

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 183 of 2010**

**BETWEEN** : **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 having its registered office at 340 Victoria Parade, Suva in Fiji.

**PLAINTIFF**

**AND** : **PARIKSHIT RAM DAYAL** (f/n Swatantra Kumar) of Flat Navo, Nadi, General Manager.

**1<sup>ST</sup> DEFENDANT**

**AND** : **SWATANTRA KUMAR** (f/n Ram Dayal) of Navo, Nadi, Managing Director.

**2<sup>ND</sup> DEFENDANT**

## **R U L I N G**

### **INTRODUCTION**

1. Before me is a Summons to Enter Summary Judgment filed by R. Patel Lawyers for the plaintiff. The defendants are represented by Pillay Naidu and Associates. The summons is made under Order 14 Rule 1 and Order 18 Rule 18(1) (c) and (d) of the High court Rules 1988 and under the inherent jurisdiction of this Court. The Fiji Development Bank (“**FDB**”) (as mortgagee) is seeking to recover from the defendants (mortgagor and guarantor) the balance of monies owing on the mortgage debt after partial recovery from mortgagee sale. The property in question is comprised in Crown Lease No. 16337, LD 4/10/4465 with improvements thereon.
2. The summons is supported by the affidavit of one Salote Tavainavesi sworn on 12 May 2011.

### **TAVAINAVESI’S AFFIDAVIT**

3. Tavainavesi is the Manager Legal of FDB. According to her, on 01 September 2006, under Account No. 114864, the FDB advanced home loan facilities in the sum of \$60,000 (sixty thousand dollars) to the first defendant (“**Dayal**”). The second defendant (“**Kumar**”) guaranteed the

said loan<sup>1</sup>. Interest was fixed at the agreed rate of 11.75% per annum. In the event of default, the interest rate was to be 1% over and above the current interest rate. The facility was payable on demand. Until demanded, the loan was to be repaid according to the agreed arrangement.

4. On 23 November 2006, under Account No. 115043, FDB granted a further loan of \$50,000.00 (fifty thousand dollars) to Dayal at the agreed interest rate of 9.95% per annum.
5. The default interest rate was fixed at 2% over and above the current interest rate. Again, Kumar guaranteed this second advance<sup>2</sup>.
6. Dayal and Kumar provided the following securities to secure the loan facilities:
  - (i) first Registered Memorandum of Mortgage No. 594429 dated 06 September 2006 over Crown Lease No. 16337, LD 4/10/4465, Nadi with improvements thereon<sup>3</sup>.
  - (ii) adequate insurance cover over the property for at least \$125,000.00 with the FDB's interest noted thereon.
  - (iii) mortgage protection cover on the total debt.
  - (iv) assignment over salary proceeds of the First Defendant with Dayal Buses Ltd to meet the stipulated repayments, and
  - (v) personal guarantee by Kumar dated 06 September 2006<sup>4</sup>.
7. Then Dayal started defaulting in his repayments. And FDB started to send letters in May and June 2007 to Dayal to settle the arrears<sup>5</sup>. Further letters were sent in July 2007 when Dayal failed to settle the arrears<sup>6</sup>.
8. On 12 October 2007, FDB served Dayal a Notice dated 18 September 2007<sup>7</sup> which it issued pursuant to the Mortgage. That Notice was a demand for immediate payment of the debt plus interest as at 31 August 2007. This was calculated at \$119,602.12 with further interest at the rate of 15.5% per annum on Account No. 114864 and 9.95% per annum on

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<sup>1</sup> annexed and marked "ST1" is a copy of the Letter of Offer dated 01 September 2006 which was signed in acceptance by Dayal and Kumar on 03 September 2006.

<sup>2</sup> annexed and marked "ST2" is a copy of the Letter of Offer dated 23 November 2006 which was signed in acceptance by Dayal and Kumar on 23 November 2006.

<sup>3</sup> **Annexed** and marked "ST3" is a copy of Memorandum of Mortgage No. 594429.

<sup>4</sup> **Annexed** and marked "ST4" is a copy of the Personal Guarantee by the Second Defendant dated 6<sup>th</sup> September 2006.

