IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 139 OF 2015

BETWEEN: **NAMUKA BAY RESORT LIMITED** a duly corporate company having its registered office at Saiyad & Associates, 3 Tukani Street, Lautoka

PLAINTIFF

AND: **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 having its registered office at 360 Victoria Parade, Suva

DEFENDANT

Before: **Hon. Justice Kamal Kumar**

Counsel: **Mr A. K. Singh for the Plaintiff**

Mr D. Sharma for the Defendant

Date of Hearing: **5 August 2016**

Date of Judgment: **30 January 2018**

RULING

(Application for Interlocutory Injunction)

1.0 Introduction

1.1 On 8 December 2015, Plaintiff filed Summons for Injunction seeking following Orders against the Defendant:-

"1. An injunction restraining the Defendant from entering or being present or trespassing on the Plaintiff's properties at Namuka Bay commonly known as Namuka Bay Resorts and further either by itself or themselves their servants or agents or workmen or contractors or howsoever be restrained from advertising or carrying out by any means whatsoever a mortgagee sale of the Plaintiff's property being Native Lease No. 28681 by virtue of powers contained in a registered Mortgage no 714545 and or promoting a mortgagee sale of the property by private treaty and or in any way whatsoever interfering with the business and or operations of the resort until further order of the Court.

2. An order for costs in the action."

*(**"the Application"**)*

1.2 On 10 February 2016, being returnable date of the Application, this Court made following Orders:-

"1. The Defendant is restrained by itself, its agents, servants or howsoever from advertising or carrying out by any means whatsoever a mortgagee sale of the Plaintiff's property comprised and described in Native Lease No. 28681 by virtue of powers contained in the registered Mortgage No. 714545 and or promoting a Mortgagee sale of said property by private treaty or in any way howsoever until further order of the Court.

2. The Affidavit of Mehboob Masuk Ali sworn on 3rd December 2015 and filed on 8th December 2015 be expunged and removed from the file.

3. The Plaintiff is to file and serve fresh Affidavit in Support by 23rd December 2015.

4. *The Defendant to file and serve Affidavit in Opposition by 14th January 2016.*

5. *The Plaintiff to file and serve Affidavit in reply by 3rd February 2016.*

6. *The Parties to file and serve submissions by 17th February 2016.*

7. *Any reply to submission to be filed and served by 28th February 2016.*

8. *By consent matter adjourned to 10th March 2016 at 2.30pm for hearing."*

1.3 The Application was next called on 15 April 2016, when parties were directed to file Submissions and Application was adjourned to 26 May 2016, at 9.30am for hearing which date was vacated and Application was called on 27 May 2016, for mention only.

1.4 On 27 May 2016, Plaintiff's Counsel informed Court that he needs to discuss settlement with Defendant's Counsel and since Mr D. Sharma was away overseas and was returning by end of June the Application was adjourned to 8 June 2016, for mention only.

1.5 On 8 June 2016, the Application was adjourned to 5 August 2016, for hearing when the Application was heard and adjourned for ruling on notice.

1.6 Parties filed following Affidavits in respect to the Application:-

Plaintiff

(i) Affidavit in Support of Mehboob Masuk Ali sworn on 11 December 2015, and filed on 18 December 2015 (**"Ali's 1st Affidavit"**);

(ii) Affidavit in Support of Mehboob Masuk Ali sworn on 29 February 2016, and filed on 4 March 2016 (**"Ali's 2nd Affidavit"**);

Defendant

Affidavit of Salote Tavainavesi in Response to Ali's 1st Affidavit sworn on 13 January 2016, and filed on 14 January 2016 (**"Tavainavesi's Affidavit"**).

2.0 Background Facts

2.1 On 24 November 2003, Plaintiff executed a Mortgage in favour of the Defendant Bank (hereafter referred to as **"the Bank"**) over property comprised and described in I-taukei Lease No. 28681 to secure financial accommodation and interest provided or to be provided by the Bank to the Plaintiff (**"the Mortgage"**).

