IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI

CIVIL ACTION NO. HBC 16 of 2013

BETWEEN : **CHANDRESH ARUN PRASAD** also known as **CHANDRESH ARUN** also known as **ARUN CHANDRESH PRASAD** of Varadoli, Ba, Fiji, Special Administrator.

PLAINTIFF

AND : **ZARSHBINA COMPANY LIMITED** a limited liability company having its registered office at the office of Divendra Singh and Company Accountants being Office No. 10 at Tukani Street, Lautoka, Fiji.

FIRST DEFENDANT

AND : **FIFA HOLDINGS (FIJI) LIMITED** a limited liability company having its registered office at Rarawai Road, Ba, Fiji.

SECOND DEFENDANT

Appearances : Mr. D. Gordon for the Plaintiff.
Mr. Koya for the 1st Defendant.
Ms. N Khan for the 2nd Defendant.
(appearances amended under the Slip Rule Ord. 20 Rule 10)

R U L I N G

INTRODUCTION

[1]. On 08 February 2013, Chandresh Arun Prasad (**"Prasad"**) obtained *ex-parte* an interim injunction to restrain the mortgagee sale on Certificate of Title 18230. This property is located in Ba, Fiji. The mortgagee in question is a small limited liability company called Zarshbina Company Limited (**"ZCL"**). ZCL has two directors namely Dr. Sahu Khan and his daughter Zarbina. The Sahu Khans are both lawyers. The question before me now is whether or not to extend the interim injunction until the final determination of this matter.

[2]. Prasad acquired CT 18230 in April 2009 through a mortgagee sale by Westpac[1]. The purchase price was $170,000. And this was the amount Prasad actually paid to Westpac. The mortgage document however reflected a higher principal sum of $203,324 (see further below). It is common ground that Dr. Sahu Khan had been solicitor for Prasad and his family for many years. And he handled all the conveyancing formalities for Prasad on the particular occasion in question in this case. Dr. Sahu Khan also arranged

[1] Westpac Banking Corporation Limited.

for finance for Prasad. And, finance was to come from Dr. Sahu Khan's own company, ZCL[2]. Prasad executed that mortgage on 22 April 2009.

Dr. SAHU KHAN

[3]. It is particularly noteworthy that Dr. Sahu Khan acted for both Prasad (the mortgagor) and ZCL (his company/mortgagee) in brokering the finance and in arranging and registering the ensuing mortgage security (Mortgage No. 718744). He also registered the transfer. In all the related documentation and applications, Dr. Sahu Khan was the solicitor who witnessed the signatures for both parties.

[4]. While a barrister and solicitor is a *"qualified witness"* under the Second Schedule to the Land Transfer Regulations[3], he or she **may** still be conflicted if he/she represents both the mortgagor and the mortgagee in a mortgage transaction, and even more so, where the solicitor himself is the mortgagee. It might be said that any lawyer in such a position, even at their best, would have been influenced, partly or wholly, by motives of self-interest from the time he/she negotiated the terms of repayment to the time he made the demands (let alone, the basis on which the demands are made). Ultimately, any question raised pertaining to the mortgage document itself may validly be questioned, and/or may even affect such questions as: whether any accounting, assessment, demand, and ultimately, whether any power of sale planned was bona fides and exercisable at all?

[5]. Mr. Gordon argues that Dr. Sahu Khan's conduct throughout his dealings with Prasad did expose him to a position of conflict to such an extent as to potentially render the mortgage void. The argument is that there are serious issues of ethics and credibility in Dr Sahu Khan's conduct. There is even a hint of an allegation in the submissions that

[2] Paragraph 6(ii) of Dr. Sahu Khan's Affidavit is set out in full:
Also the Plaintiff desperately needed some cash for himself to pay for the costs of the transaction of purchase of the house and the discharge for the then existing mortgage on the property and the registration of the transfer and the new said mortgage of the said property (including the stamp duties, Registration and agency costs and our costs).

[3] The Second Schedule states that "For the purpose of section 122 the following shall be qualified witnesses- (a) within Fiji-
.....
(iv) a commissioner for oaths of the Supreme Court of Fiji;
(v) a barrister and solicitor or a barrister or a solicitor of the court in such country;

Dr. Sahu Khan might have lent monies from his trust account in these transactions. That is speculation that might have been fuelled by the manner in which Dr. Sahu Khan conducted himself professionally in dealing with Prasad (e.g. the failure to credit the $150,000.00 on time, the unaccounted payment to a Bob Kumar, interest, and Dr. Sahu Khan's account of where the extra amount in the principal sum is to be accounted for (as discussed below).

WHY ZCL FINANCE?

[6]. Why Prasad did not apply for a loan from a commercial bank, is a question I ask myself. Perhaps, Prasad trusted Dr. Sahu Khan. After all, they had a long association[4]. According to Dr. Sahu Khan, Prasad was under time pressure to complete the purchase from Westpac. And he had asked Dr. Sahu Khan for assistance. Prasad says however that he had wanted to, and could have, obtain(ed) a loan on much better terms[5] from a commercial bank to finance the purchase. This did not happen because Dr. Sahu Khan had charmed him into believing in the ZCL option[6]. The agreement, Prasad[7] says, was that he was to repay ZCL the $170,000.00 debt. This was to be done as and when proceeds from the sale of another property of his was done and the proceeds paid into Sahu Khan's trust account.

