

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 19 of 2024

BETWEEN : HOME FINANCE COMPANY PTE LIMITED trading as HFC
BANK
Plaintiff

AND : JOHN TUINUKUAFE HILL aka JOHN TUINUKUAFE HILL
BILAVUCU and ELIZABETH BALE aka ELIZABETH
BALE WAINISAU
Defendants

Counsel : Mr N Lajendra for the Plaintiff
Mr I Fa (Junior) for the Defendants

Hearing : 14 & 15 November 2024

Judgment : 5 March 2025

JUDGMENT

[1] There are two summons before this Court for determination. The Plaintiff has obtained Default Judgment on its claim and has filed a summons seeking charging orders over three of the Defendants' properties. The Defendants have filed their own summons seeking to set aside the Default Judgment.

[2] If the Defendants are successful, then the Plaintiff's summons must be dismissed. Even if the Defendants are unsuccessful, the Plaintiff must still show that it is entitled to charging orders over the three properties.

Background

[3] This proceeding has its origins in a loan provided by the Plaintiff to the Defendants in 2017 for construction costs and contingency funds. It appears that the size of the loan was extended in 2019 and again in 2021. By November 2019, the loan facility was \$1,690,000. By April 2021, it was, it appears, \$1,893,991.85.

[4] At some point in time, the Defendants fell into arrears, apparently struggling to make repayments. The Plaintiff issued a Mortgage Demand Notice to the Defendants on 14 February 2022. The Plaintiff says that it went to very generous lengths to allow the Defendants every opportunity to meet their repayments. Such generosity being in the form of interest-only repayments, holiday repayments, restructure of the loan, and so on. However, the Defendants remained in arrears and in late 2022 the Defendants sold one of their properties to reduce their debt, the amount of \$228,020.59 being made towards the arrears. The Plaintiff exercised its mortgagee's powers and sold another of the Defendants' properties. Efforts were made to sell the property by tender but without success. The Plaintiff then entered into a private sale in mid-2023 to sell the property for \$1.5 million.

[5] The proceeds from the sale went towards the Defendants debt but they still remained in arrears. As such, the Plaintiff commenced the present proceeding to recover the outstanding debt. A Writ of Summons was filed on 2 February 2024 – the Plaintiff seeks payment of the outstanding arrears of \$628,890.82 plus accumulating interest at 7.95% per annum.

[6] The Plaintiff attempted service of the court documents through its bailiff, who learned that the Defendants were residing in Papua New Guinea. However, the Defendant's then, but now previous, solicitor¹ contacted the Plaintiff's solicitors and agreed to accept service on the Defendant's behalf. The solicitor confirmed the same by phone

¹ Astas Law.

and then in writing by email on 26 February 2024. The solicitor advising that she had *'been instructed to represent Mr and Mrs Hill in this matter with HFC Bank'* and that the Defendants have *'also authorised that service be accepted by my office on their behalf'*. Service was effected by delivery on the solicitor on 26 February 2024. The Defendants' solicitors filed an Acknowledgement of Service for the Defendants on 27 February, but did not take any further steps.

- [7] According to the affidavit of Elizabeth Bale, the second named defendant, dated 24 July 2024² the Defendants *'instructed our solicitor at the time...to contact the bailiff and to deal with the matter on our behalf'*. Ms Bale stated that the Defendants paid \$5,000 to the solicitor *'as retainer...to act on our behalf in this matter'*. However, despite attempts to follow-up, the Defendants received no further contact from the solicitor, and as such on 23 April 2024 instructed their present solicitors to represent them. Ms Bale annexed email communications between her present solicitors and her previous solicitor – the present solicitors attempting without success to obtain documents and information from the previous solicitors.
- [8] As the Defendants failed to file a Statement of Defence, the Plaintiff obtained Default Judgment against the Defendants on 19 April 2024. The same was sealed on 22 April 2024.
- [9] About this time, the Defendants appear to have learned of the Default Judgment and instructed their present solicitors who filed a Notice of Change of Solicitors on 2 May 2024. The matter was called for mention before this Court in early June 2024 at which time the Defendant's solicitors advised that the Defendants intended to apply to set aside the default judgment, but was awaiting information and documentation from the Defendant's previous solicitor.

