

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. 41 of 2024**

**BETWEEN** : **WESTPAC BANKING CORPORATION LIMITED** a duly incorporated and licensed financial institution having its head office at 1 Thompson Street, Suva, Fiji.

**PLAINTIFF**

**AND** : **ALL THE OCCUPANTS BEING PERSONS UNKNOWN TO THE PLAINTIFF** of Certificate of Title No. 14324 on Deposit Plan No. 3829 at Verrier Road, Namadi Heights, Suva, Fiji

**DEFENDANTS**

**BEFORE** : **Banuve, J**

**Counsel** : K. Chang, **Howards Lawyers** for the Plaintiff  
K. Singh, **KS Law** for the Defendants.

Date of Hearing : 17<sup>th</sup> May 2024

Date of Judgment : 13<sup>th</sup> June 2024

# JUDGMENT

## A. Introduction

1. On 19<sup>th</sup> February 2024, the Plaintiff, Westpac Banking Corporation Ltd filed an Originating Summons seeking the following orders:
  - a. *Delivery by the Defendants and all occupants and/or their agents and/or servants to the Plaintiff of vacant possession of **ALL THAT** property comprised and described in: Certificate of Title No. 14324 being Lot 14 on Deposit Plan No.3829 situated in the District of Suva, on the island of Viti Levu having an area of one rood 36.3 perches.*
  - b. *An injunction restraining the Defendants together with all other occupants and/or their agents and/or servants from interfering with and/or damaging the improvements on the said land in any way.*
  - c. *Costs of this application on an indemnity basis.*
  - d. *Such further and/or other orders the Honorable Court may deem just and appropriate in the circumstances.*
2. On 19<sup>th</sup> February 2024, Westpac also filed an Affidavit in Support of the Originating Summons.
3. The Originating Summons and Affidavit did not name the Mortgagor as a party and the Defendants were described as persons unknown, who were occupants of Certificate of Title No. 14324, Lot 14 on Deposit Plan No. 3829 situated at 14 Verrier Rd, Namadi Heights, Suva, Fiji.
4. The Originating Summons and Affidavit were served on persons who were at the premises namely a Ms Talia Grace Louse on 28<sup>th</sup> February 2024 and a Ms Andasia Marie Veu on 29<sup>th</sup> February. On 14<sup>th</sup> March 2024, an Affidavit of Service was filed as proof of service.

## **B. The Background to the Mortgage**

5. On 17<sup>th</sup> August 2011, the Plaintiff granted a loan facility to X-Rayor Trading International Ltd (“XRTL”) pursuant to an Investment Property Loan Agreement (“IPL Agreement”) to enable XRTL to purchase land comprised in CT No 3829 situated in the District of Suva, Viti Levu having an area of one rood 36.3 perches.
6. Westpac gave a loan to XRTL in the sum of \$175,200.00 for the purchase of the land.
7. The IPL Agreement also required XRTL to grant a mortgage over the land as security for the loan facility.
8. Mortgage No. 752791 in favor of Westpac was registered on 1 December 2011, the Mortgagor being X-Rayor International Trading Ltd, a company having its registered office at Lot 186, Walu Bay, Fiji and the Mortgagee being Westpac Banking Corporation ABN 33 007 457 141.
9. On 22<sup>nd</sup> July 2014, Westpac further provided a business finance loan in the sum of \$300,000 to XRTL.(“BF Agreement”)
10. In 2020, XRTL fell into arrears with their repayment obligations under the BF and IPL Agreements.
11. Westpac served a demand notice to XRTL on 20 July 2020, which was not heeded with the outstanding debts, not cleared.

<i>Product</i>	<i>Account No.</i>	<i>Amount</i>
Investment Property Loan	9803467969	\$128,466.56
Business Term Loan	980 5390268	\$189,052.80
<b>TOTAL DUE</b>		<b>\$317,519.66</b>

12. Pan Yan Bing, a Director of XRTL passed away on 9<sup>th</sup> July 2023
13. Westpac undertook a mortgagee sale of the land and called for tenders on 3 separate occasions.