MORTGAGE & REPAYMENTS

[7]. Prasad's original affidavit exhibits a copy of mortgage 718744. Clause 1 of the mortgage stipulates *inter alia* that Prasad will pay ZCL the sum of $203,324.00 by 22 July 2009 *"and thereafter on demand"*. Clearly, Prasad did not pay the sum of $203,324.00 by that stipulated date.

[4] in paragraph 9(iii) of his affidavit, Dr. Sahu Khan deposes as follows:

(iii) I agree that our firm was solicitors for the Plaintiff for a long time and since the Plaintiff was desperate to purchase the said property we assisted to arrange finance for all the monies he needed.

[5] at paragraph 4(A) of his affidavit, Prasad states that he could have obtained better terms from a commercial bank but that Dr. Sahu Khan promised him that he would only need to make payment as and when monies from the sale of his related property for $180,000.00 arrived into the trust account of Dr. Sahu Khan.

[6] i.e. that he would only need to make payment as and when monies from the sale of his related property for $180,000.00 arrived into the trust account of Dr. Sahu Khan.

[7] see paragraph 23 of his affidavit.

[8]. However, four months after the said stipulated date, Prasad did pay directly into Dr. Sahu Khan's Trust Account the sum of $150,000. Again on 16 November 2012, Prasad paid into the ANZ account[8] of one Bob Kumar the sum of $4,300.

[9]. Prasad was directed by Dr. Sahu Khan to make that last Bob Kumar-payment. And the payment was made to settle some personal commitment of Dr. Sahu Khan's to the said Bob Kumar. It is common ground between the parties that Dr. Sahu Khan was to, then, "cross-credit" that payment against Prasad's ZCL mortgage account[9]. However, that "cross-crediting" did not happen. I observe that this informal arrangement was made two and a half years after the mortgage-stipulated date of payment. Furthermore, that arrangement was made some seven months after ZCL had entered into a Deed (on 18 April 2012) to sell CT 18230 to the second defendant, Fifa Holdings (Fiji) Limited (**"FHFL"**).

PRINCIPAL SUM

[10]. Prasad and ZCL are in disagreement yet again as to what the principal sum actually borrowed was. ZCL says that it was $203,324.00. This is the figure stated on the mortgage as the principal sum borrowed by Prasad. Prasad, on the other hand, relies on the amount actually paid to Westpac in settlement for the purchase of CT 18230 which was $170,000.

[11]. The difference between those figures is $33,324.00. No argument on *non-est factum* is raised by Prasad[10]. Nor was any argument made as to what extent the *parol evidence* rule may or may not apply in this case. These are triable issues in any event.

[12]. Prasad deposes that he noticed the grossly inflated figure of $203,324 on the mortgage when the document was presented to him for execution. When he queried Dr. Sahu Khan about that, Dr. Sahu Khan had assured him that the inflated figure was just some formality and was of no consequence to the informal arrangement that they had. Why

[8] ANZ Account No. 1550099.

[9] At paragraph 19(ii) of Dr. Sahu Khan's Affidavit, Dr. Sahu Khan admits that the payment of $4,300.00 to Bob. Kumar was towards the mortgage, yet none of the Mortgage Statement issued by Dr. Sahu Khan give any credit for this $4,300.00. Therefore, according to Prasad, the mortgage demands are once again in error and unlawful.

[10] **Fiji Development Bank v Ragona** [1984] FJSC 10; [1984] 30 FLR 151 (1 May 1984).

Prasad would then sign the document anyway might attest to the trust that he had for Dr. Sahu Khan and the urgency in his matter with Westpac. However, it could also simply be evidence of the fact that $203,324.00 was actually borrowed by Prasad. This is, again, a triable issue of fact.

[13]. Dr. Sahu Khan alludes at paragraph 6(ii) of his affidavit that the sum of $203,324 includes **legal fees**, **stamp duty**, **discharge of mortgage**, and **agency costs**[11]. Mr. Gordon argues that such an assertion rings hollow if not backed by some formal accounting evidence to that effect. Furthermore, he argues that if Dr. Sahu Khan is touting **legal fees**, **stamp duty**, **discharge of mortgage**, and **agency costs** to explain the $33,324.00, then Dr. Sahu Khan's position lacks veracity because that extra figure is way above the range of any sum total that could reasonably have accrued jointly from these things[12].

[14]. It must be remembered that Prasad concedes that he has not fully paid out the mortgage debt. However, he says that only a very small balance is outstanding. For that, Prasad asserts, there was an understanding that he would pay off that remaining small amount from the proceeds of sale of another property of his[13].

[15]. Ms. Khan highlights that there is a mortgage on Prasad's other property. In any event, Prasad never queried the demand notices and must be taken to have accepted them[14]. In reply, Prasad insists that he had numerous telephone conversations with Dr. Sahu Khan discussing the amount of the mortgage debt.

ARREARS & INTEREST RATE

[16]. The calculation of arrears and interest are very much a bone of contention between Prasad and ZCL also. Their differences can be traced back to the issues regarding the

[11] Dr. Sahu Khan explains the extra amount of $33,324.00 in paragraph 6(ii) of his affidavit as being made up of **legal fees**, **stamp duty**, **discharge of mortgage**, and **agency costs**.