² Filed in support of the Defendants' summons to set aside Default Judgment.

[10] In the meantime, on 20 May 2024 the Plaintiff filed a summons seeking charging orders over three of the Defendants' properties. An affidavit in opposition was filed for Ms Bale on 31 July 2024. The Plaintiff filed an affidavit in reply on 6 August 2024.

[11] The Defendants filed their summons to set aside the Default Judgment on 24 July 2024, relying on the affidavit of Ms Bale dated 24 July 2024. The Plaintiff filed an affidavit in opposition on 30 August 2024. The Defendants filed an affidavit in reply for Ms Bale dated 4 November 2024.

Decision

[12] It is appropriate to deal first with the Defendant's summons to set aside the default judgment.

[13] The initial issue to consider, as raised by the Defendants, is whether the default judgment was obtained regularly or irregularly. The Defendant's contend that the default judgment was obtained irregularly because the Defendants were living overseas at the time the proceedings were filed and the Plaintiff ought to have obtained orders for service out of jurisdiction, which would have permitted the Defendants additional time to file their defence. The Defendants contend that their previous solicitor was not authorized to accept service on their behalf. I am unable to accept this argument. The Defendants offer no evidence to support this contention. The affidavit of Ms Bale does not suggest that the previous solicitor did not have authority. The email from the solicitor on 26 February 2024 expressly states that the solicitor was authorized. Ms Bale's statement that she paid \$5,000 to the solicitor to act on their behalf is consistent with such authorization.

[14] Accordingly, I find that the default judgment was regularly obtained by the Plaintiff.

[15] The Court has power to set aside the Plaintiff's default judgment under O.19, r.9 of the High Court Rules 1988. The Court may do so '*on such terms as it thinks just*'. The Court has a wide discretion but must act judicially in the exercise of the power. It appears that the parties agree that the test to be applied when considering an application to set aside default judgment is as follows:³

- i. Whether the applicant has reasonably explained the delay;
- ii. Whether the applicant has shown by way of affidavit evidence that it has a meritorious defense which has some prospect of success (major consideration); and
- iii. Whether the respondent will be prejudiced and suffer any irreparable harm.

[16] I am satisfied that the first and third criteria are satisfied by the Defendants. I accept there is a reasonable explanation for the delay by the Defendant's filing their Statement of Defence. Ms Bale deposes that the Defendants instructed the previous solicitor to deal with the matter and paid a retainer. The Plaintiff offers no evidence to dispute this. The delay was caused it appears by the previous solicitor sitting on the matter. The Defendants were not at fault and when informed of the default acted expeditiously to instruct their present solicitors.

[17] Similarly, I am satisfied that there is no irreparable or significant prejudice caused to the Plaintiff if the default judgment is set aside. Whilst, of course, the Plaintiff will incur further legal costs that would have been the situation had the Defendants filed their defence in time and the proceeding taken its normal course. The Plaintiff will not suffer any additional prejudice from the usual effects of a proceeding.

³ Para 20 of Defendant's written submissions.