- a. 26<sup>th</sup> August 2023;
  - b. 1<sup>st</sup> September 2023; and
  - c. 9<sup>th</sup> September 2023.
14. The tender was awarded to the successful bidder in the sum of \$750,000.00 and Westpac is in the process of attending to the sale
15. As at 31 January 2024, XRTL has an outstanding debt as follows;

<i>Product</i>	<i>Account No</i>	<i>Amount</i>
Investment Property Loan	9803467969	\$108,148.48
Business Term Loan	9805390268	\$215,896.14
<b>TOTAL DUE</b>		\$324,044.62

16. A Notice to Vacate was issued to persons unknown to the Westpac, but which it believes, are family members of the deceased sole Director of XRTL, which has not been heeded.

**C. Has the Mortgagee complied with the requirements of Order 88 of the High Court Rules 1988?**

17. In order for the Plaintiff to obtain the order for vacant possession sought in the Originating Summons filed on 19<sup>th</sup> February 2023, it has to satisfy the Court that it has complied with the requirements laid out in Order 88 Rules 1(1) (d) and 3(a)-(d) of the *High Court Rules 1988*.
18. The Plaintiff, as mortgagee has initiated proceedings by way of Originating Summons in compliance with Order 88 Rule 1(d) of the *High Court Rules 1988* on 19<sup>th</sup> February 2024
19. Order 88 Rules 3 (3) (a)-(d) states;

*“3.-(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and the mortgagee with particulars of-*

- (a) the amount of the advance;*
- (b) the amount of the periodic payments required to be made;*
- (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit, and*
- (d) the amount remaining due under the mortgage."*

20. The Plaintiff rely on the Affidavits of Shabana Fazeelat and Shaneel Shainesh Prasad<sup>1</sup> and the Defendants rely on the affidavit of Talia Grace Louse. <sup>2</sup>Counsel have provided written submissions which the Court found helpful in understanding their clients' respective positions.

21. The Plaintiff position in summary include;

- (i) The Plaintiff, in its capacity as the mortgagee, has satisfied all its obligations and seeks vacant possession of land described as CT No. 14324, Lot 14, DP 3829, situated at 14 Verrier Rd, Namadi Heights, Suva, Fiji.*
- (ii) The mortgage registered on the title of the land by the Plaintiff is unambiguous and clear as to the powers of default and attorney.*
- (iii) The Plaintiff is currently owed an amount of \$324,044.62 which keeps increasing in light of the interest that is being accrued, and thus it has an opportunity to recover what is owed from the mortgagee sale. It relies on section 75 of the Property Law Act and Order 88 of the High Court Rules 1988.*
- (iv) The Plaintiff is prejudiced and disadvantaged by the continued occupation of the land by the Defendants and the delay in vacating the land increases its financial exposure.*
- (v) The Plaintiff expects that there will be a surplus of funds remaining after the sale and following the repayment of the money owed to it, with costs and taxes, the surplus will be paid to XRTL.*

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<sup>1</sup> Filed on 19<sup>th</sup> February 2024 and 2<sup>nd</sup> May 2024, respectively.

<sup>2</sup> Filed on 5<sup>th</sup> April 2024.

