

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 400 of 2019

Kiran Wati Singh
First plaintiff

Naveen Rohit Aswar Singh
Second plaintiff

v

Kontiki Finance Limited
Defendant

Counsel: Mr Anand Singh for the plaintiffs
Mr K. Goundar for the defendant
Dates of hearing: 28th January, 2020
Date of Ruling : 21st February, 2020

Ruling

1. By summons filed on 4th December, 2019, the plaintiffs seek an interim order to restrain the defendant, in the exercise of its powers as mortgagee from recovering, repossessing and/or taking any action to sell by auction, tender or any means, vehicles numbers IL 597, HW 878, HZ 553, IF 121, IE 713, HE 229, FT 864 and FN 982 subject to Hire Purchase Agreements, (HPAs) dated 7th August, 2019, Mortgage over Native Lease Number 50035101 and personal guarantees it holds, pending determination of these proceedings; and consolidation of this case with HBC 402 of 2019. The application is made under the High Court Rules, the Consumer Credit Act and the Fijian Competition and Consumer Commission Act.

2. At the hearing, Mr Singh, counsel for the plaintiffs did not move for consolidation of this case with HBC 402 of 2019. That case is concluded.

The determination

3. The first plaintiff had entered into several HPAs with the defendant, to finance her purchase of several vehicles. She applied for a loan to rewrite the accounts and consolidate the debt. The loan was approved and the plaintiffs executed Credit Contract,(CC) dated 2 June, 2017, In July, 2018, the plaintiffs informed the defendant that they had difficulties in making repayments of their loan. The defendant approved a restructure of their loan. The plaintiffs executed CC of 9 August, 2018, and obtained credit from the defendant in a sum of \$555,835.59, providing vehicles as securities.
4. At the commencement of the hearing, Mr Singh, stated the plaintiffs do not dispute they have defaulted in repaying the loan and that the defendant has the right to enforce the agreements and seize the securities given. He submitted that the contracts do not reflect the bargain reached.
5. The first plaintiff, in her affidavits in support states that the restructured loan agreement ought to have been executed only by the second plaintiff, as at that date he was solely trading as Navs Development Solutions. She ceased to be sole trader. The restructure documents are void for uncertainty, as regards the names of the borrowers.
6. The defendant, in the affidavit in opposition filed on its behalf states that the passing of the trading name does not assign liability solely to the second plaintiff. The first plaintiff executed the loan agreements and hence she is liable.

7. The plaintiff's main grievance is that the restructure agreement was not explained to her properly. She states that as a primary school teacher, she relied entirely on the advice and explanations given by officers of the defendant. She did not seek independent financial legal advice nor read the documents. She was under considerable financial pressure and duress. She was not told how the total loan figure was arrived at. The defendant took securities over unencumbered vehicles nos. FN 982 and FT 864 without any direct benefit to her. The restructure is unreasonable, unconscionable and oppressive. The defendant exercised superior bargaining power to her serious disadvantage. The mortgage over Native Lease was obtained under unconscionable circumstances. She was not given any independent financial or legal advice on the mortgage.
8. The defendant's response is that the agreements were thoroughly explained to the plaintiffs, prior to execution. The defendant refers to the several forms provided to the plaintiffs, in terms of the Consumer Credit Act.
9. Form 2 explains the defendant's rights and obligations to the plaintiffs. Form 2 provides a disclaimer to seek independent advice from the relevant statutory body and legal advice. Forms 3A and 4 warns the plaintiffs: "*Do not sign this contract document if there is anything you do not understand*". Clause 14 of the CCs provides the plaintiffs with a warning to seek independent legal advice. Schedule 14 of the CCs further warns to seek financial advice regarding the interest rate and repayment. Schedule 3 of the CCs advise of the consequences of non-payment. The plaintiffs initialed, signed these forms and executed the loan agreement. They were not under duress.
10. Finally, the first plaintiff states that the defendant is guilty of predatory lending in failing to advise her on the serviceability of the loan, the consequences if Courts Fiji Limited,(CFL) terminated their agreement and to secure a more definitive agreement with CFL. The defendant states that it was not informed of the termination of that agreement. Their grievance lies with CFL.