[12] For example, Mr. Gordon argues that stamp duty is levied at 2% of the purchase price which, in this case, would have amount to $3,400 only. Then there is the standard $10.00 fee for discharge the mortgage. For legal fees, Mr. Gordon argues that the normal conveyancing fee for any solicitor for a sale and purchase of a residential property would be around $1000.00 if the value of the property is around $170,000. As for agency fees, Mr. Gordon would allow a maximum of $100.00. He argues that the amount that should be allowed for **legal fees**, **stamp duty**, **discharge of mortgage**, and **agency costs** should be around $5,000.00.

[13] at paragraph 9 of his affidavit, Prasad denies that he did not query the demand notices. He then refers to Dr. Sahu Khan's own letters wherein Dr. Sahu Khan alludes to numerous telephone conversations with Prasad and to a letter of Prasad's dated 16 July 2012 where he had advised Dr. Sahu Khan that he thought the mortgage was fully paid except for a very minor amount.

[14] At paragraph 12(iii) of his, Dr. Sahu Khan deposes that if Prasad had any problem with the amounts that were being demanded, Prasad should have queried the amount.

amount of principal sum borrowed (see above). Undoubtedly, this affects the amount of interest calculable on the mortgage account.

[17]. Their differences in this regard also stem from ZCL's lack of proper accounting of Prasad's mortgage account (see below). This lack of proper accounting is evident in the fact that a major payment of $150,000 that Prasad had made to ZCL on 05 November 2009 was not credited to his ZCL account until some nine months later on 23 August 2010. That correction was only made after a query from Prasad.

[18]. Prasad deposes that whilst the $150,000 was eventually credited against his ZCL mortgage account, the interest that had been allowed to accrue on his loan (from November 2009 to August 2010[15]) was left unadjusted. In other words, interest was left accruing as if Prasad had made the payment on 23 August 2010.

[19]. The same applies to the Bob Kumar[16] payment (see paragraph [5] above). According to Prasad, that payment was not at all credited against his ZCL mortgage account.

ZCL'S ACCOUNTING

[20]. Mr. Gordon argues that the lack of probity in ZCL's dealings with Prasad is evident in its haphazard accounting of Prasad's payments. This, he argues, is further demonstrated in an incident on 23 August 2010. According to Prasad, Dr. Sahu Khan did issue a demand for $74,446.27 as balance owing on the mortgage. However, two days later, this figure was reduced to $66,057.70 by Dr. Sahu Khan after Prasad questioned it. No formal accounting evidence is before me.

MORTGAGEE SALE TO FHFL AT GROSS UNDERVALUE

[21]. ZCL has committed itself to sell CT 18230 to FHFL based on a "Deed" dated 18 April 2012. The agreed sale and purchase price is stated as $80,000.00. Whilst ZCL has, on the one hand, committed itself to FHFL, it has, on the other hand, also advertised public

[15] Prasad says at paragraph 28 of his affidavit that he paid into Dr. Sahu Khan's Trust Account the sum of $150,000.00 on 5th November 2009 towards the mortgage, being monies he received from his related property sale. However Dr. Sahu Khan only gives the Plaintiff credit for $150,000.00 on 4th August 2010 against the mortgage after repeated query by the Plaintiff. Therefore interest charged to the Plaintiff from 5th November 2009 to 4th August 2010 is unlawful, incorrect and also therefore makes all further interest and demand notices incorrect.

[16] Prasad says at paragraph 16 of his affidavit that Dr. Sahu Khan agreed that monies paid into his trust account and to third parties at the request of Dr. Sahu Khan would be credited against the mortgage.

tenders for the property in the local dailies in late January and early February 2013. Prasad says that in 2006, CT 18230 was valued at $260,000.

[22]. Prasad argues that the gross undervalue in the sale price to FHFL, when contextualised against the entire circumstances of this case, clearly shows that ZCL/Dr. Sahu Khan has been acting to defeat his equity of redemption.

[23]. Prasad also queried whether or not the purported deal between ZCL and FHFL was *bona fides*. Mr. Gordon argues that the arrangement between ZCL and FHFL is still conditional upon the duplicate title and mortgage being released from the Receiver of Dr. Sahu Khan's former law firm.

[24]. Dr. Sahu Khan at paragraphs 29 and 30 of his affidavit, alludes that he had an understanding with FHFL to defer their agreement for the sale and purchase of CT 18230 in order to give Prasad time to pay the balance.

[25]. Mr. Feroz Jan Mohammed, for FHFL, deposes at paragraph 11 of his affidavit of 27 February 2013 that he has already paid $62,994.00 towards the sale to Dr. Sahu Khan and that only a balance of $17,006.00 was remaining. That balance has since been paid into court by Ms. Khan. I note here for the record that Prasad has also since paid the sum of $30,000 into Court.

[26]. Mohammed attaches the following cash payment receipts.

Date Payment Made	Payment Voucher No.	Amount
05 July 2012	8107	$12,994-00
16 July 2012	5766	$36,890-00
20 July 2012	5767	$13,110-00

[27]. Mr. Gordon queried the irregularity in the payment voucher numbers which are not in sequence[17]. Apart from that, the vouchers are not certified and do not state who the payments were made to – although the payment details are stated as: *"part-payment of mortgagee sale of property of Chandresh Arun Prasad situated at Varadoli, Ba by Zarshbina Co Ltd as per your instruction -14/07/12"*.

