

IN THE HIGH COURT OF FIJI AT SUVA

IN THE CENTRAL DIVISION

CIVIL JURISDICTION

Civil Action No.: HBC 279 of 24

BETWEEN: **ANIL BHISANIBUG KEVIN KUMAR**

PLAINTIFF

AND: **EXOTIC (FIJI) PTE LIMITED**

FIRST DEFENDANT

AND: **MERCHANT FINANCE**

SECOND DEFENDANT

Date of Hearing : **7 April 2025**

For the Plaintiff : **Mr Ram V.**

Counsel For Defendants : **Mr Tuitoga T.**

Date of Decision : **16 July 2025**

Before : **Waqainabete - Levaci, S.L.T.T, Puisne Judge**

R U L I N G

***(APPLICATION FOR INJUNCTION AND APPLICATION FOR LEAVE TO JOIN
PROVISIONAL LIQUIDATOR AS DEFENDANT)***

PART A – INTRODUCTION AND FACTS

1. There are two interlocutory applications before me. Both were called up one after another and the Court thereafter heard the parties on both the applications on the same day.
2. The first interlocutory application, filed on 11 October 2024, seeks Court orders to grant leave to the Plaintiffs to proceed the action against the 1st Defendant, who has been liquidated and that the Office of the Official Receiver be appointed as the Nominal Defendant.
3. Time was granted for the parties to file their responses to the Affidavit.
4. The Plaintiff thereafter filed another application on 29 January 2025 seeking interim injunction restraining the Second Defendant from exercising their powers as Mortgagee Sale to sell Certificate of Title No 12803 in Lot 12 on DP 3113 on Viti Levu until the final determination on the matter. This application was filed ex-parte, and given that the Defendant Counsel was already in Court on the first call date, the Court allowed for the matter to proceed inter parte and allowed documents to be served on the Defendant with time given for the parties to respond in their Affidavits.

AFFIDAVITS

Leave to join official receiver as nominal defendant

5. The Plaintiffs were advised on 6 June 2024 that the Defendants were wound up and an order for winding up of the 1st Defendants was sealed by the Court on 22 May 2024.
6. They wrote to Official Receiver and sort consent to continue with proceedings against the Defendant.
7. They then informed Court of their intentions and also sort that the Official Receiver become a nominal Defendant.
8. In an Affidavit in response filed on 17 December 2024, the Respondent objected to the application seeking leave to obtain consent and to join the official receiver as nominal Defendant.

9. The Defendant's authorized deponent deposed that the 1st Defendant entered into a mortgage with the 2nd Defendant with personal guarantees from Nilesh Prasad and Shandiya Geena Kumar on 12 April 2009 with a Mortgage document endorsed against the Certificate of Title No 12803.
10. In August 2020, there were restructuring of the mortgage for all the 1st Defendants accounts including a payout account. The restructuring was a consolidation of the 1st Defendants account currently active in 2020 with securities for each account being consolidated in order to reduce monthly payments. The restructure included the debt account and security i.e first registered third party mortgagee of the Plaintiff's Certificate of Title No 12803.
11. Together with this was a Deed of Collateralisation signed on or about August 2020 extending collateralisation to existing securities including the third party mortgage over the plaintiff's property.
12. On 10 May a wind up order was made in the High Court of Fiji and later sealed on 22 May 2024. An Affidavit Verifying Debt was filed by the Official Receiver on 5 November 2024 by the 2nd Defendant and attended a creditors meeting on 6 November 2024. The 2nd Defendant has demanded a sum of \$425,402.3 owing as third party mortgage no. 875549 left at their office and a notice of default was served on Nitin Nilesh Prasad and Shandiya Kumar on 10 December 2024 by registered mail.
13. In objecting to the application for leave to join Official Receiver as a nominal defendant, she deposed that the 2nd Defendant had suffered ongoing financial prejudice and unpaid principal and interest and owes \$802,536.14. As a result they depose the 2nd Defendant is deprived of ability of reinvesting and reallocating funds for lending or for business activities. There are also costs incurred unnecessarily and that there was sufficient notice and opportunity for the Plaintiff to remedy their default, which they failed to do so.

Interim injunction

14. The Plaintiffs depose that there is a pending matter HBC 279 of 2024 for which the claim is for breach of contract by the 1st and 2nd Defendants as per the officer letter by failing to inform the Plaintiffs of the increase in loan to avoid the plaintiff's application for discharge of property.

