

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 122 of 2021

BETWEEN : **RAVINDRA DEO VARMAN AND SUMANTLA DEVI
VARMAN**

PLAINTIFF

AND : **SSS TIMBER AND BUILDERS**

1ST DEFENDANT

AND : **SHAMAL SINGH**

2ND DEFENDANT

AND : **HOME FINANCE COMPANY LIMITED**

NOMINAL DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. S. Nand for the Plaintiff**
: **No representation for the First and Second Defendants**
: **Mr. N. Lajendra for the nominal defendant**

Date of Hearing : **28 August 2023**

Date of Decision : **2 February 2024**

DECISION

PRACTICE & PROCEDURE

Amendment of writ – addition of mortgagee in

action against contractors – Stay of mortgagee sale

a) Inglis and another v Commonwealth Trading Bank of Australia [1972] 126 CLR 161

b) Rauzia Zaweed Mohammed v Australia & New Zealand Banking Group Limited [1984] 30 FLR 136

1. The plaintiffs have filed applications for amendment of the writ, joinder of the nominal defendant and for an order to restrain the nominal defendant from proceeding with the sale of a mortgaged property. The applications were made to the master, which were referred to be determined by a judge.
2. The plaintiffs' action stems from a building contract entered into with the first and second defendants for the construction of a residence. The plaintiffs are claiming damages for alleged breaches of contract.
3. The affidavit in support of the summons to amend the writ of summons states that it is necessary to make changes to the names of the first and second defendants. There is no opposition to this application. The amendment is allowed to facilitate the plaintiffs' action.
4. The plaintiffs seek to add the name of Home Finance Company Ltd as a defendant. This application is opposed on the ground that the nominal defendant is not a party to the contracts between the plaintiffs and the first and second defendants.
5. The plaintiffs contend that the nominal defendant should be joined as the third defendant as it proposes to unjustly sell the mortgaged property, while this action is pending. The plaintiffs submit that it relied on the nominal defendant, as the financial institution that funded the project, to review the status of the construction before periodically releasing payments to the first and second defendants. The plaintiffs say it paid the nominal defendant \$50.00 in respect of each inspection.

6. The nominal defendant pleads that it was not a party to the plaintiffs' transaction with the second defendant. The bank says it is not equipped to monitor the progress of constructions projects. The nominal defendant states that periodic inspections were carried out merely to inspect the progress of construction works to release funds at various stages of the project, and that the inspection is not to be regarded as a detailed evaluation of the project.
7. Home Finance Company Ltd is a financier. The plaintiffs have not shown that it has anything to do with the contracts between the plaintiffs and the defendants. A perusal of the statement of claim shows that the plaintiffs' claims are against the first and second defendants. The only reference to the nominal defendant is that it was responsible in ensuring that the defendants completed the project in terms of the scope of work and advice the plaintiffs before the release of funds. The plaintiffs have not drawn the court's attention to any contractual provision that places such an obligation. The court is not inclined to agree with the plaintiffs' application to add the nominal defendant as a necessary party to the action.
8. The plaintiffs' application for a restraining order of the mortgage sale is opposed by the nominal defendant. The plaintiffs state that it entered into a building contract with the first and second defendants on 10 June 2019 to construct a residence. The plaintiffs took out a loan in 2017 from the nominal defendant to finance the building contract.
9. The plaintiffs say that they authorised the nominal defendant to release funds to the defendants upon carrying out an inspection for an agreed fee. They say they trusted the nominal defendant and its agent to properly inspect the progress of each stage in terms of the scope of works before requesting for release of payments to the first defendant. The plaintiffs says that the works were not completed in terms of the building contract and another contractor was engaged to complete the building.

10. The plaintiffs say that they were unable to make loan installments to the nominal defendant as they could not rent the premises by completing construction works as scheduled. They say that on 10 May 2022, the nominal defendant sent them an email advising that their property would be listed for mortgagee sale.
11. The nominal defendant relied on the decision in *Inglis v Commonwealth Trading Bank of Australia*¹ in stating that generally the powers of a mortgagee should not be restrained. In that case the court stated:

“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.”

12. The principle in *Inglis* was applied in Fiji in *Rauzia Zaweed Mohammed v Australia & New Zealand Banking Group Limited*². The plaintiffs have not satisfied court that the nominal defendant’s power to sell as mortgagee should be restrained.

¹ [1972] 126 CLR 161 at 164

² [1984] 30 FLR 136

ORDER

- A. The application to amend the writ and statement of claim is allowed.
- B. The application for joinder of the nominal defendant as a party is refused.
- C. The application for an order restraining the sale of the mortgaged property is refused.
- D. The plaintiffs are to pay the nominal defendant costs summarily assessed in the sum of 1,500.00.

Delivered at **Suva** on this 2nd day of **February, 2024**.



M. Javed Mansoor
Judge