

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 224 OF 2016

BETWEEN : **FUNWORLD CENTRE (FIJI) LIMITED** a duly incorporated limited liability company having its registered office at 7 Yasawa Street, Lautoka, Fiji.

PLAINTIFF

AND : **BANK OF BARODA** a body corporate duly incorporated in India, having its Head Office at Mandvi, Baroda, India and duly registered in Fiji under Part X of the Companies Act and having its Head Office at 86-88 Marks Street, Suva, Fiji.

DEFENDANT

Appearances : Ms A. Chand for the plaintiff
: Mr D.S. Naidu for the defendant
Date of Trial : 13 and 14 May 2019
Date of Closing Submissions : 7 August 2019 (defendant), 28 August 2019 (plaintiff)
Date of Oral Judgment : 13 September 2019
Date of Written Judgment : 23 September 2019

J U D G M E N T

Introduction

- [01] On 13 September 2019 I orally announced the judgment and told the parties that I will issue my written judgment at a later date. This is my written judgment.
- [02] The plaintiff brought this claim against the defendant seeking damages caused to the plaintiff's hotel and its fixtures and contents during the period the defendant had possession and control of the hotel under a purported mortgagee sale process.
- [03] The defendant denied and disputed the plaintiff's claim and put the plaintiff to the strict proof thereof and counterclaim against the plaintiff among other things

the sum of \$622,262.00 being the balance payable under the mortgage and securities with interest at the rate of \$150.00 per day from 5 January 2017.

- [04] The plaintiff denied the counterclaim and allegations pleaded in the statement of defence and put the defendant to the strict proof thereof.
- [05] At the trial both parties gave evidence and called witnesses and filed their respective closing submissions.

Facts

- [06] Funworld Centre (Fiji) Limited, the plaintiff borrowed a sum of \$4 million from Bank of Baroda, the defendant in 2008. The plaintiff encumbered the land on which its hotel and resort known as 'Fun World Plaza Hotel' is situated (*'the hotel'*).
- [07] On 17 October 2014, the defendant took possession and control of the hotel and its contents evicting the plaintiff and its employees and/or agents. The defendant had exclusive control of the hotel until 7 November 2014. In the meantime, the defendant had a sale and purchase agreement with Tappoo Group of Companies for the sale of the mortgaged property and Tappoo came into possession of the property and continued to be in possession until it was released to the plaintiff.
- [08] On 7 November 2014, the defendant released the hotel to the plaintiff after the plaintiff paid a sum of \$3 million in the redemption of the mortgage.
- [09] After the plaintiff got repossession, according to the plaintiff, the plaintiff had a stock-taking and it revealed that a number of their items were missing such as televisions from 135 rooms, kettles, fridge, linens and utensils.
- [10] The plaintiff claimed general damages, special damages, exemplary damages, interest and costs for loss suffered as a result of the conduct and actions of the defendants.

The Evidence

Plaintiff's evidence

- [11] The plaintiff called 3 witnesses namely Imraaz Ali (*'PW1'*), Shandil (*'PW2'*) and Kavita (*'PW3'*).

[12] PW1's evidence was that:

- (a) He was General Manager at the plaintiff company at the time the defendant took possession of the hotel.
- (b) Prior to the take-over by the defendant, the hotel was fully operation and had a good clientele.
- (c) A Ms Pritika Singh took possession of the hotel. She did not do any stock taking at the time.
- (d) Ms Singh told us to immediately vacate the premises. She did not have any court order for mortgagee possession. She did not give any notice of the possession.
- (e) All guests, employees and agents of the plaintiff were told to leave the hotel.
- (f) The plaintiff and their agents were not allowed back in the hotel premises that the plaintiff was unable to operate the hotel.
- (g) After taking possession of the hotel, the defendant sold the hotel to Tappoo Group of Companies.
- (h) The plaintiff paid the debt on 7 November 2014. The defendant then released the property to the plaintiff. The hotel keys were handed over in the lobby area, when he notice broken lights in the lobby area and he raised concern about it.
- (i) He inspected the hotel and he found that the hotel was badly damaged. He informed the defendant about it. The defendant came to inspect but did not do anything.
- (j) He took an inventory of all the missing and damaged items. The damage was around \$447,645.
- (k) He said important hotel documents such as invoices were missing. The documents were kept in the cupboard in the reception area.
- (l) The plaintiff lodged a police complaint about the missing items and the police advised that this is a civil matter.
- (m) He said the electricity costs were approximately \$1,000.00 the time the possession was given back.

