

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 94 of 2024

BETWEEN : **TREMMA HOLDINGS LIMITED** a limited liability company
incorporated under the Laws of Fiji and having its registered office
at 79 Queens Road, Martintar, Nadi, Fiji.

Plaintiff

AND : **BRED BANK (FIJI) LIMITED** a registered bank under the Laws
of Fiji having its registered office in Suva, Fiji.

Defendant

Before : U.L. Mohamed Azhar, Acting Judge.

Counsels : Ms. T. Draunidalo for the plaintiff
Mr. R. Lajedra for the defendant.

Date of Hearing : 07.08.2024

Date of Ruling : 09.09.2024

RULING

01. The plaintiff company filed an Inter-Parte Summons and moved the court for following injunctive reliefs against the defendant – the bank:
- a. The defendant is restrained from proceeding with its mortgagee's sale of CT 22426 and/or CT 22607;
 - b. In the alternative, an order that, the defendant pay into court the sum of \$ 1.1 million as the balance of a fair price for the mortgagee's sale of CT 22426;
 - c. An order for cost on a solicitor/client indemnity basis;

- d. Any other order deemed just and expedient by this court.
02. This is the second summons filed by the plaintiff. The plaintiff previously filed an ex-parte summons and sought injunction restraining the defendant from exercising its power of sale as mortgagee against CT 22426 and CT 22607. The said summons was made inter-parte and heard by Mackie J. However, Mackie J could not deliver the ruling due to emergency medical evacuation. The plaintiff then filed the current inter-parte summons seeking above orders. At the outset, the counsel for the defendant argued that, the current summons was an abuse of the process of the court. I do not agree with the counsel for the defendant on this point, because the plaintiff was compelled to bring the current summons due to the delay of the ruling which was beyond control of everyone and was purely due to medical emergency.
03. The plaintiff obtained loan facility from the defendant bank. The loan is secured by the Mortgage of CT 22426 and CT 22607. Admittedly, the plaintiff defaulted in paying loan as agreed with the defendant. The defendant sent the demand notice. The plaintiff failed to comply the requirements of the demand notice and eventually, the defendant proceeded to mortgagee's sale of the security which is CT 22426. The plaintiff seeks to restrain the defendant from mortgagee's sale on the ground that, the two months default and one month demand notice is too short for the plaintiff to secure a buyer in Fiji's small and conservative market at the true market value for the security. The alternative relief sought by the plaintiff is founded on the allegation that the defendant is to sell the property below the market value. Conversely, the counsel for the defendant submitted that, on merits the plaintiff does not qualify for injunction.
04. Two questions to be determined by the court in respect of the current summons filed by the plaintiff. Firstly, can the defendant proceed to mortgagee's sale after two months of default and one month demand notice, which is alleged by the plaintiff to be the short period? Secondly, in any event, can the defendant be restrained from proceeding to mortgagee's sale or in the alternative, be ordered to deposit a sum of \$ 1.1 million of proceeds of sale of the property?
05. As submitted by the counsel for the defendant, the sections 77 to 79 provides how and when the mortgagee can exercise its power of sale of mortgaged property for default of the mortgagor. The sections 77 and 79 which are relevant to this application are as follows:

Mortgagor in default

77. If default is made in payment of the mortgage money or any part thereof, or in the performance or observance of any covenant expressed in any mortgage or in this Act declared to be implied in any mortgage, and such

default is continued for one month or for such other period of time as is in such mortgage for that purpose expressly fixed, the mortgagee may serve on the mortgagor notice in writing to pay the mortgage money or to perform and observe the covenants therein expressed or implied, as the case may be.

Mortgagee may sell

79. -(1) 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 person in selling the mortgaged property, or any part thereof, either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots, by public auction or by private contract, or partly by the one and partly by the other of those methods of sale, and subject to such condition as to title or evidence of title, time or method of payment of the purchase money or otherwise as the mortgagee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale.

