

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 143 of 2022

BETWEEN: **BSP FINANCIAL GROUP LIMITED** formerly called “**BANK OF SOUTH PACIFIC LIMITED**” a limited liability Company duly incorporated in Fiji and having its registered office at Level 12, BSP Suva Central Building, Corner of Renwick Road and Pratt Street, Suva, Viti Levu.

PLAINTIFF

A N D: **KHERA BROTHERS PTE LIMITED** a limited liability Company having its registered office at Main Street, Ba.

DEFENDANT

Appearances: Ms. Dewan S. R. for the Plaintiff

Ms. Sadrata for the Defendant

Date of Hearing: 20 February 2023

Date of Ruling: 17 April 2023

R U L I N G

INTRODUCTION

1. A. Jalil & Sons Holdings Limited (“**Jalil Holdings**”) gave a third-party mortgage over a certain piece of land which it (Jalil Holdings) owns in favour of the Bank of the South Pacific Limited (“**BSP**”). The piece of land in question is all comprised in Commercial State Lease No. 19376, legally described as Lot 1 Plan RR 686 situated in the Town of Tavua, Province of Ba, a Subdivision of Part of Tavua Township Section 1 and comprising 796 square meters (“**property**”).
2. According to BSP, the said mortgage was registered on 13 May 2016. Whether the mortgage was registered on this date is a contentious issue. Jalil Holdings gave BSP the mortgage as security over certain advances given by BSP to another company called A Haroon & Sons Holding Limited (“**Haroon Holdings**”).
3. Haroon Holdings defaulted in its loan repayment to BSP. The total accumulated amount owed by Haroon Holdings to BSP had escalated to \$2,385,001.00 (two million, three hundred and eighty-five thousand and one dollars) as at 21 March 2022. Acting on its power of sale under the mortgage, BSP then took steps to advertise the property on two occasions in September 2020. Supreme Fuel Pte Limited (“**Supreme**”) was the successful tenderer.
4. On 25 January 2022, BSP and Supreme executed a sale and purchase agreement. Their agreed price for the property is \$1.8 million dollars. Supreme has already paid to BSP, and BSP is in receipt of, a deposit of \$180,000 – 00 (one hundred and eighty thousand dollars only).

5. However, settlement between BSP and Supreme is being staved off by a caveat on the property. The caveator is a company called Khera Brothers Limited (“**Khera**”). Khera’s purported caveatable interest stems from an alleged sale and purchase agreement it (Khera) had entered into with Jalil Holdings over the property.
6. It is undisputed between the parties that Khera and Jalil Holdings entered into the said agreement at some point well after Jalil Holdings had given the above-mentioned third-party mortgage to BSP.

APPLICATION BEFORE THIS COURT

7. What is before this Court at this time is an Originating Summons in Expedited Form filed by BSP pursuant to section 109(2) of the Land Transfer Act, and the inherent jurisdiction of this Court, seeking the following Orders:
 - (a) that the defendant shows cause why instrument of caveat No. 873031 lodged by the Defendant on State Lease No. 19376 being Lot 1 on Plan No. RR686 should not be removed under Section 109 (2) of the Land Transfer Act.
 - (b) that Caveat No. 873031 lodged against State Lease No. 19376 be removed pursuant to Section 109 (2) of the Land Transfer Act.
 - (c) further or other relief as this Honorable Court may deem fit.
8. The application is supported by an affidavit of Sanjesh Lal sworn on 06 May 2022. Lal holds the position of Supervisor Recoveries with BSP’s Asset Management Unit.
9. The respondent (Khera) opposes the application by an affidavit of Chandresh Ratilal Khera sworn on 19 July 2022. Chandresh is one of the Directors of Khera. The key things which Chandresh deposes in his affidavit are as follows:
 - (a) Khera and Jalil Company entered into their sale and purchase agreement at some point in 2018.
 - (b) before Khera and Jalil Company entered into their sale and purchase agreement over the property, Khera conducted a search on the title of the property. That search happened on 17 September 2020 and again on 01 October 2020. From that search, Khera saw that the title was unencumbered. In other words, that BSP’s mortgage was not registered as at 17 September 2020.
 - (c) at no time whatsoever during their dealing, did Jalil Company disclose to Khera that BSP had a mortgage over the property.
 - (d) Khera has paid the sum of \$440,500-00 (four hundred and forty thousand and five hundred dollars) to Jalil Company as deposit.
 - (d) to protect its interest pursuant to the sale and purchase agreement with Jalil Company, Khera registered the caveat on the property on 20 February 2019 (Caveat No. 873031).
 - (e) on 09 March 2022, Khera’s solicitors conducted another search on the said lease at the Registrar of Titles’ office. That search revealed that no mortgage was registered on the property.
 - (f) BSP’s mortgagee sale over the property is therefore fraudulent, invalid, illegal and is an abuse of process.

