

**GEMSTAR SEAFOOD LIMITED -v- ROBIN BYCROFT**

HIGH COURT OF SOLOMON ISLANDS  
(FRANK O. KABUI, J)

Civil Case Number 370 of 1999

Date of Hearing: 17<sup>th</sup> April 2002

Date of Judgment: 24<sup>th</sup> April 2002

*Mr C. Ashley for the Plaintiff*

*Mr D. Kingmele for the Defendant*

**JUDGMENT**

**(Kabui, J):** There were two applications before me at 9:30 am on 17<sup>th</sup> April 2002. The first was filed by the Plaintiff on 18<sup>th</sup> March 2002 seeking the following orders-

1. That the execution of Judgment be stayed pending further orders; and
2. That the Defendant/Respondent, within 7 days, show cause on what steps he has taken to enforce the charge as ordered by the Court of Appeal; and
3. That the Defendant/Respondent, within 7 days file and deliver to the Plaintiff/Applicant a Statement of Account showing the actual amount now owing by the Plaintiff to the Defendant; and
4. That the case be adjourned to a date to be fixed, such hearing date to be within 21 days, for the Plaintiff/Applicant to show cause on how it proposes to pay the actual amount owing; and
5. That the costs of this application be the Defendant/Respondent's costs to be taxed if not agreed; and
6. Any further or other orders the Court deems fit to make.

Paragraph 3 above was withdrawn by the Plaintiff's Counsel, Mr Ashley, on the ground that it had been taken care of in the affidavit of Mr McGuire filed on 15<sup>th</sup> April 2002. In contrast to the Plaintiff's above application, the Defendant by Summons filed on 15<sup>th</sup> April 2002 seeks the following orders-

1. The Defendant have leave to sell by tender the Plaintiff's Fixed Term Estate in Parcel Nos. 097-005-147 and 097-005-93.
2. No tender is to be accepted without the further leave of a Judge in Chambers;
3. The Plaintiff immediately deliver vacant possession of Parcel Nos. 097-005-147 and 097-005-93 to the Defendant;
4. The Plaintiff, its servants, agents, invitees, licencees or others entering parcel number 097-005-147 and 097-005-93 under the authority of the Plaintiff forthwith vacate same and forthwith remove all their chattels from same;
5. The Plaintiff, its servants, agents, invitees, licencees or others entering parcel number 097-005-147- and 097-005-93 under the authority of the Plaintiff be permanently restrained from entering Parcel Numbers 097-005-147- and 097-005-93.
6. The Provincial Police Commander at Gizo and all Police Officers under his direction forthwith upon receipt of any order made pursuant to orders 4 and 5 hereof shall

- attend and enforce the said order using such force as is reasonably necessary for such purpose upon request by the Defendant or its solicitors;
7. Pursuant to the High Court (Civil Procedure) (Amendment Rules), 1975, Appendix J Item 43, a certificate for an increase in the charges which may be claimed pursuant to the scale of costs to provide for payment to the Plaintiff for all legal professional costs incurred by the Plaintiff on a party and party basis of an incidental to these proceedings at the rate of \$650.00 per hour
  8. Such further or other orders as to this Honourable Court shall seem meet.

### **The Background**

By a Deed of Acknowledgement of Debt and Forbearance (the Deed) between Bycroft and Indian Seafood Limited (now known as Gemstar Seafood Limited), the Plaintiff acknowledged its indebtedness to Bycroft in the sum of AUD 410,000.00 being the debt owing by the Plaintiff to the Defendant. The security for this debt was the creation of a charge over the fixed-term estate in Parcel No. 097-005-147 and Parcel No. 097-005-093 situated at Gizo in the Western Province. Clause 3 of the Deed stipulated that the said sum of AUD 410,000.00 was to be repaid by the Plaintiff on or before 30<sup>th</sup> September 1999. The Plaintiff however defaulted in repayment of the said sum resulting in a debt recovery action by the Plaintiff in Civil Case No. 370 of February 2001 whereby the High Court entered judgment for the said sum in favour of the Defendant. The Court of Appeal in its decision on 15<sup>th</sup> February 2002 upheld the High Court decision as regards the said sum of AUD 410,000.00. The High Court Sheriff then took action by order filed on 4<sup>th</sup> March 2002 restraining the Plaintiff from in any way dealing with Parcel No. 097-005-147 and Parcel No. 097-005-93 including sale, gift or otherwise. The charge over these two parcels of land was lodged for registration on 18<sup>th</sup> August 1999. The charge was only registered on 5<sup>th</sup> April 2002 – a delay of over 2 years. The Court of Appeal also ordered that the sum of SBD 370,000.00 be paid into Court in part satisfaction of the said money judgment for AUD 410,000.00. The sum of SBD 370,000.00 was duly paid into Court on 1<sup>st</sup> March 2002. The AUD equivalent was AUD 118,252.00 leaving a balance of AUD 291,748.00 still owing against the Plaintiff plus costs to be assessed.