06. Accordingly, if a default continues for a month or for any such period expressly provided in the mortgage, the mortgagee may serve a notice in writing to the mortgagor to pay the mortgage money. If the default continues for one month after service of such notices, the mortgagee may sell or concur with any other person in selling the mortgaged property. In this case, the plaintiff admitted that, the loan account was in arrears by two months. The plaintiff also admitted that, the demand notice was given to comply within 30 days. However, the default, admittedly, continues since the plaintiff failed to comply with the requirements of such notice. This clearly shows that the defendant acted within the statutory powers in proceeding to mortgagee's sale in this matter. Thus, the argument of the plaintiff, that the time given by the defendant was too short, fails.
07. The principles of granting restraining orders against the mortgagee to be discussed to determine the second question. These principles stem from two leading decisions. First is **Inglis v Commonwealth Trading Bank of Australia** [1972] HCA 74; (1972) 126 CLR 161. The second is **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396. Whilst the first specifically deals with the restraining orders against the mortgagee, the second is the general authority that applies to injunctions. The principles propounded by the House of

Lords in **American Cyanamid** apply subject to some special considerations which apply in relation to an application to restrain the exercise of a mortgagee's power of sale (**Westpac Banking Corporation Ltd v Prasad** 45 FLR 1). The decisions in **Inglis** and **American Cyanamid** do not contradict but supplement each other (**Fun World Centre (Fiji) Ltd v Bank of Baroda** [2013] FJHC 519; Civil Action 168.2013, decided on 4 October 2013).

08. Walsh J in **Inglis** set out the general rule established by the court in determining the application for restraining orders against the mortgagee. He held that:

A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court

The rule, as it affects the exercise by a mortgagee of the power of sale, is stated in the following terms in Halsbury's' Laws of England, 3rd ed., vol. 27, p. 301:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has commenced a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee swears to be due to him, unless, on the terms of the mortgage, the claim is excessive."

09. Barwick C.J. (with whom Menzies J and Gibbs J agreed) dismissed the appeal against the decision of Walsh J and endorsed the general rule as follows:

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 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 right under the mortgage.

10. The Fiji Court of Appeal followed this general rule in **Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd** [2011] FJCA 23; ABU0039.2009 decided on 10 March 2011. Calanchini J (as he then was) held in **Housing Authority v Delana** [2010] FJHC 277; HBC283.2006 (30 April 2010) that:

This Court has long held the view that failing payment into Court of the amount sworn by the Mortgagee as due and owing under the Mortgage, no restraint should be placed on the exercise of the Mortgagee's powers of sale under the mortgage (see **Westpac Banking Corporation Ltd –v- Adi Mahesh Prasad (1999) 45 FLR 1**; **NBF Asset Management Bank –v- Kolinio Bulivakanua and Selina Mau Bulibakarua** Civil Action No. 97 of 1999 unreported decision of Byrne J (as he then was) delivered on 30 November 1999; **NBF Asset Management Bank –v- Donald Thomas Pickering and Eileen Pickering** Civil Action No. 170 of 1999 unreported decision of Byrne J (as he then was) delivered on 19 May 2000 and **NBF Asset Management Bank –v- Naipote Vere and Another** Civil Action No. 323 of 2001 delivered 10 November 2003 unreported per Scott J). (Emphasis is original).

11. In addition the Fiji Court of Appeal in **Westpac Banking Corporation Ltd v Prasad** [1999] FJLawRp 17; [1999] 45 FLR 1 (8 January 1999) held that:

It is clear on the authorities that if the present case be regarded as one in which the mortgagor's real claim against the mortgagee is for damages only, interlocutory relief should be granted only upon terms that the amount of the mortgage debt is paid into court. The general rule referred to in *Inglis*' case would apply in such a case.

