

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: 308 of 2008

BETWEEN: **JOTISHNA SHOBA NAIR** as Attorney of

SAMANUNU VANIQI

Plaintiff

AND: **NATIONAL BANK OF FIJI – ASSET MANAGEMENT**

Defendant

Coram: **Hickie J**

Date of Hearing: **20 November 2008**

Supplementary Submissions: **24 November 2008**
(Applicant)

26 November 2008
(Respondent's liberty to file not exercised)

Date of Ruling: **19 February 2009**

Appearances:

Mr J. Raikadroka for the Applicant Plaintiff

Mr R. Lal for the Respondent Defendant

INTERLOCUTORY RULING
ON INTER-PARTE MOTION

A. BACKGROUND

1. Inter-parte Notice of Motion

[1] This Ruling is in relation to the Plaintiff's Notice of Motion seeking the Court to grant two interim injunctions.

[2] The substantive matter is where the Plaintiff, **JOTISHNA SHOBA NAIR** as Attorney of **SAMANUNU VANIQI**, filed on 12 September 2008 a Writ of Summons and Statement of Claim seeking an injunction to restrain the Defendant **NATIONAL BANK OF FIJI** –

ASSET MANAGEMENT proceeding with a mortgagee sale as well as an Order for specific performance of an oral agreement for the Defendant to sell the property to the Plaintiff sale.

- [3] The Plaintiff also filed on 12 September 2008 an Inter-Parte Notice of Motion seeking interlocutory relief by way of two interim injunctions:
- (a) Prohibiting and restraining the Defendant, its servants and/or agents from proceedings with the mortgagee sale of Lot 1, Whippy Street, Suva; and
 - (b) Prohibiting and restraining the Defendant, its servants and/or agents from entering into any agreement whatsoever with any interested party in regards to the mortgagee sale of Lot 1, Whippy Street, Suva.
- [4] In support of the Notice of Motion, the Plaintiff relied upon the grounds set forth in an Affidavit of **JOTISHNA SHOBA NAIR** sworn on 9 September 2008 and filed on 2 September 2008. The main grounds set out in the said Affidavit are, in summary, as follows:
- (a) That **Ms SAMANUNU VANIQIA** who is usually employed as a Legal Officer in Fiji is currently on a 12 month tour of duty with the Fiji Military forces in Sinai and hence **Ms JOTISHNA SHOBA NAIR** is acting on her behalf;
 - (b) That **Ms SAMANUNU VANIQIA** was granted on 5 April 2004 Letters of Administration in the Estate of her late father, **AKUILA BALEISUVA**;
 - (c) That **Ms SAMANUNU VANIQIA** was granted on 13 September 2007 Letters of Administration in the Estate of her late mother, **KATARINA VANIQI**;
 - (d) That part of the said estates of **AKUILA BALEISUVA** and **AKUILA BALEISUVA** was a residential property contained in Crown Lease 8712 being Lot 1 on Plan SO.358 part of Lot 20 on SO.1044 situated at Whippy Street, Suva;
 - (e) That the said Defendant, **NATIONAL BANK OF FIJI – ASSET MANAGEMENT**, had a mortgage registered on 28 April 1989 over the said property;
 - (f) That there had been previous proceedings (Civil Action No. HBC 586 of 2005) in relation to the said property whereby **Ms SAMANUNU VANIQIA** had obtained an injunction against the sale of the said property;
 - (g) That the said previous proceedings were eventually struck out in August 2007;