[13] PW 2 was the Manager of the defendant at the time the defendant took over the hotel. His evidence was as follows:

- (a) He was personally looking after the hotel account as it was a large account.
- (b) He was not at work on the day of take-over by the defendant.
- (c) He said no stock-stake or inventory list was prepared at the time of take over.
- (d) He told the court that no court order was sought prior to taking possession.
- (e) He said the plaintiff redeemed the mortgage, keys were handed over to the PW1, and PW1 informed him that the light in the lobby area was damaged and several items were missing from the hotel.

[14] PW3 who is an accounts clerk for the plaintiff. His evidence was that:

- (a) The plaintiff was still recovering from the loss suffered as a result of the defendant's take-over, and he is still purchasing new items for the hotel to replace the items that went missing.
- (b) He had sighted the profit and loss statement of the plaintiff ended 31 December 2014 and it states the loss of items as \$447,645.00.
- (c) He said no theft is mentioned in that financial statement.
- (d) Under cross-examination he admitted that he was referring to an unaudited financial statement.

Defendant's evidence

[15] The defendant called only one witness namely Ashwin Ritesh Kumar ('DW1'). He in his evidence said:

- a) The Hotel was damaged in a flood that came in 2012 but was unable to confirm whether the damage occurred as a result the flood.
- b) Stock take was not done to ascertain the items that were in the hotel at the time of the takeover by the defendant.

- c) The bank advertised the mortgagee sale in the local newspapers. The plaintiff did not clear mortgage but accepted the tender of Tappoos.
- d) The defendant took possession through security officers. At that time there were some guests in the hotel.
- e) The defendant did not remove any of the items from the hotels.
- f) The plaintiff undertook to pay the remaining balance of \$35, 000.00 within 14 days but failed.
- g) During cross examination, he confirmed that the only notice served on the plaintiff was on the day of the take-over where the plaintiff was informed to immediately vacate the hotel premises. He also confirmed that no proper statutory demand notice was served on the plaintiff prior to the take-over of the Hotel.
- h) He said the defendant entered into a Sale and Purchase Agreement with Tappoos for the Sale of the plaintiff's Hotel and confirmed that the purchaser had taken possession of the Hotel after the defendant took possession of the Hotel from the plaintiff.
- i) Under cross examination he confirmed that the interest figure is yet to be cleared. He confirmed that total sum has been cleared however it is not known what the interest is remaining at the time the outstanding sum was cleared.

Discussion

[16] The plaintiff claims out of the defendant's take-over of the plaintiff's encumbered property for non-payment of the loan granted to the plaintiff by defendant. The plaintiff had obtained a loan of \$4 million from the defendant and defaulted.

- [17] The defendant purportedly exercising their right under mortgagee sale took possession of the property removing the plaintiff's employees and/or agents from the hotel. The defendant had such possession from 17 October 2014 to 7 November 2014, about 3 weeks on. On 7 November 2014, the defendant released the property to the plaintiff after the plaintiff made payment of \$3 million. In the meantime, the defendant had a Sale and Purchase Agreement with Tappoo. Tappoo was in possession of the property following the agreement until possession was released to the plaintiff.
- [18] Having had repossession of the property, the plaintiff took an inventory and inspection and found that the missing and damaged hotel items (the full details appear in the statement of claim).
- [19] It is to be noted that the defendant did not provide an inventory to the plaintiff when he took possession of the property and that the plaintiff's employees or agents were not allowed to visit the hotel.
- [20] It was not in dispute that the plaintiff took possession of the property on 17 October 2014 and released it to plaintiff upon payment of \$3 million on 7 November 2014 and that the defendant had a Sale and Purchase Agreement with Tappoo and they (Tappoo) was in possession until release of the property.
- [21] It is also to be noted that the defendant release the property to be plaintiff upon payment of \$3 million unconditionally.
- [22] The plaintiff immediately brought the issue of missing and damaged hotel items to the notice of the defendant. PW 2 who was the Manager of the plaintiff confirmed in his evidence that PW 1 informed him that light in the lobby was damaged.
- [23] The plaintiff lodged a police complaint about the missing items but was not investigated, and the police closed the case as it was in their opinion, a civil case.
- [24] PW 2 who was the Manager of the defendant at the time and in charge of the plaintiff's loan account told the court the take-over proceeded without any court order.