[17] The first payment voucher for 05 July has a higher sequence number that the subsequent payment vouchers.

[28]. A supporting affidavit from whoever received these payments for and on behalf of ZCL, and evidence that he or she had deposited these monies into a ZCL account, would allay the many related doubts I have in my mind. But I give FHFL and ZCL the benefit of the doubt and reserve these questions for trial.

[29]. Incidentally, if the above purported payments by FHFL did happen (for which I make no finding), then, at the time Prasad paid $4,300 to Bob Kumar in November 2012 (see above), FHFL would have already paid ZCL the sum of $62,994.00.

[30]. Dr. Sahu Khan deposes at paragraphs 29 and 30 of his affidavit that he had an arrangement with FHFL to terminate their deal if payment was made by Prasad as demanded and that the mortgagee sale advertisements were only to pressure Prasad into paying up. Feroz Jan Mohammed's affidavit does not acknowledge this arrangement. He, on the other hand, appears to insist on a right pursuant to the purported sale and purchase agreement. This is the context in which Mr. Gordon questions whether the purported Deed between ZCL and FHFL was bona fides.

[31]. There is strong case law authority[18] consistent with section 72(1)[19] of the Property Law Act Cap. 130 that a mortgagor's equity of redemption is suspended (not cancelled) once a mortgagee enters into a contract of sale because that equity would revive if the contract went off. Hence, where the mortgagor is questioning the validity of such a mortgagee's contract of sale on similar allegations as those that are raised in this case, the equity is salvageable still.

COMMENTS

[32]. Notably, ZCL's demand letters were signed and sent by Dr. Sahu Khan from New Zealand. He now resides in Auckland after being disbarred from practicing in Fiji. The demand notices are based on the $203,324.00 as principal sum. Presumably, the figure on the demand letters includes the interest component which had accrued from 02

[18] See discussion of cases in **Vere v NBF Asset Management Bank [2004] FJCA 50; ABU0069.2003S (11 November 2004)** .

[19] Section 72(l) **of** the Property Law Act Cap. 130 provides:

"A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all moneys due and owing under the mortgage at the time of payment."

September 2009. Prasad is adamant[20] that he does not owe the amount on the demand letters. Prasad's challenge of ZCL's purported exercise of power of sale on CT 18230 and application to restrain the same must be considered against all the above (paragraphs [1] to [30]).

THE LAW

[33]. At this *inter-partes* stage, the onus is on Prasad to convince this Court that the injunction should continue (see Fiji Court of Appeal Ruling in **Westpac Banking Corporation v Prasad** [1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999)[21]; **Whittaker v National Bank of Fiji Ltd** [2009] FJHC 275; HBC155.2009L (9 December 2009). To succeed in restraining ZCL from exercising its power of sale, a mortgagor such as Prasad must establish (i) that there are serious issues to be tried (ii) that damages would not be adequate and (iii) that the balance of convenience lies in favour of granting an interim injunction[22]. The test is that which Lord Diplock formulated in **American Cyanamid** as follows:

> The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
> So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[34]. I caution myself that I need not assess where the preponderance of evidence might lie from the affidavits before me, if there is a clash of evidence[23]. All I need do is look at the whole case and have regard to the relative strength of the claim as well as the defence before deciding what is best done[24].

[20] see paragraphs 29 and 30 of his affidavit.
[21] the FJCA said: "When the matter comes back into the list, it will not be for the defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued".
[22] See **American Cyanamid** case.
[23] As per Lord Diplock at 406-7 of **American Cyanamid**.
[24] As per Lord Denning in **Hubbard & Another v Vesper & Another [1972] EWCA Civ 9; (1972) 2 WLR 389** cited in **Vivrass Development Ltd v Fiji National Provident Fund [2001] FJHC 303; [2001] 1 FLR 260 (10 August 2001)**), Lord Denning at page 396.

Serious Issue To Be Tried

[35]. It is long settled that an injunction to restrain a mortgagee's power of sale will not be granted unless the amount of the mortgage debt, if this is not in dispute, is paid into court, or, if the amount is disputed, the amount claimed by the mortgagee is paid into court (**Inglis v Commonwealth Trading Bank of Australia**[25]. Barwick CJ confirmed the general rule when he observed at 169 that the case was within:

> the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage.

[36]. The reason why the law favours the mortgagee as such, as Walsh J explains, is to safeguard the benefit of having the security for a debt. That benefit would be defeated if the Courts were to allow a mortgagor to prevent a mortgagee, even if temporarily, from enforcing its security pending the litigation of some mere damages claim, or counterclaim by the former against the latter. Hence, a dispute as to the existence of the correct amount of the indebtedness under the mortgage, or an assertion that whatever the amount due under the mortgage it was counter-balanced by a claim for damages by the mortgagors against the mortgagee, was not a ground for preventing a mortgagee from exercising its rights under the mortgage[26].