2.2 The Mortgage initially secured the sum of Fijian Seventy four thousand nine hundred and ninety-two dollars plus interest at the rate of eight (8) percent per annum.

2.3 The Bank advanced Plaintiff further advances and as such the amount secured under the mortgage varied.

2.4 On or about 8 October 2003, Bank approved a loan of $74,992.00 to the Plaintiff for the purpose of acquiring lease from I-taukei Land Trust Board (then known as Native Land Trust Board (NLTB) (hereinafter referred to as **"ILTB"**), construction of staff quarters/dining room, repair road and furnishing four (4) bures, generator costs and consultant/engineer's costs which was to be secured by various securities including Mortgage over proposed lease (ITLB Reference No. 4/11/6929).

This loan was payable on demand but was deferred on the condition that Plaintiff make loan repayments at the rate of $800.00 per month commencing from January 2004.

2.5 On or about 26 January 2005, Bank approved Plaintiff a further loan of $77,100.00 for the purpose of constructing kitchen/dining, purchase 2 bar fridge and water system, survey/architects costs and roading, and working capital to be secured by existing securities and fresh securities including Unregistered Mortgage over ILTB lease (Ref. ILTB 4/11/1405) with repayment of loan increased to $3,760.00 per month commencing from 31 July 2005.

2.6 On or about 5 January 2007, Bank approved additional loan of $12,341.30 to Plaintiff taking total loan amount to $115,488.52 which was to be secured by existing securities with loan repayment varied to $1954.00 per month for nine years or until expiry of term. The new loan was for independent valuers cost, architect fees and working capital.

2.7 On or about 25 April 2008, Bank approved a loan of $1,168,327.00 taking total loan to $1,274,550.76 which was to be secured by existing securities including Mortgage over ILTB lease (Ref 4/11/6929) and fresh securities including Mortgage over lease to be issued (ILTB Ref 4/11/50037898) and Mortgage over Native Lease No. 15866. The purpose of new loan was to acquire land (ILTB Ref 4/11/6929) and adjoining land being Native Lease No. 13366; carry out external works to build six (6) new two (2) bedroom bures, dormitory building (40 beds), renovate existing structure and for professional services. Repayment of loan was varied to $20,050.00 per month for ten (10) years to commence from 30 June 2009.

2.8 On or about 20 November 2009, Bank following review of Plaintiff's account agreed to vary proposal of loan and repayment of loan whereby Plaintiff had to pay $15,500.00 per month (interest only) for six (6) months from March to September 2010 and then $22,100.00 per month (principal and interest) until loan is fully paid.

2.9 On 2 December 2009, Plaintiff wrote to the Bank requesting that repayments commence from June 2010.

2.10 On 30 March 2010, Bank wrote to Plaintiff advising that further to Plaintiff's request and review of Plaintiff's account, Bank has agreed for loan repayment of $16,000.00 per month (Interest & Insurance) be from July 2010 to December 2010 with review in September 2010.

2.11 On 15 September 2010, Bank wrote to Plaintiff advising that further Plaintiff's request and review of Plaintiff's Account Bank has agreed to:-

(i) Leave arrears of three hundred twenty two thousand dollars ($322,000.00) in the Account;

(ii) Repayment recovery and interest only of sixteen thousand dollars ($16,000.00) monthly is deferred to commence with effect from December 2010 to June 2011 thereafter increasing to full repayment;

(iii) Repayment would be subject to renew by April 2011 or every six (6) months;

(iv) Arrears standing on the account was to be cleared before the start of normal repayment as undertaken by the Company.

2.12 On 30 September 2010, Bank wrote to Plaintiff advising that at Plaintiff's request Bank agreed to vary specific loan application to complete resort construction comprising stage 1 as per approved plan and specification and subsequently approved variation.

2.13 On 22 March 2011, Bank wrote to Plaintiff advising that Plaintiff "has agreed to write back arrears of $16,000.00" on Plaintiff's Account "as at 1st January 2011 due to delayed completion of project" and partial repayment covering interest and insurance only of $20,000.00 month was to commence from March 2011 to June 2011 and full repayment of $32,000.00 (principal, interest and insurance) to commence from July 2011 until loan is paid in full.