22. The Court notes, that in the mortgagee sale advertisements<sup>3</sup>the subject land was described as ‘*freehold residential property comprised in CT 14324 in the name of X-Rayor International Trading Limited*’<sup>4</sup> and that the Notice to Quit/Vacate Property dated 12<sup>th</sup> December 2013 was premised on *Mortgage No. 752791 over Certificate of Title No 14324 dated 19<sup>th</sup> September 2011*.<sup>5</sup>
23. The Defendants position, in summary were that the Plaintiff has not complied with the mandatory requirements of Order 88 of the *High Court Rules 1988*;
- (i) *Pursuant to Order 88 Rule 2(3) any claim instituted for mortgage should be against the mortgagor and other parties (if any) as Defendants and the Plaintiff should have knowledge and provide particulars of every person who to the best of the plaintiff’s knowledge is in possession of the mortgaged property in accordance with Rule 3(4) in the said Order. The lack of knowledge and due diligence on the part of the Plaintiff weakens their claim.*
- (ii) *The mortgage claim is instituted against X-Rayor Trading International Ltd, who is not a party to this action. The case of Bank of Baroda v Chute provides a clear precedent where the Plaintiff’s application was struck off due to non-compliance with the same provisions. The Plaintiff is to comply with two mandatory requirements of Order 88 of the High Court Rules 1988.*

*Order 88 Rule 2(3) states, “where the Plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the mortgaged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends for at the hearing”.*

*Order 88 Rule 3(2) HCR states, “the affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.”<sup>6</sup>*

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<sup>3</sup> 26<sup>th</sup> August 2013; 1<sup>st</sup> September 2023 and 9<sup>th</sup> September 2023.

<sup>4</sup> Exhibit I in the Affidavit of Shabana Fazeelat (In Support of the Originating Summons)

<sup>5</sup> Exhibit J

<sup>6</sup> No written submissions were proffered to support this issue by the Defendant. However the version submitted by the Plaintiff “**Annexure D**” in the Affidavit of Shabana Fazeelat appears to be a **Certified True Copy** from the Titles Registry which the Court deems sufficient for the purpose of O 88, Rule 3(2)-**ANZ Banking Group Ltd v Kumar** [2003] FJHC 326, per Singh, J

- (iii) *The Defendants, are not the named mortgagors in the matter before the Court. The mortgage at issue is registered under the company, X-Rayor Trading Ltd. As such XRTL, being the registered mortgagor, ought to be a party to the proceeding.*
- (iv) *In the Affidavit in Reply deposed by Talia Grace Louse and filed on 5<sup>th</sup> April 2024, on behalf of the Defendants she deposes that whilst they were not the mortgagors, she was the trustee of the Estate of Pan Yan Bing, a director (deceased) of XRTL, the mortgagor, and in that capacity she was currently in the process of liquidating the assets owned in the Estate to repay the mortgage because [they] wanted the house, their shelter, which they would be deprived of, if the house is transferred to someone through the Bank's tender sale.*
24. The issue that the Court has to resolve are whether to grant the orders sought in the Originating Summons against the Defendants, despite they not being the named mortgagors under Mortgage No 752791 registered, on 21<sup>st</sup> October 2011, and despite the actual mortgagor, XRTL, not being made a party in this proceeding.
25. The Defendant asserts that the omission to include the mortgagor, XRTL as a party to this proceeding amounts to non-compliance with the mandatory requirement of Order 88 of the *High Court Rules 1988*, and on the authority of *Bank of Baroda v Chute* – Civil Action No 34 of 2024, non-compliance with the requirements of Order 88 are fatal, and the Originating Summons to be struck off.
26. The *Chute* case stands for the proposition that the non-inclusion of a mortgagor as a party in a Mortgage Action under Order 88 is fatal. An order for vacant possession cannot be made against a mortgagor, if it is not named as a party in proceedings under Order 88 of the *High Court Rules 1988*.
27. The Court accepts the proposition, as a general rule, however, pursuant to Order 88 Rule 1(d), the Court can grant orders for delivery of possession against persons *who are or alleged to be in possession* of the mortgaged property and are not the mortgagors, as illustrated in *NBF Asset Management Bank v United Marine Ltd [2000] FJHC 104*; *Wati v Pillay*- Civil Action No.310 of 2008; *Singh v Housing Authority* – Civil Action 645 of 2005; *NBF Asset Management Bank v Niumataiwalu* – Civil Action 427 of 1998; *Fiji Development Bank v Endeavour Youth Investment Cooperative Society Ltd* –Civil Action 337 of 1999.