12. The debt in this matter is not disputed by the plaintiff. The plaintiff has not taken any step to settle the loan despite the demand notice by the defendant. Nor the plaintiff paid mortgage debt into the court. Furthermore, apart from the injunctions, the primary relief sought by the plaintiff is damages as per the statement of claim. Accordingly, the general rule referred to in **Inglis** applies to this case and no restraint should be placed on the exercise of the defendant's power of sale under the mortgage.

13. The next question is whether the alternative order sought by the plaintiff could be granted. In the alternative, the plaintiff sought an order on the defendant to deposit into court a sum of \$ 1.1 million as the balance of a fair price for the mortgagee's sale of CT 22426.
14. The object of the interlocutory injunctions is to protect the plaintiff against grievance by violation of his right for which he could not be adequately compensated in damages recoverable in the action if he obtains the judgment in his favour at the end of the trial. However, the plaintiff's need for protection must be weighed against the need for protection of the defendant against the harm that may be caused to him for being prevented from exercising his right, if he obtains judgment in his favour. The court should determine where the balance of convenience lies (American Cyanamid, at page 406). Accordingly, the court has to consider (i) Whether there is a serious question to be tried; (ii) Whether damages would be adequate remedy; and (iii) Whether balance of convenience favor granting or refusing Interlocutory Injunction.
15. The plaintiff alleged that, the defendant is to sell the property CT 22426 below the market price and thereby breached the duty to act in good faith. It is well established that, the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith (Kennedy v De Trafford (1897) AC 180). However, the plaintiff has not pleaded the particulars for the alleged breach of duty to act in good faith. Even though it is alleged in the statement of claim that, the defendant is to sell the property below market value, the affidavit of the plaintiff in paragraph 27 states that, the current highest bid to the defendant is a sum of \$ 4.1 million and it is a sum of \$ 1 million more than the highest offer the plaintiff received. Accordingly, the plaintiff's own affidavit rebuts the allegations in its own statement of claim. There is no serious question to be tried.
16. The very purpose of the giving statutory power to the mortgagee to sell the security is to satisfy the debt owing to the mortgagee. As per the demand notice dated 25 March 2024 and sent by the defendant, the account balance as at 19 March 2024 was a sum of \$ 3,840,804.97. Another six months have lapsed since then. The total outstanding would have increased by now. If the alternative order sought by the plaintiff is granted and the defendant is ordered to deposit a sum of \$ 1.1 million, the defendant will not even be able to recover full outstanding as at 25 March 2024 let alone the accrued interest thereafter. Thus, granting the alternative order will negate the very purpose for which power of sale is given to the mortgagee by the statute. On the other hand, even the injunction is not granted, the plaintiff will be entitled for damages if it succeeds in its claim. In this way the balance of convenience favours the defendant.

17. As stated above, the plaintiff sought damage for breach of duty of good faith. Generally, it would be very difficult in deed to establish that, the mortgagee breached the duty to act in good faith, if the mortgagee exercised his power without any intention of dealing unfairly by the mortgagor. Similarly it would be very difficult in this case too, because the defendant, as admitted by the plaintiff, secured the higher offer than the one that was received by the plaintiff itself. In any event, the plaintiff will be entitled to damages as sought if it can establish such breach at trial. The defendant, being a public bank will financially be in a better position to pay such damages. Lord Diplock stated in American Cyanamid at page 408 that:

If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

18. I, having applied the principles expounded in both Inglis and American Cyanamid, decide that, the injunctions should not be granted in this case against the defendant. Furthermore, the defendant being the mortgagee was compelled to incur further costs by this application. The defendant must be compensated with the reasonable costs.
19. In result, I make the following orders:
- a. The injunctions sought by the plaintiff are refused;
 - b. The Inter-Parte Summons filed by the plaintiff on 16 July 2024 is dismissed; and
 - c. The plaintiff should pay summarily assessed costs in sum of \$ 2,000 to the defendant within a month from today.




U.L. Mohamed Azhar
Acting Judge

At Lautoka
09.09.2024