### **The Plaintiff's Case**

The case for the Plaintiff as put to me by Counsel Mr Ashley was that there was no dispute over liability for the balance of the Plaintiff's debt being AUD 291,748.00 but rather the enforcement of the charge be stayed. The grounds for taking this position were set out in the Plaintiff's application for an order to stay the enforcement of the charge over the said two Parcels of land as security for the Plaintiff's indebtedness to the Defendant. The first ground being that the Plaintiff intends to recommence fishing operation and the enforcement of the charge would jeopardize that operation. The second ground being that the Plaintiff intends to file a counter-claim against the Defendant who is overseas.

### **The Defendant's Case**

The case for the Defendant is simple and straightforward. The Defendant is a mortgagee or chargee in this case and as such cannot be restrained from exercising the right of sale unless the amount claimed has been paid in full or if in dispute, the amount is paid into Court.

### **This Case**

This case is governed by Part XII of the Land and Titles Act, particularly section 171 which provides for the enforcement of a charge as the case may be. There is nothing in section 171 above, which supports the case for the Plaintiff. This is consistent with the words of **Walsh J. in Inglis and Another v Commonwealth Trading Bank of Australia [1972] 126 C L R 161 at 164-166**, regarding mortgages. At these pages, Walsh J. said, ..."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..."

...In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.

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...

...By the proprietary rights as owners which the plaintiffs have are rights which are subject to and qualified by the rights over the property given to the defendant by the mortgage. If the defendant exercises the latter rights or threatens to do so that is not, as such, an act or a threatened act in contravention or infringement of the plaintiffs' proprietary rights. Of course, a mortgagee does at some times act, in purported exercise of the rights and the powers given to him by the mortgage, in a manner which is not a proper exercise of them and which does infringe the rights of the mortgagor. But that is not what is in question in this application, which is an application designed to prevent, until the action is determined, any exercise of the mortgagee's powers"...

On appeal, the High Court of Australia gave full approval to the words of Walsh J. by affirming the correctness of His Honour's judgment. **(See NBSI v Premium Balga Ltd and Vernon Smith & Rose Annie Anibata cc 157/2000)**. There is therefore no case for the Plaintiff to argue here. The sum of AUD 291,748.00 still remains outstanding against the Plaintiff as of today. I cannot help but to dismiss the Plaintiff's application. I however would grant the Defendant's application under section 171 of the Lands and Titles Act (Cap.133).

### **Costs**

There is however the question of costs. The Defendant has asked for an increase in the charge in terms of Item 43 in Appendix J in accordance with the High Court

(Civil Procedure) Rules (Amendment Rules) 1975. The starting point is of course Order 65, rule 13 of the High Court Rules. Under rule 13 above, the Court may allow fees and costs no less than those prescribed in the Lower Scale and no more than those prescribed in the Higher Scale in Appendix J. However, Item 43 in that Appendix gives the Court the power to increase by certification charges having regard to all the circumstances of the case. The Court has a discretion to do this but only if the circumstances of the case do warrant so doing. The actual wording of Item 43 is in these terms ..."**In any case a judge of the Court either at the trial or on notice of motion made within 14 days after judgment is pronounced may certify for an increase in any of the above charges, of such amount as he thinks fit having regard to all the circumstances of the case**"...

My understanding of Item 43 is that the charges both in the Lower as well as the Higher Scales may be increased to any amount the Court thinks fit having regard to all the circumstances of the case. (See **Hyundai Timber Company Limited v Charles Qatu and Others [1990] S I L R 1 at 2**).

The only rule that is similar in intent is Rule 10 of Order LXV of the Rules of the Supreme Court 1956 of Victoria relating to costs. There is however some difference though between Item 43 and Rule 10 above. In Rule 10, the allowed increase must not exceed 30% of the fees prescribed in Appendix N and can only be awarded on special grounds arising out of the nature and importance or the difficulty or urgency of the case. Item 43 in our case is open-ended as to the amount to be increased and such increase is to be based upon all the circumstances of the case. Counsel for the Defendant did not say much as to the circumstances that I should take into account when exercising my mind as to whether to increase the charges or not. That is, there was no evidence to highlight the features of the case that called for special attention apart from the affidavit filed by Mr McGuire on 15<sup>th</sup> April 2002 setting out the history of the case. The English equivalent being rule 9 of Order LXV of the Rules of the Supreme Court 1883 came before the Chancery Division for consideration in **Williamson North Staffordshire Railway Company [1886] 32 Ch.D. 399**. At page 402, Fry L.J. said, ..."**The object of the rule probably was to prevent one party running the other into heavy expense in a case which was not important or difficult, and to indemnify the successful party in a serious litigation on a difficult point**"...

At the same page Cotton L.J. said, ..."**Although this case is one of importance and of extreme difficulty I do not think that there are in it special grounds arising out of the nature and importance or the difficulty or urgency of the case. I have great difficulty in understanding the meaning of the rule, and it is not necessary for us to determine its construction, but I think that in the present case, though important and difficult, there are no special grounds arising out of its importance or difficulty to justify us in giving costs on the higher scale**"...

In **Assets Development Company, Limited v Close Brothers & Co. [1900] 2 Ch. 717** Buckley J. shared the same difficulty expressed by Cotton L.J. above regarding the meaning of rule 9 of Order LXV. After His Lordship discussed **Williamson v North Staffordshire Railway Co.** above and **Paine v Chisholm [1891] 1 Q.B. 534** as regards the elements that constituted "**special grounds arising out of the nature and importance or difficulty or urgency of the case,**" His Lordship at pages 720-721 said this as regards the same ..."**I think the meaning of the rule is that it is to apply where the nature and importance**

or difficulty or urgency of the case necessitate the expenditure of more money. An illustration of this is found in cases which from their nature require that a more expensive class of witnesses shall be called, such as patent cases, where the evidence which is given by the successful party is that of expert witnesses, who have to be paid according to their professional experience and capacity. This is but an illustration. Urgency might in some cases increase the necessary expense and importance and difficulty might do the like. But it is necessary, I think, to find something definite which necessarily increases the reasonable expense incurred to call the rule into action. I do not find myself in a position to lay hold of the mere fact that fraud is alleged as a special ground for ordering the plaintiff to pay more than the usual costs. On these grounds it appears to me that I ought to refuse this application"...

The wording of Order LXV, rule 10 of the Rules of the Supreme Court of Victoria appears to be the same as Order LXV, rule 9 of the Rules of the Supreme Court in England in 1883. If these cases I have cited are of any value at all, they would be so in terms of understanding the intent or object of Item 43 in Appendix J in the High Court (Civil Procedure) Rules 1964 (the High Court Rules). In our case, Item 43 speaks in wide terms than the rules I have cited above which means the Court must have regard to all the circumstances of the case in deciding to increase the charges or not. However, whatever are the circumstances, they must be compelling in order to attract the sympathy of the Court. Item 43 can be understood in two ways if one reads it carefully. One interpretation is that only the rates prescribed can be increased. This interpretation is possible if the word "of" in the sixth line is meant to read "to" so that it would read "**to such amount**". The other interpretation is that in addition to the prescribed rates, the Court may increase as well such amount as the Court thinks fit having regard to all the circumstances of the case. In this interpretation, the same word "of" in the sixth line should be read "or" so that it would read "**or such amount**". I do not however need to decide this point now because I feel that this is not a case that calls for an increase of charges. It is true that the Plaintiff's application is groundless but that is not a ground to increase the charges. The fact that the Defendant is now able to enforce its charge over the two properties at Gizo and not earlier is not a fault of the Plaintiff. The fact is that the Commissioner of Lands had not been forthcoming in granting his consent for over 2 years. The Defendant is however entitled to its costs on indemnity basis in defending the Plaintiff's application and its costs in succeeding in its application.

The Order of the Court are-

1. **The Plaintiff's application is dismissed with costs on indemnity basis.**
2. **The Defendant application is granted with costs.**
3. **Costs to be taxed if not agreed.**

**F.O. Kabui**  
Judge