- [18] The key question for determination, in my view, with respect to the Defendants' summons to set aside the default judgment, is whether the Defendants are able to demonstrate that they have a meritorious defence and counterclaim if they are allowed to defend the proceeding.
- [19] Mr Lajendra has helpfully summarized the basis for the Defendants' defence and counterclaim at paragraphs 23 and 24 of the Plaintiff's written submissions. In short, the Defendants contend that the Plaintiff owes them a fiduciary duty and has breached the same, the Plaintiff has not applied all their repayments towards the arrears as it should have (and thus their debt is considerably lower than pleaded), and the Plaintiff failed to secure a reasonable price from the mortgagee sale for their property, (the property allegedly being sold under value). The Defendants also allege unconscionable conduct on the part of the Plaintiff.
- [20] I have carefully read the affidavits filed by both parties. The affidavit by Mr Abdul Hakim for the Plaintiff is particularly voluminous containing a considerable number of documents and communications between the parties for the period from 2017. Having read the same as well as the affidavits for Ms Bale, and considered the respective submissions for both parties, I am satisfied that the Defendants do not have a meritorious defence or counterclaim. The relationship between the parties is contractual. The duties and obligations owed from one to the other is stipulated in the agreements contained with the various Letter of Offer entered into from 2017. The Defendants fell into arrears with their repayments and a Mortgage Demand Notice was issued to the Defendants on 14 February 2022. At that time the Defendants were in arrears in the amount of \$49,810.75. The Plaintiff required repayment of the full loan in the amount of \$1,842,287.49 within 30 days. The Plaintiff was entitled to do so in light of the Defendants default on its repayments.
- [21] There were subsequently numerous communication between the parties in respect to the debt. The Defendants were represented over this period by Jackson Bale Lawyers.

The Defendants sold one of their properties in late 2022 and paid the amount of \$228,020.59 towards the debt. From about the same time the Plaintiff took steps to sell another of the Defendants properties by mortgagee sale. The property was advertised for tender in October 2022 but without success. In 2023, the Plaintiff was able to secure a private sale for the amount of \$1,500,000. The sale was ready to be completed on 1 August 2023. The Defendants were made aware of the potential sale in June 2023. On 3 August 2023, the Plaintiff requested the keys for the property from the Defendants for the sale. The Defendants replied on 4 August 2023 that they had a buyer secured to purchase the property for \$2.5 million and subsequently supplied a Sale and Purchase Agreement with the buyer dated 8 August 2023. The terms of the Agreement being a deposit of only \$25,000 and the balance to be paid on the settlement date, being 60 days from the date of the Agreement, ie 7 October 2023. There followed multiple communication between the lawyers for the two parties. Despite the Plaintiff having a buyer organized, it agreed to permit the Defendants an opportunity to effect their own sale. Their buyer's finance was required to be sorted by September 2023 but this had still not been sorted by the date of settlement. The Plaintiff reluctantly permitted the Defendants a final extension to 16 October 2023. Jackson Bale Lawyers sought a further 7 day extension for the Defendants on 16 October which the Plaintiff appears to have agreed. However, on 25 October 2023 the Defendants emailed the Plaintiff directly to advise that their solicitors had withdrawn and the Defendants were now exploring refinancing the loan with BSP – the Defendants sought time to seek an answer from BSP. On 27 October 2023, new solicitors contacted the Plaintiff on behalf of the Defendants.⁴ Unsurprisingly, the Plaintiff ran out of patience and in order to protect its position carried through with the sale it had secured for the amount of \$1,500,000.

- [22] As should be plain from the above, the Plaintiff permitted the Defendants a generous amount of time to organize its own buyer despite placing at risk the sale it had secured. The Defendants were on notice from February 2022 that the entire loan was required to be repaid because of their defaults. The Plaintiff was well within their legal rights to arrange a mortgagee sale of the Defendants properties over which they

⁴ I note that the Defendants went through 4 solicitors over a 6 month period from October 2023 to April 2024, being somewhat indicative of the state of their financial affairs.

held registered mortgages.⁵ The obligations of a mortgagee were discussed by Fatiaki J in *Fiji Development Bank v Chute*, [1996] FJHC 87 (4 January 1996). That case too involved a default judgment following the failure of the defendant to file a defence. The defendant applied to set aside the default judgment. The learned Judge stated:

*Even assuming that the holder of a **Bill of Sale** owes a similar duty to the borrower/grantor, the parameters of the duty are clearly set out in the judgment of **Cross L.J.** in the leading case of *Cuckmere Brick Co. v. Mutual Finance Ltd.* (1971) Ch. D. 949 when he said at p.969:*

"A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power.

Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it."