- (h) That the Defendant via its Solicitors, **CROMPTONS**, by letter dated 10 September 2007 then agreed to settle with **Ms SAMANUNU VANIQIA** the mortgage over the said property for \$65,000 with settlement to take place on 28 September 2007;
- (i) That **Ms SAMANUNU VANIQIA** via her Solicitor, **VUIBAU LAW**, by letter on 12 September 2007, responded to the Defendant's letter said that they would try and expedite the grant of Letters of Administration in the Estate of her late mother, **KATARINA VANI**;
- (j) That **VUIBAU LAW**, by letter on 21 September 2007, wrote to **CROMPTONS** acting for the Defendant that Letters of Administration in the Estate of **KATARINA VANI** had been granted and transmission by death was granted on 19 September 2007;
- (k) That **CROMPTONS** then responded on behalf of the Defendant on 18 December 2007 saying settlement had been extended until 31 January 2008;
- (l) That **CROMPTONS** then wrote further letters to **VUIBAU LAW** on 4 and 23 January 2008 asking that they advise as to the present status of the matter;
- (m) That **RAIKADROKA LAW** who had now taken over the carriage of the matter for **Ms SAMANUNU VANIQIA** wrote to **CROMPTONS** on 31 January 2008 asking for the original title so that they could lodge the transmission by death;
- (n) That **CROMPTONS** responded on 18 February 2008 enclosing the original title deeds to the said residential property;
- (o) That when the original title deeds were sighted, it was noted that the mortgage on the property had been incorrectly cancelled in January 2007 by the Titles Office and this was brought to the attention of **CROMPTONS** in March 2008 wherein they asked that the transmission be put on hold;
- (p) That **CROMPTONS** then wrote on 5 June 2008 to **Ms SAMANUNU VANIQIA** asking that the title be returned and that they had advised the Defendant to proceed with a mortgagee sale of the said property;
- (q) That the said property was then advertised in *The Fiji Times* on 22 August 2008 for mortgagee sale by tender, closing on 5 September 2008;
- (r) That the Defendant will proceed with its mortgagee sale unless restrained by the Court.

2. The Defendant's response

[5] The Defendant filed on 9 October 2008 a Statement of Defence and Counter-Claim.

[6] In addition, the Defendant filed on 13 October 2008 an Affidavit of **SARA BULAVAKARUA** sworn on 9 October 2008 in opposition to the Motion filed on 12 September for an interim injunction. The main grounds set out in the said Affidavit are, in summary, as follows:

- (a) That the Plaintiff **JOTISHNA SHOBA NAIR** has no locus to bring this action as –
- (i) No power of attorney has been exhibited which makes her Attorney for **SAMANUNU VANIQI**; and
 - (ii) Even if the Plaintiff did have such power of Attorney, the action should have been commenced in the name of **SAMANUNU VANIQI** only;
- (b) That the injunction being sought to restrain the mortgagee sale is an abuse of process as essentially the same order was dissolved in Civil Action No.HBC 586 of 2005 before Coventry J in the High Court at Suva on 10 July 2007 and costs awarded against **Ms SAMANUNU VANIQI**;
- (c) That **Ms SAMANUNU VANIQI** entered into a settlement with the Defendant being –
- (i) That **Ms SAMANUNU VANIQI** was to pay the Defendant \$65,000;
 - (ii) That such settlement was to take place no later than 28 September 2007;
- (d) That at the request of **Ms SAMANUNU VANIQI**, settlement was extended on a further six occasions –
- (i) to 31 October 2007;
 - (ii) then to 31(?) November 2007;
 - (iii) then to 31 January 2008;
 - (iv) then to 29 February 2008;
 - (v) then to 30 April 2008;
 - (vi) then to 31 May 2008;
- (e) That the Defendant has a mortgage over the said property and loan repayments have been defaulted with \$169,449.33 outstanding as at 30 September 2008;

- (f) That as a result of the default in the mortgage, the Defendant exercised its power of sale by tender resulting in a tender being accepted from **Mr MOHAMMED HANIF** and, as such, the mortgagor's equity of redemption has expired;
- (g) That the Plaintiff has failed to give any undertaking as to damages to support the application for an injunction.

3. The Plaintiff's further material

- [7] The Plaintiff filed a Supplementary Affidavit in Response sworn and filed on 31 October 2008, of **JOTISHNA SHOBA NAIR**, stating, in summary, as follows:
- (a) That a Power of Attorney appointing Mr NAIR as the Attorney of **Ms SAMANUNU VANIQI** was registered on 30 April 2008;
- (b) That the power of sale was only invoked when the Defendant mistakenly thought that the Plaintiff had somehow fraudulently discharged the mortgage an error which had come from the Registrar of Titles Office and was rectified;
- (c) That while there has been no undertaking as to damages it can be dispensed with since the value of the property would be more than enough to cover any claim for damages;
- (d) That the previous court action was a challenge by **Ms SAMANUNU VANIQI** in relation to interest whereas the present action is against the Defendant's decision to proceed with the mortgagee sale despite having made an agreement which was not breached by **Ms SAMANUNU VANIQI**.
- [8] Counsel for the Applicant Plaintiff filed on 11 November 2008 "**Skeletal Written Submissions**" in support of their Application, in summary, as follows:
- (a) The provisions of sections 75 and 79 of the *Property Law Act* [Cap. 130] allows the Defendant to enter into possession and sell the property in case of default: see Singh J in **Australia and New Zealand Banking Group Ltd v Bulewa** (Unreported, High Court of Fiji at Suva, Civil Action No.HBC0233J of 2002S, 10 March 2004; Paclii: [2004] FJHC 280; <http://www.paclii.org/fj/cases/FJHC/2004/280.html>);
- (b) The principles which need to be satisfied for the grant of an injunction have been set out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and applied and adopted in the Fiji Islands, the test being –
- (i) Is there a serious issue to be tried?

