

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 147 of 2022

BETWEEN: **VISHAL NADAN** of Malolo, Nadi, Shareholder of Dominion Transport Limited in the republic of Fiji Islands.

FIRST PLAINTIFF

A N D: **DOMINION TRANSPORT PTE LIMITED** a limited liability company having its registered office at Malolo, Nadi in the Republic of Fiji Islands.

SECOND PLAINTIFF

A N D: **HOME FINANCE COMPANY LIMITED** a financial institution established under the Banking Act having its registered office at 371 at Victoria Parade, Suva.

FIRST DEFENDANT

A N D: **SATYA NADAN** of Malolo, Nadi, in the Republic of Fiji Islands.

SECOND DEFENDANT

Appearances: Mr. Sushil Sharma with Mr. Nabua A. for the Plaintiffs
 Mr. Lajendra M. for the first Defendant (Home Finance Company Limited)
Date of Hearing: 30 August 2022
Date of Judgment: 10 March 2023

JUDGMENT

INTRODUCTION

1. Before me is a Motion filed by the plaintiffs, Vishal Nadan (“**Vishal**”) and Rahul Nadan (“**Rahul**”). They seek the following Orders:
 - (a) that leave be granted to Vishal and Rahul to institute proceedings on behalf of Dominion Transport Pte Limited (“**DTCPL**”) which was wound up by the Court on 25 October 2021.
 - (b) that, until further Orders of this Court, the defendants either through their agents, servants, employees or whosoever be restrained from carrying out a sale or mortgagee sale of the assets which are under the Bills of Sale or Mortgaged by the Home Finance Company Pte Limited (“**HFCPL**”).

- (c) that the Winding Up Order made by this Court in Winding Up Action No. HBE 20 of 2021 be stayed pending the outcome of this application.
2. The application is supported by an affidavit of Vishal sworn on 20 May 2022 and a supplementary affidavit of Rahu sworn on 14 June 2022. HFCPL opposes the application through an affidavit of Jainendra Kumar sworn on 29 June 2022.

BACKGROUND

3. Vishal and Rahul are brothers. They are the sons of the second defendant, Satya Nadan (“**Satya**”). Their (Vishal’s and Rahul’s) grandfather was the late Permal Padayachi (“**Padayachi**”). He (Padayachi) was the founder of **DTCPL**.
4. Padayachi died testate on 20 January 2003. At the time of his death, Vishal was just a little over six (6) years and two (2) months old. Rahul was seven (7) years and eleven (11) months old.
5. Probate No. 41061 over the Padayachi-estate was granted to Satya on 20 March 2003. In fact, Satya became the sole executor and trustee of the Padayachi estate. He also became the Director of **DTCPL**.

Bequests in Padayachi’s Last Will & Testament

6. Padayachi’s Last Will and Testament is dated 28 March 2002. He made the following bequests therein:

I GIVE DEVISE AND BEQUEATH all and singular my real and personal property of whatever nature and kind and wheresoever situate including any property over which I may have a power of appointment or disposition **TO** and **UNTO** my trustee upon trust as follows:

- (a) To hold in trust Crown Lease No. 9921 Lot 9 together with all improvements thereon situated at Tunalia Road, Malolo Nadi for my grandchildren **VISHAL NADAN** and **RAHUL NADAN**in equal shares until they attain the age of twenty one (21) years and to transfer the said Crown Lease unto their names.
- (b) To hold in trust Crown Lease No. 9136 Lot 1 situated at Tunalia, Nadi for my grandchildren **VISHAL NADAN** and **RAHUL NADAN**in equal shares until they attain the age of twenty-one (21) years and to transfer the said Crown Lease unto their names
- (c) From my 45000 shares in Dominion Transport Company Limited, 22500 shares each to be given to my grandchildren **VISHAL NADAN** and **RAHUL NADAN** until they attain the age of twenty-one (21) years for their own use and benefit absolutely
- (d) Sub-divided land known as Lot 5 (ND 5163) situated at Tunalia Road, Nadi to be given to my son **SATYA NADAN**.
- (e) Sub-divided land known as Lot 6,7, and 8 (ND 5163) situated at Tunalia Road, Nadi to be given to my grandchildren **VISHAL NADAN** and **RAHUL NADAN** equal shares for their own use and benefit absolutely.