(my underlining)

*No mention whatsoever is made as to **when?** the power must be exercised (if at all) **nor** is there the slightest suggestion that the duty arises **before** the exercise of the power of sale so as to include demand, seizure or repossession **nor** in my view, is there any warrant for extending the duty to such preliminary steps.*

In light of the foregoing I am firmly of the view that the defendant's proposed 'Defence' is insupportable in law and raises no triable issue. The application is accordingly dismissed with costs to be taxed if not agreed.

[23] Addressing the Defendants' defences and counterclaim:

⁵ See section 79(1) of the Property Law Act 1971.

- i. The Plaintiff's obligations to the Defendants are as stipulated in the contractual terms contained in the Letter of Offer.
- ii. Even so, the Defendants were permitted a considerable amount of time to repay the loan after it became due in full following the Demand Notice in February 2022.
- iii. The proceeds of the sale in the amount of \$228,020.59 were used by the Plaintiff towards the loan debt.
- iv. The Plaintiff was entitled to sell the Defendants property by a private sale. The Plaintiff was given ample time to find another purchaser for a larger sale price. They did not do so.
- v. There is nothing in the pleading in the Proposed Statement of Defence and Counterclaim, or in the material produced by the parties in their affidavits, to support the allegations of unconscionable conduct on the part of the Plaintiff or a breach of any alleged fiduciary duty. I am satisfied that the Plaintiff's conduct was fair and reasonable as evidenced by the opportunities it allowed the Defendants to repay the loan and to find its own buyer.
- vi. The Defendants were advised on several occasions by the Plaintiff and their solicitors in 2023 of the amount of the debt yet did not question the same.⁶ They do so now to assert a defence but the contention lacks substance.

[24] I now turn to the Plaintiff's summons seeking charging orders on three of the Defendants' properties. The Defendants oppose the application but offer no basis for their opposition except that they deny the amount owed and have applied to set aside

⁶ The Plaintiff supplied a loan statement to the Defendants solicitors on 23 June 2023. The solicitors replied on 20 July 2023 noting the same and reserving the right to seek clarification on the figures. It does not appear that the Defendants did so.

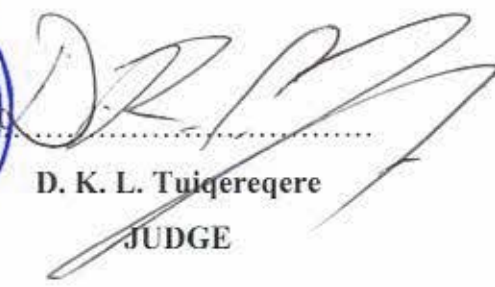
the default judgment. According to the Certificate of Title for the three properties one or either of the Defendants is the registered proprietor. In light of the default judgment against the Defendants in the amount of \$628,890.82, and the fact that the Defendants are the registered proprietors, I am satisfied that the Plaintiff is entitled, pursuant to s 32(1) of the High Court Act 1875, to a charging order over the three properties.

Orders

[25] I make the following orders:

- i. The Defendants summons to set aside the Plaintiff's Default Judgment is dismissed.
- ii. The Plaintiff is entitled under section 32(1) of the High Court Act 1875 to a charge over the following properties:
 - Certificate of Title No 36566 being Lot 22 on DP 7145 'Nabitu' (part of) situated in the District of Sigatoka and Island of Viti Levu having an area size of 3ha 7134m².
 - Certificate of Title No 40580 being Lot 1 on DP 9966 'Block 1 Deuba' (part of) situated in the District of Serua and Island of Viti Levu, having an area size of 2ha 235m².
 - Housing Authority Sublease No 368262 being Lot 42 on DP 4883 situated in the District of Labasa and Province of Macuata, having an area size of 15.6 perches.
- iii. The Plaintiff is entitled to costs summarily assessed in the amount of \$2,500, payable by the Defendants within 28 days.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Lajendra Lawyers for the Plaintiff

Fa & Company for Defendants