

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 217 of 2013

BETWEEN : **SISTERS AIRCOOL & ELECTRICAL SERVICES LIMITED** a
company incorporated in Fiji and having its registered office at Suva.
PLAINTIFF

AND : **WESTPAC BANKING CORPORATION LIMITED**
FIRST DEFENDANT

AND : **ASERI MANULEVU** of Suva, Bank Officer
SECOND DEFENDANT

AND : **LEPANI MAKUBUNA** of Suva, Bank Officer
THIRD DEFENDANT

AND : **CHOU YAT MING** and **YPI FUNG KWAI** both of Vunikawai,
Colo-i-Suva, Farmers
FOURTH DEFENDANT

AND : **THE REGISTRAR OF TITLES**
FIFTH DEFENDANT

Counsel : **Mr. Singh V. for the Plaintiff**
Ms. Low P. for the 1st, 2nd and 3rd Defendants

Date of Hearing : **Mr. Nand M. for the 4th Defendant**
Ms. Sharma T. for 5th Defendant

Date of Judgment : **26 October, 2018**

JUDGMENT

INTRODUCTION

1. The Plaintiff's claims are based on mortgagee sale of property by 1st Defendant. The Plaintiff is claiming fraud and as an alternate remedy claiming deceptive, misleading and unconscionable conduct. (Section 54 of Fiji Commerce Commission Act, 2010). The Plaintiff had defaulted the mortgage and the 1st Defendant had proceeded to mortgagee sale. The Plaintiff had requested for a private sale and certain conditions were imposed by 1st Defendant and parties had agreed to the same, but Plaintiff failed to comply with conditions by deadline on 15.2.2013. The 1st Defendant had accepted a tender after that, and proceeded to transfer the property. The 1st Defendant was aware of

1st Defendant was aware of the Plaintiff's efforts to save the property from mortgagee sale but transferred the property on 18.4.2013. 1st Defendant proceeded with the transfer after the Plaintiff could not complete with the private sale or the conditions stipulated by 1st Defendant. The 1st Defendant had granted an ultimatum till 15.3.2013 and concluded the transfer of the property on 18.4.2013. The mortgagee sale was advertised on the newspapers on 12th January, 2013 and also on 18th January, 2013. Before proceeding with the mortgagee sale 1st Defendant had allowed the Plaintiff to seek refinance through another credit institute and this had also failed. In the circumstances there is no fraud or unconscionable conduct on the part of the Defendants.

AGREED FACTS

2. The Agreed Facts in this matter as listed in the pre-trial conference minutes is as follows;
 1. The Plaintiff is a company incorporated in Fiji and has its registered office at Suva.
 2. The Plaintiff was at all relevant times the registered proprietor of the property comprised in Certificate of Title No. 16058 being Lot 20 on DP 4147 ("the Property").
 3. In or about December 2005 the 1st Defendant ("the Bank") upon request of the Plaintiff advanced certain facilities to it which was secured by way of a registered mortgage over the Property, being Mortgage No. 579625 ("the Mortgage") on 22 December 2005.
 4. The Plaintiff defaulted in making repayments under the mortgage.
 5. As a consequence thereof, on or about 22 November 2012, the Bank issued a Demand Notice addressed to the debtor (Plaintiff) for the payment of the \$259,949.03 (Two Hundred and Fifty Nine Thousand Nine Hundred Forty Nine Dollars and Three Cents) being monies it owed to the Bank.
 6. On or about January 2013 the bank exercised its right under the mortgage to tender the property for sale by the mortgagee.
 7. The mortgagee's sale notices published in the Fiji Times on 12 January 2013 and 19 January 2013.
 8. Despite the mortgagee's sale notices published in the Fiji Times, the Plaintiff failed to pay the debt due and owing to the Bank under the mortgage.