<sup>5</sup> A copy each of the letters dated 08 May 2007 and 06 June 2007 are annexed and marked "ST5".

<sup>6</sup> A copy of the letters dated 04 July 2007 and 10 July 2007 are annexed and marked "ST6".

<sup>7</sup> A copy of the Notice of Demand dated 18 September 2007 is annexed and marked "ST7".

Account No. 1155043 from 01 September 2007 until full payment. Dayal did not settle these debts.

9. FDB then sent Dayal a warning letter to update his account. This was followed by a second warning letter on 25 July 2008. Then on 29 August 2008, FDB served Dayal a second Notice of Demand (addressed to Dayal) dated 18 August 2008<sup>8</sup>. This second Notice stated the account balance as at 31 July 2008 to be \$139, 274.15 with further interest at the rate of 12.5% per annum on Account No. 114864 and 10.25% per annum on Account No. 1155043 from 01 August 2008 until full payment. FDB also served Kumar (Guarantor) the same Notice of Demand (addressed to Kumar with exactly the same demand) on the same day<sup>9</sup>.
10. Neither Dayal nor Kumar took any step to settle the FDB debt as demanded.
11. Then on 22 November 2008, FDB exercised its powers as mortgagee over the property and advertised it for sale in the Fiji Times and the Fiji Sun on 22 November 2008<sup>10</sup>. Five tenders ranging from \$54,500.00 to \$72,500.00 responded. And by letter dated 20 January 2009, FDB advised Dayal that it would accept the highest tender unless Dayal settled the total debt plus accrued interest and costs within 14 days<sup>11</sup>.
12. Dayal however still failed to redeem the mortgage debt.
13. On 12 February 2009, FDB sent a letter of acceptance to the tenderer<sup>12</sup>. Then on 18 March 2009, FDB entered into a sale and purchase agreement over the property with the successful tenderer for \$72, 500.00<sup>13</sup>. Settlement took place on 22 October 2009.
14. A Valuation Report dated 15 October 2008 of the property was prepared by Westate Consultants which assessed the Current Market Value of the property at \$95,000.00<sup>14</sup>. Tavainavesi deposes that the said Valuation Report did not specify the Forced Sale Value of the said property. ‘
15. Upon receiving the proceeds of sale, FDB immediately credit the money against Dayal’s account. The debt balance for Account No. 115043 stood at

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<sup>8</sup> A copy of the Notice of Demand dated 18 August 2008 is annexed and marked “ST8”.

<sup>9</sup> A copy of the Notice of Demand dated 18 August 2008 is annexed and marked “ST9”.

<sup>10</sup> A copy each of the advertisements are annexed and marked “ST10”.

<sup>11</sup> A copy of the said letter dated 20 January 2009 is annexed and marked “ST11”.

<sup>12</sup> A copy of the said letter dated 12 February 2009 is annexed and marked “ST12”.

<sup>13</sup> A copy of the said Sale and Purchase Agreement is annexed and marked “ST13”.

<sup>14</sup> A copy of the Valuation Report dated 15 October 2008 is annexed and marked “ST15”.

\$13,235.13 with arrears of \$19,550.00. And for Account No. 114864, the remaining debt balance stood at \$88,793.16 with arrears of \$23,805.09.

16. On 26 October 2009, demand Notices were sent to the defendants to settle the outstanding balance sum<sup>15</sup>. On 26 August 2010, FDB's solicitors sent Dayal Demand Notices<sup>16</sup> to pay the following remaining debts within 14 days.
    - a. account No. 115043 - \$19,339.60 together with interest accruing thereon at the rate of 10.25% per annum from 1<sup>st</sup> August 2010; and
    - b. account No. 114864 - \$105,833.85 together with interest accruing thereon at the rate of 12.5% per annum from 1<sup>st</sup> August 2010.
  17. The defendants however have failed and/or neglected to pay the outstanding amount and the default continues to date.
  18. Tavainavesi says, on advice, that the defendants have not shown any valid and meritorious ground in their statement of defence. She asks for summary judgment against the defendants as follows:
    - (i) Account No. 115043 - \$19,339.60 together with interest accruing thereon at the rate of 10.25% per annum from 1<sup>st</sup> August 2010; and
    - (ii) Account No. 114864 - \$105,833.85 together with interest accruing thereon at the rate of 12.5% per annum from 1<sup>st</sup> August 2010.
- (a) Costs on an indemnity basis.

## **THE LAW**

19. **Order 14 Rule 1(1)** states as follows:

*1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for **judgement** against that defendant.*

20. The Order 14 summary judgment procedure is available to any plaintiff who desires a quick judgment on his or her claim. Courts grant summary judgment where it is clear that the defendant has no defence to the claim. Courts will also grant summary judgment if the defence raised is either

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<sup>15</sup> A copy each of the said Demand Notices are annexed and marked "ST16".

<sup>16</sup> A copy each of the said Demand Notices are annexed and marked "ST17".

not a bona fide defence or discloses no triable issue and will merely have the effect of delaying a judgment in favour of the plaintiff. (**Carpenters Fiji Ltd. v Joes Farm Produce Ltd Civil Appeal No. ABU 0019/2006**).

21. The plaintiff must prove each claim clearly and must satisfy the court that the defendant has no defence which has any realistic prospect of success.
22. Once the plaintiff establishes his or her claim, the evidential and persuasive burden then shifts to the defendant who must adduce affidavit evidence dealing specifically with the plaintiff's claim and also stating clearly what the defence is and what facts he or she relies on to resist the entry of summary judgment (see **Magan Lal Brothers Ltd. V L.B. Masters and Co. Civil Appeal No. 31/84**).
23. If the defendant has not filed an affidavit but a defence, the Court must then direct its attention to the issues raised in the defence to see whether the defence has merits and is not just a sham to delay judgment or avoid the necessity of showing cause by affidavit (see **Magan Lal** (supra) and **Halsbury's Laws of England (4<sup>th</sup> edition) Volume 37 paras 413 – 415, Notes 4**).

#### **THE DEFENDANTS' POSITION**

24. The defendants have not filed any affidavit to oppose the application. I have reviewed their statement of defence. They plead that they were never explained matters relating to the interest rate nor were they explained and/or interpreted the arbitrary powers of variation of the loan and recall vested by in FDB.
25. Dayal admits to the further advance but asserts that this was done without the knowledge or approval of Kumar. Dayal also admits that certain securities were given but Kumar's guarantee did not cover the further advances.
26. The defendants also plead that the FDB failed to inform them of the tenders. The plead as follows:
  1. The Plaintiffs failed to disclose to the Defendants the tender price for which the property was sold.

2. That the defendants sold the mortgaged property for a sum for less than the actual market value of the property resulting in loss to the defendants.
  3. The Plaintiffs failed to obtain the best available price for the mortgaged property resulting in loss to the defendants.
  4. That the Plaintiffs failed to account to the Defendants for the sale of the mortgaged property and the sum credited towards the account.
27. The defendants deny owing FDB the sum of \$125, 173.00 and interest or any sum at all. They also claim that the FDB's claim is contrary to the Consumer Credit Act and the Fair Trading Decree.

### **ANALYSIS OF DEFENDANTS' POSITION**

28. I am of the view that the defence lacks merit and is merely a sham defence to delay judgement and to avoid the necessity of having to show cause by affidavit. My reasons follow:
- (i) the documentary evidence in the affidavit of Tavainavesi shows that both defendants signed the Guarantee to the initial loan before their own solicitor on 06 September 2006 (see footnote 1).
  - (ii) the documentary evidence (see footnote 2) further shows that both Dayal and Kumar also signed their acceptance of FDB's offer of additional facility on 23 November 2006. The relevant documents bear their signatures to that effect.
  - (iii) the defendant's plea that they were not explained the interest rate and/or FDB's power "*of variation of the loan and recall*" as they put it, rings hollow. I say that because, firstly, they had the benefit of being represented by their own lawyer and secondly, in any event, the defence of *non est factum* is not lightly allowed where a person of full age and capacity has signed a written document embodying contractual terms (**Saunders v. Anglia Building Society (1971) A.C. 1004**).
  - (iv) I note that the statement of defence is pleaded in such a way so that it is Dayal who is actually pleading that the further advance to him (Dayal) was done without the knowledge and consent of the guarantor (Kumar). I query why Kumar himself has not pleaded that. In any event, that shortfall could have been addressed by Kumar filing an affidavit to properly set up his refuting evidence.

Such evidence, I imagine, would have to allege that the signatures were forged. I note that the pleading makes no allegation of “forged signature(s)”.

- (v) since Kumar has chosen not to swear an affidavit, the only conclusion I can make is that the defence is a sham defence designed to avoid the necessity of having to show cause by affidavit.
- (vi) the defendants’ allegation that FDB failed to inform the defendants of the tenders or the tender price that it had accepted is also rather weak when considered against the documentary evidence in Tavainavesi’s affidavit that the FDB did send to Dayal a final notice that it would accept the highest tender and the amount if Dayal did not redeem in 14 days.
- (vii) again, the defendants could have filed an affidavit to refute that evidence – but chose not to.
- (viii) the allegation that the FDB sold the property for a sum less than actual market value is weak when held against the evidence that FDB did duly advertise the property on mortgagee sale and that the bank did accept the highest bidder. While a mortgagee indeed has an obligation to a mortgagor to obtain the best price, that obligation does not equate to a duty to obtain the best market price imaginable. A mortgagee, after all, has rights of its own which he is entitled to exercise adversely to the mortgagor.
- (ix) in **Bank of Cyprus (London) Ltd v Gill [1979] 2 Lloyds LR 508**, the mortgaged security in question was a hotel. The mortgagee had taken possession of the property after the mortgagor had defaulted. Following a consultant’s report the mortgagee closed the hotel. Later, the mortgagee sold it by private treaty. After the sale, the mortgagee sued the mortgagor for the balance of mortgage debt after deduction of the sale proceeds. It so happened that, some three years after they acquired the property, the new owners sold it on to another for a price that was higher than the mortgage debt. The mortgagor argued that the bank had failed to exercise reasonable care and, of course, cited the subsequent sale of the hotel by the new owner for a sum in excess of the mortgage debt.
- (x) Lloyd J based his decision on **Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949** and said:

The law, as I understand it, is that a mortgagee in possession is entitled to sell at any time. He is not obliged to wait on a rising market or for a market to recover. But at the same time he cannot sell without taking proper price at the time in question. That in itself may take some time

- (xi) in **Standard Chartered Bank Ltd v Walker [1982] 3 All ER 938**, a guarantor was called upon to make up the deficiency of the **mortgagor's** indebtedness upon realisation of the mortgaged security. The guarantor alleged there had been negligence in the conduct and timing of the sale by the mortgagee and that the receiver of the property had acted under the mortgagee's instructions becoming in effect the mortgagee's agent. Lord Denning M R affirmed **Cuckmere Brick** as follows:

"This duty is only a particular application of the general duty of care to your neighbour which was stated in *Donoghue v Stevenson* [1932] A C 5326 ... The mortgagor and the guarantor are clearly in very close 'proximity' to those who conduct the sale. The duty of care is owing to them, if not to the general body of creditors of the mortgagor. There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that in choosing the time, he must exercise a reasonable degree of care."

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"If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible, and also to the guarantor so that he is made liable for as little as possible on the guarantee."

- (xii) there is nothing in the defence to allege that the FDB might have wrongly calculated the sum owing.

## **CONCLUSION**

29. I enter summary judgement against the defendants jointly and severally for the following sums:
- (i) Account No. 115043 - \$19,339.60 together with interest accruing thereon at the rate of 10.25% per annum from 01 August 2010.
  - (ii) Account No. 114864 - \$105,833.85 together with interest accruing thereon at the rate of 12.5% per annum from 01 August 2010.
- (b) \$1,500 costs.

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Anare Tuilevuka  
**JUDGE**  
07 October 2013