

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: Ms S. Prasad for the plaintiffs
Mr K. Goundar for the defendant
Date of hearing : 3rd March, 2020
Date of Judgment: 12th August, 2020

Judgment

1. The plaintiffs, in their originating summons seek the following reliefs:
 - a. *A Declaration that the Defendant is a credit provider under the definition of credit provider in the Consumer Credit Act 1999(CCA).*
 - b. *A Declaration that the court had jurisdiction (after hearing the parties) under the CCA (section 82(2) to Order the postponement of recovery or enforcement which is the subject matter of the application on such terms as the Court thinks fit.*
 - c. *The Plaintiffs seek an order (after the parties have been heard) against the Defendant for postponement under section 88 of Consumer Credit Act 1999 and all ancillary orders as the Court thinks fit to enforce the postponement of the Declarations of the Court.*

- d. *Declarations:*
- i. *That the Plaintiffs did not have the benefit of independent legal and financial advice at the time of entering into the Hire Purchase Agreement or the purported re-structure.*
 - ii. *The Defendant has been guilty of the Practice of predatory lending when it knew or ought to have known that in the event the Plaintiffs' cartage contract with the third party was cancelled, the Plaintiffs would default in their repayments unless a major re-structure was undertaken to bail the Plaintiffs from the financial position caused thereby.*
 - iii. *The Defendant is guilty of the practice of predatory lending in not ensuring the ability of the Plaintiffs to meet their obligations under the HP Agreement and the subsequent restructure and lending the funds irrespective.*
 - iv. *That the Defendant did not comply with the mandatory disclosure requirements under the Consumer Credit Act at the time of the initial loan and prior to the purported restructure.*
- e. *The Plaintiffs seek relief under all or any of the Declarations sought above including the setting aside of the HP Agreement, Mortgage and Personal Guarantees rendered by the Plaintiffs to the Defendant pursuant to the giving and taking of the credit facility or at the time of the restructure and or relief on such terms and conditions as the Court thinks fit.*
- f. *That the conduct of the Defendant credit provider has been unconscionable in the process of the making of the loan then subsequently in the purported restructure of the loan and the in the enforcement thereof in breach of Commerce Commission Decree 2010 section 76 in the circumstance:*
- i. *The contents of the Hire Purchase Agreements were not properly or adequately explained to the Plaintiffs.*
 - ii. *The Plaintiffs did not have the advantage of the independent financial and legal advice.*
 - iii. *The unequal bargaining power and respective financial positions of the Plaintiffs and the Defendant.*
 - iv. *The Defendant taking undue advantage of the circumstance of the Plaintiffs in the restructure of the HP Agreement and thereby improving its own security position by taking additional securities from the Plaintiffs without an apparent or corresponding benefit to the Plaintiffs.*
- g. *A Declaration that the conduct of the Defendant is oppressive and unconscionable entitling the Plaintiffs to relief from the Court in equity and common law.*
- h. *The Plaintiffs seek an order for the release of additional two trucks having registration numbers FN 982 and FT 864, personal guarantees of the Plaintiffs and Mortgage over Native Lease 50035101 secured under the circumstances of unconscionable and oppressive conduct of the Defendant under CCA or Commerce Commission Decree 2010 or common law.*
- i. *A Declaration that the joint HP Agreements, the mortgage and personal guarantees (showing the 1st and 2nd Plaintiffs as mortgagors/hirers) are void for uncertainty as the 1st Plaintiff had ceased to be registered as trading as Navs Development Solutions at the time of entering into the securities at the time of the restructure on 7th August 2018.*

