

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. **HBC 155 of 2009L**

BETWEEN : **BRETT WHITTAKER** and **LOUISE WHITTAKER**

Plaintiffs

AND : **NATIONAL BANK OF FIJI LTD TRADING AS COLONIAL**
NATIONAL BANK

Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Messrs. I D Roche & P A Lowing for the Plaintiffs
Ex-Parte Application

Solicitors: Lowing Nandan & Associates for the Plaintiffs
No Appearance for the Defendant

Date of Hearing: 27 August 2009
Date of Judgment: 31 August 2009

INTRODUCTION

[1] This is an ex parte application by Mr and Mrs. Whittaker to restrain the Colonial Bank from proceeding with mortgagee sale of their properties.

[2] The application came ex parte because there was urgency in that the Bank was threatening to advertise mortgagee sale on the next day, Friday 28 August 2009.

[3] I heard Counsel for the Whittakers on 27 August 2009 and granted the restraining orders they sought against the Bank, namely:

- 1. *Until further order, the Defendant by its officers, solicitors, servants and agents be restrained from taking any steps to act upon or in furtherance of the exercise any of the powers referred to in documents purporting to be Notices addressed to the Plaintiffs and dated 4 June 2009 and 22 August 2009 including advertising and sale of any land being the land described in Schedule A attached to this Order (hereinafter referred to as the Land).***
- 2. *Until further order the Defendant whether by its servants or agents be restrained pursuant to Sections 125 and 127 of the Fair Trading Decree (as amended) from howsoever dealing with any of the Land or part thereof (including but not limited to) selling the Land, foreclosure or appointment of a Receiver/Manager over the Land.***
- 3. *Until further order the Defendant whether by its servants or agents be restrained from howsoever exercising any power of sale or any of its powers as first mortgagee over the Land or part thereof (including but not limited to) selling, foreclosure or appointment of a Receiver/Manager or in anyway whatsoever over the Land.***
- 4. *That this Order in the first instance be served on the defendant immediately by facsimile to its Suva office on 330 4481 and that a sealed copy of this order, a sealed copy of the Writ of Summons and Affidavit of Brett Whittaker dated 27 August 2009 be served on the defendant at its registered office by 12 noon on Friday 28 August 2009.***
- 5. *Costs be reserved.***
- 6. *That this notice be returnable on 2 September 2009 at 9.30 am.***

[4] These are my reasons.

THE APPLICATION

[5] The application was supported by a substantive and comprehensive affidavit sworn by Mr Whittaker which deserves commendation for the way it was drafted and

put together. The Plaintiff also filed a Writ of Summons and Statement of Claim and Mr Roche filed an outline of his submissions.

THE FACTS FROM THE AFFIDAVIT

[6] Mr Roche took me through the affidavit which showed two things. Firstly, there are several serious issues between the parties. There is the issue of whether the Bank's demand notice was valid and compliant with **sections 77, 78 and 79** of the **Property Law Act [Cap 130]** so as to give the Bank the right to proceed with mortgagee sale. It is clear also that the parties have fallen out and the Bank may have acted in bad faith and in breach of contract by reneging on a previous loan agreement and by its change of attitude which appears to have come about simply because of a change in management. There is the issue of promissory estoppel. The Statement of Claim also alleges misleading and deceptive conduct by the Bank and seeks specific performance of that loan agreement.

[7] Secondly, there was a real likelihood of the Plaintiffs being damaged in their reputation as "high end" builders in the building market in Fiji if the Bank was allowed to proceed with the threatened mortgagee sale. It is clear that the attitude of the Bank is that it is no longer willing to talk to Mr Whittaker and is determined to proceed with the mortgagee sale.

THE LAW

[8] **Order 29 rule 1(2)** of the **High Court Rules 1988** require that the applicant shows urgency and that irreparable or serious mischief would result in proceeding inter parte.

[9] The Applicant must also bring himself within the **American Cyanamid**¹ principles, i.e. that there are serious issues to be tried, damages are not an adequate remedy and the balance of convenience lies in his favour: **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2004] FJCA 59; **ABU0011.2004S & ABU0011A.2004S** (26 November 2004); **Glenore Ltd v Global Premium Services Ltd** [2009] FJHC 174; **HBC148.2009L** (21 August 2009).

APPLICATION TO THE FACTS

URGENCY

[10] I am satisfied that there is urgency in hearing the application ex parte in that the threatened advertising of mortgagee sale was to happen the next day. It was not a case where the applicant waited for the last moment before coming to Court. Mr Whittaker had been in communication and negotiating with the Bank, albeit unsuccessfully, prior to issuing his application.