9. The Plaintiff on or about 4 February 2013 approached the Bank through its solicitors to seek time to engage in a private sale of the property to completely pay-off the Mortgage debt.
10. Without prejudice to its rights under the mortgage, on or about 11 February 2012 the Bank informed the Plaintiff's representative that it may consider agreeing to a private sale, if the following conditions were to be met by 15 February 2013:
 - a. Signed Sales and Purchase agreement by all three directors of the Plaintiff and all purchasers.
 - b. The Purchase Price figure to be stipulated clearly.
 - c. A non-refundable bank Cheque deposit of \$27,500.00 made in favour of the Bank.
 - d. The executed Sales and Purchase agreement to include a clause for settlement being concluded by no later than 15/03/13.
11. On 15 February 2013 the Bank informed the Plaintiff that the aforementioned conditions were not met by the Plaintiff, the Bank had awarded the property to a bidder.
12. On 15 February 2013 the solicitors for the Plaintiff contacted the Bank to inform that Plaintiff was unable to deposit the amount of \$27,500.00 by 15 February 2013.
13. On 9 April 2013 the Bank entered into a Sale and Purchase Agreement for sale of the Property to the 4th Defendants.
14. On or about the 18 April 2013 the Bank contacted the Plaintiff's solicitors and informed them that the Bank had not received the consent to the private sale by one of the directors of the Plaintiff.
15. On 18 April 2013 the Bank transferred the property to the 4th Defendant, Chou Yat Ming and Yip Fung Kwai. The transfer instrument was signed on behalf of the Bank by its attorney on 26 March 2013.
16. The Bank provided a loan to the 4th Defendant to purchase the subject property.

ANALYSIS

3. The Plaintiff called 3 witnesses. The first witness was Mr. Robert Mario, who gave evidence and stated that he was a director of Sisters Aircool and Refrigeration Services Ltd In 2013 the Plaintiff owned a property at 40 Panapasa Road, Namadi Heights, Suva. It was registered under Plaintiff. In 2013 he was living there with his

family. His two sisters, their husbands and their children were also living there. His two sisters' families were paying rent to Plaintiff at that time.

4. The property is comprised in Certificate of Title No. 16058. The transfer to Plaintiff was endorsed on 22/12/05. At the same time Plaintiff had taken a mortgage from 1st Defendant to finance the transaction and mortgage is endorsed on the title.
5. In 2012 Plaintiff faced with financial hardships due to alleged internal issues with one director who had left and formed his own entity. The Plaintiff could not meet its debt obligations. In 2012 Plaintiff defaulted on their loan to 1st Defendant.
6. The property was advertised for Mortgagee sale in the local newspapers, when the Plaintiff made attempts for private sale and the 1st Defendant had informed about their intension of proceeding with the mortgagee sale and further advertisements in local newspaper by email of 18.01.2013 (D8).
7. The 1st Defendant in email of 22.01.2013 reiterated the 'long time given' for settlement of the default.
8. At the same time, email of 11.02.2013 of the 1st Defendant indicated that they ' may consider' the private sale by Plaintiff, as a 'final measure of assistance' with certain conditions , and they were as follows
 - (a) Signed Sales and Purchase agreement by all the directors (Robert, Ben and Nina Mario) of the Plaintiff and intended third party purchaser.
 - (b) The Purchase Price figure to be stipulated clearly.
 - (c) A non-refundable Bank Cheque deposit of \$27,500 made in favour of the Bank.
 - (d) The executed Sales and Purchase agreement to include a clause for settlement being concluded by no later than 15/03/13.
 - (e) All the above conditions be completed by 15.2.2013.
9. The Plaintiff was unable to provide \$27,500 that 1st Defendant had required as a condition for private sale and had failed to obtain signatures of all three directors of the Plaintiff by the said ultimatum of 15.2.2013. (P13)