2.14 In March 2008, Plaintiff entered into an Agreement with Maisuria Design Limited and Messrs Patel and Sharma whereby Plaintiff confirmed Maisuria Design Limited as Project Manager and Messrs Patel and Sharma as independent solicitors and advisor for the project.

2.15 On 30 November 2006, Plaintiff wrote to Bank providing progress report and requesting for bridging finance.

2.16 On 26 May 2010, Plaintiff wrote to The Honourable Prime Minister and Minister of Finance advising that:-

(i) Plaintiff has received completion certificate from Nadroga Rural Local Authority and it is in the process of applying for a licence and organising official opening of the Resort;

(ii) Drawback is road condition and connection of electricity for which Plaintiff needs assistance;

(iii) Requesting for subsidy for FEA to supply electricity;

(iv) Plaintiff had decided to have the hotel opened before 30 June 2010.

2.17 By Notice of Demand dated 30 October 2014, Bank demanded payment of the sum of $2,598,299.79 from Plaintiff being account balance as at 30 September 2014, with interest at 13.10 % per annum from 1 October 2014 to date of payment.

3.0 APPLICATION FOR INTERLOCUTORY INJUNCTION

3.1 The principles relating to Application for Interlocutory Injunction has been well settled in that for the Court to grant Interlocutory Injunction Court must be satisfied that:-

(i) There is a serious question to be tried;

(ii) Balance of Convenience favour granting of the interlocutory injunction:

American Cyanamid *v.* Ethicon Co. Ltd [1975] 1AllER 504; **Mohammed *v.* ANZ Banking Group Ltd** [1984] 30FLR 136; **Roxy Motor Parts *v.* Habib Bank Ltd** [2005] FJCA 49, ABU0060J 2004S (15 July 2005)

3.2 In **Strategic Nominees Ltd (In Receivership) *v.* Gulf Investments (Fiji) Ltd** [2011] FJCA 23; ABU 0039 2009 (10 March 2011) his Lordship Justice Marshall (as then he was) cast some doubt as to applicability of the principle in ***American Cyanamid*** case in respect to Interlocutory Injunction Application to restrain mortgage sale.

3.3 His Lordship Justice Marshall (as he then was) quoted the following comments of the trial Judge, his Honour Justice Walsh and High Court Judge his

Lordship Chief Justice Barwick from **Inglis *v.* Commonwealth Trade Bank of Australia** [1971-1972] 126 CLR 161.

His Lordship Justice Walsh:

"But the proprietary rights as owner which the plaintiffs have are rights which are subject to and qualified by the rights over the property given to the defendant by the mortgage. If the defendant exercises the latter rights or threatens to do so that is not, as such, an act or a threatened act in contravention or infringement of the plaintiffs' proprietary rights". (page 166)

"In my opinion the principles on which the Court has always acted do not permit the Court to intervene because of the existence of those claims, and I am of the opinion that I should not grant the application." (pages 167-168)

His Lordship Chief Justice Barwick:

"The case falls fairly, in my opinion, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage." (page 169)

3.4 His Lordship Justice Marshall (as he then was) in referring to **Mobil Oil Co. Ltd. *v.* Rawlinson** [1981] 43 P & CR 221; **Citibank Trust Ltd *v.* Aviyor** [1987] 3 All ER 241 and **National Westminster Bank Plc. *v.* Skelton** [1993] 1 All ER 2&2 cases delivered after ***American Cyanamid*** and ***Inglis*** stated as follows:-

"37. Because there are no relevant proprietary interests or other legal interests in place and because the policy of the law is 'no restraint' none of these cases even mention American Cyanamid and the quia timet interim injunction principles.

But in Fiji the only case ever cited in the Samuel Keller line is Inglis. The later cases in the line were not before the Fiji courts in any of the cases discussed above such as Naigulevu. This has lead to the introduction of, in a wholly inappropriate context, American Cyanamid principles. At least in the earlier Fiji cases Inglis has been, after much irrelevant discussion followed. I believe the decision in this case is the first occasion what in any common law jurisdiction that the Samuel Keller/Mobil Oil principle has not been applied in a case that falls four square within the factual matrix of cases such as Samuel Keller, Inglis and Skelton. It is not in the interest of the common law jurisdiction in Fiji for this to happen."