- (g) BSP also conducted a search on the lease in March 2022. Surprisingly, two mortgages were then registered on the lease – the first in favour of Westpac which was then cancelled and the second in favour of BSP.
- (h) BSP is negligent in not registering its mortgage on the lease at all material times.
- (i) Khera is a bona fide purchaser. If there had been a mortgage registered on the property, Khera would not have entered into the sale and purchase agreement with Jalil Company – let alone, pay Jalil Company the deposit of \$440,500.
- (j) after BSP advertised the property, Khera tried to negotiate with BSP to buy the property.

COMMENTS

10. Chandresh annexes to his affidavit a faint copy of State Lease No. 19376. There are no memorials on the copy of the lease annexed. Chandresh annexes to his affidavit a copy of the sale and purchase agreement between Khera and Jalil Holdings. Notably, it is not stamped. The year “2018” is typed in as the year of the agreement, although, the date and the month are not filled in.
11. I note also that the evidence of payment of deposit of \$440,500-00 which Chandresh annexes to his affidavit is, but a table, which appears to have been generated from Khera’s own computer. The table purports to record seventeen (17) payments made to A. Jalil between 26 November 2018 (made to Anil J Singh Lawyers) and 25 July 2019. Notably – at some point – the cheque numbers are out of sequence *vis a vis* the dates.
12. The parties agree that Khera did enter into negotiations with BSP to purchase the property after BSP had advertised. Notably however, the parties differ on the price which Khera was offering. According to the affidavit of Sanjesh Lal at paragraph 24, Khera had offered \$2,700,000-00 (VIP) less the deposit of \$439,500-00 which Khera had already (allegedly) paid to Jalil Holdings as deposit. Chandresh however deposes at paragraph 24 that Khera was willing to settle with BSP for the final sum of \$2 million (VIP).
13. Apparently BSP vide a letter dated 31 August 2021 of its solicitors, had accepted Khera’s offer of \$2 million dollars (VIP). This acceptance however was conditional upon Khera paying a deposit of 10% and signing and remitting an offer letter within seven days. Khera did not respond within seven days.
14. By Chandresh’s affidavit, Khera blames network problems for its failure to comply with the seven-day stipulation. This allegedly resulted in Khera receiving the offer letter late by email.
15. However, because Khera was sort-of still interested in the property, Khera’s solicitors then wrote back to BSP to seek a month to obtain a valid Engineers Certificate and compliance certificate for the partly constructed building that was already on the property. Khera reasoned that it would not be able to obtain finance without this clearance.
16. However, BSP refused and retracted its conditional acceptance of Khera’s tender vide a letter dated 26 October 2021. It appears to me that the amount which Khera is allegedly willing to settle with BSP is just slightly higher than that which BSP has accepted from Supreme. I underscore the word allegedly to emphasize that in all these years, there is no unequivocal commitment from Khera to

purchase the property. I say this because Khera's willingness to purchase the property is contingent on it obtaining a favorable Engineers Certificate and also subject to it securing finance.

17. Clearly, BSP was under no obligation to accept Khera's equivocal and conditional offer. Accordingly, BSP would pursue and accept the offer by Supreme.

