

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

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 257 of 2024**

**BETWEEN** : **MOHAMMED ALEEM KHAN** of Kennedy Avenue, Nadi,  
Businessman.

**Plaintiff**

**AND** : **KRISHNA SAMI NAIDU** of Samabula, Suva, Businessman

**First Defendant**

**AND** : **BRED BANK (FIJI) LIMITED** a registered bank under the Laws  
of Fiji having its registered office in Suva, Fiji.

**Second Defendant**

Before : Mr. Justice U.L. Mohamed Azhar

Counsels : Ms. T. Draunidalo for the plaintiff  
Mr. R. Lajendra for the defendant.

Date of Hearing : 18.02.2025

Supplementary submission of the plaintiff filed on : 05.08.2025

Supplementary submission of the 2<sup>nd</sup> defendant filed on : 07.08.2025

Date of Ruling : 12.08.2025

**RULING**

01. The plaintiff, through an Ex- Parte Notice of Motion supported by an affidavit sworn by him, moved the court for an order:

- a. To bar, restrain and injunct the defendants from dealing with CT 12555 in any manner whatsoever;

- b. That the second defendant is barred, restrained and enjoined from proceeding with its Mortgagee's sale of CT 12555;
  - c. The cost of this application be costs in the cause; and
  - d. Any other order deemed just and expedient by this court.
02. The plaintiff was the original proprietor of all that property in Certificate of Title Number 12555 (**the property**). The plaintiff and the first defendant had numerous business relationship for quit long time. The plaintiff alleges that, the first defendant fraudulently obtained two default judgments in two civil actions, namely HBC 39 of 2012L and HBC 123 of 2012L against the plaintiff and transferred the property to his name. The first defendant then mortgaged the property to the second defendant. The first defendant defaulted in payment and the second defendant proceeded to mortgagee's sale. The plaintiff moved the court to restrain the second defendant from proceeding with the mortgagee's sale.
03. The first defendant appeared through his solicitors and informed the court that, he did not have objection to the mortgagee's sale of the property by the second defendant. The first defendant therefore did not file any affidavit. The second defendant objected to the injunction against the mortgagee's sale and filed the affidavit in opposition.
04. At the outset, the counsels acknowledged that I, sitting as the Master delivered the ruling refusing the application of the plaintiff to set aside the default judgment and orders in that Civil Action No. 39 of 2012 and Civil Action No. 123 of 2012. They informed that, they did not have any objection for me hearing the current application for injunction.
05. At the hearing of the motion for injunction, the counsel for the plaintiff submitted that, the decision in **Inglis v Commonwealth Trading Bank of Australia** [1972] HCA 74; (1972) 126 CLR 161, generally applies to the cases where the mortgagors seek to restrain the mortgagees from exercising the right of sale. The **Inglis** requires the mortgagor to bring the amount due to the mortgagee to the court in order to restrain the latter from proceeding to mortgagee's sale. However, this is the case by a person, not being a mortgagor, who is impeaching the title on ground of fraud and therefore, that decision does not apply to this case. The counsel submitted that in any event the plaintiff was willing to deposit certain amount of money into the court in respect of this case.
06. The counsel further submitted that, the plaintiff is only required to satisfy the court on the requirements established by **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396. Accordingly, the serious question that to be tried in this case is fraud. The counsel contended that, the first defendant fraudulently obtained the default judgment and other

orders in that Civil Action No. 39 of 2012 whilst the plaintiff was overseas. The first defendant having obtained the said judgment and other orders transferred the property to himself. Thereafter the first defendant mortgaged the property to the second defendant. The plaintiff later filed the application to set aside the said default judgment and other orders made in his absence. The application was refused and has filed an appeal against the refusal to set aside the said judgment and orders. The leave to appeal was granted. In addition, the court granted stay.