[37]. The Fiji Court of Appeal in **Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd [2011] FJCA 23; ABU0039.2009 (10 March 2011)** sets justifies the above position from a macroeconomics perspective:

> 8. Securitisation of loans together with guarantees of debts have now for a very long time been at the centre of commercial lending by banks and other financial institutions. They are important legal mechanisms essential to the flow of lending required in a market economy.
> 9. Because of their importance equity and common law courts have always insisted that the mortgagees remedies upon default including power of sale remain unrestrained by the courts.
> 10. This is shown by a succession of recent cases since 1970. What they all have in common is an attempt by the mortgagor to set up a claim for breach of contract, willful default or even defamation against the mortgagee. Then an attempt is made to restrain the sale of the mortgaged property until the court can adjudicate upon the set up claim. The mortgagor hopes that these usually artificial and thin claims will somehow win the day and the mortgage will be wholly or partially discharged and the companies will be able to keep its property. If the mortgagor finally loses his set up claim he will have delayed the day of payment. That is also his objective.

[25] (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64 as per Walsh J at 164–165).
[26] Barwick CJ, Menzies and Gibbs JJ who expressed the view that the case fell fairly within the general rule identified by Walsh J.

[38]. I have not come across any case authority that suggests that the above principles may have to make way for the ordinary interlocutory injunction-law principles in a case where the mortgagee in question is not a commercial lending bank or a financial institution (as ZCL is not). The point is still moot though. However, the thrust of Mr. Gordon's argument, as I see it, is to contextualise the various issues in this case (see paragraphs [1] to [31] above) against the many hats that Dr. Sahu Khan wore throughout his dealings with Prasad which (potentially, I say, as it is still a triable issue) led him to compromise his position. First he was Prasad's solicitor. Second, he was broker between Prasad and his (Dr. Sahu Khan's) own company, ZCL. Third, he was (literally) the financier of Prasad, whilst still Prasad's solicitor. And fourth, he (literally) became mortgagee.

[39]. Hence, the lack of clarity in the terms of the mortgage, the lack of proper accounting of Prasad's payment, and all other issues related to these, might more than justify the conclusion that Dr. Sahu Khan was, always, all along, orchestrating and acting deliberately to sabotage and incapacitate Prasad from redeeming his mortgage.

[40]. Against all these, Mr. Gordon would question whether or not ZCL's purported power of sale is exercisable at all. And if exercisable, whether ZCL owed a duty to Prasad to act in good faith (see **Radike v NBF Asset Management Bank [2005] FJCA 26**) or to act with reasonable care in respect of Prasad's interest (**Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch D 949**). These I must say, are valid questions, even though they are normally asked after a mortgagee has exercised a power of sale.

[41]. Having said that, I state here for the record that Prasad has made a payment of $30,000 only into Court. The amount claimed by ZCL is $74,446.27.

[42]. In Australia, the Courts have found exceptions to the general rule in **Inglis** with regards to the requirement to pay the mortgage debt into Court as a condition to granting injunctive Orders against the exercise of a mortgagee power of sale. **Harvey v**

McWatters[27] for example, although decided much earlier than **Inglis**, is still applied today in most Australian Courts. In **Harvey**, Sugerman J articulated exceptions to the general rule as follows:

> There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of similar type. But it is a rule resting on different principles and reasoning. These permit of a greater flexibility. **They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in.** The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee (my emphasis).

[43]. **Glandore Pty Ltd v Elders Finance & Investment Co Ltd**[28] was a case where Morling J applied **Harvey v McWatters** at 135–136 as follows:

> I do not think that the present case is a case of the kind to which the general principle in *Inglis' case* applies. It falls more easily into the second class of case discussed by Sugerman J in *Harvey v McWatters*. This being so I am not constrained by authority to require the applicants to pay into court the whole amount of the mortgage debt as a condition of obtaining interlocutory relief. Rather I think the proper approach is to mould an order so as to ensure adequate protection to the mortgagee and to otherwise do justice between the parties during the period pending the final hearing.
> Having regard to the fact that the value of the security held by Elders (at Elders' own valuation) is more than double the amount of the mortgage debt it is difficult to see how any prejudice will be suffered by Elders by the granting of interlocutory relief, provided the final hearing is not unduly delayed. During the course of argument it was agreed that the parties could be ready for a final hearing with three months. There is no suggestion that the secured property is falling in value and in those circumstances I do not think the applicants should be required to pay any part of the principal debt into court pending the final hearing. However it is not right that Glandore should have the use of the respondent's money without paying interest on it. There is already an amount of $307,000 unpaid interest and expenses owing to Elders and this must be paid as a term of the grant of interlocutory relief. Moreover, the unpaid interest must be paid to Elders, and not into court. This will ensure that Elders has the use of the money pending the hearing, and will reduce the amount of its mortgage debt to about $1.5 million, for which it will have security in excess of $4 million. Because Elders does not appear to have any immediate plans for the sale of "Oonavale" and as the applicants will want some time to raise the $307,000 to pay Elders I propose to give them until 14 January 1985 to pay the unpaid interest and expenses (my emphasis).

[44]. In the above case, the mortgagor had alleged that it had been induced to borrow moneys secured by the mortgage by reason of misleading conduct in contravention of s 52 of the Australian Trade Practices Act 1974, namely, the promise to make future advances. He

[27] (1948) 49 SR (NSW) 173 at 178; 66 WN (NSW) 72.
[28] (1984) 4 FCR 130 at 135–136; 57 ALR 186; [1985] ATPR 40-517.

had challenged the validity of the mortgage and had sought an order that the mortgage be varied under section 87(2)(b)[29] of the Australian Trade Practices Act.

