

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 291 of 2023

BETWEEN: **MOHAMMED ALEEM KHAN** of Kennedy Avenue, Nadi, Businessman.
PLAINTIFF

A N D: **KRISHNA SAMI NAIDU** of Samabula, Suva, Businessman.
FIRST DEFENDANT

A N D: **ANANTH REDDY** of Suva, Businessman.
SECOND DEFENDANT

A N D: **WESTPAC BANKING CORPORATION** a retail bank established under the Laws
of Fiji.
THIRD DEFENDANT

A N D: **VONSELA** a Company incorporated under the Laws of Fiji having its registered office
at Denarau.
FOURTH DEFENDANT

Appearances : Ms. Tupou Draunidalo on instructions of Pillai Naidu & Associates for the Plaintiff
 : Ms. Gul Fatima (appeared on 12 June 2024) and Ms. Nancy Choo (appeared on 21
 : February 2025) for R. Patel Lawyers for the First Defendant
 : Mr. Jon Apted for the Third Defendant
Date of Hearing : 12 June 2024 and 21 February 2025
Date of Ruling : 05 March 2025

R U L I N G

1. The background to this case is set out in the various judgments and rulings which I set out below:

- (i) **Gulf Investments (Fiji) Pty Ltd v Reserve Bank of Fiji** [2009] FJHC 209; HBC154.2009L (18 September 2009)
- (ii) **Gulf Investments (Fiji) Ltd v Strategic Nominees Ltd** [2009] FJHC 246; HBC153.2009L (30 October 2009)

- (iii) **Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd** [2011] FJCA 23; ABU0039.2009 (10 March 2011)
- (iv) **Gulf Investment (Fiji) Ltd v Strategic Nominees Ltd** [2012] FJLawRp 85; (2012) 2 FLR 202 (2 August 2012)
- (v) **Naidu v Gulf Investment (Fiji) Pty Ltd** [2022] FJHC 23; HBC217.2019 (21 January 2022)
- (vi) **Naidu v Khan** [2023] FJHC 391; HBC39.2012L (15 June 2023)
- (vii) **Khan v Naidu** [2024] FJHC 651; HBC39.2012 (16 October 2024)

2. Aleem Khan (“**Khan**”), the plaintiff, obtained an injunction *ex-parte* in December 2023 against Westpac Banking Corporation Limited (“**Westpac**”).
3. The injunction restrained Westpac from exercising its mortgagee-power-of-sale over a certain property in Denarau South.
4. The property in question is comprised in State Lease No. 16928. It is valued between \$60 to \$300 million. This state lease is held by a company called Gulf Nominees Limited (“**GULF**”). **GULF** also held a Class 1 Special Tourism (Development) Lease over an adjacent piece of native land.
5. In this ruling, I deal with two matters:
 - (i) the first is the question of whether or not the injunction which was granted *ex-parte* in December 2023, should continue as an interim injunction.
 - (ii) the second is whether or not I should grant leave to Khan to adduce a Ruling which was handed down by my brother Judge Mackie in October 2024.
6. I am not inclined to order that the injunction which was granted *ex-parte* should continue as an interim injunction for the following reasons.
7. Firstly, Khan is not the mortgagor. The mortgagor is **GULF**.
8. Secondly, while Khan, at some point in time, did own the majority shares in **GULF** and was also the managing director of the company, he, on 22 October 2015, signed an **Indemnity** by which he agreed to transfer his shares in **GULF** to Krishna Sami Naidu in *lieu* of payment of a default judgment sum in excess of \$2 million dollars which Naidu had obtained against Khan

on 31 May 2012 (see **Naidu v Khan** [2023] FJHC 391; HBC39.2012L (15 June 2023) as per then Master Azhar).