15. Thereafter the 2nd Defendants have placed an advertisement on 25 January 2025 seeking for mortgagee sale of the property known as Certificate of Title number 12803, which is the property under contention.
16. The Plaintiffs seek injunctive orders against the 2nd Defendant until the completion of the court proceedings.
17. In filing their Affidavit in Response, the Respondents depose that they admit that the property was advertised.
18. They depose that the Defendant mortgagee is suffering ongoing financial prejudice due to the 1st Defendants default on the unpaid principal and interest due depriving the 2nd Defendant of the ability to reinvest and reallocate the advanced funds for lending or business activities causing administrative and legal burdens and costs.
19. That the Plaintiffs were given sufficient notice and opportunity to remedy their default which they have failed to do so.

LAW, SUBMISSIONS AND ANALYSIS

Leave to join Official Receiver as nominal defendant

20. Section 531 of the Companies Act provides that:

Where a winding up order has been made or a provisional liquidator has been appointed under section 537, no action or proceedings must be proceeded with or commenced against the company, except by leave of the court and subject to such terms the Court may impose.

21. Hence section 531 of the Companies Act stipulates the requirements that until a winding up order has been made or a provisional liquidator appointed, can leave be sort for proceedings to continue.
22. In their submissions, the Plaintiff argued that since 30th November 2023 when the writ was filed, the 1st defendant was operating. However, winding up orders against the 1st Defendant occurred when the pleadings had closed.
23. Pursuant to section 531 and section 537 of the Companies Act 2015, when an interim liquidator is appointed, leave of the court must be obtained for an action to continue against a company that has been wound up. The Plaintiffs seek for the 1st

Defendant to be retained as they had entered into the Agreement which mortgaged the property currently under contention.

24. The Plaintiffs argue that the application is not misconceived as the registry had mistakenly given two numbers rather than placing it under Civil Action No 258 of 2023.
25. The Affidavit of the Plaintiff filed on 11 October 2024 annexes the Sealed court Orders entered on 10 May 2024 which determined that:
 - (i) *The Debt is not disputed and admitted by the company;*
 - (ii) *Accordingly an order made for winding up of the Company made an official receiver is appointed Liquidator of the purpose of liquidation.*
26. The Affidavit also annexes the letter from the Official Receiver reiterating the requirement for leave of the Court to allow for proceedings to continue and to join the Official Receiver as a nominal party to the proceedings.
27. In reply, Counsel for the Defendant argued that no action for winding up orders has been made or a provisional liquidator has been appointed in accordance with section 531 of the Companies Act 2015. In the current matter, the Plaintiffs are personal guarantees and provided their property as a security for the registered mortgage.
28. The Defendants submit that they have filed an affidavit verifying debt with the official receiver for the debt owed by the 1st Defendant. In the Fiji Daily Post Ltd -v- Westpac Banking Corporation [2018] FJJHC 244; HBC 600.2005 (28 March 2018) where Alfred J explained about parliamentary' s intention for section 531 of the Companies Act to obtain obligatory permission (a) to go on or continue with the legal action against the company (b) to start legal action against the company. Winding up dismisses the management power of directors and thus the liquidator takes over the company. The Defendants also referred the court to Commonwealth of Australia -v- Davis Samuel Pty Ltd [No 5] [2008] ACTSC 124 (14 March 2008 and 23 May 2008) which referred to the case of Oceanic Life Pty Ltd -v- Insurance and Retirement Services Pty Ltd (1993] 11 ACSR 516 at 520 where Zeelan J raised questions for leave as (1) whether there is a substantial question to be tried, (2) whether the action would interfere with the orderly winding up of the respondent (3) whether the action would serve any sufficient purpose and (4) whether the action would have any adverse effect upon the respondent and shareholders.
29. The Defendants argue there is no substantial question to be tried as the summons is misconceived. There is no challenge to the validity of the mortgage. Finally, the

action would prejudice the Defendants and adversely affect the shareholders interests.

30. In Vivek Investment Pte Limited, In re [2017] FJHC 696; Windingup 07.2017 (25 September 2017) held that:

“The decision in **Re Union Accident Insurance Co Ltd [1972] 1 All ER** cited by the learned Counsel for the Respondent is persuasive on the question of *locus* of the Board of Directors after a winding up Order is made. In respect of the issue of *locus*, among other things, the Court held as follows.