10. An email from the solicitors of Plaintiff on 15.2.2013 at 1.25 PM (D8) had reiterated 1st Defendant's conditions and sought 2 weeks for payment of the deposit \$27,000 and other conditions to be fulfilled in the meantime. This is an admission of non-fulfilment of all the conditions by dead line.
11. On 15.2.2013 the 1st Defendant had informed at 5.18 PM through an email that the deadline for private sale had passed and observed non-compliance of the conditions. 1st Defendant had indicated that they would award the tender of the property to an interested buyer, and proceeded with an offer (D9) to 4th Defendant and they accepted it on 25.2.2018. This offer acknowledged the right of mortgagor for redemption.
12. The 1st Defendant had rejected the two week extension requested by Plaintiff and proceeded to accept the tender, but the right of the mortgagee for redemption existed.
13. On 12 March 2013 Plaintiff's solicitors sent out a further letter to 1st Defendant requesting the settlement sum together with a copy of the same Settlement Authority dated 5 February 2013. This was replied on 15.4.2013 where the request was denied since the customer authority was not signed by all three directors.
According to Plaintiff by not providing sums they were precluded from redemption. This cannot be accepted as Plaintiff could not even provide \$27,000 and sought two weeks for that.
14. On 15.4.2013 through an email 1st Defendant had informed that already tender was awarded and expected for conclusion 'shortly'.
15. On 19th April 2013 through an email 1st Defendant informed that the property had been sold and the transaction settled on the previous day.
16. On 24 April 2013 an email to the Reserve Bank complaining its behaviour was made and it was inquired by them. In it Reserve Bank had requested to look in to reverse the transfer but the 1st Defendant had told that it was not possible.
17. The first issue raised by the parties at the pre-trial conference, was whether the Plaintiff received a copy of the Bank's demand notice dated 22 November 2012 and if not then the effect, if any, thereof?

18. The evidence from both the Plaintiff and the Defendant shown that the Plaintiff did not receive the demand notice from the First Defendant dated 22 November 2012. Also the said document was not addressed to the Plaintiff or had the Plaintiff's registered office stated there. The Plaintiff and its directors knew about the default and they had tried to refinance it with the concurrence of the 1st Defendant, prior to mortgagee sale. Even when 1st Defendant proceeded for mortgagee sale it was known to all the directors of Plaintiff.
19. The Defendant's witnesses admitted that there was no demand notice issued by them prior to proceedings with the mortgagee sale, to the Plaintiff.
20. The definition of Mortgage is found in the Section 2(1) of Land Transfer Act, 1972 and it states
- "mortgage" means any charge on land, or any estate or interest therein, created under the provisions of this Act for securing-*
- (a) *the repayment of a loan or satisfaction of an existing debt;*
- (b) *the repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;*
- (c) *the payment to the holders for the time being of any bonds, debentures, promissory notes or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of that charge;*
- (d) *the payment to any person or persons by yearly or periodical payments or otherwise or any annuity, rent charge or sum of money other than a debt, and includes the instrument effecting the same;*
21. The Plaintiff had mortgaged the Property owned by it, and had obtained a loan from 1st Defendant and had also defaulted it. These are all admitted facts.
22. The Plaintiff admits the default for more than one month. According to the Plaintiff it was due to one director of the Plaintiff leaving the company with some cash.
23. Section 79 of the Property Law Act , states as follows;

"79. - (1) If default in payment of the mortgage money or in the performance or observance of any covenant continues for one month after the service of the notice referred to in section 77, the mortgagee may sell or

concur with any other person in selling the mortgaged property... " (emphasis added)