- (f) All my monies deposited with any Commercial Bank in Fiji and all rental income received from any of my properties to be shared equally between my grandchildren VISHAL NADAN and RAHUL NADAN
- (g) The rest and residue of my estate both real and personal unto my son SATYA NADAN absolutely

2013 & 2014 Borrowings

- 7. One of the first things which Satya did upon becoming Director of DTCPL was to appoint one Lina Goundar as Company Secretary.
- 8. It is not clear to me what the financial situation or solvency status of DTCPL was at the time when Satya became Director (and Lina Goundar became Secretary). However, in 2013, some ten years or so after he became Director, Satya borrowed \$1,495,000 – 000 (one million four hundred and ninety-five thousand dollars) from HFCL (“**2013 borrowing**”). He again borrowed \$2,109,896-00 (two million, one hundred and nine thousand, eight hundred ninety and six dollars) from HFCL in 2014 HFCL (“**2014 borrowing**”).

Court Sanction? Securities Offered for the Borrowings

- 9. According to Vishal, Satya was obliged by law to, first, obtain the sanction of the High Court before he could borrow against the estate. For the 2013 borrowing, he did not obtain the prior sanction of the Court.
- 10. Also, for the 2013 borrowing, Satya offered as security a Bill of Sale over some buses which DTCPL had purchased for its bus-service operations. This Bill of Sale was actually registered on 24 December 2013. It appears that the money borrowed in the 2013 borrowing was used to purchase the buses.
- 11. For the 2014 borrowing, Satya did apply for, and obtained, a Court Order in Suva on 16 April 2014. He did so before he applied to HFCL. The Order gave him power to execute and give a mortgage, a charge, a Bill of Sale, and/or Transfer documents - in respect of all the above properties (as per the Will) including the 45,000 shares in DTCPL in favour of HFCPL “**for the consideration sum not exceeding \$2,200,00-00 (two million two hundred thousand dollars)**”.
- 12. Satya secured the 2014 borrowing by giving mortgages on certain lands which are part of the Padayachi-estate properties. Most of these were bequeathed to Vishal and Rahul, and a smaller portion to Satya.
- 13. On 16 September 2014, HFCPL registered a mortgage No. 803748 to the value of \$2,109,896-00 (two million, one hundred and nine thousand, eight hundred ninety and six dollars).
- 14. Vishal highlights that the total amount which Satya borrowed from HFCL when the 2013 and the 2014 borrowings are added together - actually exceeds the above ceiling of \$2,200-00 set

by the Court in 2014 (total amount borrowed from HFCL was \$3,604,896-00 which is made up of (i) the \$1,495,000 – 00 borrowed in 2013 and (ii) the \$2,109,896-00 borrowed in 2014).

15. Notably, the fleet of buses over which Satya, in his capacity as director of DTCPL, had granted the Bills of Sale as security for the 2013 borrowing - were assets of DTCPL. In contrast, the assets over which Satya had granted the Mortgage as security against the 2014 borrowing – were assets which personally belonged to Padayachi - and which were to pass to Vishal and Rahul and also to Satya himself (see assets Last Will and Testament above).

Vishal & Rahul Were Minors at Time Satya Borrowed Monies from HFCL

16. At the time when Satya obtained the loans in 2013 and 2014 from HFCL, Vishal and Rahul were still minors. Vishal was born on 11 December 1996. Rahul was born on 07 February 1995. Hence – Satya – in his capacity as sole executor/trustee of the Padayachi estate - was holding on trust Vishal's and Rahul's share of the estate and was to distribute these to them when they turn twenty-one. As I have said, he gave a mortgage to HFCL over assets to which Vishal and Rahul were beneficially entitled, whilst they were still minors, to secure DTCPL's 2014 loan.