IRREPARABLE OR SERIOUS MISCHIEF

[11] I am also satisfied that there is likely to be irreparable or at least serious mischief if the Bank is notified of the application. The relationship between the parties have broken down irretrievably and the Bank is more likely than not, to proceed with the threatened advertising of mortgagee sale.

DAMAGES NOT ADEQUATE

[12] I also accept Mr Roche's submission that this is a case where damages are not an adequate remedy. The hitherto good reputation of the Plaintiffs as "high end" property developers since 1994 may be so damaged irreparably that no amount of monetary compensation can make good such damage. I accept what Mr Whittaker says in paragraph 90 of his affidavit.

¹ (1975) 1 All E R 396

UNDERTAKING TO DAMAGES

[13] For present purposes, I am satisfied that the Plaintiff's undertaking as to damages is sufficient. The likely losses that the Bank may suffer is no more than the outstanding balance of principal and interest but the unencumbered value of the Plaintiff's properties is more than such losses.

BALANCE OF CONVENIENCE

[14] As to the balance of convenience, I challenged Mr Roche to convince me as to why I should find the balance of convenience in his client's favour when the weight of authority is to the effect that a defaulting mortgagor wishing to stop a mortgagee exercising power of sale must pay the amount owed into Court. See for example: **Inglis v Commonwealth Trading Bank of Australia [1972] HCA 74; (1972) 126 CLR 161 (28 April 1972).**

[15] His submission was this. If I were to accept that the Whittakers have a prima facie case then the Bank's power of sale does not arise. That still leaves open, in my opinion, the question of whether the alleged misrepresentations were sufficient to vitiate the funding agreements and mortgages pursuant to which the Bank is basing its actions on.

[16] Counsel also agreed that the Bank may have acted in bad faith. I for myself prefer to look at the matter in that light. For present purposes, I need only be satisfied that there is a serious issue and therefore make no conclusive finding in that respect in this judgment. As Mr Whittaker says in his affidavit,² in reliance of the letter of offer from the Bank of 8 June 2005 signed and accepted by him and his wife, he not only changed his bank but moved house to Denarau and changed his position and entered into new development projects. The Whittakers initially banked with the ANZ Bank. A change in Managing Directorship put the Colonial Bank on a course which ultimately

² Paras 21-28

resulted in the Bank dishonouring the initial funding arrangement that it had agreed to provide.³ The Whittakers were put in a position where they had no choice but to agree to a new funding arrangement in August 2006 of about half of what was agreed to originally.⁴ Between then and 2009 Mr Whittaker made several attempts to get the Bank to approve projects which he was convinced would generate income to pay down the loan but the Bank refused to budge. He says:⁵ "I explained that I felt that the (Bank) had lured me into a facility, gained my business and then betrayed that commitment."

[17] Kay J in **Warner v. Jacob** (1882) 20 Ch D 220, at 224 said:

"...a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him to better realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud."

[18] This statement was cited with approval by the Privy Council in **Haddington Island Quarry Company Limited v. Hudson** [1911] AC 727 @ 729, an appeal from the Court of Appeal of British Columbia. Subsequent cases and legal writers have referred to this rule as the "good faith" standard.

[19] What is meant by 'good faith'? Isaacs J in **Pendlebury v Colonial Mutual Life Assurance Society Ltd** (1912) 13 CLR 676 at 699-701 said:

*"But what is included in 'good faith'? Lindley LJ in **Kennedy v. De Trafford** [1896] 1 Ch 762 at 772 said: 'It is not right, or proper, or legal, for him, either fraudulently, or willfully, or recklessly, to sacrifice the property of the mortgagor'. Lord Herschell in the House of Lords ([1897] AC 180 at 185) said that was all included in good faith."*

BALANCE FAVOURS PLAINTIFFS

³ See for example paras 29-34, 37, 44, 46 of the affidavit.

⁴ Para 47-49

⁵ Para 57

[20] I find that the facts as they appear from Mr Whittaker's affidavit support a case where the balance of convenience lay in favour of the Plaintiffs.

[21] I therefore granted the orders as prayed and adjourned this matter to **2 September 2009** at 9.30am for the Bank to appear and be given an opportunity to be heard as to whether the interim orders that I have made should remain until the final determination of this action.

.....
Sosefo Inoke
Judge