9. Thirdly, in any event, even if (assuming) Khan was still the majority shareholder of GULF, which he is not, generally, a shareholder is not entitled personally to an equitable proprietary interest in any property of the company to which he holds shares. It follows that, even if Khan is still a shareholder of GULF (which he is not), he has no personal equitable proprietary interest in the mortgaged property of GULF. It follows *ipso facto* that Khan lacks locus to even injunct Westpac's mortgagee action on the company property.
10. Fourthly, and flowing from the above, and based on Ms. Draunidalo's submissions in Court, Khan appears to seek a chance to redeem the mortgage at this interlocutory stage. The equity of redemption is available only to a mortgagor, which, as stated above, Khan is not.
11. Fifthly, and flowing from the above, the proper plaintiff to redeem the mortgage would be the company (GULF) and not any shareholder (as per the proper plaintiff rule in **Foss v Harbottle** (1843) 2 Hare 461).
12. Sixthly, and flowing from the above, GULF, in any event, was wound up on 08 November 2021. This was noted by Amaratunga J in **Naidu v Gulf Investment (Fiji) Pty Ltd** [2022] FJHC 23; HBC217.2019 (21 January 2022).
13. Accordingly, even if it is to be assumed that Khan had a remotely tenable argument that he is entitled as a shareholder (which he is not) to bring a derivative action on behalf of GULF to injunct Westpac from exercising its rights as mortgagee on GULF's Denarau properties (which Khan has not succeeded in showing), Khan ought to have sought the prior leave of the Court pursuant to section 537 of the Companies Act 2015 before filing the claim, and also before seeking the *ex-parte* injunction.
14. In addition to all the above, one of Khan's main arguments to restrain Westpac from exercising its power of sale over the Denarau properties revolves around the argument that Westpac's mortgage ought to be set aside because Westpac had knowledge (constructive or actual) of the unconscionable circumstances under which Khan was made to transfer his shares in GULF.

15. The unconscionable conduct in question is all alleged against the first, second and fourth defendants. At best, Khan's remedy in this regard would be to seek damages against these defendants in relation to that transaction.
16. Even if Khan were to succeed eventually in proving its case against the above defendants, the company (GULF) is already in liquidation before the Official Receiver. All that Khan would succeed in getting is a remote chance that if Westpac were to proceed with its mortgagee sale, there would be some leftover after all the priority payments are settled.
17. Having said that, even if Khan were to have a reasonably good chance of succeeding in its claim against the first, second and fourth defendants, that would still not be sufficient to justify a continuation of the injunction against Westpac.
18. I agree with Mr. Apted's point that Khan would have to establish that the title to the mortgaged property was tainted by fraud, and that Westpac had notice of the said fraud, to even remotely raise the possibility of impugning the mortgage. Ms. Draunidalo's argument only centered around the shares.
19. In other words, whatever cause Khan may have in relation to the GULF shares is all personal to him. Whatever that personal cause is, and even if it is a strong one, it cannot create in Khan's favour a direct personal equitable proprietary interest in GULF's assets so as to allow Khan to, for example, bring an action in his personal capacity to injunct Westpac in this case.
20. In **Macaure v Northern Assurance Co Ltd** [1925] AC 619, Lord Buckmaster said:

Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

(see also reference to the above case in **Subamma v Ark Co Ltd** [2022] FJHC 315; HBC173.2015 (24 June 2022) as per (then) Master Azhar; **Kempf v Toberua Island Ltd** [1994] FJHC 41; Hbc0301d.91s (26 April 1994) as per Mr. Justice Fatiaki).

21. Also, Ms. Draunidalo appears to put forward an argument that fraud was committed against GULF. While I do not wish to go into detail on that argument, suffice it to say that I accept Mr. Apted's position that the fraud which Khan complains of pertains to the transfer of his shares in GULF to the first defendant. As noted above, that transfer was effected pursuant to a Deed (Indemnity) which Khan executed on 22 October 2015.