[45]. In **Linnpark Investments Pty Ltd v Macquarie Property Development Finance Ltd [2002] WASC 272**, the mortgagee alleged that the mortgagor owed it a total amount of $7,673,735.26. The mortgagor however insisted that it owed the mortgagee no more than $7,083,926.04. The sum in dispute was $590,000 in round figures. Barker J referred to the general rule as stated by Walsh J in **Inglis** and identified two exceptions to the general rule. These are, namely, where the amount claimed by the mortgagee was obviously wrong and possibly when, there is a question as to whether the mortgagee's power has become exercisable at all. In the result, Barker J saw no reason why the general rule should not be applied in the circumstances of that case.

[46]. In **Contractor Services Pty Ltd v Esanda Finance Corp Ltd [1990] ATPR 41-020** at 51,355 French J stated:

> The full impact of that [**Inglis**] condition has been mitigated in cases where the claim is said to go to the root of the mortgagee's title, including the case in which relief is sought under sec. 87 of the Trade Practices Act 1974 to vary or set aside the mortgage.
>
> (the above was endorsed by the South Australian Supreme Court in **National Australia Bank Ltd v Zollo**[30].

[47]. The learned authors of **Meagher, Gummow and Lehane's Equity Doctrines and Remedies (4th ed)** make the following observations (at para [3-080]):

> "This is a rule which can, obviously, operate somewhat harshly if, for example, the mortgagee is exercising his power of sale in an improper manner. Yet, so far, the rule has been applied almost inflexibly: a mortgagor in default who is unable to repay the moneys secured is almost invariably denied equitable relief and relegated to his pecuniary claim ...
> But Walsh J made it clear that there was no challenge to the general rule as to payment. To this the only established exceptions are (a) where the amount claimed by the mortgagee is obviously wrong,

[29] Section 87(2)(b) states as follows:

87. (1) Where in a proceeding instituted under or for an offence against this Part the Court finds that there has been a contravention of a provision of Part IV or V, the Court may, in addition to imposing a penalty under section 77 or 79, granting an injunction under section 80 or making an order under section 82 in an action for the recovery of the amount of any loss or damage, make such other orders as it thinks fit to redress injury to persons caused by any conduct to which the proceeding relates or any like conduct engaged in by the defendant.

(2) The orders that may be made under sub-section (1) include, but are not limited to-

(a) .....

(b) an order varying a contract or such an arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(c) .....

(d) .....

[30] (1995) 64 SASR 63 at 67 per Matheson J (King CJ and Millhouse J concurring).

> or (b) possibly, when there is a question as to whether the mortgagee's power has become exercisable at all.
> ...
> The equitable doctrine does not apply in its full vigour wherein injunctive relief is sought under s 80 of the Trade Practices Act 1974: Town and Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific (1988) 20 FCR 540, 97 ALR 315."

[48]. In **Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd (1988) 20 FCR 540 at 545; 97 ALR 315**, the Federal Court of Australia said:

> 24. It does appear, however, that the requirements of the rule may be relaxed where the mortgagor's proceedings involve an attack upon the enforceability of the security documents. (See **Harvey v. McWatters (1948) 49 SR (NSW) 173.)**
> 25. ..... But as we have observed, the traditional rule was apparently relaxed where the mortgagor attacked the enforceability of the security. The powers of this Court under s.87 of the Act enable the mortgagor to obtain in an appropriate case orders varying the terms of agreements or to declare them void as a consequence of the contravention of the provisions of the Act by the mortgagee. This may strengthen the inclination of the Court in an appropriate case to refrain from requiring the applicant to provide adequate security for its indebtedness before restraining a mortgagee from exercising its powers. (see **Glandore Pty. Ltd. v. Elders Finance and Investment Co. Ltd.** [1984] FCA 407; (1984) 4 FCR 130 per Morling J. pp 133-136; **Cunningham v. National Australia Bank** (1987) 77 ALR 632; cf. **Mainbanner Pty. Ltd. v. Dadincroft Pty. Ltd.**, Unreported, (Federal Court of Australia, Pincus J, 8 March 1988.))
> 26. As a matter of discretion the relaxation of such a requirement in this Court usually would be restricted to cases where the allegations which ground the plea for the use of the Courts powers under s.87 are clearly arguable and not merely colourable and to cases which show an obvious nexus between the allegations of misleading or deceptive conduct in contravention of s.52 of the Act and the formation of the security documents sought to be varied or rendered unenforceable by the exercise of those powers (my emphasis).

[49]. In the Supreme Court of Western Australia case of **Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd**[31], the headnotes set the background of the case as follows:

> Appeal from a Master - Respondent sought an order for possession of land asserting default under a mortgage - where the Master made an order for possession on the first occasion the summons came before the Court - where the appellants disputed the extent of the debts the respondent asserted were secured by the mortgage - where the appellants sought to restrain the exercise of the order for possession pending the determination of the dispute between the appellants and the respondent - whether there is a triable issue as to the exercise of the powers pursuant to the mortgage and/or the amount secured and due under the mortgage - whether a notice under s 55A of the Law of Property Act 1936 (SA) is invalid if it claims a greater sum than is subsequently found to be due and owing - consideration of the conditions to be imposed on any grant of interlocutory relief - held that there is a triable issue that the right to enter into possession has not become enforceable - appeal allowed - relief granted subject to conditions.