28. In these cases orders for delivery of possession pursuant to Order 88 Rule 1(d) have been issued by the Court against “persons” who were authorized by mortgagors to act on their behalf,<sup>7</sup> or as joint occupants with the mortgagors;<sup>8</sup> had replaced the mortgagor as the occupant of the mortgaged property or because their interest as a third party, had been raised improperly to defeat the entitlement of the mortgagee<sup>9</sup>.
29. The Court in the *Chute* case followed an earlier authority; *NBF Asset Management Bank v United Marine Ltd* [2000] FJHC 104. The Court had held in that case that whilst it could not rule against the mortgagor, United Investments Ltd, as it was not a party to the action, it could rule against the Defendant, United Marine Ltd, who whilst not the mortgagor, was in actual possession of the mortgaged premises, pursuant to a lease. It had sought in the mortgage proceeding, to plead its leasehold interest, (in support of the mortgagor), to defeat the right to possession of the mortgagee. The Court, whilst not ruling against the mortgagor, did make orders against the Defendant.
30. The *Chute* case, read together with the *United Marine Ltd* case, has a broader application than that contended for by the Defendant and provide a rationale also for the grant of orders of possession in mortgage actions against “other persons”, where the mortgagors have not been included as a party;
- (i) Where the mortgagor is no longer in possession of the mortgaged property and there is a possibility of the mortgagor’s interest being adversely affected by the possession proceedings, the mortgagor should be made a party, otherwise no orders may be made against the mortgagor.
  - (ii) A mortgagee’s right to possession, a right at law, ought not be lightly treated as abrogated or restricted, even in cases where the mortgagor is not named as a party in the mortgage action.
  - (iii) In appropriate cases, an order for possession may be issued against a third party, as in the *United Marine* case, where a mortgagor, despite not being included as a party, seeks nevertheless, to rely on the interest of the third party, to defeat the interest of a mortgagee.

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<sup>7</sup> *Wati v Pillay* –Civil Action 310 of 2008, *NBF Asset Management Bank v Niumataiwalu* –Civil Action 427 of 1998.

<sup>8</sup> *Fiji Development Bank v Endeavour Youth Investment Cooperative Society Ltd* –Civil Action 427 of 1998

<sup>9</sup> *NBF Asset Management Bank v United Marine Ltd* [2000] FJHC 104.



- (iv) The third party interest may be binding on the mortgagee, if included in the mortgage document. The reason advanced by the mortgagee for initiating proceedings were that the mortgaged property was currently occupied by the Defendants, as acquaintances and family members of Mr Pan Yan Bing (deceased), the sole director of XRTL.
31. The Court notes that the mortgaged land had been advertised for sale on 3 separate occasions; 26<sup>th</sup> August 2023, 1<sup>st</sup> September 2023 and 9<sup>th</sup> September 2023 with the land described as belonging to the mortgagor XRTL, despite a director Pan Yan Bing having passed away earlier on 9<sup>th</sup> July 2023.<sup>10</sup>
32. The Plaintiff's position appears to be that with the demise of the late Pan Yan Bing, the sole Director of XRTL, the mortgagor as a separate legal entity ceased to operate, leaving the Plaintiff with no option but to initiate proceedings against the Defendants, as current occupants of the mortgaged property.
33. No evidence has been adduced by the Plaintiff however to affirm the status of the mortgagor or whether it had only one Director.
34. The Court finds, in the circumstance, that no orders can be made against the mortgagor XRTL, because it is not a party to this proceeding.
35. The Court will however deal with the case advanced by Talia Grace Louse on behalf of the Defendants, that she has a right of possession over the mortgaged property, as Trustee of the Estate of Pan Yan Bing and that interest ought to prevail over the interest of the mortgagee which it seeks to enforce in the Originating Summons filed on 19<sup>th</sup> February 2024.
36. The Court notes that Talia Grace Louse has deposed in the Affidavit in Reply filed on 5<sup>th</sup> April 2024, that whilst she did not represent the mortgagor, she was the trustee of the Estate of Pan Yan Bing, a Director and shareholder (deceased) of XRTL, the mortgagor, and in that capacity she was currently in the process of liquidating the assets owned in the Estate to repay the mortgage because they want the house as shelter and they would be deprived of that if the house is transferred to someone through the Bank's tender sale. The Defendants had no intent of vacating or selling the mortgaged property.