3.5 His Lordship expressed the view that ***American Cyanamid*** principle only applies to restrain the Defendant from committing a wrong.

3.6 However the courts in Fiji has over the years applied both principles in dealing with Application for Interlocutory Injunction to restrain mortgagee sale as the principles in ***Inglis*** and ***American Cyanamid*** does not contradict but supplement each other.

Roxy Motor Parts (Supra) and **Mohammed *v.* ANZ Banking Group Ltd** [1984] 30 FLR 136 (2nd August 1984)

3.7 In **Mohammed *v.* ANZ Banking Group Ltd** (1984) 30 FLR 136 (2 August 1984) his Lordship Justice Kermode (as he then was) stated as follows:-

"In 1972 in the case of Inglis & Another v. Commonwealth Trading Bank of Australia 126 C.L.R. 161 the High Court of Australia in a very short judgment delivered by Barwick C.J. dismissed an appeal from Walsh J's decision dismissing an application for an interim injunction seeking to restrain a mortgagee exercising powers conferred by a mortgage. The learned Chief Justice said:

'I have not heard anything, nor been referred to any authority,

which causes me in the least to doubt the correctness of the refusal of Walsh J. to grant the interlocutory injunction sought by the appellant or the reasons which he gave for that refusal. I find no need to discuss the arguments offered, and the authorities referred to, by the appellant. Such of them as were relevant are sufficiently answered in his Honour's reasons.

The case falls fairly, in my opining, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage.'

Mr Koya argues that the granting of an interlocutory (interim) injunction is still governed by equitable principles. There is no doubt that in an appropriate case the Court is empowered to restraint a mortgagee exercising power of sale. Mr Koya relies on the case of American Cyanamid Co. v. Ethicon Ltd. [1975] UKL 1; 1975, A.C. 396 and has put forward several propositions supported by a number of authorities.

Those authorities support certain principles enunciated in the Cyanamid case I would consider on the balance of convenience that damages would be an adequate remedy to the plaintiff."

3.8 His Lordship further went on to say that:-

"If I had to consider the principles enunciated in the Cyanamid case I would consider on the balance of convenience that damages would be an adequate remedy to the plaintiff."

3.9 In conclusion his Lordship stated as follows:-

"I do not consider however, I can or should interfere with the Bank's exercise of powers conferred on it by the said mortgage. It has a statutory power to sell under the mortgage and this case is in any event a case where an interim injunction would not be granted because in my view damages would be an adequate remedy if the plaintiff were to succeed on any of her claims against the Bank."

3.10 In **Propst *v.* ANZ National Bank Limited** [2012] NZHC 1012 (11 May 2012) his Lordship Justice Gilbert in dealing with Application to restrain mortgagee's power of sale under the heading Legal Principles stated as follows:-

"The Plaintiff must show that there is a serious question to be tried. The Court must consider where the balance of convenience lies and whether overall justice is best served by granting or withholding the injunction in all of the circumstances of the particular case.

Unless the validity of a mortgagee's power of sale has been impeached, the normal rule is that an injunction restraining the exercise of that power will not be granted unless the mortgagor pays the amount secured by the mortgage to the court.

In such cases, the court will consider what sum, if any, should be paid to the court to protect the mortgagee."

3.11 His Lordship cited ***American Cyanamid*** and ***Parry v. Grace*** [1981] 2 NZLR 273 (HC) as authority for above principles.

3.12 In light of the decisions in ***Mohammed v. ANZ Banking Group Ltd***; ***Roxy Motor Parts Ltd***; ***Strategic Nominees***; ***Westpac Banking Corporation v. Adi Mahesh Prasad*** it is apparent that depending on particular circumstances of the case both principles are equally applicable to Application for Interlocutory Injunction to restrain exercise of mortgagee's power under the mortgage.