[50]. The Court in **Andrew Garrett Wines** was of the view that the submission by the mortgagor that an overstatement of the amount due leads to the invalidity of a notice under s 55A of their Property Law Act is arguable, and therefore raises a triable issue[32].

[31] (2004) 206 ALR 69; (2004) 232 LSJS 314; [2004] SASC 60 (2 March 2004).

[51]. Mr. Gordon submits that the requirement to pay the balance sum into court applies invariably where the mortgagor is claiming a set-off or a counter-claim against the mortgagee. However, where a mortgagee has exercised fraud and/or engaged in misrepresentation in exercising its mortgagee powers of sale, then the Court may or may not grant an injunction along the **American Cyanamid** principles and there is o requirement to pay the alleged mortgage debt into Court.

[52]. He relies on the Fiji Court of Appeal case of **Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Ltd**[33] for these propositions.

[53]. Mr. Gordon submits that an injunction based on the second category has been made out in this case. There is a serious issue to be tried as to the terms of the mortgage, whether the mortgage was executed under fraud, duress or misrepresentation as Dr. Sahu Khan, who prepared and registered the mortgage, was also the director of the mortgagee.

[54]. The above case of **Harvey v McWatters** (see paragraph [41] above) was mentioned in the Fiji Court of Appeal decision in **Chambers v Wakaya Limited [2011] FJCA 25, decision dated 15th March 2011*:***

> 4. I recently explained this principle in my judgment of 10th March 2011 in **Strategic Nominees Ltd (In Receivership) v. Gulf Investments (Fiji) Limited** Civil Appeal No. ABU 0039 of 2009. There are other situations under the common law and statute where the power to issue injunctive relief arise. In the **Strategic** judgment I refer also to the framework of law in respect of mortgagors in default

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[32] The Supreme Court of South Australia opined as follows:

34. As to the second limb of the first argument of the mortgagors, there is surprisingly little authority on the point of whether a notice under s 55A is invalid if it claims a greater sum than is subsequently found to be due and owing by the mortgagors to the mortgagee. The significance of the point is that if it is arguable, then it is arguable that the right to enter into possession has not arisen in the sense of not being enforceable, and, therefore the case does not fall within the general rule identified in **Inglis v Commonwealth Trading Bank of Australia [1972] HCA 74; (1972) 126 CLR 161** which I discuss in detail below.
35. I have not been able to find authority dealing directly with the point in relation to a notice under s 55A of the LPA. In **Bunbury Foods Pty Ltd v National Bank of Australasia Ltd [1984] HCA 10; (1984) 153 CLR 491 at 504**, the High Court said that even a notice given to a mortgagor by the mortgagee as a condition precedent of a power of sale is not rendered invalid because it demands payment of more than is due. The issue was discussed at some length by Powell J in **MIR Bros Projects Pty Ltd v 1924 Pty Ltd (1980) 2 NSWLR 907.** The authorities his Honour referred to suggest that as far as the notice required by s 132 of the RPA is concerned an overstatement of the amount due to the mortgagee will not invalidate the notice (**Cockell v Bacon (1852) 16 Bevan 158; [1852] EngR 852; 51 ER 737**; **Humphery v Roberts (1866) 5 SCR (NSW) 376**; **Stephenson Developments Pty Ltd v Finance Corporation of Australia Limited [1976] Qd R 326**; **Circuit Finance Pty Ltd v Glenauchen Pty Ltd (2001) 212 LSJS 338).** The mortgagee submits that there is no obvious point of distinction between a notice under s 132 of the RPA and a notice under s 55A of the LPA. There is a good deal to be said for that submission. The decision of Legoe J in **National Australia Bank Ltd v Zollo (1992) 59 SASR 76** does deal with a notice under s 55A and it does suggest that a serious defect in the notice may lead to the conclusion that the notice is invalid. However, the defects in that case were of a different kind, and arguably more serious than an overstatement of the amount due.
36. In addition to the submission that the principle enunciated in the line of cases of which **Bunbury Foods Pty Ltd v National Bank of Australasia Ltd** (supra) is an example means that a notice under s 55A is not invalid because of an overstatement of the amount due, the mortgagee will no doubt say that the acceptance of the mortgagors' submission would mean that there would be a significant exception to the general principle referred to in **Inglis v Commonwealth Trading Bank of Australia** (supra). The exception would arise in those cases in which the mortgagee was required to serve a notice under s 55A of the LPA and there was an overstatement of the amount due.
37. Despite these submissions and not without some hesitation, I have concluded that the mortgagors' submission that an overstatement of the amount due leads to the invalidity of a notice under s 55A is arguable, and therefore raises a triable issue. I think the point is arguable having regard to the terms of s 55A and the purpose of the section which I think is to provide a clear opportunity to owners of property used for a particular purpose (i.e. domestic or agricultural) to avoid the exercise of certain powers under a mortgage. Furthermore, I cannot exclude the possibility that evidence of what might have happened had the correct amount due been stated may be relevant to the outcome of the issue.