THE LAW

18. A mortgagor is entitled to redeem a mortgaged property. That entitlement to redemption exists both in equity (equity of redemption) and in law (as per section 72(1) of the Property Law Act. In both equity and law, the entitlement to redeem the mortgaged property is lost once the mortgagee has sold the property under its power of sale.
19. In this case, Jalil Holdings is not the party which owes money to BSP. Rather, Jalil Holdings is a third-party mortgagor.
20. A third-party mortgage is given by **A** (third-party mortgagor) to **B** (Bank/Financier/Credit Provider) as security for a loan advance by **B** to **C** (borrower). In that sense, a third-party mortgage is akin to a guarantee by **A** to **B** to answer for the payment or performance of **C**'s debt to **B** in the event of a default by **C**. **C** remains the party primarily responsible to **B** for the debt. The debt is not **A**'s. Rather, the debt remains **C**'s. Notably, however, **A**'s liability is limited to the amount which can be realised upon the disposal of the property which **A** has offered up as security under the mortgage. Like a general mortgage, **C**'s power of sale against **A**'s mortgaged property becomes exercisable once **C** defaults in payment.
21. In this case, it appears that the third party mortgagor (Jalil Holdings) did enter into a sale and purchase agreement with Khera at a time when BSP's mortgage remains undischarged.
22. It is not quite clear from the material in the affidavit filed by Khera and the submissions filed by its solicitors as to the motive behind the purported sale and purchase agreement between Khera and Jalil Holdings.
23. Was it Jalil's attempt to redeem the mortgage on the property so that the proceeds from the Khera-sale could be applied towards Haroon Holdings' debt to BSP? If so, then one would think that the mortgage instrument would include a stipulation that BSP's prior consent be obtained first. Again, it is not clear from the material whether Jalil Holdings did obtain BSP's prior consent prior to the agreement with Khera.
24. Was it Jalil Holdings' attempt to sell of the property, collect the proceeds, and undermine the mortgage in favour of BSP?
25. According to Sanjesh Lal, Khera started communicating with BSP after it (Khera) entered into the sale and purchase agreement with Jalil Holdings. For one reason or another, Khera and Jalil Holdings languished on their deal for many years. As I have said, the evidence presented by Khera as proof that it had paid a deposit – is wanting in many respects. For such a deal involving a lot of money, one would expect that the monies would be deposited into the trust account of a solicitor. This appears to

be not the case here. I say all this to underscore the point that – at the end of the day – Khera’s position as a (purported) purchaser rests on rather shaky ground compared to BSP’s interest as a mortgagee.

26. As I have said above, BSP has now signed a sale and purchase agreement with Supreme. However, settlement between BSP and Supreme is being staved off by a caveat placed on the property by Khera. So, is Khera’s caveat sustainable?

27. There are four different ways by which a caveat may be removed under the Land Transfer Act. These are provided for under sections 109,110,111 and 116 (see **Colonial Fiji Life Ltd v Ali** [2008] FJHC 413; Civil Action HBC 338 of 2005 (13 March 2008 as per Jitoko J).

28. Section 109 of the Land Transfer Act (Cap 131) provides as follows:

Notice and opposition to caveat

109.-(1) Upon the receipt of any caveat, the Registrar shall give notice thereof to the person against whose application to be registered as proprietor of, or, as the case may be, to the registered proprietor against whose title to deal with, the land, estate or interest, the caveat has been lodged.

(2) Any such applicant or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, and the court on proof of service of the summons on the caveator or upon the person on whose behalf the caveat has been lodged and upon such evidence as the court may require, may make such order in the premises, either ex parte or otherwise as to the court seems just, and, where any question of right or title requires to be determined, the proceedings shall be followed as nearly as may be in conformity with the rules of court in relation to civil causes.

29. The procedure for the removal of caveat under section 109(2) of the Land Transfer Act is as follows:

(a) the Registrar receives and registers a caveat

(b) the Registrar then notifies the registered proprietor or any person with any registered interest in the land (such as registered mortgagees and other charge holders) that a caveat has been lodged.

(c) the registered proprietor or any of the interested parties may then apply to the High Court by Summons for the caveator to show cause why the caveat should not be removed.

(d) the Court upon hearing of evidence it requires, may make orders accordingly.

30. The scheme of caveats under the Land Transfer Act ensures that equitable estates are temporarily protected in anticipation of legal proceedings or until the determination of those which are already afoot. The onus is on the caveator to convince the court that her caveat should be extended until full trial.

31. The principles to be applied are analogous to those that apply in an interlocutory injunction application. The caveator must establish: firstly, that there is a serious question to be tried. Under this heading, it is relevant to consider the interest he claims on the land; secondly, that the balance of

convenience favours maintenance of the caveat until trial; and thirdly, that the overall justice of the case favours keeping the caveat until trial (see the Fiji Court of Appeal's judgment in **Bahadur Ali v Fiji Development Bank**).

Serious Issue to be Tried?

32. Is there a serious issue to be tried? The main question in this case is whether or not Khera has an equitable interest by virtue of its purported sale and purchase agreement with Jalil Holdings and/or by virtue of any arrangement it might have reached with BSP.
33. Again, as I have said, I have some serious misgivings about whether or not Khera had actually paid a deposit pursuant to its purported sale and purchase agreement with Jalil Holdings. The evidence which Khera produces is simply insufficient.
34. Even if Khera did pay a deposit, which in normal circumstances, would create an equitable interest, there is no evidence placed before me that the Director of Lands had consented to that dealing under section 13 of the State Lands Act pursuant to which the alleged deposit was paid. An equitable interest cannot arise on any dealing which has not complied with a regulatory statutory consent, where the statute concerned stipulates that the said consent must be first had and obtained before any dealing is entered into, and that any such dealing entered into without the said consent having been first had and obtained will be null and void.

Overall Justice of the Case

35. And even if the Director of Lands had consented to the purported dealing between Khera and Jalil Company, the equitable interest of Khera, in my view, would still have to rank below BSP's interest. I say this for the following reasons:
 - (a) BSP's interest was created first. As a general rule, all things equal, equitable interests are ranked in the order of their creation so BSP, as a prior mortgagee would have priority in time anyway.
 - (b) there is a long line of authority submitted by Ms. Devan and which I agree to which state that, except in exceptional cases, a Court will not restrain a Mortgagee from exercising its power of sale under a mortgage (see **Rauzia v ANZ Bank**, Supreme Court Civil Action No. ABU 323 of 1984 date of decision 02 August 1984 per Kermode J; **MacCleod v Jones** (1883) 24 Ch. 289 at p.299; **Inglis & Anor v Commonwealth Trading Bank of Australia** [1972] 126 CLR 161; **Home Finance Company Ltd v Temo** Civil Action No. HBC 279 of 2009;
 - (c) the only time when a Court will interfere is if the mortgagor deposits into Court the sum owing.
 - (d) the mortgagor in this case is Jalil Company
 - (e) since Jalil Company is a third-party mortgagor, and is not the debtor, and whose liability is only limited to the amount which can be realised on the disposal of the property in

question – I would have required Jalil Company sought an injunction to restrain BSP from exercising its power of sale, I would most certainly have required Jalil to deposit into Court the full sum of the value of the property in question before I would grant an injunction to restrain the mortgagee sale

- (f) I would impose the same requirement on Khera if Khera desired to injunct BSP from exercising its power of sale.
36. In addition to all the above, it is hard for me to see how the remedy of specific performance might be available to Khera to enforce the alleged agreement it has with Jalil Holdings – whilst BSP has a mortgage over the property. Traditionally, the view is that unless a purchaser is entitled to specific performance of her contract of sale, she does not have an equitable interest in land. Her equitable interest is commensurate only with her ability to obtain specific performance.
37. It is also hard for me to find that there was ever any *consensus ad litem* in the manner in which Khera had engaged with BSP – as I have outlined above.
38. In **Legione v Hateley** [1983] HCA 11; (1993) 152 CLR 406 for example, Mason and Dean JJ in their joint judgment stated at p.446:

"In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, at p.349).

Balance of Convenience

39. In my view, the balance of convenience favours the removal of the caveat to allow BSP to complete the sale of the property to Supreme. BSP is a large commercial bank in Fiji. Should Khera succeed in convincing this Court in the other matter that it has an enforceable equitable interest in this case which is stronger than BSP's – I am certain that BSP better placed to pay any costs and damage.

ORDERS

40. In the final, I hereby Order as follows:
1. That Caveat No. 873031 lodged against State Lease No. 19376 be removed pursuant to Section 109 (2) of the Land Transfer Act.
 2. Costs in favour of BSP which I summarily assess at \$1,000 (one thousand dollars only)



Anare Tuilevuka
JUDGE
Lautoka

17 April 2023