3.13 In any event the grant of injunction is a discretionary remedy and as such the Court should be able to exercise its discretion to do justice between the parties

within the confines of established legal principles and law.

3.14 The Plaintiff in this case has not challenged the validity of the mortgage or Bank's power of sale granted pursuant to the mortgage but has challenged the manner in which the loan transaction was handled.

3.15 Under the circumstances the Plaintiff is required to deposit the balance debt owing to the Bank in Court to enable the Court to restrain exercise of Bank's power of sale under the mortgage. ***Inglis v. Commonwealth (Supra)***.

3.16 Since the Plaintiff has not paid the mortgage debt in Court it is not entitled to the Interlocutory restraining Orders it is seeking in this matter.

3.17 However in the interest of justice I would consider as to whether the Plaintiff is entitled to interlocutory injunction relief under the principles of ***American Cyanamid***.

Whether there is a serious question to be tried?

3.18 Plaintiff has challenged the manner in which the Bank had conducted the manner which tender for construction of the villas and disbursement of loan funds were handled by the Defendant.

3.19 It is well established that when granting credit facilities to customers and in exercise of power of sale under mortgage. Bank as mortgagee is not acting as trustee of the mortgagor.

3.20 In **Warner v. Jacob** [1882] 20 Ch D 220 his Lordships Justice Kay stated as follows:-

> ***"The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be***

evidence of fraud."

3.21 This principle has been cited and adopted in many cases dealing with mortgagee's exercise of power of sale;

Tubunavere *v.* Colonial National Bank [2007] FJHC 129; Civil Action No. 486 of 2000 (2 March 2007)

Myong Chung Kim *v.* Fiji National Provident Fund [1998] FJHC 172: HBC 568j of 1998 (14 December 1998).

3.22 Plaintiff in Ali's 1st Affidavit makes various allegation against the Bank which will be dealt in turn as follows:-

The Project

Plaintiff alleges that Plaintiff submitted application for loan for forty (40) villas but Bank approved loan for four (4) double villas, a modest kitchen and four (4) backpackers room and this could secure revenue constraints to Plaintiff.

If the Bank did not approve the loan for forty (40) villas then Plaintiff had a choice to not to accept the reduced loan and seek finance from elsewhere.

Plaintiff after accepting the loan approved by the Bank cannot now complain that it was not what it asked for initially.

The building contract

Plaintiff at paragraphs 12 to 14 of Ali's 1st Affidavit alleges that the Bank had set up the procedure for contracting out construction of the project, tender was accepted by Consultant who reported directly to the Bank. At paragraph 15 of Tavainavesi's Affidavit, the Bank denies the allegation and states as follows:-

(i) Plaintiff entered into an Agreement with Maisuria Design Limited and Patel and Sharma, Solicitors in March 2008. (Annexure "R" of Tavainavesi's Affidavit);

(ii) The said Agreement was drawn by Plaintiff's then Solicitor, Patel and

Sharma;

(iii) Maisuria Design Limited (**"Maisuria"**) was appointed by the Plaintiff right from the beginning and Maisuria was involved from preliminary and development work as confirmed by letter dated 30th November 2006, from Plaintiff to the Bank. (Annexure S of Tavainavesi's Affidavit);

(iv) Plaintiff endorsed payment of fees to Maisuria.

Sub-Standard Building Work

There is no evidence that Plaintiff took any action against builder or consultant in respect to the project.

Obviously the Bank has no say in respect to the standard of building works which was supervised by Plaintiff and Maisuria.

Inordinate delay

Plaintiff at paragraphs 16 to 19 in Ali's 1st Affidavit blames the consultant and builder for delay in completing the project and commencing construction prior to approval of building plans. If the consultant was engaged by Plaintiff as is stated in Tavainavesi's Affidavit, then the Bank should not be held responsible.

In fact the Bank assisted the Plaintiff by writing back loan repayment arrears of $16,000.00 (paragraph 17 of Tavainavesi's Affidavit refers).