(ii) Are damages an adequate remedy?

(iii) If not, where does the balance of convenience lie?

(c) **The Plaintiff submits that there is a serious issue to be tried** on the basis that the parties had agreed to the extension until 31 May 2008 for settlement but it was not possible due to an error by the Title Office in cancelling the Defendant's mortgage who mistakenly thought that the Plaintiff had somehow been involved and thus the Defendant exercised their right to sale because the Plaintiff had failed to settle;

(d) **The Plaintiff submits that damages would not be an adequate remedy for the Plaintiff** as if the Defendant is not restrained from proceeding with its proposed sale **Ms SAMANUNU VANIQI** will have lost the emotional attachment associated with her family home. The problem is, as Counsel for the Plaintiff has acknowledged, that **Ms SAMANUNU VANIQI** is not prepared to give an undertaking as to damages should her substantive action fail but says such amount can be taken from the sale of the said property and which goes against the sentiments expressed in a number of recent cases in Fiji, most recently being by Scutt J in *Naigulevu v National Bank of Fiji* (Unreported, High Court of Fiji at Suva, Civil Action No.598 of 2007, 15February 2008; Paclii: [2008] FJHC 141, <http://www.paclii.org/fj/cases/FJHC/2008/141.html>);

(e) **The Plaintiff submits that the balance of convenience lies with the Plaintiff** as the Defendant having agreed previously to extension to a long standing matter could suffer little or no inconvenience if they await the outcome of the substantive action and, indeed, the reason why settlement did not take place is attributable to the Defendant's then Solicitors seeking that the transmission be put on hold in March 2008 whilst the mortgage issue was clarified.

4. The Defendant's further material

[9] Counsel for the Respondent Defendant filed on 19 November 2008 "**Written Submissions**" opposing the Plaintiff's motion, in summary, as follows:

(a) That the said Plaintiff, **JOTISHNA SHOBA NAIR**, does not have a cause of action against the Defendant and should only be the second named Plaintiff;

(b) That the proceedings are an abuse of process because it was previously dealt with by the High Court of Fiji at Suva on 10 July 2007 and the injunction to restrain the mortgagee sale was dissolved and the action struck out;

- (c) That a mortgage is a security redeemable on payment or discharge of the debt or obligation: *Stanley v Wilde* [1899] 2 CH 474, and thus the Defendant's power of sale is available to it upon default in payments by the mortgagor standing at \$169,449.53 as at 30 September 2008;
- (d) That an injunction will not be granted to restrain a mortgagee sale merely because the mortgagor has a claim for damages against the mortgagee: *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161;
- (e) That where a mortgagor falls within the exceptions to the rule in *Inglis* (supra) they may have to give an undertaking as to damages: *Glandore Pty Ltd v Elders Finance and Investment Co Ltd* (1984) 4 FCR 130;
- (f) That as a general rule, a condition of the grant of an injunction to restrain a mortgagee sale will be payment into Court of the sum claimed by the mortgagor: *Inglis* (supra) (Walsh J at 164-165 with whom Barwick CCJ and Menzies and Gibbs JJ agreed);
- (g) The above principles have been adopted been adopted in the Fiji Islands in *Prasad v Raniga* (Unreported, High Court of Fiji at Suva, Civil Action No. HBC 256d of 1996S, 12 July 1996, Byrne J; Paclii: [1996] FJHC 29, <http://www.paclii.org/fj/cases/FJHC/1996/29.html>); *Pickering v National Bank of Fiji* (Unreported, High Court of Fiji at Suva, Civil Action No.HBC 252 of 1997S, 22 May 1998, Fatiaki J; [1998] FJHC 75, <http://www.paclii.org/fj/cases/FJHC/1998/75.html>); and *Hae v NBF Asset Management Bank* (Unreported, High Court of Fiji at Suva, Civil Action No.HBC 588D of 1998S, 27 July 2000, Shameem J; Paclii: [2000] FJHC 88, <http://www.paclii.org/fj/cases/FJHC/2000/88.html>);
- (h) That the Defendant rejects the Plaintiff's assertions that the delay in settlement was no fault of **Ms SAMANUNU VANIQI** -
- (i) Settlement was to be on a without prejudice basis;
 - (ii) **Ms SAMANUNU VANIQI** has breached the terms of settlement by failing to settle by 31 May 2008
- (i) That the Defendant asserts that all the requirements for it to exercise its power of sale have been met –
- (i) The Defendant has a mortgage over the said property;
 - (ii) The mortgagors have defaulted and a demand has been made by the Defendant;

