

In the High Court of Fiji  
at Suva  
Civil Jurisdiction  
Civil Action no. HBC 140 of 2018

Home Finance Company Limited  
Plaintiff

v

Evalyne Rajani Lata Kumar  
Aka Evalyne Rajni Lata aka Evelyne Kumar  
Defendant

Counsel: Mr Devanesh Sharma for the plaintiff

Mr I. Fa for the defendant

Date of hearing : 27<sup>th</sup> November, 2018

Date of Judgment : 12<sup>th</sup> December, 2018

### RULING

1. The defendant seeks a stay of execution of my judgment of 19th October, 2018, granting the plaintiff, an order for vacant possession of her property and an injunction restraining her from interfering or removing the improvements thereon.

#### *The determination*

2. The law on stay pending appeal was stated by His Lordship Chief Justice Gates in *Native Land Trust Board v Shanti Lal*, [CBV0009.11, January, 2012] as follows:

*The court considering a stay should take into account the following questions. ... set out by the Court of Appeal and ... applied frequently in this court. They were summarised in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd**, Civil Appeal ABU0011.04S 18<sup>th</sup> March 2005. They are:*

- (a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- (b) *Whether the successful party will be injuriously affected by the stay.*
- (c) *The bona fides of the applicants as to the prosecution of the appeal.*
- (d) *The effect on third parties.*
- (e) *The novelty and importance of questions involved.*
- (f) *The public interest in the proceeding.*
- (g) *The overall balance of convenience and the status quo.*

3. The first test provides that the court must consider whether the appeal will be rendered nugatory if no stay is granted, albeit this factor "*is not determinative*".
4. Mr Fa, counsel for the defendant submitted that the appeal will be rendered nugatory, if the stay is not granted. The riposte of Mr Sharma, counsel for the plaintiff was that a successful litigant should not be deprived of the fruits of litigation. The plaintiff has obtained a judgment under Or 88 and is entitled to vacant possession under its mortgage.
5. The rule is that the court "*does not make a practice of depriving a successful litigant of the fruits of litigation and locking up funds to which prima face he is entitled pending appeal*" - *The Annot Lyle*, (1886) 11 PD 114,116, *CA; Monk v. Bertram*, (1891) 1 QB 346)
6. In *Federal Commissioner of Taxation Myer Emporium Ltd*,(No.1) (1986) 160 CLR 220 at pgs 221 to 223:
 

*It is well established by authority that the discretion which it confers to order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal. .Generally that will occur when because of the respondent's financial state there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed.* (emphasis added)
7. Pathik J in *Eyre v Estate Management Services Ltd*, [1997] FJHC 234 stated that examples of situations "*where appeal could be rendered nugatory will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance*".
8. I am satisfied that the plaintiff will be in a position to pay damages to the defendant, in the event she is successful in her appeal.
9. The second test is whether the successful party will be injuriously affected by the stay.

10. The defendant states that the stay would not injuriously affect the plaintiff, as there are other assets available to it to support its security position.
11. It is settled law that “a mortgagee, so long as part of the mortgage debt remains unpaid may pursue any or all of the remedies available to the mortgagee at the same time”- **Ram Prasad vs ANZ Banking Group Limited**, (HBC 0121/99S).
12. I am satisfied on the bona fides of the defendants in prosecuting the appeal.
13. I do not find that the grounds of appeal raise novel questions of law and issues of public interest, nor have an effect on third parties. This is a summons under Or 88 for vacant possession.
14. The defendant contends that she has a strong case and should be granted a stay.
15. The Court of Appeal in **AG and Minister of Health v Loraine Die**, (Misc. No 13 of 2010) stated:

*The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal..That hurdle is higher than that of chances of success.(emphasis added)*

16. The defendant's grounds of appeal read as follows;
  - (1) *That the Learned Judge erred in law and in fact in proceeding to determine the Plaintiff's Application for vacant possession in a summary manner under Order 88 of the High Court Rules 1988 when it was clear on the evidence before it, that the Defendant was challenging the legality of the second registered mortgage number 787288 on the grounds that the second registered mortgage in favour of the Plaintiff was obtained through duress, unconscionable conduct and through deceptive and misleading conduct contrary to section 75 of the Commerce Commission Decree 2010.*
  - (2) *That the Learned Judge erred in law and in fact in dismissing the Defendant's Summons for Consolidation of the case Home Finance Company Limited v Evalyne Rajani Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumae; Civil Action No. HBC 140 of 2018 and the case Evelayne Ragni Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumar v Home Finance Company Limited t/as HFC Bank; Civil Action No. HBC 68 of 2018 as the Defendant had met all the requirements in law for consolidation of proceedings*