07. The counsel, in articulating her submission in relation to the second defendant, stated that, the solicitors, who had been representing the first defendant in all other matters, acted for the second defendant in executing the said Mortgage by the first defendant. The solicitors had the knowledge of fraud as alleged by the plaintiff and could have advised the second defendant – the bank of this allegation. Accordingly, the counsel argued that, the allegation of fraud was within the knowledge of the agent of the second defendant, i.e. the solicitors.
08. The counsel cited several decisions and in particular the decision of Privy Council in **Assets Company Limited v. Mere Roihi and Others** [1905] A.C. 176 for the degree and nature of the fraud required to be proved to impeach a registered title. The counsel argued that, the knowledge of fraud as alleged by the plaintiff was brought home to the second defendant through its agent – the solicitors, who acted for the first defendant in all relevant cases and for the second defendant in executing the mortgage by the first defendant.
09. Conversely, the counsel for the second defendant argued firstly that, the law in respect of restraining a mortgagee from proceeding with mortgagee's sale is a combination of principles in two cases, namely **Inglis** (supra) and **American Cyanamid Co. v. Ethicon Ltd** (supra). The counsel cited several local cases which followed **Inglis**. The counsel submitted that, the plaintiff initially did not offer any amount. Subsequently, he proposed to deposit a sum of \$ 250,000.00. Thereafter the plaintiff expressed his willingness to deposit a sum of \$ 500,000.00. However, the sum of \$ 500,000.00 is insufficient against the debt exposure of \$ 1,419,667.48 as at 18 June 2024.
10. Secondly, the counsel argued that, there is no serious question to be tried in this matter in order to apply the principles expounded in **American Cyanamid** (supra), as the second defendant did not have any knowledge, at all, of the allegation of fraud. The detailed submission of the counsel for the second defendant is that, the property was initially mortgaged to Dominion Finance on 24 November 2017. It was then discharged on 01 November 2022 after the second defendant refinanced the said mortgage. On the same day, i.e. on 01 November 2022, the current mortgage was registered in favour of the second defendant. By the time the second defendant took a mortgage over the property, it had been in the name of the first defendant for approximately a period of 5½ years and in Dominion

Finance's mortgage for approximately a period of 5 years. However, there had not been any challenge by the plaintiff or any person about the ownership of the first defendant or the first mortgage to Dominion Finance.

11. Two questions to be determined by the court in respect of the current summons filed by the plaintiff. First is whether Inglis applies to this matter along with American Cyanamid and accordingly, should the plaintiff be required to deposit into the court total amount due to the second defendant under the mortgage to restrain the latter from proceeding to mortgagee's sale? Second is if American Cyanamid only applies to this case, whether plaintiff satisfied all requirements of American Cyanamid?
12. The courts in Fiji have been following two decisions in dealing with an application for restraining mortgagee's sale. They are Inglis and American Cyanamid. Whilst the first specifically deals with the restraining orders against the mortgagee's sale, the second is the general authority that applies to injunctions. The principles propounded by the House of Lords in American Cyanamid apply subject to some special considerations which apply in relation to an application to restrain the exercise of a mortgagee's power of sale (Westpac Banking Corporation Ltd v Prasad 45 FLR 1).
13. The court in Fun World Centre (Fiji) Ltd v Bank of Baroda [2013] FJHC 519; Civil Action 168.2013, decided on 4 October 2013 held that, the decisions in Inglis and American Cyanamid do not contradict but supplement each other.
14. Walsh J in Inglis set out the general rule established by the courts in determining the application for restraining orders against the mortgagee. He held that:

A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers 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 rule, as it affects the exercise by a mortgagee of the power of sale, is stated in the following terms in Halsbury's' Laws of England, 3rd ed., vol. 27, p. 301:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has commenced a redemption action,

or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee swears to be due to him, unless, on the terms of the mortgage, the claim is excessive."