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<sup>10</sup> Annexure B to the Affidavit of Talia Grace Louse filed on 5<sup>th</sup> April 2024

37. The intent expressed by the Trustee of the Estate of Pan Yan Bing to redeem the said mortgage, and not vacate the mortgaged property, is advanced also, in the interest of the mortgagor, against the mortgagee, in the Affidavit of Reply dated 5<sup>th</sup> April 2024, (although there is no evidence of authorization from the mortgagor to that effect).<sup>11</sup>

*“17. I further state that I am currently in the process of liquidating the assets owned in the Estate to repay the mortgage because we want the house as that is our shelter and we would be deprived of shelter if the house is transferred to someone through the Bank’s tender sale. Further I am advised by counsel, and I have reason to believe that the property is worth more than a \$1,000,000.*

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*21. Furthermore I want to emphasize that we have no intention of vacating or selling the property because we do not have anywhere to go. On the contrary, we are committed to retaining it and intend to settle the mortgage with the bank, in good faith, We will be prejudiced if we are to vacate the property given the fact that we will be deprived of our only shelter.*

.....

*24. I further state that I have just been appointed as the Trustee of the shareholder in March 2024 and I have been working tirelessly trying to sort out the company’s affairs.”*

38. The Court is not without sympathy for the Defendants, however, the general law is settled, and does not allow the Court to entertain the position taken that their interest, as a third party to the mortgage, ought prevail over and defeat the interest of the mortgagee, where it seeks to exercise its right to possession under the mortgage pursuant to an Order 88 proceeding.

39. The right to possession of the mortgagee is premised on an unequivocal right of ownership over the legal estate of the mortgaged property. In *Four Maids Ltd v. Dudley Marshall (Properties) Ltd* (1957) Ch. 317, it was affirmed that the mortgagee may go into possession “before the ink is dry” on the mortgage, unless

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<sup>11</sup> Talia Grace deposes that she is a Managing Director by occupation, although it is not clarified what business or company she is employed in.

there is something in the contract, express or by implication, whereby he has contracted out of that right.<sup>12</sup>

40. As referred to earlier, Order 88 Rule 1(1)(d), applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor.....being an action in which there is a claim for any of the following reliefs namely-  
.....

*“(d) delivery of possession (whether before or after foreclosure or without foreclosure to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property.”*

41. On the evidence provided by the Defendants the Court, does not find any basis to interfere either with the mortgagee’s right to possession or its power of sale over the mortgaged property.

#### **D. Value of Property in Question**

42. Due to the mortgagor’s default in addressing its payment obligations under the IPL and BF Agreements the Plaintiff, as mortgagee, publicly called for tenders for the sale of the mortgaged property on 3 separate occasions on 26<sup>th</sup> August 2023, 1<sup>st</sup> and 9<sup>th</sup> September 2023 and following this process the tender was awarded to the successful bidder for the sum of \$750,000.00.<sup>13</sup>
43. The Plaintiff is currently in the process of attending to the sale and must deliver the vacant land at settlement. No evidence has been provided on whether the successful tender has been reduced to contractual terms, subject to this proceeding for it to be settled. It is unnecessary to enter into a discussion whether a conditional contract, has been formed, as discussed, for example, by the Court of Appeal in *Property & Bloodstock Ltd v Emerton* [1968] 1 Ch 94 at p 118<sup>14</sup>, as the countervailing ‘condition’ to redeem the mortgage is not vested on persons, other than the mortgagor.
44. The Plaintiff expects there will be a surplus of funds remaining after the sale and following the repayment of the money owed to Westpac and other costs and

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<sup>12</sup> Per Lord Harman at p 320

<sup>13</sup> Paragraph 19 of the Affidavit of Shabana Fazeelat.