(j) That the Defendant has accepted a tender for sale of the property before it has been sold by the mortgagor which has given rise to a contract between the Defendant and the successful tenderer which extinguishes the mortgagor's right of redemption: see *Lord Waring v London and Manchester Assurance Co Ltd* (1935) 1 Ch 130; and *Property and Bloodstock Limited v Emerton* (1968) 1 Ch 94;

(k) That the Plaintiff can be adequately compensated with damages by the Defendant should the Plaintiff be successful at trial which the Defendant is in a position to pay, but which, conversely, the same cannot be said about the Plaintiff, that is, if the injunction be granted and the Plaintiff fails at trial, the Plaintiff is not in a position to pay damages then or now and a claim for damages is not a sufficient ground to restrain a mortgagee sale: see *Inglis* (supra);

(l) That on the issue of the Plaintiff failing to provide an undertaking as to damages, this is an essential requirement in an application for an injunction and that the Plaintiff provide evidence of their financial position or not be taken seriously: *Sagalu & Ors v Arula Investment Company Limited* (Unreported, Fiji Court of Appeal, Civil Appeal No. 67 of 2000); *Chung Exports Ltd v Food Processors (Fiji) Ltd* (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 12 of 2003S, 26 August 2003, Eichelbaum, Tompkins and Penlington JJA; Paclii: [2003] FJCA 48, <http://www.paclii.org/fj/cases/FJCA/2003/48.html>);

(m) That if the Plaintiff wishes to proceed with its Motion then it must tender to the Court the mortgage sum of \$169,449.53: see *Inglis* (supra).

B. THE HEARING OF THE MOTION

1. Oral Submissions

[10] At the hearing, Counsel for the Applicant Plaintiff submitted in summary as follows:

(a) That the Plaintiff concedes that the Defendant has a right to oppose this motion the Defendants had granted an extension to settle until 31 May 2008 and that settlement was for \$65,000;

(b) The Plaintiff's case is simple in that the delay was caused by the Defendant's mortgage being wrongly cancelled by the Registrar of Titles an error which was then

picked up by the Defendant whose solicitors thought that somehow the Plaintiff was involved and that this was the main reason for not proceeding to settlement and also the reason why the Defendant decided to foreclose;

(c) That although the Plaintiff has not given undertaking as to damages the value of the property outweighs any damages which might be awarded, being a property with a value in excess of \$250,000 such that the difference would be about \$80,000 after mortgage;

(d) That the parties had agreed to an extension and but for the mortgage having been erroneously discharged in January 2007, settlement would have been possible;

(e) That the Plaintiff acknowledges that come 31 May 2008, they had agreed to settlement but here had been a pattern of behaviour, the letters of administration delayed settlement and then the problem of the Defendant's mortgage having been wrongly discharged such that the allegations that the plaintiff may have been involved stopped the process of settlement.

[11] Counsel for the Respondent Defendant submitted in response in summary:

(a) That the crux of this case is about settlement which the Defendant says was to be before 31 May 2008, a date which was accepted by the Plaintiff;

(b) That the Plaintiff says after 31 May 2008 she was unable to settle due to error on discharge of Defendant's mortgage;

(c) That the Defendant's position is that numerous extensions were granted to the Plaintiff to settle the matter, indeed some six extensions (see the Affidavit of **SARA BULAVAKARUA**, paragraph 4) but as at 31 May 2008 it was still not settled;

(d) That as a result of cancellation of the mortgage error, the Plaintiff says that she was unable to settle. But settlement was on a "without prejudice" basis such that the Defendant had a right to go back to its original position;

(e) That the power of Sale had arisen by 31 May 2008, there was no settlement and the Plaintiff is saying that she would have settled if the mortgage error had not delayed the matter. The Plaintiff should have exhibited in the Affidavit an ability to settle and that the Defendant had refused to settle. The Affidavit of the Plaintiff is bare on this issue;