11. The first plaintiff, in her affidavit states that “ *the reason for the default is that at the time we entered the restructure, my business had completely collapsed for the reasons;*
 - a. *All my actual and potential customers had moved away from me and would not direct any further business because of my immediate past record.*
 - b. *I had insufficient capital to inject into the business to facilitate the giving of credit to the customers for their cartage, the giving of 30 to 60 days credit to captive customers is a main stay of this business.*
 - c. *I needed at least a three months deferment of monthly installments to the Defendant to recover and to start the business afresh.*
 - d. *I needed a repayment holiday which I did not get.*”
12. The plaintiffs accepted the terms of the loan restructure agreement, the mortgage and made payments, until their contract with CFL was terminated. She states that her “*husband and I jointly defaulted in the repayment under restructure*”.
13. The contentions regarding the agreements, failure to explain, obtain independent legal advice, duress, predatory lending and that the defendant’s conduct was oppressive, unfair and unconscionable are unsubstantiated and have come up only when the defendant sought to enforce the securities.
14. In my view, there is no serious issue to be tried.
15. In any event, if the plaintiffs were to be successful at the trial, their remedy is in damages. The plaintiffs have not disclosed their assets. As opposed to the plaintiffs, the defendant is a lending institution and is capable of compensating the plaintiffs in damages. The balance of convenience strongly militates against the grant of a restraining order.
16. Mr Goundar, counsel for the defendant did not dispute the applicability of the Consumer Credit Act.
17. In any event, I do not consider it appropriate in the circumstances of this case, to stay the enforcement proceedings in terms of section 88(3) thereto.
18. In my view, the objectives of the Fijian Competition and Consumer Commission Act, as set out in section 2, do not cover the credit transactions in issue.

19. The plaintiffs have not given an undertaking as to damages nor stated that they are willing to deposit the moneys owing in Court.

20. *Inglis v Commonwealth Trading Bank of Australia*, (1972) 126 C.L.R. 161 is authority for the proposition that as a general rule a stay will not be granted restraining a mortgagee from exercising powers conferred by a mortgage, in particular a power of sale, unless the amount of the debt is paid, if this is not in dispute. Walsh J at pgs 164-165 said :

A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of power of sale given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid, or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into Court...

The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.

In my opinion the fact that such claims have been brought provides no valid reason for the granting of an injunction to restrain, until they have been determined, the exercise by a mortgagee of the remedies given to him by the mortgage.

Barwick CJ (*Ibid*, at pg169) expressed the same opinion in these words:

The case falls fairly, in my opinion, 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 of 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 right under the mortgage.

21. The judgment of Walsh J was upheld by the Full Court of the High Court of Australia, (126 CLR at 168-9) which approved his reasons

22. Marshall JA in *Strategic Nominees Ltd v Gulf Investments(Fiji) Ltd*, [2011] FJCA 23; ABU0039.2009 (10 March, 2011) stated at paras 6 to 9:

.. There is no violation of the mortgagor's rights when the mortgagee seeks to enter into possession or to exercise his right of sale. It is simply a question of realizing the security which was freely granted so that a commercial loan would be made to the mortgagor and his associates.

It follows that with the mortgagee's power of sale, there is no balance of convenience arising out of a contested issue which will be resolved on trial.

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.

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.

At para 34, he said:

Walsh J states in terms that the policy of the courts has always been to prevent the lender/mortgagee being stopped or delayed in realising the security. Given the commercial importance of charges and mortgages to lending by banks and financial institutions this policy of the Courts is essential. The continuing policy of the Courts is that liquidity in realising mortgage securities should not be undermined. (emphasis added)

23. I decline to exercise my discretion to grant the interim restraining order sought.

24. **Orders**

- a. The summons of the plaintiffs is declined.
- b. Costs in the cause.



A.L.B. Brito-Mutunayagam
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Judge
21st February, 2020