DTCPL Defaults, HFCL Takes Steps to Realize Securities

17. When exactly DTCPL started to have financial problems – is not clear to me. However, during the COVID-19 crisis, the company was having great difficulty in managing its liquidity, and had fallen into arrears in its loan repayment with HFCL – as well as settling its debts with some unsecured creditors.
18. On 25 October 2021, this Court granted an Order to Wind Up DTCPL pursuant to a petition of one of the company's unsecured creditors – and appointed the Official Receiver as liquidator. That winding up process is actually on foot now before the Official Receiver.
19. On 14 May 2022, HFCPL advertised in the Fiji Sun for sale all the buses and routes of DTCPL by way of tenders. The tender closed on 31 May 2022. HFCL took action on its securities when DTCPL failed to settle the arrears after several demand notices – and proceeded to sell the company's buses which were secured by the Bill of Sale.
20. It appears that, at the time when this action was filed, DTCPL's total debt to HFCL had escalated to \$4,903,908.14 (four million, nine hundred and three thousand, nine hundred and eight dollars and fourteen cents).

COMMENTS

Vishal's Case Against Satya

21. Vishal alleges that, at the time when Satya borrowed \$1,495,000 – 00 in 2013, he (Vishal) was seventeen (17) years old and was still a minor and was not aware of his rights. Padayachi's Will did not give Satya any power to borrow such a large sum of money. Accordingly, Satya should have obtained the prior sanction of the High Court before borrowing the said money

22. Satya did obtain a sanction from the High Court in Suva on 16 April 2014 to borrow up to \$2,200,00-00 (two million two hundred thousand dollars), and allowed him to offer as security assets which did not belong to the company but which belonged to the estate. As it turned out, Satya went ahead and borrowed a further \$2,109,896-00 from HFCL in addition to the pre-existing 2013 borrowing of \$1,495,000 – 00. So, while the 2014 borrowing was still within the Court-sanctioned limit, the company’s total cumulative borrowing from HFCL (when the 2013 sum is added to the 2014 sum) - was well in excess of that limit.

Vishal’s Case Against HFCL

23. As to how HFCL is accountable in all these, Vishal’s case theory appears to rely on the following alleged facts:
- (a) HFCL drafted and prepared the bills of sale and mortgage instruments.
 - (b) HFCL knew that Satya was the executor/trustee of the Permal Padayachi estate.
 - (c) HFCL knew that Vishal has a beneficial interest in the 22,500 shares in DTCPL – and which shares were part of the properties which Satya had offered up for security in the 2014 borrowing.
 - (d) HFCL knew that Vishal had not attained the age of 18 years at the time when Satya was offering the said shares as security.
 - (e) HFCL and Satya were both aware of the requirement of section 15 of the Trustee Act.
24. HFCL actually gave a total loan to Satya to the amount of \$3,604,896-00.

SHOULD I GRANT LEAVE TO PLAINTIFFS TO INSTITUTE PROCEEDINGS ON BEHALF OF DTCPL?

25. The plaintiffs have not obtained the consent of the Official Receiver to pursue this claim. DTCPL was wound up on 25 October 2021 and the Official Receiver is already appointed as liquidator.
26. On 18 May 2022, Sushil Sharma Lawyers wrote to the Official Receiver to seek consent to institute this case. However, the Official Receiver’s Office advised that only the leave of the Court is required and that the leave of the Official Receiver is not required.
27. On further perusal of the Companies Act 2015, I note that section 229 only requires the leave of the Court:
- 229.** When a winding-up order has been made or an interim liquidator has been appointed under section **236**, no action or proceeding shall be proceeded with or commenced against the

company, except by leave of the court and **subject to such terms as the court may impose.**