“.....No doubt that is so, but it is common ground that notwithstanding the appointment of provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and counsels to oppose the current petition and, if a winding up order is made, to appeal against the order.

The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to inquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it.

If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company. ...”

29. In light of the above, it is my considered view that the respondent Company’s alleged insolvency need not be an absolute bar for it to come before the Court to play its **Residuary** role through its Directors in order to salvage the Company.”

31. The Directors, in this instances, have very limited residuary powers to exercise, only if these are powers that cannot be exercised by the liquidator for matters pertaining to winding up that are provided for in the applicable laws or by an order of the court or where there is a challenge to the appointment of the liquidator.

32. However, these are not proceedings where the Directors seek reliefs against the liquidator.
33. The application before this court by the Plaintiff, is leave to appoint the provisional liquidator as a nominal defendant on behalf of the 1st Defendant, who is wound up.
34. In the case of Fiji Daily Post Limited -v- Westpac Banking Corporation HBC 600 of 2005 Alfred J held that the proceedings before the Master was a nullity as the summons to seek leave to prosecute the Appeal was not conducted by the Provisional Liquidator. The Plaintiff was the liquidated company and it was rightly so that the responsibility to prosecute the appeal rested solely with the Provisional Liquidator.
35. Where the Plaintiffs seek to join the Provisional Liquidator as a Defendant on behalf of the liquidated 1st defendant, the Defendants referred the Court to two Australian cases, Commonwealth of Australia -v- Davis Samuel Pty Ltd [No 5] [2008] ACTSC 124 (14 March 2008 and 23 May 2008) which made reference to the precedent case of Re Gordon Grant & Grant Pty Ltd [1983] 2 Qd R 314 at 315 – 317.
36. McPherson J in Re Gordon Grant -v- Grant Pty Ltd (Supra) summarized the relevant principles of determining an application for leave to proceed against a company in liquidation as follows:
 1. A decision to grant or, alternatively, refuse leave to proceed against a corporation in liquidation is a matter of judicial discretion.
 2. The prohibition against commencing or proceeding with an action or other proceeding against a company once a winding up order is made or the company is placed into liquidation has been a continuous feature of companies legislation.
 3. Without the relevant restriction, a corporation in liquidation could be subjected to a multiplicity of actions which would be both expensive and time-consuming (and could, by extension, have a significant impact upon any return to creditors).
 4. A claimant should proceed by way of lodgment of a proof of debt unless he or she can demonstrate that there is some good reason why a departure from that procedure is justified in the case of the particular claim in dispute.
 5. It is impossible to state in an exhaustive manner all of the circumstances in which leave to proceed may be appropriate. However, those circumstances can include factors such as the amount and seriousness of the claim and the degree of complexity of the legal

and factual issues involved and the status of the proceedings if they have already been commenced.

37. The Court adopts these principles which has been cited with approval in the Australian Courts. Although not widely considered here, the principles allows the Court to exercise its discretion in consideration of relevant circumstances. This Court finds these principles relevant and relatable to Fiji's current corporate law.
38. There is no evidence before this Court that the Plaintiffs have lodged their proof of debt with the provisional liquidator to demonstrate a good reason why the proceedings should continue, showing to this court their failure to comply with administrative directions in accordance with the Companies Act 2015 and its subsidiary laws and their lack of appreciation for the law. The lodgment of debt will enable the Provisional Liquidator to prioritize debt accordingly. The Defendants, on the other hand have lodged their Proof of Debt to the Provisional Liquidator.
39. The Plaintiffs, in their submissions, argues that the commencing claims are not within the application before the Court, but pending in another matter, running parallel before the Master. Hence they justify that in that claim, there are reasons why there is a serious claim containing complex issues in which they argue that they are not personally liable for the debts of the 1st Defendant, extended beyond what they had agreed to in their personal guarantee. The Defendants on the other hand, intend to exercise their powers of Mortgagee to sell the property owned by the Plaintiffs, for which the Plaintiffs had secured their property as personal guarantee.
40. The summons before the court is an interlocutory application and not an originating application. Even if this Court were to deal with it as an originating summons, Order 7 rule (3) of the High Court Rules requires that a Statement of Questions and concise Statement of Reliefs of Remedies be filed. The Summons also does not particularize the cause of action relied upon requiring the Court to determine which are contrary to Order 5 of the High Court Rules. Hence the Court cannot accept that this is an originating application, but merely an interlocutory application.
41. The Plaintiffs have indicated the basis of their claim in the summons, however they have not particularized their cause of action as well as the questions and remedies sort for the Court to determine. The Court therefore cannot determine the seriousness of the claim and the complexity of the issues at hand as there is no originating application.