15. Examination of the decisions in Inglis and other authorities, both local and foreign, which expounded the general rule reveals that, the parties in all of those cases were the mortgagors and mortgagees. The relationship between the mortgagor and mortgagee is contractual. The mortgage is the contract between them. The mortgagor is, as the borrower, obliged to pay the amount lent to him together with other fees and charges. The mortgaged property is the collateral and the mortgagee is entitled to realize the collateral when the borrower (mortgagor) defaults on the loan. The rationale for requiring the mortgagor to bring the total amount, therefore, is to ensure that the mortgagees' security is protected, and if the defaulting mortgagor is successful in restraining the sale, the money should readily be available to satisfy the debt.
16. However, the position should be different when it comes to any person other than the mortgagor for several reasons. Firstly there is no contractual relationship like mortgagor and mortgagee and as such, no money is due from the plaintiff the mortgagee. Secondly the challenge to the proprietorship of the power of sale generally arises from allegation of fraud. Thirdly, even in cases between the mortgagor and the mortgagee, the court departed from the general rule when the bad faith leading to fraud was shown on part of the mortgagee in dealing with mortgaged property (MacLeod v Jones (1883) 24 Ch D. 289). In this case, the plaintiff is seeking to restrain the second defendant (the mortgagee) on the ground of alleged fraud. Thus, I agree with the submission of the counsel for the plaintiff and hold that, in this case, the decisions in Inglis and other authorities, which establish the general rule, do not apply. In contrast, the principles illustrated in American Cyanamid apply to this case.
17. Now I move on to the second question as to whether the plaintiff satisfied all three requirements of American Cyanamid to restrain the second defendant from proceeding to mortgagee's sale? The first requirement is whether there is a serious question to be tried in this case. The serious question in this case, according to the counsel for the plaintiff, is fraud. The plaintiff alleges that, the first defendant fraudulently transferred the property to himself and then mortgaged it to the second defendant. The allegation of fraud was brought home to the second defendant through its agent, i.e. the solicitors.
18. The fraud is the exception to the indefeasibility of the title registered under the Land Transfer Act which is based on the Torrens system of land registration. The mere assertion

of fraud is not sufficient to defeat the title of a registered proprietor. Actual fraud or moral turpitude must be shown on the part of the registered proprietor or of his agents (Wicks v. Bennett [1921]30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97).

19. The Privy Council in Assets Company Ltd v Mere Roihi [1905] AC 176 defined fraud for the purpose of the Land Transfer Act at page 210 in the following manner:

"...by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

20. Accordingly, the questions are whether there was an allegation of fraud at the time the mortgage in favour of the second defendant was executed on **01 November 2022** and whether it was brought home to the second defendant through its agent, i.e. the solicitors, as alleged by the plaintiff. It is important to examine the entire issues and the allegations between the plaintiff and the first defendant to determine these questions.
21. The legal tussle between the plaintiff and the first defendant commenced with the two cases filed by the first defendant against the plaintiff. They are (a) the Civil Action No. 39 of 2019L and (b) the Civil Action No. 123 of 2019L.
22. The first defendant file the Civil Action No. 39 of 2012L against the plaintiff and three companies in which the plaintiff was the major shareholder and Managing Director. The plaintiff did not take any step in this case and Justice Inoke made some interim orders on

09.03.2012 in relation to 3 properties and shares of the companies. Thereafter the default judgment was entered against the plaintiff on 31.05.2012. Later, Justice Tuilevuka (as His Lordship then was) made some additional orders in this case on 09.03.2012.

23. The first defendant commenced the Civil Action No. 123 of 2012L against the plaintiff claiming the property based on an agreement both of them entered into. The plaintiff again failed to take steps and Justice Tuilevuka (as His Lordship then was) made order on 19.11.2012 to transfer the property to the first defendant. The plaintiff again failed to comply with the order made by Justice Tuilevuka. Subsequently an additional order was made on 27.06.2016 and the court authorized the Deputy Registrar of High Court Lautoka to transfer the property to the first defendant. this is how the property was transferred to the first defendant.
24. The plaintiff instead taking steps in above cases where the default judgment and orders were entered, commenced three new actions. They are **Civil Action No. 231 of 2018**, **Civil Action No. 187 of 2019** and **Civil Action No. 203 of 2019**.
25. In Civil Action No. 231 of 2018, the plaintiff sued the first defendant, one Anil Kumar and Dominion Finance. The plaintiff alleged that, the first defendant fraudulently transferred the property to himself and then mortgaged to Dominion Finance. However, the plaintiff voluntarily paid cost in sum of \$ 1000 to the first defendant and discontinued this matter on **01 July 2022**.
26. In Civil Action No. 187 of 2019, the plaintiff sued Aleem Investment Limited and the first defendant. The dispute was in relation to a loan. The plaintiff moved the court for a monetary judgment against the first defendant in sum of AUD 3,218,850.00 and damages. There was no allegation of fraud in that case. The plaintiff, however, withdrew this action too on **06 July 2022** after paying an agreed cost in sum of \$ 1000.00 to the first defendant.
27. In Civil Action No. 203 of 2019, the plaintiff sued the first defendant, one Amreeta Devi and Emirates Holding Limited. The dispute was in relation to an Acknowledgement of Debt and allegation of fraud in relation to the property. The plaintiff as he did in other two cases, discontinued this case on **01 July 2022**. In addition the plaintiff paid the agreed costs in sum of \$ 1000.00 to the first defendant for discontinuing that matter.
28. Accordingly, in two out of three cases the plaintiff alleged fraud on part of the first defendant in relation to transfer of the property. In all cases, the particular solicitors who acted for the second defendant in executing the mortgage, represented the first defendant. However, plaintiff voluntarily and on payment of costs to the first defendant withdrew and or discontinued all three cases in the first week of **July 2022**. On the other hand, the

