liquidation exercise certain powers pursuant to Companies Act:-
The Section 242 (1) The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection:-
 - (a) *To bring or defend any action or other legal proceeding in the name and on behalf of the company;*

- (b) To carry on the business of the company, so far as may be necessary for the beneficial winding up thereof;*
- (c) To appoint a barrister and solicitor to assist him in the performance of his duties.*
- (d) To pay any classes of creditors in full;*
- (e) To make any compromise, or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;*
- (f) To compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or suppose to subsist between the company and contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such call, debt, liability or claim and give a complete discharge in respect thereof.*

(2) The liquidator in a winding up by the court shall have power:

- (a) to sell the real and personal property and things in action of the company by public auction or private contract, what power to transfer the whole thereof to any person or company or to sell the same in parcels.***

- (b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents and, for that purpose, to use, when necessary, the company's seal.**
- (c) *to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate creditors.*
- (d) *to draw, accept, make endorse any bill of exchange or promissory note in to the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business.*
- (e) *to raise, on the security of the assets of the company, any money requisite.*
- (f) *to take out, in his official name, letters of administration to any deceased contributor, and to do, in his official name, any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company and, in all such cases, the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself. Provided that nothing in this paragraph shall be deemed to affect the rights, duties and privileges of the Public Trustee;*

3. The exercise by a liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the

court with respect to any exercise or proposed exercise of any of those powers.

16. In careful examination of the above sections, it is abundantly clear that any decision in relation to the reliefs in originating summons requires prior approval of the court.
17. The Official Receiver by his letter dated 22 May 2012, granted the consent to the solicitors for the Plaintiff for registration. However, by his subsequent letter dated 15 June stated as follows:

“This letter serves to inform you that we have reconsidered our consent letter of 22 May 2012 and it is in the best interest of your client and the unsecured creditors that have filed claims to the office that you seek the Leave of the Court for registration of mortgage to the above mentioned property.”

18. In my view, the Official Receiver correctly informed by its subsequent letter that leave of the court is required for registration as the winding up is subject to supervision of the court and in terms of Section 243(3) of the Companies Act.
19. I now turn to consider the relevant provisions in the Companies Act in determining the reliefs sought by the Plaintiff in its summons.
20. *Section 316(1)* of the Companies Act deal with the disclaimer of onerous property in case of Company wound up.
21. *Section 316(1)* states as follows:

*316.-(1) Where any part of the property of a company which is being wound up **consists of land of any tenure burdened with onerous covenants**, of shares or stock in companies, of*

*unprofitable contracts or of any other property that is unsalable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, **may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within 12 months after the commencement of the winding-up or such extended period as may be allowed by the court, disclaim:***

Provided that, where any such property has not come to the knowledge of the liquidator within 1 month after the commencement of the winding-up, the power under this section of disclaiming the property may be exercised at any time within 12 months after he has become aware thereof or such extended period as may be allowed by the court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order, in the matter as the court thinks just.

22. However, Section 225 of the Companies Act, imposes restriction on disposition of property in certain circumstances.

Section 225 states as follows:

*In the winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, **unless the court otherwise orders, be void.***

23. In view of the above two sections in the Companies Act, court is obliged to ascertain whether the decision to register the unregistered mortgage would cause prejudice to the other creditors of the company and in best interest of the company.
24. It is a legal principle that a mortgage that was executed after a winding order was made to be null and void. In the instant case, the mortgage was executed in 2007 and the order was made to wind up the company in year 2011. As the mortgage was executed well before the winding up order was made, the transaction or the decision to mortgage the property to secure a loan, does not become and cannot be considered as a suspicious transaction.
25. It is further evident from the affidavits of the Defendants that the company under liquidation has defaulted in its repayment to the Bank and the Bank issued a demand notice to exercise its right under the securities of the company. The Defendants further admitted in their affidavits that the Plaintiff is the sole secured creditor, against the land and in the creditors list. It is also observed that the Plaintiff's mortgage is only being registered against crown lease 18103 subject to express authority to complete, it is only the Plaintiff who can claim a right as a secured creditor against the property.

26. Pursuant to Section 316 of the Companies Act, the Official Receiver has power to disclaim onerous property. In view the reasons stated in the above paragraph, the disclaimer would not, in my view affect the creditors of the company.
27. I have considered the affidavits filed by the Plaintiff and the Defendants. It is clear that the object of the Plaintiff is only to register its mortgage to conclude the mortgage sale of the Crown Lease 18103, and no prejudice would be caused to either company under liquidation or to its creditors in formalisation of the registration of a mortgage executed in way back in 2007.
28. In the case of **Cambridge Credit (Fiji) Ltd v W.F.C Ltd Vol 21 FLR 182**, discussed the protection available to the unregistered mortgage.

*In the **Cambridge Credit (Fiji) Ltd v W.F.G Ltd** Vol. 21 FLR 182 the Fiji Court of Appeal stated that section 106 is concerned with the protection of unregistered instruments in land, and added, (p.185).*

‘Section 106 of the Fiji Act is designed to protect unregistered instruments in land. For instance an agreement for sale and purchase, an unregistered Mortgage, an agreement to give a Mortgage or an option to purchase land are just a few examples of unregistered instruments which are capable of be protected by the lodging of a caveat.’

29. In view of the above reasoning I conclude that registration is mere a formality as all other requisites for registration has been duly complied with, by the Plaintiff.

Final Orders

- a. The second Defendant is directed to complete the registration of Mortgage over Crown Lease No. 18103 being Lot 4 on Plan SO. 781 – Nausori Industrial Subdivision in favour of the Plaintiff and forthwith return the said Mortgage and the relevant Crown Lease to the Plaintiff.
- b. The Plaintiff and/or its against is allowed to exercise the Plaintiff's powers under its mortgage including selling the land in Crown Lease 18103.
- c. The costs of any sale be deducted from the sale proceeds received from the sale of Crown Lease 18103.
- d. Parties are to pay their own costs.

Susantha N. Balapatabendi

JUDGE