42. There is no parallel application pending before this court to consolidate the proceedings nor to seek that the trials be heard together, given that they are related proceedings.

Interim Injunction

43. In their application for injunctive reliefs, the Counsel for the Plaintiff seeks that the 2nd Defendant be stopped from exercising their right of mortgagee sale. They argue that the sale would remove the very property that is personal and relied upon by the Plaintiffs. There are serious issues to be tried as the loan was increased and mortgage refinanced without their approval.
44. The property for which the Defendant seeks to sell is mortgaged as securities for the 1st Defendants loan. The Defendant counsel also considered the principles of injunction. The Defendant argued that there was no serious question to be tried as there was no originating process. The validity of the mortgage or its enforceability has not been challenged. Furthermore, there is no basis to restraint the 2nd Defendant from exercising its rights arising from a registered mortgage.
45. On a balance of convenience, the Defendant argues that if an interim injunction is granted, Defendants rights will be delayed further and prejudicial to the Defendants ability to recover debt which now stands over \$800,000 from February this year. The Plaintiff must now bear the consequences of default.
46. The Defendants submit when considering the American Cyanamid principles, they argue that it is difficult to ascertain whether the plaintiffs cause of action possesses the requisite substance to warrant further consideration due to lack of originating process. There is therefore no qualifying grounds for an injunctive reliefs.
47. Counsel for the Defendant argued that there was no originating process in this action for which the Plaintiffs seek injunctive reliefs. HBC 358 of 2023, the other related case, has an originating application. Therefore there is no justification for granting an interim application. There were two separate files for the same action, which the Plaintiff has failed to remedy. The notice of motion was initially struck out by Justice Sharma as there was no commencement proceedings.
48. The Defendants finally argue that on a balance of convenience, if an interim injunction is granted, there will be delay in the 2nd Defendant exercising his rights to recover the debt.

49. This is the second Summons filed by the Plaintiffs seeking for injunctive reliefs against the Defendants.
50. Let me address the preliminary issue before this Court. The Plaintiffs have again filed for an injunctive relief. However there is no originating proceedings pending or will be filed for the reliefs sort.
51. The Plaintiff relies upon the application filed on CA 358.23 which contains the originating applications.
52. There is no application before me to consolidate this matter with CA 358.23. Order 4 Rule 9 of the High Court Rules allows for the Court to grant consolidation of two or more causes or matters pending in the same division if the Court finds there are common questions of law and facts, the reliefs claimed in respect of or arise from the same transaction or for some other reason it is desirable to make an order.
53. Order 2 rule (1) of the High Court Rules allows for rectification for irregularities but does not remedy failures of a fundamental kind. This is not an irregularity but is a fundamental error, that when not addressed will affect the basis of the application. In Lata -v- Singh [2022] HBN 02.2022 (6 July 2022) my brother Judge struck out an application commenced by Notice of Motion and Affidavit as it was not in compliance with Order 5 of the High Court Rules which prescribes the mode of commencing proceedings for a substantive action.
54. Since this error has not been rectified by the Plaintiff, this Court finds that the application is a nullity.
55. However for completeness sake, let me address the injunctive application to determine the merits of it.
56. Order 29 of the High Court Rules allows for injunctive applications for a cause or matter before or after trial or whether or not it was included in the originating application. An application can be made for interim injunctive orders prior to the originating application being filed.
57. According to the application before me, the applicants seek to injunct the 2nd Defendants from exercising their Mortgagee Power of Sale.
58. The precedent decisions adopted in the Fijian Courts when considering the principles of injunction generally, is the case of American Cynamid Co -v- Ethicon Ltd [1975] UKHL 1 which provided in summary whether:

- (i) Whether there is a serious question to be tried;
- (ii) The balance of convenience;
- (iii) Whether damages is an adequate remedy.

59. The Mortgagee power of sale is exercisable in accordance with sections 75,76,77,78 and 79 of the Property Law Act where there are arrears in payments.