- (3) That the Learned Judge had failed to exercise its discretion, judicially and lawfully when dismissing the Defendant's application for consolidation when it refused to consider that:
- (i) The two cases arose out of the same transaction;
  - (ii) They had common questions of law and fact;
  - (iii) That the issues under determination in Evelayne Rajni Lata Kunar aka Evalyne Rajni Lata aka Evalyne Kumar v Home Finance Company Limited t/as HFC Bank; Civil Action No. HBC 68 of 2018 was entirely relevant to the present case;
  - (iv) That the Plaintiff in Evalayne Rajni Lata Kumar aka Evalyne Rajni Lata aka Evalyne Kumar v Home Finance Company Limited t/as HFC Bank; Civil Action No. HBC 68 of 2018 are related to the Defendant in the present case and it was the intention that there be a consolidation;
  - (v) That the Solicitors for the Plaintiff in Evelayne Rajni Lata Kumar aka Evalyne Kumar v Home Finance Company Limited t/as HFC Bank; Civil Action No. HBC 68 of 2018 had no say in the issue of consolidation;
  - (vi) That the Court had erred in finding that the Solicitors in Evelayne Rajni Lata Kumar aka Rajni Lata aka Evalyne Kumar v Home Finance Company Limited t/as HFC Bank; Civil Action No. HBC 68 of 2018 had not consented to the consolidation.
- (4) That the Learned Judge erred in law and in fact was bias in dismissing the Defendants application for consolidation of proceedings in a summary manner as it failed to exercise its discretion properly and in accordance to law, and to take into account all relevant considerations before arriving at its decision.
- (5) That the Learned Judge erred in law and in fact in proceeding to determine the Plaintiff's application under O.88, r.1 when at all material times the Plaintiff had not satisfied the requirements of O.88,r.1 that it had a right to foreclose or redeem mortgage number 787288, as at all material times there was prima facie evidence before the Court:
- (i) The second registered mortgage over CT No. 29212 was not a condition of the loan between the Plaintiff and the borrower for the advance of the sum of \$135,000.00.
  - (ii) That there was no consideration paid to the borrower or the Defendant to vary the Agreement for loan to include a second mortgage to CT 29212.
  - (iii) That the Plaintiff had exercised threats and duress to compel the granting of a second mortgage by the unilateral imposition of a 5% penalty interest over and above the agreed rate, if the second mortgage was not signed.
- (6) That the Learned Judge erred in law and in fact by making a finding equating the 5% penalty interest that the Plaintiff threatened to impose on the borrower if the Defendant failed to sign a second mortgage with the 5% penalty imposed by the Agreement in the event of a default.
- (7) That the Learned Judge erred in law and in fact in finding that the Plaintiff was entitled to impose the 5% penalty in terms of clause 7.3 as Modern Investment Services Limited ("MISL") was not in default when the threat was made.

- (8) That the Learned Judge erred in law and in fact in inferring that the Defendant had obtained independent legal advice before executing the second registered mortgage when:
- (i) There was no evidence to support such a finding; and
  - (ii) Where this very issue was a matter for determination in *Evelayne Rajni Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumar v Home Finance Company Limited t/as HFC Bank*; Civil Action No. HBC 68 of 2018.
- (9) That the Learned Judge erred in law and in fact in making a finding that the Plaintiff had not exercised "Duress" and "threats" on the Defendants to sign the second registered mortgage when there was prima facie evidence of duress and threat, without examining witnesses and reviewing evidence that was obtained under discovery in the *Evelayne Rajni Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumar v Home Finance Company Limited t/as HFC Bank*; Civil Action No. HBC 68 of 2018.
- (10) That the Learned Judge erred in law and in fact finding that the Defendant had not established the pre-requisites of economic duress.
- (i) When there was no evidence before him to make such a finding; and
  - (ii) When this very issue was the subject for determination by the High Court in Civil Action No. HBC 68 of 2018 in the case of *Evelayne Rajni Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumar v Home Finance Company Limited t/as HFC Bank*.
- (11) That the Learned Judge erred in law and in fact when it found that the Plaintiff had the right to claim possession of the Defendant's property as she had not paid the monies due to the Plaintiff or redeemed the mortgage when such is not a requirement of law when the validity of the mortgage is being challenged as at all material times, the Plaintiff had more than adequate security to cover its lending to MISL.

17. The principal contention of the defendant is that the plaintiff's summons could not be determined and granted, as the defendant challenged the legality of the second registered mortgage number, on the ground it was obtained by duress, by a threat to impose a 5% penalty. The second mortgage was not a condition for the advance of \$135,000.00. It is further contended that I erred in finding that the plaintiff was entitled to impose the 5% penalty in terms of clause 7.3, when Modern Investment Services Limited (MISL) was not in default.

18. As Mr Sharma pointed out, the defendant has not challenged the loan nor the sums of monies advanced by the plaintiff to MISL. The defendant, in her affidavit in support of the summons for stay states "*MISL defaulted on its loans and the Plaintiff proceeded to call in its securities*". Clause 7.3 of the letter of offer of 24<sup>th</sup> August, 2012, provided for the imposition of a 5% penalty, in the event of default.