- property was mortgaged to the second defendant on **01 November 2022**. Accordingly, there was no allegation of fraud against the first defendant at all at the time the mortgage was executed in favour of the second defendant. Had the plaintiff continued with at least two cases where he alleged fraud, the knowledge of alleged fraud could have been attributed to the second defendant through its solicitors. However, the plaintiff withdrew all his cases.
29. Furthermore, the plaintiff in 2020 filed summons in the other two cases filed by the first defendant, i.e. the Civil Action No. 39 of 2019L and (b) the Civil Action No. 123 of 2019L to set aside the default judgment and other orders. The plaintiff founded his applications to set aside those judgment and orders only on the ground that, they were irregularly entered without proper service of processes on him as required by the rules of the court. There were several affidavits, sworn by the plaintiff and his wife, filed to support his summons in both cases. However, he did not raise any allegation of fraud against the first defendant. The sole argument urged by the plaintiff and his counsel was that the default judgment and other orders made in the Civil Action No. 39 of 2019L and (b) the Civil Action No. 123 of 2019L were irregular. Therefore, there was no allegation of fraud at all at the time of executing the mortgage in favour of the second defendant.
30. Finally, the plaintiff commenced another proceedings in this court, i.e. Civil Action No. 197 of 2023 against the first defendant and Dominion Finance on **06 September 2023**. In this action, the plaintiff alleged that, the first defendant fraudulently obtained the default judgment and transferred the property. This action was filed after 10 months from the date on which the property was mortgaged by the first defendant to the second defendant. This subsequent allegation does not affect the mortgage that was already executed and registered.
31. The above discussion clearly indicates that, the allegation of fraud on part of the first defendant was before the court well before the mortgage was executed in favour of the second defendant. However, the plaintiff withdrew all those cases he filed against the first defendant and even paid costs for withdrawing or discontinuing those cases. As the result, there was no allegation of fraud at all at the time of mortgage to the second defendant for the solicitors to advise the second defendant.
32. Thus, the plaintiff failed to establish the first requirement that, there is serious question to be tried in this matter as required by **American Cyanamid**. As the result, this court is not required to proceed further and examine other two requirements. The Court of Appeal held in **Sea Pilots (Fiji) Ltd v Peckham** [2025] FJCA 12; ABU055.2024 (17 February 2025) that:

[10] If there is no serious question to be tried, the court should not proceed to consider irreparable harm or balance of convenience. In Eng Mee Yong v Letchumanan [1980] AC 331, the Privy Council confirmed that a case with no reasonable cause of action cannot justify injunctive relief and In Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273, it was held that if a claim is groundless, the court need not go further. The test for an interim injunction is sequential. If a party fails to establish a serious question to be tried, the court must dismiss the application without considering the second and third steps. Courts will only evaluate irreparable harm and balance of convenience after the first criterion is met. This approach ensures that the injunction process remains fair, efficient, and consistent with established legal principles.

33. Therefore, the application for injunction restraining the second defendant from proceeding to mortgagee's sale ought to be dismissed. The plaintiff is well aware that, he withdrew his cases where he alleged fraud against the first defendant and also paid costs in sum of \$ 3,000.00 for all three cases. However, he still tried to restrain the second defendant on the same allegation. The plaintiff's conduct shows that, he somehow wanted delay mortgagee's sale in the absence of any serious question to be tried. For this reasons, I consider that the costs should be on high scale for this application.
34. In result, I make the following orders:
- a. The injunctions sought by the plaintiff are refused;
  - b. The Inter-Parte Motion filed by the plaintiff on 16 July 2024 is dismissed; and
  - c. The plaintiff should pay summarily assessed costs in sum of \$ 5,000 to the second defendant within a month from today.



  
U.L.Mohamed Azhar  
Acting Judge

At Lautoka  
12.08.2025