Default to pay mortgage

At paragraph 21 to 23 of Ali's 1st Affidavit the Plaintiff alleges that Bank called for a tender on 18 July 2018, for sale of land and incomplete buildings and listed the Plaintiff company with Data Collection Bureau.

At paragraph 22 of Tavainavesi's Affidavit, the Bank states that delay in construction of Bure was not attributed to the Bank and that they had to take action by serving Demand dated 30 October 2014 and not 18 July 2014, to minimise its loss.

Any prudent financier will take such an act if arrangements are not kept as was in this case.

Unfulfilled Undertaking

At paragraph 24 of Ali's 1st Affidavit Plaintiff alleges that Bank agreed to fund $80,000.00 for construction of road and $20,000.00 was to be paid as electricity bond but failed to do so.

At paragraph 20 of Tavainavesi's Affidavit the Bank denied any fund being allocated for building road leading to the project site on the ground that it is a cane access road and all farmers in that area are levied for road maintenance.

Bank also states that they did not pay $20,000.00 bond for electricity on the ground that bond was increased to $56,101.00 and Plaintiff could not provide the difference when Plaintiff wrote to Prime Minister's office seeking subsidy (Annexure "T" of Tavainavesi's Affidavit).

At paragraph 25 of Ali's 1st Affidavit Plaintiff alleges that he complained to the Bank about the consultant and caused Plaintiff's Solicitors to write to Consultant and terminate its contract when he was summoned by Bank's Manager in Nadi who informed him that if consultant was not re-instated then Bank would withdraw loan and that he had to agree under duress.

At paragraph 24 of Tavainavesi's Affidavit the Bank denies that Plaintiff agreed under protest and states that payments could only be made once it was certified by the consultant.

At paragraph 26 of Ali's 1st Affidavit Plaintiff alleges that no quantity surveyor was appointed for the project.

At paragraph 25 of Tavainavesi's Affidavit the Bank states that it cannot comment unless specific particulars are provided.

In any event it was Plaintiff's project and as such it had all the right to appoint quantity surveyor and if it failed to do so it acted and suffered any loss it do so at its own peril.

At paragraph 27 of Ali's 1st Affidavit he states that he had to inject $80,000.00 of his own money to complete the project and start operation.

At paragraph 26 of Tavainavesi's Affidavit the Bank states that it cannot comment on what is stated at paragraph 27 of Ali's 1st Affidavit in the absence of any evidence and further says that since project was completed in 2011, Plaintiff failed to make a single loan repayment.

Unfair and unconscionable conduct of Bank

At paragraph 28 of Ali's 1st Affidavit Plaintiff alleges that the Bank made payments without visiting the project and conferring the cost and that the Bank would get Plaintiff to sign blank forms for release of funds about which it lodged complaint with Commerce Commission of Fiji.

At paragraph 27 of Tavainavesi's Affidavit the Bank states that it had verified all amounts before it was disbursed which is evidenced by changes in amounts the details of payment is highlighted at paragraph 27 of Tavainavesi's Affidavit.

From the Affidavit evidence this Court finds that Plaintiff did not act unfairly and unconscionably towards Plaintiff. In fact there is no evidence that the Bank made any payments which did not relate to the project or the mortgaged property.

If the Bank did so then Plaintiff would have taken action which it did not.

3.23 I find that the Bank at all times acted in good faith towards the Plaintiff and in contrast Plaintiff despite several undertakings failed to keep its side of the bargain.

3.24 I therefore find that there is no serious question to be tried as far as Defendant's right to exercise its rights under the mortgage is concerned.

Balance of Convenience

3.25 One aspect of balance of convenience is that whether damages would be an

adequate remedy.

3.26 The mortgaged property is a Hotel/Commercial lease and as such damages (if any) suffered by the Plaintiff as a result of sale of the mortgaged property is ascertainable and Bank's ability to pay any damages assessed by the Court is not doubted.