19. The offer letter of 4<sup>th</sup> June, 2014, identifies a second registered mortgage. I found the allegation of duress to be baseless and that the defendant had obtained independent legal advice. The defendant did not protest nor challenge the second mortgage, until a lapse of five years after she executed the second mortgage.
20. The plaintiff issued its demand on the mortgage on 9<sup>th</sup> May, 2017. The defendant filed *Evelyne Rajani Lata Kumar aka Evalyne Rajni Lata aka Evelyne Kumar v Home Finance Company Limited*, (Civil Action No. HBC 68 of 2018), alleging duress, undue influence and unconscionable conduct on 14<sup>th</sup> March, 2018, as stated in paragraph 16 of her affidavit in support of stay.
21. In the exercise of my discretion, I declined the summons for consolidation of the summons under Or 88 and Civil Action No. HBC 68 of 2018, which is at the discovery stage, for the reasons set out in my judgment.
22. In my judgment, the grounds of appeal do not have strong prospects of success. The defendant does not have an arguable case.
23. Calanchini P in *Newworld Ltd v. Vanualevu Hardware (Fiji) Ltd* [2015] FJCA172; ABU76.2015 (17 December 2015), at paragraph 16 stated:

*The respondent's principal objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This court is required to consider the bona fide of the appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail it is usually sufficient if an appellant has an arguable case. If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application should be refused.*(emphasis added)

24. Kermode J in *Mohammed v ANZ Banking Group Ltd*, [1984] FJ Law Rep 11 cited the following passage from the judgment of Cotton L.J. in *McLeod v. Jones*, (1883) 24 Ch. 289 :

*This is an application to restrain a mortgagee from exercising his power of sale. Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the Plaintiff applying to pay into Court not what the Judge or the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having been yet taken, swears is due to him on his security. And that is perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe..(emphasis added)*

25. Mr Fa cited the cases of *Harvey v McWatters*, (1948)49 SR (NSW)173 and *Inglis v. Commonwealth Trading Bank of Australia*, (1971-1972) 126 CLR 161. These cases are authority for the proposition that a mortgagee will not be restrained from exercising the powers conferred by a mortgage and, in particular, a power of sale, unless the amount of the mortgage debt, if this is not in dispute, is paid, or unless, if the amount is disputed, the amount claimed by the mortgagee is paid into court.

26. In *Harvey v McWatters*, a mortgagor sought an interlocutory injunction to restrain his mortgagee from selling her property. The dispute was as to the time when and the terms on which a sum of GBP15000 had been paid by the plaintiff to the defendant. Sugerman J decided that it should suffice to give adequate protection to the mortgagee, if a lesser payment is paid into court than would have been required if the ordinary rule had applied.

27. In *Inglis v Commonwealth Trading Bank of Australia*, the plaintiffs filed an action for damages for breach of contract, defamation, fraud and conspiracy against the Commonwealth Trading Bank of Australia, in order to avoid sale of their property by the bank upon mortgage default. Walsh J held that the general rule that a mortgagee will not be restrained from exercising its power of sale will not be departed from merely because the mortgagor claims to be entitled to set off an amount of damages claimed against the mortgagee. The judgment of Walsh J sitting at first instance was upheld by the Full Court of the High Court of Australia which approved his reasons (126 CLR at 168-9).

28. *Halsbury's Laws of England*, Vol 17, (4<sup>th</sup> Ed) at para 455 :

*The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay, if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing.* (footnotes omitted), (emphasis added)

29. I do not find any special or exceptional circumstances in this case.

30. Finally, I consider the balance of convenience test. This test requires a determination of which of the two parties will suffer greater harm from a refusal of a stay pending the determination of the appeal. The plaintiff will be denied the fruits of its litigation, if a stay is granted. I have reached a finding that the appeal will not be rendered nugatory, as the plaintiff is in a position to pay any damages that may be claimed by the defendant.

31. Marshall JA in *Strategic Nominees Ltd v Gulf Investments(Fiji) Ltd*, [2011] FJCA 23; ABU0039.2009(10 March, 2011) referring to the judgment of Walsh J in *Inglis v Commonwealth Trading Bank of Australia*, (*supra*) stated as follows at para 34:

*Walsh J states in terms that the policy of the courts has always been to prevent the lender/mortgagee being stopped or delayed in realising the security. Given the commercial importance of charges and mortgages to lending by banks and financial institutions this policy of the Courts is essential. The continuing policy of the Courts is that liquidity in realising mortgage securities should not be undermined.* (emphasis added)

32. In my judgment, the balance of convenience favours the plaintiff.

### 33. Orders

- (a) The application for a stay is declined
- (b) The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 1500.



*A.L.B. Brito-Mutunayagam*

A.L.B. Brito-Mutunayagam  
Judge  
12<sup>th</sup> December, 2018