[33] [2011] FJCA 23.

who issue a cross claim of some kind in order to postpone or prevent the **mortgagee**'s exercising his right of possession or **sale**. This is a good example of a situation and legal framework where the law developed, in **Harvey v. McWatters** [1948] 49 SR (NSW) confirmed by the High Court of Australia in **Inglis v. Commonwealth Trading Bank of Australia** (1971-72) CLR 161, a limited specific form of injunctive relief outwith the *quia timet* interim interlocutory injunction framework.

5. In **Strategic** as in this present case in the Court below the learned judge applied **American Cyanamid v. Ethicon** [1975] AC 396 principles. But in **Strategic** and in this present case the judgment of Lord Diplock in that case does not apply. Lord Diplock was concerned only with *quia timet* injunctions. He says so in the judgment. His detailed rules centred on *"balance of convenience"* and *"preserving the status quo"* only apply in decisions concerning whether to grant the Plaintiff a *quia timet* interim interlocutory injunction. The *quia timet* situations have been extended in **Mareva** [1980] AER 213 and **Anton Pillar** [1976] Ch 55 but not otherwise. Without any further development of the *quia timet* law situations the law and the extent of the Fiji High Courts jurisdiction is clear. **If the Plaintiff does not have an action to prevent the Defendant infringing a proprietary or other established legal right of the Plaintiff, there is no jurisdiction to entertain an application or grant an interim interlocutory injunction on a *quia timet* or any other basis**. In the mainstream common law jurisdictions there is no new law that Lord Diplock's advice can be used in other situations. There are cases, however, such as **Bryanston Finance v. de Vries** (No.2) [1976] Ch 63 where the Court of Appeal in England has emphasized that it is an egregious error to interpret **American Cyanamid** and *"balance of convenience"* and so forth in ways and into situations never intended or envisaged by Lord Diplock.

[55]. While most of the Australian cases that followed **Harvey v McWatters** had found exceptions to the **Inglis** rule based on statute, Mr. Gordon seems to argue that the same approach might be taken in Fiji also if Dr. Sahu Khan's conduct is held up to light against Fiji's Consumer Credit Act as was in force at the time. This argument involves serious issues of fact and law.

[56]. For all of the above reasons, I concur with Mr. Gordon that there are serious issues of both fact and law to be tried in this case.

WOULD DAMAGES BE AN ADEQUATE REMEDY?

[57]. Prasad is not pursuing a claim for damages based on some purported right in persona. He is fighting to keep the property. And has paid into Court the sum of $30,000. I accept the submission that, as Dr. Sahu Khan and his family are all in New Zealand, and both directors of ZCL are in New Zealand, there is a risk that Prasad will not be able to obtain any damages later from ZCL should he succeed against it, if the injunction is lifted now. The only remedy in the interim is to preserve the property by continuing interim orders and proceed to a quick trial.

BALANCE OF CONVENIENCE

[58]. The balance of convenience favours an interim injunction in my view considering all the issues I have discussed above. Notably, Prasad has given his undertaking for damages including an affidavit from Mr. Samuel K. Ram, solicitor that further monies are settling in favour of Prasad from the proceeds of sale of his other property. I acknowledge Ms Khan's strong argument that the affidavit of Mr. Ram does not disclose the fact that there was a mortgage on the property in question and that the mortgagee was threatening a mortgagee sale on it as well. This, she argues, was a material non-disclosure of fact which, in itself, should warrant the dismissing the application and the current standing orders. Mr. Gordon argues that at the time the Ram affidavit was filed, the mortgagee had not taken steps to threaten a mortgagee sale and that the fact was simply not within the knowledge of Mr. Ram or Prasad. Whilst I do not treat Ms Khan's objection lightly, I consider it relevant to the issue of undertaking as to damages the fact that Prasad has paid into Court the sum of $30,000.00, which, in my view, is sufficient security for ZCL in the circumstances of this case.

[59]. In **Harvey v McWatters** (supra), where the only order sought was an order restraining the mortgagee from selling, Sugerman J discussed the risks to the mortgagee in such a case at 177 thus:

> *"He runs no more risk than that of losing some particularly advantageous sale and that of possible depreciation of the security pending the hearing. It is obvious that the maximum possible loss is not the amount sworn to be due or the amount in fact due under the mortgage, but the value of the security itself, and the evidence here suggests a strong possibility that this is a good deal less than the amount secured by the mortgage. But while this is the maximum in any case, the greatest loss possible in a given case may be much less."*

CONCLUSION

[60]. For the above reasons, I grant Order in Terms of the Summons dated 05 February 2013 as follows:

(i) the first defendant Zarshbina Company Limited and second defendant FIFA Holdings (Fiji) Ltd are restrained from dealing with, transferring, selling, alienating or otherwise disposing of Certificate of Title No. 18230 until further orders of this Court.

(ii) the Registrar of Titles is to forthwith accept that endorse the orders of the Court onto Certificate of Title No. 18230 and that the Registrar of Titles shall not accept, approve, endorse any further dealings on Certificate of Title No. 18230 until further orders of this Court.

[61]. These Orders are to continue until further Orders of this Court. Costs in the cause. Case is adjourned to 31 May 2013 at 8.30am for mention.

.....

Master Tuilevuka

17 May 2013