

In the High Court of Fiji
At Labasa
Civil Jurisdiction

Civil Action No. HBC 44 of 2021

Home Finance Company PTE Limited

Appellant

v

Tabua Bakery (Fiji) PTE Limited

First respondent

Tower Insurance (Fiji) PTE Limited

Second respondent

Registrar of Titles

Third respondent

Counsel: Mr N. Lajendra for the appellant
Mr K. Ratule for the first respondent
Mr A. Namua for the second respondent
Mr S. Kant for the third respondent

Date of hearing: 19th October,2022

Date of Judgment: 7th November,2022

Judgment

1. The appellant appeals a Ruling of the Acting Master of 4 April, 2022.

2. The appellant had provided the first respondent with loan facilities against several securities, including a first registered mortgage over Crown Lease No. 3460, Lots 10 and 11 section 14 Labasa Township (property).
3. The first respondent moved to restrain the appellant from disposing and advertising the property for mortgage sale. On 4 April, 2022, the Acting Master extended the interim injunction granted ex parte till 6th June, 2022, to allow the first respondent an opportunity to pay the arrears of \$212,700.49, “*in default the interlocutory injunction is dissolved forthwith*”. The Acting Master held that there is no serious question to be tried and concluded that the first respondent can be adequately compensated by damages.
4. Mr Lajendra, counsel for the appellant argued that the Order is contrary to the principles laid down in the *American Cyanamid*, in that the Acting Master failed to discharge the interim injunction, when he found that there is no serious question to be tried and held the first respondent could be adequately compensated in damages. The Acting Master erred in allowing the first respondent to clear the arrears only in a sum of \$212,700.49, when the entire loan account is on demand. The Order was also contrary to the decision in *Inglis v Commonwealth Trading Bank of Australia*, (1972) 126 CLR 161, which required the first respondent to pay the full amount into Court.
5. Mr Ratule, counsel for the first respondent agreed with the submissions of Mr Lajendra, but stated that his instructions were to oppose the appeal and seek that the interim injunction continue as the first respondent has paid the sum of \$212,700.49 into Court.
6. Mr Namua, counsel for the second respondent and Mr Kant, counsel for the third respondent did not contest the appeal.
7. In my view, the application of the guiding principles laid down by Lord Diplock across the board to applications for interim injunction is misconceived.

8. Marshall, JA in *Strategic Nominees Ltd vs Gulf Investments (Fiji) Limited*, (Civil Appeal [2011] FJCA 23; ABU0039.2009 (10 March, 2011) stated that the American *Cyanamid* principles have been introduced in a “*wholly inappropriate context*”. At para 40, he said :

...in American Cyanamid v Ethicon (supra) Lord Diplock did not extend the existing categories or situations in any way. Lord Diplock was concerned in a patent case where there was a threatened continuing breach of a proprietary right of the Plaintiff by the Defendant. Lord Diplock was only concerned with the principles on which interlocutory restraint in such cases should be granted. His judgment was in no way concerned with extending the situations where an interim injunction will be available.

9. In that case, the Court of Appeal held that the *quia timet* interlocutory injunction to restrain an alleged violation of a proprietary right and the test of serious question to be tried do not apply to the rights of a mortgagee to exercise his power of sale, when there is default by a mortgagor. Marshall, JA said at paras 6 to 7:

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. (emphasis added)

He referred to the following passage from the judgment of Walsh J in *Inglis v. Commonwealth Trading Bank of Australia* (1972) 126 C.L.R 161 at page 166:

But 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.

At para 34, Marshall, JA stated:

Therefore, in context, the mortgagor has no proprietary rights or other established legal rights able to be protected by a quia timet interim injunction. Also in Inglis in the passage cited in paragraph 16 above,

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.

In summary, he said that it “*is not a quia timet situation where there has to be in the Plaintiff an existing proprietary or other legal right under threat by the actions of the Defendant. The law of quia timet interim injunctions does not apply*”.

10. In the present case, it follows that the appellant’s right to enter into and exercise its right of sale of property given by the first respondent as security cannot be restrained.

11. In my judgment, the only injunctive relief available to the first respondent pending trial was payment into Court of the entire arrears due.

12. The appeal is allowed.

13. **Orders**

- a. The appeal of the appellant is allowed. The interim injunction granted on 4 April, 2022, is discharged.
- b. The first respondent shall pay the appellant costs summarily assessed in a sum of \$1000.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

JUDGE

7th November, 2022