3.27 Other facts which tips the balance of convenience in favour of the Bank are as follows:-

(i) Bank commenced mortgagee sale/legal action in October 2014;

(ii) Plaintiff was granted loan for the project which loan needs to be paid;

(iii) Project was completed in 2011, and since then Plaintiff has made no attempts to make any loan repayment;

(iv) No attempt has been made by Plaintiff to deposit loan repayment arrears or any or any substantial amount acceptable to Court in Court towards Bank debt, **Inglis**;

(v) Bank as financial institution and commercial entity needs to maintain its financial position by creating write-offs if not able to recover debt fully by mortgagee sale or otherwise;

(vi) Bank debt is increasing due to interest and fees;

(vii) It is apparent that Plaintiff has used the Application to delay the inevitable.

3.28 At this point I wish to echo the following comments made in ***Strategic Nominees*** case:-

"Securisation of loans together with guarantees of debts have now for a very long time been at the centre of commercial lending by banks and other financial institutions. They are important legal

mechanisms essential to the flow of lending required in a market economy.

Because of their importance equity and common law courts have always insisted that the mortgagees remedies upon default including power of sale remain unrestrained by the courts.

This is shown by a succession of recent cases since 1970. What they all have in common is an attempt by the mortgagor to set up a claim for breach of contract, wilful default or even defamation against the mortgagee. Then an attempt is made to restrain the sale of the mortgaged property until the court can adjudicate upon the set up claim. The mortgagor hopes that these usually artificial and thin claims will somehow win the day and the mortgage will be wholly or partially discharged and the companies will be able to keep its property. If the mortgagor finally loses his set up claim he will have delayed the day of payment. That is also his objective.

It is not in the interest of Fiji for the law to be changed in this way because Fiji needs bank and financial institutions whether from Fiji or from overseas to be able to make loans secured on property. In many cases such loans are instrumental and successful in saving businesses on the edge of collapse or of ensuring profitable development where otherwise there would be a shortage of capital and finance. Some of the time the business plan of the debtor and mortgagor fails. In that situation the mortgage security must fall into the bank or financial institution within the law quickly and without being clogged and delayed by court actions that are not within the framework of law applicable to such securities."

3.29 Lord Cottenham when dealing with application to set aside mortgagee sale in **Jones *v.* Matthie** 11 Jur. 504 made the following comments which is quoted in ***Warner v. Jacob (Supra)***:

"Such a power as this may, no doubt, be used for purposes of

oppression, but when conferred it must be remembered that is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing. If the power is exercised for fraudulent purposes this Court will interfere, and as in other cases, if the party actually deposits in Court the amount due, it will not allow the power to be exercised at all."

3.30 It is apparent that the Plaintiff not long after obtaining credit facilities from the Bank was facing difficulty in meeting its obligations to the Bank which left the Bank with no option but to recall its debt by exercising its powers under the mortgage and there is no evidence of any fraud on part of the Bank.

3.31 I therefore find that balance of convenience favours the Bank.

3.32 I must clarify at this point that even if balance of convenience favoured the Plaintiff it will not have any bearing on this Ruling on the ground that Plaintiff has failed to pay the mortgage debt in Court as conditions for granting of injunction in the absence of challenge to validity of the mortgage or lawfulness of the exercise of Bank's power of sale.

Inglis v. Commonwealth; ***Strategic Nominees***; ***Mohammed v. ANZ Banking Group Ltd (Supra)***

4.0 CONCLUSION

4.1 In view of what has been said above I do not think that the Bank should be stopped from exercising its power of sale any further.

5.0 Accordingly I make the following Orders:-

(i) Interim Injunction granted on 10 December 2015, is hereby discharged/dissolved;

(ii) Plaintiff's Application for Interlocutory Injunction by Summons dated 3 December 2015, be dismissed and struck out;

(iii) Plaintiff is to pay Defendant's costs of the Application assessed in the sum of $3,000.00 within twenty-one (21) days from date of this Ruling;

(iv) Substantive matter is to take its normal course and Notice of Adjourned Hearing be served on parties for this matter to be called before the Master of the Court.

K. Kumar
JUDGE

At Suva
30 January 2018

Maqbool & Co. for Plaintiff
Gibson & Co. for Defendant