

In the High Court of Fiji at Suva

Civil Jurisdiction

Action No. 560 of 2007

Fiji Development Bank

Plaintiff

Esaroma Ledua

First Defendant

Mele Ledua

Second Defendant

Lote Rasiga

Third Defendant

Appearances: Ms M. Vasiti for the plaintiff

Mr F. Vosarogo for the defendants

Date of hearing: 5th August, 2013

JUDGMENT

1. In these proceedings, the plaintiff moves for summary judgment against the first, second and third defendants. The first defendant, in his affidavit in reply, opposed the summons for summary judgment.
2. *The statement of claim*
 - The plaintiff had made certain loan facilities to Waikava Marine Industries Limited (“*the debtor*”). The debtor granted “*Bill of Sale on Deed Supplementing Ship Mortgage and Debenture*”, as security to secure the loan.
 - As a further security, the defendants executed a Deed of Guarantee dated 22nd April, 2003, and 23 December, 2003, in favour of the plaintiff for loans and advances made to the debtor.
 - The debtor made defaults in repayments. The plaintiff exercised its right under its security, but could not recover any assets, as the debtor was defunct and wound-up.

- The plaintiff served notice of demand dated 11th September, 2007, to the defendants demanding payment of the debt together with interest.
 - As at 30th September 2007, the debtor owed a sum of \$488,562.39 to the plaintiff together with interest at the rate of 11% per annum from 1st October, 2007.
3. The first defendant, in his affidavit opposed the summons for summary judgment, on the following grounds, which as so far as relevant, are as follows:
- a) the affidavit of the plaintiff is deficient, as it does not disclose sufficient facts concerning the claim.
 - b) The terms and conditions of the guarantee limits the defendant's liability to \$104,312.00.
 - c) The plaintiff has failed to disclose the resale value of the ship "Waikava". He believes that the resale value when disclosed, should be sufficient to meet the guarantee value of \$104,312.
 - d) The guarantee is unenforceable, without proof of service of the credit contract to the first defendant.

4. The determination

- 4.1 I have perused the affidavit in opposition to the plaintiff's application for summary judgment. The first defendant does not dispute he signed the guarantee. I note that the first defendant has referred to several matters averred in the statement of defence of the defendants. These do not arise for consideration, as the statement of defence has been struck out by the Master, as it disclosed no reasonable cause of action and is an abuse of the process of Court.
- 4.2 I proceed to consider the other matters set out in the affidavit.
- 4.3 The first point is that the plaintiff's affidavit does not disclose sufficient facts concerning the claim. Counsel for the plaintiff, Ms Vasiti in her written submissions cited the following passage from the *White Book* citing Will J in *May v Chidley*, (1894) 1QB 451 in reply:

..the function of the affidavit is to verify the cause of action, and it does not matter that it does not state or verify all the particulars given in the statement of claim or special indorsement. The statement of claim or special indorsement would, it is true, be defective if the allegation of notice of

dishonor were omitted, but the verification of the cause of action in the affidavit may be made in general terms.

- 4.4 The above passage, in my view, provides a complete answer to the first point.
- 4.5 Counsel for the defendant Mr Vosarogo at the hearing, conceded that the defendant's guarantee was not limited to \$104,312. He said that there were two triable issues, namely the failure of the plaintiff to give the first defendant the credit contract and disclose the resale value of the ship.
- 4.6 Ms Vasiti quite correctly pointed out that the Consumer Credit Act applies to "*the provision of credit..intended to be provided wholly or predominantly for personal, domestic or household purposes*", as provided in section 6 (1)(b). The loan guaranteed by the defendants was in pursuit of a commercial venture.
- 4.7 I am satisfied that the defendants were made aware of the necessary documents concerning the guarantee, as expressly acknowledged by the defendants, in their guarantee.
- 4.8 Finally, it is contended that the plaintiff had not disclosed to the defendants the resale value of the ship. The first defendant, in his affidavit states that he "*believes that the resale value when disclosed, should be sufficient to meet the guarantee..*"
- 4.9. The first defendant has not given particulars of the resale value of the ship. In any event, there was no obligation on the plaintiff to exercise its power of sale over the vessel as held in the case of *Fiji Development Bank v Moto*, (1995) FJHC 166 as cited by Ms Vasiti.
- 4.10 In that case, an application for summary judgment was made in terms of a guarantee. Fatiaki J (as he then was) cited the following passage from the judgment of Lord Templeman in *China & South Sea Bank Ltd v Tan Soon Gin*, (1990) 1 AC 536 at pg 545:

The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full

The creditor is not obliged to do anything. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The

surety contracts to pay if the debtor does not pay and the surety is bound by his contract. (emphasis added)

4.11 I am not satisfied that there is an arguable defence or question in dispute which ought to be tried.

4.12 In my judgment, the plaintiff is entitled to summary judgment against the defendants and interest at the rate of 11% per annum from 1st October, 2007, until date of payment as prayed for.

5. Orders

- a) I enter summary judgment against the first, second and third defendants in a sum of \$ 488,562.39 together with interest at the rate of 11% per annum from 1st October, 2007, until date of payment.
- b) the defendants shall pay the plaintiff costs in a sum of \$ 2500 summarily assessed.

11 September, 2014



A.L.B. Brito-Mutunayagam
A.L.B. Brito-Mutunayagam

Judge