24. When the default is admitted and the bank had also in no uncertain manner indicated to the directors of the Plaintiff that it will take next step to recover the loan, the obligation contained in Section 79 (1) of Property Act for notice is fulfilled and the sale was completed on 18.4.2013.
25. 1st Defendant had allowed the Plaintiff for refinance from another credit institute and had given time to settle though refinance before proceeding with the mortgagee sale.
26. The Plaintiff was fully aware of the mortgagee sale and if they were unaware of the mortgagee sale due to lack of demand notice they had ample time to come to court and obtain restraining order for the sale on that basis. This indicates the knowledge of the all the parties about the mortgagee sale and the issue of demand notice in terms of Sections 77 and 79 of Property Act is fulfilled as more than one month lapsed from October 2012 to 18th April 2013 when settlement was concluded.
27. Lepani Makabuna, the 1st Defendant's witness, confirmed that he had had a discussion with solicitors for the Plaintiff and had informed Plaintiff could redeem the property, and this is correct position as it was a condition between 1st and 4th Defendants. (See D9).
28. The Plaintiff had requested more time on the date of expiry of ultimatum on 15.2.2013 and this was not consented by 1st Defendant.
29. In **Ram v FNPF Investment Ltd** [2014] FJHC 796 the Court discussed as follows;
"...In Vere v NBF Asset Management Bank [2004] FJCA 50; ABU0069.2003S (11 November 2004)(unreported) Fiji Court of Appeal held that there is not right of redemption to the mortgage once an unconditional tender was accepted..."
30. The 1st Defendant did not accept the tender from the 4th Defendant unconditionally. Therefore a right to redeem for the Plaintiff continued, till transfer of the property to third party.

31. Justice Fatiaki in *Khan v Fiji Development Bank* [2000] 1 FLR 11 had discussed on a mortgagor's right to redemption and he held that it existed till the end of transfer of the property is completed. So the Plaintiff could have redeemed the property till 18.4.2014. There was no evidence of them fulfilling conditions prior to this date.
32. Plaintiff was allowed by the 1st Defendant to redeem its property but they failed to do so prior to 18.4.2013. The Plaintiff had sought 10% of the settlement sum which was not provided and admittedly this sum was not available at any time till 18.4.2013. The Plaintiff's solicitors sought 2 weeks from 12.3.2018 to submit this amount, but the evidence was that they were unable to collect \$27,000.
33. The Plaintiff was aware of the default in October, 2012 and 1st Defendant had allowed sufficient time when they finally awarded the tender and settlement of the transfer on 18th April, 2013.
34. The reason 1st Defendant required all the signatures of the Directors of the Plaintiff was explained by them in their email and this was not denied at the hearing. There was a dispute between an appointment of one director and in the circumstances the 1st Defendant had safeguarded its interest adequately.
35. The Plaintiff had pleaded fraud against 1st to 4th Defendants. In *Stuart v Kindston* (1923)32 CLR 309 at 359 Starke J stated
'No definition of fraud can be attempted, so various are its forms and methods'
36. The 'fraud' under Land Transfer Act is different from common law concept and it is not confined to deceit or fraudulent misrepresentation (see *Latec Investment Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 273 per Kitto J). The circumstances of the case should be considered with applicable law, to ascertain whether there was a fraud committed against the Plaintiff in the mortgagee sale.

37. In Waimiha Sawmilling Company Limited (in liquidation) vs Waione Timber Company Limited 1926 A.C 101 (Privy Council) (1925) NZPCC 267 Lord Buckmaster in the interpretation of 'fraud' under Torrens System in NZ held. At p106

'...it is plain that unless conduct coming within the meaning of the word "fraud" as used in these sections can be imputed to the respondents their title succeeds'.

38. In the words of the NZ Supreme Court in Fels v Knowles¹:

"The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct). "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easement or incorporeal rights, the rights registered."

Now fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v Mere Roihi² states that: "Fraud in these actions" (i.e., actions seeking to affect a registered title) "means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud- and unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear³..... The act must be dishonest, and dishonestly must not be assumed solely by reason of knowledge of an unregistered interest....' (emphasis added)

39. The 1st Defendant had informed Plaintiff about their intention to proceed with mortgagee sale after allowing time for refinance. The 1st Defendant had refused to defer the recovery process through mortgagee sale and 'as last measure' indicated that

¹ 26 N.Z.L.R.604,620

² [1905] A.C. 176,210.