28. The granting of leave is at the discretion of this Court. If the Court does grant leave, it is then open to the Court to impose terms thereon. There is no reason why this court cannot, as a condition for granting leave, require a Report of the Official Receiver – or even seek the views of the creditors.
29. However, in this case, I am not at all inclined to grant leave in the first place. There has been no good reason placed before me as to why I should allow the plaintiffs to institute these proceedings on behalf of DTCPL. The company is already going through the process of winding up before the Official Receiver. That process is a mechanism for the collective execution against the assets of DTCPL - for the benefit of all its creditors. It (mechanism) is designed to allow for an equitable and fair distribution of the assets amongst DTCPL creditors.
30. **In re Bostels Ltd** (1968) Ch. 346 at 353 (cited in **In the Matter of Chaz Lumber Limited**, Supreme Court of Fiji, 1985 Volume 31 FLR at page 55), Pennycuick J, in dealing with the principles governing the substitution of a supporting creditor as petitioner, observed that the rule allowing substitution operates to reduce costs and to conserve the assets of the Company, because the remedy of winding up:

enures for the benefit of the creditors as a whole and the costs of the petition fall upon the assets available for distribution amongst the creditors as a whole

In **In the Matter of Chaz**, the Cullinan J said as follows:

Ultimately therefore, rule 32 operates not so much for the convenience of a supporting creditor as in the interests of all creditors as a whole.

31. I am of the view that – allowing the plaintiffs to drag DTCPL back into Court, will be counterproductive to the overall aim of reducing costs and conserving the assets of the DTCPL. On the contrary – involving the company in the current litigation will only expose it (the company) to further costs, in the event that the plaintiff's will lose this case.
32. Apart from that, staying the winding up process may entail allowing the company to resume and continue trading. In Australia, the Courts recognize that there is a public policy against returning an insolvent company to the commercial world. As Street J said in **Re Data Homes Pty Ltd** [1971] 1 NSWLR 338 – the court will not exercise its discretion in a way which:

[has] "the consequence of permitting an insolvent company to go forth again into the community".

33. In **Brolrik v Sambah** [2001] NSWSC 1171 , the Court said:

Finally, the court must consider the public interest. The main component of that interest in cases such as the present is that companies not shown to be solvent and financially stable should be left in liquidation so as to avoid risk and prejudice to those with whom they in future do business....

SHOULD THE DEFENDANTS BE RESTRAINED FROM CARRYING OUT A SALE OR MORTGAGEE SALE OF THE ASSETS WHICH ARE UNDER THE BILLS OF SALE OR MORTGAGED BY HFCPL

34. This question requires me to consider the principles in the American **Cyanamid Co (No 1) v Ethicon Ltd** [1975] UKHL 1 (05 February 1975) and to ask (i) is there a serious issue to be tried? (ii) where does the balance of convenience lie/are damages an adequate remedy (iii) undertaking as to damages.
35. The only real issue which the Plaintiffs have highlighted is whether or not the securities (Bill of Sale and mortgage) in favour of HCFL could be set aside on account of the HCFL's (alleged) breach of its fiduciary duty to Vishal and Rahul.
36. At this point, I will say that it is hard for me to see how HFCL could owe a fiduciary duty to Vishal and Rahul – although – having said that – I am prepared to accept that I may be wrong if I am proven otherwise at trial.
37. For now, I will say that, because Vishal and Rahul were not customers of HFCL in terms of the loan transactions in question, it is likely that they will find difficulty in establishing that HFCL owed them a duty in the first place.
38. Traditionally, the relationship between banks and their customers was said to be based purely on contract. Hence, in **N Joachimson v Swiss Bank Corporation** [1921] 3 KB 110,117, Bankes J said:
- ...the ordinary case of banker and customer, their relations depend entirely or mainly on implied contract.
39. However, over the years, the Courts have come to accept that Banks may also owe their customers a duty of care based on tort and even a fiduciary duty in equity. This is particular so in situations where a Bank has given investment, commercial, and/or transactional advice to certain customers.
40. A Bank may be exposed to liability in the tort of negligence if it had given such advice to a customer – and which advice was relied upon by a the trusting customer, and where it was reasonable for the customer to trust and rely on the advice (see discussion in **Nambia v Fiji Development Bank** [2019] FJHC 808; HBA017.2017 (16 August 2019); **Finch & Anr v Lloyds TSB Bank plc & Ors** [2016] EWHC 1236 QB as per Judge Pelling QC).
41. The Banker may also be exposed to an action for breach of fiduciary duty by undue influence when giving such advice (**Commercial Bank of Australia Limited v Amadio** (1983) 151 CLR 447; **Woods v Martin's Bank Ltd** [1954] 1 QB 55; **Barclays Bank plc v O'Brien** [1994] 1 AC 180).
42. It appears to me – although I stand corrected - that, whether there is a duty in contract, tort or in equity (fiduciary), that duty can only be predicated upon a pre-existing banker and customer relation.