(f) The Defendant's Affidavit is clear, there was no communication from the Plaintiff after the expiry of the settlement date whereby the Plaintiff was saying that she was ready to settle or asking for an extension of settlement;

(g) That in the Plaintiff's original Affidavit, the correspondence stops at February 2008. If the Plaintiff was in a position to settle there is no evidence of that and that the Defendant said that it was not in a position to settle;

(h) That the Defendant's position is that it was entitled to exercise the power of sale after 31 May 2008 which is what it did as set out in paragraph 8 of the Affidavit of **SARA BULAVAKARUA** whereby the Defendant accepted a tender on 15 September 2008 - see Exh "SB 6";

(i) That from May to September 2008 there was no attempt by the Plaintiff to settle or to indicate to the Defendant an ability to settle nor a request to extend the settlement time;

(j) That the Defendant submits that the Plaintiff's equity of redemption has now expired and the Defendant has now entered into an agreement with a successful tenderer such that the Defendant is now bound to that tenderer and wishes to complete the sale;

(k) The Plaintiff has failed to give an undertaking as to damages and is misguided offering an asset as security which she could only do so after the sale but she is trying to restrain that sale whilst offering the surplus proceeds from any sale as security as such the undertaking is worthless.

2. Supplementary Submissions

[12] At the conclusion of the hearing, the Applicant Plaintiff was ordered to file and serve within four days, a copy of the case they had raised at the hearing together with a maximum one page summary cover sheet highlighting the parts of the case to which they wanted the Court to note. The Respondent was then given liberty to file a maximum one page in response. The Applicant complied with this order, the Defendant decided not to exercise its right.

[13] In their supplementary submission, Counsel for the Applicant Plaintiff attached one case authority, ***Australia and New Zealand Banking Group Ltd v Kumar and Laxmi*** (Unreported, High Court of Fiji at Suva, Civil Action No. HBC 307 of 2002, 1 January 2003, Singh J; Paclii: [2003] FJHC 326, <http://www.pacii.org/fj/cases/FJHC/2003/326.html>), and submitted in summary as follows:

(a) That the parties had agreed to an extension and there was no breach on the Plaintiff's part as she needed the title deeds to effect transmission;

(b) That in *Kumar* (supra), the Defendants claimed that the *Consumer Credit Act* had streamlined enforcement procedures which was not adhered to by the Plaintiff, however, Singh J found: "*A mortgage is a contract between a mortgagee and mortgagor. The terms of mortgages vary infinitely depending on what the parties agree to.*"

C. THE FINDINGS

[14] The problem for the Applicant Plaintiff is simply this: a settlement date had been agreed between the parties being 31 May 2008. For whatever reason, it did not take place and after a number of months, the Defendant as the Mortgagee then advertised in August 2008 the property for sale by tender. This has taken place and a tender has been accepted.

[15] In addition, the Plaintiff has not satisfied the test for the grant of an injunction as set out in *American Cyanamid Co v Ethicon Ltd* (supra). Rather than setting out again in detail the submissions from both Counsel as they apply to each of the three criteria as stated in *American Cyanamid*, I find as follows:

(a) *Is there a serious issue to be tried?* This is debatable. The problem here is that there is no evidence in the Affidavits before the Court that the Plaintiff did anything between 31 May 2008 and 12 September 2008 to effect settlement or that she was in a position to settle;

(b) *Are damages an adequate remedy?* The Plaintiff claims an emotional attachment to her family home which cannot be adequately compensated by damages flowing from a sale of that home as proposed by the Defendant. At the same time, the Plaintiff has not offered an undertaking as to damages to compensate the Defendant should the injunction be granted but then the Plaintiff ultimately fails at trial. All that the plaintiff can "offer" if it can be termed as such, is her saying that there will be adequate equity in the property presently valued at \$250,000 after the mortgage has been deducted. This conveniently misses the point. As Counsel for the Defendant succinctly stated in her oral submissions

at the hearing of the Motion: The Plaintiff is trying to restrain the sale of a property whilst offering the surplus proceeds from any subsequent sale as security should she ultimately fail at trial. Such an undertaking is worthless. In addition, as Scutt J recently noted in *Naigulevu* (supra), a case cited by the Plaintiff in support of their case:

*“Are damages an adequate remedy here? Mr Naigulevu and Mrs Naigulevu face a considerable barrier on this point. **The authorities are clear. The approach of this Court is clear. Rarely, if at all, do the authorities allow for, or this Court endorse, the issue of an injunction to prevent a mortgagor from foreclosing on a mortgage, and advertising, tendering and selling property subject to it. If such a step is taken, then the quid pro quo is that the party in whose favour the injunction is issued is obliged to pay into court the full sum to which the mortgagor is entitled, should the mortgagor fail and the mortgagee succeed.** [My emphasis]*

Scutt J’s view was “further confirmed by the Orders” she made:

“ ... if the sum of \$80,000.00 is paid into Court within the stipulated 28 day period, then the injunction will remain until the final determination of the substantive matter. If that sum is not paid in to Court within that period, the injunction will necessarily be lifted.”