60. In Maharaj (trading as Ashneel Maharaj Limited) -v- Maharaj [2023] FJHC 454; HBC 203.2023 (11 July 2023) this Court had stated:

The key principles identified in case of American Cyanamid (Supra) summaries in the 'Supreme Court Practice 1999' (Sweet and Maxwell, London, 1998) pg. 565 para 29/L/3 states –

(i) evidences have not been tested by oral examination are only tendered on Affidavit;

(ii) the grant of the remedy is discretionary and temporary;

(iii) it is not the courts function to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend upon nor to determine serious questions of law for detailed argument;

(iv) where an application for injunction is to restrain a defendant from doing acts alleged to be in violation of the plaintiffs legal rights contested on facts the granting of the injunction tis to be taken when the existence of the right or violation of the right is uncertain and will remain until final judgement;

(v) To mitigate injustice during uncertainty when granting interlocutory injunction

(vi) subject to undertakings to pay damages to the defendant sustained by reason of the injunction if it is shown at trial that the Plaintiff was not entitled to injunction

(vii) the objective of seeking injunction is to protect the plaintiff from injury by violation of his right for which could not be adequately compensated in damages recoverable in the action of uncertainty where resolved in his factor at trial; the plaintiffs need for protection is weighed against the corresponding need of the defendant to be protected against injury

(viii) the claim is not frivolous or vexatious and there is a serious question to be tried;

(ix) On evidence satisfying the court by both parties at a hearing on the application of the Applicant, on a balance of probabilities that the act of the other party, may, on a balance of convenience, violate the Applicants rights.

(x) there must be available on materials placed before the Court at hearing, that the plaintiff has a real prospect of succeeding in his claim for permanent injunction at trial, the court should then consider the balance of convenience to grant or refuse an interlocutory relief.'

61. In Westpac Banking Corporation -v- Prasad [1998] FJCA 38; ABU 0027 in an Appeal by the Bank seeking to remove the interlocutory injunction, the Court determined there was serious question to be tried where the Respondents sued the Bank for failing to insure the mortgaged property and stated:

“The question we have to determine is whether his decision was in error. Upon the basis of the matters that appear to have been argued before him, it was not. Applying the principles which usually apply to applications for interlocutory relief, this was a case where it was open to his Lordship to hold that there was a serious question to be tried and that the balance of convenience favoured the respondent.

62. It is an unquestionable duty upon the Mortgagee to exercise his powers to sell the property where a debt is owing.

63. The Mortgagor has a right to injunct the Mortgagee where he can make payments to Court for the debt owing.

64. However there are case precedences that establish that where the Mortgagor challenges the enforceability of the documents, the requirement for payment of the mortgage may not be imposed – (see Prasad -v- Westpac Banking Corporation [2024] FJHC 67; HBC 11.2024 (5 February 2024) citing Where there is an attack on the enforceability of the security documents, where the grounds are arguable and not just mere application without any merit.

65. The Plaintiff argues there is a serious question to be tried and makes reference to the Writ filed in CA 358 of 2023 for which the Plaintiffs makes claims against the Defendants for re-financing the mortgage to the 1st Defendant without their knowledge, consent or approval.

66. However since there is no originating claim filed, in this matter, this Court cannot determine what are the issues of contention nor whether there is an arguable case. Hence whether or not there is a serious question, has not been established out right by the Plaintiffs.

67. Secondly, whether damages is an adequate remedy. The Plaintiff deposes that the property is currently under contention and the sale is not an adequate remedy as they contest in the Claim in CA 358 of 2023 that they do not owe the 2nd Defendants, as Mortgagee's the debt owing at \$800,000 for being personal guarantee and hence are not liable for the re-finance given to the 1st Defendants.
68. In this instance, damages is adequate enough.
69. There is no originating proceedings to stipulate the particulars claimed. Hence the Court finds that damages is an adequate remedy.
70. Lastly, on a balance of convenience, it would not be appropriate to injunct the Defendants from exercising their powers as a mortgagee. The application is also misconceived as the matter was filed without there being an originating proceeding or to file an originating application.

Orders of the Court:

- (i) Application for leave to join the Provisional Liquidator is not granted and dismissed;
- (ii) Application for interim injunctive reliefs is not granted and dismissed;
- (iii) Costs against the Plaintiffs payable to the Defendants for the sum of \$2000.




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Senileba Waqainabete – Levaci,
Puisne Judge, High Court of Fiji