43. In this case, there was no pre-existing banker/customer relationship between HFCL and Vishal/Rahul at the time when the loan/borrowings in question were being processed. Rather, HFCL's customer, at all times, was the company – DTCPL. It was the company that had applied for the 2013 and 2014 borrowings to HFCL through its director – Satya.
44. The only time Satya ever engaged with HFCL in his capacity as executor/trustee of the Padayachi estate was when he was offering the mortgage(s) over the estate property as security for the 2014 borrowing. Satya, notably, had then applied to the Court for sanction which he obtained before applying for the 2014 borrowing.
45. In any event, it is hard to see how the HFCL might be liable in tort or breach of fiduciary duty to Satya, when the nature of their dealings did not involve any investment, transactional or commercial advice – although, having said that, I understand this is a triable question of fact.
46. I am of the view that the balance of convenience does not favour the placing of any restraint on HFCL from pursuing its rights to realize its securities for the following reasons:
- (a) DTCPL owes a massive amount to HFCL – let alone – the amount of money it owes to its unsecured creditors.
 - (b) there is no suggestion in any of the affidavits filed by Vishal and Rahul as to how they propose to restore DTCPL's solvency or liquidity.
 - (c) HFCL is a commercial bank. If, in the event Vishal and Rahul are able to establish their claim against HFCL, HFCL is better able to compensate them in damages compared to Vishal's and Rahul's relative ability to pay HFCL's costs should HFCL succeed in defending the claim.
 - (d) Vishal submits that if HFCL proceeds to sell the fleets of buses of DTCPL, Vishal will suffer losses and damages as he holds 22,500 shares in DTCPL. He has already lost those shares as the company was wound up.
 - (e) Vishal further submits that unless the winding up order is stayed, it is likely that all the fleets and buses and other assets of DTCPL will be sold. This is merely stating the obvious. This is the very essence of the Bills of Sale and the Mortgages in question.
47. At paragraph 44 of his Affidavit, Rahul gives the "usual undertaking as to damages". This is hardly enough. Even if it were, I would still decide against granting the Orders sought on the basis of what I have discussed above.

ORDERS

48. I refuse to grant leave to the plaintiffs to institute proceedings on behalf of Dominion Transport Pte Limited which was wound up by the Court on 25 October 2021. The plaintiffs should have joined the Official Receiver which they did not.

49. I also decline to grant any Order to restrain the defendants from carrying out a sale or mortgagee sale of the assets which are under the Bills of Sale or Mortgaged by the Home Finance Company Pte Limited.
50. I also refuse to stay the Winding Up Order made by this Court.
51. Costs to the defendant which I summarily assess at \$1,500-00 (one thousand five hundred dollars only).
52. Case adjourned to 22 March 2023 for mention at 10.30 a.m.



Anare Tuilevuka
JUDGE
Lautoka

10 March 2023