Scutt J in *Naigulevu* was simply following the authorities on this point, that is, as Counsel for the Defendant has submitted: A condition of the grant of an injunction to restrain a mortgagee sale will be payment into Court of the sum claimed by the mortgagor: *Inglis* (supra); *Prasad* (supra); *Pickering* (supra); and *Hae* (supra). The Plaintiff has clearly failed on this point.

(c) If not, where does the balance of convenience lie? As the Plaintiff has not given an undertaking, there would seem little point dealing with the third criteria, however, for completeness I note that the Plaintiff says it lies with her. With all due respect, this is a matter which has been outstanding for some years and six previous dates of settlement were offered but which the Plaintiff failed to meet. The Defendant has now sold the property to another and is bound to proceed with that contract.

[16] The Defendant has submitted that the case is one appropriate for an award of indemnity costs. As I have discussed in a number of recent cases, it is my view that for indemnity costs to be awarded, there would need to be conduct which could be pointed to by the

Defendant whereby the Plaintiff “had acted wholly unreasonably in connection with the hearing” and **such conduct would need to be “reprehensible conduct”** to signify the Court’s condemnation as to the way the Plaintiff has conducted the litigation: see, for example, ***Singh v Naupoto*** (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008, Hickie J – costs); Paclii [2008] FJHC 193, <http://www.paclii.org/fj/cases/FJHC/2008/193.html>).

- [17] As was noted in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler) (Bailii: [2005] UKSPC SPC00468, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html>) , two separate considerations are required (at paragraph 11):

*"The party's conduct must be unreasonable, but with the further characteristic that it is **unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma.**"*

- [17] Although the Plaintiff’s Counsel was aware of the potential problems with this Notice of Motion particularly as to the naming as to who is the actual Plaintiff, there being no undertaking as to damages and further once the Defendant had filed its Affidavit annexing the copy of the letter of 15 September 2008 that the Plaintiff was aware that tender of **Mr MOHAMMED HANIF** had been accepted. On another view, however, he still had an arguable case to place before the Court. I do not find any evidence that the Plaintiff “acted wholly unreasonably in connection with the hearing” of this Motion.
- [18] As to whether the Applicant Plaintiff may have an action against her former Solicitor and/or the Registrar of Titles is not a matter for this Court to consider. The problem still remains that there is no evidence before the Court that the Plaintiff was in a position to settle the property between 31 May 2008 and bringing the filing of this Notice of Motion on 12 September 2008.

[19] There is one final matter I wish to mention. At the first “call” of this Motion on 15 September 2008, Counsel appearing for the Respondent Defendant gave an undertaking to this Court that *“Until further Order of this Court, the Defendant would not proceed with any disposition of the property at Lot 1, Whippy Street, Suva”*. I do note that on the same day, 15 September 2008, the Defendant entered into an agreement with **Mr MOHAMMED HAIF** as the successful tender for the said property. On one view that was not a breaching of the undertaking and the Defendant was purely arranging its affairs to proceed with the sale should it be successful in having the Plaintiff’s Motion dismissed. On another view, the Defendant was, if not disposing of the property then, by entering into an agreement with the successful tender, it was ensuring that it was now bound to that tenderer to complete the sale (and thus strengthening its position to argue that the Motion was fruitless). Perhaps, the parties may wish to consider this when negotiating their respective views as to costs and how much the Applicant should pay on a party-party basis or if the parties should be responsible for their own costs.

[20] **The Court orders as follows:**

- 1. That the Applicant Plaintiff’s Notice of Motion filed on 12 September 2008 is dismissed.**
- 2. That the question of costs of this Motion which if not agreed between the parties by 4pm on 24 February 2009 then to be determined by the Court at 8.30am on 26 February 2009.**

Thomas V Hickie

Judge

Solicitors:

Raikadroka Law, Barristers & Solicitors, Suva

Jamnadas & Associates, Barristers & Solicitors, Suva