The determination

2. The first plaintiff, in her affidavit in support states that she entered the trucking business as a sole trader. She executed certain financial and legal documents entirely on the advice and explanations given by officers of the defendant and under financial duress. She did not seek independent financial legal advice nor read the documents. The restructure documents were not explained to her nor was she given independent advice.
3. The defendant's response, in the affidavit in opposition filed on its behalf is that the Secured Credit Contracts,(SCC) and Hire Purchase Agreements were thoroughly explained to the plaintiffs, prior to execution. They were not under duress.
4. The affidavit in opposition attaches the following forms provided to the plaintiffs. Form 2 titled *"INFORMATION STATEMENT"* explains the rights and obligations of the defendant and advises the plaintiffs to get legal advice. Forms 3A and Forms 3B, both titled *"IMPORTANT"* informs the plaintiff of *"THINGS YOU MUST KNOW" "BEFORE YOU SIGN"*. Form 4 is likewise, regarding the guarantee. Forms 3A warns the plaintiffs *"Do not sign this contract document if there is anything you do not understand"*.
5. Clause 14 of the SCC warns the plaintiffs to seek independent legal advice. Schedule 14 to seek financial advice regarding the interest rate and repayment. Schedule 3 advises of the consequences of non-payment.
6. I find that the plaintiffs were provided with detailed explanations, advice and warnings and advised if in doubt, to contact the Dept of Fair Trading and Consumer Affairs or get legal advice.
7. In my judgment, the first plaintiff has not established that the restructure documents were not explained to her.

8. The first plaintiff defaulted in making payments under the hire purchase agreements and SCC. In her supporting affidavit, she states that she went to meet the Senior Finance Manager of the defendant, as she needed a financial restructure to bail herself out of her predicament when her business "*completely collapsed*".
9. In the circumstances, the contentions advanced that the necessity for the restructure was not explained to the plaintiffs and the first plaintiff ceased to trade under the stated business name are untenable.
10. The plaintiffs accepted the terms of the loan restructure agreement, the mortgage over the native lease and made payments, until their contract with CFL was terminated.
11. I have reconsidered the provisions of the Fijian Competition and Consumer Commission Act and reached the conclusion that the Act does apply to the credit transaction between the parties.
12. Section 2(a) states that the objective of the Act is to promote the interests of the "*consumers*". The term "*consumer*" refers to a person who acquires goods or services. Any facilities granted in trade or commerce are included in the definition of the term "*services*".
13. In my judgment, the plaintiffs have not established that the defendant engaged in oppressive or "*unconscionable conduct*", within the meaning of section 76(1) and (2) of the above Act. In particular, they have not established that they were unable "*to understand (the relevant) documents*" and "*undue influence or pressure was exerted on or any unfair tactics were used against*" them.
14. In my view, the mortgage and securities over unencumbered vehicles nos. FN 982 and FT 864 were "*reasonably necessary for the protection of the legitimate interests*" of the defendant.

15. Next, the first plaintiff contends that the defendant is guilty of predatory lending. She purchased the vehicles predominately on the basis of a revolving cartage agreement with Courts Fiji Limited,(CFL) and the defendant was satisfied that the income generated was adequate to service the loans. The agreement was subsequently terminated “*abruptly and unilaterally without any notice or any apparent reason*”.
16. The defendant states that the plaintiffs informed them that their contract with CFL was valid and denies it was informed that the contract was terminated. Their grievance lies with CFL.
17. In my judgment, the agreements under review were not conditional on the serviceability of the contract with CFL.
18. The plaintiffs have sought relief under the Consumer Credit Act.
19. Section 6(1)(b) provides that the Act covers credit provided “*wholly or predominantly for personal, domestic or household purposes*”.
20. None of these elements are present in the instant case, where credit was obtained by the first plaintiff for her “*trucking business*”, to purchase trucks for the “*cartage of goods*”. It follows, the Act does not apply.
21. I refer to the following passage from the judgment of Calanchini J in *Alam v Colonial National Bank*, [2017] FJSC 32; CBV6.2017 (15 December 2017):

.. Under Section 11 the Consumer Credit Act is presumed to apply to all credit contracts unless the creditor can show that it falls into one of the exempt categories. Section 6(1) of the Act specifies four requirements all of which must be satisfied before the Act will apply to a credit contract. One of those requirements is set out in Section 6(1)(b) and Section 6(5) which when read together provide that more than half of the credit must be provided or must be intended to be provided for the purpose of personal, domestic or household purposes..... It would appear that the Act does not apply if more than half of the borrower's purpose is for business or investment. (emphasis added)

22. In the result, I decline to grant the declarations and orders sought in the originating summons of the plaintiffs.

23. *Orders*

- a. The originating summons of the plaintiffs is declined.
- b. The plaintiffs shall pay the defendant costs summarily assessed in a sum of \$ 2500.



A.L.B. Brito-Mutunayagam
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Judge
12th August, 2020