- [25] A mortgagee who goes into possession becomes the manager of the charged property. He thereby assumes a duty to take reasonable care of the property. This requires him to be active in protecting and exploiting the security, maximising the return, but with taking undue risks (see: Halsbury's Laws of England 5th Ed Mortgage (Vol. 77 (2016)), para 429).
- [26] Further, a mortgagee who goes into possession of the Mortgaged property and thereby excludes the Mortgagor from control of it, is bound to the account to the Mortgagor, not only for the rents and profits which he actually receive, but also for the rents and profits which, but for his willful default or neglect, he might have received; ... (see Halsbury's Laws of England 5th Ed Mortgage (Vol. 77 2016)), para 430).
- [27] Order 88 of the High Court Rules 1988, as amended (HCR), provides for mortgage actions, such as action for possession or payment.
- [28] There is no evidence before the Court that the defendant sought recourse to O 88, HCR before taking possession of the mortgaged property.
- [29] There is also no evidence before the court that the defendant gave notice to plaintiff before getting into possession of the mortgaged property.
- [30] The defendant's position was that he was taken in light of the defendant's acceptance of the tender under the mortgagee sale process and the entry by the defendant was to preserve the mortgaged property to enable the successful tenderers to take over. The tender process was completed but the plaintiff was able to persuade the successful tenderer not to proceed with purchase thereby giving the plaintiff an opportunity to redeem its mortgage by payment of the mortgage debt namely \$3 million on 7 November 2014 and balance of \$700,000.00 on or before 21 November 2014. Unfortunately this did not happen. The defendant was not bound to give an audit or prepare a checklist when handing back possession.
- [31] Section 79(1) of the Property Law Act states "*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 in selling the mortgaged property,...*"

- [32] The defendant led no evidence that they complied with Section 79 of the Property Law Act and/or provided the benefit and protection of S.80 (2) of the Consumer Credit Act.
- [33] On the evidence, I find that the defendant had proceeded with mortgagee sale and took possession of the mortgaged property irregularly. I also find that the defendant had a duty to take reasonable care of the mortgaged property while they were in possession and control of it, and that the defendant is bound to account to the plaintiff (Mortgagor) for their willful default or neglect to protect and care of the mortgaged property. It follows that the defendant is liable to pay damages to the plaintiff for missing damaged hotel items.
- [34] PW 1, the Manager of the plaintiff company was a credible witness who in his evidence said: he checked each room in the hotel and found hotel items were missing from each room and door locks were broken and he immediately brought this to the notice of the defendant. PW 2 who was the Manager of the plaintiff at the time confirmed in his evidence that the visited the hotel upon a complaint of missing items and found that light in the lobby area was damaged.
- [35] On the evidence, I find that the hotel items were missing and damaged while the defendant was in the possession and control of the mortgaged property.

Damages

- [36] I now proceed to assess the damages for missing and damaged hotel items.
- [37] The plaintiff claims a sum of \$447,645 for missing and damaged hotel items. The plaintiff has given a full list of the missing items. A sum of \$50,940.00 is claimed for suffered loss of income and a further sum of \$1,094.48 for electricity consumed by the defendant. In addition, the plaintiff claims a sum of \$800,000.00 as general damages.
- [38] The above figures are plaintiff's own calculations. The plaintiff did not sufficiently explain how they came into those figures. The plaintiff's evidence was that hotel items were missing and damaged. There was no evidence as to when the missing items were purchased and whether they were brand new or used ones. There was also no evidence on whether the damaged items were partly or damaged beyond repair.

- [39] In order to prove loss of income, the plaintiff did not provide their audited profit and loss accounts in the previous years and in the year of taking possession back from the defendant.
- [40] I would accept the defendant's submission that the plaintiff was able to substitute loss and damages of \$499,678.40 or loss of income as a result of the takeover through unsubstantiated and unsigned accounts tendered by them during the trial.
- [41] Taking all into account, I am prepared to allow a sum of \$150,000.00 as damages which include general damages of \$50,000.00. I would decline pre-judgment interest.
- [42] As a successful party, the plaintiff is entitled to costs of these proceedings, which I summarily assess at \$3,000.00.

Counterclaim

- [43] The defendant counterclaimed the sum of \$622,262.00 with daily interest of \$150.00 per day with effect from 5 January 2017, the sum of \$150,000.00 as special damages and \$100,000.00 as general damages.
- [44] As I said, the mortgaged property was released to the plaintiff upon payment of \$3 million unconditionally. However, the defendant did not issue discharge of the mortgage when the plaintiff asked for discharge of the mortgage, the defendant demanded withdrawal of this action.
- [45] The defendant came into possession of the mortgaged property irregularly by removing the plaintiff and its employees and/or agents.
- [46] The counterclaim was not proved by the defendant and they are not entitled to claim any damages as the takeover has been declared as "irregular". In the circumstances, I would dismiss the counterclaim.

The result

1. There shall be judgment in favour of the plaintiff in the sum of \$150,000.00.

2. The defendant's counterclaim is dismissed.
3. The defendant will pay summarily assessed costs of \$3,000.00 to the plaintiff.

M. H. Mohamed Ajmeer
23/9/19

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

23 September 2019

Solicitors:

Anishini Chand Lawyers, Barristers & Solicitors for the plaintiff

Pillai Naidu & Associates, Barristers & Solicitors for the defendant