³ This statement was cited in *Waller v Davies* [2007] NZCA 51; [2007] 2 NZLR 508; (2007) 8 NZCPR 1 at [32] (CA) per Hammond J for the Court (leave to appeal refused: Supreme Court of New Zealand, SC 20/2007, 13 June 2007, Tipping, McGrath and Anderson JJ; [2007] NZSC 43).

it may consider private sale upon certain conditions and the Plaintiff was unable to meet the said conditions. So, there was no fraud on the part of the 1st to 4th Defendants.

40. The 1st Defendant entered into a conditional Sale and Purchase Agreement on 9 April 2013 and also responded with a conditional acceptance of the tender on 21 February 2013 and these conditions were accepted by 4th Defendant on 25.2.2013. This was after ultimatum expired on 15.2.2013 to fulfil the conditions laid down by them to Plaintiff on 11.2.2013. This agreement of 9.4.2013 also recognized mortgagor's right to redemption, and remained till 18.4.2013 4th Defendant is a bona fide purchaser and not a privy to any actions of 1st, 2nd and 3rd Defendants.
41. The Plaintiff claimed 1st and 2nd Defendant acted in misleading, deceptive and unconscionable manner. The 1st and 2nd Defendants not acted in a misleading deceptive and unconscionable manner by representing to the Plaintiff that it would be allowed to redeem the Property. There was no such conduct in breach of Section 54 of the Fair Trading Decree 1992/Commerce Commission Decree 2010 which deals with deceptive, misleading and unconscionable conduct.
42. The Plaintiff in its pleadings had stated in what manner they were misled or deceptive. The particulars of fraud was again relied for this claim. Since I have rejected the same I need not repeat the same and suffice to state that Plaintiff had failed to prove deception or unconscionable conduct on the part of the 1st and 2nd Defendants. The Plaintiff who was represented by solicitors were aware of their rights to redeem till 18.4.2013 but failed to produce, signed sale and purchase agreement before this date.
43. The request for outstanding loan balance on 12.3.2013 was not replied till 15.4.2013 and this was not a deceptive action by 1st and 2nd Defendants.
44. The Plaintiff's evidence through Riteshni Prasad of BSP which was not challenged by the Defendants was the property had a valuation of \$480,000.00 in 2013, but the property was transferred under mortgagee sale by the 1st Defendant for \$285,000.00. The said valuation of the Plaintiff further stated that forced sale value was only \$384,000.

45. Mortgagee sale while the occupants are in possession would also further reduce the price. The right of redemption of mortgagor till final settlement and loss of expenses in such an instance, is further reason for lowering the price due to uncertainty till final settlement. In the circumstances the value accepted by the bank is justified.

CONCLUSION

46. The Plaintiff has failed to prove fraud. There was no fraud on the part of the 1st - 4th Defendants. 1st Defendant had acted as the mortgagee to secure its loan. The 1st Defendant had allowed the Plaintiff to obtain refinance from another credit agency before proceeding with mortgagee sale. This was in 2012 and proceeded with the mortgagee sale in January, 2013 with paper advertisements and again given time till 15.2.2013 to comply with conditions for a private sale of the Property. These conditions were not met. The Plaintiff was informed about the acceptance of the tender and also their right of redemption remained till the transfer was completed on 18.4.2018. The Plaintiff had claimed that conduct of the 1st and 2nd Defendants amounted to misleading or deceptive or unconscionable. The statement of claim is based on Section 54 of Fair Trading Decree/Commerce Commission Decree 2010. From the facts alleged in the statement of claim the conduct of the 1st and 2nd Defendant cannot be considered as unconscionable misleading and deceptive. So the damages claim also fails. The Plaintiffs writ of summons is struck off, the statement of claim is dismissed. There is no cost assessed considering circumstances of the case.

FINAL ORDERS

- a. The Plaintiff's statement of claim is dismissed, writ of summons is struck off.
- b. No costs awarded considering the circumstances of the case.

Dated at Suva this 26th day of October, 2018.



Justice Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva