

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 284 OF 2014

BETWEEN : **CREDIT CORPORATION (FIJI) LIMITED**
Plaintiff

A N D : **GENESI ASSET MANAGEMENT (FIJI) LIMITED**
Defendant

Counsel : Mr. R. Naidu for the Plaintiff
No Appearance for the Defendant

Date of Hearing : 15th October, 2014

Date of Judgment : 20th October, 2014

INTERLOCUTORY JUDGMENT

[1]. The plaintiff has filed a summons for interim injunction under Order 29 Rule 1(1) and (2) of the High Court Rules of 1988. The said summons seeks for the following orders:-

[1]. ***An Order the Defendant Genesi Asset Management (Fiji) Limited by itself and/or by its servants and/or agents or otherwise howsoever do forthwith release to and deliver to the plaintiff Credit Corporation (Fiji) Limited and/or to the servants or agents of the plaintiff possession of motor vehicle registration number FQ 899 engine number 2KD7819149 chassis number MROES12G303024647 that is subject to a asset purchase agreement between the plaintiff and the defendant.***

- [2]. ***An injunction restraining the defendant Genesi Asset Management (Fiji) Limited by itself and/or by its servants and/or agents or otherwise howsoever from interfering or hindering in way with the plaintiff's exercise of its rights to take possession of motor vehicle registration number FQ 899 engine number 2KD7819149 chassis number MROES12G303024647 that is subject to a asset purchase agreement between the plaintiff and the defendant.***
- [3]. ***An order that the police do assist the plaintiff Credit Corporation (Fiji) Limited in the execution of this order;***
- [4]. ***An order for expedited hearing of this summons;***
- [5]. ***An order that the time for service and hearing of this summons be abridged to one day so that this summons can be heard at the earliest as an urgent application;***
- [6]. ***Liberty to apply generally on 2 days notice;***
- [7]. ***The costs of this application be paid by the defendant;***
- [8]. ***Such other order maybe made in the premises as shall be just.***

[2]. The interpartes summons was taken up for hearing on 15.8.14. On the day an affidavit of service had been filed by one Timaleti Datt deposing that on 13.10.14 the documents had been personally served on Genesi Asset Management (Fiji) Ltd at its registered office at 88 Milverton Road, Suva, Fiji and that it had been accepted by one Nelson Kawan.

[3]. When the case was taken up for hearing on 15.10.14, the defendants were not present nor were they represented by the solicitors. The names of the

defendants were called and as the affidavit of service has been filed the court proceeded to hearing.

- [4]. The summons of interim injunction was supported by the affidavit of Reshma Goundar and has been sworn on 7.10.14.

Plaintiff's Case

- [5]. The plaintiff being a financial institution had granted a loan to the defendant to purchase two motor vehicles with the registration numbers FQ 899 and FD 433 on the terms and condition of the offer letter RG 4. The defendant had signed it and accepted it. It was submitted that the parties had agreed on the interest, repayment period and the monthly repayment amount.
- [6]. The defendant has executed an asset purchase agreement infavor of the plaintiff over the two motor vehicles.
- [7]. As per the asset purchase agreement RG 5 inter alia the two vehicles were assigned by the defendant to the plaintiff as security for the payment of the loan.
- [8]. Even through the loan agreement states about the punctual repayment of the loan the defendant had breached the condition and defaulted on the loan repayment.
- [9]. It was submitted that the defendant has failed to make payments after 11.7.14 and as at 30.9.14 the outstanding amount stands at \$62,939.16.

- [10]. The plaintiff had served a default notice on the defendant. Subsequently several correspondences have been directed to the defendant to repay the loan.
- [11]. The plaintiff had sent a repossession notice which was marked RG7.
- [12]. Thereafter the defendant had made arrangements to repay and made a repayment but subsequently had defaulted. Accordingly a fresh repossession notice RG 8 had been sent to the defendants.
- [13]. Acting under the asset purchase agreement the plaintiff had recovered one motor vehicle with the registration number FD 433 from the defendant.
- [14]. However the plaintiff submits that the second motor vehicle with the registration number FQ 899 cannot be found. It is further alleged that the defendant in breach of the agreement is refusing to surrender the vehicle nor cooperate in locating the vehicle.
- [15]. The plaintiff submits RG 10, the statement of accounts pertaining to the loan given to the defendant and argues that at present the default stands at a substantial amount.
- [16]. Plaintiff also alleges that the defendants have not only violated the loan agreement by failing to repay, he has violated the terms of the assets purchase agreement by unlawfully refusing to hand over the vehicle bearing number FQ 889.
- [17]. The affidavit of service was filed stating that the documents had been delivered to the defendants registered office, the defendant had opted not to come before the court and answer the allegation against the defendant.

Determination

[18]. As per the orders sought I find Order 1 is in the nature of a mandatory order and Order 2 is a restraining order. The principles for granting a mandatory injunction were set out in **Redland Bricks Ltd –v- Morris (1969) 2 ALL ER 576.**

- i. A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution, but in the proper case unhesitatingly.*
- ii. Damages will not be a sufficient or adequate remedy if such damage does happen.*
- iii. The cost to the defendants to do the work or the act must be taken into account.*
- iv. The court must be careful to see that the defendants knows exactly infact what he has to do.*

However the House of Lords went onto say every case must depend essentially on its own particular circumstances.

In a mandatory injunction case the principles to adhere will change on the circumstance of the case.

[19]. The plaintiff is seeking through Order 1 to get possession of the motor vehicle that has been taken as the security for the loan. As per RG 4 under the heading default the plaintiff has the right to re-posses the property and the defendant is bound to give information pertaining to the property.

[20]. As per RG 5 the asset purchase agreement, the defendant under Clause 4 has agreed to pay a monthly repayment and in the event of default the plaintiff has

the right to take repossession of the vehicle under clause 7 of the agreement subject to the fulfilling the terms therein.

[21]. The plaintiff in the application is seeking to take possession of the securities taken under the assets purchase agreement. In the offer letter as well as the asset purchase agreement the plaintiff's right to repossess in the event of default is secured.

[22]. The plaintiff is seeking to get orders 1 to get possession of goods that they have taken as security in granting the loan. If a financial institute that grants a loan on a security cannot obtain the possession of the said security at the time of an alleged breach of contract, the purpose of obtaining security will be futile. When there is a breach of contract and if the lending party is unable to take possession of the security obtained then there is a probability of suffering grave damage. The plaintiff has departed with the money and can't get the possession of the security taken. It was submitted that there is a high probability of the good's being disposed by the defendants. In such an event damages will not be a sufficient remedy.

In determining this application the test the court should follow was also laid down in American Cynamide Co –vs- Ethican Ltd (1975) AC 396. As per the said case n granting injunctive relief court should consider the following: -

- i) Whether there is a prima facie case with the probabilities of plaintiff succeeding and whether there is a serious issue to be tried.***
- ii) Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff.***
- iii) Undertaking as to damages.***

[23]. In this case the plaintiff has submitted to court the offer letter, the asset purchase agreement and the notice of repossession. The plaintiff also has submitted the statement of accounts to show the amount due from the defendant and the performance of the loan account. The plaintiff has satisfied court that the loan is in default. Considering all the facts I think the plaintiff has passed the thresh hold of establishing the prima facie case.

Balance of Convenience.

[24]. The consequence of granting the injunction specially in the nature of a mandatory and a restraining nature has been considered by this court. It is pertinent to note that after the documents were served the defendant has opted not to be present or represented in court. Accordingly the application for injunction goes unopposed. In the circumstances with the evidence submitted to court I am inclined to think the balance of convenience in this matter is in favour of the plaintiff.

[25]. The plaintiff with the affidavit evidence and the attached annexure has established that in the event of default they have the right to reposses the goods. The plaintiff brought to my attention the case of **Fiji Development Bank –v- Mosese Qalitakivuna Soronakadavu HBC 38 of 2014**. Where I have held that “I am of the view that the purpose of obtaining security when granting a loan is to recover or minimise the loss if in default.” I find the facts of this case are similar to the facts of the above mentioned case.

[26]. As submitted in this instance the plaintiff has parted with the money for the defendant to purchase the vehicle. As a commercial lending institution plaintiff has secured the loan among other securities over the two vehicles. As per the offer letter as well as the Asset Purchase Agreement the plaintiff has secured their rights to repossess the vehicle in the event of default. However the defendant has failed to comply with the terms and hand over the possession of

the vehicle. Further they have failed, even to assist in finding the whereabouts of the vehicle number FQ 899; engine number 2KD 7819149; Chassis number MROES 12G 303024647. When the interim injunction application was heard the defendant had opted not to even answer the allegation against them.

[27]. The plaintiff has satisfied court that they have issued notice of overdue payments and the repossession notices against the defendant.

[28]. In seeking the injunction relief the plaintiff has also given an undertaking for damages. The financial statement of the plaintiff RG 11 was submitted to show the financial standing of the plaintiff with the undertaking as to damages. This court is satisfied with the undertaking for damages given by the plaintiff.

Conclusion

[29]. For the above stated reasons, I am inclined to accept that the plaintiff has satisfied this court to obtain the orders sought in the interpartes summons for interim injunction dated 7th October 2014. As the plaintiff is successful in this application he is entitled for cost and a cost of \$750 summarily assessed is award to the plaintiff.

[30]. Accordingly I make the following orders:-

[1] An Order that the Defendant Genesi Asset Management (Fiji) Limited by itself and/or by its servants and/or agents or otherwise howsoever do forthwith release to and deliver to the plaintiff Credit Corporation (Fiji) Limited and/or to the servants or agents of the plaintiff possession of motor vehicle registration number FQ 899 engine number 2KD7819149 chassis number MROES12G303024647 that is subject to a asset purchase agreement between the plaintiff and the defendant.

- [2]. ***An injunction restraining the defendant Genesi Asset Management (Fiji) Limited by itself and/or by its servants and/or agents or otherwise howsoever from interfering or hindering in way with the plaintiff's exercise of its rights to take possession of motor vehicle registration number FQ 899 engine number 2KD7819149 chassis number MROES12G303024647 that is subject to a asset purchase agreement between the plaintiff and the defendant.***
- [3]. ***An order that the police do assist the plaintiff Credit Corporation (Fiji) Limited in the execution of this order.***
- [4]. ***The plaintiff is awarded a cost of \$750.***
- [5]. ***The case to take its normal case.***



Mayadunne Corea

JUDGE

20.10.2014