22. While fraud is indeed a triable issue and the onus is on he who alleges it to prove it, in terms of the injunction that is now before me, Khan would have to prove notice on the part of Westpac to even stand a chance of convincing me that the injunction ought to continue as an interim injunction.
23. Ms. Draunidalo argues that notice ought to be imputed to Westpac in the circumstances of this case. The argument is that, if Westpac had carried out its due diligence as a responsible lender, it would have been put on notice of the fraudulent circumstances involved.
24. Mr. Apted maintains that the transfer of the shares is irrelevant in terms of Westpac's position as mortgagee because Westpac only dealt with GULF as a corporate body. It was under no obligation to enquire into the dynamics behind the changes in the shareholding. Furthermore, and as stated above, had Westpac dug deeper so to speak as argued by Ms. Draunidalo, all that Westpac would encounter is that there was a default judgment against Khan which had led to the Deed of Indemnity which Khan eventually executed in favour of Naidu and which had led to the transfer of Khan's shares in GULF to Khan and eventually to Vonsella Limited (see discussion in **paragraphs 34 to 37** below).
25. Ms. Draunidalo struggles though to explain what duty of care, if any, is owed by Westpac to the borrower, GULF, in appraising its loan application.
26. I agree with Mr. Apted's submissions that, as a general rule, a lender owes no duty of care to a borrower. A prudent lender, guided by its operations manuals, will make appropriate appraisals before granting a loan. However, its primary concern in making these appraisals would be its own security rather than out of any sense of duty to secure the interest of the borrower. Any due diligence that it undertakes prior to granting a loan is carried out to minimize its own risk and not for the borrower's benefit.
27. Ms. Draunidalo submits that there are known cases where equity has stepped in to vary or set aside a mortgage in circumstances where a Bank is found to have engaged in unconscionable conduct when it has used its position of power in securing a third-party mortgage or a guarantee from a party who is at a special disadvantage – and where the Bank had knowledge of the said disadvantage but had exploited it (see **Commercial Bank of Australia v Amadio** (1983) 151 CLR 447; [1983] HCA 14 (High Court of Australia)).

28. However, this case before me is distinguishable from the Amadio type of scenario. Westpac did not deal with Khan at any stage whatsoever because by the time, Khan's interest in GULF had already long passed to Naidu and from Naidu to Vonsella eventually.
29. I agree with Mr. Apted's submissions that, if at all Khan has an equitable remedy, then the remedy, at best, is arguable only against the original mortgagee, namely, Strategic Nominees Limited ("**Strategic**") which is a New Zealand finance company based in Auckland New Zealandⁱ.
30. By way of background, around 2009, while Khan was still the majority shareholder and director of GULF, GULF was approached by two entities namely Oceania Fiji and Oceania NZ (together "**the Oceanias**"). The Oceanias were interested in partnering with GULF to develop GULF's Denarau properties for Tourism purposes.
31. GULF agreed. I will not attempt to explain how their partnership was structured. Suffice it to say that, because GULF was providing the properties to be developed, the arrangement was that the Oceanias were to be responsible for securing finance for the project.
32. Oceania NZ then approached Strategic for a loan. Strategic saw that:
- (i) the advance sought by Oceania was in excess of NZ \$5 million only.
 - (ii) the advance was being sought to finance the tourism development project on GULF's Denarau properties pursuant to the partnership arrangement between GULF and the Oceanias.
 - (iii) GULF's Denarau properties was valued at more than NZ\$20 million at the time.
33. Based on that appraisal, Strategic agreed to lend the money to Oceania New Zealand on the condition that GULF's Denarau properties, the site of the proposed Tourism development project for which Oceania NZ was seeking finance – be given up as security for the advance.
34. In the event, GULF agreed and gave a third-party mortgage over its Denarau properties in favor of Strategic. It would appear that GULF acted in the belief that the money which Strategic would lend to Oceania NZ would be applied to the Tourism project on GULF's Denarau land, which of course, would benefit him. As it turned out:

- (i) Strategic lent the money to Oceania NZ. That transaction happened in New Zealandⁱⁱ.
 - (ii) Oceania NZ received the money, sent a small portion of it to Oceania Fiji (its sister company in Fiji) and then literally “disappeared”.
 - (iii) Alas! The Strategic loan was left unpaid.
35. Strategic then moved to exercise its power of sale over GULF’s Denarau properties.
36. It was against that background, and in the midst of Strategic’s move to seize GULF’s Denarau properties, that Khan entered into various arrangements with Mr. Krishna Sami Naidu in 2012.
37. One of those arrangements saw Khan executing a Deed by which Khan effectively acknowledged that he (personally) as well as his various companies (including GULF), were severally indebted to Naidu for various works and services provided by Naidu as well as various monies which Naidu had lent out to Khan and/or either of his companies. The cumulative debt acknowledged in the Deed as being owed by Khan and/or his companies is \$2,000,000.00. In due course, Naidu would obtain a default judgment on the said Deed in 2012. When Khan failed to settle the said debt, Khan in 2015, executed the **Indemnity** which is referred to in **paragraph 8** above.
38. To cut a long story short, Naidu did acquire Khan’s shares in GULF pursuant to the Indemnity. In due course, he would then sell the shares to Vonsella Limited. I gather that Vonsella then granted the mortgage to Westpac to refinance the loan debt to Strategic which, by that time, had long been in receivership (as noted in **Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd** [2011] FJCA 23; ABU0039.2009 (10 March 2011)).
39. The onus is on Khan to satisfy the Court that the injunction should continue (see **Westpac Banking Corporation v Prasad** [1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999)). For the injunction to continue, Khan must satisfy the test in the **American Cyanamid Co. v. Ethicon Ltd** [1975] UKHL 1; (1975) 1 All ER. 504, (1975) AC 396:
- (i) that there is a serious issue to be tried
 - (ii) that the balance of convenience favours the injunction
 - (iii) that damages would not be adequate

40. The reasons set out above do not convince me that there is a serious issue to be tried between Khan and Westpac as mortgagee.
41. In any event, even if I am wrong on that score, I would still decide this application in favour of Westpac on the balance of convenience. Westpac is a major commercial bank with substantive assets in this part of the world. It is in a relatively good position to meet any judgment against it, in favour of Khan, arising from this case.
42. In any event, the mortgagor (GULF) is already in liquidation before the Official Receiver. Hence, any surplus left from the proceeds of a mortgagee sale after reduction of the mortgage-debt, will be applied in terms of the priority scheme in the Companies Act. Any leftover from that, is what will be available to the shareholders of GULF. Again, Khan is no longer a current shareholder. I do note that in the case before Inoke J (**Gulf Investments (Fiji) Ltd v Strategic Nominees Ltd** [2009] FJHC 246; HBC153.2009L (30 October 2009)), Gulf had sought an injunction to restrain the mortgagee sale by Strategic in 2009. This was appealed to the Fiji Court of Appeal where the Fiji Court of Appeal directed GULF to pay into Court the mortgage debt of NZ\$5,811,616.27 as a condition for the continuation of the injunction. I gather that GULF did not comply with condition. The Deed (Indemnity) which Khan signed in favour of Naidu would follow a few years later. As to the second application, even if I were to grant leave to Khan to adduce the interlocutory Ruling which was handed down by my brother Judge Mackie in October 2024, the said Ruling would have no bearing on this decision for the reasons stated above.

ORDERS

43. The injunctive orders granted *ex-parte* on 28 December 2023 are to be dissolved forthwith. Costs to Westpac which I summarily assess at \$5,000 – 00 (five thousand dollars only) and to the first and fourth defendants at \$1,500 – 00 (one thousand five hundred dollars only i.e. seven hundred and fifty dollars each).



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Anare Tuilevuka
JUDGE
05 March 2025

ⁱ See Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd [2011] FJCA 23; ABU0039.2009 (10 March 2011).

ⁱⁱ As Inoke J noted in Gulf Investments (Fiji) Ltd v Strategic Nominees Ltd [2009] FJHC 246; HBC153.2009L (30 October 2009):

[5] According to Strategic, a total of NZ\$3.8m was advanced to Oceania NZ and out of that NZ\$1.5m was remitted directly to Oceania Fiji in Fiji. The sum of NZ\$1.3m remains undrawn. The loan was to be repaid by 27 April 2008. Oceania NZ failed to repay the loan on that date and Strategic instructed its Fiji solicitors to demand payment from Gulf and all the other guarantors. The amount demanded was about NZ\$5.8m. Attempts to settle matter failed. Gulf complains that despite the large expenditure, the only work carried out was a survey of the Land.