<sup>14</sup> per Danckwerts LJ.

taxes the surplus funds, will be dispatched to XRTL. The Estate of Pan Yan Bing may have a right to seek a share of these funds, thereafter.

45. In its submissions, the Defendants contend that the Plaintiff's attempt to sell the mortgaged property at a value significantly below its market value is unjust and prejudicial to the Defendants and it is in the interest of justice that they be allowed to redeem the mortgage and to sell the property.
46. Several points need noting;
- (i) A mortgagee's decision to sell the mortgaged property is binding on the mortgagor *unless* it is proved that it is exercised in *bad faith*. It is a power given to the mortgagee to realize its debt, [and the Court will not interfere with the sale], if it exercises it bona fide, without corruption or collusion with the purchaser, even though the sale is very disadvantageous, unless the price is so low as in itself to be evidence of fraud - *Mohammed Isaq Khan v FDB* [2000] 1 FLR11.<sup>15</sup>
  - (ii) The right to redeem the mortgage is vested on the mortgagor pursuant to section 72(1) of the *Property Law Act* [Cap 130], which also authorizes a mortgagee sale, at any time before the property has been actually sold by the mortgagee under his power of sale, *on payment of all monies due and owing under the mortgage at the time of payment*. The statutory right to redeem is not vested on persons, other than the mortgagor, in any event.
47. The Court finds that there is no evidence before it of *bad faith* in the manner the mortgagee exercised its rights of sale of the mortgaged property, either through corrupt or collusive conduct with the purchaser or indeed that the bid it accepted was so low to be tantamount to fraud. The evidence indicates rather, that the Plaintiff had exercised its rights under the mortgage *bona fide* and that the decision to publicly tender the mortgaged land for sale, on 3 separate occasions, was only resorted to after all attempts to have the mortgagor address its repayment obligations under the IPL and BF Agreements, were not heeded.
48. In addition, the power to redeem the mortgage is vested on the mortgagor, in any event, not the Defendants. Nor is there any evidence before the Court that

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<sup>15</sup> The facts of Khan are distinguishable in there the right of redemption was exercisable by the mortgagor and the subject property was to have been sold by the mortgagee, despite a shortfall in value.

the mortgagor has sought to exercise the power to redeem the mortgage pursuant to section 72(1) of the *Property Law Act* {Cap 130}.

49. Consonant with its finding on vacant possession the Court also grants the injunction sought by the Plaintiff in the Originating Summons, in line with settled law and practice that failing payment into the Court of the amount sought by the mortgagee, no restraint should be placed on the Plaintiff's power of sale under the mortgage and sought in the Originating Summons to restrain the Defendants, together with all other occupants, from interfering with and/or damaging the improvements on the said land in any way-*ANZ Banking Group Ltd v Bulewa* – Civil Action 233 of 2022.

#### **FINDING:**

The Court orders;

1. **Delivery by the Defendants and all occupants and/or their agent and/or servants to the Plaintiff of vacant possession of ALL THAT property comprised and described in:**

**Certificate of Title No. 14324 being Lot 14 on Deposit Plan No.3829 situated in the District of Suva, on the island of Viti Levu having an area of one rood 36.3 perches.**

2. **An injunction restraining the Defendants together with all other occupants and/or their agents from interfering with and/or damaging the improvements on the said land in any way.**
3. **Parties to bear their own costs.**



  
Savenaca Banuve  
Judge

**At Suva  
13<sup>th</sup> June 2024.**